

# VANUATU

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## 1. CONTEXT

The New Hebrides, an island group in the South Pacific, was first discovered by Europeans in 1606.<sup>1</sup> In 1906, Britain and France agreed to a Convention establishing a sphere of joint influence in the country, under which they had parallel jurisdiction each over their own subjects.<sup>2</sup> In 1914, the two colonial

<sup>1</sup> The Islands of New Hebrides were discovered by the Spanish explorer Pedro Fernández de Queirós, who landed in 1606 on Espiritu Santo (now known simply as Santo). The archipelago was later mapped and named New Hebrides by the English explorer Captain James Cook in 1774. See Sue Farran 'Pacific Punch: Tropical Flavors of Mixedness in the Island Republic of Vanuatu' in Anna Koppel, Vernon Valentine Palmer and Mohammed Y Mattar (eds) *Mixed Legal Systems, East and West* (Ashgate, 2015) 124.

<sup>2</sup> The Convention was signed in London on 20 October 1906, and is known as the London Convention.

powers agreed to a new Protocol establishing the Anglo-French Condominium over the New Hebrides. The Protocol provided for greater mixed juridical functions, including the administration of a joint court, the making of joint regulations for the order and good governance of the islands, and certain services to be undertaken in common.<sup>3</sup> Due to World War I, the Protocol of 1914 was not ratified or implemented until 1922.

Calls for independence began in the mid-1960s. This was sparked by disputes over the system of land ownership under the Condominium, which allowed for appropriation of customary lands by Europeans.<sup>4</sup> While a number of French-speaking parties opposed the idea of immediate independence, the English-speaking pro-independence movement that became Vanua'aku Pati repeatedly called on the two colonial powers to grant New Hebrides independence.

In 1978, with the consent of the British and French administrations, a temporary government was established. In 1979, the latter appointed a constitutional planning committee with a specific role to draft the written Constitution. An Exchange of Notes between the UK and France approved the final draft of the document on 23 October 1979. On 30 July 1980, the New Hebrides acceded to its independence and became the Republic of Vanuatu.

## 2. SOURCES OF LAW

Vanuatu was jointly administered by the UK and France from 1906 until 1980. As a result of this, the country has several sources of law. The Constitution, statutory law, British and French laws, colonial Joint Regulations, common law and indigenous customary law apply.

### 2.1. CONSTITUTION

The Constitution of Vanuatu is the supreme law of the land.<sup>5</sup> It lays out, among other things, the basic structure of the government, the requirements of citizenship, the basic tenets of land ownership and provides for fundamental rights and freedoms of individuals.

<sup>3</sup> The protocol respecting the New Hebrides signed at London on 6 August 1914, by representatives of the British and French governments. Farran, above n 1, at 125.

<sup>4</sup> Howard Van Trease 'The Colonial Origins of Vanuatu Politics' in Howard Van Trease (ed) *Melanesian Politics: Stael Blong Vanuatu* (Macmillan Brown Centre for Pacific Studies, University of Canterbury and Institute of Pacific Studies, University of South Pacific, 1995) 13; Miranda Forsyth *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu* (ANU Press, 2009) 2.

<sup>5</sup> Article 2 of the Constitution.

The procedures for amending the Constitution are different from those covering Acts of Parliament. Article 85 of the Constitution provides that Parliament may amend the Constitution by a vote of no less than two-thirds of all members at a special sitting attended by at least three-quarters of members. Alternatively, if there is no such quorum, Parliament may meet a week later and make a decision by the same majority even if only two-thirds of the members are present. Article 86 of the Constitution requires that any amendment regarding the status of the three official languages (English, French, Bislama), the electoral system or the parliamentary system shall not come into effect unless approved by a national referendum.

## 2.2. STATUTORY LAW

Parliament is authorised by the Constitution to ‘make laws for the peace, order and good government of Vanuatu.’<sup>6</sup> Any bill passed by Parliament becomes law after it is assented to by the President of the Republic and gazetted by the State Law Office. The laws made are to be consistent with the Constitution.

The Constitution provides that the pre-independence laws and regulations, which were still in force in the country after 30 July 1980, continue to form part of the laws of the Republic of Vanuatu. The Acts of Parliament adopted since independence and the pre-independence regulations that are still in force are compiled in the *Laws of Vanuatu*, and were published in two revised editions in 1988 and 2006. In these revised editions, the laws are designated by chapter numbers (Cap).

## 2.3. COLONIAL LAWS

In accordance with art 95(2) of the Constitution, the British and French laws in force or applied in Vanuatu immediately before 30 July 1980 continue to apply after independence to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu. The same article also provides that the application of these colonial laws should, wherever possible, take into account custom or customary law.

During the time that Vanuatu (then New Hebrides) was under the administration of the UK and France, the Anglo-French Protocol of 1914, which regulated the government of New Hebrides, provided that the laws of Britain and France were to apply to their respective nationals and to nationals of other countries, including indigenous New Hebrideans who chose to be subject to

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<sup>6</sup> Article 16(1) of the Constitution.

such laws. Indigenous New Hebrideans who did not choose to be subject to those laws were subject to customary law.

The French legislation and subsidiary legislation that applied to French nationals and optants was provided by the French Codes, together with legislation specifically stated (by these same laws) to apply to New Caledonia or New Hebrides, or applied to New Hebrides by the French Commissioners in Nouméa.

Similarly, English laws were applied to UK citizens and optants living in the territory of New Hebrides in accordance with art 20 of the Pacific Order in Council 1893 (UK), which provided for the application of ‘the substance of the law for the time being in force in England’. In 1961, the statutes of general application in force in England on 1 January 1961 were applied in New Hebrides in accordance with art 15 of the Western Pacific (Courts) Order 1961 (UK). The High Court of New Hebrides Regulation 1976 later extended the date of the application of English statutes of general application to 1 January 1976. Accordingly, prior to independence, British nationals and optants were, *inter alia*, subject to statutes of general application in force in England on 1 January 1976. They were also subject to legislation and subsidiary legislation expressly stated to apply to the New Hebrides.

#### 2.4. COMMON LAW AND EQUITY

Before independence, French nationals and optants were not subject to the common law and equity of England.<sup>7</sup> As far as the UK citizens and optants were concerned, the High Court of New Hebrides Regulation 1976 provided for the reception of the common law and equity, so far as the local circumstances of the New Hebrides permitted.<sup>8</sup>

The Constitution of Vanuatu does not expressly provide for the reception of the common law and equity. However, in accordance with art 95(2) of the Constitution, the British and French laws in force or applied in Vanuatu immediately before 30 July 1980 continue to apply after independence, unless they are expressly revoked or are incompatible with the independent status of Vanuatu. The Constitution of Vanuatu, in effect, continues in force the above Regulation of 1976, which permits the application of common law and equity in the country.

<sup>7</sup> Principles of common law and equity are principles evolved by the UK courts on the basis of the common practices of the Kingdom in early times, with some additions from other sources; and principles developed by the Court of Chancery in the interests of equity and fairness. See Jennifer Corrin and Don Paterson *Introduction to South Pacific Law* (4th ed, Intersentia, 2017) 30–31.

<sup>8</sup> The High Court of New Hebrides Regulation 1976 (UK).

## 2.5. JOINT REGULATIONS

Prior to independence, the Resident Commissioners of the UK and France were specifically authorised by the Anglo-French Protocol of 1914 to issue jointly local regulations binding on all inhabitants of New Hebrides.<sup>9</sup> Accordingly, a large number of Joint Regulations were issued, some of which authorised the making of rules or orders by local public authorities.<sup>10</sup>

The Constitution provides in art 95(1) that these Joint Regulations and subsidiary legislation made thereunder in force immediately before 30 July 1980 continue to apply after independence and will be construed with adaptations necessary to bring them into conformity with the Constitution.

The Joint Regulations that are still in force are included in the compilation *Laws of Vanuatu*, published in two revised editions in 1988 and 2006. They are now called Acts of Parliament.

## 2.6. CUSTOMARY LAW

The Constitution recognises custom as a source of law in Vanuatu. Article 95(3) of the Constitution provides that '[c]ustomary law shall continue to have effect as part of the law of the Republic of Vanuatu'. Article 47(1) of the Constitution provides that custom is a source of law in dispute resolution.<sup>11</sup> Article 95(2) states that the application of colonial laws should, wherever possible, take into account custom.

With regard to land transactions, art 74 of the Constitution provides that rules of custom form the basis of ownership and use of land in Vanuatu.<sup>12</sup> Article 51 of the Constitution states that Parliament may provide for the manner of the ascertainment of relevant rules of custom, which influences the courts in applying custom. Parliament, however, has yet to exercise its powers under this provision.

The Island Courts Act 1983, which provides for the establishment of Island Courts, specifically requires the Island Courts to 'administer' the customary law prevailing within the territorial jurisdiction of the court, so far as the same is

<sup>9</sup> Article 7 of the Anglo-French Protocol Respecting the New Hebrides.

<sup>10</sup> See Don Paterson 'Vanuatu' in Michael A Ntummy (ed) *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 368.

<sup>11</sup> Article 47(1) provides: 'the administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.'

<sup>12</sup> Article 74 of the Constitution states: 'The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.'

not in conflict with any written law and is not contrary to justice, morality and good order.<sup>13</sup>

### 3. CONSTITUTIONAL LAW

The expression ‘constitutional law’ generally refers to written and unwritten laws, established conventions and practices that provide for the establishment and functioning of the national government.<sup>14</sup> In Vanuatu’s context, the Constitution is the principal written law regulating, among other things, the operation of the government. In addition to the Constitution, unwritten principles of common law and customary law, as well as established conventions and practices, operate to regulate the functioning of the national government. This section will focus on the written Constitution and then on those aspects of the Constitution that are provided in other legislation, the common law and constitutional conventions.

#### 3.1. THE WRITTEN CONSTITUTION

During the constitutional transition towards independence, with the agreement of Britain and France, the written constitution was drafted by a Committee comprised of representatives of different political parties and groupings and with the assistance of two constitutional experts, one appointed by the UK and one by France.

The draft constitution was then approved and enacted by the UK and France in an Exchange of Notes in 1979.

