Journal of South Pacific Law

TWO RECENT CASES OF ABUSE OF CHIEFLY POWERS IN VANUATU

DON PATERSON*

INTRODUCTION

For many years there has been much discussion about the role of custom in the legal system of Vanuatu. Article 95(3) of the Constitution states "Customary law shall continue to have effect as part of the law of the Republic of Vanuatu".[1] This does not expressly state, however, what the relationship of custom is to the other components of the legal system: Does custom override the laws which article 16 of the Constitution states that the Parliament of Vanuatu may make?[2] Does custom override, or is it subordinate to, British and French laws that Article 95(2) of the Constitution states "shall continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking account of custom"?[3]

In late 2015 two incidents occurred in two different islands of Vanuatu, Tanna and Pentecost, that raised such questions. Both cases involved the forcible expulsion of people from their homes in custom villages upon the orders of custom chiefs. The chiefs who had ordered and taken a leading role in these forcible expulsions were charged with offences under the Penal Code, such as inciting criminal trespass and malicious entry of dwelling houses. The prosecutions of both cases commenced before the Supreme Court of Vanuatu in 2018. But from then on the similarities in the two cases ceased, and each case took a different path.

*Emeritus Professor, School of Law, University of the South Pacific.
[1] Article 95(3) of the *Constitution of Vanuatu* 1980.
[2] Article 16 of the *Constitution of Vanuatu*: "Parliament may make laws for the peace order and good government of Vanuatu"
[3] Article 95(2) of the *Constitution of Vanuatu*

In one of these cases, the Pentecost case[4], the chief took a commanding position and claimed that since he was exercising customary powers as a custom chief, the courts of the State had no jurisdiction over his actions. He supported these claims by refusing to perform any customary conciliation with the victims of his actions and by insisting that he must appear before such Courts in his custom dress. The custom dress disturbed the first judge before whom the chief appeared, and he was sentenced for contempt of court which captured the attention of local media, and even international media. But the second judge who was assigned to deal with the case was not perturbed, and the chief was permitted to appear in any costume that he wished provided that it was not indecent. The trial proceeded, and the Supreme Court convicted the chief of most of the offences of which he was charged, and sentenced him to imprisonment for 3 years and 9 months, which was not suspended. The chief did not accept this decision and appealed to the Court of Appeal where he repeated his defense that his actions as custom chief were not justiciable by courts of the State. The Court of Appeal rejected this defense, and upheld both the conviction and the unsuspended sentence.[5]

In the other case, the Tanna case[6], the two chiefs took a more conciliatory position, and did not claim that their actions in directing their followers to eject the villagers from their homes were not justiciable by courts of the State as offences under the Penal Code. They also made customary conciliation with the families who had been ejected from their homes. The Supreme Court convicted the chiefs of most of the offence of which they had been charged, and sentenced them to 9 months imprisonment, which was suspended for 3 years. The chiefs accepted this verdict and did not appeal to the Court of Appeal.

From a legal point of view, the most interesting case was that of the Pentecost chief, because it confronted head on in both the Supreme Court and the Court of Appeal, the legal issue of the role of custom in the legal system of Vanuatu, and enabled the two Courts to give very authoritative rulings upon the relationship between article 95(3) and article 47(1)

[4] *Public Prosecutor v James* [2017] VUSC 191.
[5] *Public Prosecutor v James* [2018] VUCA 44.
[6] *Public Prosecutor v Kaper* [2018] VUSC 169.

of the Constitution, and to make it very clear that custom cannot over rule the written law of this country as contained in legislation and the Constitution.

THE TANNA CASE

Facts of Tanna case

On 13th November 2015 some 19 men, armed with bush knives, axes, stones and sharpened pieces of wood, forcibly entered the houses of five families living in Louanpakal village North Tanna, removed all their belongings and then boarded up the houses so that the families could not return into their houses. This eviction was carried out upon the instructions of three chiefs who said that they had given instructions to their family members that this eviction was to be carried out.

The evicted families fled into the bush where they lived and scavenged for several weeks. Some were able to find refuge in the homes of relatives. After several months and the conduct of custom reconciliation ceremonies the families were allowed back into their homes in Louanpakel Village.

