DISPUTE RESOLUTION OPTIONS IN VANUATU: AN EXTENSIVE MENU FOR A SMALL STATE

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This article sets out the range of institutions for dispute resolution in Vanuatu. It then discusses some of the restrictions on accessing these forums, drawing on pertinent legislation and case law, and an Australian government survey which took place on the island of Malekula in 2015 (the 'Malekula Study').[1] *The impact of the country's size on these issues is highlighted in the discussion.*

Cet article présente dans un premier temps, l'ensemble des institutions coutumières et étatiques qui permettent le règlement des litiges au Vanuatu.

L'analyse de l'auteur se porte ensuite sur les freins législatifs, jurisprudentiels voire géographiques qui au Vanuatu limitent dans la pratique le libre accès à ces diffèrents forums. A l'appui de sa thèse l'auteur cite le rapport d'enquête réalisée par le gouvernement australien sur l'île de Malekula en 2015 (le 'Malekula Study').

I INTRODUCTION

Vanuatu is a small state with a population of 272,459[2] and a land mass of 12,189 sq km.[3] Despite its size it has an abundance of forums for the resolution of disputes. In addition to a three-tier hierarchy of common law courts, the state has provided institutions for the resolution of customary disputes, in particular, cases involving customary land. Apart from the options provided by the state, traditional forums exist

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1 Australian Government, Conflict Management and Access to Justice in Rural Vanuatu Report, July 2016.

2 *Mini Census* Report Vol 1, 1 <https://vnso.gov.vu/index.php/component/advlisting/?view=download&fileId=4542>. 19 October 2018.

3 Government of Vanuatu, <www.governmentofvanuatu.gov.vu/index.php?option=com_content&view=article&id=52&Itemid=62>. The territorial waters cover 450,000 square kilometres.

and resolve disputes in accordance with customary laws[4] and procedures applying in the locality. In this respect, it is important to note that these laws and procedures are not part of an homogenous system, but a product of the diverse cultures of the Ni-Vanuatu people reflected in the existence of about 81 indigenous languages that are actively spoken.[5]

Access to justice has traditionally been seen as access to the courts or the availability of legal assistance,[6] and plural options for resolving disputes have been regarded as an important part of this.[7] On this measure, Vanuatu would seem on the surface to be performing well. However, in reality the picture is not as bright as it first appears. This paper begins with some background on Vanuatu. It looks mainly at civil proceedings but there is some reference to criminal cases, and many issues are relevant in both spheres.

II BACKGROUND

Vanuatu, known formerly as the New Hebrides, is made up of a Y shaped chain of 83 islands, including fourteen main islands. It lies 2,500 kms Northwest of Sydney, and 2000 kms North of Auckland. As mentioned, it has a landmass of about 12,000 sq kms, which is slightly larger than the Sydney metropolitan area, but its sea area is about 710,000 sq kms.[8] The capital, Port Vila, is on Efate Island. Vanuatu is a land of contrasts, where coral islands and broad beaches lead on to towering volcanoes and lush tropical rainforest. Its deep natural harbours make it a favourite haven for visiting yachts. Average temperatures range from 23°c to 28°c.

The indigenous people (known collectively as Ni-Vanuatu) form approximately 99% of the population of 230,000 people,[9] about 75% of whom live in rural areas. In urban areas, small communities of French, British, Australian, New Zealand, Vietnamese, Chinese, and other Pacific Islanders add further cultural diversity. The

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4 The term "customary laws" is used here to refer to a narrower concept than "kastom". "Kastom" is a term used in Vanuatu to refer to a much more extensive idea, which at its broadest encompasses anything that is non-Western: Australian Government *Conflict Management and Access to Justice in Rural Vanuatu Report* (Canberra, 2016) 6.

5 John Lynch and Terry Crowley *Languages of Vanuatu: A New Survey and Bibliography* (Pacific Linguistics, ANU, Canberra, 2001) 4.

6 Access to Justice Taskforce *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Attorney-General's Department, Canberra, September 2009) 5.

7 Above n 6 at 4.

8 UN, Earthwatch <http://islands.unep.ch/CLT.htm>.

9 *2016 Mini Census* Report Vol 1, 57 <https://vnso.gov.vu/index.php/component/advlisting/?view=download&fileId=4542> 19 October 2018.

official languages are Bislama, English and French, but Ni-Vanuatu also speak their local indigenous languages.[10]

The country was never formally colonised, but from 1887 until independence in 1980 was jointly administered by the British and French.[11] Vanuatu is a member of the Commonwealth with a President as Head of State and government based on the Westminster system.

III STATE FORUMS

A Common Law Courts

Vanuatu has a three-tier hierarchy of state courts, which follows the standard Common Law model of inferior court (Magistrates' Courts), superior court (Supreme Court) and appeal court (Court of Appeal).

1 Magistrates' Courts

Magistrates' Courts are established under and governed by the Judicial Services and Courts Act 2006. They are presided over by a lay magistrate or senior magistrate appointed by the President on the advice of the Judicial Service Commission.[12] When hearing appeals from an Island Court, they must sit with two or more assessors knowledgeable in custom.[13]

Magistrates' Courts have jurisdiction to deal with civil cases where the amount claimed or the subject matter in dispute does not exceed vt1,000,000 (NZ$13,000).[14] They also have jurisdiction to hear landlord and tenant disputes involving up to vt2,000,000, claims for maintenance not exceeding vt1,200,000, and uncontested petitions for divorce or nullity of marriage.[15] Magistrates' Courts are specifically excluded from exercising jurisdiction in wardship, guardianship, interdiction, appointment of *conseil judicaire*, adoption, civil status, succession, wills, bankruptcy, insolvency or liquidation.[16] Criminal jurisdiction is restricted to

10 Above n 5 at 4.

11 Convention of 16 November 1887; New Hebrides Order 1907(UK). New Hebrides Order in Council 1922 (UK) SRO 1922/717, repealed by the New Hebrides Act 1980 (UK).

12 Judicial Services and Courts Act Cap 270, ss 13 and 18.

13 Island Courts Act, Cap 167, s 22(2).

14 Magistrates' Court (Civil Jurisdiction) Act, Cap 130, s 1, as amended by Magistrates' Court (Civil Jurisdiction) (Amendment) Act 1994.