##### 3.1.1. *Structure and Format of the Written Constitution*

The Constitution of Vanuatu commences with a preamble which emphasises the unity of the country and its struggle for nationhood, and proclaims the establishment of the Republic of Vanuatu based on Melanesian values and Christian principles.<sup>15</sup>

The Constitution then continues with the substantive parts in chapter 1. This consists of some general provisions about the nature of the state, the status of the Constitution, the national and official languages, and the national sovereignty,

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<sup>13</sup> Section 10 of Island Courts Act 1983 Cap 167.

<sup>14</sup> Corrin and Paterson, above n 7, at 77.

<sup>15</sup> See Preamble of the Constitution; Constitutional Committee, *Republic Blong Vanuatu* (1979) 157.

electoral franchise and political parties.<sup>16</sup> Article 1 of the Constitution provides that '[t]he Republic of Vanuatu is a sovereign democratic state' and art 2 stipulates that '[t]he Constitution is the supreme law of the Republic of Vanuatu'.

Chapter 2 provides for fundamental rights, freedoms and duties of individuals. Chapter 3 sets out the rights to citizenship. In chapter 3, the original art 13 dealt with the avoidance of dual nationality; it was amended in 2013 to allow for dual citizenship.<sup>17</sup> Chapter 4 contains provisions establishing the legislative branch of the government. Chapter 5 establishes the Malvatumauri Council of Chiefs, and prescribes its function and organisation. Chapter 6 contains provisions establishing the head of state (President). Chapters 7 and 8 provide respectively for the executive and judicial branches of the government. Chapter 9 contains provisions creating the public service and the Ombudsman. Chapter 10 provides the Leadership Code. Chapter 11 deals with emergency powers.

Chapter 12 contains provisions about land. It is to be noted that due to significant problems related, among other things, to the failure by the government to protect the interests of customary landowners, art 78, which comes under this chapter, was amended in 2013 to allow the creation of customary land management, which is a customary institution intended to resolve land ownership and disputes over custom land.

Chapter 13 deals with decentralisation. Chapter 14 regulates the amendment of the Constitution and chapter 15 contains transitional provisions allowing for the continued existence of laws, certain public offices and institutions.

### 3.1.2. *Interpretation of the Written Constitution*

The courts in Vanuatu have held that constitutional provisions must be interpreted broadly unless the terms of the provisions are precise and unambiguous; consideration must be given to the purpose of the Constitution, which is to advance the constitutional objectives, taking due account of the country's circumstances and resources.<sup>18</sup> However, it has been held that the courts should not use an ordinary statute, such as the Interpretation Act, to interpret the Constitution. This is because such an approach would undermine the Constitution, which is the supreme law of the land.<sup>19</sup> When interpreting ambiguous words and expressions of the Constitution, the courts are to rely not

<sup>16</sup> Corrin and Paterson, above n 7, at 86.

<sup>17</sup> Constitution (Sixth) (Amendment) Act No 27 of 2013.

<sup>18</sup> *Timakata v Government of Vanuatu* [1989–94] 2 Van LR 691; *Virelala v Ombudsman* [1997] VUSC 35; *President of the Republic of Vanuatu v Speaker of Parliament* [2008] VUSC 77.

<sup>19</sup> *Silas v Public Service Commission* [2014] VUCA 9; *Union Electrique du Vanuatu Ltd v Republic of Vanuatu* [2017] VUSC 96.



only on the substantive terms of the Constitution, but also on the Preamble of the Constitution.<sup>20</sup> It has also been noted that the Preamble of the Constitution is not a substantive provision such as arts 1–95. Rather, the Preamble is an introductory statement expressing some underlying principles, philosophies and aspirations, which form the basis of the new nation.<sup>21</sup>

### 3.2. THE LEGISLATURE

The legislature consists of a single chamber known as Parliament. It has the power, among other things, to make laws for the peace, order and good government of Vanuatu. Members of Parliament are elected by universal suffrage through an electoral system that includes an element of proportional representation, so as to ensure fair representation of different political groups and opinions.<sup>22</sup> Subject to certain qualifications and restrictions imposed by the Representation of People Act 1982<sup>23</sup> and the amendments of art 13 of the Constitution in 2013,<sup>24</sup> every citizen of Vanuatu who is at least 25 years of age is eligible to stand for election and every citizen of at least 18 years of age is eligible to vote.

Parliament is required under the Constitution to meet twice a year in ordinary session. In addition, it may meet in extraordinary session at the request of the majority of its members, the Speaker or the Prime Minister. Parliament makes its decisions by a public vote of a simple majority of the members voting. The quorum for Parliament is two-thirds of its members, or if there is no such quorum, Parliament is to meet three days later and a simple majority of members will suffice.

Parliament has power to control the executive. It may pass, by an absolute majority of members, a motion of no confidence in the Prime Minister, causing the Prime Minister and other ministers to cease to hold office, although they may continue to exercise their functions until a new Prime Minister is elected.<sup>25</sup>

The life of a Parliament is four years from the date of its election, unless it is dissolved by the vote of an absolute majority of the members at a special meeting when at least three-quarters of the members are present.<sup>26</sup> Parliament may be dissolved by the President on the advice of the Council of Ministers. However, no dissolution of Parliament is allowed within the first 12 months after a general election.

<sup>20</sup> *President of the Republic of Vanuatu v Speaker of Parliament* [2008] VUSC 77.

<sup>21</sup> *President of the Republic of Vanuatu v Speaker of Parliament* [2008] VUSC 77. The Court cited a Solomon Islands case to support this view: *Minister of Provincial Government v Guadalcanal Provincial Assembly* [1997] SBCA 1.

<sup>22</sup> Article 17(1) of the Constitution.

<sup>23</sup> Representation of People Act 1982 Cap 146.

<sup>24</sup> Constitution (Sixth) (Amendment) Act No 27 of 2013.

<sup>25</sup> Article 43 of the Constitution.

<sup>26</sup> Article 28 of the Constitution.

Article 18 of the Constitution establishes an Electoral Commission, which has general responsibility for the registration of electors and the conduct of elections for Parliament, for the Malvatumauri Council of Chiefs, and for local government and municipal elections. The Electoral Commission consists of a Chairman and two members appointed by the President, with the advice of the Judicial Service Commission.

### 3.3. THE JUDICIARY

Chapter 8 of the Constitution contains provisions providing for the judiciary. The main function of the judiciary is to resolve proceedings according to law. Article 49 of the Constitution establishes the Supreme Court with unlimited jurisdiction in civil and criminal matters. The Supreme Court also has jurisdiction to hear and determine all cases relating to claims that constitutional rights have been infringed.<sup>27</sup> Moreover, when a question concerning the interpretation of the Constitution arises before a subordinate court, and the court believes that the question concerns a fundamental point of law, the court must submit the question to the Supreme Court for determination.<sup>28</sup> The Supreme Court also has jurisdiction to hear and determine the validity of any bill or regulation referred to the Court by the President.<sup>29</sup> Article 54 provides that the Supreme Court may hear and determine any question regarding whether a person has been validly elected, vacated or has become disqualified to sit in Parliament, or in the Malvatumauri Council of Chiefs or a local government council. As an appellate court, the Supreme Court has jurisdiction to hear appeals from Magistrates' Courts, review convictions, receive referrals from the Magistrates' Courts on questions of law and hear land appeals from Island Courts on questions relating to procedure.

The Chief Justice of the Republic of Vanuatu is appointed by the President after consultation with the Prime Minister and the leader of the opposition. All judges of the Supreme Court are appointed by the President on the advice of the Judicial Service Commission.<sup>30</sup>

The Constitution also provides for a Court of Appeal to be composed of two or more judges of the Supreme Court sitting together. It has the jurisdiction to hear all criminal and civil appeals from the Supreme Court exercising its original and appellate jurisdiction.<sup>31</sup>

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<sup>27</sup> Article 53(1) and (2) of the Constitution.

<sup>28</sup> Article 53(3) of the Constitution.

<sup>29</sup> Article 16(4) of the Constitution.

<sup>30</sup> Articles 49(3) and 47(2) of the Constitution.

<sup>31</sup> Article 50 of the Constitution.

Magistrates' Courts are not referred to in the Constitution, but are established under the Judicial Services and Courts Act.<sup>32</sup> Magistrates' Courts are courts of summary jurisdiction and are subordinate to the Supreme Court. They have jurisdiction to hear and determine, in a summary way, proceedings for an offence for which the maximum punishment does not exceed imprisonment for two years.<sup>33</sup> Magistrates' Courts also have jurisdiction to hear and determine, in a summary way, civil proceedings:

- (1) in which the amount claimed or the value of the subject matter does not exceed 1,000,000 VT (not including claims relating permanent physical damage to a person);
- (2) relating to disputes between landlords and their tenants where the value of the claim does not exceed 2,000,000 VT;
- (3) relating to undefended suits for divorce or judicial separation, subject to the directions of the Chief Justice; and
- (4) relating to claims made under the Maintenance of Family Act,<sup>34</sup> the Maintenance of Children Act,<sup>35</sup> or any other law providing for the maintenance of children, mothers of children or wives where the annual sum claimed does not exceed 1,200,000 VT.<sup>36</sup>

Magistrates' Courts may hear appeals from decisions of Island Courts, except those which concern the ownership of land. Magistrates are appointed by the President of the Republic on the advice of the Judicial Service Commission.

The Constitution provides that all members of the judiciary hold office until they reach the age of retirement.<sup>37</sup> Removal of a judge from office may only occur if he or she is convicted and sentenced on a criminal charge, or he or she is found guilty by the Judicial Service Commission of gross misconduct or professional incompetence.<sup>38</sup> It has also been held that the principles of natural justice must be observed when removing a judge from office. Thus, a judge against whom allegations are made must be given an adequate opportunity to respond to those allegations.<sup>39</sup>

Article 52 of the Constitution requires Parliament to establish village and island courts with jurisdiction over customary and other matters and to provide

<sup>32</sup> Judicial Services and Courts Act No 54 of 2000 Cap 270.

<sup>33</sup> Section 14(2) of the Judicial Services and Courts Act 2000 Cap 270.

<sup>34</sup> Maintenance of Family Act 1966 Cap 42.

