ADJECTIVAL PLURALISM: PROCEDURE AND PROOF IN THE COURTS OF VANUATU

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This article considers the uncertainties surrounding the laws governing procedure and proof in Vanuatu today. It seeks to identify the adjectival laws that apply from amongst the competing options. To provide some context for the discussion, it commences with some background on Vanuatu's political and legal system then moves on to outline the court system within which adjectival laws operate, and identifies specifically the laws that potentially govern procedure and evidence in both civil and criminal cases.

Cet article analyse les incertitudes qui affectent aujourd'hui au Vanuatu, les règles procédurales et plus particulièrement celles relatives à l'établissement de la preuve. L'auteur s'attache à identifier les lois qui auront vocation à s'appliquer parmi les différentes options possibles. Pour situer la discussion dans son contexte, cette étude commence par un rappel du système politique et juridique de Vanuatu, puis décrit le système judiciaire dans lequel les lois supplétives fonctionnent, et recense en particulier les textes qui peuvent potentiellement s'appliquer dans le cadre procédural et de l'établissement de la preuve dans les affaires civiles et pénales.

I INTRODUCTION

Due to its former status as a condominium of Britain and France, Vanuatu is one of a small number of countries with a mixture of both British common law and civil law in the State system.[1] The Constitution implies that the British and French laws are retained as a transitional measure, until the Parliament of Vanuatu provides a different regime.[2] However, whilst Vanuatu has been gradually building up a body

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1 Others are South Africa, Botswana, Cyprus, Scotland (UK), Guyana, Louisiana (USA), Malta, the Philippines and Sri Lanka. Many other common law countries have traces of civil law in their system and vice versa.

2 Constitution of Vanuatu 1980, art 95(2) ("Constitution").

of homegrown laws, more than forty years after Independence introduced laws still form a significant part of the law. This is problematic, as those laws do not always fit well with the cultural background of Vanuatu. Further, the relationship between the two sources of introduced law is uncertain, as is the relationship between State law and customary laws, which have also been given constitutional recognition as part of State law.[3] Whilst British and French laws remain largely distinct, they are administered in the same court system. This complex arrangement raises numerous questions regarding the substantive law to be applied in any given situation,[4] which is a reoccurring theme in court judgments.[5]

Perhaps less obviously, the co-existence of these different sources of law poses difficult questions for the identification and application of adjectival laws. This article considers the uncertainties surrounding the laws governing procedure and proof in Vanuatu today. It seeks to identify the adjectival laws that apply from amongst the competing options and to resolve some of the questions arising. To provide some context for the discussion, it commences with some background on Vanuatu's political and legal system, with a brief reference to the historical events surrounding Independence. The discussion moves on to outline the court system, which provides the framework within which adjectival laws operate. It then identifies more specifically the laws that potentially govern procedure and evidence in both civil and criminal cases and examines the surrounding uncertainties.

II BACKGROUND

The Republic of Vanuatu is an archipelago in the South-West Pacific, lying about three-quarters of the way from Hawaii to Australia and a two hour flight from Auckland.[6] Formerly known as the New Hebrides (in French, les Nouvelles-Hébrides), a name given to the islands by Captain Cook, it was governed jointly by France and Britain from 1906[7] until independence on 30 July 1980.[8] It consists of about 14 main islands, but more than 80 islands in total, about 65 of which are

3 Constitution, art 95(3).

4 For further discussion of the opting system see Corrin, J "Comment Ça Va?: The Status of French Laws in Vanuatu" (2022) 70(2) AJCL 275.

5 See eg *Pentecost Pacific Ltd v Hnaloane* (1984) [1980-1988] 1 Van LR 134; *Montgolfier v Nguyen* (Court of Appeal, Vanuatu, Lunabek CJ, von Doussa, Young, Saksak, Fatiaki, Sey, Chetwynd, Geoghegan, JJ, 15 April 2016), available via www.paclii.org at [2016] VUCA 14.

6 Government of Vanuatu "About Vanuatu", Gov.Vu <About Vanuatu (gov.vu)>.

7 Convention between the United Kingdom and France Concerning the New Hebrides (signed 20 October 1906, ratifications exchanged 9 January 1907) ('London Convention').

8 The Constitution was brought into force by an Exchange of Notes between the Governments of United Kingdom and France, 23 October 1979.

inhabited.[9] It has a land area of 12,189 sq km, which is slightly larger than the Sydney metropolitan area.[10] Most islands are mountainous, of volcanic origin, with narrow coastal plains. The islands are spread out over 1,300 km^2, with a total sea area of some 710,000 km^2.The population of about 300,000[11] is mainly constituted by indigenous peoples, known collectively as Ni-Vanuatu. The 2020 census states that the other one percent is constituted mainly by part Ni-Vanuatu, and other Pacific peoples, together with Europeans, Australians and New Zealanders (0.3 per cent) and Asians (0.2 per cent).[12] The latest census does not break down these groups, but in 2009 non-citizens were primarily Australians (579 residents), French (342) and New Zealanders (258), There were only 73 British residents, but a clear majority of Anglophones,[13] with about 64 per cent of the population over five being literate in English, as opposed to 37 per cent in French.[14] The official languages are Bislama, English and French.[15] In addition, there are over 100 local languages.

Until independence, Vanuatu was the last remaining condominium.[16] It is one of eight countries which are members of both the Organisation Internationale de la

9 Vanuatu National Statistics Office, *2009 National Population and Housing Census, Basic Tables Report* (Vanuatu National Statistics Office, 2009) vol 1, 3-5. <http://www.vnso.gov.vu/images/stories/2009_Census_Basic_Tables_Report_-_Vol1.pdf>.

10 City of Sydney, *Geography* (30 April 2013) Metropolitan Sydney <http://www.cityofsydney.nsw.gov.au/learn/about-sydney/metropolitan-sydney>.

11 Vanuatu National Statistics Office "Vanuatu 2020 National Population and Housing Census Analytical Report" (17 November 2021), Vanuatu National Statistics Office <2020 NPH Census (gov.vu)>Vol 1 Table 1.

12 Vanuatu National Statistics Office, "Vanuatu 2020 National Population and Housing Census Analytical Report" (17 November 2021), Vanuatu National Statistics Office <2020 NPH Census (gov.vu)> Vol 2 Table 32 at 50.

13 Vanuatu National Statistics Office, *2009 National Population and Housing Census, Basic Tables Report* (Vanuatu National Statistics Office, 2009) vol 1, 3-5. http://www.vnso.gov.vu/images/stories/2009_Census_Basic_Tables_Report_-_Vol1.pdf accessed 25 April 2019.

14 Vanuatu National Statistics Office, *2009 National Population and Housing Census, Basic Tables Report* (Vanuatu National Statistics Office, 2009) vol 1, v. http://www.vnso.gov.vu/images/stories/2009_Census_Basic_Tables_Report_-_Vol1.pdf accessed 25 April 2019. As this adds up to 101%, presumably some respondents were bilingual. The Mini census in 2016 did not include this information.

15 Constitution, art 3.

16 See further Hubert Benoist, "Le Condominium des Nouvelles-Hebrides et La Society Melanesienne", PhD Thesis, 2 February 1970.

