RESTRICTING THE FREEDOM OF MOVEMENT IN VANUATU: CUSTOM IN CONFLICT WITH HUMAN RIGHTS

PARKINSON WIRRICK*

Custom, traditions, the traditional economy and customary law or *kastom* in Vanuatu are all a part of life for most ni-Vanuatu. As stated by Ralph Regenvanu, 'the reality of Vanuatu today is that the traditional economy is by far the most important and predominant economy in the country.'[1] Custom in Vanuatu though, is in conflict with written law at many times and in many contexts. Vanuatu has recently been experiencing an increase in crime and other social problems in the urban centres (particularly Port Vila). In response calls are usually made for the application of custom in the sending of undesirable individuals back to their islands or villages. Though the sending of individuals back to their islands was and is in fact practiced under ni-Vanuatu custom to a limited extent, this practice is contrary to written law.[2]

Specifically, the legal position is that the practice is contrary to the *Constitution* of Vanuatu - this being the supreme source of law.[3] Article 5(1)(i) provides that the 'freedom of movement' is a 'fundamental' right and freedom of the individual in Vanuatu. There are however, restrictions to this right. Under Article 5(1), this freedom is subject to the '…rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health.'

THE CURRENT PRACTICE OF FREEDOM OF MOVEMENT

Given the legal position above, the actual position of the freedom of movement is now considered. Within Vanuatu, the population, if they are willing and able can freely move from their places of residence to the urban centres or other places within Vanuatu without fear or repercussion. However, there are cases where the freedom of movement has been restricted based on the exercise of chiefly authority in correcting an alleged wrong. One clear case law example of restrictions to the freedom of movement which came before a court of law is *Public Prosecutor v Kota.*[4] Also for example, according to Chief Jacob Kapere,[5] who is the head chief of the South Tanna people residing in Port Vila, there are many cases he has been privy to in Port Vila where restricting the freedom of movement

* LLB student, University of the South Pacific.

[1] Ralph Regenvanu, 'The Year of the Traditional Economy- What is it all about?' (2007).

[2] See *Public Prosecutor v Walter Kota and Ten Others* [1993] VUSC 8 http://www.paclii.org. In this case a woman was forcibly taken from Port Vila and returned to her husband on Tanna, following a customary decision that she must stay with him. Some of the chiefs who were charged were found guilty of inciting a kidnapping and one person was found guilty of the act of kidnapping.

[3] Article 2.

[4] *Walter Kota*, above n 2.

[5] Interview with Jacob Kapere, Chief, South Tannese people residing in Port Vila (Port Vila, 1 October 2007).

was sanctioned against particular Tannese. Such cases mainly involved orders that the particular person return to South Tanna. Moreover, it was stated by Chief Kalanga[6] of White Sands, Tanna that he and other chiefs had in fact ordered certain people to return to White Sands, Tanna in the past.

The lack of reported cases as opposed to cases as indicated from the author's interviews with certain chiefs perhaps signifies a general compliance to chiefly authority in Vanuatu. This may be especially so where the individual whose freedom of movement is infringed knows he or she has committed a crime, immoral act or other action which he or she is reluctant or ashamed to bring to light in a court of law. There is therefore in Vanuatu a difference between the legal position on paper and the actual position concerning the freedom of movement. Given the suggestion that the freedom of movement is in fact restricted by chiefly authority in practice and that this authority is accepted by those subject to it, thus legitimised, why then can we not formally make lawful this reality? Let us now consider the calls for further restrictions to the freedom of movement and the argument in its favour.

The elements calling for further restrictions on the freedom of movement see the existing right as being too liberal. This is stated as causing for example, undesirable persons to enter or remain in the urban centres and commit various criminal, anti-social and immoral acts that threaten the economy and social and moral order of the country. For example, in the *Vanuatu Daily Post* issue of 3 September 2003,[7] chief and Minister of Parliament for Efate rural, Mr Jimmy Meto Chillia stated that crime is costing hundreds of jobs each year and that custom chiefs should be given formal legal powers to "deport" or send home their troublemakers from rubbishing the image of Port Vila with their criminal activities.