<sup>35</sup> Maintenance of Children Act 1966 Cap 46.

<sup>36</sup> Magistrates' Court (Civil Jurisdiction) Act No 4 of 1981 Cap 130, s 1, as amended by s 1 of Magistrates' Court (Civil Jurisdiction) (Amendment) Act No 8 of 1984.

<sup>37</sup> The retirement age in Vanuatu is 55 (s 54 of Employment Act 1983 Cap 160).

<sup>38</sup> Article 47(3) of the Constitution.

<sup>39</sup> *D'Imecourt v President of Vanuatu* [1988] VUSC 59; see also Corrin and Paterson, above n 7, at 109.

for the role of chiefs in such courts. A system of Island Courts was established in 1983 by the Island Courts Act. The Island Courts have jurisdiction to hear and determine minor civil claims and criminal matters and to administer the customary law that prevails in their territorial jurisdictions.<sup>40</sup> In relation to its criminal jurisdiction, an Island Court cannot impose a fine exceeding 24,000 VT or a sentence of imprisonment exceeding six months.<sup>41</sup> In the exercise of its civil jurisdiction, an Island Court may award compensation or damages not exceeding 50,000 VT.<sup>42</sup> Section 10 of the Island Courts Act provides that an Island Court is to apply, among other things, customary law prevailing within its territorial jurisdiction, unless it is in conflict with any written law and is contrary to justice, morality and good order.

### 3.4. CONSTITUTIONAL OFFICES AND ENTITIES

#### 3.4.1. *Executive Government*

The executive power is vested in the Prime Minister and Council of Ministers, and is to be exercised as provided by the Constitution or a law.<sup>43</sup> The Prime Minister is elected by an absolute majority of the Members of Parliament voting by secret ballot. The Prime Minister appoints the other ministers from among the Members of Parliament and may designate one of them as Deputy Prime Minister.<sup>44</sup> The Prime Minister assigns responsibilities for the conduct of government to the ministers and may remove them from office. Ministers remain Members of Parliament. The Council of Ministers (Prime Minister and all other ministers) are collectively responsible to Parliament. A motion of no confidence against the Prime Minister, if supported by an absolute majority of the Members of Parliament, will cause the Prime Minister and other ministers to cease to hold office. The Council of Ministers may also be terminated whenever the Prime Minister resigns or dies, but the ministers continue to exercise their functions until a new Prime Minister is elected.

#### 3.4.2. *Head of State*

Chapter 6 of the Constitution provides for the head of state, known as the President. The President must be an indigenous Ni-Vanuatu citizen qualified

<sup>40</sup> Sections 7, 8 and 10 of the Island Courts Act. See also Anita Jowitt 'Island Courts in Vanuatu' (1999) 3 *Journal of South Pacific Law* <<http://www.paclii.org/journals/fjspl/>>.

<sup>41</sup> Section 11 of the Island Courts Act.

<sup>42</sup> Section 12 of the Island Courts Act.

<sup>43</sup> Article 39(1) of the Constitution.

<sup>44</sup> Article 42 of the Constitution.

to be elected to Parliament.<sup>45</sup> The head of state is elected by an electoral college consisting of the Members of Parliament and the chairmen of the local government councils. The President is elected by a vote of three-quarters of the members of the Electoral College present at the first meeting.<sup>46</sup> If there is no such quorum, the Electoral College is to reconvene 48 hours later and elect the President with a vote of at least two-thirds of the members present.

The head of state symbolises the unity of the nation; the role is essentially honorific. The Constitution however does give the head of state some powers. Some of these powers are not required to be exercised on advice: the head of state has the power to refer a bill or a regulation to the Supreme Court for its opinion, if the head of state considers that it is inconsistent with the Constitution.<sup>47</sup> Article 44 of the Constitution provides that in the case of the death of the Prime Minister and that there is no Deputy Prime Minister, the President may appoint a caretaker Prime Minister. The head of state is also authorised to appoint the five members of the Public Service Commission after consultation with the Prime Minister.<sup>48</sup> The head of state appoints the Ombudsman after consultation with the Prime Minister, Speaker of Parliament, leaders of political parties, the President of the Malvatumauri Council of Chiefs, the chairs of provincial councils and the chairs of the Public Service Commission and of the Judicial Service Commission.<sup>49</sup>

Article 38 of the Constitution provides that the President may, on the advice of a parliamentary committee, pardon, commute or reduce a sentence imposed on a convicted person. The President may also dissolve Parliament on the advice of the Council of Ministers; this power is to be exercised at the discretion of the President.<sup>50</sup>

The term of office of the President is five years. The President may be removed from office by the Electoral College for gross misconduct or incapacity.<sup>51</sup> The Constitution does not expressly provide for the suspension or resignation of the President. However, this has occurred in practice: a President resigned in 1984.

### 3.4.3. *Malvatumauri Council of Chiefs*

Chapter 5 of the Constitution provides for the Malvatumauri Council of Chiefs, composed of custom chiefs elected by their peers sitting in District

<sup>45</sup> Article 35 of the Constitution.

<sup>46</sup> Article 34 (Sch 1) of the Constitution.

<sup>47</sup> Articles 16(4) and 39(3) of the Constitution.

<sup>48</sup> Article 59 of the Constitution.

<sup>49</sup> Article 61 of the Constitution.

<sup>50</sup> *President of Vanuatu v Korman* [1998] VUCA 3; *Vohor v Abiut* [2004] VUCA 1.

<sup>51</sup> Article 36 of the Constitution.

Councils of Chiefs.<sup>52</sup> The Council elects its own President. The Council is to meet at least once a year. The Council itself, Parliament or the government may call additional meetings.

Prior to the 2013 constitutional reforms, art 30 of the Constitution provided that the Council had general competence to discuss matters relating to land, custom and tradition, and that it could be consulted on questions relating to land, custom and tradition.<sup>53</sup> This article was amended in 2013 and the government must now consult with the Council of Chiefs in areas related to land, custom and tradition. However, there is still no requirement that the government follow the advice of the Council. The amendment also provided that the Malvatumauri Council may make recommendations for the preservation and promotion of Ni-Vanuatu culture and languages.<sup>54</sup>

#### 3.4.4. *Public Administration*

##### 3.4.4.1. The Public Service

Public servants are appointed by the Public Service Commission. Only citizens of Vanuatu are appointed to public office. For as long as their posts exist, they are not to be removed, except in accordance with the Constitution.<sup>55</sup> This security of tenure does not apply to personal political advisors to the Prime Minister and ministers, and senior public servants may be transferred by the Prime Minister to other posts of equivalent rank. Public servants leave the public service upon reaching retirement age or upon being dismissed by the Public Service Commission.<sup>56</sup>

The Public Service Commission is established under art 59 of the Constitution and is composed of five members appointed for three years by the President after consultation with the Prime Minister. Every year the President may appoint one of the members to be the Chair of the Commission.

In accordance with art 60 of the Constitution, the Public Service Commission is responsible for the appointment and promotion of public servants, and the selection of those to undergo training courses. The Public Service Commission is also responsible for the discipline of public servants. It has, however, no authority over the members of the judiciary, the armed forces, the police or the teaching services. The Public Service Commission is an independent body; in exercising its functions, the Commission is not subject to the direction or control of any other person or body.<sup>57</sup>

<sup>52</sup> Article 29(1) of the Constitution.

<sup>53</sup> Article 30 of the Constitution.

<sup>54</sup> Constitution (Sixth) (Amendment) Act No 27 of 2013; art 30(1) of the Constitution.

<sup>55</sup> Article 57(5) of the Constitution.

<sup>56</sup> Article 57(7) of the Constitution.

<sup>57</sup> Article 60(4) of the Constitution.

#### 3.4.4.2. The Ombudsman

The Ombudsman is appointed for five years by the President after consultation with the Prime Minister, the leaders of political parties, the President of Malvatumauri Council of Chiefs and the chairpersons of the Public Service and the Judicial Service Commission.<sup>58</sup> The Ombudsman is an independent body whose main function is to investigate and report upon administrative action taken by officials of the central, provincial and local government, by statutory bodies and other public officials.<sup>59</sup> Moreover, the Ombudsman is authorised to investigate complaints that an individual has not obtained, in the official language he or she uses, the services which the individual may rightfully expect from the administration.<sup>60</sup> The Ombudsman Act 1998 also authorises the Ombudsman to investigate breaches of the Leadership Code.<sup>61</sup>

#### 3.4.5. *Provincial and Local Government*

Chapter 13 of the Constitution provides for decentralisation in order to enable the people of Vanuatu to fully participate in the affairs of their local government. The same chapter also authorises Parliament to enact legislation to realise that ideal. Accordingly, the Decentralisation Act 1980 established local government regions and local government councils.<sup>62</sup> The same legislation provides for the election of local government councils every four years. Each Council consists of representatives of customary chiefs.

A local government council is responsible for the good government of its local government region and the welfare of its people.<sup>63</sup> It has, for instance, the power to deal with the choice of location, construction and maintenance of schools, clinics, dispensaries, health centres, bridges, roads (other than those under the responsibility of the national government), water supplies, wharves, markets, libraries, museums and cultural centres.<sup>64</sup> Each Council is also authorised by the same Act to regulate and control markets, supervise and control area and village councils, and provide staff for village courts and information services.<sup>65</sup>

The Council is authorised to license cinemas, business premises and premises for sale of liquor or for trading. Each Council also has indirect power to levy and collect various kinds of taxes (ie head tax, liquor licensing tax, trading tax), control vehicular traffic, and register births, deaths and marriages.<sup>66</sup>

<sup>58</sup> Article 61 of the Constitution.

<sup>59</sup> Articles 61–65 of the Constitution; see also Corrin and Paterson, above n 7, at 111–112.

<sup>60</sup> Article 64 of the Constitution.

<sup>61</sup> Section 12 of the Ombudsman Act No 7 of 1998.

<sup>62</sup> Sections 2 and 3 of the Decentralization Act 1980 Cap 127.

<sup>63</sup> Section 23(1) of the Decentralization Act 1980 Cap 127.

<sup>64</sup> Part I(A) of the Schedule, Decentralization Act 1980; see also Paterson, above n 10, at 373.

