CHILD ADOPTION: A DILEMMA IN A PLURAL LEGAL SYSTEM: A CRITICAL COMMENT ON RECENT CASE LAW

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ABSTRACT

Inter-country adoption is almost certain to be contentious and present difficult cases for the courts to decide. This may be aggravated in plural legal systems where the court may have a number of avenues available when making a decision. While in some cases international law on inter-state adoption may be of assistance, if the jurisdiction in question is not party to any of the relevant conventions, the court may have to fall back on domestic law or general principles gleaned either from international law or prior jurisprudence. This article considers the judicial approach taken in the plural legal system of the Pacific island state of the Republic of Vanuatu, and argues that the case under scrutiny demonstrates the opportunities and challenges which confront judges when they have several options available to them as a result of operating in plural legal systems.

INTRODUCTION

I recently came across a case report from the Pacific island Republic of Vanuatu that illustrates the very real practical challenges of plural legal systems. Vanuatu, as some readers might be aware, was prior to independence governed by a bizarre, dysfunctional but unique Anglo-French condominium government. As a consequence, at independence both French and English laws were left in place as applicable laws in an interim period pending reform by the national legislature. Prior to independence, non-indigenous people, if not automatically brought within their own national French or British laws, were able to 'opt' for one or the other. Post-independence, it was made clear by the courts that the possibility of 'opting' was no longer available and that all laws governed everyone within the jurisdiction of Vanuatu equally. The new *Constitution* also provided that

> [u]ntil otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.[1]

Where there was a gap in the laws, Section 47(1) of the *Constitution* stated that '[i]f 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'.

Effectively therefore, custom got two bites of the cherry and became a source of pre-eminent resort where there was a lacuna in the law or there appeared to be a clash or potential conflict between introduced French and British law and indigenous law.[2] Added to this plurality at independence are the post-independence obligations of Vanuatu as a sovereign state under

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[1] Section 95(2).

[2] It might be argued that the reference in the Preamble to 'the establishment of the united and free Republic of Vanuatu founded on traditional Melanesian values, faith in God, and Christian principles' further reinforces the role of custom, although preambles generally do not have any force of law.

international law. In particular. for purposes of this comment, Vanuatu is not only a signatory state of the *United Nations Convention on the Rights of the Child* (UNCRC)[3] but has, exceptionally within the region, incorporated it into domestic law.

THE LEGAL FRAMEWORK

In Vanuatu, adoption is governed not only by formal law but also by customary law; both formal and customary adoption are recognised. Therefore, regardless of what the *Constitution* says, custom is already a source of law in respect of adoption in this jurisdiction. Balanced against customary or personal law is the law of the state, including the formal domestic law and international law. Thus, where litigating parties seek the assistance of the formal courts in regulating their family affairs—in this case the adoption of a child—the state is likely to assume a particular position to ensure that the adoption is in line with national and international law and policies regarding children. At a national level this requires that the state provide a procedural framework so that the parent(s) placing the child for adoption, and the adoptive parent(s), are protected by various safeguards designed to ensure that the actual and prospective parent(s) are fully aware of the legal significance of the process and are appropriately involved. At an international level, consideration might be given to the UNCRC and the *Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption*.[4]

THE CASE: *IN THE MATTER OF 'MM' AND IN THE MATTER OF CODE CIVIL ARTICLES 343-359 AND IN THE MATTER OF AN ADOPTION APPLICATION BY 'SAT'*. SUPREME COURT OF VANUATU, ADOPTION CASE NO 03 OF 2014

This case, argued before Mr Justice Stephen Harrop in the Supreme Court of the Republic of Vanuatu, raises a number of interesting points regarding the role of the court in plural legal systems and, in particular, whether the manoeuvrability which may be found within such systems is not itself rather problematic.

The case can be considered under the following questions:

1. What was the applicable law?
2. What judicial tools were available to the court?

The facts of the case were, in brief: the application by a single male, resident in New Caledonia, to adopt a ni-Vanuatu female child. The unmarried mother of the child consented as did her wider family, and satisfactory social welfare reports had been received regarding the prospective adoptive parent.

