

Mats and Restorative Justice in Vanuatu

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Mats are often unconsciously walked on, tripped over and habitually searched out to wipe our wet and muddy shoes on. Beyond a mat's functional and decorative characteristics, it is an object that does not attract much legal attention in law. However, in Vanuatu, fine mats are different. A 'fine mat' is a significant custom object. Fine mats within ni-Vanuatu² homes and culture are symbols of status and wealth, which are proudly displayed and exchanged in various custom ceremonies.³ They also embody juristic importance in Vanuatu's pluralist legal system.

This article argues that a ni-Vanuatu fine mat is more than a benign object. A feminist critique would suggest that, in their use as compensation for sexual harm victims, mats can memorialise violence and tie a victim of sexual crime to a narrative of patriarchal justice. By using the mat as a point of reference, this article will suggest how Vanuatu's sentencing practices can better facilitate a sexual assault victim's agency to redress gender inequality where custom reconciliation practices fall significantly short.

Vanuatu's criminal justice system has various statutory provisions which promote custom reconciliation ceremonies between the perpetrator and victim.⁴ The most commonly used provision is section 119 of the Criminal Procedure Code, which provides that:

Upon the conviction of any person for a criminal offence, the court shall, in assessing the quantum of penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may, if he is satisfied that undue delay is unlikely to be thereby occasioned, postpone sentence for such purpose.⁵

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² ni-Vanuatu is the term used for a citizen of Vanuatu.

³ *Public Prosecutor v Bule* [1994] VUSC 18. See also, Jean Tarisesei, 'Today is not the Same as Yesterday, and Tomorrow it will be Different Again: Kastom in Ambae, Vanuatu' in Bronwen Douglas (ed), *State, Society and Governance in Melanesia* (Australian National University, 2000) <https://openresearch-repository.anu.edu.au/bitstream/1885/140991/1/women%26governance3_0.pdf> accessed 23 July 2019.

⁴ Judicial Services and Courts Act 2000 s 65(2)-(3), Penal Code (Amendment) Act 2006 and Criminal Procedure Code [Cap 136], Island Courts Act 1983 [Cap 167] s 10. See also Constitution of the Republic of Vanuatu arts 95(2), 47(1).

⁵ Criminal Procedure Code [Cap 136] s 119.

Newton Cain, a scholar in South Pacific politics, policy and development observes that the courts have adopted different approaches to customary settlements across the South Pacific region.⁶ In Vanuatu, the purpose of custom is to quickly put everyone back onto a straight 'road' again.⁷ In other words, custom can resolve disputes, mend relations and restore peace between families and villages.⁸ The function and structure of a custom settlement is three-fold. First, to appease the victim; second, to redeem the perpetrator; and, third, to restore a sense of order and peace in the community.⁹ Generally, a customary settlement requires a perpetrator to give custom objects such as island food, kava, pigs (either alive or dead) and fine mats to the victim.¹⁰ But, in many cases, women often lack the status and ability to affect custom settlement proceedings as older male family members tend to speak on behalf of the victim.¹¹

The achieving and restoring of peace by custom lies at the core of Vanuatu's custom system of justice - however, it is challenging not to think that justice here may be distributed more towards the perpetrator than the victim. Victims have reported experiencing ongoing and overwhelming feelings of shame and embarrassment associated with sexual violence and crime even after a custom reconciliation ceremony has occurred.¹² The United Nations has expressed concerns at the use of customary law within the South Pacific region and custom may insufficiently focus on the needs of the victim in an attempt to provide redress.¹³

The current regime assumes that receiving custom objects and financial compensation will adequately deliver justice for the victim, but, unlike some custom objects like food and kava, which can be consumed, a fine mat has a degree of permanency and, if displayed, becomes a powerful presence within a victim's or a family member's home. Generally, mats can be found in homes displayed or stored in a basket above a fire to keep the mat free of insects and mildew.¹⁴ Parkinson Wirrick

⁶ Tess Newton Cain, 'The Incorporation of Customary Law and Principle into Sentencing Decisions in the South Pacific Region' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change – Law, Society and Governance in the Pacific* (Australian National University Press, Canberra 2010) 174. Compare *Public Prosecutor v Vuti* [2011] VUSC 75; *Public Prosecutor v Malau* [2017] VUSC 25.

⁷ See case study of M and W in Tony Crook, Susan Farran and Emilie Roëll, 'Understanding Gender Inequality Actions in the Pacific: Ethnographic Case-Studies & Policy Options' (European Union, Publications Office of the European Union 2016) Report 184–85 <<https://research-repository.st-andrews.ac.uk/handle/10023/10119>> accessed 23 July 2019.

⁸ *Public Prosecutor v Joshua Tovor* [2011] VUSC 230, [6]

⁹ Jean Zorn, 'Issues in Contemporary Customary Law: women and the Law' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change – Law, Society and Governance in the Pacific* (Australian National University Press 2010) 130.

¹⁰ *Ibid*, 106. For example, *Public Prosecutor v Boronie* [2016] VUSC 178, [8]; *Public Prosecutor v John* [2013] VUSC 175.

¹¹ Sofia Shah, 'Sexual Offences in Vanuatu under the Light of Custom and Law: 'An Avenue for Restorative Justice' (2013) 8 *Asian J Criminol* 257, 269.