15 Ibid.

16 Magistrates' Court (Civil Jurisdiction) Act, Cap 130, s 2.

offences bearing a maximum penalty of two years' imprisonment.[17] Civil and criminal jurisdiction may be extended in some circumstances.[18] Magistrates' Courts hear appeals from civil decisions of island courts, except decisions as to ownership of land, where appeal is to the Supreme Court.[19]

2 Supreme Court

The Supreme Court was established under art 49 of the Constitution.[20] It consists of the Chief Justice, appointed by the President on the advice of the Prime Minister and the Leader of the Opposition,[21] and three puisne judges,[22] appointed by the President on the advice of the Judicial Services Commission.[23] The constitution of the court is one judge sitting alone.[24] The Courts Act[25] provided for assessors knowledgeable in custom to sit with judges of the Supreme Court courts to act as advisors.[26] In 2006, this Act was repealed.[27] The Judicial Services and Courts Act which replaced it makes no mention of assessors, but states that the Supreme Court must be constituted by a judge sitting alone in certain constitutional applications and 'in any other proceeding unless an Act or law otherwise provides.'[28] The Island Courts Act provides that the Supreme Court must sit with two assessors when hearing appeals from an Island Court.[29]

The Supreme Court has unlimited jurisdiction to hear and determine civil[30] and criminal proceedings.[31] It also has jurisdiction to hear civil and criminal appeals from

17 Judicial Services and Courts Act, Cap 270, s 14(1)-(2).

18 See Judicial Services and Courts Act, Cap 270, s 14.

19 Island Courts Act, Cap 167, s 22(1).

20 See also Judicial Services and Courts Act Cap 270, Part 4.

21 Constitution of Vanuatu 1980, art 49.

22 Constitution, art 49(2).

23 Constitution, art 47(2).

24 Judicial Services and Courts Act, Cap 270, s 27.

25 Cap 122.

26 Courts Act Cap 122 s 14.

27 Judicial Services and Courts Act Cap 270, s 72.

28 Judicial Services and Courts Act Cap 270 s 27(b).

29 Island Courts Act Cap 167, s 22(2). See also Civil Procedure Rules, Cap 270, r 16.34(6)(a).

30 Constitution, art 49(1); Judicial Services and Courts Act Cap 270, s 28.

31 Constitution, art 49(1). Criminal Procedure Code Cap 136, s 200.

a Magistrates' Court,[32] and to review convictions by the Magistrates' Court, whether or not there has been an appeal.[33] As discussed further below, the Supreme Court has a limited right to review the decisions of Island Courts (Land).[34] Its decision in such cases is final.[35] In addition, the Supreme Court has exclusive jurisdiction on the interpretation of the Constitution involving a fundamental point of law.[36] The President may refer to the Supreme Court any legislation that he or she considers to be unconstitutional.[37] The Supreme Court has jurisdiction to determine applications regarding infringement of the Constitution,[38] and more specifically applications concerning breach of the bill of rights.[39] It also determines questions as to membership of Parliament[40] and hears complaints from citizens about emergency regulations made by the Council of Ministers.[41]

3 Court of Appeal

The Court of Appeal was established under the Constitution.[42] Due to the small size of the country, this is not a permanent body, but is constituted from time to time as the need arises by two or more Judges of the Supreme Court.[43] The Court of Appeal has broad-ranging jurisdiction.[44] It determines civil and criminal appeals from the Supreme Court[45] acting as a court of first instance,[46] and hears 'further appeals' from the Supreme Court acting in its appellate capacity.[47] It has all the power, authority and jurisdiction of the Supreme Court and may substitute its own

32 Judicial Services and Courts Act Cap 270, s 30(1).

33 Judicial Services and Courts Act, Cap 270, s 31(1).

34 Custom Land Management Act 2013, s 47.

35 Island Courts Act 1983, s 22(4).

36 Constitution, art 53(3).

37 Constitution, art 39(3).

38 Constitution, art 53.

39 Ibid, art 6.

40 Ibid, art 54.

41 Ibid, art 72.

42 Article 50.

43 Constitution, art 50.

44 Ibid, s 48.

45 Constitution, art 50; Judicial Services and Courts Act Cap 270, s 48(1).

46 Criminal Procedure Code Cap 136, s 200(2).

47 See below.

judgment or opinion, but may not interfere with the exercise of discretion unless it was manifestly wrong.[48] A judgment of the Court of Appeal may be executed as if it were an original judgment of the Supreme Court.[49]

B Forums Dealing with Customary Disputes

This section of the article examines the avenues established by legislation to deal with customary disputes. Island Courts have been established to administer customary law and to deal with minor local disputes. Customary land cases are also dealt with under a statutory scheme.

1 Island Courts

The Island Courts were established by the Island Courts Act 1983, pursuant to the Constitution.[50] Each court is constituted by at least three justices knowledgeable in customary law, at least one of whom must be a custom chief residing within the jurisdiction of the Island Court. Each Island Court must also have a supervising Magistrate with powers and duties prescribed by the Chief Justice.[51]

Island Courts are specifically empowered to administer the customary law prevailing within their territorial jurisdiction so far as it is not in conflict with any written law and is not contrary to justice, morality and good order.[52] Provided that the territorial jurisdiction exists,[53] they may determine civil claims in contract or tort involving up to vt50,000 (NZ$657); claims for compensation under provincial bylaws not exceeding vt50,000 and unlimited claims for maintenance.[54] Criminal jurisdiction extends to offences where the penalty is up to 6 months' imprisonment or a fine of vt24,000 (NZ$315) and committed 'wholly or in part within the territorial jurisdiction of the court'.[55] As mentioned above, appeals from these courts lead back into the Common Law courts.

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48 Judicial Services and Courts Act Cap 270, s 48(3).

49 Ibid, s 48(5).

50 Article 52.

51 Island Courts Act Cap 167, s 2.

52 Island Courts Act Cap 167 s 10.

53 The island courts have jurisdiction in cases where the defendant is ordinarily resident within their territorial jurisdiction or in which the cause of action arose or offence occurred within their boundaries: Island Courts Act Cap 167, s 6.

54 Island Courts Act Cap 167, s 12.

55 Island Courts Act Cap 167, s 11.

In theory, Island Courts no longer have jurisdiction to decide customary land disputes.[56] However, in practice they continue to hear such cases with appeals still being heard by the Supreme Court.[57] Island Courts (Land) are also now provided for, and these bodies are discussed below.