THE APPLICABLE LAW

In considering the applicable law, I propose to adopt a hierarchical approach, which itself is not unproblematic. In Vanuatu, the *Constitution* is the supreme law and various provisions of the *Constitution* were applicable here.

[3] 1577 UNTS 3 (entered into force 2 September 1990).
[4] 32 ILM 1134 (entered into force 1 May 1995).

First, one must consider the statement of fundamental rights, which include the rights not to be discriminated against on the grounds of sex and equal treatment before the law,[5] and imposes a duty on parents to provide for their children.[6]

Second, the *Constitution* provides in Article 47(1):

> 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.

Finally, as a statement of interim provision in Article 95, the *Constitution* states:

> (1) Until otherwise provided by Parliament, all Joint Regulations and subsidiary legislation made thereunder in force immediately before the Day of Independence shall continue in operation on and after that day as if they had been made in pursuance of the Constitution and shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution.
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> (2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.
>
> (3) Customary law shall continue to have effect as part of the law of the Republic of Vanuatu.

The reason for the latter provision is that both French and British law were in force in Vanuatu at the date of independence (1980) as a consequence of the Anglo-French Condominium government of the country. Prior to independence, French citizens were governed by French law and British citizens by British law. Others (excluding the indigenous population) could opt for the law of one or other of the metropolitan powers. The provision clearly envisaged that these colonial laws would be replaced by national laws in the years following independence. Thirty-four years later, however, the law on adoption has not been placed on the parliamentary agenda. Consequently, pre-independence laws apply, and it was this plurality which troubled the court. The English law, which had been held to apply in

[5] Article 5(1): 'The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health…'.

[6] Article 7(h): '[I]n the case of a parent, to support, assist and educate all his children, legitimate and illegitimate, and in particular to give them a true understanding of their fundamental rights and duties and of the national objectives and of the culture and customs of the people of Vanuatu'.

previous formal adoption cases, was the *Adoption Act 1958*.[7] The French law which applied was Articles 343–368 of the French *Civil Code*,[8] and *Law 66-500 11 July 1966*.

Before turning to this issue, however, there are other laws that need to be considered.

THE UNCRC

Vanuatu is a signatory to the *United Nations Convention on the Rights of the Child*, and has gone further than most Pacific island nations by incorporating this international convention into domestic law via the *Convention of the Rights of the Child (Ratification) Act*, Act 26 1992. Clearly this Act ranks below the *Constitution* in the hierarchy of sources, alongside other Acts of Parliament, but might arguably impact the interim arrangement provisions in Article 95 as reflecting the independent status of the country. If that were the case, the rights of the child, here 'MM', should be firmly placed in the foreground of any court decision.

In the context of adoption, Article 21 of the UNCRC states that:

> States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
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> (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
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> (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country or origin;
>
> (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
>
> (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
>
> (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

It is somewhat surprising in this case that virtually no reference was made to the UNCRC which emphasises the importance of ensuring that the best interests of the child are the paramount consideration in matters of adoption.[9] Though—unlike some Pacific island

[7] See for example, *In re Tyson Togomiro* [2013] VUSC 178; *In re Apunga, Application for Adoption* [2011] VUSC 42; *In re Denis Catting* [2010] VUSC 23; *In re Anita Dorren Leiman* [2009] VUSC 81; *In re Chelsea Lee* [2000] VUSC 22.
[8] For the law in translation see S. Farran, *A Digest of Family Law in Vanuatu* (2003) 90.
[9] Article 21.

constitutions—the Vanuatu *Constitution* is silent in respect of the status of international legal principles within the sources of law, it might have been argued that because these obligations have been assumed by the sovereign state of the Republic of Vanuatu, they rank above residual colonial laws.