¹² Vanuatu Women's Centre, 'Vanuatu National Survey on Women's Lives and Family Relationships' (May 2011) 92.

¹³ United Nations Women, 'Handbook for Legislation on Violence Against Women' (2008) 16.

¹⁴ Carlene Winch-Dummet and Silas Chief Viratameria Buli, *The Production, Symbolism, Exchange and Value of Red Mats and Pigs in Traditional Economy of South West Pentecost Vanuatu* (2011) 7

in his study of Vanuatu custom, observes a great emphasis on a duty and obligation to respect customary norms, laws and chiefly authority.¹⁵ It is arguable, therefore, that a victim and their family should display the mat so not to be seen as subversive, and to demonstrate their upholding of custom and respect for community norms and Melanesian values in keeping the peace and maintaining social order and harmony.

The 2001 case of *Public Prosecution v Gideon*¹⁶ illustrates the concerning extent to which custom can influence a judge's discretion in sentencing. In this case, the victim was a 13-year-old girl who sustained injury following unlawful intercourse. The accused pleaded guilty to rape and the court found the victim's age to be an aggravating factor. Despite the court describing the offence as an 'act of senseless sexual intercourse', the sitting judge relied upon sentencing remarks in the case of *Peter Wayne* by finding that customary settlements 'benefit[ted] sentence'.¹⁷ The maximum sentence for rape is life imprisonment (14 years) but on the basis of Gideon's guilty plea and customary settlement of VT 30,000, a pig and a fine mat, the court under section 119 of the Criminal Procedure Code reduced his sentence to only 13 months and ordered that the sentence be wholly suspended.

Gideon is one of many cases where custom allows for a sentence to be either suspended or significantly reduced.¹⁸ The outcome of *Gideon* and other cases may encourage defendants to make use of custom to avoid harsher penalties. However, the use of custom as a sentencing tactic can diminish women's identity and further undermine their already subordinate status in Vanuatu.¹⁹

The high cultural value of fine mats explains their use in legal settlement of sexual violence against women.²⁰ In spite of this, a mat can also emanate a legal narrative about the lives and experiences of sexual abuse victims that serves as a reminder of their violence and pain. A fine mat for a victim may act as an implicit link between the realities of a victim's sexual abuse and their unrecognised feelings of helplessness and shame as a victim. If a victim did not have the opportunity in custom to reject a mat, the fine mat could become an ongoing trigger of the traumatic event, thereby causing the victim to live through a 'private death'.

Accordingly, it is important for Vanuatu's legal system to attempt to account for the vulnerability and disempowerment that a custom object can represent for

<http://seaspirit.weebly.com/uploads/1/2/2/7/12279747/the_production_symbolism_exchange_and_value_of_red_mats_and_pigs_in_the_traditional_economy_of_south_west_pentecost_vanuatu.pdf> accessed 12 May 2019.

¹⁵ Parkinson Wirrick, 'Restricting the Freedom of Movement in Vanuatu: Custom in Conflict with Human Rights' 12(1) (2008) *JSPL* 76, 81.

¹⁶ [2001] VUSC 118.

¹⁷ *Public Prosecutor v Peter Wayne & Others* CR 08 of 2000.

¹⁸ See *Public Prosecutor v Tabigerian* [2015] VUSC 181; *Public Prosecutor v Kalgai* [2005] VUSC 58; *Public Prosecutor v Georges* [2004] VUSC 68 (with aggravating factors).

¹⁹ Lissant Bolton, 'Women, Place and Practice in Vanuatu: a view from Ambae' (1999) 70 (1) *Oceania* 43.

²⁰ See a small sample of cases: *Public Prosecutor v Boesel* [2018] VUSC 16; *Public Prosecutor v Amos* [2016] VUSC 199; *Public Prosecutor v Yonna* [2007] VUSC 108; *Public Prosecutor v Robin* [2005] VUSC 69; *Public Prosecutor v Wayne* [2000] VUSC 57.

victims of sexual violence. Although there is a plethora of stand-alone legislative reform ideas addressing violence against women in Vanuatu, there appears to be very little political will to operationalise these recommendations and other suggestions to overcome the inadequacies of Vanuatu's criminal law sentencing provisions for victims of sexual violence. In particular, it has been strongly advocated by Law Reform Commissions to remove custom in sentencing.²¹

A common principle behind the recommendations is the promotion of a victim's agency and autonomy.²² It has been suggested that judges must start to create and encourage clear opportunities for a victim to have a voice and agency in sentencing. Currently, Vanuatu's pre-sentencing procedure allows a victim to write a victim impact statement ('VIS'), but VIS forms should include a section for a victim to comment on the suitability of custom in sentencing. Without this opportunity, a victim is unable to openly inform the court of the unsuitability of custom as redress, the trauma suffered from a sexual crime, and how they feel about a possible reduced sentence.

While custom is an important part of Vanuatu society, its use in sentencing must be carefully administered to ensure adequate victim redress. As outlined in this article, even benign objects such as a mat can have long-lasting negative impacts on sexual crime victims and their recovery.

²¹ Vanuatu Law Commission, *Penal Code: Sexual Offences & Customary Reconciliation – Legislative Review* No05/14 (2014) 9; New Zealand Law Reform Commission, *Converging Currents: Custom and Human Rights in the Pacific* Study Paper 17 (2006) 96.

²² *Supra* (n11, n12).