CHAPTER 1

SOURCES OF CRIMINAL LAW IN VANUATU

Criminal law of the New Hebrides

1.1 Prior to the independence of Vanuatu in 1980, what were then called the New Hebrides were jointly ruled as an Anglo-French condominium by the United Kingdom and France. The condominium was established by a treaty in 1906. Its governance arrangements were amended by the Anglo-French Protocol of 1914, which came into effect in 1922.

1.2 The condominium has sometime been called 'the pandemonium' because of its complex, overlapping systems for government. There were plural legal systems. Each colonial power had its own laws, courts, police and prisons. Nationals of either country were subject to the law of that country; for this purpose, Australians and New Zealanders were treated as British nationals. Nationals of other countries could opt for either jurisdiction. They were described as 'optants' in legal cases. However, there were also some Joint Regulations of the two condominium powers, including a 'Native Criminal Code' for offences committed by indigenous people against other indigenous people. These offences were processed through 'Native Courts'. There was also a 'Joint Court' with jurisdiction over offences under the Joint Regulations, offences committed by nationals of one condominium power against nationals of the other, offences committed by indigenous people against nationals of the condominium powers and against the Condominium itself, and some serious offences committed by indigenous people against other indigenous people. Where indigenous people committed offences against nationals of the condominium powers, they could be tried either in the Joint Court or in the national court of the relevant condominium power: see Bresnihan and Woodward (eds), *Tufala Gavaman* (Institute of Pacific Studies: 2002) p 299. The applicable law was the national law of the victim. Where the victim had no nationality (eg the Condominium itself) or where there were multiple victims with different nationalities, the applicable law was the national law of the authority prosecuting the matter: see *Condominium v Butu* [1974] VUNHJC 41; *Public Prosecutor v Masisi* [1974} VUNHJC 47.

1.3 Thus, depending on the nature of the offence and the identity of the victim, an indigenous person might be held criminally liable under English law, French law, a local regulation made under the English or the French authority, or a Joint Regulation, and might be tried in a Native Court, the Joint Court or one of the national courts.

1.4 Until 1973, English law applicable in the New Hebrides included domestic statutes such as the Offences Against the Person Act 1861 and the Larceny Act 1916. However, in 1973 a British Regulation (Q. R. No. 9 of 1973) introduced the model Penal Code developed by the Colonial Office and already in force in the British dependencies in the Pacific: Fiji, Solomon Islands, and the Gilbert and Ellice Islands (now Kiribati and Tuvalu). The model Penal Code was based on the Queensland Criminal Code. There was also a Criminal Procedure Code.

1.5 Applicable French law included the Code Penale and the Code de Procedure Penale.

1.6 With independence looming in 1980, work commenced on drafting a new Penal Code and Code of Criminal Procedure for all persons in Vanuatu. As an interim measure, a Joint Regulation terminated the applicability of English and French criminal law: Criminal Law (Interim Provisions) Regulation 1980. All persons in Vanuatu were temporarily made subject to the Native Criminal Code. In addition, proceedings in all courts were made subject to a Rules of Criminal Procedure Order issued in 1979.

The Vanuatu Codes

1.7 The central core of the criminal law of Vanuatu is now contained in two Codes: a Penal Code which creates criminal offences and prescribes punishments and a Criminal Procedure Code which regulates how offences will be processed through the criminal justice system. These Codes were first enacted in 1981, after the country became independent.

- The most serious offences are generally included in the Penal Code: for example, murder and manslaughter, assault, rape, theft, robbery. However, criminal offences are found in a range of other statutes, including legislation relating to customs and immigration, fisheries, drugs, taxation, and road traffic. Nevertheless, these other offences are governed by the provisions of the Penal Code on criminal responsibility: these are general provisions which are not limited to offences in the Code itself.
- The Criminal Procedure Code governs procedure for both trials and appeals and in all levels of court. It applies directly only to offences in the Penal Code: s 2(1). Nevertheless, it can still provide guidance on procedural arrangements for offences under other statutes. For procedural matters not covered by the Criminal Procedure Code, the Code authorises courts of criminal jurisdiction to 'exercise such jurisdiction according to substantial justice and the general principles of law': s 2(2). The Code can provide guidance on the content of these 'the general principles of law'.