Trial of Tanna Case

The trial of the chiefs and their followers was held on 20 August 2018 where the chiefs pleaded guilty to offences of inciting and soliciting criminal trespass and malicious entry of dwelling houses, and their followers pleaded guilty to carrying out these offences. On 24 August 2018 the chiefs were sentenced to 9 month's imprisonment suspended for three years, and their followers were sentenced to 3 years imprisonment, also suspended for 3 years.

In the course of his judgement the Judge, Fatiaki J, made the following statement:

> *"The two (2) defendant chiefs confirm the performance of several custom reconciliation ceremonies to the complainants in December 2017 and June and July 2018. Both chiefs are highly regarded within the North Tanna*

communities and each possesses "... a lot of traditional knowledge". However, they both profess to having little knowledge of Vanuatu laws and both claim to be unaware that their decisions and orders involved the performance of illegal/criminal offences. Both say that "... the main contributing factor to the offences was the land dispute between (unidentified) parties". Both claim that the (unexplained) land dispute was resolved by the Tanna Chiefs Council but the complainants reneged on the agreement to share the (unidentified) properties on the disputed land. Both chiefs expressed to the probation officer their desire and "... ambition in life is for his community to be united and have peace and live a good life". If I may say so such honorable sentiments and hopes are what is expected of all chiefs in Vanuatu but the way to achieve it is by the exercise of wise counsel, lawful advice, and persuasion. A united and peaceful community cannot be achieved by taking the law into your own hands and inciting violent and unlawful behavior from your tribesmen and members of the community. Your power and influence as chiefs of your people and communities must be exercised with restraint to do good and to prevent wrong-doing and lawlessness which is the very opposite of the peaceful community that you hope for your people. Remember also that the law exists for all and there are lawful processes and procedures for the resolution of all problems in Vanuatu society including for land disputes. I accept and respect the role of traditional kastom chiefs in resolving disputes and in maintaining peace in rural village communities but, equally, the written laws of Vanuatu which includes the Penal Code, exist to guide and help all people to live peacefully and free. It protects both the victim and the offender equally and provides an avenue for calmly addressing grievances and resolving disputes after hearing all sides. Given the prevalence and frequency of this type of group-offending being instigated and incited by customary chiefs, the time is fast-approaching when deterrent immediate custodial sentence will be imposed on the chiefs who must bear the greater responsibility for such offences. In considering the appropriate sentence for each category of offender, I am guided by the maximum sentences provided in the Penal Code or Criminal Trespass the law provides a maximum penalty of imprisonment for 1 year. For the offence of Threats to Kill a maximum penalty of 15 years imprisonment and for Unlawful Entering a Dwelling House imprisonment for 20 years where the home is used for human habitation as in this case. Malicious Damage to Property carries a maximum penalty of imprisonment for 1 year or a fine of VT5,000 or both and Inciting and Soliciting the commission of an offence

> *is punishable according to the offence incited which in the present case is the unlawful entering into the dwelling houses of the 5 complainants and removing all the contents therefrom. There is not the slightest doubt in my mind that the involvement of the three (3) chiefs was pivotal in the commission of the offences and indeed, I am convinced that none of the offences would have occurred had it not been for their instigation and incitement. It should not be necessary for the court to say that traditional chiefs wield extra-ordinary powers and influence in a traditional and rural village setting and, as with all power, it is capable of being directed towards doing good or towards evil and wrong-doing. The blind unquestioning obedience of tribal members to a chiefly edict/decree places an enormous burden on chiefs to ensure that the decisions and orders they issue to their followers is reasonable and lawful at all times and does not provoke a breach the laws of the land which applies to all inhabitants of Vanuatu from Torba to Tafea. The law also exists for the guidance and protection of all members of society and applies equally to all including traditional kastom chiefs and their people."*[7]

THE PENTECOST CASE

Facts of Pentecost Case

This case arose out of the actions of a chief, Vira Leo, of north east Pentecost Island. Around December 2010 a customary ban or tabu had been placed upon the collection of fish in an area of the sea near Nageha Village. Chief Vira Leo, who is chief of Lavatmaguemu Village, had been involved in the placing of the ban, although this village was not under his control, but was under the control of another chief. On or about 10 December 2015 two men took some sea urchins from near the banned area.