THE 1993 HAGUE CONVENTION

The status of the UNCRC within the legal system of Vanuatu can be contrasted with the *Hague Convention on the International Adoption of Children*, to which Vanuatu is not a party and has not incorporated any of its provisions into formal law. *The Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption* adds weight to the protections afforded to children under the UNCRC and also those found in the *United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*.[10] The *Hague Convention* seeks to ensure that where inter-country adoption takes place, it does so in the best interests of the child and that children are protected from abduction, sale or trafficking. Its aims are to put in place safeguards and to encourage co-operation between states to ensure that these aims are met.

Although it might have been desirable that Vanuatu become a party to the Convention, UNICEF has made it clear that while it supports the *Hague Convention*, first and foremost national governments should bear responsibility for ensuring both the best interests of the child and assisting parents to raise their families so that, ideally, children can be left with the birth parent, or with the extended family, before being considered for adoption by non-kin or people from a different ethnic, cultural or racial group. While inter-country adoption is one care possibility, it should be one of last resort.[11] Clearly, in this case, these preferred possibilities had been explored and rejected.

Though Vanuatu is not a party to it, the *Hague Convention* has been considered by Vanuatu courts, most notably in the case of *In Re M* [2011] VUSC 16, which concerned the adoption of a slightly older female child by a couple in New Caledonia. Attention was drawn to the purpose of the Convention, which

> recognises that growing up in a family is of primary importance and is essential for happiness and healthy development of the child. It also recognises that intercountry adoption may offer the advantage of permanent family to a child for whom a suitable family cannot be found is his or her Country of origin. By setting out clear procedures and prohibiting improper financial gain, the Convention provides greater security, predictability and transparency for all parties to the adoption, including prospective adoptive parents. The Convention also establishes a system of co-operation between authorities in countries of origin and receiving countries, designed to ensure that intercountry adoption takes place under conditions which help to guarantee the best adoption practices and elimination of abuses.

The Supreme Court went on to hold that:

> While Vanuatu is not a signatory to the Hague Convention, it is still committed to the principles embedded in Article 21 of the Convention for the Rights of the Child when

[10] GA Res 41/85, UN GAOR, 95th plen mtg, UN Doc A/RES/41/85 (1986).
[11] UNICEF Press Centre, 'Intercountry adoption' (14 July 2014) http://www.unicef.org/media/media_41918.html (Accessed 18 December 2014).

> dealing with adoptions and, in particular, inter-country adoptions. That requires paramount consideration being given to the rights of the child in question. It is now well understood that those rights of the child can best be achieved by:
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> a. First considering national solutions – that is, the placement for adoption in the country of origin;
> b. Ensuring that the child is "adoptable";
> c. Ensuring that information about the child and his/her parents is preserved;
> d. Ensuring that the prospective adoptive parents are evaluated thoroughly by an independent, responsible and competent government agency in their country;
> e. Ensuring that the match of adoptive parents and child is suitable;
> f. Imposing additional safeguards where required;
> g. Ensuring that the placement in the foreign country will be monitored and generally supervised by a responsible and appropriate arm of that foreign country.

In the case of *Re M*, the application failed because of the lack of evaluation of the adoptive couple in New Caledonia and the absence of arrangements in place to meet guidelines d) and g). These facts are distinguishable from the case of *Re MM*.

CASE LAW

In the case under consideration, very little reference was made to the existing case law on adoption in Vanuatu or to case law which might have thrown some light on the interpretation of the British and French laws in force at the date of independence. In the case of the latter, this may be because there is some uncertainty as to whether this body of jurisprudence is part of the legal system of Vanuatu.

The relevant article refers to 'the British and French laws in force or applied in Vanuatu immediately before the Day of Independence' in the English-language version (Article 95) and 'les loi françaises et britanniques en vigueur aux Nouvelles-Hébrides au jour de l'indépendance in the French-language version (Article 93).