<sup>65</sup> Part I(A) of the Schedule, Decentralization Act 1980.

<sup>66</sup> Part I(B) of the Schedule, Decentralization Act 1980.

In accordance with s 26(1) of the Decentralization Act, local government councils may make laws for the good government of the region and the welfare of its people. These regional laws are to be consistent with the Constitution and any written law.

#### 3.4.6. *Custom Land Management Office*

Land rights and interests of customary landowners are protected under the Constitution.<sup>67</sup> However, due to significant problems, related, among other things, to the failure by the government to protect the interests of customary landowners, the Constitution was amended in 2013 to allow for the creation of a customary institution. This customary institution was created to resolve land ownership and disputes over customary land.<sup>68</sup> The amended version of art 78 of the Constitution also provides that the final decisions reached by customary institutions, after being recorded in writing, are binding and are not subject to appeal or review by any court of law.

After the constitutional amendment of 2013, a new piece of legislation, the Custom Land Management Act, was enacted in 2013. This Act was passed to give effect to the new art 78 of the Constitution. In fact, the new law formalises the recognition of customary institutions, specifically nakamals and custom area land tribunals. Such customary institutions determine the rules of custom relating to the ownership and use of land.<sup>69</sup> The new law also specifies that final decisions reached by these customary institutions, when appropriately recorded, are binding and are not subject to appeal or judicial review by any court of law.<sup>70</sup> These decisions may be reviewed by the Supreme Court, but only on the grounds of incorrect composition, improper process or fraud (matters of process). Reviews on merit are not permitted.

### 3.5. THE LEGAL PROFESSION

The legal profession in Vanuatu is not referred to in the Constitution. It is governed by the Legal Practitioners Act 1980. This piece of legislation establishes a Law Council consisting of the Chief Justice, who is the chairperson, the Attorney-General and one legal practitioner appointed by the Minister of Justice.

In accordance with s 5 of the Legal Practitioners Act, the Law Council has general responsibility for the control and supervision of legal practitioners. The Law Council is authorised by the same section to prescribe the qualifications

<sup>67</sup> Article 73 of the Constitution.

<sup>68</sup> Constitution (Sixth) (Amendment) Act No 27 of 2013.

<sup>69</sup> Section 1(1) of the Custom Land Management Act 2013.

<sup>70</sup> Section 1(2) of the Custom Land Management Act 2013.



for legal practitioners, keep a Register of Legal Practitioners, control the registration of notaries public, and be responsible for the discipline, legal education and conduct of legal practitioners.

The Law Council is also authorised, under s 7 of the Act, to establish a Disciplinary Committee, which is to receive and hear complaints against legal practitioners and their employees. The Disciplinary Committee is composed of a judicial officer nominated by the Chief Justice, a legal practitioner nominated by the Attorney-General, and three other persons who are not registered as legal practitioners under the law, but are considered suitable by the Law Council.

It has been noted that after lawyers are qualified to practise, there is little supervision and continuing education to help them acquire suitable legal experience.<sup>71</sup> To address, among other things, this issue, the Law Society Act was passed in 2010 to provide for mandatory continuing legal education for legal practitioners.<sup>72</sup>

### 3.6. COURT PROCEDURE

#### 3.6.1. *Civil Proceedings*

The procedures for civil proceedings before the Supreme Court and the Magistrates' Court are regulated by the Civil Procedure Rules of 2002.<sup>73</sup> Proceedings in the Supreme Court are started by filing a claim in an office of the Supreme Court anywhere in Vanuatu.<sup>74</sup> Proceedings in the Magistrates' Court are started by filing a claim in the office of the Magistrates' Court in the district where the claimant or defendant lives, where the actions that led to the proceedings happened, or where the property that is the subject of the claim is located.<sup>75</sup> Before both the Supreme Court and Magistrates' Court, a person may apply during proceedings for an interlocutory order.<sup>76</sup>

In accordance with r 4.3 of the Civil Procedure Rules, a claim must contain a statement of the case, set out the claimant's address, be in a specific form, and have with it a response form. In addition, a claim filed in the Magistrates' Court must show the facts that give the Court jurisdiction to examine the claim. In both the Supreme Court and the Magistrates' Court, the defendant must file and

<sup>71</sup> See Caroline Penfold 'Contextualising Program Outcomes for Pacific Island Law Graduates' (2012) 22 *Legal Education Review* 51 at 67 and 69; also Jennifer Corrin 'Dispute Resolution Options in Vanuatu: An Extensive Menu for a Small State' (2019) *Comparative Law Journal of the Pacific*, Hors Serie Vol XXIII: Small States: A Collection of Essays, 154–155.

<sup>72</sup> Section 4 of the Law Society Act 2010.

<sup>73</sup> Civil Procedure Rules of 2002, Order 49.

<sup>74</sup> Section 2.3 of the Civil Procedure Rules of 2002.

<sup>75</sup> Section 2.4 of the Civil Procedure Rules of 2002.

<sup>76</sup> Section 2.7 of the Civil Procedure Rules of 2002.

serve a response within 14 days of the date of service of the claim.<sup>77</sup> The failure to do so risks a default judgment.

The procedure for civil proceedings in Island Courts is regulated by the Island Courts (Civil Procedure) Rules 2005. These require that every civil claim is started by the claimant filing a written statement of claim. The claim is to be signed by the claimant at an office of an Island Court. The claim is to be within the jurisdiction of the Island Court (as authorised by the warrant establishing the Island Court). In addition, a statement of claim must be filed at the office of the Island Court where the defendant ordinarily resides or carries on business, or where the course of action arose, or if the claim is about ownership of customary land, where the land in question is situated.<sup>78</sup> The statement of claim must specify the name, occupation and address of both the claimant and defendant, and also the grounds of the claim.<sup>79</sup> If the claim relates to the ownership or boundary of customary land, the claim should contain a description of the boundaries and a map of the land. The defendant must file and serve a response at the office of the Island Court where the statement of claim was filed, at least seven days before the date of hearing of the claim.<sup>80</sup>

### 3.6.2. *Criminal Proceedings*

Criminal proceedings in the Supreme Court and Magistrates' Court are regulated by the Criminal Procedure Code Act 1981. The Act, which has been amended a number of times, allows any person who has reasonable and probable cause to believe that an offence has been committed by any person to make a complaint to a judicial officer.<sup>81</sup> The Criminal Procedure (Amendment) Act 1984 further requires that complaints be made under oath, whether submitted orally or in writing, and be signed by both the private prosecutor and judicial officer. Proceedings may be instituted by a private prosecutor or a public officer, namely a public prosecutor.<sup>82</sup> The judicial officer is then required to draw up and sign a formal charge. However, if he or she is of opinion that a complaint does not disclose any offence, he or she may refuse to admit the complaint and provide the reasons for doing so.<sup>83</sup>

<sup>77</sup> Sections 4.4 and 4.13 of the Civil Procedure Rules of 2002.

<sup>78</sup> Rule 1(2) of the Island Courts (Civil Procedure) Rules 2005.

<sup>79</sup> Rule 1(3) of the Island Courts (Civil Procedure) Rules 2005.

<sup>80</sup> Rule 2 of the Island Courts (Civil Procedure) Rules 2005.

<sup>81</sup> Section 35 (1) Criminal Procedure Code Act 1981, as amended by the Criminal Procedure (Amendment) Act No 13 of 1984.

<sup>82</sup> Section 33 of Criminal Procedure Act 1981; section 35 of the Criminal Procedure (Amendment) Act 1984.

<sup>83</sup> Section 35(2) and (3) of the Criminal Procedure Code Act 1981, as amended by the Criminal Procedure (Amendment) Act of 1984.

The Criminal Procedure Code Act also authorises a police officer to institute criminal proceedings by bringing before the court a person arrested without a warrant.<sup>84</sup> In such circumstances, the judicial officer must draw up and sign a charge containing a statement of the offence the accused is charged with.<sup>85</sup>

The procedure for criminal proceedings in the Island Courts is regulated by the Island Courts (Criminal Procedure) Rules 2005. A police officer is to initiate criminal proceedings. After receiving a complaint or becoming aware that a person may have committed a criminal offence, the police officer must make a full investigation, and if it appears that a criminal offence has been committed, he or she must file a charge at an office of the Island Court.<sup>86</sup> The charge sheet must contain the name and address of the accused, the offence with which he or she is charged, and the date and place of the alleged offence. The Court may permit the complainant to withdraw the charge. If the accused is not in custody, a police officer must send him or her a summons in which the details of the charge and the date of the hearing are indicated.<sup>87</sup>

### 3.6.3. *Appellate Proceedings*

In civil proceedings, appeals from the Magistrates' Court to the Supreme Court, or from the Supreme Court to the Court of Appeal, may be brought by any party to the proceedings. The appeal may concern questions of law or fact or mixed law and fact.<sup>88</sup> Appeals must be filed within 28 days of the date of the decision.<sup>89</sup> The Civil Procedure Rules also state that filing an appeal against a civil judgment does not affect the enforcement of the judgment, unless the appellant applies for a suspension and the court grants such suspension.<sup>90</sup>

Civil appeals from the Island Court to the Magistrates' Court may be brought within 30 days from the date of the decision of the Island Court.<sup>91</sup> The Island Courts Act provides that notwithstanding the 30-day requirement, an application may be granted by a judge if the application is made within 60 days from the date of the decision.<sup>92</sup> Customary land decisions from the Island Courts may be brought directly to the Supreme Court if the questions raised relate to procedure; questions based on merit cannot be brought directly to the Supreme Court.

<sup>84</sup> Section 12 of the Criminal Procedure Code Act 1981.

<sup>85</sup> Section 379(1) of the Criminal Procedure Code Act 1981.

<sup>86</sup> Rule 1 of the Island Courts (Criminal Procedure) Rules 2005.

<sup>87</sup> Rule 1(5) of the Island Courts (Criminal Procedure) Rules 2005.

<sup>88</sup> Rule 16.27(1) and (2) of the Civil Procedure Rules 2002.

<sup>89</sup> Rule 16.28(1) of the Civil Procedure Rules 2002.

<sup>90</sup> Rule 13.4 of the Civil Procedure Rules 2002.

