

A NOTE ON VANUATU'S CASES ON THE RIGHT TO EQUALITY

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This paper considers the case law of Vanuatu in relation to the constitutional principle of equality and the difference between "formal equality" and "substantive equality".

Cet article examine la jurisprudence de Vanuatu sur le principe constitutionnel d'égalité et la différence entre «égalité formelle» et «égalité substantielle».

I INTRODUCTION

In Vanuatu, the principle of equality is recognised only by the Constitution. No other legislation explicitly does. Article 5(1) of the Constitution provides:

The Republic of Vanuatu recognises that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health:

- (a) life;
- (b) liberty;
- (c) security of the person;
- (d) protection of the law;
- (e) freedom from inhuman treatment and forced labour;
- (f) freedom of conscience and worship; (g) freedom of expression;
- (h) freedom of assembly and association;
- (i) freedom of movement;
- (j) protection for the privacy of the home and other property and from unjust deprivation of property;

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- (k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants less developed areas.

At first sight, it may seem that there is no particular problem with the above equality clause. However, a close look may reveal some gaps. Indeed, one can argue that the above equality clause is rather broadly worded and only mentions the 'equal treatment under the law or administrative action' and 'protection of the law'. Article 5(2) describes the 'protection of the law' as including the essential requirements of a fair hearing by anyone facing prosecution.¹

However, in the above equality clause there are no expressions such as 'equal before and under the law' or 'the right to the equal protection and equal benefit of the law'. Therefore, courts may sometimes apply this art 5 in a very formal way and not go beyond the consideration of whether individuals are treated identically under the law. Yet, if Vanuatu and its institutions aspire to create a more equal society, one can argue that not only should the right to equality be clearly defined by legislation or by case law, but art 5 should also be amended to guarantee substantive equality. In addition, one can argue that an analytical framework of the right to equality (in other words a test to be applied when analysing an equality claim) promoting the approach of substantive equality needs to be established by courts. The failure to do so may result in some problematic or questionable judgments in which courts apply the current clause of equality in a very formal manner. The case *In Re Adoption Application by SAT* is a perfect example where Supreme Court of Vanuatu denied the right of a homosexual to adopt a girl.² The

1 *Boulekone v Timakata* [1986] VUSC 11 <www.paclii.org/>; See also art 5(2) of the Constitution.

2 *In Re MM Adoption Application by SAT* [2014] VUSC 78 <www.paclii.org/>; Also see Sue Farran "Child Adoption: A Dilemma in a Plural Legal System: A Critical Comment on Recent Case Law" (2014) *Journal of South Pacific Law* 14, <www.usp.ac.fj/fileadmin/random_images/home_middle_banners/emalus/JSPL/2014/Farran.pdf> (Accessed 20 July 2017); For discrimination issues in general, see Roselyn Tor et Anthea Toka, *Gender, Kastom and Domestic Violence. A Research on the Historical Trend, Extend, and Impact of Domestic Violence in Vanuatu* (2004); Anna Naupa 'Making the Invisible Seen: Putting Women's Rights on Vanuatu's Land Reform Agenda' in Siobhan McDonnell, Matthew Allen and Collin Filer (eds) *Kastom, Property and Ideology* (2017) 305; Andonia Piau-Lynch, 'Vanuatu: Country Gender Profile' Report to the Japan International Cooperation Agency (2007) <www.jica.go.jp/english/our_work/thematic_issues/gender/background/pdf/e07van.pdf>; Sue Farran "Gender Discrimination: A Review of Legislation in Vanuatu" (2000) 51 *Development Bulletin* 17 <www.vanuatu.usp.ac.fj/sol_adobe_documents/usp%20only/Pacific%20law/Farran2.pdf> (Accessed 30 July 2017); Sue Farran *Human Rights in the South Pacific: Challenges and Changes* (2009); Kenneth Brown and Jennifer Corrin "Conflict in Melanesia: Customary Law and the Rights of Women" (1994) 24 *Commonwealth Law Bulletin* 1334.

Court held, among other things, that the applicant (homosexual) 'is being treated the same under the law as any other adult male applying to adopt a female child in Vanuatu'.