When Chief Vira Leo heard of this, he ordered that the two men appear before him. They did so, together with a tusked pig which they presented to him by way of apology. The chief responded by shouting at them, punching one of them, and then picking up a

[7] *Idem*, paras 20-27.

piece of wood as a weapon and chasing them, and telling them that if they and their families were not out of the village by nightfall, he would shoot them.

Following this announcement, Chief Vira Leo, together with some followers, started attacking houses in Nageha Village, and throwing their contents outside, and they also attacked the church of the village, whilst the Chief continued with his threats to shoot the two men. Accordingly, the two men and their families fled to a neighboring village. The next morning Chief Vira Leo returned to the village, this time with burning branches, and set fire to seven houses. The terrified villagers, some 32-35 people, young and old, fled into the bush where they had to scavenge to survive, and their condition was worsened by the weather which deteriorated and made matters much worse for them.

These events were reported to the police, and with their support, the villagers were able to return to their villages and destroyed homes. Ultimately the Chief Vira Leo was charged with 44 allegations of criminal offences, and eight of his followers were also charged with a number of offences.

Preliminary skirmish – custom dress in Court

The proceedings against Chief Vira Leo and his followers did not begin on a very happy note. When the judge, Chetwynd J, entered the courtroom to hear whether the defendants would plead guilty to the offences for which they were charged, he was startled to find that all nine defendants were dressed in custom dress. He took this to be a sign of disrespect to the court, and even defiance of its jurisdiction, and adjourned the hearing until 26 October 2016 to enable them to dress more appropriately and he warned them that he would find them guilty of contempt of court if they continued to wear custom dress. When the hearing opened on 26 October 2016, the judge was very cross indeed to find the defendants still in custom dress. He refused to hear them enter pleas for themselves because they were in contempt of court, and instead he entered pleas of “not guilty” for all of them, and then remanded them in custody until the trial date which he fixed at 6 March 2017. Chief Vira Leo stood up and started to speak. The Daily Post newspaper then records that the Judge became furious with the disrespect the Court was getting, stood up, and

pronounced that the court was adjourned while already on his way to slam the door behind him and left.[8]

During 2017, occurred the trials of the eight followers of Chief Vira Leo, who all changed the pleas that had been entered for them and pleaded guilty to the charges. Four were sentenced by Chetwynd J, and then, when he left the country, the remaining four were sentenced by Wiltens J, who then became responsible for conducting the trial of Chief Vira Leo which was set down for 22-24 May 2018. At the pre-trial conference, Chief Vira Leo maintained his desire to wear traditional dress. This did not cause the affront to Wiltens J that it had to Chetwynd J, and the Chief was told that "he could dress as he liked at the trial, subject to his attire being respectful and not indecent".[9] Accordingly, the Daily Post reported: "Chief Viraleo Boborenvanua was finally allowed into the Supreme Court with his indigenous attire on May 21, 2018 to enter his plea – not guilty".[10]

Trial – jurisdiction of Court

The trial of Chief Vira Leo proceeded and it soon became apparent that the chief's defence was that what he was doing was administering a customary punishment to people who had acted in breach of a customary tabu placed over the sea near Nageha Village, and that this customary punishment called "leodingvuha" was not something that was within the jurisdiction of the Supreme Court to deal with, and that it should be dealt with only by custom.

