GIVING A DOG ITS TEETH BACK: REFORMING THE POWERS OF THE MALVATUMAURI IN VANUATU

LAWS 532: COMPARATIVE INDIGENOUS RIGHTS

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Beatrice Tabangcora

STUDENT ID: 300463444

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I Introduction

In the plural legal systems of the South Pacific island nations, there is an ongoing struggle to harmonise indigenous customary law and introduced Western influenced laws. Before colonisation reached the shores of Vanuatu, indigenous custom governed the lives of society; a decentralised system of traditional authority was vested in chiefs who made custom rules and used custom to resolve disputes.[1] To this day, chiefs continue to use custom in daily village affairs even though the laws of Vanuatu do not grant these powers to the traditional authority.

The establishment of the Malvatumauri, or the National Council of Chiefs, in Vanuatu was described as the "closest thing to state recognition of the kastom system".[2] However, the Council has been largely ineffective and its impact, insignificant. The Malvatumauri has made several attempts to be active in its role through a number of proposals. This prompted the drafting of and subsequent passing of the Council of Chiefs Act 2006 by Vanuatu Parliament. Although this was hailed as a step in the right direction, the Act was criticised by the Secretary of the Malvatumauri who compared it to "a dog that had had all its teeth removed and yet the dog was still expected to hunt pigs".[3]

How then do we give the proverbial dog its teeth back?

The first four parts of the paper contain a discussion on custom in Vanuatu. Part II of this paper discusses the colonial history of Vanuatu and the resulting impact that it has had on the legal system. Part III of the paper focusses on defining the term "custom" while Part IV discusses the relationship between custom and the other sources of law that exist in Vanuatu. Part V elaborates on other issues that affect the application of custom in Vanuatu.

The final three sections of the paper elaborates on the current frameworks relating to tradtiaional authority. Part VI focuses on the Malvatumauri Council of Chiefs in Vanuatu while the focus of Part VII is the Village Fono in Samoa. Part VIII elaborates on possible solutions that would allow the Malvatumauri Council of Chiefs to play a more meaningful role in the application of custom.

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[1] Lissant Bolton *Chief Willie Bongmatur Maldo and the Role of Chiefs in Vanuatu* (1998) Journal of Pacific History at 1.
[2] Miranda Forsyth *A Bird The Flies With Two Wings: Kastom and state justice systems in Vanuatu* (ANU E Press, Canberra, 2009) at 162.
[3] Miranda Forsyth *A Bird The Flies With Two Wings*, above n2 at 163.

This paper concludes with a recommendation that: the Constitutional provision regarding custom be amended, the island courts be reformed and the Council of Chiefs Act be amended to grant powers to chiefs to create bylaws and resolve disputes under custom.

II Colonial History of Vanuatu

The archipelago now known as Vanuatu is believed to have been inhabited by Melanesian people for thousands of years prior to the arrival of the first European explorer in 1606.[4] Before European contact, custom governed the lives of the indigenous peoples of Vanuatu, who are known as ni-Vanuatu. In Melanesia, traditional authority came in the form of a "Big Man", an influential individual who would gain the support of family often through his wealth; in return, the big man was obligated to provide for the family. Prior to colonisation, Pacific societies functioned:[5]

> without state mechanisms…the Pacific nevertheless had functioning legal systems. They had complex sets of unwritten rules governing aspects of social, political and economic behaviour. They had effective methods for ensuring that the rules would be followed and they also had workable procedures for settling disputes.

In 1774, James Cook named the archipelago "New Hebrides" after mapping the central and southern islands.[6] In 1906, New Hebrides became a joint condominium colonised by both Great Britain and France.[7]

During this period of colonisation, British laws only applied to British citizens and optants while French laws applied only to French citizens and optants; neither law contained a provision that stated that the laws of each country was applicable to that of the other or to New Hebrideans.[8] Interestingly, custom was tolerated during the colonial period, provided that it did not conflict with the laws applicable to British and French settlers; this is unlike the colonial situation in Samoa, which saw Samoan *matai* stripped of their chiefly titles and customary powers.[9] This peculiar

[4] Don Paterson "Vanuatu" in Michael Ntumy (ed) *South Pacific Island Legal Systems* (University of Hawaii Press, Honolulu, 1993) 365 at 365.
[5] Jean Zorn "Custom Then and Now: The Changing Melanesian Family" in Anita Jowitt and Tess Newton Cain (eds) *Passage of Change: Law, Society and Governance in the Pacific* (Pandanus Books, Canberra, 2003) 94 at 96.
[6] Don Paterson "Vanuatu", above n4 at 365.
[7] Don Paterson "Vanuatu", above n4 at 366.
[8] Jennifer Corrin and Don Paterson *Introduction to South Pacific Law* (4th ed, Intersentia Ltd, Cambridge, 2017) at 46.
[9] Sue Farran and Jennifer Corrin *Developing Legislation to Formalise Customary Land Management: Deep Legal Pluralism or a Shallow Venner?* (2017) 1 LDR at 2.

situation continued until 1980, when New Hebrides became independent and was renamed "Vanuatu". This made Vanuatu last of the South Pacific nations to gain independence from its colonisers.[10]

The colonial history of Vanuatu is reflected in its unique plural legal system. The Constitution of Vanuatu which is recognised as the supreme law, recognises several other sources of law: statutes enacted by Parliament[11], British and French laws[12], Anglo-French Joint Regulations[13], common law and equity[14] and customary law[15]; academics have described the Constitution as having created "a system of complex legal pluralism".[16]

III Defining "Kastom"

Kastom, custom and customary law are three terms that are often used interchangeably, when referring to the norms, practices and usages of the indigenous peoples of a certain area.[17] Kastom is the Bislama translation of custom.[18] Custom is used to refer to the way people dress or prepare food and the languages that are spoken; custom also refers to rules created by traditional leaders that dictate everyday life such as keeping village curfews, the protection of sacred sites or maintaining peace within the village.[19] The term 'custom' has a two-folded nature:[20]

> [C]ustom can merely be a practice or usage, that is, what is actually done by people...it can also be a practice or usage that is required to be done. The practice or usage becomes a rule or a law, and people are punished for failing to observe that custom.