There are a number of issues related to this provision. First, there is no such thing as 'British' law, as the law of England and Wales is different from that of Scotland. The Scottish law on adoption in 1980, for example, was the *Adoption (Scotland) Act 1978*, not the *Adoption Act 1958*. Second, it is not clear if the plural 'laws' is merely linking French and British laws or is intended to encompass various forms of law; for example, legislation, regulations, statutory instruments, case law and so on. The French version refers to 'les loi'[12] suggesting plural to encompass 'French' and 'British', but singular in terms of 'loi' (law). Whether in the French version 'loi' is intended only to refer to written law and not 'la jurisprudence' (the decisions of the courts) is unclear. The English version is phrased somewhat differently and may be more general in scope:

> Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or

[12] Article 93(2) : 'Sauf décision contraire du Parlement, les loi françaises et britanniques en vigueur aux Nouvelles-Hébrides au jour de l'indépendance constituent à s'appliquer à compter de ce jour tant qu'elles n'auront pas été expressément abrogées et dans la mesure où elles ne sont pas incompatibles avec le statut d'indépendance des Nouvelles-Hébrides et avec la coutume'.

> incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.

If 'laws' includes case law, the following is of interest. Under Scottish law it has been held, albeit post-1980, that under the applicable 1978 legislation, '[a]n unmarried single person could apply for an adoption order (s.15(1)(a)) and the statute did not express any fundamental objection to an adoption by a proposed adopter living in a homosexual relationship'. *T, Petitioner* Court of Session (Inner House, First Division), 26 July 1996, [1997] SLT 724. Even if one dismisses the reference to a proposed adopter living in a homosexual relationship as indicating changing social trends and views in the 1990s, it is clear from the first part that a single person could adopt under at least one of the 'British' laws.

It is also clear from the provisions in Article 95 that a law may be incompatible although not expressly revoked. It has been argued elsewhere that the law on adoption in France and in Britain operated in a context completely distinct from that in Vanuatu, especially as regards the supporting frameworks for the operation of the law.[13] However, in this case the court held unequivocally that these metropolitan laws were not incompatible with the independent status of Vanuatu.

THE JUDICIAL TOOLS AVAILABLE TO THE COURT

The provisions of French and English law on adoption appeared to say different things. Under the English law, adoption of a female child by a sole male adopter was not permitted (Section 2(3)), apart from limited exceptional circumstances which did not apply here. The provisions of the French law did not discriminate on the grounds of sex, and indeed it would have been inconsistent had they done so given the guiding principles which underscored the Civil Code, of *liberté, egalité* and *fraternité*. The Code had, moreover, been supplemented by *Statut no 66-500 of 11 July 1966* and *no 76-1179 of 22 December 1976*. It is probable that these provisions affecting personal status were extended by metropolitan France to New Caledonia and from there to French citizens in what was then the Nouvelles-Hébrides. The only restriction appears to have been age by the time of independence, with adoption being restricted to those over 28 (Article 343-1CC). Indeed, Francoz-Terminal has expressed the view that Article 343-1 of the Civil Code allows a single person over the age of 18 to adopt, regardless of sex.[14]

Given the apparent divergence in the two applicable laws the first thing the court considered was whether the applicant, who was a French national, could opt for the matter to be determined under French law. Choice of law in plural legal systems, especially in family matters, is not unknown, and indeed in Vanuatu post-independence choice of law was being exercised by litigants or for them by the court.

It was not until the decision in *Banga v Waiwo* [1996] VUSC 5 that some clarification appeared to be given to the matter. It was held by Chief Justice d'Imecourt in *obiter dicta* that 'opting' was no longer an option. This was accepted in the later case of *Joli v Joli* (2003) VUCA 27. Strictly speaking, this was not entirely accurate. Parties could still opt for laws

[13] S. Farran, 'Child adoption: the challenges presented by plural legal systems of South Pacific island states' (2009) 21(4) *Child and Family Law Quarterly* 462.

[14] L. Francoz-Terminal, 'From same-sex couples to same-sex families? Current French legal issues' (2009) 21(4) *Child and Family Law Quarterly* 485, 496.

governing contracts. Not all laws applied, either then or today, equally to all people: for example laws on marriage, succession and on adoption, where customary forms predominantly apply to indigenous people.