The counsel for Chief Vira Leo relied upon article 47 of the Constitution which states: "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 issue according to substantial justice and whenever possible in conformity with custom".[11]

[8] *Vanuatu Daily Post*, 26 October 2016, 1.
[9] *Public Prosecutor v Leo* [2018] VUSC 75, para. 2.
[10] *Vanuatu Daily Post*, 24 May 2018, 3.
[11] Article 47 of the *Constitution of Vanuatu.*

But Wiltens J held that this Article makes it clear that custom is subordinate both to the law and also to substantial justice:

> *"I fully accept that if there were no rules of law applicable, then the Supreme Court would need to determine the case according to substantial justice. That is not the case here. Customary considerations would only be a factor in the Supreme Court's consideration if there were no rules of law applicable to what it was determining, and if it were possible to determine the matter on the basis of substantial justice. It is at that point that customary considerations would come into play, such that, if possible the Court's determination on the basis of substantial justice would also conform with custom. Of the three bases on which the Court must make a determination, customary considerations are the least significant or compelling. The most compelling basis requires the Court to determine the matter in accordance with law; if no rules of law are in place, then the next basis of determination is substantial justice. If the matter is to be determined on the basis of substantial justice, it is only then, if possible, that conformity with custom is to be considered. The Constitution applies to Chiefs as much as to other citizens in – as do the provisions of the Penal Code- see section 1".*[12]

Accordingly, Wiltens J held on 28th May 2018 that the Supreme Court had jurisdiction to deal with any actions which were regulated by the legislation of Vanuatu, even although they might also be subject to customary rules, and in dealing with such matters the Court should apply first the law of the country, before considering substantial justice or custom. The judge concluded: "The preliminary submission that the Supreme Court has no jurisdiction to hear this criminal trial is rejected. The invitation to refer the case to 'Custom jurisdiction' is declined. The trial will continue in the Supreme Court at Dumbea, 9am on 22 October 2018".[13]

[12] *Public Prosecutor v Leo*, above n9, paras 30-32.
[13] *Idem*, paras 39, 40, 41.

Trial, Verdict, Sentence

A report of the trial does not seem to be recorded in PacLII, but subsequent recorded proceedings indicate that on 21 December 2018 Chief Vira Leo was found guilty by Wiltens J of 39 of the offences charged.

On 22 February 2019, Wiltens J sentenced the chief in respect of these offences. The judge adopted a starting point of 7 years which was 1 year longer than the sentence that the chief supporter of Chief Vira Leo had received earlier. Then the judge deducted 18 months for the Chief's clean record; 18 months for the Chief's genuine belief that he was entitled in custom to inflict such discipline; and 3 months for custom reconciliations which the chief had undertaken with other chiefs and villages on Pentecost Island (but not Nageha Village which had suffered so much from his actions, although that was promised for the future "when the time is right.").[14]

Wiltens J then considered whether all or any part of that sentence should be suspended, and concluded: "I am unwilling to exercise my discretion in Vira Leo's case. The offending is just too serious, and there is a distinct lack of any remorse shown. In my view the issue of parity with the others also precludes such lenience".[15] So the Chief was sent at once to prison to begin his sentence.

Appeal against Conviction

Chief Vira Leo appealed against both his conviction and also the sentence, and the judgment of the Court of Appeal is recorded as *Leo v Public Prosecutor* [2019] VUCA 50.[16]

As regards the conviction, only one ground of appeal was relied upon by counsel for Chief Vira Leo: "That the Judge erred in fact and in law when he failed to find that the appellant was acting in accordance with customary law which took precedence over the

[14] *Idem*, paras 28-31.
[15] *Idem*, para 35.
[16] *Leo v Public Prosecutor* [2019] VUCA 50

Penal Code".[17] The Court of Appeal, like the Supreme Court took the words of Article 47(1) as their starting point, and agreed with the Supreme Court about the effect of those words as regards custom: "We agree with the prosecution submissions that 'custom' and 'customary law' are subservient to the Constitution and legislation enacted by Parliament. Customary law cannot be inconsistent with the Constitution and legislations enacted by Parliament. Customary law only applies if there is no rule of law applicable. We endorse the statement made by the learned judge in his judgement in Public Prosecutor v Leo [2018] VUSC 75".[18] The Court then repeated the passage from the judgment of Wiltens J that has been quoted earlier in this article.[19]