This paper attempts to demonstrate that the substantive equality better takes into account the differentiated needs of vulnerable groups and people and thus is more likely to help prevent all kinds of discrimination in Vanuatu's society. Therefore, it encourages Vanuatu lawmakers to amend article 5 of the Constitution and include a few expressions such as 'equal before and under the law' or 'the right to the equal protection and equal benefit of the law' in order to guarantee substantive equality for every individual. This article also encourages Vanuatu courts to establish an analytical framework of the right to equality that promotes the substantive equality approach. In this regard, the Supreme Court's decision in the case *Bonh v Republic of Vanuatu*³ is likely a turning-point.

II FORMAL EQUALITY v SUBSTANTIVE EQUALITY?

Formal equality rests on the idea that individuals who are in the same situation should be treated equally. This conception of equality is likely to conceal indirect discrimination. A rule which appears to be neutral can have a disproportionate impact on a certain group of people. For instance, a rule which prohibits individuals under 1.80m from joining the police force would appear to be neutral. Yet, this rule discriminates indirectly against women since they are generally smaller than men and a big majority of them will not meet this physical requirement.⁴ In this sense, Robert Wintemute argued that formal equality is clearly not sufficient.⁵ In addition to that, substantive equality must be guaranteed to each individual.

Substantive equality is based on the idea that 'the promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognised at law as human beings equally deserving of concern, respect and consideration'.⁶ This definition was given by the Supreme Court of Canada in the case *Andrews v Law Society of British Columbia*,⁷ a landmark decision on the right to equality. It must be noted that this definition has been cited by the Supreme

3 *Bonh v Republic of Vanuatu* [2013] VUSC 42.

4 Peter Hogg *Constitutional Law of Canada* (5th ed, Thomson Carswell, Ontario, 2007) 618.

5 Robert Wintemute "Sexual Orientation and the Charter. The Achievement of Formal Legal Equality (1985-2005) and Its Limits" (2004) 49 McGill Law Journal 1180.

6 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

7 *Andrews v Law Society of British Columbia*, above n 7, at 171.

Court of Vanuatu. This conception of substantive equality favours a treatment that goes beyond 'being treated equally' and aims to correct all kinds of discrimination (direct and indirect).⁸ It will show for instance that a rule which prohibits women from joining the police force would be regarded as discriminatory. In addition, it will show that this same rule would be discriminatory in its application if the police recruitment process has the effect of the rejection of a disproportionate number of women's applications. In short, substantive equality is crucial for the rights of minority and vulnerable groups. It goes beyond the so-called neutrality of law to identify and correct the negative effects of law on these groups of people.

Women's right to equality (women are taken here as a group of people) is a relevant example to note. Surely women want the same rights as men (formal equality is important in this regard), but this same treatment approach proves to be insufficient to respond to their needs, given differences such as biological differences.⁹ The Convention on the elimination of all forms of discrimination against women (CEDAW)¹⁰ follows this same line of reasoning. Vanuatu has legislated for this Convention.¹¹

Requiring the States parties to eliminate all forms of discrimination against women, CEDAW aims to attain its primary objective which is achieving equality between women and men.¹² In light of CEDAW and CEDAW committee general recommendations,¹³ it is clear that CEDAW goes beyond the formal equality and

8 See for example Pascale Fournier "L'égalité substantielle comme école buissonnière du droit? À propos du caractère indéterminé du droit comparé religieux" in Louise Langevin (ed) *Rapports sociaux de sexe/genre et droit: repenser le droit* (2008) 63; See also the judgment of *Canada (AG) v Lavell* [1974] SCR 1349 <www.canlii.org/>. In this case, the Supreme Court of Canada had developed a formal conception of equality.

9 Christiane Pelchat, 'La Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes: effets quotidiens sur la vie des femmes au Québec' (2010) <www.csf.gouv.qc.ca/modules/fichierspublications/fichier-28-1163.pdf> (Accessed 30 June 2017).

10 Convention on the Elimination of All Forms of Discrimination against Women 1979 (entered into force in September 1981, acceded to by Vanuatu in 14 August 1995).