The court in this case concurred with the no-opting approach, which meant that the court was faced with a plural regime governing adoption on the grounds that 'the previously-applied British and French adoption laws together form part of what may be called "the adoption law of Vanuatu". Neither has precedence over the other and they both apply to everyone' (Para 26). This led to considering the interpretation tools available.

Interpretation in Vanuatu is regulated by the *Interpretation Act* Cap 132 (1981). Section 8 of the Act provides that '[a]n Act shall be considered to be remedial and shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.' This, however, comes under the heading of Acts of Parliament and Statutory Orders, so it is questionable whether this specific rule applies to introduced, foreign law. However, the general application of the Act is broad and encompassing. Section 1 states:

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

Counsel for the state relied on the more general maxim *generalis specialibus non derogant*, whereby the general has to give way to the more specific, so in this case, French law should give way to English law. The authority proposed for this assertion was *Statute Law in New Zealand*[15] and *Statutory Interpretation in Australia*.[16] This interpretative principle has been referred to in passing by the court in Vanuatu,[17] and elsewhere in the region, but usually in the context of two provisions within the same statute,[18] although in Fiji it has been applied in the case of reading a general statute with a specific one.[19] To argue that this maxim is part of

[15] John Burrows, *Statute Law in New Zealand* (3rd ed 2003).
[16] D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* (6th ed 2006).
[17] See *Virelala v Air Vanuatu* [1999] VUSC 15, an employment case in which the principle was mentioned briefly by Acting Chief Justice Lunabek but found not to be applicable.
[18] 'If there is a conflict between a provision of an Act which is of general application and a specific provision of the same Act, the general provision gives way to the specific provision'. *Keil v Land Board* [2000] WSSC 41. 'The maxim *generalia specialibus non derogant* would seem peculiarly applicable: the broad generality of the opening sentence of the clause does not derogate from the special provisions'. *Wiebenga v 'Uta'atu* [2005] Tonga LR 28.
[19] 'I should say the Criminal Procedure Decree is a general statue. The Bail Act is a special statute. In Harlow v Minister of Transport [1951] 2 KB 98 English court applied that legal maxim of Generalia Specialibus non Derogant, that is General statue's provision does not override Special Statute's provision and, special statue's provision should prevail.' *State v Raqauqau* [2010] FJMC 174.

the law of Vanuatu, however, might be overstating the case. There is certainly no reference to it in the *Interpretation Act*.

Article 47(1) of the *Constitution* provides that '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'. In this case, however, the court held that this article did not apply because there was no gap in the law, but rather an internal conflict of laws, so substantial justice was not required. Instead the court referred to the constitutional provision under Article 95(2), that in respect of British and French law wherever possible custom should be referred to, and court instructed counsel for the state to seek the opinion of the Malvataumari (the National Council of Chiefs established under the *Constitution*) to provide advice on the matter.

Quite how the instruction was framed or indeed asked is not clear from the judgment. The straightforward question should have been 'does custom permit the adoption of a female child by an unmarried man?', which was the issue where there was conflict between French law and English law. What appears to have been asked must have been something different because the response which came back from the Malvatumauri suggests that this was not the question which was asked, or that if it was, it was elaborated upon. The response from the Malvatumauri was that custom did not allow or approve of same-sex marriage—a non-sequitur if ever there was one. Reporting the response of the Council, it was stated:

> The President says that based on custom, Christian principles and sustainability of clans/tribes to continue, the Malvatumauri resolved at its 17 October 2013 meeting that it did not agree with same-sex marriage in Vanuatu and that marriage is between a man and woman only. He then says: "Therefore the adoption of a ni-Vanuatu child by a gay person is not tolerable because it could cause moral impacts on the child concerned because of the situation of same sex household or marriage does not suit the context of social living in Vanuatu". (Para 52)

What this response *might* have been relevant to had the question been asked, was whether custom had any view on what was in the best interests of the child if the adoptive parent was in a same-sex *de facto* relationship. No secret had been made in court that the proposed adopter, SAT, was in a same-sex *de facto* relationship in New Caledonia, where such relationships are lawful, nor that the assessment of SAT as a potential adoptive parent was made against this context. However, the adoption was made by a single male to adopt a female child.