<sup>91</sup> Section 22(1) of the Criminal Procedure Code Act 1981, as amended by s 7 Schedule Island Courts (Amendment) Act No 15 of 2001.

<sup>92</sup> Section 22(5) of the Island Courts Act 1982.

In criminal proceedings, appeals from the Magistrates' Court to the Supreme Court or from the Supreme Court to the Court of Appeal are brought by either the criminal defence lawyer or the representative of the offender giving notice of appeal to the Registrar of the Court within 14 days after the sentence has been rendered.<sup>93</sup> It has been held that if an appeal is brought by a prosecutor, the accused must be personally served with the notice of appeal.<sup>94</sup> Criminal appeals from the Island Court to the Magistrates' Court follow the same rules as civil appeals from Island Courts to the Magistrates' Court.

### 3.7. DISPUTE RESOLUTION

Diverse options for dispute resolution exist in Vanuatu.<sup>95</sup> While some options are provided by the State, others emanate from the chiefly traditional systems, which resolve disputes in accordance with customary law.

As seen earlier, the State provides for ordinary State courts (in other words, a three-tier hierarchy of common law courts), which are the central means for dispute resolution. This includes the Magistrates' Courts, the Supreme Court and the Court of Appeal. They are established to adjudicate disputes between parties and administer justice in accordance with the rule of law in civil, criminal and administrative matters. Island Courts are hybrid courts; they hear and determine not only minor civil and criminal matters, but also administer the application of customary law.

The State also provides for the establishment of customary institutions to resolve customary land disputes. These are nakamals and area land tribunals, established by the Custom Land Management Act 2013.<sup>96</sup> Nakamals are authorised to determine the ownership of customary land within their custom area.

The Public Service Act 1998 also provides for the establishment of an administrative tribunal, called the Disciplinary Board of the Public Service Commission, to hear and determine disciplinary offences relating to public servants.<sup>97</sup>

Moreover, traditional forums for the resolution of disputes exist throughout the islands of Vanuatu. The vast majority of Ni-Vanuatu people live in accordance with their custom. Customary ways of resolving disputes are very much present. Chiefs are responsible for conducting resolution of disputes between individuals in local communities. Conflict between individuals in

<sup>93</sup> Section 201 of the Criminal Procedure Code Act 1981.

<sup>94</sup> *Public Prosecutor v Toa* [2003] VUCA 13.

<sup>95</sup> See for example Corrin, above n 72.

<sup>96</sup> Sections 1 and 2 of the Custom Land Management Act 2013.

<sup>97</sup> Section 37 of the Public Service Act No 11 of 1998.

local communities is often resolved through customary reconciliation. It is to be noted that Island Courts, which were established to, among other things, administer custom, are encouraged to promote reconciliation and facilitate settlement in an amicable way.<sup>98</sup>

Finally, it should be noted that the Rules of Civil Procedure of 2002 provide that the courts may, by order, refer a matter for mediation if they consider that mediation may help to resolve issues in dispute and if no party to the dispute raises a substantial objection.<sup>99</sup> Suitable mediators may be trained mediators, chiefs, church leaders or elders in the communities.

## 4. LAW OF PERSONS

### 4.1. MARRIAGE

The Civil Status (Registration) Act 1970 requires that all marriages, including dissolutions and nullifications of marriage, must be recorded by district registrars.<sup>100</sup> Moreover, the Marriage Act 1970 requires that marriages are to be celebrated before a district registrar or a minister approved for celebrating marriages, or be made in accordance with custom.<sup>101</sup> By doing so, the law recognises civil, religious and customary marriages in Vanuatu.

All marriages, including the ones made in accordance with custom, must fulfil the requirements of age, specifically that males must be over 18 years and females over 16. There must also be parental consent for any party to the marriage who is under 21 years of age.<sup>102</sup> There are additional, miscellaneous requirements concerning prior notice, procedure, witnesses and formalities after the ceremony, namely registration.<sup>103</sup> All marriages, whether civil, religious or customary must be registered.

### 4.2. ANNULMENT AND DIVORCE

#### 4.2.1. *Void and Voidable Marriages*

A marriage may be annulled by a decree of nullity on the grounds that it is void or voidable.

<sup>98</sup> Section 20 of the Island Courts Act.

<sup>99</sup> Section 10.3 of the Civil Procedure Rules of 2002.

<sup>100</sup> Sections 23 and 24 of the Civil Status (Registration) Act 1970 Cap 61.

<sup>101</sup> Section 1 of the Marriage Act 1970 Cap 60.

<sup>102</sup> Sections 2 and 3 of the Control of Marriage Act 1966 Cap 45.

<sup>103</sup> Parts 2–4 of the Marriage Act 1970 Cap 60; see also Paterson, above n 10, at 386.

A marriage that is void is never a marriage. Section 1 of the Matrimonial Causes Act 1986<sup>104</sup> provides that a marriage will be held by the courts to be void if:

- marriage was induced by duress or mistake;
- at the time of the marriage one of the parties was, because of mental illness, incapable of understanding the nature of the marriage ceremony;
- the parties were too closely related to each other; or
- the marriage did not follow proper legal procedure.

A voidable marriage is a full and proper marriage until it is set aside by the courts. Section 2 of the Act provides that a marriage may be held to be void on the following grounds:

- (1) lack of consummation by the respondent;
- (2) unsoundness of mind or recurrent fits of insanity or epilepsy at the time of the marriage;
- (3) venereal disease of the respondent at the time of marriage; or
- (4) pregnancy of the wife by a man other than the husband.<sup>105</sup>

Section 2 states that in the last three cases, the petitioner must, in addition, show that he or she was unaware of the facts alleged, that he or she has commenced the proceedings within a year of the date of marriage, and that he or she has had no sexual intercourse with the respondent since becoming aware of the facts alleged. A decree of nullity of voidable marriage operates only to annul the marriage from the date of the pronouncement of the decree. Therefore, any children born as a result of the marriage are legitimate.

#### 4.2.2. *Divorce*

The Matrimonial Causes Act 1986 also provides for the dissolution of marriage. Section 4 states that a customary marriage may be dissolved only in accordance with the rules of custom. Section 5 states that a civil or religious marriage may be dissolved if the respondent has committed adultery, has deserted the petitioner without just cause for a period of at least three years, has treated the petitioner with persistent cruelty, has an incurable unsoundness of mind for a period of at least five years, or has been absent for at least seven years without any

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<sup>104</sup> Section 1 of the Matrimonial Causes Act 1986 Cap 192. For more on the explanation of these grounds, see Sue Farran *A Digest of Family Law in Vanuatu* (University of the South Pacific, 2003) 44–45.

<sup>105</sup> Section 2 of the Matrimonial Causes Act 1986 Cap 192. See also Paterson, above n 10, at 386–387.

communication. The wife may also petition for divorce on the ground that her husband has, after the marriage, been convicted of rape or an unnatural offence.

There are a number of restrictions on divorce. Section 6 states that a petition for divorce may not be presented within the first two years of the marriage, unless exceptional hardship has been suffered by the petitioner or exceptional depravity has been practised by the respondent. Section 9 provides that the courts may not proceed with the hearing of a petition for divorce unless they are satisfied that reconciliation between the parties is impossible. Moreover, a court must dismiss the petition for divorce if it is satisfied that the petitioner has aided, connived at, or condoned the adultery complained of, has condoned the cruelty complained of, or has acted in collusion with the respondent. Finally, s 16 of the Matrimonial Causes Act provides that the courts must dismiss a petition for divorce if they are not satisfied that proper arrangements have been made for the care and upbringing of any child of the marriage who is under 16 years of age.

### 4.3. ADOPTION

#### 4.3.1. *Legal Adoption*

There was no Joint Regulation providing for adoption in Vanuatu. Since independence, Vanuatu has not yet enacted its own Act of Parliament in this respect. An Adoption Bill was drafted in 2019. During the final stage of the writing of this chapter, the bill is still under consultation. The Explanatory Note of the Bill provides that this bill not only sets out the process and requirements for formal adoption in Vanuatu, but it also regulates formal adoption and does not apply to custom adoption.<sup>106</sup>

The current written laws relating to adoption are an English colonial law, the Adoption Act 1958 (UK),<sup>107</sup> and the French Civil Code applicable in Vanuatu on 30 July 1980. As noted earlier, in accordance with art 95(2) of the Constitution, existing colonial laws continue to apply after 30 July 1980 to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu, and whenever possible taking due account of custom. The French laws applicable in Vanuatu after 30 July 1980 are rarely used due to the fact that most of the legal practitioners in Vanuatu are trained in common law jurisdictions and are not familiar with French law.<sup>108</sup>

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<sup>106</sup> Bill for the Adoption Act 2020.

<sup>107</sup> Adoption Act 1958 (UK).

<sup>108</sup> See Sue Farran 'Family Law and French Law in Vanuatu: An Opportunity Missed?' (2004) 35 Victoria University of Wellington Law Review 382.

Under the UK Adoption Act 1958 and other adoption-related laws, including the Adoption Act 1926 (UK),<sup>109</sup> adoptive parents must be over 25 years of age and at least 21 years older than the person in respect of whom the adoption application is being made. An exception to this rule exists where the adopter is closely related to the adoptive child. In such circumstances of close relation, the 21-year gap requirement may be waived. Adoption of a female child by a single male is prohibited, unless there are exceptional circumstances.

The Supreme Court of Vanuatu has held that the adoption of a female child by a gay couple is prohibited in Vanuatu.<sup>110</sup> This is on the basis that it is contrary to Vanuatu customs and traditions, and contrary to s 2(2) of the Adoption Act 1926 (UK) left in place by the Adoption Act 1958 (UK).<sup>111</sup>

In accordance with the English legislation applicable in Vanuatu, where spouses are adopting, the consent of both spouses is required.<sup>112</sup> In addition, the consent of any natural parent of the child, or guardian or person who has actual custody of the child must be obtained, unless the child is abandoned or the required consent cannot be obtained because the relevant person cannot be found, or is incapable of giving consent or has persistently rejected the child.<sup>113</sup> Any payment or reward for giving a child up for adoption renders the adoption illegal, unless the court has approved the payment.<sup>114</sup>

#### 4.3.2. Custom Adoption

In Vanuatu, a child may also be adopted in accordance with custom. Customary rules relating to adoption vary from one area to another. Custom adoption has been recognised as legal adoption in Vanuatu.<sup>115</sup>

## 4.4. MAINTENANCE AND CUSTODY OF CHILDREN

### 4.4.1. Maintenance

Children under 18 years of age have a right to be supported by their parents. In accordance with s 1 of the Maintenance of Family Act 1966, it is an offence for a man to fail to maintain, for a period exceeding one month, his wife or his

<sup>109</sup> Section 2 of Adoption Act 1926 (UK); see also the explanation of Farran, above n 105, at 32–33.