1.8 The Vanuatu Penal Code and the Criminal Procedure Code are unique documents but are both recognizably based on a heritage of English law. Most of the concepts and principles of the Penal Code will be familiar to any lawyer trained in a common law system. Moreover, the Criminal Procedure Code has adopted the adversarial trials of the common law world rather than the inquisitorial system of French law.

1.9 The Vanuatu Penal Code is based on a draft prepared by A. G. Chloros, formerly Professor of Comparative Law at King's College, University of London. It is a unique document, in contrast to most Pacific criminal statutes which are based on models from elsewhere.

- The New Zealand Crimes Act has been the model for the criminal statutes of Samoa, Cook Islands, Niue and Tokelau. The New Zealand Act was based on a draft code prepared for England by Sir James Stephen in 1878, and revised as a draft Bill by a Royal Commission in 1879. The Stephen code was never enacted in England but it became the basis for the codes of Canada and New Zealand. The model was then exported in varying versions to the South Pacific dependencies of New Zealand. The independent state of Tonga enacted a Criminal Offences Act with some similar features.
- Versions of the Queensland Criminal Code were introduced into the Australian dependencies of Papua New Guinea and Nauru. The Queensland Code was also the basis for the model Penal Code of the British Colonial Office which was introduced into the British Pacific dependencies of Fiji, Solomon Islands, and the Gilbert and Ellice Islands (now Kiribati and Tuvalu), as well as briefly into the pre-independence New Hebrides: see **1.4**. The Queensland Code was prepared by the then Chief Justice of the State, Sir Samuel Griffith, in 1897, and is commonly known as the 'Griffith Code'.
- In recent times, a Model Criminal Code initiative from Australia has provided the basis for the Australian Crimes Act (Cth) and for substantial parts of new codes for Fiji and Nauru: see Crimes Act 2009 (Fiji) and the Crimes Act 2016 (Nauru).

1.10 The Vanuatu Penal Code cannot be traced to any of these external models. The Code aims to provide a comprehensive scheme of criminal responsibility and of justifying and excusing defences, like the Griffith Code and unlike the Stephen Code. However, its design differs markedly from that of the Griffith Code. The Griffith Code accepts negligence as generally an appropriate basis for responsibility for serious offences against the person. In contrast, the predominant view of the common law which developed in the course of the twentieth century has been that criminal responsibility should generally require certain subjective states of mind, such as intention to engage in the conduct or awareness of its risks. In other words, objective

principles of responsibility have generally been replaced by subjective principles. This is reflected in the Vanuatu Code. Its key general provision is as follows:

> 6 (2) No person shall be guilty of a criminal offence unless it is shown that he intended to do the very act which the law prohibits; recklessness in doing that act shall be equivalent to intention.

In its original form, this affirmation of subjectivist principles was supported by a provision on mistakes of fact which allowed a defence to be based on an unreasonable as well as a reasonable mistake. Section 12 read:

> A mistake of fact shall be a defence to a criminal charge if it consists of a genuine, even though not reasonable, belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent.

In 1989, s 12 was amended to require that a mistake be reasonable:

> A mistake of fact shall be a defence to a criminal charge if it consists of a genuine and reasonable belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent.

This was, however, a later qualification to the original scheme and it does not sit easily with rest of Code. See **2.10-2.12** for further discussion.

1.11 Although much of the Vanuatu Penal Code embodies conventional common law principles, its provisions on diminished responsibility are unusual. Many jurisdictions in the common world include diminished responsibility as a partial defence of murder, reducing the offence to manslaughter. There is no such defence in Vanuatu. Instead, diminished responsibility is a finding available for any offence but merely affects sentencing options. The consequence of a finding of diminished responsibility is that 'the punishment shall be mitigated at the discretion of the court': Penal Code 24. A finding of diminished responsibility is a potential outcome for some cases that in other jurisdictions might lead to a complete or partial defence:

- s 25: where there is mental disorder but it does not qualify for an insanity defence;
- s 26: where there has been compulsion by threats to commit an offence or coercion by a person in actual or moral authority;
- s 27: where there has been provocation of such a degree as to deprive a normal person of self-control;
- s 28(5): where there has been voluntary withdrawal from an attempt;
- s 29(3): where there has been voluntary withdrawal from a conspiracy.