The issue is also strongly related to land. Land is a sensitive issue and a great heritage in Vanuatu as it strongly connects a Melanesian to his or her identity. Land is also declared as being indetachable from its custom owners by Vanuatu's *Constitution*.[8] Many calls for further restrictions to the freedom of movement were made by the custodians of land where social problems and crime are a concern. This is sometimes not obvious but the customary connection of those calling for further restrictions to the freedom of movement to the land is an undercurrent of the calls usually made.

Calls for further restrictions to the freedom of movement are not only made by the articulators of custom - the chiefs - but also the police and others as well. For example, in another *Vanuatu Daily Post* report of November 25, 2004[9] it was reported that 'Police want unemployed sent home.' Here, Chief of Staff John Taleo appealed to the Port Vila

[6] Interview with Kalanga, Chief, White Sands Tannese people residing in Port Vila (Port Vila, 12 October 2007.
[7] Len Garae, 'Chiefs demand power to punish criminals' *Vanuatu Daily Post* (Port Vila, Vanuatu) 3 September 2003, 1.
[8] See Articles 73, 74 and 75.
[9] Len Garae, 'Police want unemployed sent home' *Vanuatu Daily Post* (Port Vila, Vanuatu) 25 November 2004, 3.

Town Council of Chiefs and representatives of Island Council of Chiefs in Port Vila to '…send their unemployed young people back to their islands.'

Furthermore, very recently the Shefa Provincial Council made a public statement in *The Independent* newspaper stating that the 'government and judiciary should give the chiefs power and authority to send back criminals/offenders convicts rapist etc back to their home island to serve their sentence and no come back to Efate.'[10] This statement is consistent with recommendations from the crime summit held in Port Vila in May 2008, where it was suggested that chiefs should have '…constitutional and legal standing where law enforcement is concerned.'[11]

These examples show that calls for restrictions to the freedom of movement based on giving chiefs formal legal authority, come from a wide range of sources within Vanuatu society. The major argument in favour of further restrictions to the freedom of movement is based on correcting the social problems and crime caused by having such a liberal right in the first place. This argument to further restrict the freedom of movement is justified as being consistent with customary law. It can be argued that placing further restrictions on the freedom of movement would merely be formal recognition of a form of law which has been, and is, operative and complied with long before the introduction of written/state law. There are however, strong arguments against any further restrictions to the freedom of movement.

ISSUES OF PRACTICALITY

Leaving the notions of "inalienability" and the "universalism" of human rights aside for now, some arguments against any further restrictions to the freedom of movement relate to the impracticability of such a proposal and its application and enforcement. For example, portions of the populations of both Port Vila and Luganville were born in these urban centres and have resided there for most of their lives. Making lawful the ordering of such people to return to where they are from is unreasonable to say the least. There are no comprehensive or accurate accounts of what percentage of, for example Port Vila residents who have no land rights in their places of origin. A vivid example can be seen from the reported tension between a Paamese family and Santo people. Here it was reported that the family ordered to leave Luganville by the chiefs had been living in the town (Luganville) long before independence, and 'also had some right to be there'.[12]

Furthermore, who exactly the formalised customary law will apply over is another difficult question to address. There are people in Vanuatu who will definitely object to

[10] *The Independent* (Port Vila, Vanuatu) 20 April 2008.
[11] Graham Crumb, 'Kastom & The Law: Worlds Apart' *Vanuatu Weekender* (Port Vila, Vanuatu) 24 May 2008, 2. It can be noted that such calls to restrict freedom of movement in response to perceived threats to law and order or social stabililty are not new. For examples of similar calls in 2000, following coups in Solomon Islands and Fiji see Anita Jowitt, 'Migration, Unemployment and Urban Crime in Vanuatu' (Occasional Paper Number 9, University of the South Pacific School of Law Occasional Papers Series 2001) 7-9.
[12] Radio New Zealand International, 'Vanuatu chiefs want trouble making family out of Luganville' (14 August 2006) http://www.rnzi.com/pages/news/php?op=read&id=26075 (Accessed 7 November 2007).

being formally bound by a law based on ni-Vanuatu custom. It is also difficult to have a customary-based law apply over naturalised citizens or other citizens who simply do not fall under any specific customary group of Vanuatu. Customary law and practices vary widely throughout Vanuatu, which is another challenge. Another question to ponder over is the significance, if any, custom has over those whom restrictions on the freedom of movement is aimed to apply over.