Francophonie and the Commonwealth of Nations.[17] It has a Westminster style of State government,[18] co-existing with a traditional chiefly system.[19]

III THE LEGAL REGIME

A Sources of Law

Prior to Independence, the laws of the New Hebrides consisted of customary laws of the indigenous inhabitants and written laws authorised by the Protocols under which the condominium was established.[20] Article 1 of the Protocol provided that:

> The Group of the New Hebrides, including the Banks and Torres Islands, shall form a region of joint influence, in which the subjects and citizens of the two Signatory Powers shall enjoy equal rights of residence, personal protection, and trade, each of the two Powers retaining sovereignty over its nationals and over corporations legally constituted according to its law for the purpose of carrying on agricultural, industrial, commercial or other enterprises, and neither exercising a separate authority over the Group.

At the time, the arrangement was considered favourable to France and an opportunity to increase its influence.[21]

In the early 1970s, the Vanua'aku Party was established, and campaigned for independence. Britain and France found themselves at odds over these demands.[22] Britain was in favour of granting independence, although not on the terms demanded,[23] whereas France was opposed.[24] The Vanua'aku Party's dominance was challenged by 'Nagriamel', a protest movement led by Jimmy Stevens, which had

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17 The others are Cameroon, Canada, Dominica, Mauritius, Rwanda, Saint Lucia, and Seychelles.

18 Constitution, arts 4, 7, 8.

19 Constitution, art 5 acknowledges the chiefly system and gives it a role in State government through a National Council of Chiefs.

20 Protocol between Great Britain and France Respecting the New Hebrides, Great Britain-France, signed 6 August 1914 (entered into force 18 March 1922: New Hebrides Order in Council 1922, no 17) Treaty Series No 7 (1922) ('Protocol 1914').

21 Polities *Le Condominium Franco-Anglais des Nouvelles-Hebrides* (Pedone, Paris, 1908) 7, cited in Anthony Angelo "Nagol Jumping should Return to Pentecost" in Nihon Hikakuhō Kenkyūjo (ed) *Comparative Law in the 21st Century* (Chuo University Press, Tokyo, 1998) 1011, 1012.

22 See further, Howard Van Trease *The Politics of Land in Vanuatu: From Colony to Independence* (Institute of Pacific Studies, University of the South Pacific, Fiji, 1987); Marc Tabani "Political History of Nagriamel on Santo, Vanuatu" (2008) 78(3) Oceania 332.

23 Australian Department of Foreign Affairs, 'New Hebrides: Australian Action and Initiatives,' Cabinet Memorandum 829, 2.

24 Steven R Fischer *A History of the Pacific Islands* (Palgrave Macmillan, Hampshire, UK, 2002) at 249-250.

emerged in the 1960s in response to land clearing for coconut plantations.[25] Nagriamel, reputedly backed by French factions, opposed the terms on which Independence was planned. In June 1980, Jimmy Stevens led an uprising on Espirito Santo island and declared the island's independence. As neither France nor the United Kingdom sent troops, the uprising was quelled with assistance from Papua New Guinean soldiers.[26] In the meantime, on 30 July 1980, the country had become independent, with a new constitution based on a Westminster parliamentary democracy.[27]

Since Independence, Vanuatu's laws are to be found in:

- The Constitution of Vanuatu 1980, which is expressed to be the supreme law;[28]
- Acts of Vanuatu's Parliament,[29] including Acts incorporating international conventions into domestic law;[30]
- Decisions of the Vanuatu Courts;[31]
- Law in existence on 30 July 1980 that is:
    - King's (or Queen's) Regulations (made by Resident Commissioner, in the case of Britain);[32]

25 Howard Van Trease *The Politics of Land in Vanuatu: From Colony to Independence* (Institute of Pacific Studies, University of the South Pacific, Fiji, 1987) at 247.

26 The 'coconut war' as it was nicknamed, came to an end after Stevens' son was shot at a Papua New Guinean roadblock in late August 1980 and Stevens surrendered. Stevens remained in prison until 1991: Howard Van Trease *The Politics of Land in Vanuatu: From Colony to Independence* (Institute of Pacific Studies, University of the South Pacific, Fiji, 1987) at 258.

27 Sam Alasia 'Party Politics and Government in Solomon Islands' (1997) Australian National University School of Pacific and Asia Studies Discussion Paper 7/1997.

28 Constitution, art 2.

29 Article 16.

30 Vanuatu is a dualist state. Whilst not part of the law until domesticated, international conventions may be taken into account in the exercise of a Vanuatu court's discretion.

31 Constitution, art 47(1).

32 The High Commissioner of the Western Pacific was authorised to make these regulations: New Hebrides Order 1911 (UK). In practice they were made by the Resident Commissioner and subject to disallowance by the High Commissioner: Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens and Co, London, 1966) 904.

- Regulations (made by the High Commissioner in New Caledonia, in the case of France);[33]
- Joint Regulations made by Resident Commissioners of Britain and France during the Condominium;[34]
- British laws meeting certain conditions;[35]
- French laws in force at Independence and meeting certain conditions;[36]

- Customary Laws;[37]
- Customary international law.

Whilst these sources are presented largely in a descending hierarchy of importance, decisions of Vanuatu courts will not normally override regulations or legislation that have been retained in force, except to the extent that the court is deciding that the law does not meet the criteria for its application, a requirement that is discussed further below.

The British laws retained in force in Vanuatu include Acts of Parliament and subsidiary legislation of 'general application'[38] in force on 30 July 1980, being the date of Independence,[39] and English common law and equity.[40] A complicating factor is that the English legislation in force at Independence had a 'cut-off' date of 1 January 1976 imposed on it.[41] Thus, only Acts of general application passed by the English parliament before that date form part of the law of Vanuatu. These laws

33 Arrete No 777-20 CG, 9 September, Journal Official de la New Calédonie, 1 October 1909, 339, art 1, cited in Marcin Pruss *French Law in the New Hebrides* (LLM Thesis, University of the South Pacific, 2011) 57, n 366.

34 Protocol between Great Britain and France respecting the New Hebrides, February 1906, art VII. The joint regulations remaining in 1988 were re-promulgated and deemed to be Vanuatu laws: Revision and Consolidation of the Laws Act Cap 185, 3(1)(b) and 11(2). The resulting consolidation was published as the *Revised Edition of the Laws of the Republic of Vanuatu 1988*.

35 Constitution, art 95(2).

36 Constitution, art 95(2). The New Hebrides were treated as a French Territory, administered locally by the Resident High Commissioner, subject to the superior authority vested in the High Commissioner of the Western Pacific based in New Caledonia.

37 Constitution art 95(3). See further, *Banga v Waiwo* Supreme Court, Vanuatu, 17 June 1996, available via www.paclii.org at [1996] VUSC 5.

38 For a discussion of the meaning of this phrase see Jennifer Corrin "Transplant Shock: the hazards of introducing statutes of general application" in Vito Breda (ed) *Legal Transplants in East Asia and Oceania* (Cambridge University Press, 2019) ch 2.

39 The British statutes in force were those enacted prior to 1 January 1976: Constitution of Vanuatu 1980, art 95, read with High Court of the New Hebrides Regulation 1976, s 3.

40 Article 95(2).

41 High Court of the New Hebrides Regulation 1976, reg 3.

included adjectival laws such as statutes governing the admission of evidence and various procedural rules.