Generally the customs that fall under the latter category, which accords punishment when breached, are termed as "customary law".[21] However, there continues to be a debate on whether

[10] Don Paterson "Vanuatu", above n4 at 366; Ron Adams and Sophie Foster "Vanuatu" (9 August 2018) Encyclopaedia Britannica <https://www.britannica.com/place/Vanuatu>.
[11] Constitution of the Republic of Vanuatu 1980 (Vanuatu), art 16.
[12] Above n11, art 95 (2).
[13] Above n11, art 95 (1).
[14] Above n11, art 95 (1).
[15] Above n11, art 95 (2-3).
[16] Jennifer Corrin Care *Bedrock and Steel Blues: Finding the Law Applicable in Vanuatu* (1998) CLB 594 at 598.
[17] Jean Zorn "Custom Then and Now: The Changing Melanesian Family", above n5 at 96.
[18] Bislama is a form of pidgin that incorporates both English and French words. It is one of the three national languages of Vanuatu.
[19] Jennifer Corrin and Don Paterson *Introduction to South Pacific Law,* above n8, at 51.
[20] Jennifer Corrin and Don Paterson *Introduction to South Pacific Law,* above n8, at 51.
[21] Jennifer Corrin and Don Paterson *Introduction to South Pacific Law,* above n8, at 51.

the terms "custom" and "customary law" denote the same meaning. It is clear that not all custom is law. Legal positivists argue that custom, having not been associated with the concept of the state, is not law at all but instead a normative order in the form of custom.[22]

The dynamic and ever-evolving nature of custom is often overlooked or misunderstood.[23] Custom evolves as society evolves. Some aspects of custom that existed prior to the arrival of Europeans continue to be practiced. However, there have also been significant changes to custom that reflect major changes in society. These changes include: the introduction of Christianity to the islands of the South Pacific, the shift from a barter-based economy to a cash-based economy and other Western influences that came with colonisation.

Furthermore, there is a problem with using the catch-all phrase "custom" in reference to Melanesian countries like Vanuatu, the Solomon Islands and Papua New Guinea. This is due to the fact that custom "is not a homogenous body of law applying throughout the country" because there are "great variations between the customs of different communities, even on the same islands".[24] Across the 83 islands of Vanuatu there are "approximately 108 distinct linguistic and cultural groups".[25] The situation in Melanesia is unlike Polynesian countries like Samoa where custom is relatively the same across the entire country.

In Melanesia, custom is not only competing with other sources of law but also with variations of itself. This difficulty is apparent in the island courts of Vanuatu, which were created with the intention that it would "provide a forum for the resolution of customary law disputes".[26] The jurisdiction of the island courts encompass numerous forms of custom; this means that often one form of custom is given preference above another.[27] The island court justices, who are knowledgeable in custom but not educated in law, have discretion to choose which form of custom to apply because there is no procedure in place to determine which custom is applicable; this means

[22] Sean P. Donlan, 'Things being various: normativity, legality, state legality' in M Adams and D Heirbaut (eds), *The Method and Culture of Comparative Law: Essays in Honor of Mark van Hoecke* (2014).
[23] Further discussion in Part V (A) of this paper.
[24] Jennifer Corrin Care *Customary Law in Conflict: the Status of Customary Law and Introduced Law in Post-colonial Solomon Islands* (2001) 167 UQ Law Journal at 174; Jennifer Corrin and Don Paterson *Introduction to South Pacific Law,* above n8, at 51.
[25] Anita Jowitt "Island Courts in Vanuatu" (1999) 3 JSPL at 1.
[26] Anita Jowitt "Island Courts in Vanuatu", above n25 at 1.
[27] Anita Jowitt "Island Courts in Vanuatu", above n25 at 1.

that matters are often decided using a form of custom that parties are unfamiliar with.[28] This creates yet another complication for trying to harmonise custom and law within Melanesia.

In *Waiwo v Waiwo and Banga*, then Senior Magistrate Lunabek (who is now the Chief Justice), proposed that where the court was presented with two conflicting forms of custom, "the court should look for a common basis or shared foundation in the customary law applicable" – a proposal that received the approval of the New Zealand Law Commission.[29]

IV Kastom in the Law of Vanuatu

A Kastom in the Constitution

Custom is recognised in most constitutions of the South Pacific, with the exception of Tonga which makes no mention of custom.[30]

The preamble of the Constitution states that Vanuatu is "founded on traditional Melanesian values".[31] The term "custom" is not defined within the Constitution itself. However, the Interpretation Act of Vanuatu defines "custom" as "the customs and traditional practices of the indigenous peoples of Vanuatu".[32] The definition provided by the Interpretation Act, which falls short in actually defining what "custom" is, does clearly provide that only customs of the indigenous people of Vanuatu are to apply. This means that all other customs of the people who are resident in Vanuatu, but are non-indigenous, are not afforded the same consideration under law.

Article 95(3) of the Constitution provides that "customary law shall continue to have effect as a part of the law of the Republic".[33] Art 47(1) further provides that in the event that:[34]

> 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.