<sup>110</sup> *In Re MM Adoption Application by SAT* [2014] VUSC 78.

<sup>111</sup> Section 2(2) of the Adoption Act 1926 (UK); Adoption Act 1958 (UK).

<sup>112</sup> Section 2(3) of the Adoption Act 1926 (UK).

<sup>113</sup> Section 2(3) and (4) of the Adoption Act 1926 (UK); see also the explanation by Farran, above n 105, at 33.

<sup>114</sup> Section 9 of the Adoption Act 1926 (UK).

<sup>115</sup> *M v P, Re the Child G* [1998] VUSC 2.



legitimate children under 18 years of age. The same section also makes it an offence for a mother to desert, for a period exceeding one month, her children under 18 years of age. In these two cases, if found guilty, the punishment is one or both of a fine not exceeding 20,000 VT and imprisonment for a term not exceeding three months. Such conduct can be excused if the offender is financially incapable of providing the maintenance. This financial incapacity must be by reason of illness or injury, imprisonment, or any other circumstances beyond the person's control.

#### 4.4.2. *Custody*

In the case of divorce, parents are free to make their own arrangements regarding the custody of any children of the marriage. Generally, courts will not interfere if both parties accept the arrangements regarding the custody of the children. The courts will intervene only when parents cannot agree on custody arrangements. Section 15(1) of the Matrimonial Causes Act 1986 provides that a court, when making a decree of divorce or nullity of marriage, may make an order for, among other things, the custody of the children of the marriage. It has been held that the guiding principle is the interests of the child, which is a principle recognised and affirmed in the Convention on the Rights of Child ratified by Vanuatu in 1995.<sup>116</sup>

## 5. NATURE OF THE LAW AND OBLIGATIONS

### 5.1. TORTS

There was no Joint Regulation relating to tort liability in Vanuatu. Since independence, Vanuatu has not passed an Act of Parliament in this respect. However, as noted earlier, art 95(2) of the Constitution, in effect, continues in force the UK Regulation of 1976, which permits the application of common law and equity and the French Code Civil in Vanuatu.

The current law of torts in Vanuatu is made up of principles of common law and equity. Generally, these principles were used by the English courts as the basis for determining what kind of conduct should give rise to liability to pay compensation or damages to persons suffering injury or damages from such conduct. The main kinds of conduct giving rise to liability are trespass (to land, person or things), nuisance, negligence, failure to keep animals known to be dangerous under proper control, and deceitful or defamatory statements.<sup>117</sup>

<sup>116</sup> *Molu v Molu* [1998] VUSC 15; Convention on the Rights of Child Ratification (Ratification) Act No 26 of 1992.

<sup>117</sup> For more details on the law of torts, see Corrin and Paterson, above n 7, at 287–316.

## 5.2. CONTRACT

There is no Joint Regulation relating to the law of contract. In conformity with art 95(2) of the Constitution, the basic principles of contract law in Vanuatu are provided by the rules of common law and equity, although post-independence legislation has intervened to some extent.<sup>118</sup>

The principles of common law and equity have determined when promises made by a person are binding and enforceable by the courts. Generally, in accordance with the rules of common law and equity, there are two kinds of undertakings that are binding. The first is that made in a written document called a deed. The second is that made in exchange for something of value given or promised to be given, unless illegal, contrary to public policy, or based upon certain fundamental mistakes of fact.<sup>119</sup>

It is important to note that custom is also recognised as a relevant source of law applicable to contract law, at least at the village level. Generally, contractual disputes arising in the local villages are governed by the rules of custom.

## 5.3. RESTITUTION

The rules of common law and equity also regulate the law of restitution in Vanuatu. There was no Joint Regulation or post-independence legislation in this respect. Generally, when it is proven that a party breaches a contract, the available remedies are damages, injunctions, specific performance and restitution. Independently of contract, under the law of restitution a defendant may be ordered to restore money or the benefit of work done, goods supplied, or services rendered to the plaintiff if it shown that he or she would otherwise be unjustly enriched.<sup>120</sup>

## 6. PROPERTY LAW

### 6.1. LAND LAWS

The Constitution provides that all land in Vanuatu belongs to the indigenous custom owners and their descendants,<sup>121</sup> that the rules of custom form the basis of ownership and land use in Vanuatu,<sup>122</sup> and that only indigenous citizens of Vanuatu who acquired land in accordance with a recognised system of land

<sup>118</sup> See for example the Law Reform (Contract) Act No 23 of 2009 requiring, among other things, contractual documents to be described as a deed or an agreement under seal (s 3(1)(c)).

<sup>119</sup> For more details on the law of contract, see Corrin and Paterson, above n 7, at 237–285.

<sup>120</sup> Corrin and Paterson, above n 7, at 283.

<sup>121</sup> Article 73 of the Constitution.

<sup>122</sup> Article 74 of the Constitution.

tenure will have perpetual ownership of their land.<sup>123</sup> The Constitution provides, however, that the government may acquire and own land for the public interest.<sup>124</sup> The government may also buy land from custom owners for the purpose of transferring the ownership to indigenous citizens or indigenous communities.<sup>125</sup>

Any land transaction between an indigenous citizen and a non-indigenous citizen or a non-citizen must be approved by the government.<sup>126</sup> No approval should be given if the transaction is prejudicial to the interests of the landowners, the indigenous citizens (who are not custom owners), the community in which the land is situated or the Republic.

There are also a number of Acts relating to land in Vanuatu. The Land Reform Act and Land Leases Act were enacted to provide, among other things, for the lease of land. Accordingly, land may be leased by custom owners to other persons for a maximum period of 75 years<sup>127</sup> and may be mortgaged.<sup>128</sup>

The Land Reform Act also provides that all land owned by the British government, the French government, the Condominium or the municipality was, on 30 July 1980, automatically transferred to the government of Vanuatu, and is considered public land held for the benefit of the Republic.<sup>129</sup>

New laws passed in 2013 related to, among other things, the government's failure to adequately protect the interests of landowners, including custom owners. The new laws consisted of amendments to the Constitution, amendments to the Land Reform Act and Land Leases Act, and a new Custom Land Management Act. The purpose of this series of reforms was, essentially, to reduce the power which had been given to the Minister of Lands to approve land leases. The reforms require that the Minister sign leases only after they are approved by the Land Management Planning Committee.<sup>130</sup> In addition, leases for development on customary land will not be concluded until free, prior and informed consent of the custom owner group is obtained.<sup>131</sup>

## 6.2. LAWS RELATING TO TANGIBLE AND INTANGIBLE PROPERTY, AND TO CULTURAL PROTECTION

In Vanuatu, property law is influenced by ideas and structures introduced through the common law of England, customary law, indigenous ideas relating to property, and international law.<sup>132</sup>

<sup>123</sup> Article 75 of the Constitution.

<sup>124</sup> Article 80 of the Constitution.

<sup>125</sup> Article 81 of the Constitution.

<sup>126</sup> Article 79 of the Constitution.

<sup>127</sup> Section 32(1) of the Land Leases Act 1984.

<sup>128</sup> Section 52(1) of the Land Leases Act 1984.

<sup>129</sup> Section 9 of the Land Reform Act 1980.

<sup>130</sup> Section 8(B)(b) of the Land Reform (Amendment) Act 2013.

<sup>131</sup> Section 6(E)(a)(ii) of the Land Reform (Amendment) Act 2013.

<sup>132</sup> Sue Farran and Don Paterson *South Pacific Property Law* (Cavendish Publications, 2004) 1.

In Vanuatu, rights to corporeal things, including land and personal property or chattels, are protected under a number of land laws and the common law. Rights in incorporeal things, however, are not well protected by the law, though Vanuatu has started to enact pieces of legislation in this respect. These rights affected include the right to medicinal knowledge, magic, skills in making traditional artefacts and clothing, song and oral history, methods of cultivation and food preparation, and other forms of indigenous knowledge.<sup>133</sup>

There are a number of Acts which relate to the protection of intellectual property rights. These include the Trademarks Act 2003, the Patents Act 2003, the Designs Act 2003, the Copyright Act 2000, the Trade Secrets Act 2000, the Geographical Indication (Wine) Act 2000 and the Circuit Layout Act 2000. The Protection of Traditional Knowledge and Expressions of Culture Act 2019 aims to protect, regulate and manage traditional knowledge and expressions of culture in Vanuatu.

## 7. COMMERCIAL LAW

Vanuatu has enacted a number of pieces of legislation in the area of commercial law. The Companies Act 2012 provides for the formation, registration and governance of companies in Vanuatu. It should be mentioned that this particular Act repealed and replaced the old Companies Act, which was adopted in 1986. The Companies Act provides that any person may, either alone or together with another person, apply to have his, her or their company registered under the Act. This is subject to requirements relating to incorporation, as prescribed by s 6, being fulfilled.<sup>134</sup> A company may be registered as a private company, public company or community company. The Companies Act also provides for the director or directors of the company who will have the powers necessary for managing, directing and supervising the management, business and affairs of the company.<sup>135</sup> In exercising the powers and duties, the director or directors must act in a good faith and in the interests of the company.<sup>136</sup>

The Companies Act prohibits, among other things, certain misleading and deceptive conduct. All advertisements relating to offers of securities to the public are prohibited.<sup>137</sup> Accordingly, a person must not engage in any conduct relating to advertisement for debt and equity securities that is misleading or deceptive or that is likely to mislead or deceive. A person found guilty of this offence is liable

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<sup>133</sup> Farran and Paterson, above n 133, at 6.

<sup>134</sup> Section 6 of the Companies Act 2012.