11 Convention on the Elimination of All Forms of Discrimination against Women (Ratification) Act 1995.

12 Simone Cusak and Lisa Pusey "Cedaw and the Right to Non-Discrimination and Equality" (2013) 14 *Melbourne Journal of International Law* 63; Also see arts 1-4 of CEDAW which promote substantive equality approach.

13 General Recommendation n25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women on temporary special measures (CEDAW A/59/38, 2004) and General Recommendation n 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/GC/28, 2010).

defends the concept of substantive equality.¹⁴ Certainly a number of CEDAW provisions impose an obligation to treat men and women identically. In this sense, formal equality requires that women and men be treated the same because they are equals. As some commentators explained, 'this concept of equality lives in numerous provisions of CEDAW and is concerned primarily with the content of laws and practices and their even-handed application'.¹⁵ For instance, art 7 of CEDAW requires States parties to take appropriate measures to guarantee women equal rights with men to vote and art 9 requires them to adopt all necessary measures to guarantee women equal rights with men to acquire, change or retain their nationality.¹⁶

However, conscious of the limitations of the formal equality approach, the CEDAW Committee explained:¹⁷

A purely formal legal or programmatic approach is not sufficient to achieve women's *de facto* equality with men. ... The Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.

14 Diane Roman *La Convention pour l'élimination des discriminations à l'égard des femmes* (1st ed, Editions Pedone, Paris, 2014) 110-112.

15 Simone Cusak and Lisa Pusey, above n 12, at 63; Andrew Byrnes "Article 1" in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (OUP, Oxford, 2012) 54.

16 CEDAW, arts 7 and 9, above n 10.

17 General Recommendation n 25, above n 13, §8; Also see the recommendations of Human Rights Council (Human Rights Council "Report of the Working Group on the Universal Periodic Review – Vanuatu" 26th Session, A/HRC/26/9, 2014.

Being a State party to CEDAW, Vanuatu is obliged to take all appropriate measures to comply with it.¹⁸ Vanuatu is obliged to go beyond the formal equality approach and defend, as CEDAW does, substantive equality.¹⁹

III ANALYSIS OF VANUATU LAW ON THE RIGHT TO EQUALITY

The right to equality is guaranteed by art 5 of the Constitution of Vanuatu. In the years following Independence, Vanuatu courts have applied on different occasions this constitutional provision.²⁰ It is not intended here to analyse all the cases that deal in one way or the other with the notion of equality but those that seem relevant and important to show the necessity to go beyond the formal equality approach. The first well known case with regard to the right to equality and the principle of non-discrimination was rendered in 1995 in the case *Noel v Toto*.²¹ In this case, Supreme Court applied art 5 of the Constitution and the provisions of CEDAW to grant equal land rights to a woman who claimed (through her son) the same land rights and benefits from her brother and land owner of a family and customary land. This case constitutes a precedent on women's rights to equality and land property. It was the first time in Vanuatu that the Supreme Court clearly recognised that women have the same rights with men in respect to customary land.

This case is relatively straightforward and there was no need for the Court to go beyond formal equality. The formal application of art 5 of the Constitution was sufficient to correct the discrimination faced by the claimant.

18 CEDAW Ratification Act, above n 11.

19 See United Nations CEDAW Committee "Concluding observations on the combined fourth and fifth periodic reports of Vanuatu" CEDAW/C/VUT/CO4-5, 2016, 2 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/064/87/PDF/N1606487.pdf?OpenElement>>; Also, see United Nations CEDAW Committee "Concluding comments of the Committee on the Elimination of Discrimination against Women: Vanuatu" CEDAW/C/VUT/CO/3, 2007, 2, <<file:///C:/Users/morse/Downloads/N0737566.pdf>>

20 In *Boulekone v Timakata*, above n 1, the Court of Appeal explained, among other things, what is meant by protection of the law. The Court stated that art 5(1)(d) specifies the essential requirements of a fair hearing by anyone facing an allegation, that is to say, the principles of natural justice as known and understood in the free and democratic world which will be applied by the tribunal considering the allegation. All tribunals in Vanuatu are accordingly bound by the rules of natural justice whether they be administrative in function or purely judicial. This decision was followed and referenced in the case *Kalo v Public Service Commission* N2 [1988] VUCA 1 and *Willie v Public Service Commission* [1993] VUSC 4 <www.pacii.org/>. For the application of article 5 in general, see *Re Barak Tame Sope & Others v Attorney General & Others* [1988] VUSC 12; *Timakata v Attorney General* [1992] VUSC 9; *In re the Constitution, Malifa v Attorney General* [1995] VUSC 43.