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[28] Anita Jowitt "Island Courts in Vanuatu", above n25 at 1.
[29] *Waiwo v Waiwo* [1996] VUMC 1; Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP12, 2006) at 204.
[30] Law Commission *Converging Currents*, above n29 at 36.
[31] Constitution (Vanuatu), above n10.
[32] Interpretation Act 1981 (Vanuatu), s 2.
[33] Constitution (Vanuatu), above n10, art 95(3).
[34] Constitution (Vanuatu), above n10, art 47(1).

The use of the term "customary law" in art 95(3) and "custom" in art 47(1) brings into question whether the drafters of the Constitution intended for the two terms to have different connotations.

The Constitution is clear that customary law is subordinate to the Constitution and laws enacted by Parliament. However, there is ambiguity regarding the standing of customary law in relation to other sources of law. This ambiguity stems from the drafting of art 47(1). The provision seems to denote that the 'rule of law' and 'custom' are two very different and very separate things. Several academics have criticised the drafting of art 47(1) and argue that as a result, customary law is subordinate even to statutes of general application and common law and equity.[35] The only clear provisions on custom within the Constitution are arts 73 and 74, which pertain to the ownership of land.

B Kastom and International Rights Instruments

1 Kastom and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

Vanuatu, along with 9 other South Pacific nations, is not a signatory to UNDRIP.[36] Commentators speculated that the reasons for this lack of support were: the political status of South Pacific nations as independent states rather than territories, the inability of the South Pacific nations to recognise the relevance of UNDRIP to their countries and pressure from New Zealand and Australia.[37]

Several articles of UNDRIP, however, support the notion of empowering custom leaders to create bylaws for their respective villages. Article 3 of UNDRIP recognises that indigenous peoples have the right to self-determination.[38] Article 4 recognises that indigenous people "in exercising their right to self-determination, have the right to autonomy…in matters relating to their internal and local affairs".[39] Further, art 5 states that "indigenous peoples have the right to maintain and

[35] Jennifer Corrin and Don Paterson *Introduction to South Pacific Law,* above n8, at 48.
[36] Fiji, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Solomon Islands, Tonga and Tuvalu also have not signed UNDRIP. Only Samoa and the Federated States of Micronesia have endorsed UNDRIP.
[37] Holly Jonas et al "Pacific Island Delegates at International Conference Identify Endorsement and Implementation of UNDRIP as Advocacy Priority" (7 October 2015) Global Forest Coalition <https://globalforestcoalition.org/pacific-island-delegates-at-international-conference-identify-endorsement-and-implementation-of-undrip-as-advocacy-priority/>.
[38] United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), art 3.
[39] UNDRIP, above n38, art 4.

strengthen their distinct political, legal, economic, social and cultural institutions" and art 11 recognises indigenous peoples rights to "practise and revitalise" their customs.[40]

Although it has yet to become a signatory of UNDRIP, Vanuatu has used the language of the Declaration of "free, prior and informed consent" in environmental conservation and deep sea mining laws, policies and regulations.[41] It must be noted that because the push to incorporate the language of the Declaration came from the South Pacific Community (SPC), which is a regional organisation, it is unlikely that the Government of Vanuatu incorporated the language of the Declaration on its own accord.

UNDRIP is clear that it is to be read in conjunction with other UN international instruments. Therefore, the application of custom is subject to individual human rights, moving custom even further down on the hierarchy of laws in Vanuatu.[42] The 'little brother' status afforded to custom is contentious because custom is continuously perceived as inconsistent with international human rights.[43]

V Other Issues Affecting the Application of Kastom in Vanuatu

A Foreign judges and the interpretation of kastom

Vanuatu, like most of the South Pacific nations, employ foreign judges from common law jurisdictions to sit on its judiciary. This is a matter of necessity as the availability of local legal talent was, and continues to be, limited.[44] The judiciary has a significant amount of influence on the application of custom within a particular jurisdiction. However, in the case of Vanuatu, this influence was held by "cultural outsiders" who were expected to decide on matters of custom that came before them in court.[45] Furthermore, expatriate judges are often unwilling or have trouble applying custom because it is unwritten.[46] There are several examples of situations where expatriate judges have failed to take custom into account in their decisions.

[40] UNDRIP, above n38, arts 5 and 11.
[41] Dina Whitaker "Land Reform in Vanuatu" (15 October 2015) Center for World Indigenous Studies < https://www.cwis.org/2014/10/land-reform-in-vanuatu/>.
[42] UNDRIP, above n38, art 1.
[43] Further discussion in Part V (B) of this paper.
[44] Natalie Baird "Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific" (2014) 19 Canterbury Law Review 80 at 80.
[45] Law Commission *Converging Currents*, above n29 at 205.
[46] Jean Zorn "Custom Then and Now: The Changing Melanesian Family", above n5 at 97.

Boe and Taga v Thomas was an appeal to the Supreme Court regarding the death of a young girl in a road accident.[47] Both parties of the matter were Ni-Vanuatu. The parents of the young girl who had been killed alleged that the court of first instance had "failed to give weight or sufficient weight to the custom of the parties assessing general damages".[48] Chief Justice Cooke completely disregarded this claim and stated that he could not consider custom because it "varies so much in each village throughout Vanuatu and that it would be quite impossible to lay down guidelines for those dealing with the matter"; a common justification for a judge's reluctance to apply custom.[49] This case also illustrates the problem caused by the drafting of art 47 of the Constitution. After declaring that it would be impossible to consider custom, Cooke CJ then stated that nevertheless, there existed a rule of law: an English statute of general application, the Fatal Accidents Act 1846.[50]

In *Nagol Jump*, concerned an application that had been made to the court to determine the intellectual property rights associated with the *nagol jump*.[51] The *nagol jump* or land diving is a customary ceremony that originates from the southern part of the island of Pentecost in Vanuatu; it involves individuals jumping from makeshift towers with vines tied to their ankles – "the progenitor of the modern pastime of bungie-jumping".[52] Here, the applicants from Pentecost claimed to be the custom owner of the ceremony and were trying to prevent the ceremony from being performed in Santo, another island of Vanuatu. Chief Justice d'Imecourt, having been informed of the history and purpose of the customary tradition then states "this is not a custom court but a court of law. This application comes before me under the supreme law of Vanuatu namely the Constitution and I will give my judgment according to law".[53] It is implied from the statement made by d'Imecourt CJ that in his view, custom was separated from law.