The French laws which were retained in force were not the same as those applying in France. Pursuant to the principle of legislative speciality, the applicable laws are found either in "texts which are specific to the territories or in French texts which make express mention of application to the Overseas Territories or which are extended to them by a later text".[42] Thus, the French Codes applied only if extended to the New Hebrides by France,[43] and in conjunction with laws made by the French High Commissioner of the Western Pacific in New Caledonia or the Resident French Commissioner of the New Hebrides, up to the date of Independence. In the absence of information to the contrary, French law of the New Hebrides appears to have mirrored the law of New Caledonia.[44]

The Constitution provides in art 95(2) that these British and French laws continue in force, stating that:

> 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.

This makes it clear that only laws applying immediately before the Day of Independence remain in force. Thus, whilst French laws were not subject to a cut-off date prior to Independence, laws made by France or its representative in New Caledonia made after Independence do not apply. Consequently, Vanuatu cannot take advantage of any reform of French laws after 1 July 1980.

Article 95(2) also makes it clear that British and French laws will not apply if they have been expressly revoked, and the words '[u]ntil otherwise provided by Parliament' imply that they will also be overridden by legislation of the Vanuatu

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42 Yves-Louis Sage "The Application of Legislation in the French Overseas Territories of the Pacific" (1983) 23 VUWLR 15 at 17-18.

43 Extension to New Caledonia also applied to the New Hebrides: Pruss *French Law in the New Hebrides*, above n 33.

44 Promulgation was by notice in the Official Gazette of New Caledonia, with the intention that promulgation would also take place in the New Hebrides, but it appears that was not always the case: Angelo "Nagol Jumping should Return to Pentecost", above n 21.

parliament which governs the field.[45] However, the circumstances that will amount to incompatibility 'with the independent status of Vanuatu' are much less clear, as are the circumstances when it will be possible to take 'due account of custom'.[46]

The other issue arising from art 95(2) is that it does not indicate to whom British and French laws apply. This is unfortunate because the regulations which governed the application of these laws and provided a system of opting was repealed at independence.[47] In cases where Parliament has not 'otherwise provided', the question of applicability has been left for the courts to grapple with. In such cases the courts have not adopted a common approach.[48] The preponderance of authority clearly indicates that, since independence, introduced laws apply to everyone in Vanuatu,[49] a stance that was recently confirmed by the Court of Appeal.[50] In practice, the default position appears to be that British law applies unless a party requests the application of French law. In the event of conflict, between British and French law, the prevailing law will be determined by the court in accordance with substantial justice.[51]The Court of Appeal has expressed a preference for making a principled choice of the law to be applied in each case, as opposed to 'creating' a law for the resolution of the conflict'.[52]

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45 As to whether British and French law may apply if there is gap in Vanuatu legislation, see Jennifer Corrin and Vergil Narokobi *Introduction to South Pacific Law* (5th ed, Intersentia, Cambridge, UK, 2022) at 37.

46 In *Re MM, Adoption Application by SAT* (Supreme Court, Vanuatu, Vaudin d'Imecourt CJ, 17 June 1996) [55], available via www.paclii.org at [2014] VUSC 78, it was suggested that custom will override British and French laws in cases involving family matters. See further, Corrin and Narokobi *Introduction to South Pacific Law*, above n 45, at 36.

47 *Exchange of Notes on the Independence of the New Hebrides between Great Britain and France*, Great Britain and France 23 October 1979, [1979] PITSE 3 [c]. See *T v R* [1980-1994] Van LR 7 and *Mouton v Selb Pacific Ltd* (Supreme Court, Vanuatu, Vaudin d'Imecourt CJ, 13 April 1995) available via www.paclii.org at [1995] VUSC 2. For further discussion of the opting system see Corrin "Comment Ça Va?: The Status of French Laws in Vanuatu", above n 4.

48 See further, Corrin "Comment Ça Va?: The Status of French Laws in Vanuatu", above n 4.

49 See eg *T v R* (1980) [1980-88] 1 Van LR 7, 9; *Banga v Waiwo*, above n 37; *Mouton v Selb*, above n 47*; Re MM* [2014] VUSC 78. See also, *Clements v The Hong Kong and Shanghai Banking Corporation* [1980-88] 1 Van LR 416, 416-7, where French law was not in issue, but the Court of Appeal expressed the view that introduced laws applied to everyone within the jurisdiction.

50 *Li Ya Huang v Russet* Court of Appeal, Vanuatu, 18 November 2022) [95], available via www.paclii.org at [2022] VUCA 32.

51 The Constitution of Vanuatu, art 47(1) 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'.

52 *Li Ya Huang v Russet*, above n 50, at [104].

B The Courts

During the colonial era, there were three separate systems of courts in Vanuatu. One system was constituted by Joint Native Courts and Joint Courts. The Joint Native Courts dealt with minor matters involving indigenous inhabitants pursuant to a code of native law compiled under the 1914 Protocol.[53] These courts were constituted by the British or French resident agent, taking turns for 30 days each, assisted by two indigenous assessors.[54] The President was the Agent who was of the same nationality of the accused, or where there were several accuseds of different nationality, the President would be chosen by lot.[55]

The Joint Court had jurisdiction to deal with more serious offences committed by indigenous inhabitants against other indigenous inhabitants.[56] It also has broad criminal jurisdiction in crimes committed by indigenous inhabitants against non-indigenous inhabitants,[57] and contraventions of the provisions of the Protocol or Joint Regulations.[58] In civil cases the Joint Court had jurisdiction to deal with most disputes regarding immovable property between indigenous inhabitants and between indigenous and non-indigenous inhabitants.[59] The Joint Court was presided over by a British Judge, a French Judge and a presiding Judge appointed by the King of Spain.[60] In criminal trials the Joint Court was assisted by four assessors chosen from non-indigenous inhabitants by lot.[61] each of whom had a vote on the question of guilt but only a consultative voice on sentence.[62]

The second regime consisted of British courts, established for British nationals and optants. These consisted of the High Commissioner's Court,[63] which was

53 Protocol 1914, art 8.4.

54 Protocol 1914, art 8.6.

55 Protocol 1914, art 8.6.

56 Protocol 1914, art 12.2(B).

57 Protocol 1914, art 12.2(A).

58 Protocol 1914, art 12.3.

59 Protocol 1914. art 12.1.

60 Protocol 1914, art 10.

61 Protocol 1914, art 11.

62 Protocol 1914, art 11.3.

63 Pacific Order in Council 1893.

replaced by the High Court of the Western Pacific,[64] which in turn was replaced by the High Court of the New Hebrides.[65] Subordinate courts were established in the form of Magistrates' Courts.[66]

The third system was constituted by French courts, established for French nationals and optants. The civil court was the Cour de Justice de Paix a Competence Etendue and the criminal court was the Tribunal Criminal. In cases not reserved for the Joint Court,[67] both civil and criminal cases involving British citizens and optants were dealt with in the common law courts, applying the common law; cases involving French citizens and optants were dealt with by the French courts, applying French law.[68]

Since Independence, Vanuatu has had only one system of courts to administer State laws. This consists of a three-tier hierarchy of state courts in the standard common law form of inferior court, superior court and appeal court. The inferior courts, called the Magistrates' Courts, are established under and governed by the Judicial Services and Courts Act 2000. They are presided over by a lay magistrate or senior magistrate.[69] The Supreme Court is the superior court, which was established under art 49 of the Constitution. It is normally constituted by one judge sitting alone[70] from amongst the Chief Justice[71] and three puisne judges.[72] The Supreme Court has unlimited jurisdiction to hear and determine civil[73] and criminal proceedings.[74] It also has jurisdiction to hear civil and criminal appeals from a Magistrates' Court,[75] and to review convictions by the Magistrates' Court, whether

64 Western Pacific (Courts) Order 1961.

65 High Court of the New Hebrides Regulation 1976.

66 Magistrates' Courts Regulation Cap 2, QR 3 1962.

67 Magistrates' Courts Regulation Cap 2, QR 3 1962, art 12.

68 Protocol 1914, art 20.3. For a description of the courts operating in the New Hebrides prior to Independence see Sue Farran and Ted Hill "Making Changes with Rules in the South Pacific: Civil Procedure in Vanuatu" (2005) 3(2) Journal of Commonwealth Law and Legal Education 27.