2 Nakamals and Custom Area Land Tribunals

Jurisdiction over customary land was transferred from the Island Courts to Customary Land Tribunals in 2001.[58] Where a dispute involved land within a single village, it was dealt with by a Village Land Tribunal constituted by the principal chief as chairperson, two other chiefs or elders and a secretary, appointed by the principal chief.[59] Where the dispute involved land of more than one village, a Joint Village Land Tribunal was required, and this was constituted by the principal chief of each village, two elders of each village and a secretary, appointed by the principal chiefs acting together.[60] When hearing appeals customary land tribunals were named and constituted differently depending on where the land was situated. For example if the land was situated on an island with multiple customary systems, a Joint Custom Area Land Tribunal would be required. Appeal to a Common Law court was excluded,[61] although the Supreme Court had a power of review for lack of due process.[62] Customary Land Tribunals proceedings were fraught with difficulties and in 2002 the Court of Appeal declared them to be unconstitutional.[63]

In 2013, in far-reaching reforms, customary land jurisdiction was transferred to traditional forums (nakamals) with an appeal to newly established Custom Area Land Tribunals.[64] Nakamals have jurisdiction to determine ownership of customary land within their custom area.[65] If the land lies across custom boundaries a Joint

56 Island Courts Act Cap 167, s 8(2); Customary Land Tribunals Act Cap 271.

57 See, eg, *Manlaewia v Maripopongi* [2015] VUSC 119; *Uritalo v Chilia* [2016] VUSC 9; *Kwirinavanua v Tetrau* (Unreported, Court of Appeal of Vanuatu, Lunabek CJ, von Doussa, Asher, Aru, Chetwynd, Wiltens, 27 April 2018).

58 Customary Land Tribunals Act Cap 271.

59 Customary Land Act 2001, s 8.

60 Customary Land Act 2001, s 9.

61 Customary Land Tribunal Act 2001 s 33.

62 Customary Land Tribunal Act 2001 s 39.

63 *Valele Family v Touru* [2002] VUCA 3.

64 Custom Land Management Act 2013, ss 1(1) and 2.

65 Custom Land Management Act 2013, s 15(1).

Nakamal must be held.[66] The meeting of the nakamal must be convened and decisions made in accordance with the relevant rules of custom.[67] However, the Act imposes a quorum of two-thirds of the adult members of the nakamal and for Joint Nakamals, two-thirds of the adult members of both nakamal.[68]

A right of review by the Island Court (Land) exists. This court is constituted by a Judge or Magistrate and four justices of the Island Court from the area where the land is located.[69] In general, the Act excludes appeal or review by the Common Law courts,[70] but the Supreme Court has a limited power to review decisions of Island Courts (Land) on the basis of lack of due process or fraud.[71] To avoid a challenge on the grounds of unconstitutionality, based on chapter 8, which vests administration of justice in the judiciary,[72] the Constitution has been amended to provide that decisions reached by customary institutions or procedures in accordance with art 74[73] and recorded in writing, 'are binding in law and are not subject to appeal or any other form of review by any Court of law.'[74]

C Traditional Forums

1 Village Courts

In some areas of Vanuatu local leaders, referred to here as 'chiefs',[75] still deal with disputes by virtue of their traditional customary authority, as they have been doing since pre-colonial times. From an internal perspective, the binding force of these decisions depends on the loyalty and commitment of community members to the traditional system. From an external perspective, there is nothing in the formal written law to prevent chiefs from dealing with disputes. Disputes dealt with by chiefs often involve land and chiefly title. However, in the Malekula Study, the most

66 Custom Land Management Act 2013, s 15(2).

67 Custom Land Management Act 2013, s 17(3).

68 Custom Land Management Act 2013, s 17.

69 Custom Land Management Act 2013, s 43(2).

70 Custom Land Management Act 2013, s 47(4).

71 Custom Land Management Act 2013, s 47.

72 Constitution art 47(1).

73 Constitution, art 74 provides: 'The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu'.

74 Article 78(3), inserted by Constitution (Sixth) (Amendment) Act 2013 s 25.

75 This is a contentious term, but is used here as shorthand for traditional leaders respected by the relevant community. See further Lamont Lindstrom and Geoffrey White (eds) *Chiefs Today: Traditional Pacific Leadership and the Postcolonial State* (Stanford University Press, Stanford, 1997).

common conflicts were found to be theft, followed by adultery, then black magic.[76] Other common disputes involved fighting, failure to repay money, marital and custody disputes, domestic violence, sexual assault and gambling.[77]

Chiefs' forums are usually arranged at village level and for that reason are often referred to as village courts. Their processes differ from place to place, but proceedings often take place in the nakamal, that is, the same place that land disputes are now dealt with under the state scheme described above. In larger villages decisions will be made by a panel of chiefs. Proceedings are usually unwritten, but there are some instances of written pronouncements.

Chiefs' decisions are not normally enforceable in state courts and, unless specifically provided for in legislation, there is nothing to prevent a party who is dissatisfied with a chief's decisions from taking their claim to the Common Law courts. The outcome of such action will depend very much on the attitude of the presiding judge. Similarly, there is nothing to prevent the state from prosecuting in respect of a criminal offence, even where indigenous authorities have already dealt with the matter.[78] However, such proceedings may be used as evidence and taken into account on sentencing. Further, there are instances of the police assisting chiefs to enforce their decisions, even where those decisions were unconstitutional.[79]

2 Councils of Chiefs

The Constitution established a National Council of Chiefs ('the Malvatumauri')[80] with the detail provided by the National Council of Chiefs (Organisation) Act 1985. In 2006, a more elaborate framework was set up.[81] The Malvatumauri Council of Chiefs oversees the workings of two other levels of councils established under the 2006 Act namely, the Island and Urban Councils of Chiefs.[82] An Island Council is established on each of Vanuatu's islands, and an urban council in Port Vila (the capital) and Luganville, the main town on Santo.[83]

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76 Above n 4, at 73.

77 Ibid.

78 *Public Prosecutor v Kota* [1989-94] 2 Van LR 661.

79 See, eg *Public Prosecutor v Kota* [1989-94] 2 Van LR 661.

80 Article 29. The Constitution (Sixth) (Amendment) Act 2013, subart 18(2)(c): deletes 'National Council of Chiefs' and substitutes 'Malvatumauri Council of Chiefs'.

81 National Council of Chiefs Act 2006.

82 National Council of Chiefs Act 2006, Part 3.

83 National Council of Chiefs Act 2006, Schedule.

The National, Island and Urban Councils are not traditional bodies; appointment is by election under a process provided by statute that has no traditional roots.[84] However, the members of the Councils are all custom chiefs and for this reason, this avenue of dispute resolution has been included here under customary forums.