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[47] *Boe and Taga v Thomas* (1980-88) 1 VLR 293.
[48] Kenneth Brown *Reconciling Customary Law and Received Law in Melanesia: the Post-Independence Experience in Solomon Islands and Vanuatu* (Charles Darwin University Press, Darwin, 2005) at 81.
[49] *Boe and Taga v Thomas,* above n43 at 296; Kenneth Brown *Reconciling Customary Law and Received Law in Melanesia,* above n478 at 81.
[50] *Boe and Taga v Thomas*, above n47.
[51] *In re the Nago Jump, Assal and Vatu v The Council of Chiefs of Santo and Santo Regional Council* (1989-94) 2 VLR 545.
[52] Kenneth Brown *Reconciling Customary Law and Received Law in Melanesia,* above n48 at 82.
[53] *In re the Nago Jump*, above n51 at 546-7.

Kenneth Brown posits that:[54]

> …the final sentence spell out the all too plainly the standpoint of the Chief Justice. The essential hallmark of this outlook harks back to the Austinian analytical positivist doctrine that 'law,' such as customary law, that does not emanate from a sovereign political source is not law.

In 2016, an expatriate judge was in the midst of yet another controversial decision regarding an accused group's choice to wear traditional garments to their plea hearing. Justice Chetwynd, who is from England, stated that the group had to provide him with a "good reason" as to why he should let them wear their traditional wear in court because "it was rude to appear in custom attire" and that the court was "not a nakamal[55] or custom court house".[56] When the group refused to change out of their traditional wear, Chetwynd J found them in contempt of court.[57] It was speculated that the reason behind this group's decision to wear traditional garments was to make a political statement. Be that as it may, the rationale behind Chetwynd J's decision is flawed. An indigenous person should not have to have a good reason to wear their traditional garments in court. To insist that Western clothing is the only type of clothing acceptable in court is wrong and perpetuates a patronising colonial attitude.

The present judiciary of Vanuatu is predominantly local. Three of the six justices, of the Supreme Court, along with the Chief Justice of Vanuatu are indigenous Ni-Vanuatu. The remaining three justices are expatriates from Fiji, New Zealand and England. It would be unfair to condemn all expatriate judges as incorrect, as the application of custom however, largely depends on the capacity and skill of each judge.[58]

B Perceived inconsistency between kastom and individual human rights

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[54] Kenneth Brown *Reconciling Customary Law and Received Law in Melanesia,* above n48 at 83.
[55] A *nakamal* is a traditional meeting place used for customary ceremonies and where men meet to drink kava.
[56] Radio New Zealand "Bail for Vanuatu group jailed for wearing traditional garb" (21 October 2016) RNZ Pacific: Vanuatu < https://www.radionz.co.nz/international/pacific-news/316226/bail-for-vanuatu-group-jailed-for-wearing-traditional-garb>.
[57] *Public Prosecutor v James* [2016] VUSC 142; Radio New Zealand "Bail for Vanuatu group jailed for wearing traditional garb", above n56.
[58] Law Commission *Converging Currents*, above n29 at 205.

Another issue that affects the application of custom in the law is the perception that it is inconsistent with international human rights. There are a wide range of examples across the South Pacific of customary practices which supposedly infringe upon individual human rights.

There are a number of instance in Vanuatu that indicate a clash between the custom and human rights, especially in relation to the rights of women.

In *Noel v Toto* involved an application made to the Court regarding the ownership of land on the island of Santo in Vanuatu.[59] According to the evidence given at trial, custom dictated that a women who married was to be deprived of her property rights to the land. However, men who married would not be deprived. Justice Kent held that although the Constitution of Vanuatu expressly states that land matters are to be dealt with in custom, custom was inconsistent with art 5 of the Constitution which guarantees non-discrimination on the basis of sex.[60] He further notes that upholding that custom would "be entirely inconsistent with the Constitution and the attitude of Parliament to rule that women have less rights with respect to land than men".[61] Another example is in the political sphere, where custom has been used to justify male-only leadership. In Vanuatu's first national election, the council of chiefs from Northern Efate attempted to bar women candidates from running.[62]

In Vanuatu, there also exists the practice using giving children as a form of customary retribution. For example, if a person who has murdered someone has a child, the child is then given to the family of the deceased to replace the life that has been taken.[63] Another form of customary retribution that infringes on human rights is payback killings, which operate under the same concept as the previous example: a life for a life.[64]

There are some customs however, that have been misconceived, such as brideprice in Melanesia. Brideprice, is a traditional ceremony where a groom presents the father of the bride with valuable traditional commodities, such as money, pigs, cattle, woven mats or fabric. This customary practice, which was originally meant to symbolise the groom's gratitude to the family for raising

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[59] Noel v Toto [1995] VUSC 3.
[60] Noel v Toto, above n59; Jennifer Corrin and Don Paterson *Introduction to South Pacific Law,* above n8, at 70.
[61] Noel v Toto, above n59; Jennifer Corrin and Don Paterson *Introduction to South Pacific Law,* above n8, at 70.
[62] Law Commission *Converging Currents*, above n29 at 91.
[63] Miranda Forsyth *Beyond Case Law: Kastom and Courts in Vanuatu* (2004) 35 VUWLR 427 at 434.
[64] William F S Miles "Pigs, Politics and Social Change in Vanuatu" (n.d) Emalus Library Online Documents Collection – Vanuatu < http://www.vanuatu.usp.ac.fj/library/online/Vanuatu/Miles.htm >.