69 Judicial Services and Courts Act Cap 270, ss 13 and 18.

70 Judicial Services and Courts Act, Cap 270, s 27.

71 Constitution, art 49.

72 Constitution, art 49(2).

73 Constitution, art 49(1); Judicial Services and Courts Act Cap 270, s 28.

74 Constitution, art 49(1); Criminal Procedure Code Cap 136, s 200.

75 Judicial Services and Courts Act Cap 270, s 30(1).

or not there has been an appeal.[76] In addition, the Supreme Court has exclusive jurisdiction on the interpretation of the Constitution involving a fundamental point of law.[77] The President may refer to the Supreme Court any legislation that he or she considers to be unconstitutional.[78] The Supreme Court has jurisdiction to determine applications regarding infringement of the Constitution,[79] and more specifically applications for breach of the bill of rights.[80] It also determines questions as to membership of Parliament[81] and hears complaints from citizens about emergency regulations made by the Council of Ministers.[82]

The Court of Appeal was also established under the Constitution.[83] Due to the small size of the country, this is not a permanent body, but is constituted from time to time as the need arises by two or more judges of the Supreme Court.[84] The Court of Appeal has broad-ranging jurisdiction.[85] It determines civil and criminal appeals from first instance decisions of the Supreme Court,[86] and hears 'further appeals' from the Supreme Court acting in its appellate capacity.[87] It has all the power, authority and jurisdiction of the Supreme Court and may substitute its own judgment or opinion, but may not interfere with the exercise of discretion unless it was manifestly wrong.[88]

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76 Judicial Services and Courts Act, Cap 270, s 31(1).

77 Constitution, art 53(3).

78 Constitution, art 39(3).

79 Constitution, art 53.

80 Article 6.

81 Article 54.

82 Article 72.

83 Article 50.

84 Constitution, art 50.

85 Section 48.

86 Constitution, art 50; Judicial Services and Courts Act Cap 270, s 48(1); Criminal Procedure Code Cap 136, s 200(2).

87 See above, text at n 77.

88 Judicial Services and Courts Act Cap 270, s 48(3).

Avenues for dealing with customary disputes have also been provided in Vanuatu.[89] Customary land disputes are heard first in a Nakamal[90] with an appeal to a Custom Area Land Tribunal and a limited right of review by the Island Court (Land).[91] The Supreme Court has supervisory jurisdiction but may not determine a dispute.[92] Its decision in such cases is final.[93] Other Island Courts are only concerned with minor disputes and offences, mainly involving Ni-Vanuatu parties. Appeal lies to the Magistrates Court.[94] A choice between British and French law is unlikely to arise in these forums, but is still a theoretical possibility particularly in civil disputes in the Island Courts.

C The Common Law Approach

The court framework provided at Independence weighs heavily in favour of the application of the common law. This has been supported by the courts clear preference for the common law system. This was emphatically declared In *Timakata v Attorney General*,[95] where Chief Justice Vaudin d'Imecourt stated:

> At the time of independence, in July 1980, Vanuatu had a joint Court system. On the one hand an English judge, on the other a French Judge. Was it by coincidence or by choice that the newly born nation, out of the two, chose the English judge and that, therefore, for the last 12 years, the laws as applied in Vanuatu were influenced by the Common law system? The answer is a simple one if one considers that the region, the other Melanesian nations of the Pacific, (bar one notable exception) the Court of Appeal under whose aegis Vanuatu falls, are all based on the Common law system and the rule of law.
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> Why, therefore, would Vanuatu have chosen otherwise than it did! It is clear, that the legal system of this nation is intrinsically linked to the system of those nations of the world as apply the Common Law system and the rule of law. Counted amongst those are virtually all the nations of the Commonwealth of nations, of which Vanuatu is a proud adherent.

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89 See eg, Island Courts Act Cap 167; Custom Land Management Act 2013.

90 A 'nakamal' is a defined as 'a customary institution that operates as the seat of governance for a particular area: Custom Land Management Act 2013, s 2 and Part 2.

91 Custom Land Management Act 2013, Part V and s 45.

92 Custom Land Management Act 2013, s 47.

93 Island Courts Act 1983, s 22(4).

94 Island Courts Act 1983, s 22(1).

95 (1992) [1989-1994] 2 Van LR 575. See also *Willie v Public Service Commission* (1992) [1989-1994] 2 Van LR 634, 645 and *Banga v Waiwo*, above n 37.

More recently, in deciding whether the application of Queen's Regulations or the French Civil Code should govern the distribution of an intestate estate, the Court of Appeal agreed with these sentiments. It cited d'Imecourt CJ's comment in a different case, *Banga v Waiwo*, that, 'after so many years of independence we have become, by the passage of time and the way we have applied our laws since independence, a common law jurisdiction'. The Court of Appeal considered that, '[t]he truth of that proposition is even more evident in 2022.'[96]

There are other statements from Vanuatu Courts that express a more specific preference for the common law approach to adjectival law, which are discussed in the next section.[97]

IV ADJECTIVAL LAW

There are significant differences between the British and French laws governing procedure and evidence.[98] Before independence application of British or French law usually carried with it subjection to either the British or the French courts and the accompanying adjectival laws. As discussed above, Vanuatu now has its own system of courts, with their own rules of civil and criminal procedure. It has yet to introduce its own law of evidence, which, as discussed below, leaves open the question as to whether British or French laws of procedure and evidence should apply.

A Procedure

1 Civil procedure

The common law civil procedure rules applying at Independence were those that had been introduced to govern proceedings in the common law courts throughout the Western Pacific, the Western Pacific High Court (Civil Procedure) Rules 1964, commonly refer to as the 'High Court (Civil Procedure) Rules'.[99] They were based on the Supreme Court Rules of England and Wales ('SCR'), although greatly simplified. The Rules provided that in the event of a lacuna, procedure would be governed by the 'practice and forms in force for the time being in the High Court of Justice in England [ie the SCR] … so far as they can be conveniently applied'.[100] In

96 *Li Ya Huang v Russet*, above n 50, at [108].

97 See eg *Public Prosecutor v Chilia* Supreme Court, Vanuatu, 25 February 2016, available via www.paclii.org at [2016] VUSC 33.