1.12 The wording of s 24 is odd. The provision refers to both a mandatory reduction and a discretion. Moreover, it is always open to a court to exercise sentencing discretion by treating diminished responsibility as a mitigating factor. This follows from general sentencing principles; s 24 is not needed to create the discretion. The best interpretation of s 24 may be that it mandates some reduction of punishment for diminished responsibility but that the amount of the reduction is at the discretion of the court.

1.13 Another unique feature of the Penal Code is that it incorporates a limitation period on prosecutions.

> s 15 No prosecution may be commenced against any person for any criminal offence upon the expiry of the following periods after the commission of such offence –
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> (a) in the case of offences punishable by imprisonment for more than 10 years – 20 years;
> (b) in the case of offences punishable by imprisonment for more than 3 months and not more than 10 years – 5 years;
> (c) in the case of offences punishable by imprisonment for 3 months or less or by fine only – 1 year.

This kind of general provision is found in no other Pacific jurisdiction with a heritage of English law. Limitation periods are part of the culture of American law, but not English law.

1.14 The most striking feature of the Vanuatu Penal Code is its brevity. It is roughly one-third of the length of the Solomon Islands Penal Code or the Fiji Crimes Act. Precise comparisons are difficult because of randomness of reform initiatives and consolidation exercises. Nevertheless, the following table will give some indication of the brevity of the Vanuatu Code in comparison with the codes of its nearest neighbours.

- Vanuatu Penal Code as per 2006 Consolidation: 17,292 words; 1,066 sections.
- Solomon islands Penal Code as per 1996 Consolidation: 56,143 words; 2,442 sections.
- Fiji Crimes Act as enacted 2009: 61,526 words; 3,902 sections.

1.15 The brevity of the Vanuatu Penal Code is achieved in several ways including trusting the judiciary to reach sensible interpretations of general terms, and favouring judicial sentencing discretion over offence elements in the scheme of penal liability. Criminal law comprises a set of specific offences, each of which proscribes and

attaches a specific measure of penal liability to a form of conduct considered harmful. Proliferating offences with precise and relatively narrow definitions can restrict the role of judges in determining the scope of offences and in exercising sentencing discretion. This process can be seen in the 18 offences of larceny in the Solomon Islands Penal Code, each with its specific measure of penal liability related to what has been stolen or under what circumstances. It can also be seen in the range of offences in both the Solomon Islands Code and the Fiji Crimes Act relating to causing death or injury to a person: for example, murder; manslaughter; infanticide; intentionally causing grievous harm; unlawfully causing grievous harm; unlawfully wounding; recklessly or negligently endangering life or safety; negligently causing harm; assault causing bodily harm. The Vanuatu Penal Code has departed from this approach, preferring simple definitions of a restricted range of offences, with finer gradations in culpability to be handled through the exercise of sentencing discretion.

1.16 The treatment of causing death or injury to a person illustrates the distinctive style of the Vanuatu Penal Code. There are just three offences, with gradations of penal liability according to the circumstances or consequences of the criminal conduct.

- Section 106 creates the offence of intentional homicide, with liability to (a) 20 years' imprisonment if the homicide was not premediated or (b) life imprisonment if it was premediated.
- Section 107 creates the offence of intentional assault, with liability to (a) 3 months if no damage is caused, (b) 1 year if there is damage of a temporary nature, (c) 5 years if there is damage of a permanent nature, or (d) 10 years if death is caused.
- Section 108 creates the offence of unintentional harm through recklessness or negligence, with liability to (a) 3 months if there is damage of a temporary nature, (b) 2 years if there is damage of a permanent nature, or (d) 5 years if death is caused.

This scheme was adopted from the Native Criminal Code of the New Hebrides. However, it fits neatly within the overall style of the Penal Code.

1.17 The treatment of theft and related offences provides another example of the style of the Penal Code. Section 125 creates one basic offence of causing loss to another by (a) theft, (b) misappropriation, or (c) false pretences, with liability to imprisonment for 12 years however the loss is caused. The provision is supplemented in ss 122-124 by definitions of theft, misappropriation and false pretences. There are also a few additional offences dealing with dishonest conduct resembling theft and with various forms of fraud. Nevertheless, the scheme is characteristically simple in conception and succinct in expression.