his future wife, was quickly condemned instead as the act of buying the bride. Although traditionally, there was a noble meaning behind the practice of brideprice, it seems that even the indigenous people of Vanuatu have lost sight of this meaning; the payment of brideprice is often used as justification for acts of domestic violence against women.[65]

However, it is wrong to regard all custom as being inconsistent with human rights. For example, in Samoa, it is common for one to hear the phrase: "children do not have human rights", even though Samoa is a signatory of the Convention on the Rights of a Child.[66] Unasa Va'a states that this statement is stems from the fear that children, in exercising such rights, would disobey their parents; Unasa attributes this fear to the misconceptions caused by the Samoan translation of the term "rights" to "*aia tatau*", which in Samoan denotes a harsh and threatening meaning.[67] Unasa Va'a further argues that themes found within individual human rights regimes already exist within indigenous custom and beliefs. For example, in indigenous Samoan beliefs, all people who descended from the god Tagaloalagi, were afforded the same rights – there was no concept of gender.[68] The current approach to solving conflicts that arise between custom and individual rights is to deal with each matter on a case-by-case basis; the adjudicator is tasked with trying to achieve balance between custom and rights.

C Political instability and lack of commitment from the Government of Vanuatu

Vanuatu and other the countries of Melanesia are notorious for their political instability. From 2011, Vanuatu has had six different Prime Ministers and nine Ministers of Justices; in almost every year since 2011, a motion of no confidence was passed.[69] The former President of the Malvatumauri Council of Chiefs, Chief Seni Mao Tirsupe, in his departing speech urged:[70]

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[65] Kely Haines-Sutherland "Balancing Human Rights and Customs in the Pacific Region: A Pacific Charter of Human Rights?" (2010) 2 *The ANU Undergraduate Research Journal* 125 at 131.
[66] Unasa L F Va'a *Samoan Custom and Human Rights: An Indigenous View* (2009) 14 VUW LR 237 at 237.
[67] Unasa L F Va'a *Samoan Custom and Human Rights: An Indigenous View*, above n66 at 240.
[68] Unasa L F Va'a *Samoan Custom and Human Rights: An Indigenous View*, above n66 at 238.
[69] Jonas Cullwick "Malvatumauri President preparing to leave office" (17 March 2018) Vanuatu Daily Post < http://dailypost.vu/news/malvatumauri-president-preparing-to-leave-office/article_b37a74af-7228-507a-a668-f60b444b9593.html>; The Minister of Justice is directly responsible for the Malvautmauri.
[70] Jonas Cullwick "Malvatumauri President preparing to leave office", above n69.

> government and political leaders not to forget that Vanuatu is founded on custom and Christian principles and we must not continue to disrespect this nation as a football that we can kick around in our small corners.

VI Traditional Authorities in Vanuatu

A The Malvatumauri Council of Chiefs

The Constitution provides for the Malvatumauri Council of Chiefs. The Malvatumauri Council of Chiefs is a national body that consists of elected chiefs from every region in Vanuatu. The chiefs are elected by their peers in the District Councils of Chiefs and serve on the Malvatumauri for a term of four years.

Article 30 of the Constitution outlines the two functions of the Council:[71]

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

The Constitutional provision did not create an obligation on Parliament to consult with the Malvatumauri. This lack of obligation in turn watered down the authority of the Malvatumauri, resulting in its ineffectiveness.

However, the ineffectiveness was not for a lack of trying. The Malvatumauri, over the years, has advocated for a more active position in law making and conflict management. The chiefs of the Malvatumauri, whose function is significantly limited by the Constitution, expressed their frustration with their inability to 'straighten out' the problems presented to them.[72] This is also exacerbated by the fact that in the rural communities of Vanuatu, access to the institutions of the

[71] Constitution (Vanuatu), above n11, art 30.
[72] Miranda Forsyth *A Bird That Flies with Two Wings*, above n2, at 163.

formal state justice system: such as courts and the police is extremely hard or impossible to get to within a reasonable time. This leaves the matter to be dealt with by the chiefs in custom.

B National Council of Chiefs Act 2006

In 1983, the Malvatumauri produced a "Custom Policy", which aimed to set out a codified law that was to apply to the entire country.[73] In 2000, the Chief's Legislation Project made recommendations to the government to enact legislation to empower chiefs in their roles and establish customary courts, a "chiefly system of justice" that would be integrated into the state court system.[74]

This prompted the drafting of the National Council of Chiefs Bill in 2006. The Bill had attempted to provide chiefs with the power to resolve disputes in accordance to custom, to make by-laws and to require the assistance of the police in enforcing penalties.[75] However, no limitations on these powers were provided by the Bill. These powers were in fact, removed even before the Act had been tabled at Parliament.[76]

C Weaknesses in the current framework

The Council of Chiefs Act that ultimately was passed did nothing but establish the organisation of different chiefly councils and prescribe the functions of such councils.

In 2013, Parliament amended the provision regarding the Malvatumauri Council of Chiefs. Article 30(2) of the Constitution now reads: "The Council **must** be consulted on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament" (emphasis added).[77] The amendment now requires Parliament to consult with the Malvatumauri when drafting legislation that concerns custom. This move however, albeit a positive one, will not bring about positive change if the Government does not have the internal capacity to recognise when the matter at hand concerns custom. There is hope that Parliamentarians, all of whom are indigenous ni-Vanuatu, will have the capacity to do so.