Pacific island countries remain extremely intolerant of same-sex relationships.[20] Homosexual conduct is widely criminalised and indeed it is only in Fiji, as the result of presidential

[20] George, for example writes 'Homophobia remains a powerful feature of political and religious rhetoric.' Nicole George, 'In sickness and in health' in N. Besnier and A. Alexeyeff (eds), *Gender on the Edge, Transgender, Gay and Other Pacific Islanders* (2014) 293, 294. George also points out that gay rights advocacy takes place against 'a backdrop of religious conservatism and ethno-nationalism'. Ibid 293. In the same collection Teresia Teaiwa writes, 'Attitudes towards homosexuality are marked by ambivalence and antipathy'. Teresia Teaiwa, 'Same Sex, Different Armies: Sexual Minority Invisibility among Fijians in the Fiji Military Forces and British Army' in N. Besnier and A. Alexeyeff (eds), *Gender on the Edge, Transgender, Gay and Other Pacific Islanders* (2014) 268. See also Tracey McIntosh 'Words and worlds of difference: Homosexualities in the Pacific' (Sociology and Social Policy Working Paper Series 3/99, University of the South Pacific 1999), and Nicole George, 'Contending Masculinities and the Limits of Tolerance: Sexual Minorities in Fiji' (2008) 20 *The Contemporary Pacific* 163–189.

decree, that homosexual conduct between consenting adults has been de-criminalised. The attitude of the Malvatumauri is not, therefore, in itself surprising, although quite what set of factors had prompted it to make such a resolution in 2013 is unclear. However, the spectre of same-sex marriage is raised in the context of various proposed or suspected law reforms ranging from wholesale reform of family law (see the outcry in Fiji prior to the *Family Law Act*) to laws to address domestic violence. Furthermore, the rise of Christian fundamentalism in the region and its integration into claims of custom engenders an increasingly intolerant, illiberal context for the advocacy of minority group rights—or, in some circumstances, women's rights.[21] Ironically, negative attitudes to same-sex relationship evidenced by the Malvatumauri are a further legacy of colonial encounters made concrete in the criminal law introduced into the region and the religious doctrine of missionaries, and there is some evidence to suggest that pre-contact various forms of homosexual and homo-erotic conduct existed in traditional societies. It is possible that some forms of this continue, for example, in initiation and grade-taking ceremonies.[22]

WAS THE COURT BOUND BY THE STATEMENT OR OPINION OF THE MALVATUMAURI?

Counsel for the applicant argued that because there were laws in force, custom should not apply. The court disagreed and held that after independence French and British laws continued to apply *only* on the basis that, wherever possible, due account is taken of custom. This is a sweeping statement. Considering that not all areas of activity of the newly independent state, and certainly today, were not governed by custom, this interpretation would create considerable gaps in the law if applied rigorously.

The court admitted to adopting a pluralist approach. It cited with approval the previous case of *Montgolfier v Gaillande* [2013] VUSC 39, in which a pluralistic approach had been adopted, and although the case had subsequently gone on to appeal, the pluralist approach had not been criticised. But what does this pluralist approach mean? Justice Sey in *Montgolfier* had explained this to mean applying 'both the Common Law and French Civil Code as and when necessary'. Leaving aside the confusion introduced by Justice Sey's reference to the 'Common Law'—which potentially encompasses more than the law of England and Wales and could embrace the whole of the common law world—this explanation does not really clarify what this pluralistic approach means.