98 See eg *Pentecost Pacific Ltd v Hnaloane*, above n 5, at 136.

99 See also Western Pacific Court of Appeal Rules 1973 (WP).

100 Western Pacific High Court (Civil Procedure) Rules 1964 (WP) O 71.

the Magistrates Court the Magistrates' Courts (Civil Procedure) Rules 1976, made by the Chief Justice of Vanuatu,[101] also followed the common law pattern. In both cases, this strengthened the ties with the common law.

French adjectival laws were provided by the Code de Procedure Civile, as reissued in 1975,[102] and as extended to the New Hebrides, and by laws made by the French High Commissioner of the Western Pacific in New Caledonia or the Resident French Commissioner of the New Hebrides, up to the date of Independence. The French rules of civil procedure applying at independence were contained in the Code of Civil Procedure as it applied in New Caledonia at that date,[103] together with any specific amendments made for the New Hebrides by the High Commissioner.[104] More specifically that part of the Code that governed proceedings before justices of the peace was applied with certain exceptions designed to simplify procedure. This included a provision that authorised the judge to disregard the rules of the Code of Civil Procedure if the parties so requested.[105]

In practice, the High Court (Civil Procedure) Rules were the de facto rules of the Vanuatu courts after Independence, even when they applied French law.[106] A rare exception can be found in *Pentecost Pacific Ltd v Hnaloane*,[107] which is discussed below.

In 2002, Vanuatu brought into effect its own Rules. The High Court (Civil Procedure) Rules and the Magistrates' Courts (Civil Procedure) Rules were expressly repealed.[108] No mention was made of a repeal of the French Civil Procedure Code, reflecting the fact that the French civil procedure was not being employed by Vanuatu's post-independence courts.

From the introduction of Vanuatu's Civil Procedure Rules, it is arguable that only they can apply to cases coming before the courts, on the basis that the Vanuatu

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101 These Rules were made under the power conferred by the Magistrates Courts Regulations, s 72.

102 This was the last reissue of the Code prior to Independence.

103 Arrete No 1031 of 20 October 1902, Journal Officiel de la Nouvelle-Calédonie et dependences 1 November 1902, 388-390 cited in Pruss *French Law in the New Hebrides*, above n 33, at 44, n 291.

104 Arret No 777, September 1909, JONC 1 October 1909. See further Pruss, above n 33, at 56-57.

105 Arret No 15 C G of 11 March 1911 art 1; decree of 10 December 1912, art 1, cited in Pruss, above n 33, at 45, fn 293.

106 Arret No 15 C G of 11 March 1911 art 37; decree of 10 December 1912, art 37, cited in Pruss, above n 33, at 45, n 295. See eg *Mouton v Selb*, above n 47.

107 (1984) [1980-1994] 1 Van LR 134, 136.

108 Rule 18.16.

Parliament has 'otherwise provided'.[109] However, the Civil Procedure Rules do not perpetuate the practice of referring to the SCR where there is a gap in the Vanuatu Rules. Instead, if no procedure is provided, 'the court is to give whatever directions are necessary to ensure the matter is determined according to substantial justice'.[110] This raises the question of whether a Vanuatu court may refer to French rules of procedure when it is dealing with a case under French law and there is no applicable Civil Procedure Rule. A commentary on the rules published in 2009 sheds no light on this possibility,[111] which is considered further below.

The main distinction between British and French procedure is that the common law is adversarial. The Civil Procedure Rules are modelled mainly on the Civil Procedure Rules 1998 of England and Wales,[112] and incorporate reforms in Britain stemming from the Wolf Report by introducing case management[113] and incorporating principles of justice and fairness.[114] However, the system remains adversarial at heart[115] and differs from the inquisitorial system favoured by the civil law, which is discussed further later in this article.

Another procedural difference is the common law right to trial by jury, but this does not apply in Vanuatu, as this aspect of the common law system has not been transported to this part of the world,[116] As mentioned above, prior to Independence, many of the courts sat with an indigenous assessor or assessors.[117] This practice was continued after Independence by the Courts Act,[118] which provided for assessors knowledgeable in custom to sit with judges of the Supreme Court to act as

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109 Constitution, art 95(1).

110 Rule 1.7 (b). The mandate to act in accordance with substantial justice is repeated in the Constitution of Vanuatu, art 47(1).

111 Ari Jenschel *Civil Court Practice Vanuatu* (AusAID, Canberra, 2009).

112 See further Jenshel, above n 111, which annotates the rules with references to the corresponding rules in the 1998 Rules. But see Farran and Hill "Making Changes with Rules in the South Pacific: Civil Procedure in Vanuatu", above n 68.

113 Rule 1.4.

114 Rule 1.2.

115 See eg r 12.1 governing the order of proceedings at trial.

116 On the reasons for this see further, Peter Duff "The evolution of trial by judge and assessors in Fiji" (1997) 21 Journal of Pacific Studies 189.

117 Protocol 1914, art 8.6. See eg *Public Prosecutor v Ruben* [1943] VUNHJC 1.

118 Cap 122, s 14.

advisors.[119] In 2006, this Act was repealed.[120] The Judicial Services and Courts Act, which replaced it makes no mention of assessors, but states that the Supreme Court must be constituted by a judge sitting alone in certain constitutional applications and 'in any other proceeding unless an Act or law otherwise provides.'[121] The Island Courts Act provides otherwise, stating that a court must sit with two assessors when hearing appeals from Island Courts.[122]

2 Criminal procedure

The criminal procedure rules applying at Independence included the Police and Criminal Procedure Rules 1910, applying in the Joint Court, and the Criminal Procedure Code[123] and the Rules of Criminal Procedure 1979,[124] applying in the British system. The prevailing French rules were contained in the Code de Procédure Pénale, as extended to the New Hebrides, and by laws made by the French High Commissioner of the Western Pacific in New Caledonia or the Resident French Commissioner of the New Hebrides, up to the date of Independence. In less serious cases, the procedures prescribed in France for tribunaux de simple police were applied to cases before the tribunal criminal, subject to certain exceptions specifically applying to cases heard in the New Hebrides.[125] In more serious cases, the procedures prescribed in France for the tribunaux correctionnels were applied, again, with some exceptions specifically designed for the New Hebrides. [126]

At Independence, the 1979 Rules were initially kept in force as a transitional measure and applied to the Magistrates' Courts, the Supreme Court and the Court of Appeal.[127] The Criminal Procedure Code and the Code de Procedure Pénale of France were repealed.[128] The current Criminal Procedure Code[129] commenced on 1

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119 Courts Act Cap 122, s 14.

120 Judicial Services and Courts Act Cap 270, s 72.

121 Section 27(b).

122 Island Courts Act Cap 167, s 22(2). See also Civil Procedure Rules Cap 270, r 16.34(6)(a).

123 Cap 3.

124 Rules of Criminal Procedure Order 1979.

125 Arrete No 15 CG of 11 March 1911, art 1 and Decree of 10 December 1912, art 1, finalising Decree of 9 May 1909, art 8, cited in Pruss *French Law in the New Hebrides*, above n 33, at 45, n 297.

126 Arrete No 15 CG of 11 March 1911, art 1 and Decree of 10 December 1912, art 1, finalising Decree of 9 May 1909, art 8, cited in Pruss, above n 33, at 46, n 299.