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[73] National Council of Custom Chiefs of the Republic of Vanuatu *Custom policy of the Malvatumauri* (1983).
[74] Miranda Forsyth *A Bird That Flies with Two Wings*, above n2, at 165.
[75] Miranda Forsyth *A Bird That Flies with Two Wings*, above n2, at 165.
[76] Malvatumauri Council of Chiefs Act 2006 (Vanuatu).
[77] Constitution (Sixth)(Amendment) Act 2013 (Vanuatu), art 30(2).

Although there has been a few projects regarding customary land disputes that the Malvatumauri was involved in, the amendment to the Constitution has yet to address the ineffectiveness of the Malvatumauri. In August 2018, the *Vanuatu Daily Post*, a prominent newspaper, reported in August of 2018 that the Malvatumauri is "currently non-existent" and ineffective.[78]

VII Traditional Authorities in Samoa: The Village Fono

Samoa, unlike Vanuatu, does not have a national council of chiefs like the Malvatumauri. However, Samoa recognises traditional authority and utilises a decentralised form of village government.

A The Samoan Village

Prior to colonisation, Samoan society was governed by custom and traditions. Unlike Vanuatu, Samoa traditionally utilised an aristocratic chiefly model, however this has changed over time. The village constitution or *fa'alupega*, identifies *matai* titles associated that particular village. Each *Suafa o matai* or chiefly titles were owned by the *aiga* (family). *Matai* titles are also ranked according to the hierarchy established by the village constitution. The chiefly titles, which are tied to customary land, were passed down through lineage or given to young individuals who had given *tautua* (service) to the chief and village.[79]

Each village has a *fono o matai* (village council). Every extended family in the village has a representative on the council; the highest ranking *matai* of every family is often this representative. Arguably, the system in place in Samoa reflects democratic values. The village *fono* was responsible for ensuring the peace, order and prosperity of the village (through the management of village lands). It was also responsible for creating village rules, protocols and determining punishment for the infringement of village protocol.

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[78] "Malvatumauri Council of Chiefs currently non-existent: Campaign for Justice" (4 August 2018) *Vanuatu Daily Post* <http://dailypost.vu/news/malvatumauri-council-of-chiefs-currently-non-existent-campaign-for-justice/article_cf058bf2-f832-553e-bc03-99b44a5cae18.html>.

[79] A matai title can be given to an individual in a prominent position (ie former UN Secretary General Ban Ki Moon and former NZ PMs John Key and Bill English to name a few). Over the years, Samoans have expressed dissatisfaction with the bestowal of matai titles and the fact that they can now be 'bought'.

This decentralised system of village government in Samoa continues to thrive and has been effective in balancing custom and formal laws.

B Custom in the Law of Samoa

Custom in Samoa was severely limited or completely abolished by the respective colonial regimes of Germany and New Zealand.[80] When Samoa gained independence in 1962, the Constitution came into force. The Constitution of Samoa recognises custom as part of the law. Furthermore, Part IX of the Constitution specifically provides for customary land and titles.

Article 111(1) defines the 'law' being in force in Samoa as including:[81]

> includes this Constitution, any Act of Parliament and any proclamation, regulation, order, by-law or other act of authority made thereunder, the English common law and equity for the time being in so far as they are not excluded by any other law in force in Samoa, and any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction.

The requirement that the custom acquire the force of law before being considered as part of the law of Samoa places a layer of complication on the application of custom. Furthermore, like the Vanuatu Constitution, there continues to be uncertainty as to the relationship of custom with statutes of general application and common law and equity. It is unclear from the wording of art 111(1) that once a custom has "acquired the force of law" it would override common law and equity.[82]

B The Village Fono Act 1990

In 1990, the Parliament of Samoa passed the Village Fono Act to validate and empower the village fono.[83] The Act provides that its objectives are:[84]

> (a) to provide for the recognition and protection of Village Fono;

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[80] Samoan Offenders Ordinance 1922 (Samoa).
[81] Constitution of the Independent State of Samoa 1960 (Samoa), art 111(1).
[82] Constitution (Samoa), above n81, art 111(1); Jennifer Corrin and Don Paterson *Introduction to South Pacific Law,* above n8, at 48.
[83] Village Fono Act 1990 (Samoa), s 3(3).
[84] Village Fono Amendment Act (2017) Samoa, s 2A.

(b) to confer the exercise of power and authority by Village Fono in accordance with custom and usage of their village;

(c) to validate the past and future exercise of powers and authority by Village Fono;

(d) to provide procedures to be followed by Village Fono when undertaking inquiries into village misconduct or imposing punishment, including banishment or ostracism; and

(e) to empower Village Fono to make faiga fa'avae or i'ugafono.

Under the Act, limitations are placed on the jurisdiction of the village fono such as: Several forms of punishment are codified.[85] The Village Fono Act also empowers the village councils to make bylaws in relation to the hygiene and economic development of the village; the reason these types of bylaws are specifically provided within the Act is because they do not generally fall under custom.[86]

Several safeguards are placed within the Act to ensure that the powers granted to the village councils are not abused. Section 11 provides individuals with the right to appeal a decision of the village fono. The Act also places an obligation upon the Court to take into consideration any punishment imposed by the village fono when sentencing a person who is found guilty of village misconduct to avoid excessively punishing the victim.[87] Furthermore, if a village council would like to impose the customary punishment of banishment on an offender, they are first required to file a petition with the Land and Titles Court, who then decides whether to uphold the banishment or not.