<sup>135</sup> Section 63 of the Companies Act 2012.

<sup>136</sup> Section 64 of the Companies Act 2012.

<sup>137</sup> Section 138 of the Companies Act 2012.

to a fine not exceeding 500,000 VT or to an imprisonment term not exceeding five years, or to both a fine and imprisonment.

The Financial Dealers Licensing Act 1971, as subsequently amended by the Dealers in Securities (Licensing) Amendment Act 2017 and the Financial Dealers Licensing (Amendment) Act 2018, makes provision for regulating the business of dealing in securities, the protection of the public by creating penalties for fraudulently inducing persons to invest money, and other related matters. Any person carrying on or purporting to carry on the business of dealing in securities (among others, debenture stocks, loan stocks, bonds, certificates of deposit, proceeds of foreign exchange) is required to hold a licence under this Act.<sup>138</sup> The failure to do so is an offence punishable on conviction by a fine of 25 million VT or imprisonment for a term not exceeding 15 years, or both (if the person is a natural person), or a fine not exceeding 125 million VT (if the person is a body corporate).

The Partnership Act 1975 declares the law of partnership and provides for the formation of limited partnerships. Accordingly, a partnership is the relationship that subsists between persons carrying on a business (which expression includes every trade, occupation or profession) in common with a view of profit.<sup>139</sup> This definition of partnership excludes the relationship between members of any company or association that is registered as a company or formed or incorporated under the Company Act or any related legislation.

A limited partnership consists of not more than 20 persons and must consist of one or more general partners liable for all debts and obligations of the firm and one or more persons (limited partners) whose contribution consists of a certain amount of capital or property specified at the time of the creation of the partnership.<sup>140</sup> The limited partners are not liable for debts and obligations of the firm beyond the amount so contributed.

In 2013, Parliament passed the Companies (Insolvency and Receivership) Act, which provides for the management and administration of insolvent companies and for related purposes. In relation to insolvent companies specifically, the Act provides for the possibility of compromises with creditors<sup>141</sup> and for the liquidation of such companies.<sup>142</sup> A liquidator of an insolvent company takes possession of, protects, realises and distributes the assets, or the proceeds of the realisation of the assets, of the company to its creditors, and if there are surplus assets, distributes them or the proceeds of the realisation of the surplus assets in accordance with the Act.

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<sup>138</sup> Section 2 of the Financial Dealers Licensing Act 1971, as amended by the Dealers in Securities (Licensing) Amendment Act No 11 of 2017 and the Financial Dealers Licensing (Amendment) Act No 31 of 2018.

<sup>139</sup> Section 1 of the Partnership Act 1975 Cap 92.

<sup>140</sup> Section 47 of the Partnership Act 1975 Cap 92.

<sup>141</sup> Division 1, Part 2 of the Companies (Insolvency and Receivership) Act No 3 of 2013.

<sup>142</sup> Division 2, Part 2 of the Companies (Insolvency and Receivership) Act No 3 of 2013.

The relevant law relating to international carriage by air in Vanuatu is the Convention for the Unification of Certain Rules for International Carriage by Air, adopted in 1929, as amended and replaced by the Hague Protocol to the Warsaw Convention of 1955 and the Montreal Convention of 1999. Vanuatu ratified the Convention for the Unification of Certain Rules for International Carriage by Air in 2005 and therefore is obliged to comply with its provisions. This Convention provides for the documentation and duties of the parties relating to the carriage of passengers, baggage and cargo.<sup>143</sup> It also provides for the liability of the carrier and the extent of compensation for related damages.<sup>144</sup>

The Maritime Act 1981 regulates the carriage of goods by sea by providing for the responsibilities and liabilities of the vessels and carriers travelling within the islands and waters of Vanuatu.<sup>145</sup>

With regard to the carriage of passengers by sea, Vanuatu has ratified a number of international conventions, including the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 1974, and its Protocol.<sup>146</sup> That Convention provides, among other things, for liability of the carrier for the damage suffered as a result of the death of or personal injury to a passenger and the loss of or damage to luggage if the incident which caused these damages occurred in the course of the carriage and was due to the fault or neglect of the carrier or of his servants or agents acting within the scope of their employment.<sup>147</sup>

Finally, banking in Vanuatu is regulated under the International Banking Act 2002, which repealed the Banking Act 1970. The Act provides that any person carrying on banking business in Vanuatu must hold a licence to do so. Such licence is issued by the Reserve Bank of Vanuatu.<sup>148</sup> The Act also provides for supervision and enforcement to be exercised by the Reserve Bank of Vanuatu.<sup>149</sup>

## 8. ENVIRONMENTAL LAW

Since independence, Vanuatu has enacted a number of environmental laws. The current overarching environmental law is the Environment and Conservation Act;<sup>150</sup> it provides essentially for the conservation, sustainable development

<sup>143</sup> Chapter II of the Convention for Unification of Certain Rules for International Carriage by Air (Ratification) Act 2005.

<sup>144</sup> Chapter III of the Convention for Unification of Certain Rules for International Carriage by Air (Ratification) Act 2005.

<sup>145</sup> Section 70 of the Maritime Act 1981 Cap 131.

<sup>146</sup> Protocol to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974. See also Ratification of Certain Conventions and Protocols Act No 38 of 2017.

<sup>147</sup> Article 3 of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.

<sup>148</sup> Sections 6 and 7 of the International Banking Act No 4 of 2002.

<sup>149</sup> Part 3 of the International Banking Act No 4 of 2002.

<sup>150</sup> Environment and Conservation Act 2003, Cap 283 (title of Act amended by Act No 28 of 2010).

and management of the environment. The Act formally establishes the Department of Environmental Protection and Conservation (DEPC), including providing for its functions and responsibilities.<sup>151</sup> It also provides a process of identification and management of the environmental impacts of proposed development projects.<sup>152</sup> Moreover, the Act provides for the recognition of community conservation areas and gives direction to communities in relation to registration of their conservation areas at the national level and to bioprospecting (research).<sup>153</sup>

It should be noted that the above Act started as the Environmental Management and Conservation Act in 2002. In 2011, it underwent a name change, after it had combined three different Acts: the Environmental Management and Conservation Act; the Environment Management and Conservation (Amendment) in Statute Law (Miscellaneous Provisions) Act; and the Environmental Management and Conservation (Amendment) Act.

The Pollution (Control) Act 2013 creates a framework for the DEPC to develop and introduce pollution standards and permit systems and allows the department to take compliance action when pollution is occurring. DEPC officers can, for instance, issue notices under this Act ordering any person to take measures or extra measures to prevent, control or reduce pollution.

Further, the Waste Management Act 2014 provides for the protection of the environment by establishing specific responsibilities to be undertaken by the DEPC, the municipal and provincial councils, the Ministry of Health and the Department of Biosecurity in relation to the identification, collection and disposal of waste, planning and reporting on waste management, and management of hazardous waste. In accordance with this legislation, three orders were signed in 2018 by the Minister of Lands and Natural Resources to implement the decision of the Council of Ministers to ban certain non-biodegradable plastics.<sup>154</sup>

In 1991, Vanuatu passed the International Trade (Flora and Fauna) Act to implement Vanuatu's obligations as a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The Act provides for the control and regulation of the export and import of certain species of fauna and flora, and for related purposes.

In 1995, Parliament passed the National Parks Act, making provision for the declaration of national parks and nature reserves, for the protection and preservation of such areas, and for related matters.

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<sup>151</sup> Part 2 of the Environment and Conservation Act 2003.

<sup>152</sup> Part 3 of the Environment and Conservation Act 2003.

<sup>153</sup> Part 4 of the Environment and Conservation Act 2003.

<sup>154</sup> Waste Management Regulation Order No 15 of 2018; Private Waste Operator's License Fees Order No 16 of 2018; and Waste Management (Penalty Notice) Regulation Order No 17 of 2018.

In relation to its response to climate change, Vanuatu has ratified the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol) and the Paris Agreement. In 2016, Vanuatu submitted its first Nationally Determined Contribution (NDC) under the Paris Agreement.<sup>155</sup>

Being one of the countries most vulnerable to climate change, Vanuatu has adopted a number of important policies dedicated to climate change adaptation and disaster risk reduction.<sup>156</sup> Vanuatu is also one of a few countries having a dedicated Climate Change Ministry; it was established in 2014. This Ministry oversees the National Disaster Management Office, which is responsible for the coordination of preparation for and responses to emergencies and disasters in Vanuatu.

## 9. NATURAL RESOURCES

### 9.1. MINERALS

Since independence, Vanuatu has passed a number of laws regulating natural resources. The Mines and Minerals Act<sup>157</sup> was passed in 1986 to regulate and control the search for and exploitation of minerals. Section 2 of the Act provides that the property in minerals, in their natural condition in land, is vested in the Republic of Vanuatu. It is stated in the same section, however, that this should not prejudice the grant or the exercise of rights under or pursuant to the Act. The Mines and Minerals Act also specifies that all rights exercisable in relation to minerals, by the government of Vanuatu with respect to the continental shelf or the exclusive economic zone, are vested in the Republic.<sup>158</sup>

The Petroleum (Exploration and Production) Act 1993 makes provision for the search and production of petroleum. The Minister responsible has the power to grant a petroleum prospecting licence to an individual or a body corporate under conditions prescribed.<sup>159</sup> A licensee whose petroleum prospecting licence is in force, or any person, may apply for the grant of a petroleum production licence under the conditions prescribed by the Act.<sup>160</sup>

<sup>155</sup> Republic of Vanuatu 'Intended Nationally Determined Contribution (INDC)' Submission to the United Nations Framework Convention on Climate Change (2015).

<sup>156</sup> See for instance, National Advisory Committee on Climate Change 'Republic of Vanuatu: National Adaptation Programme for Action (NAPA)' (Policy, Government of Vanuatu, December 2007); Government of the Republic of Vanuatu 'Vanuatu Climate Change and Disaster Risk Reduction Policy 2016–2030' (Project Report, Government of Vanuatu, 2015).

<sup>157</sup> Mines and Minerals Act 1986 Cap 190.

<sup>158</sup> Section 3 of the Mines and Minerals Act 1986.