21 *Noel v Toto* [1995] VUSC 3.

A few years later, in *Joli v Joli*,²² the Magistrates Court applied art 5 of the Constitution and CEDAW to divide matrimonial assets equally between the parties (a divorced couple). The Court's decision was based on the principle of equality between men and women guaranteed under art 5 of the Constitution and under arts 5 and 16 of CEDAW. The Court stated:²³

...there is a presumption that all such assets are beneficially owned jointly, no matter whose name they are in or who in fact paid for them, made them or acquired them. That presumption can be rebutted concerning any asset by showing that it was the intention of the parties that at the time of its acquisition or subsequently both intended it should be the sole property of one.

This interpretation seems to be in line with the substantive equality approach. Rather than focusing on each party's contribution to the acquisition of assets (in which case the husband would likely be entitled to more assets as he had contributed significantly), the Court gave equal concern, respect and consideration to each one in the marriage.

On the appeal however, the Vanuatu Court of Appeal proceeded in a different way. Referring to the right to equality, the Court stated that 'the broad aspirational statements contained in the Constitution cannot be translated directly into principles of the kind formulated by his Lordship'. In addition, the Court of Appeal refused to apply the provisions of CEDAW because the Parliament had yet to decide how gender equality in matrimonial property should operate in Vanuatu. The Court noted:²⁴

It is a matter for Parliament to decide what if any changes to the social patterns of conduct of men and women in this Republic should occur, and how Vanuatu as a State party to the Convention will seek to reflect that Convention in its domestic law. It is not the task of the Court to undertake this difficult exercise.

22 *Joli v Joli* [2003] VUSC 57.

23 *Joli v Joli* [2003].

24 *Joli v Joli* [2003].

Although the Court of Appeal drew a similar conclusion to the one of Magistrates Court (equal sharing of the matrimonial assets²⁵), one can argue that its approach of disregarding CEDAW is detrimental to women's rights to equality.²⁶ Furthermore, the argument of the Court to not apply CEDAW because the Parliament had not yet decided on how gender equality in matrimonial property should operate in Vanuatu is irrelevant. When ratifying CEDAW in 1995 by the Convention on the Elimination of All Forms of Discrimination against Women (Ratification) Act, the Parliament of Vanuatu had transformed the Convention into Vanuatu's law and thus had accepted that the Convention would have effect in the national legal system. Vanuatu courts can apply CEDAW and all the principles formulated in it such as the principle of equality between men and women.

In the above case, the Court of Appeal made known the limitations of the equality clause (art 5 of the Constitution) when it stated that 'the broad aspirational statements contained in the Constitution cannot be translated into the presumption of equal division of family assets'. As mentioned, the current formulation of art 5 of the Constitution only promotes a formal application. This was obvious in the case *In Re Adoption Application by SAT*, rendered in 2014. In this adoption related case, the Supreme Court rejected the application of SAT,²⁷ a homosexual (in a relationship with another homosexual) from New Caledonia to adopt a Ni-Vanuatu child girl unwanted by the father. The mother, uneducated and jobless, had no means to look after her. The Ni-Vanuatu family of the mother consented to the

25 Considering the lack of national legislation with regard to the sharing of matrimonial assets, the Court of Appeal resorted to colonial laws (Matrimonial Causes Act 1965 UK and Matrimonial Causes Act 1973 UK, s 24), which give the judges the power to decide on such sharing. The Court finally opted for an equal sharing of matrimonial assets between the ex-spouses taking account of the time they spent together and their respective contribution while they were still living together. For more details on this case, see Sue Farran "The Joli Way to Resolving Legal Problems: A New Vanuatu Approach?" (2003) 7(2) *Journal of South Pacific Law* <www.pacii.org/journals/fJSPL/> (accessed 8 July 2017); Sue Farran "What is the Matrimonial Property Regime in Vanuatu?" (2001) 5 *Journal of South Pacific Law* <www.pacii.org/journals/fJSPL/> (Accessed 8 July 2017).