127 Criminal Law (Interim Provisions) Regulation 1980, reg 2.

128 Regulation 3.

129 Cap 136.

October 1981, not long after Independence and, by implication, the 1979 Rules no longer applied. Like the Civil Procedure Rules, the Criminal Procedure Code 'otherwise provides', and would therefore appear to rule out the application of other British criminal procedure rules such as the Criminal Justice Act 1972.[130] This view is reinforced by the fact that criminal offences are now dealt with under the Penal Code of Vanuatu,[131] meaning that British and French substantive criminal laws are no longer an option for the courts to employ.[132] Like the Civil Procedure Rules, the Criminal Procedure Code is designed to operate in a common law system, and assumes the operation of the adversarial system.[133]

3 Procedure in customary forums

As mentioned above, competition between British and French law is unlikely to arise in the Island Courts or in forums provided for dealing with customary land disputes, but is not out of the question other than in criminal cases.[134] In any event, these courts and forums all have their own rules of procedure. Those applying in the Island Courts Act are based on common law processes.[135] For example, civil cases must be instituted by filing a written statement of claim together with copies to be served on each defendant.[136] The customary land dispute forums employ a special procedure, rather than civil or common law processes.[137]

4 The language of court proceedings

It is also relevant to consider the language of court proceedings. Prior to Independence, the Protocol stated that proceedings in the Joint Court should be in

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130 On 1 January 1976, the cut-off date for the applicable British legislation, the criminal procedure rules in Britain were not consolidated. They were consolidated by the Criminal Procedure Rules 2005, which have been subsequently amended.

131 Penal Code Act 1981. Section 152 repealed the Native Criminal Code Joint Regulation 12, 1962, which had been amended to apply to all persons in Vanuatu by Criminal Law (Interim Provisions) Regulation 1980, reg 1.

132 The French Code Penal and the Penal Code (QR 9, 1973) were repealed for Vanuatu by the by the Criminal Law (Interim Provisions) Regulation 1980, reg 3.

133 See eg ss 82-92 relating to evidence at trial.

134 See above, text at nn 130 and 131.

135 Island Courts (Civil Procedure) Rules 2005 (replacing the Island Court (Civil Procedure Rules 1984); Island Courts (Criminal Procedure) Rules 2005.

136 Island Courts (Civil Procedure) Rules 2005, r 1.

137 Custom Land Management Act 2013, ss 16, 17, 38 and Sch 1.

English and French and that in disputes between British and French parties the proceedings were to be interpreted and the judgments drawn up in both languages. Further, the court registers were to be kept in both languages.[138] Since Independence, there has been no express provision as to the language to be employed in the Supreme or Magistrates Court. However, the Constitution states that the official languages of Vanuatu are English, French and Bislama.[139] In criminal cases an accused who does not understand the language used in the proceedings is entitled to an interpreter.[140] It is also provided that every citizen has the right to services that they may rightfully expect from the administration of the Republic in the official language that they choose.[141] The right to have court proceedings in or translated into French does not appear to have been tested in the courts.

In the Island Courts, the hearing must be conducted in Bislama. If the accused or, in civil cases, a party or a witness, does not understand Bislama, a suitably qualified person must be obtained by the court to interpret for that party or witness.[142] The Custom Land Management Act 2013 provides that written notice of proceedings in Custom Area Land Tribunals must be in Bislama or a vernacular language of one or more of the disputing custom owner groups.[143]

B Evidence

The other question arising in court proceedings is which rules of evidence should apply. Vanuatu does not have its own evidence legislation.[144] However, it does have some rules of evidence contained in Part 11 of the Civil Procedure Rules 2002 and in various sections of the Criminal Procedure Code.[145] Outside of these rules, it would appear that the British and French laws of evidence may apply.

1 Evidence in civil proceedings

Identifying the British legislation governing evidence at the cut-off date is no easy task. It consists of a patchwork of statutes spanning a range of years, superimposed

138 Protocol 1914, art 18.

139 Constitution of Vanuatu 1980, art 3.

140 Constitution of Vanuatu 1980, art 5(2)(d).

141 Constitution of Vanuatu 1980, art 64(1).

142 Island Court (Civil Procedure) Rules 2005, r 7; Island Courts (Criminal Procedure) Rules 2005, r 6(2).

143 Custom Land Management Act 2013, Sch 1, para 1(2)(a).

144 In 2023 the Evidence Bill (Vanuatu) was circulated for comment. It is based entirely on the Evidence Act of Solomon Islands.

145 See eg ss 82 to 90 and Part 5,

on the common law, rather than a code. The main legislation governing civil evidence, in force in 1976, was the Civil Evidence Acts 1968 and 1972.[146] The Civil Evidence Act 1968 was confirmed as applicable in Vanuatu in *S, An Infant v Moti*.[147] More recently, and more explicitly, the Court of Appeal stated that the 'law of evidence for Britain as at the day of Independence is contained in the Civil Evidence Act 1968 UK'. In *Turala v Republic of Vanuatu*[148] the Court applied s 4(1) as authority for the admissibility of hearsay documents contained in documentary records.

The Bankers' Books Evidence Acts 1859 and 1879 also apply. For example, in *Plantations Reunies de Vanuatu Ltd v Russet*[149] the defendant's objection to answering a question about a bank's records on the grounds that this was hearsay was overruled on the basis of s 3 of the Bankers' Books Evidence Act 1879.

In civil cases, French rules of evidence regarded as procedural are to be found in certain parts of the Code de procédure civile.[150] However, where rules of evidence are closely connected to substantive rights they are to be found primarily in in the Code Civil.[151] These Codes are seldom referred to by the courts when dealing with evidence. A rare example of reference to French procedural rules can be found in *Pentecost Pacific Ltd v Hnaloane,*[152] a case concerned with the interpretation of a written employment contract. The general rules of evidence of Britain and France[153] are aligned in prohibiting reference to parol evidence in cases where a written contract had been entered into, unless there is ambiguity. However, the Court of Appeal held that, in employment cases, the procedural code for employment tribunals of French Overseas Territories, which was in force in New Caledonia at the

146 See also Witnesses Act 1806; Evidence Act 1843; Evidence Act 1845; Evidence Act 1851; Documentary Evidence Act 1853; Bankers' Books Evidence Acts 1859 and 1879; Documentary Evidence Act 1882.

147 [1999] VUSC 38.

148 [2013] VUCA 20 [13].

149 Supreme Court, Vanuatu, 24 June 1996 at [72], available via www.paclii.org at [1996] VUSC 7.

150 Code de procédure civile, arts 9 to 11 and 143.

151 French Civil Code, art 1315. See further Martin Oudin *Evidence in Civil Law – France* (Institute for Local Self-Government and Public Procurement, Maribor, Slovenia, 2015).

152 *Pentecost Pacific Ltd v Hnaloane*, above n 5.

153 See eg *Pym v Campbell* (1856) 6 E & B 37; French Civil Code, art 1347.

date of the proclamation of the Constitution, applied.[154] This rendered admissible the 'widest possible selection of types of evidence as to the content and to the existence of a contract of employment'.[155]

2 Evidence in criminal proceedings

In criminal cases in Vanuatu, the French laws of evidence, which are mainly contained in the Code de procedure penale, are specifically excluded from applying.[156] The British criminal evidence laws that were in force on the cut-off date of 1 January 1976 include the Criminal Evidence Act 1898 and the Criminal Evidence Act 1965.[157] The Criminal Evidence Act 1898 was referred to, but not directly applied in *Public Prosecutor v Kalosil*.[158] The Bankers' Books Evidence Acts, which as mentioned above have been held to apply in civil cases in Vanuatu, also appear to be applicable in criminal cases. In *Public Prosecutor v Kaltabang*[159] the Supreme Court referred without objection to the fact that the Senior Magistrate had made an order on the application of the police for the disclosure of bank accounts under the Bankers' Book Evidence Act.