The Court of Appeal also added its endorsement of words spoken by a former Chief Justice of Vanuatu, Cooke CJ, and by Downing J in earlier cases: "We further agree with the statement made in *PP v Georges Lingbu*[20] where Chief Justice Cooke held that unfamiliarity with the Constitution was no excuse and that customary law applied only to matters not covered by the Constitution or the Penal Code, and in *PP v Kota*[21] where Justice Downing made several pertinent comments as follows: '….I think that the Chiefs must realise that any power they wish to exercise in custom is subject to the Constitution of the Republic of Vanuatu and also subject to the Statutory Law of Vanuatu……this has arisen again from the fundamental misunderstanding of the constitutional rights by Chiefs together with those around the Chiefs, whether they be assistants or members or committees of the communities' ".[22]

The Court of Appeal concluded: "For the foregoing reasons we agree with the submission of the Public Prosecutor that the appellant has not established any error that goes to his convictions. Accordingly, this part of his appeal fails and is dismissed".[23]

[17] *Idem*, para 8.
[18] *Idem*, paras 12-13.
[19] *Idem*, para 13.
[20] *PP v Georges Lingbu* App Case 3 of 1983.
[21] *PP v Kota* [1993] VULaw Rp 7.
[22] *Leo v Public Prosecutor*, above n16, para 14.
[23] *Idem*, para 15.

Appeal against Sentence

As regards the appeal against sentence, the Court of Appeal was equally unresponsive: "We consider this end sentence [of 3 years and 9 months imprisonment] is proper taking into consideration the fact that the deductions allowed for mitigating factors were very generous. The Court should not interfere with it".[24]

As to whether any or all of the sentence should be suspended, the Court said:

> *"We consider the provisions of section 57 of the Penal Code. In this case, in view of the nature of the crimes, the particular circumstances of these crimes and the character of the offender, we consider that the learned Judge was right in refusing to suspend the sentence. In our opinion the appellant failed to show that the learned Judge erred in applying his discretion not to suspend the imprisonment sentence. In our view, custom chiefs who incite, solicit or encourage other people, including their followers, to participate in the commission of serious crimes and/or they are also active participants of those crimes, must go to prison".*[25]

Two unanswered questions of fact

Although there is no doubt at all about the decision of the Supreme Court and the Court of Appeal as to their decisions and the grounds for those decisions, there remains some uncertainty about two factual aspects of the case. These are not significant, because even if both of them were resolved in favour of Chief Vira Leo, they would not cause any change to the decisions of the Courts. But for those readers who like to have all loose ends neatly tied up at the end of a case, these undetermined aspects are a little unsettling.

First, who placed the custom ban or tabu against catching fish in the sea near Nageha Village, and was it valid in custom? The statement of facts that was adopted by both the Supreme Court and the Court of Appeal stated that a customary ban or tabu was placed against swimming and fishing in the sea near Nageha Village, and that Vira Leo "played a part in imposing that ban., even though Nageha Village had its own chief, and

[24] *Idem*, para 19.
[25] *Idem*, para 19-20.

Vira Leo had no express authority over the area in question nor the consent of members of the village to impose a ban. There had been no prior consultation".[26]

It is unclear from these passages as to precisely what role Chief Vira Leo played in respect of this ban. Was he solely responsible, in which case, since he was not the chief of Nageha Village and had no consent from the chief or members of Nageha Village, was it a valid ban in custom? This is a question which the report of the judgment of the Supreme Court and the judgment of the Court of Appeal, at least as recorded in PacLII, provide no clear answer.

Second, did the two men in fact breach the ban or tabu, or did they in fact not breach the ban or tabu? The report of the judgment of the proceedings in the Supreme Court states:

> *"The taboo was in relation to fishing according to Harry Loloi, and swimming and fishing according to Hopkins Binihi. They were said to have broken the ban on or about 10 December 2015 by taking sea urchins or beche de mer. Both denied that in evidence before me -they told me they had been swimming but in an area outside the banned area and while they did take beche de mer, it was from a permitted area".*[27]

It seems from this passage that the two men were in fact not in breach of the ban imposed upon fishing and/or swimming in the sea near Nageha Village. But both judgments indicate clearly that the men decided to apologise and present a tusked pig: "The two villagers decided to apologize, with a tusked pig, and went to see Vira Leo in person".[28] If the two men did not breach the ban then why did they apologise with a tusked pig? Was this an acknowledgement of guilt, or merely an attempt to placate an over–irascible neighbour?