If a truly pluralistic approach were adopted, it should admit a normative heterogeneity permitting different ways of seeing and doing within the same field of focus. Indeed, a feature of legal pluralism is that it precisely does *not* assume that law and legal institutions are dominated by one paradigm of thought, but that rather that the law should reflect and

[21] George, for example, has highlighted the role of the Methodist church in Fiji as 'a vocal opponent of gay rights groups' and points out that gay rights advocacy takes place against 'a backdrop of religious conservatism and ethno-nationalism. George, above n 19, 293. Manfred Ernst points out that new religious groups in the Pacific tend to import fundamentalist and right-wing agendas almost wholesale from the United States, including opposition to abortion, feminism, trade unionism and sexual minority rights. Manfred Ernst, *Winds of Change: Rapidly Growing Religious Groups in the Pacific Islands* (1994) 272. See also Christine Stewart writing about PNG: '[R]ecent times have seen a significant spread of charismatic and fundamentalist forms of Christianity'. Christine Stewart, 'On the Edge of Understanding: Non-Heteronormative Sexuality in Papua New Guinea, in N. Besnier and A. Alexeyeff (eds), *Gender on the Edge, Transgender, Gay and Other Pacific Islanders* (2014) 323, 337, 338. See generally Matt Tomlinson and Debra McDougall (eds), *Christian Politics in Oceania* (2013).

[22] Aldrich Robert, *Colonialism and Homosexuality* (2003); Gilbert Herdt, *Ritualised Homosexuality in Melanesia* (1984).

incorporate the complex and diverse patterns of societal norms. Clearly in Vanuatu adoption is a social field in which 'behaviour pursuant to more than one legal order occurs'.[23] Griffiths's social-scientific theory of legal pluralism is founded on the observation that 'social action always takes place in a context of multiple, over-lapping "semi-autonomous" social fields, which it may be added, is in practice a dynamic condition'. Not only are there different applicable laws but also different forms of adoption, which, in the case of customary adoption, is further pluralised by the diverse forms of customary law.

It is also clear that the courts themselves adopt differences of approach in terms of rigour of scrutiny when dealing with adoption. Not only are there procedural differences, but individual dimensions are afforded different weight depending on the ethnicity and place of residence of the prospective adopter, as well as possibly issues of age, health, wealth, and in this case at least, sex. The weighting may be influenced by where the focus lies on the normative hierarchy. These factors might include the opinions of experts, the structure of the receptor family, the material, cultural, religious or other benefits which may be offered to the child. A truly pluralistic approach should be conscious of these elements identifying hybrid legal spaces in circumstances where 'multiple normative systems occupied the same social field'.[24]

This use of a pluralistic approach implies a degree of creativity rather than a mechanistic approach to the plurality on offer.

If the pluralistic approach referred to is simply that the court looks as a raft of laws pertaining to the same matter—here, adoption—it will not assist the court very much. Some mechanism for selecting the preferred option will still be needed. Alternatively, does this approach mean that the court can impose its own preferred hierarchy of laws within the parameters of manoeuvrability created by this legal pluralism? If that is so then a number of legal consequences flow from the decision. First, statements of custom from a non-elected, non-judicial body, the Malvatumauri, acquire the force of law through the doctrine of precedent adopted in Vanuatu. Second, at least in this case, declarations of custom trump French law (or indeed English law) still in force where there is lack of specificity to deal with the matter before the court or where there is recourse to Article 95 or possibly Article 47. Third, custom may trump or gloss international obligations, here incurred under the UNCRC. 'Glossing' the UNCRC or any other international treaty so as to give it local resonance may not, in itself, be a bad thing, and might make such international obligations more acceptable or palatable in country. Equally, however, this process could have adverse consequences and undermine the protections that instruments, such as the UNCRC, are meant to afford. In the case of children in the Pacific this could be a very real problem. Custom is not always kind to children, especially the girl child.