26 The Vanuatu Rural Development & Training Centers' Association (VRDTCA) in partnership and consultation with members of Women's Advocacy Coalition of the Vanuatu Association of Non-Governmental Organisations (WAC/Vango), Port Vila Town Council of Women, Community Paralegal Association (CPA), Vanuatu Teachers' Union, Liave Association, Church of Christ Women's Fellowship, Anglican Mothers' Union, Port Vila Business Women's Association et Vanuatu Society for Disabled People, "Vanuatu NGO Shadow Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)", 38th CEDAW Session, May 2007, 10 <www.iwraw-ap.org/resources/pdf/Vanuatu.pdf> (accessed 20 June 2017); Dejo Olowu *International Law, A Textbook for the South Pacific* (CDP, Washington, 2010) 115.

27 Above n 2, fictional name invented by the Court.

adoption. Given the absence of national legislation in the area of adoption, the Court applied not only the Adoption Act of 1958 (UK) which prohibits the adoption of a female infant by a male,²⁸ but also Vanuatu custom²⁹ to reject the application by SAT.

Regarding the right to equality in particular, SAT claimed that a rejection of his application would amount to a breach of art 5 of the Constitution which provides for equal treatment under the law for everyone. The Court dismissed this claim and held, among other things, that 'SAT is being treated the same under the law as any other adult male applying to adopt a female child in Vanuatu'. There are two issues to note in this case. First, the Court applied art 5 of the Constitution in a very formal way. Second, this case proved the limitations of art 5 of the Constitution. There is need to amend it and word it in a way that it identifies and corrects all forms of discriminations.

In none of the above cases have Vanuatu courts clearly elaborated an analytical framework of equality claims under art 5 of the Constitution and they have not mentioned the idea of substantive equality. Only the Constitution provides for the principle of equality. In addition, it is quite general. All of these constitute a gap that needs to be addressed.

IV TOWARDS SUBSTANTIVE EQUALITY IN VANUATU

It was not until 2012 that the Supreme Court of Vanuatu realised the importance of establishing an analytical framework of the right to equality because a Canadian citizen challenged a regulation preventing him from practising law in Vanuatu. In the case *Hamel-Landry v Law Council*,³⁰ Hamel-Landry a Canadian citizen residing in Vanuatu applied to the Law Council to be registered as a legal practitioner.³¹ The Legal Practitioners Act authorises the Law Council to make

28 Adoption Act of 1958 (UK). Section 2(3) of this Act provides "An adoption order shall not be made in respect of an infant who is a female in favour of a sole applicant who is a male, unless the Court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order".

29 The Court was referring to a Declaration against gay marriage adopted by the Malvatumauri in 2013. Paragraph 52 of the judgment stated: 'Therefore the adoption of a Ni-vanuatu child by a gay person is not tolerable because it could cause moral impacts on the child concerned because of the situation of same sex household or marriage does not suit the context of social living in Vanuatu. With all due respect to the individual rights of every person, this is the view that the Malvatumauri has reached'.

30 *Hamel-Landry v Law Council* [2012] VUSC 119.

31 Under Legal Practitioners Act 1980 (Vanuatu), s 5, the Law Council has the responsibility, among other things, not only to supervise legal practitioners, but also to "prescribe the

regulations governing the practice of law in Vanuatu.³² Accordingly, in 1996, the Law Council adopted the Legal Practitioners (Qualifications) Regulations³³ providing for the qualifications required for any person desiring to be registered as a legal practitioner. Regulation 2 provides:³⁴

No person shall be qualified to be registered as a legal practitioner unless he or she –

- (a) holds a law degree or similar qualification from a University or such other appropriate institution recognised by the Law Council; and
- (b)
 - (i) is a Ni-Vanuatu citizen who is admitted as a barrister and/or solicitor in a Commonwealth jurisdiction; or
 - (ii) not being a Ni-Vanuatu citizen admitted in a Commonwealth jurisdiction, has at least two years post-graduate supervised practical legal experience acceptable to the Law Council;
- (c) is resident in Vanuatu.