This was illustrated in *Pitomoa Mauga*, where the village council of Lotofaga purported to justify the banishment of the appellant under the s 3 of the Village Fono Act 1990. The Court of Appeal, agreeing with Vaai J who had presided over the matter at first instance, held that the Act did not grant the village fono the power to banish offenders of village protocol from the village. Furthermore, the Court also noted with approval the submission of the counsel for the appellant,

[85] Village Fono Act 1990, above n83, ss 6 and 9.
[86] Village Fono Act 1990, above n83, s 5.
[87] Village Fono Act 1990, above n83, s 8.

that there was a "need to marry modern democratic ideals and human rights with indigenous customs and traditions".[88]

The constitutionality of the customary practice of banishment has also been decided by the Court of Appeal of Samoa. In *Ta'amale v Attorney General*, the Court of Appeal found that:

> We must emphasise strongly that a banishment order should never be lightly made. It is an extreme measure of social control and can only be justified in any given case if it is truly essential to preserve the stability of the village life and organisation bring about hardship and distress.

C The Village Fono Amendment Act 2017

Over the years, a number of initiatives have taken place in Samoa, with the purpose of bettering this framework. In 2015, the Government of Samoa made a commitment to revisit the powers of the village fono to ensure that the human rights and freedoms of individuals are observed and respected.[89]

This led to a review of the Village Fono Act which led to the enactment of the Village Fono Amendment Act by the Parliament of Samoa.[90] Under s 4 (1) of the Village Fono Act 1990, there was no requirement for the village to keep written records of enquiry or of punishments imposed.[91] However, the Village Fono Amendment Act 2017 now provides that "a Village Fono may keep written record of its inquiry into any allegation of village misconduct or of any punishment imposed".[92] Keeping records of these matters would be helpful in ensuring transparency and consistency in the decisions and punishments handed down by the village fono. However, because this provision does not require a village fono to do keep records, the new provision is ultimately just as ineffective as the one that it replaces.

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[88] *Pitoamoa Mauga et al* v *Fuga Leituala* (unreported, CA March 2005, Lord Cooke of Thorndon P., Casey & Bisson JJ) at [10]; Leulua'ialii Tasi Malifa "Village Fono Act Reforms" (paper presented at the Samoa Law Society Biennial Law Symposium) December 2015.
[89] Dateline Pacific "Samoa to reform village bylaws" (9 July 2015) Radio NZ <https://www.radionz.co.nz/international/programmes/datelinepacific/audio/201761646/samoa-to-reform-village-bylaws>.
[90] Village Fono Amendment Act 2017 (Samoa).
[91] Village Fono Act, above n83, s 4 (1).
[92] Village Fono Amendment Act 2017, above n90, s 4 (1).

The major effect of the Amendment Act is that it extends the powers and scope of the village fono to make bylaws for the village and also makes provision for the registration and codification of these bylaws. Each village fono in Samoa now has the power to make bylaws in relation to:[93]

> (a) hygiene and sanitation;
>
> (b) development and use of village land for the economic betterment of the village;
>
> (c) harmony;
>
> (d) improvement of living standards;
>
> …
>
> (f) imposing a curfew within any village or village land in accordance with village customs and practices (including the power to exempt any person during a curfew if necessary in an emergency situation or to enforce the curfew);
>
> (g) promoting social cohesion and harmony;
>
> (h) classifying village misconducts and penalties;
>
> (i) protecting Samoan customs and traditions;
>
> (j) safeguarding village traditions, norms and protocols;
>
> (k) protecting natural resources and the environment;
>
> (l) promoting natural justice and fairness principles in decision making processes and procedures;
>
> …
>
> (n) any other matter to give effect to or to promote wellbeing, development and maintenance of harmony and good order of the village and its inhabitants.

The extension of the scope of matters in which village fono may make bylaws is a success for the traditional leaders and the application of custom in Samoa. The recognition of traditional authority by the Village Fono Act and the subsequent Village Fono Amendment Act has legitimised the powers of the local village fono which has always existed and was already in practice, but until

[93] The excluded provisions concern administrative matters such as enquiries and the recording of meeting minutes.

then, was operating outside of the formal state justice system. Village bylaws, and custom in general, is often unwritten; this characteristic of custom made it seem vulnerable to abuse by chiefs. Therefore, the codification of village bylaws can also be seen as yet another safeguard as it would prevent the village council from abusing the powers granted by the Act.

In addition to the amendment of the Village Fono Act, there have also been a number of workshops run by the Ministry of Women, Community and Social Development on village governance for members of village fono from around Samoa. These workshops focussed on educating chiefs in various village fono on the contents of the Village Fono Act. This resulted in the codification of the village bylaws of a number of villages.

VIII Ways Forward: Possible Solutions

It is apparent from the above discussion that traditional authorities in Vanuatu are largely ineffective. This problem stems from the complications surrounding the application of custom. It is unlikely that the drafters of the Constitution envisioned that the Malvatumauri Council of Chiefs be a mere token.

A Amending the Constitutional provisions regarding custom

As discussed before, there has been a Constitutional amendment to the provision regarding the Malvatumauri Council of Chiefs which now requires Parliament to consult the Malvatumauri when considering a bill that concerns matters of custom.[94] However, s 47 of the Constitution must be amended in order to provide clarification on where exactly custom stands within the hierarchy of laws in Vanuatu. If the precedent established by the courts is to be upheld, then custom will continue to remain subordinate to all other sources of law within Vanuatu and will not be given adequate consideration or any consideration at all, by the courts when considering a matter.

B Reforming the island courts

The island courts of Vanuatu, which were briefly discussed above, were created in order to provide a forum for solving customary disputes.[95] However, they have been highly criticised. Jowitt concluded that:[96]

[94] Constitution (Sixth)(Amendment) Act, above n77, art 30 (2).
[95] Anita Jowitt “Island Courts in Vanuatu”, above n25 at 1.
[96] Anita Jowitt “Island Courts in Vanuatu”, above n25 at 1.