These are major arguments against the application of any possible customary law-based formal law aimed at lawfully restricting the freedom of movement. The challenges are related to the limited authority of custom in general as is currently provided in Vanuatu's legal framework and also relate to the disputed personal applicability of custom in general in the Vanuatu context today - particularly in the urban setting. There are also possible threats of abuse of power by chiefs under the pretext of achieving social stability. Unfair or unjust results are another real threat posed by such power and discretion.

Despite these arguments however, further restrictions to the freedom of movement based on custom may find a place within the current legal framework. This though, must be based on a formal customary law-based law which is able to be appropriately applied and enforced while having effective checks and balances on power and discretion. Such a law may well involve the "formalisation" of custom or customary law to a certain extent. "Formalisation" involves writing down and solidifying custom or customary law into the body of written/state law to a certain extent. "Formalisation" of custom will produce a solid and more fixed law or rule. This effect is contrary to custom's dynamic, adaptable and mutating nature (which is similar to common law evolution), but will produce a more certain body of law, thus eliminating unpredictability and the possibility of unwanted results. The notion that "formalisation" of customary law renders it no longer custom is important, but, perhaps in adding to a Pacific or Vanuatu jurisprudence it is desirable that more laws that are drawn from the basis of custom are recognised in legislation.

Furthermore, there is the argument that formally recognising customary law's authority in further restrictions to the freedom of movement would help to legitimate at least this aspect of customary law. Legitimisation of a law occurs when the majority accepts it either expressly or implicitly by not challenging it. Prior to the introduction of written law (and Christianity) in Vanuatu, certain practices were not accepted and not practiced. One of these the incarceration of people in correctional centres. However, the effective introduction and enforcement of different values and morals through written laws such as the *Constitution* and the *Penal Code* [Cap 135] have added to the legitimacy of such laws and the values and morals that underpin them. It can be argued that formal recognition by the state of a further restriction to the freedom of movement would assist in its legitimisation. Here, one can argue that since the incarceration of criminals is seen as legitimate due in part to it being part of our body of written laws, then along the same lines further restrictions to the freedom of movement can achieve such legitimacy. In this way the concerns noted above, about lack of acceptance of custom by certain groups, and lack of clarity about which custom should apply and to whom custom should apply can be overcome.

HUMAN RIGHTS AND RESTRICTIONS ON FREEDOM OF MOVEMENT

A key counter-argument to the possible solution that further restrictions on human rights which are in line with custom should be legislated is that any further restrictions on the freedom of movement would undermine internationally accepted human rights. Vanuatu has incorporated human rights into its *Constitutio*n. How though did a freedom of movement (among other individual rights) find its place in the *Constitution* of Vanuatu as being a "fundamental" individual right?

The *Constitution* and governing system in Vanuatu today were adopted from the British Westminster model, which has a great influence on the form and substance of Vanuatu's legal system and written laws today. Also, as argued by Jennifer Corrin Care 'all the countries of the region…have shown a desire to protect internationally accepted human rights…[and] with regard to Vanuatu, the rights contained in its constitution are based on the Canadian Bill of Rights.'[13] These facts suggest that Vanuatu's constitutional drafters sourced the content of the constitutional rights provisions externally; simply conforming to what was and is internationally accepted without great debate, opposition or input from the people (including the chiefs).