One of the functions of the Councils is 'to resolve dispute according to local custom[85] … in their respective islands or urban areas.'[86] Since 2013, the Malvatumauri and Island Councils of Chiefs have a supervisory role in the land dispute resolution process.[87]

D Other Avenues for Dispute Resolution

1 The Church

The Church is another important avenue for dispute resolution in Vanuatu. Churches often play an important part in village society[88] and frequently take on a primary role in local disputes, including not only religious conflicts but also disagreements about use of common spaces in the village,[89] domestic violence and fighting and black magic, together with disputes with a moral element such as adultery.[90] In the Malekula Study, 46% of women and 48% percent of men said that they had used a religious leader to solve a problem.[91]

There is no universal procedure for churches involved in resolving disputes, although individual religious denominations may have guidelines or manuals for their ministers. On Malekula, church officials will be present at a 'Monday Meeting' with chiefs and community members, which often involves the discussion of minor problems, apologies from those involved, praying and offers of forgiveness.[92] Praying, confessions and announcements of forgiveness are typically part of any process, reflecting the emphasis on forgiveness and reconciliation.[93]

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84 National Council of Chiefs Act 2006, ss 5 and 12.

85 (1)(a).

86 (2).

87 Custom Land Management Act 2013 s 7.

88 See above n 4, eg the example of the Presbyterian Church in Malekula in *Australian Government, Conflict Management and Access to Justice in Rural Vanuatu Report* (Canberra, 2016) 80.

89 Above n 4, at 80.

90 Above n 4, at 86.

91 Above n 4, at 87.

92 Above n 4, at 71.

93 Above n 4, at 86.

2 *Ombudsman*

The Constitution of Vanuatu provides for an Ombudsman, appointed by the President after consultation with the Prime Minister, Leader of Opposition, Speaker of Parliament and the chairpersons of the Public Service Commission, Judicial Service Commission, National Council of Chiefs and Provincial Government Councils.[94] The Ombudsman has jurisdiction to consider actions, inaction or decisions of government departments, statutory bodies, and provincial and local government. The Ombudsman is specifically authorised to investigate a complaint about failure to provide government services in an official language.[95] The Ombudsman Act 1998 also authorises the Ombudsman to investigate breaches of the Leadership Code.[96] The constitutionality of this provision was upheld by the court in *Virelala v Ombudsman.*[97]

An advantage of this process is that an investigation may be commenced on the initiative of the Ombudsman or after complaint by any person or body affected by the conduct in question; no fees are charged. The Ombudsmen has a discretion to decline to investigate upon specified grounds. Investigations are commenced by notice in writing to the head of the body being investigated. All relevant material may be required to be provided; investigations are conducted in secret. There is no obligation to hold a hearing, but an opportunity to respond must be given to a person who may be the subject of an adverse comment or criticism. A breach of this requirement was held by the Supreme Court to require the withdrawal of the Ombudsman's report and recommendations.[98] An adverse report may be based on action which was oppressive, discriminatory, based on improper motives or irrelevant considerations, contrary to natural justice, or given without reasons.[99] The disadvantage of this form of dispute resolution is that the Ombudsman only has power to make recommendation; he or she cannot compel compliance. The Ombudsman's recommendation must be sent to the head of the body under investigation, the complainant and in some cases to the Prime Minister.[100] The report

94 Constitution of Vanuatu, art 61.

95 Ibid, art 64.

96 Ombudsman Act 1998 (Vanuatu), s 12.

97 [1997] VUSC 35. The case considered the provision in the former Ombudsman Act 1985, but s 12 has been repeated in the current Ombudsman Act 1998.

98 *Jimmy v The Ombudsman* [1996] VUSC 26. The report was re-issued the following year.

99 Ombudsman Act 1998 (Vanuatu), s 12.

100 Ombudsman Act 1998 (Vanuatu), s 29.

must also be made public, unless this would be contrary to 'public security or public interest'.[101]

3 Public Service Commission

One other body that deals with the resolution of disputes in Vanuatu is the Public Service Commission established under the Constitution.[102] It is composed of five members appointed for three years by the President after consultation with the Prime Minister.[103] One of the functions of the Commission is to deal with employment disputes and discipline of employees in accordance with the Public Service Act 1998 Act.[104]

4 Government Remuneration Tribunal

Vanuatu has a government remuneration tribunal but this is not an adjudicative body. Rather, its purpose is to determine the maximum remuneration payable to Government employees and agents.[105]

IV REPERCUSSIONS OF SMALLNESS FOR ACCESS TO JUSTICE

On paper, this menu of courts and other dispute resolution bodies appears extensive, but in practice the options may not live up to the written description. The size of the country, the remoteness of some of its islands, and the diffusion of the population over such large rural areas present significant hurdles for service delivery. In many villages there are no roads and access to the courts or other dispute resolution forums is limited by restricted transport options. More generally, remoteness and inaccessibility impact upon infrastructure and the internal market economy and restrict the capacity of the public and private sectors. Indicative of this is the fact that about 83% of households in Vanuatu have no electricity.[106] Problems are exacerbated by climate change and natural disasters to which Vanuatu is particularly vulnerable; it is a frequent victim of cyclones and earthquakes. In addition to limited access and availability of forums, the size of the country also has repercussions for the effectiveness of the service in terms of efficiency and fairness.

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101 Ibid, s 34(2). See further on the operation of ombudsmen in the South Pacific, A Satyanand "Growth of the Ombudsman Concept" (1999) 3 JSPL 1.

102 Constitution art 59.

103 Article 59(1).

104 Public Service Act 1998 s 8(1).

105 Government Remuneration Tribunal Act Cap 250, s 1.

106 M Dornan "Access to Electricity in Small Island Developing States of the Pacific: Issues and Challenges" (2014) 31 Renewable and Sustainable Energy Review 726.

Some of the most serious issues and barriers to access to justice will now be examined, focussing mainly on those which arise from the size of the jurisdiction.

A The Practice of 'Borrowing'

During the colonial era, courts and adjectival laws were transplanted into Vanuatu from both the United Kingdom and France. As discussed above, since Independence, Vanuatu has retained a Common Law system of courts. It has also retained introduced laws of evidence, relying on the Common Law and a cocktail of pre-1976 United Kingdom Acts such as the Evidence Acts 1898,[107] 1938 and 1965 and the Bankers' Books of Evidence Acts 1879 and 1859.[108] The position is complicated by the fact that the French law also applies in Vanuatu.[109] However, the French rules of evidence[110] were arguably repealed by the Vanuatu Criminal Procedure Code[111] and displaced by the Civil Procedure Rules 2002.[112] Whilst the rules of procedure have been patriated, the civil rules 'borrow heavily from those of a former colonial power'[113] and the Criminal Procedure Code is based on a British model code.[114]

For small countries, 'borrowing' ideas and personnel from larger developed nations may seem like a good boost to scarce resources. However, transplanting laws without due regard to local circumstances can be dangerous.[115] In theory, British and French laws only apply 'so far as circumstances admit'.[116] However, courts in Vanuatu rarely embark on an investigation of whether this condition is fulfilled.[117] Whilst introduced adjectival law may perform its duty admirably in commercial cases or those where local circumstances are not at play, in cases where cultural

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107 For an example of its application in Vanuatu see, eg *Public Prosecutor v Kalosil* [2015] VUSC 135.