Where no statutory provision is available, the British common law has been resorted to and its enduring relevance is illustrated by *Public Prosecutor v Chilia*.[160] In that case Chetwynd J said, '[i]n this jurisdiction there are no specific legislative provisions dealing with the admissibility of evidence and so we rely on common law principles'. Presumably, His Honour was speaking only of situations where there was no applicable provision in the British evidence legislation of general application, and indeed that was the position in the case before him, which was dealing with the admissibility of confessions.

Similarly, in *Public Prosecutor v Adams*[161] the Supreme Court was called on to decide on the admissibility of a record of interview signed by one of the accused. Having concluded that neither the Constitution nor Vanuatu legislation contained

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154 The title of this Code is not referred to in the judgment. It would appear to be a reference to the Code du Travail, 15 December 1952.

155 *Pentecost Pacific Ltd v Hnaloane*, above n 5, at 136.

156 Criminal Law (Interim Provisions) Regulation 1980, reg 3.

157 See above n 146.

158 Supreme Court, Vanuatu, 9 October 2015 at [72], available via www.paclii.org at [2015] VUSC 135.

159 (1986) [1980-1994] Van LR 211.

160 *Public Prosecutor v Chilia*, above n 97.

161 [2008] VUSC 12.

any specific provision, the Court held that, "[a]ccording to the Constitution then the applicable law would be in relation to criminal matters the common law of Britain applied in 1980".[162] Interestingly, in the course of the judgment the court recited the terms of art 95(2) including the continuing application of British and French laws, but gave no explanation as to why French evidence law was irrelevant. In fact, as mentioned above those laws are excluded by Regulation from applying.[163]

3 Evidence in customary forums

The Island Courts Act provides that the court must not apply technical rules of evidence and shall admit and consider such information as is available.[164] This leaves room for an inquisitorial approach, which would appear more in line with the cultural practice of storytelling, which has gained recognition in the guise of 'talanoa', an indigenous methodology for communication and research.[165] It should perhaps be noted that in Papua New Guinea, another Melanesian jurisdiction, the Supreme Court has held that the inquisitorial mode of procedure is incompatible with their common law model.[166] Moreover, whilst the Island Court Act suggests a different approach, the rules of procedure made under the Island Courts Act have incorporated some adversarial practices regarding evidence.[167] For example, in a criminal hearing, the prosecutor must call the complainant and witnesses for the prosecution to give evidence, and when each has given evidence he or she may be questioned by the accused.[168]

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162 The court appears to have been unaware that the cut-off date for British statutes of general application is 1 January 1976: see above, text at n 45.

163 Criminal Law (Interim Provisions) Regulation 1980, reg 3.

164 Island Courts Act Cap 167, s 25.

165 See further, Mele Tupou Vaitohi "Using The Pasifika Talanoa Research Methodology in Equity Legal Research" (2022) 27 CLJP/JDCP 1; Cammock R, Conn C, & Nayar S "Strengthening Pacific voices through Talanoa participatory action research" (2021) 17(1) AlterNative: An International Journal of Indigenous Peoples 120–129.

166 *Independent State of Papua New Guinea v Transferees* Supreme Court of Papua New Guinea, 5 August 2015.

167 Island Courts (Civil Procedure) Rules 2005 (replacing the Island Court (Civil Procedure Rules 1984); Island Courts (Criminal Procedure) Rules 2005.

168 Island Courts (Criminal Procedure) Rules 2005, r 6(c). The justices may also ask question but this right also exists in common law trials.

V APPLICATION OF FRENCH PROCEDURE AND EVIDENCE LAWS IN CASES DECIDED UNDER FRENCH LAW

Adjectival laws have been developed hand in hand with the substantive rules to which they apply. It is therefore hardly surprising that, since the vast majority of claims instituted in Vanuatu are founded on common law rules or their statutory descendants, court procedure and evidence follow the common law. Nevertheless, in cases with a strong French connection, including applications by French nationals living in France or a French Collectivity,[169] institution or defence of claims under French law is still a possibility.[170] In such cases it cannot be assumed that Anglicised adjectival laws will be a good fit.[171]

With regard to evidence, *Pentecost Pacific Ltd v Hnaloane*,[172] provides a rare exception. In that case, which was decided before the introduction of Vanuatu's Civil Procedure Code, the Court of Appeal held that as the substantive law applicable was Vanuatu's Employment Act, and as Vanuatu did not have its own rules of procedure, the procedure to be followed depended on art 95(2) of the Constitution. This, the Court interpreted as meaning that the choice between French law and British law would be decided according to the nationality of the defendant, which in this case was French. Accordingly, the Procedural Code of 15 December 1952, for the French Overseas Territories, which was in force in New Caledonia at the date of the proclamation of the Constitution, applied. This Code was found to render "admissible the widest possible selection of types of evidence as to the content and to the existence of a contract of employment". Whilst this could be seen as a precedent for the application of the French rules of evidence, the law in question was the parol evidence rule, which although discussed as if it was a procedural evidence rule, is generally accepted to constitute substantive contract law.[173]

As for procedure, the existence of Vanuatu rules of procedure weighs heavily against the application of French rules. Whilst the Civil Procedure Rules are in the form of subsidiary legislation, they are made under the authority of parliament and would therefore appear to qualify as a provision which subjects the introduced law

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169 New Caledonia was classified as an overseas territory from 1946, but gained special status in 1999 as a result of the Nouméa Accord 1998. It is now a Special Overseas Collectivity.

170 See further Corrin, 'Comment Ça Va?: The Status of French Laws in Vanuatu', above n 4.

171 Hans Kelsen *General Theory of Law and State* (The Law Book Exchange Ltd, New Jersey, 2009) 129.

172 *Pentecost Pacific Ltd v Hnaloane*, above n 5.

173 See eg Paul R Jackiewicz "Evidence - The Parol Evidence Rule: Its Narrow Concept as a Substantive Rule of Law" (1955) 30 Notre Dame L Rev 653.

on civil procedure to an implied repeal.[174] Further, like their predecessor, the Civil Procedure Rules are designed to operate with the common law and make no mention of civil law, although they have been translated into French.[175] But what of the case where there is no applicable Civil Procedure Rule? As mentioned above, the Civil Procedure Rules state that where no procedure is provided, "the court is to give whatever directions are necessary to ensure the matter is determined according to substantial justice".[176] This appears to allow an avenue for a Vanuatu court to have recourse to French rules of procedure when it is dealing with a case under French law and there is no applicable provision under the Rules. An isolated example of this can be found in *Montgolfier v de Gaillande*,[177] where, having held that French law would apply to the issue of inter vivos gifts, the court considered that "a more vigorous inquisitorial approach using French law [might] be useful in determining the issue". The court adopted a pluralist approach, ordering English translations of the original authorities in French and relevant articles of the Code Civil to be made by an official translator and filed by the defendants in Court. The Civil Procedure Rules were ordered to apply to all other issues. Moreover, it was held that those Rules were to be applied 'as interpreted according to Common Law Principles.'[178]

In addition to the mandate to give directions ensuring substantial justice applies in proceedings that are not governed by the 2002 Rules, it is relevant to note the 'Overriding Objective' of the Rules. This is stated in a preliminary part, which commences with the following words:[179]

> The overriding objective of these Rules is to enable the courts to deal with cases justly.
>
> (2) Dealing with cases justly includes, so far as is practicable:
>
> (a) ensuring that all parties are on an equal footing … .