The rights and freedoms provisions of Vanuatu's *Constitution* are described as being "fundamental". The word "fundamental" is also used in the preamble of the United Nations *Universal Declaration of Human Rights 1948* to describe human rights. Human rights are also described as being "universal", "inherent" and "inalienable." The international acceptance of human rights as being "fundamental", "universal", "inherent" and "inalienable" has been legitimised within Vanuatu society and this is obvious in Vanuatu's *Constitution* and the general compliance to it. However, elements of Vanuatu society at the same time see another equally legitimate source of law in custom[14] - which is often quite contrary to certain human rights.

An argument against the notion of human rights being appropriate to the Vanuatu context is that it basically undermines certain customs and traditions- custom and traditions which have been part of Vanuatu life and accepted by ni-Vanuatu since time immemorial. As stated by Anita Jowitt, '…if…[human] rights really were universal and inalienable then they would exist within all cultures and surely customary norms would have developed in accordance with them.'[15] From one viewpoint, human rights are not universal but are a tool in the grand scheme of globalisation through standardisation. As argued by Ian Fraser 'it could be that "human rights" is a mask, a rhetorical device to

[13] Jennifer Corrin Care, 'Conflict Between Customary Law and Human Rights in the South Pacific' (Conference paper presented at the 12th Commonwealth Law Conference, Kuala Lumpur Malaysia, September 1999) http://www.vanuatu.usp.ac.fj/sol_adobe_documents/usp%20only/pacific%20law/corrin.htm (Accessed 3 September 2007).

[14] That custom is a source of law is supported by the *Constitution.* Article 95(3) of the *Constitution* provides 'Customary law shall continue to have effect as part of the law of the Republic of Vanuatu.'

[15] Anita Jowitt, 'The Notion of Human Rights' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: law, society and governance in the South Pacific* (2003) 186.

conceal manoeuvres and motivations quite unconnected to the concept itself - the playing of a *game.'*[16]

Such arguments are, however, usually countered based on the idea that; '…human rights are the birthright of every person.'[17] The premise that by being born a human being we all share a common, biological moral order denies the influence of culture and society on ones "human nature". This argument holds that the society one is a member of does not influence his or her "human nature"; thus, ones "human nature" is only a product of genetics and not of culture or society. This argument is not irrefutable; and is indeed part of the great body of discourse relating to the universalism versus cultural relativism of human rights debate.

According to Jack Donnelly, '"human nature" is a range of possibilities varying , in part in response to culture, within certain psychobiological limits; it is as much a project and an individual and social discovery as it is a given.'[18] Here, his counter-argument is that culture and society do in fact influence ones "human nature." Thus, it can be adduced that the concept of human rights is not a universally inherited fact of life because "human nature" varies from culture to culture and it is by this "human nature" that one defines human rights- if indeed the concept has traditionally been a part of that particular society.

Furthermore, the definite relationship between culture, "human nature" and the concept of human rights gives rise to an obvious proposition, that is; the concept of human rights and the values underpinning them, such as equality for all, have never existed in certain societies - particularly traditional ones. Thus, where inherited tradition and customs still have influence and regulate human behaviour within a society, that society will face challenges to the complete acceptance, respect and legitimisation of certain human rights via its (inherited) legal framework. This is currently the situation in Vanuatu regarding the right to freedom of movement regardless of what the written law states.

In further contending against the notion of universality and of the concept of human rights itself, Andreas Follesdal[19] raises nine main criticisms, the most significant ones of which are highlighted as follows. Firstly, human rights are based on atomistic egotism - that is, being unduly based on a Western conception of the individual as self-interested and atomised. Secondly, he states that human rights ignore human duties. This point is all the more potent within the Vanuatu (and Pacific) context due to the nature of our cultures', societies' and traditions' great emphasis on the individual human duties and obligations to respect customary norms, laws and familial and chiefly authority rather than rights.[20]