108 For an example of its application in Vanuatu see, eg *Plantations Reunies de Vanuatu Ltd v Russet* [1996] VUSC 7; *Public Prosecutor v Kaltabang* [1980-1994] Van LR 211.

109 Constitutions of Vanuatu 1980 art 95(2).

110 See Code de procédure pénale as it applied in New Caledonia at the time of Vanuatu independence.

111 Criminal Procedure Code Cap 136 (Van). The Act prescribes an adversarial system for criminal proceedings in Vanuatu.

112 Part 11.

113 Ari Jenshel, Annotated Civil Procedure Rules, 2007, Canberra: Attorney-General's Department, 8.

114 Eric Colvin 'Criminal procedure in the South Pacific' (2004) 8: 1 Journal of South Pacific Law 6.

115 See further, Jennifer Corrin "Transplant Shock: The Hazards of Introducing Statutes of General Application" in Vito Breda (eds) *Legal Transplants in East Asia and Oceania* (Cambridge University Press, forthcoming 2019).

116 High Court of the New Hebrides Regulation 1976 s 3.

117 For an exception see, eg *Harrisen v Holloway (No 2)* (1984) 1 Van LR 147.

practices or customary laws are involved they may be highly unsuitable. Adjectival laws have been developed hand in hand with the substantive rules which they apply and it cannot be assumed that they will work well with a different type of law.[118] According to Roberts-Wray, under colonial law 'where a case is more suitably determined in accordance with customary law, English law will be excluded under the rule that it is to be applied only so far a local circumstances permit.'[119] However, that is not the approach that has been taken in Vanuatu. Even though the Constitution obliges courts to take customary laws into account,[120] the customary context has never been seen as a reason to question the application of adjectival laws designed to operate in an adversarial system. The Supreme Court has viewed custom and customary laws as facts that must be proved, stating that:[121]

> Although it is conceivable that there might not be a need for strict rules regarding the obtaining of evidence of a particular custom if and when the need arises to establish a particular custom, evidence must, nevertheless, be obtained and a clear custom must be established.

The rules of evidence do not apply in the Island Courts, which are directed to 'admit and consider such information as is available',[122] but no such leeway is given for the hearing of customary cases in the Common Law courts. There are no specific provisions to assist in proving customary law, although the civil procedure rules say that a party relying on customary law must state the laws relied on in the pleadings.[123] The rules of evidence excluding opinion and hearsay evidence[124] may pose significant obstacles to relying on customary laws before the court.[125] As a result, where customary laws are involved the vast majority of the population may be

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118 Hans Kelsen *General Theory of Law and State* (The Law Book Exchange Ltd, New Jersey, 2009) 129.

119 Sir Kenneth Roberts Wray *Commonwealth and Colonial Law* (Stevens and Sons, London, 1966) 556. See High Court of the New Hebrides Regulation 1976 s 3.

120 See, eg Constitution of Solomon Islands 1978, sch 3, para 2(1(c).

121 *Banga v Waiwo* (Unreported, Supreme Court of Vanuatu, D'Imecourt CJ, 17 June 1996) 4.

122 Island Courts Act Cap s 25.

123 Civil Procedure Rules 2002, R4.2(1)(d).

124 Cf *Manaon v Pakoa* [2018] VUSC 177 where hearsay evidence was admitted (although not of customary law) on the basis that this was in line with international jurisprudence.

125 This has been the view in Australia, see, eg Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102, (2005) [19.11], citing Peter Gray, 'Do the Walls Have Ears? Indigenous Title and Courts in Australia' (2000) 5(1) Australian Indigenous Law Reporter 1; Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Final Report – The Interaction of WA Law with Aboriginal Law and Culture*, Project 94 (2006) 319.

prevented from having their cases dealt with fairly in the main hierarchy of state courts.

Another aspect of 'borrowing' arises in relation to the judiciary. As discussed further below, there is a shortage of experienced lawyers in Vanuatu and the pool available to take judicial roles is limited. This has repercussions for the superior courts. Whilst the Chief Justice is in 2019 a Ni-Vanuatu, the judiciary still relies heavily on expatriate lawyers. Due to the small size of the country, the Court of Appeal is not a permanent body, but is constituted from time to time in Port Vila as the need arises, and funds allow, by two or more Judges of the Supreme Court.[126] Many of these judges are non-residents from Australia and New Zealand who fly in for the sittings of the Court. Sharing resources is a sensible option for small jurisdictions, but there is a danger that the highest court will not consider local context or cultures which might call for the exclusion of British or French laws, on the basis that local 'circumstances [do not] admit'.[127] There is a tendency for Australian and New Zealand judges to rely on the Common Law from their home countries. This may be one factor contributing to the failure to develop an indigenous jurisprudence. Chief Justice Lunabek stated in 1998, when still a Senior Magistrate, 'Vanuatu jurisprudence is in its infancy and we have to develop our own jurisprudence'.[128] Since that time, there has been little progress.

B Failure to Decentralise

Common Law courts are confined mainly to the capital and provincial centres. For example, there is only one Magistrate on Malekula and she tours very infrequently.[129] The remoteness of many villages together with their small population has led to a position where the state justice system is absent. The Island Courts were intended to sit throughout the country to administer justice locally. However, they are in 2019 operating on only 10 of the larger and more populated islands.[130] Lack of resources means that they rarely sit outside main towns.[131]

Even in places where courts are constituted, they may not sit as often as is desirable, giving rise to backlogs. For example, at the beginning of 2010, 352 cases

126 Constitution, Art 50.

127 High Court of the New Hebrides Regulation 1976 s 3.

128 See further J Corrin "Bedrock and steel blues: finding the law applicable in Vanuatu" (1998) 24 CLB 594.

129 Above n 4, at 134.

130 Michael Goddard and Leisande Otto, *Hybrid Justice in Vanuatu: The Island Courts* (World Bank, Washington, 2013) 19.

131 Above n 4, at 134.

were completed by the Island Courts and 447 were still pending.[132] Failure to deal with cases in a timely manner contravenes the constitutionally enshrined right to a fair hearing within a reasonable time.[133]