Where the case has a strong French component, this provides support for the contention that the French rules of procedure and evidence should come into play

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174 The Rules were made by the Judicial Committee under the Courts Act Cap 122, s 30.

175 Regles de procedure civile 2002. The Rules do mention customary law, but only briefly in relation to pleadings: Civil Procedure Rules 2002, r 4.2(1).

176 Rule 1.7 (b).

177 *Montgolfier v Gaillande* Supreme Court, Vanuatu, 21 March 2013, accessible via www.paclii.org at [2013] VUSC 39.

178 At [18].

179 Rule 1.2.

whenever it is necessary in order to deal with the case justly and putting parties on an equal footing.

Whilst *Pentecost Pacific Ltd v Hnaloane*[180] and *Montgolfier v de Gaillande*,[181] provide precedents for the application of French rules of evidence and procedure, this is still a rare occurrence.

Missed Opportunity

Has Vanuatu missed the opportunity to embrace the French elements of its legal system? full exploration of this question is beyond the scope of this article and, in respect of substantive law, has been traversed elsewhere.[182] However where French law is the logical choice[183] its application with the accompanying adjectival laws would comply with the constitutional mandate to achieve 'substantial justice,'[184] and to cherish the country's 'ethnic, linguistic and cultural diversity'.[185]

In fact, in recent years the distinction between the rules of procedure in common law countries and French adjectival laws has declined. Under the UK Civil Procedure Rules which came into force in 1999, the judge is given wide case management powers to ensure that the dispute is resolved in accordance with the Rules' overriding objective of dealing with cases justly.[186] This includes the power to control the evidence.[187] In the following year, on the other side of the Channel, French rules of procedure were the subject of dramatic reforms. This has led to some commentators suggesting that France now has a hybrid system which straddles the inquisitorial and adversarial approaches.[188] In fact, the Code de procédure pénale commences with the principle that, "Criminal procedure should be fair and adversarial and preserve a

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180 *Pentecost Pacific Ltd v Hnaloane*, above n 5.

181 *Montgolfier v Gaillande*, above n 177.

182 Anthony Angelo "L'Application du Droit Français au Vanuatu: Quelques Observations sur son Déclin et sur son Avenir [The Application of French Law in Vanuatu: Some Observations on Its Decline and Its Future] [author's trans]" (1997) 3 RJP 13. Available at http://www.paclii.org/vu/other/resources/lddfav376/?stem=&synonyms=&query=Vanuatu%20other%20resources.

183 See eg *Montgolfier v Gaillande*, above n 177. See also Sue Farran "Family Law and French Law in Vanuatu: An Opportunity Missed?" (2004) 35(2) VUWLR 367. Farran suggests that French law has useful provisions which could help to clarify the rights and status of children.

184 Constitution, art 47; Civil Procedure Rules 2002, r 1.7(b).

185 Constitution, Preamble,

186 Civil Procedure Rules 1998 (UK), rr 1.1, 1.4, 32.1 and Parts 3 and 26.

187 Civil Procedure Rules 1998 (UK), r 18.1.

188 Eva Steiner *French Law: A Comparative Approach* (2nd ed, Oxford University Press, 2018) 192.

balance between the rights of the parties".[189] Chapter 1 Part VI is headed, 'La Contradiction', which may be translated as Adversarial Procedure' and art 16 states:

> In all circumstances, the judge must supervise the respect of, and he must himself respect, the adversarial principle. In his decision, the judge may take into consideration grounds, explanations and documents relied upon or produced by the parties only if the parties had an opportunity to discuss them in an adversarial manner. He shall not base his decision on legal arguments that he has raised suo motu without having first invited the parties to comment thereon.

Today, the most that can be said is that the French system is more inquisitorial than the British and the British is more adversarial than the French.[190]

Should Vanuatu choose to reform its adjectival laws, this would provide an opportunity to abandon the cut-off date for British and French legislation governing evidence and procedure. Another possibility might be the adoption of an inquisitorial system in line with the local culture of *talanoa*. Alternatively, the hybrid French model would seem worthy of investigation, with the potential for providing a process capable of accommodating both civil and common law cases. A more radical alternative would be to abandon the status quo altogether. This would allow the development of a Vanuatu jurisprudence through comparative analysis of both legal traditions. This analysis might also explore the customary modes of dispute resolution and the surrounding custom and culture of Vanuatu. The selective application of laws most appropriate to the circumstances of Vanuatu is, after all, already sanctioned by the Constitution[191] and the courts.[192]

VI CONCLUSION

It is now nearly forty-five years since Vanuatu achieved Independence. As the country moves further away from its colonial past the statute books will gradually fill with more adjectival laws enacted by or made under the authority of the Parliament of Vanuatu. There is every reason to believe that these laws will follow the common law path which was laid down at Independence with the establishment of the common law system of courts and rules of procedure and evidence designed

189 Nouveau Code de procédure civile, art 1-P, para 1, inserted by Law no 2000-516 of 15 June 2000 art 1 Official Journal of 16 June 2000.

190 J A Jolowicz "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52(2) ICLQ 281.

191 Articles 47(1) and 95(2).

192 See eg *Li Ya Huang v Russet*, above n 50, at [97]; *Joli v Joli* [2003] VUCA 27.

for an adversarial system. Already, the Criminal Procedure Code, enacted just after Independence, and the Civil Procedure Rules, made in 2002, are based on the common law model.

The Evidence Bill is currently out for consultation. It is modelled on the Evidence Act 2009 of its neighbour, Solomon Islands, rather than on the introduced law or other models from overseas. Nevertheless, the Solomon Islands' Evidence Act is undoubtedly cast in the common law tradition and it seems almost certain that this will be the direction for all future legislation in Vanuatu. Once Vanuatu has 'otherwise provided,' the scope for the direct application of introduced laws will disappear and with it the question of whether British or French adjectival law will disappear. With this will go the opportunity to embrace the French elements of its legal system and to develop a Vanuatu jurisprudence based on the best of both systems, an approach to adjectival law raised so far only in *Montgolfier v Gaillande*.[193] Apart from this case, evidence and procedure have become almost completely anglicised. The view expressed in 1908 that the London Convention was 'particularly favourable to France' and offered 'very great possibilities to develop its interests and to increase its influence'[194] has not transpired to be the case. In the meantime, the common law is the default system of law, evidence and procedure, and the burden of establishing that French adjectival law should apply is a heavy one.[195]

193 *Montgolfier v Gaillande*, above n 177.

194 Polities *Le Condominium Franco-Anglais des Nouvelles-Hebrides*, above n 21.

195 See eg *Bernard v Gallo* Supreme Court, Vanuatu, 16 April 2014, accessible via www.paclii.org at [2014] VUSC 19.