The remainder of the judgments do not make clear whether the men did, or did not, breach the ban, so this must remain a mystery, but even if one assumes that they did breach

[26] *Public Prosecutor v Leo* [2019] VUSC 11, para 9; *Leo v Public Prosecutor*, above n16, para 4 (i).
[27] *Public Prosecutor v Leo*, above n26, para 10. The same passage is repeated in the judgement of the Court of Appeal: *Leo v Public Prosecutor*, above n16, para 4 (ii).
[28] *Public Prosecutor v Leo*, above n26, para.11; *Leo v Public Prosecutor*, above n16, para 4 (iii).

the ban, the punishments rained down upon them by Chief Vira Leo were clearly excessive and illegal.

The Effect of Article 95 of the Constitution

Article 95 of the Constitution of Vanuatu is often regarded as a strong indication that customary law is alive and well in Vanuatu, and it was strongly relied upon by counsel for Chief Vira Leo at the forefront of his argument for the appeal from conviction. But the way in which both the Supreme Court and the Court of Appeal interpreted and applied article 95 shows that that Article is much less significant than many assume. Article 95 (3) reads as follows: "Customary law shall continue to have effect as part of the law of the Republic of Vanuatu".[29] The Court of Appeal made it clear that this section is to be read in conjunction with Article 47 (1) of the Constitution which states: "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 applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom".[30]

As a result, customary law can only be applied if there is no rule of law available, and if the customary law is in conformity with substantial justice.[31] The Court of Appeal also endorsed the following statement by Wiltens J in the Supreme Court about the effect of Article 95 - it neither diminishes nor increases the role of customary law in the legal system of Vanuatu:

> *"Article 95 of the Constitution was inserted into the document to deal with transitional matters. What it plainly says is that customary law will continue to have effect as part of the laws of Vanuatu. Pre-independence, customary law played a relatively minor part in the way the laws were administered. Some thirty-eight years later, that continues to be the position. Article 95 was not ever intended to give greater prominence to customary considerations- just to maintain the status quo. There has been no*

[29] Article 95 (3) of the *Constitution of Vanuatu*.
[30] Article 47(1) of the *Constitution of Vanuatu*.
[31] *Leo v Public Prosecutor*, above n16, para 12.

> *diminution of significance, neither has customary law taken on added significance, except in one area and that relates to ownership and use of land. Had Parliament wished, customary law in the area of alleged criminal misconduct could also have been devolved to the Chiefs – that has not occurred. There cannot be a clearer message of Parliament's intent than 38 years of silence in the face of many calls for change"*[32]

An unanswered question of law

Without wishing to prolong the patience of the reader of this article, I feel that I cannot let this discussion of the decisions of the Courts in the Pentecost case go without drawing attention to an issue which was not directly answered by these Courts, viz what is the relationship between custom and the common law? In the two cases discussed in this article there was a conflict between legislation (the Penal Code) and custom, and the Courts held that the term "law" in Article 47 includes legislation and the Constitution. The following passage is typical: "We agree with the prosecution submissions that *custom* and *customary law* are subservient to the Constitution and legislations enacted by Parliament. Customary law cannot be inconsistent with the Constitution and legislations enacted by Parliament. Customary law only applies if there is no rule of law applicable".[33]

But does the term "law" also include the rules of common law and equity? Do the unwritten rules of law also override custom? If, for instance, the chiefs in both the Tanna case and the Pentecost case had earlier made a contract with the families that they could occupy the houses in the village for a certain period, would the chiefs be liable for damages for breach of contract?

CONCLUSION

These two cases, from two different islands in Vanuatu, illustrate how careful chiefs and their advisers must be when exercising their customary powers. Those powers

[32] *Leo v Public Prosecutor*, above n16, para 13.
[33] *Idem*, para 12.

must be exercised within the limits imposed by the legislation of Vanuatu, and that legislation applies to all people in Vanuatu, young and old, black and white, male and female, chiefs and non-chiefs.