C Legal Representation

In addition to lack of financial resources, there is also a lack of human capital in that there is a shortage of experienced practitioners. In 2011, there were 40 private lawyers in Vanuatu, based almost exclusively in the capital. This equates with 1 to 5,614 of the population as it then stood,[134] compared with 1 to 409 in New Zealand and 1 to 418 in Australia.[135]

The number of lawyers has increased dramatically since the University of the South Pacific (USP) introduced a law degree in 1994. The Law School is based at the USP's Emalus Campus in Vanuatu.[136] In 2017, 10 Ni-Vanuatu students graduated with an LLB and in 2018, 5.[137] After graduation students must move to Fiji for six months to complete the Professional Diploma in Legal Practice before they can be admitted. In 2018, 58 USP law graduates were admitted to the Fiji Bar, including several from Vanuatu.[138] However, after qualification, there is little formal

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132 Vanuatu, of Government, 2010b, '2009 Official Statistics for Court of Appeal, Supreme Court, Magistrates Courts and the Island Courts' 2010, Port Vila. Unpublished, cited in Daniel Evans, Dr Michael Goddard with Professor Don Paterson *The Hybrid Courts of Melanesia A Comparative Analysis of Village Courts of Papua New Guinea, Island Courts of Vanuatu and Local Courts of Solomon Islands*, 2010, World Bank, 7.

133 Constitution, Art 5(2)(a).

134 South Pacific Lawyers Association, Needs Evaluation Survey for South Pacific Lawyer Associations, Final report, 5 <https://docs.wixstatic.com/ugd/0217f9_54872c6fdb3d472288d883520f41d966.pdf> accessed 6 November 2018.

135 South Pacific Lawyers Association, *Needs Evaluation Survey for South Pacific Lawyer Associations*, Final report, 5. <https://docs.wixstatic.com/ugd/0217f9_54872c6fdb3d472288d883520f41d966.pdf> accessed 6 November 2018. There were 37 in-house and government lawyers in Vanuatu: South Pacific Lawyers Association, *Needs Evaluation Survey for South Pacific Lawyer Associations*, Final report, 14. <https://docs.wixstatic.com/ugd/0217f9_54872c6fdb3d472288d883520f41d966.pdf> accessed 6 November 2018.

136 See further Caroline Penfold "Contextualising Program Outcomes for Pacific Island Law Graduates" (2012) 22 *Legal Education Review* 51, 51-53.

137 Email from Emeritus Professor Don Paterson to the author, 6 December 2018.

138 Fonua Talei "New Lawyers Admitted to Bar" <www.pressreader.com/fiji/fiji-sun/20180222/282179356566227> accessed 6 December 2018; Rusiate Baleilevuka "38 Law graduates from USP admitted to the Bar as new Legal Practitioners" 09/08/2018 <http://fijivillage.com/news/38-Law-graduates-from-USP-admitted-to-the-Bar-as-new-Legal-Practitioners-9kr52s> accessed 6 November 2018.

supervision or continuing education,[139] and whilst Vanuatu is the only Pacific island country to have mandatory CLE[140] mentoring is an issue. Accordingly, the quality of legal advice can suffer. It has been said that:[141]

> USP graduates are, however, often thrust into positions of authority and responsibility beyond the level of their 'training' and without the support of an experienced mentor. They are literally thrown in at the deep end.

The lack of experienced legal practitioners available to give advice and provide representation in court is a serious barrier to accessing the Common Law courts. Amongst the small population the literacy rate is about 85%.[142] Education is only free up to year eight of junior secondary school,[143] and only about 50% of the population go to high school.[144] This means that a large proportion of society requires legal assistance to access Common Law courts where complex adjectival law is at play.[145] Even the Island Courts, where legal representation is not allowed, are bound by rules of procedure in both civil and criminal proceedings.[146]

The limited number of lawyers, together with the low level of wages for government lawyers may be a particular problem in the provision of free legal services. The Public Solicitors Office, a constitutionally enshrined body tasked with providing 'legal assistance to needy persons',[147] is under extreme pressure. In 2016, it was reported that there had been no lawyer from the Public Solicitor's Office on Malekula for over a year.[148] Another problem that arises in small jurisdictions is that where co-accused or both sides to a civil dispute request assistance from the Public

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139 Caroline Penfold "Contextualising Program Outcomes for Pacific Island Law Graduates" (2012) 22 *Legal Education Review* 51, 67 and 69.

140 Vanuatu Law Society Act 2010.

141 Robert Cartledge "Thrown in at the deep end" (2011) NewSPLAsh, 9.

142 UNESCO, Sustainable Development Goals <http://uis.unesco.org/country/VU>. Figures are at 2015.

143 There are plans to increase this to years nine and ten: Flo Vanua, 'Education Ministry clarifies on confusions over free education in 2018' 17 January 2018, The Vanuatu Independent <https://vanuatuindependent.com/2018/01/17/education-ministry-clarifies-confusions-free-education-2018/>.

144 UNESCO, Sustainable Development Goals <http://uis.unesco.org/country/VU>. Figures are at 2015.

145 Civil Procedure Rules 2002 (Vanuatu) apply in all common law courts.

146 Island Courts (Civil Procedure) Rules 2005; Island Courts (Criminal Procedure) Rules 2005.

147 Constitution, Art 56.

148 Australian Government, Conflict Management and Access to Justice in Rural Vanuatu Report, July 2016, 134.

Solicitor's Office it is necessary to construct Chinese walls or proceed on a 'first come first served' basis.

D Affordability

Given that courts are mainly to be found in Port Vila and other major towns, the expense of travelling to lodge documents and attend hearings may be prohibitive for those living in remote areas. Court fees may also present a barrier for potential litigants. The current Supreme Court application fee is vt20,000 (NZ$264), with a further vt30,000 (NZ$396) payable for each estimated day of the hearing on setting down for trial.[149] The minimum wage in Vanuatu was increased from 1 January 2018 to vt200 (NZ$2.6) per hour.[150] Lawyers' fees may also be a barrier to accessing a court. The dearth of practitioners means that there is little competition for clients, which has an impact on the fees charged.