<sup>159</sup> Sections 11 and 14 of the Petroleum (Exploration and Production) Act 1993.

<sup>160</sup> Sections 28 and 29 of the Petroleum (Prospection and Production) Act 1993.



The Quarry Act was enacted in 2013 to provide for the regulation of quarries. This Act establishes a Commissioner who is authorised to issue quarry permits to extract building materials.<sup>161</sup>

The Geothermal Energy Act 1987 was passed by Parliament to regulate and control the exploitation of geothermal energy and to provide for incidental related matters. The Act authorises the Minister responsible to grant prospecting and production licences for geothermal energy.<sup>162</sup>

## 9.2. FORESTRY

In 2001, Parliament passed the Forestry Act, which makes provision for the protection, development and sustainable management of forests and for the regulation of the forestry industry. The Act provides, among other things, that in performing their functions, forest authorities must have regard to the following principles: (1) the forests of Vanuatu must be sustainably managed, developed and protected so as to achieve greater social, environmental and economic benefits for current and future generations; (2) the diversity of the forests and forest ecosystems of Vanuatu must be protected; (3) the rights of custom owners and other Ni-Vanuatu with customary interests in forests must be recognised; and (4) any relevant international obligations undertaken by Vanuatu must be respected.<sup>163</sup>

The Act also provides for commercial forestry operations. These operations may be conducted only in accordance with a licence granted by relevant authorities under the Act.<sup>164</sup> Accordingly, among others, the following licences may be granted: timber licence, mobile sawmill licence and sandalwood licence.<sup>165</sup>

## 9.3. FISHERIES

In 2014, the Fisheries Act was passed. It repealed the old Fisheries Act of 2005.<sup>166</sup> The Act makes provision for the management, development and regulation of fisheries within Vanuatu waters, and for the control of the fishing vessels entitled to fly the flag of Vanuatu outside of Vanuatu waters in a manner consistent with Vanuatu's international obligations. The Act provides that the Department of

<sup>161</sup> Sections 2 and 19 of the Quarry Act 2013.

<sup>162</sup> Parts V and VII of the Geothermal Energy Act 1987.

<sup>163</sup> Section 4 of the Forestry Act 2001.

<sup>164</sup> Part 5 of the Forestry Act 2001.

<sup>165</sup> Part 5 of the Forestry Act 2001.

<sup>166</sup> The Fisheries Act No 55 of 2005 Cap 315 repealed the Fisheries Act 1982.

Fisheries has the principal function of, and authority for, the conservation, management and development of the fisheries resources in Vanuatu.<sup>167</sup> The Act also provides that a person must not use a Vanuatu vessel for commercial fishing or related activities in Vanuatu waters unless he or she has a fishing licence.<sup>168</sup> The Director of the Department of Fisheries is authorised by the Act to issue fishing licences.<sup>169</sup>

## 10. CRIMINAL LAW

The Penal Code of Vanuatu<sup>170</sup> is the main statute that provides for the acts or omissions which will be regarded as criminal offences and for the rules related to the criminal law in the country.

One of the important principles in criminal law is that the accused is innocent until proved guilty. Unless and until the prosecution proves that the accused is guilty of an offence, he or she is innocent in the eyes of the law.<sup>171</sup> Another important principle is that the prosecution has the burden of proving its case. The prosecution has to prove beyond reasonable doubt that the offence has been committed by the person charged.<sup>172</sup> The courts must decide, after the parties have presented their submissions and produced evidence, whether the prosecution has proved its case beyond reasonable doubt. Where the prosecution fails to produce evidence for all of the elements of the offence, there is no case to answer.

It is to be noted that the Penal Code of Vanuatu lists a number of exemptions from criminal responsibility. Section 12 of the Code provides that a mistake of fact can be a defence to a criminal charge.<sup>173</sup> The mistake must, however, be a reasonable and genuine belief in a fact which, had it existed, would have rendered the conduct innocent. Moreover, an accused is not criminally responsible if, by reason of a disease of the mind at the time of the act, he or she was unable to understand the nature of the act or to know that the act was wrong.<sup>174</sup> It is important to note, however, that for a successful insanity defence, the accused has to prove that he or she was insane at the time of the offence.<sup>175</sup> In Vanuatu, children below the age of 10 are not criminally responsible.<sup>176</sup> Section 21 of the

<sup>167</sup> Section 3(2) of the Fisheries Act 2014.

<sup>168</sup> Section 35(a) and (b) of the Fisheries Act 2014.

<sup>169</sup> Section 36 of the Fisheries Act 2014.

<sup>170</sup> Penal Code of Vanuatu, 1981 Cap 135.

<sup>171</sup> Among other cases, see *Public Prosecutor v Arnhabat* [2003] VUSC 50; see also Pacific Judicial Education Programme, *Vanuatu Magistrates Bench Book* (2004) 69.

<sup>172</sup> *Public Prosecutor v Taleo* [2001] VUSC 8.

<sup>173</sup> Section 12 of the Penal Code.

<sup>174</sup> Section 20 of the Penal Code.

<sup>175</sup> Section 20(1) of the Penal Code.

<sup>176</sup> Section 17 of the Penal Code.

Code provides that voluntary intoxication will not constitute a defence, unless the offence charged is one in which the degree of intoxication was such as to deprive the accused of the capacity to form the criminal intention.<sup>177</sup> Involuntary intoxication is deemed to be a mental disease.<sup>178</sup> In accordance with s 11 of the Code, ignorance of the law is not a defence to any criminal charge.

## 11. ROLE OF INTERNATIONAL LAW AND TREATIES

Vanuatu adopts a dualist approach to international law; treaties are not part of domestic law and do not create domestic rights and obligations unless and until the national Parliament enacts legislation to that effect.<sup>179</sup> This approach is provided for in art 26 of the Constitution, which states:

Treaties negotiated by the Government shall be presented to Parliament for ratification when they – (a) concern international organizations, peace or trade; (b) commit the expenditure of public funds; (c) affect the status of people; (d) require amendment of the laws of the Republic of Vanuatu; (e) provide for the transfer, exchange or annexing of territory.

It is in the field of human rights treaties that the effect of this dualist approach is particularly noticeable. In practice, however, this approach has not been consistently adopted by the courts. While in *Noel v Toto*<sup>180</sup> the Supreme Court of Vanuatu applied the Convention on the Elimination of all Forms of Discrimination against Women to grant equal land rights to women, in *Joli v Joli*<sup>181</sup> the Court of Appeal refused to apply the same Convention, even though Vanuatu was a party to it. In the latter case, the Court held that it was the role of Parliament to decide how gender equality in matrimonial property must operate in the country.

Vanuatu has ratified the following human rights conventions: the International Covenant on Civil and Political Rights in 2008,<sup>182</sup> the Convention on the Elimination of all Forms of Discrimination against Women in 1995,<sup>183</sup> the Convention against Torture in 2010,<sup>184</sup> the Convention on the Rights of

<sup>177</sup> Section 21 of the Penal Code.

<sup>178</sup> Section 20(4) of the Penal Code.

<sup>179</sup> See Dejo Olowu *International Law: A Textbook for the South Pacific* (CDPublishing.Org, 2013) 113.

<sup>180</sup> *Noel v Toto* [1995] VUSC 3.

<sup>181</sup> *Joli v Joli* [2003] VUCA 27.

<sup>182</sup> Covenant on Civil and Political Rights (Ratification) Act 2008.

<sup>183</sup> Convention on the Elimination of all Forms of Discrimination against Women (Ratification) Act 1995.

<sup>184</sup> Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Ratification) Act 2010.

Child in 1992,<sup>185</sup> and the Convention on the Rights of Persons with Disabilities in 2008.<sup>186</sup>

Upon ratification, Vanuatu is under an obligation to amend and develop domestic legislation to comply with these treaties. Thus, after ratifying the Convention on the Elimination of all Forms of Discrimination against Women, Vanuatu passed the Family Protection Act 2008; it aims to improve family relations by providing for an offence of domestic violence and family protection orders in the case of domestic violence. Vanuatu also amended a number of pieces of legislation, including the Municipalities Act,<sup>187</sup> to create reserved seats for women in municipal councils.

Treaties in the field of trade also need to be specifically incorporated by an Act of Parliament. Vanuatu has ratified a number of trade agreements, including the Trade Agreement Among the Melanesian Spearhead Group Countries in 1994,<sup>188</sup> the ACP-EU Partnership Agreement in 2001,<sup>189</sup> the Pacific Island Countries Trade Agreement (PICTA) in 2003,<sup>190</sup> and the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization in 2019.<sup>191</sup> Upon ratification, these trade treaties became part of Vanuatu's domestic law.

## 12. CIVIL SOCIETY ORGANISATIONS

In addition to the chiefly systems, churches are regarded as important civil society organisations because they play a significant role in the maintenance of peace and stability in the communities. In Vanuatu, most NGOs are registered under the Charitable Associations Act, but churches are not required to be registered. Individuals are free to form a Christian association, as freedom of association is provided for in the Constitution.<sup>192</sup>

Trade unions are regulated under the Trade Unions Act 1983, which provides for the registration of trade unions, the conditions for registration and the powers of the registrar of trade unions. A trade union operating in the country must be registered in accordance with the Act.

<sup>185</sup> Convention on the Rights of the Child (Ratification) Act 1992.

<sup>186</sup> Convention on the Rights of Persons with Disabilities (Ratification) Act 2008.

<sup>187</sup> Municipalities (Amendment) Act 2013.

<sup>188</sup> Trade Agreement Among the Melanesian Spearhead Group Countries (Ratification) Act 1994.

<sup>189</sup> ACP-EU Partnership Agreement Act 2001 Cap 273.

<sup>190</sup> Pacific Island Countries Trade Agreement (PICTA) Act 2003 Cap 292.

<sup>191</sup> Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization No 27 of 2019.

<sup>192</sup> Article 5 of the Constitution.

In ending this chapter, it is interesting to note that Vanuatu is not only one of the most culturally diverse countries in the world, with many different languages, cultures and traditions, but it also has a very complex legal system as a result of its colonial past. Economically, however, Vanuatu is one of the least developed countries, relying heavily on overseas aid, agriculture and tourism. Mineral exploitation is almost non-existent.

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