1.18 The Vanuatu Criminal Procedure Code is less distinctive. The Vanuatu Code generally follows the scheme of a British Colonial Office model, so that there is substantial similarity in structure, content and expression to the Solomon Islands Criminal Procedure Code or the Fiji Criminal Procedure Act 2009. The Vanuatu Code is shorter than the procedural statutes of its neighbours but the difference is less dramatic than with the Penal Code: 60-75% of the length of the Solomon Islands or Fiji statutes, depending on the measure of comparison. This has been achieved in part through removal of some topics covered in the neighbour jurisdictions. For example, The Solomon islands and Fiji statutes contain specific directions on the content of a judgment and the mode of delivering it. The judgment must be given in open court, and it must contain the point or points for determination, the decision thereon and the reasons for the decision: Solomon Islands Criminal Procedure Code ss 150-151; Fiji Criminal Procedure Act ss 142-143. These provisions are absent from the Vanuatu Code.

The Constitution

1.19 The Constitution of Vanuatu s 5(2) supplements the Codes as a source of criminal law. It guarantees certain constitutional rights in relation to criminal liability and criminal procedure, including a fair hearing within a reasonable time, no retroactivity, and no double jeopardy. However, fewer constitutional rights are prescribed than in many other Pacific constitutions, with a narrow focus that includes the court process but not searching, arrest or detention.

1.20 The official languages of Vanuatu are Bislama, English and French and legislation is published in both English and French. The Constitution s 64 guarantees that citizens may obtain administrative services in the language that they use. In practice, superior courts operate in English. However, both Bislama and English are widely used in Magistrates Courts.

Judicial decisions

1.21 The legal system of Vanuatu has developed as a 'common law' system in which judicial decisions are authoritative sources of law and decisions of superior courts are binding on lower courts. Statutes take priority over pure 'common law' decisions of the courts, but statutes mean what the courts say what they mean.

1.22 The 'common law' character of the Vanuatu legal system has been underpinned by the make-up of the legal profession and the judiciary. Although exceptions are permitted, the standard qualification for admission as a legal practitioner in Vanuatu is a law degree plus eligibility for admission in another Commonwealth jurisdiction: Legal Practitioners (Qualifications) Regulation s 2. Until the late 1990s, most practitioners were admitted in Australia, New Zealand or Papua New Guinea. Following the establishment of the law school at The University of the South Pacific in the mid-1990s, most law graduates from Vanuatu have been qualified for admission in Fiji which is the accrediting jurisdiction for USP law degrees. Thus, legal practitioners have generally been trained in 'common law' jurisdictions. In addition, appointment as a judge requires qualification to practise as a lawyer in Vanuatu: Constitution of Vanuatu s 49(4). Therefore, judges too have generally trained as common lawyers.

1.23 Judicial decisions from elsewhere in the common law world can be an important element in the interpretation of the Codes: for example, in the interpretation of the term 'intent'. Relevant precedents are drawn not only from England but also from Australia and New Zealand. Retired judges from Australian and New Zealand are employed to participate in the Court of Appeal. They take a leading role in hearing appeals, although sitting with local judges.

1.24 In addition to being an interpretive aid, the common law is used to in fill in gaps in the legislative scheme. The Penal Code is a near to comprehensive document. Yet it makes no mention of certain matters: for example, the general principle excluding liability for causing harm by omitting to prevent it occurring. Moreover, there are major gaps in the Criminal Procedure Codes. For example, there are no provisions on abuse of process in the prosecution of cases. This matter is left to common law remedies.

Justice and custom

1.25 The Vanuatu Constitution s 47(1) acknowledges roles for justice and custom where there are no applicable rules of 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.

The role of substantial justice in the scheme reflects standard common law methodology. When a point is not covered by existing law, a judge can make law. The role of custom is distinctive, although severely limited. In *Leo v Public Prosecutor*

[2019] VUCA 50, the defendant had claimed that certain attacks on people and property were justified as enforcement of customary law. The argument was summarily dismissed in the Court of Appeal at [12]:

> …*"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.