Whilst village court proceedings are no doubt cheaper than state courts, dispute resolution by chiefs is becoming increasingly expensive. In the Malekula Study 69% of community members who had gone through the chiefs to resolve a dispute said that the process had cost them money.[151]

E State Courts and Customary Cases

Whilst there is a constitutional mandate for the judiciary to resolve proceedings 'whenever possible in conformity with custom', customary cases present challenges for lawyers.[152] The Constitution left decisions on how to 'provide for the manner of the ascertainment of relevant rules of custom' to Parliament. However, it did direct Parliament to, 'provide for persons knowledgeable in custom to sit with the Judges of the Supreme Court or the Court of Appeal and take part in its proceedings.[153] This is an obvious way of assisting Judges to decide customary cases fairly. The constitutional mandate was fulfilled by the Courts Act[154] which came into force at Independence and provided for persons knowledgeable in custom to sit with the Judges of the Supreme Court.[155] In 2006 the Courts Act was repealed by the Judicial

149 Civil Procedure Rules 2002, sch 1.

150 *Vanuatu Government Gazette* No 96, 26 December 2017.

151 Australian Government, Conflict Management and Access to Justice in Rural Vanuatu Report, July 2016, 89.

152 See also *Banga v Waiwo* (Unreported, Supreme Court of Vanuatu, D'Imecourt CJ, 17 June 1996)

153 Article 51.

154 Cap 122, s 14.

155 Constitution, Art 51.

Services and Courts Act.[156] This makes no provision for the Supreme Court or Court of Appeal to sit with assessors. However, as mentioned above, the Supreme Court and Magistrates' Court must sit with assessors when hearing appeals from an Island Court,[157] which is the most likely source of customary issues.

Notwithstanding the assistance that might be gained from assessors, it appears that there is some unwillingness on the part of Judges schooled in the Common Law to deal with appeals from Island Courts involving customary laws. In *Chief Poilapa v Masaai*,[158] Justice Spear refused to exercise jurisdiction in a case involving custom on the basis that it did not qualify as a question of law, question of fact, or question of mixed law and fact.[159] His Lordship appears to have been of the view that the Supreme Court only had jurisdiction to make orders relating to custom in exceptional circumstances.[160] The other side of the coin is that appointing assessors knowledgeable in custom brings with it the risk of apprehended bias,[161] a problem that also exists with Island Court justices; this is discussed further below. Other than the appointment of assessors, Parliament has provided no guidance on how rules of custom are to be ascertained, and an attempt by a Senior Magistrate to provide assistance was rejected by the Supreme Court.[162]

Outside of the Common Law courts, a statutory avenue for resolving customary disputes exists in the form of the Island Courts. However, whilst the legislation states that they are to 'administer the customary law prevailing within [their] territorial jurisdiction',[163] the warrants establishing these bodies,[164] together with the procedural rules imposed upon them[165] have limited their ability to deal with

156 Cap 270 s 72.

157 Island Courts Act Cap 167 s 22(2).

158 (Unreported, Supreme Court, Vanuatu, Spear J, 6 June 2011) available via www.paclii.org at [2011] VUSC 302.

159 Judicial Services and Courts Act Cap 270 (Van), s 30.

160 *Tenene v Namak* [2003] VUSC distinguished.

161 See, eg *Matarave v Talivo* [2010] VUCA 3.

162 *Banga v Waiwo* (Unreported, Supreme Court of Vanuatu, d'Imecourt CJ, 17 June 1996) 4.

163 Island Courts Act Cap 167 s 10.

164 Jurisdiction is conferred by warrant under s 1. See, eg Warrant Establishing the Efate Island Court (30 April 1984). For a summary of the jurisdiction of Island Court conferred by warrants see Michael Goddard and Leisande Otto *Hybrid Justice in Vanuatu: The Island Courts* (World Bank, Washington) 20.

165 Island Courts (Civil Procedure) Rules 2005; Island Courts (Criminal Procedure) Rules 2005; Island Courts (Court Clerks) Rules 2005; Island Courts (Supervising Magistrates) Rules 2005.

customary cases.[166] Whilst they continue to deal with disputes about chiefly title[167] and a backlog of customary land disputes[168] the penalties that they may impose are expressed in Common Law terms.[169]

A very different kind of barrier to access to Common Law courts is apparent from *Public Prosecutor v James*.[170] In that case, a chief from Pentecost and nine other defendants appeared before the Supreme Court in custom dress to answer criminal charges including threats to kill, arson, assault and damage to property. Chetwynd J, took issue with their dress and told them to either change into 'appropriate' clothes or give reasons why they should be permitted to wear custom dress. The defendants refused to change their clothes and, on being asked whether they were wearing custom dress to make a statement that they did not accept the authority of the Supreme Court or respect the court they answered 'yes'. Apart from three minors who were granted bail, the defendants were sentenced to 72 hours imprisonment for contempt of court. When the defendants came before the court again two days later, they were still wearing custom dress. The Court then adjourned the case for five days, releasing all defendants on bail, with a proviso that they would again be imprisoned for contempt of court if they appeared in custom dress unless they had had made a successful request to the Chief Justice through the Chief Registrar to wear custom dress for some compelling reason. From this it would appear that, normally, it is necessary to dress in 'appropriate' Western clothes to access the Common Law courts. However, it should be noted that at the trial of the first defendant in this case before a different Judge, all other defendants having pleaded guilty, the defendant was told that he might, 'dress as he liked at trial, subject to his attire being respectful and not indecent.'[171]

F Lack of Independence

In small jurisdictions, where members of society are living in close proximity, there is a problem with perceived bias. In customary cases, given that customary

166 See, eg Warrant Establishing the Efate Island Court (30 April 1984). See further David Weisbrot "Custom, Pluralism, and Realism in Vanuatu: Legal Development and the Role of Customary Law" (1989) 13 (1) Pacific Studies 65, 81.

167 Australian Government, Conflict Management and Access to Justice in Rural Vanuatu Report, July 2016, 36.

168 Australian Government, Conflict Management and Access to Justice in Rural Vanuatu Report, July 2016, 36; Michael Goddard and Leisande Otto *Hybrid Justice in Vanuatu: The Island Courts* (World Bank, Washington, 2013) 21.

169 Island Courts Act Cap 167, s 11.

170 [2016] VUSC 142.

171 *Public Prosecutor v Leo* [2018] VUSC 75, 1.

laws and processes differ from place to place, there is a tension between providing for those knowledgeable in the local custom to decide disputes and finding traditional leaders who are not related to a party or interested in the proceedings in some other way.