> Despite the Constitutional requirements that an adequate procedure for the resolution of custom disputes be established, Vanuatu still does not seem to have achieved this goal. Rather, the Island Courts Act, whilst it purports to provide a suitable mechanism for the resolution of customary disputes appears in large to be a decentralised, less formal, Magistrates Court type system.
>
> Even if the operational difficulties were resolved through adequate funding and staffing, and the legal jurisdiction of the courts were extended to include a wider customary law jurisdiction, the structure itself would still be inadequate to provide an appropriate forum for the resolution of customary disputes.

Another academic, Forsyth noted that the island courts: "presently 'float nomo', being neither satisfactory state courts nor kastom courts".[97] It is clear from Jowitt and Forysth's criticisms that the island courts of Vanuatu need to undergo reform in order for it to serve its purpose intended under the Constitution.

However, what if the entire island court system was overhauled, and instead replaced by an even more decentralised, village-centric framework such as that in Samoa? When the justices that worked in the island courts were asked "where the considered island courts to stand in relation to law and *kastom*", the justices answered "island courts administered law and *kastom* belonged to village…and nakamals."[98] The justices further expressed that they preferred to deal with matters in the village and nakamals, because the kastom forums allowed them to work towards holistic outcomes that were 'win-win', in contrast to the 'win-lose' outcomes that were perpetuated by the higher courts.[99]

C Empowering local chiefs in Vanuatu

Would a framework similar to that established by the Village Fono Act of Samoa be feasible for Vanuatu? The implementation of such a framework would require the amendment of the Malvatumauri Council of Chiefs Act 2006. Like the Samoan framework, chiefs would be given the power to create bylaws for their respective villages or areas. The scope of the type of bylaws

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[97] Michael Goddard and Leisande Otto "Hybrid Justice in Vanuatu: The Island Courts" (The World Bank, Justice & Development Working Paper Series 22/2013) 2013 at 30.
[98] Michael Goddard and Leisande Otto "Hybrid Justice in Vanuatu: The Island Courts", above n97 at 29.
[99] Michael Goddard and Leisande Otto "Hybrid Justice in Vanuatu: The Island Courts", above n97 at 31.

that can be created would also be expressly stated within the Act and provisions regarding the registration and codification of the bylaws would also be provided.

Furthermore, limitations on the powers of chiefs and safeguards such as: the right to appeal the decision of a council, a requirement that a written record be kept of custom punishments and the consideration of custom punishments when sentencing an individual would be embedded in the Act in order to prevent abuse of these powers. This would address the shortcomings of the National Council of Chiefs Bill which provided the powers to create bylaws, but failed to place any limitations on these powers.[100] It would also address the shortcomings of the s 4 of the Village Fono Amendment Act by requiring the council to keep records of inquiries into alleged misconduct and of any punishment handed down by the chiefs, therefore ensuring transparency and consistency.

There are a number of factors that would suggest that the Samoan framework cannot be adopted to Vanuatu's circumstances. For one, Vanuatu would have a difficult time implementing and managing the same framework because of the number of linguistic and cultural groups as well as the geographical location of these groups; these factors mean that the implementation of the framework would be time-consuming and expensive. Secondly, political instability and the lack of commitment from the Government of Vanuatu for this matter would also mean that securing support and funding for this project would be complicated and tedious.

Although there are a number of concerns regarding the implementation of the framework, it does not deny the fact that these decentralised local village governments already exist and continue to operate. Matters, especially in the rural areas of Vanuatu, are still being resolved by custom. Like Samoa, empowering chiefs through the Act would only legitimise what has always existed outside of the formal justice system.

Vanuatu would be in a better position to take the framework even further than Samoa has, because it has what Samoa does not – a national body of chiefs established by the Constitution.

[100] Miranda Forsyth *A Bird That Flies with Two Wings*, above n2, at 165.

IX Conclusion

There is, and will continue to be, the issue of harmonising custom and the law in the South Pacific. There is no one right answer.

There are a number of reasons to explain why the application of custom is difficult in Vanuatu. These reasons include: the nature of custom, the fact that there are over 100 variations of custom in Vanuatu, the position ascribed to custom by ambiguously drafted Constitutional provisions and its relationship with other sources of law, expatriate judges and their application of custom, perceptions of inconsistency with individual human rights and political instability in Vanuatu.

It is also clear that the institutions that were set up to address customary issues, such as the Malvatumauri Council of Chiefs and the island courts, are not achieving the purpose intended for them and are therefore, in dire need of reform.

Samoa, who like Vanuatu has a decentralised form of local village governments, has a different approach which involves the recognition of traditional authority by the Village Fono Act and the subsequent Village Fono Amendment Act. These Acts of Parliaments legitimised the powers of the local village fono which was already in practice, but until then, had been operating outside of the formal state justice system.

In conclusion, there are three possible legal solutions for this issue. The first solution, is to amend the Constitutional provision to clarify the position of custom in relation to the other sources of law and to require the courts to take custom into consideration. If this is not done, custom will remain subordinate to all introduced laws – even archaic English laws that are no longer in force in England. The second solution, is to overhaul the entire island court system and instead give the power to village councils to deal with matters in custom, as currently exists in Samoa. The final solution would be to amend the Malvatumauri Council of Chiefs Act, to give chiefs in Vanuatu the power to create bylaws and adjudicate matters according to custom.

There also remains the fact that these legal solutions are simply not enough to solve the problem that these custom institutions are facing. There has to be more awareness and a greater prioritisation of custom by the Government and public of Vanuatu.

The solutions discussed in this paper constitute only a few pieces of the puzzle; it is also not the perfect answer to the problem. However, if these solutions were to be implemented, it would be a

step in the right direction in trying to harmonise the state and custom systems and ensuring that the Malvatumauri plays a meaningful role in the application of custom within Vanuatu.

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