---

[16] Ian Fraser, 'Human Rights vs. Custom in the Pacific: Struggle, Adaptation or Game?' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: law, society and governance in the South Pacific* (2003) 202.
[17] Diana Ayton-Shenker, 'The Challenge of Human Rights and Cultural Diversity' (1995) http://un.org/rights/dpil627e.htm (Accessed 27 May 2008).
[18] Jack Donnelly, *Universal Human Rights in Theory and Practice* (1989) 112.
[19] Andreas Follesdal, 'Human Rights and Relativism' http://www.etikk.no/globaljustice/papers/GJ2003_Follesdal_Human_Rights_and_Relativism.doc (Accessed 27 May 2008).
[20] We can note that Article 7 of the Vanuatu *Constitution* refers to the duties of citizens. It states:

Follesdal goes on to state that human rights ignore social and economic needs. Vanuatu needs social stability in order to function properly as a nation state and so not as to fall into the class of apparently "failed states" or remain part of the so-called "arc of instability". Further restrictions to the freedom of movement aim to achieve this end. The fifth criticism of human rights made by Follesdal is that human rights violate respect for individuals' tacit consent. His point here is relevant to Vanuatu in that the tacit consent of individuals in being subject to customary law should be respected - even if customary law is contrary to human rights.

Follesdal goes on in his sixth criticism of human rights by stating that human rights violate respect for other cultures. This point is highly relevant and was raised above regarding the apparent undermining of Vanuatu customary law by prohibitions on restrictions of freedom of movement. Relating to the above point is Follesdal's eighth argument, that human rights violate state sovereignty. This argument is related to the above argument. Vanuatu customary law is constitutionally provided as a source of law. Hence, from one perspective, international human rights provisions that were incorporated into Vanuatu's written law which violate customary law by virtue of hierarchical superiority may be viewed as violating state sovereignty.

CONCLUSION

Despite the discourse against human rights, Vanuatu is a member of the international community and is a recipient of much international aid and support. Any further restrictions to individual human rights as currently provided via the *Constitution* may jeopardise this much needed support from the international community. Human rights are not absolute, but are 'subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health'[21] and there are currently justifiable limits on the freedom of movement in the form of incarcerating

---

7. Every person has the following fundamental duties to himself and his descendants and to others-
(a) to respect and to act in the spirit of the Constitution;
(b) to recognise that he can fully develop his abilities and advance his true interests only by active participation in the development of the national community;
(c) to exercise the rights guaranteed or conferred by the Constitution and to use the opportunities made available to him under it to participate fully in the government of the Republic of Vanuatu;
(d) to protect the Republic of Vanuatu and to safeguard the national wealth, resources and environment in the interests of the present generation and of future generations;
(e) to work according to his talents in socially useful employment and, if necessary, to create for himself legitimate opportunities for such employment;
(f) to respect the rights and freedoms of others and to cooperate fully with others in the interests of interdependence and solidarity;
(g) to contribute, as required by law, according to his means, to the revenues required for the advancement of the Republic of Vanuatu and the attainment of national objectives;
(h) in the case of a parent, to support, assist and educate all his children, legitimate and illegitimate, and in particular to give them a true understanding of their fundamental rights and duties and of the national objectives and of the culture and customs of the people of Vanuatu;
(i) in the case of a child, to respect his parents.

[21] *Constitution* Article 5(1).

criminals. However, a distinction can be drawn between restricting the freedom of movement of individuals who have been found guilty of crimes against the state and restricting the freedom of movement of individuals who have not committed any crime against the state, but have offended in custom or are undesirable "potential trouble makers". Further restrictions to the freedom of movement could be seen as an indication that Vanuatu, as a state and a member of the United Nations, is not respecting its international obligations regarding human rights. Moreover, as argued by Diana Ayton-Shenker, 'as the world becomes a smaller place with the advent of globalisation, universalism makes more sense as a philosophy of human rights.'[22] Thus, the question for Vanuatu is; can it further restrict the freedom of movement and not be seen as violating human rights? And how exactly can it do this in its current legal framework?

[22] Diana Ayton-Shenker, 'The Challenge of Human Rights and Cultural Diversity' (1995) http://un.org/rights/dpil627e.htm (Accessed 27 May 2008).