In the Common Law courts, the Judicial Services and Courts Act prohibits a Judge from presiding if he or she has an interest or a perceived or actual bias.[172] However, this provision does not apply to assessors. Nevertheless, the Court of Appeal has held that there are well-established principles of general law which deal with the consequences of apprehended bias on the part of a member of a tribunal, whether judicial or administrative in nature.[173] Apprehended bias has been used as a ground for seeking leave to appeal from the Supreme Court sitting on appeal from the Island Court in a customary land case. However, the Court has made it plain that the mere fact that the assessors know one of the parties or have themselves been involved in land disputes will not necessarily be grounds for setting a decision aside. As stated by the Court of Appeal in *Matarave v Talivo:*[174]

> The Island Courts Act recognizes that assessors will come from the same geographic area as the disputed land, and that they will bring to the decision making their own expert knowledge on matters of custom. In these circumstances the fact that the chosen assessors have themselves participated in claims over custom land ownership, or have particular knowledge of the customs of an area will not establish a basis for an apprehension that they will not decide the matter fairly and in accordance with the scheme of the legislation. Moreover, issues of necessity might arise. … Given the scheme of the Island Courts Act, it would be impossible in some cases to find assessors that were not familiar with the issues involved in the dispute, and who did not know any of the parties.

In the Malekula Study, a key concern about the management of conflict by chiefs was lack of neutrality.[175] Community members and some chiefs reported that chiefs sometimes made decisions in their own or their family's interests. In some cases this was gender related and may have contributed to the study's general finding that women found chiefs' decisions less fair than did men.[176]

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172 Cap 270 s 38.

173 *Matarave v Talivo* [2010] VUCA 3.

174 *Matarave v Talivo* [2010] VUCA 3.

175 Above n 4, at 90.

176 Ibid.

G Restrictions on the Use of Customary Forums

By and large village courts and other customary forums for dealing with disputes in accordance with customary law have been left to their own devices by the state, the recent attempt to include nakamals in the land dispute process being a prominent exception. However, from time to time the state courts have flexed their muscles and made it plain that chiefs are not allowed to usurp state jurisdiction. This has occurred in two principal contexts, the first being where the decisions of chiefs have conflicted with human rights and the second where they have inflicted punishment for 'criminal' activities. An example in the former category is *Public Prosecutor v Kota*,[177] where the first accused and his wife were both from Tanna but lived in Port Vila. When the couple became estranged, the husband asked the paramount chiefs for assistance. When the wife refused to obey the chiefs' decision that she must return to her husband she was forcibly placed on a boat and taken back to Tanna. The Supreme Court held that despite the fact that such action was in accordance with the indigenous customary law of that island this was an offence under the Penal Code[178] and contravened the wife's constitutional right to freedom of movement.[179] The chiefs were found guilty of inciting kidnapping and were fined and given a suspended sentence of 12 months.

With regard to the second category of case, a recent example can be found in *Public Prosecutor v Leo*[180] the defendant pleaded not guilty to 44 counts of criminal misconduct, including several counts of threatening to kill, malicious damage and arson. In defence it was contended that these actions were taken under the authority of a customary court presided over by five chiefs, as the victims had broken a *gorogore* (customary ban) on harvesting beche de mer. The court had imposed a fine of 5,000 tusked pigs. It was ruled that, in default the offenders were to leave the village. If they failed to do so they would be subject to a 'custom eviction'.[181] The defendant argued that as the fine was not paid and there was no voluntary departure, the customary eviction and accompanying acts for which the defendant was being tried were all justified. Given the customary court process and enforcement, the defendant argued that the case was not justiciable under Vanuatu's written laws. Wiltens J held that the Constitution[182] empowered the judiciary to resolve

177 (1989-94) 2 Van LR 661.

178 Cap 135, ss 35 and 105(b).

179 Article 5. See also *Re P* [1980-88] 1 VanLR 130.

180 [2018] VUSC 75.

181 [2018] VUSC 75 [17].

182 Articles 47 and 49.

proceedings according to law and bestowed on the Supreme Court 'unlimited jurisdiction to hear and determine any civil or criminal proceedings'.[183] Accordingly, His Honour held that Supreme Court did have jurisdiction to hear the matter. Noting also that the Penal Code provided that the criminal law applied throughout Vanuatu, Wiltens J stated that '[c]ustomary considerations would only be a factor in the Supreme Court's considerations if there were no written rules of law.[184] His Honour added that:[185]

> Had Parliament wished, customary law in the area of alleged criminal misconduct could also have been devolved to the Chiefs – that has not occurred. There cannot be a clearer message of Parliament's intent than 38 years of silence in the face of many calls for change.

This judgment relegated customary laws to the lowest position in the hierarchy of laws, only to be taken it into account if there was no written law and then only if it was possible to interpret or apply substantial justice in a way which conformed with custom.

V CONCLUSION

Vanuatu's array of dispute resolution forums include not only a Common Law hierarchy of courts, but also statutory forums designed to provide access to justice in small communities. The latest addition to these statutory forums goes further in attempting to bridge the gap between state procedures and customary processes, handing decision-making back to traditional leaders in their nakamals. Village courts also resolve local disputes, largely without state intervention. Whilst superficially, these options appear to offer an extensive menu of dispute resolution avenues, there are a number of formidable barriers to accessing them. Vanuatu's colonial history and the resulting pluralism have obviously had a significant influence on the current position. Whilst the existence of Common Law and customary legal systems sometimes offer a choice for litigants, tensions between the two systems remain unresolved.

In cases other than customary land and minor disputes between members of the community the state still asserts its superiority and appears to regard the state court as the proper forum to determine matters. However, Vanuatu's small size and remote, dispersed rural communities make it difficult to access the Common Law courts.

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183 His Honour also relied on the Judicial Services and Courts Act Cap 270 s 28, which is similar to s 49.

184 [31].

185 [34] and [35].

Many of the issues stem from lack of resources which are restricted by the small scale economy. However, it is arguable that creative solutions might improve the situation through reallocation of resources rather than incurring a great deal more expense.[186]

As stated in the Conflict Management and Access to Justice in Rural Vanuatu Report, 'in most human societies, some problems are very difficult to solve within the context of small, interrelated communities.'[187] To date, legislation has failed to deliver access to justice across the archipelago and it is questionable whether it is capable of doing so if it continues to reflect the dominance of the Common Law. This carries with it a cultural bias which is nowhere more starkly highlighted than in *Public Prosecutor v James*,[188] where the defendants were imprisoned for refusing to change out of customary dress. In the lead up to Vanuatu's 40th anniversary of independence in 2020, there is a pressing case for the development of fair and accessible dispute resolution options which take account of 'ethnic, linguistic and cultural diversity' as a feature of the country's 'common destiny'.[189]

186 Above n 4, at 145.

187 Above n 3, at 90,145.

188 [2016] VUSC 142.

189 Constitution 1980, Preamble.