In order to admit the opinion of the Malvatumari the court had to look beyond the formal adoption application before it and examine the whole family context of the proposed adoption. Arguably, by doing this the court presented itself with a situation which was not governed by either the applicable French law or English law: does the law permit a single man in a de facto same-sex relationship to adopt a female child? If the court were going to do so why not consider a broader spectrum of interpretation relating to placing children in same-sex households? For example, subsequent case law on the French law on adoption has held

[23] J. Griffiths, 'What is Legal Pluralism?' (1986) 18 *The Journal of Legal Pluralism and Unofficial Law* 1, 2.
[24] P.S. Berman, 'The new legal pluralism' (2009) 5 *Annual Review of Law and Social Science* 225.

that the court cannot discriminate against potential adoptive parents on the grounds of their sexual orientation (*EB v France* (2008) Eur Court HR (Application No 43546/02)).

These changes have, of course, come too late to be part of the law introduced in Vanuatu and existing at the time of independence. The court was at some pains to point out that the non-discrimination provisions found in the *Constitution* referred to sex, not sexual orientation.

Nevertheless, given that the court was asking itself a question which was not the exact question posed by the diverging approaches of the existing colonial laws, there was the opportunity to hold that there was indeed a gap in the law and the guiding principle should have been to achieve substantial justice in line with Article 47(1). In fact, the court adopted a very narrow view of 'substantial justice', holding that this should be understood to mean 'an approach which leads to consistency of outcome'. I would suggest that this interpretation is flawed. The term 'substantial justice' brings together two elements: 'equity' from the common law, and the underlying fundamental principles of the civil law, both of which are directed at achieving justice in individual cases, not in shoring up the rule of precedent. Indeed, the law of precedent is not part of the French law that was brought to the table when the *Constitution* was being drafted. Both allow a degree of discretion to judges to ensure that the law remains relevant and fair.

A better approach might have been to ask how was the court to achieve substantial justice and for whom? In this case surely, the answer was 'the child'. The best interests of the child, informed by the provisions of the UNCRC and the case law of the Vanuatu courts in which this has been considered, would have required the court to first see if MM could be adopted within the country. Evidence was presented showing that no members of the extended family could or would adopt her and, as there are no formal adoption agencies in Vanuatu, there was no other avenue to be explored on this count.

Failing this, the court should have considered what was in MM's best interests. Her situation was dire. Her mother had no support from the child's father, having had the child while still herself a child; was single, young, unemployed and destitute, being totally dependent on the goodwill of relatives. She was living in a household of sixteen of whom only one was working. SAT, on the other hand, had obtained the requisite social welfare and psychologist reports and appeared to be able to offer MM a secure future in a domestic setting in which she would have female siblings through adoption. The fact that the reports of experts were available both from New Caledonia and in Vanuatu should have been given more weight by the court because this type of evidence is frequently not available in inter-country adoptions in the region and their existence often depends on the goodwill and efficiency of the receiving country, i.e. that of the adopter. Their significance is particularly important if the court is to act in the best interests of the child where countries are not parties to the *Hague Convention on Inter-Country Adoption* and in light of the guidelines set out in *In Re M*.

In the wider context of putting the child first, the decision of the court is disappointing. The court not only went beyond the formal application and admitted matters that arguably it was not required to do, but also applied in-country prejudices and values to a situation which was perfectly lawful in the country where MM, had the adoption been successful, would have been brought up. In the context of the actual case it is very sad. What will the future hold for MM? Will she have enough to eat or will she be able to go to school? Teenage pregnancy and children born out of wedlock are increasingly common in the region. While the extended family might try to do their best, often these children are an unwelcome burden on limited

resources. Girl children are particularly vulnerable to abuse, either through the burden of domestic and other labour imposed on them, or more seriously, sexual assault including incest and rape.

In this case, the plural legal regime pertaining to adoption in Vanuatu placed the court in the position where it had a number of options available. It claimed to use a 'pluralist approach' without specifying what that meant. Clearly the selection of judicial tools when several are available is crucial to the outcome. Effective judicial ruling on a plural legal situation may modify or remove that plurality especially if the common law rule of *stare decisis* is followed. In systems where the context of the law is conservative, and made more so by appealing to traditional authorities outside the legal system, reducing the possibilities to manoeuvre within the law may have negative consequences for the parties in the instant case and also restrict the possible options for future litigants.