Born in Québec Canada, Hamel-Landry held an LLB from Laval University and was admitted to the Québec Bar in 2009. However, he did not have the two years practical legal experience required by the regulation. He only had 9 months experience as legal counsel.

The Law Council rejected his application because he did not meet the criteria. Hamel-Landry then sought a review of the Law Council's decision on the ground, among others, that it was based on an illegal regulation (2(b)) which discriminates on the basis of citizenship and that it was outside the power of the Law Council to make such a discriminatory provision. Hamel-Landry further argued that reg 2(b) was inconsistent with art 5(1)(k) of the Constitution. He explained that reg 2(b) discriminated against him because it provided for a supplementary requirement for foreigners (two years of practical legal experience) which is not the case for Ni-Vanuatu citizens. He pointed out that 'there is no legitimate objective justifying this differentiated treatment in the context of the Legal Practitioners Act and that the provisions in issue disproportionately disqualify non-Ni-Vanuatu citizens and deny

qualification for legal practitioners". The Law Council consists of the Chief Justice, the Attorney General and a legal practitioner appointed for a period of two years by the Minister of Justice.

32 At s 15(1).

33 The Legal Practitioners (Qualifications) Regulations 1996 (Vanuatu).

34 The Legal Practitioners (Qualifications) Regulations, s 2.

them equal treatment under the law and administrative action'.³⁵ To support his arguments, Hamel-Landry cited the Canadian decision of *Andrews* which also concerned discrimination on the basis of citizenship.

The Supreme Court ruled in favour of Hamel-Landry and held that reg 2(b) discriminated against the claimant because it created a differentiated treatment and that there was no legitimate objective justifying it. Therefore, the Supreme Court quashed the decision of the Law Council and ordered it to reconsider the claimant's application.

Like the earlier cases, in *Hamel-Landry* the Court did not have to apply the substantive equality approach because as a foreigner, the claimant was clearly treated differently than Ni-Vanuatu citizens. The formal equality approach adopted by the Court was sufficient to identify and correct the discrimination against the claimant. However, this case is likely to be the starting point of the establishment (or possible establishment) of the analytical framework of the right to equality. The Canadian case not only developed for the first time the substantive equality approach in Canada, but it also established an analytical framework of the right to equality. With regard to the latter, the *Andrews* case put forward a test to be applied when analysing an equality claim.³⁶ The application of such a test requires checking thoroughly if there is a breach to the right to equality.

A year after the *Hamel-Landry* case, the Vanuatu Supreme Court had another occasion to examine a discrimination related case. In *Bohn v Republic of Vanuatu*³⁷ the Supreme Court not only referred to the *Andrews* case, but also established for the first time an analytical framework for the right to equality in Vanuatu.

In this case, Robert Bohn (an American naturalised citizen of Vanuatu) argued, among other things, that s 23(A) of the Representation of the People (Amendment) Act³⁸ is inconsistent with art 5 of the Constitution, which prohibits discrimination

35 *Hamel-Landry v Law Council*, above n 30, §23.

36 According to this test, a legislative measure contravenes section 15 of the *Canadian Charter* when two conditions are met: Firstly, a right to equality is infringed. Regarding the equal benefit of the law, it has to be proved that the contested measure (a) establishes a difference of treatment, and (b) causes harm or damage to someone (plaintiff). Secondly, this difference of treatment discriminates against that someone. To be discriminatory the legislative measure must, considering its context, aim specifically to apply to a kind of 'discrete and insular minority'. The distinction must be based on the membership to a particular group mentioned in the section 15 (or a similar group).

37 *Bohn v Republic of Vanuatu*, above n3.

38 Representation of the People (Amendment) Act 2012 (Vanuatu).

based on origin, and protects the right of every individual to equal treatment under the law. In providing qualifications for candidates to stand for national elections in rural constituencies, s 23(A) of the Act provides, among other things, that: 'Any person not originating from a rural constituency is not eligible to qualify as a candidate for election for that particular constituency'.³⁹ Robert Bohn contested the 2012 national elections in the Epi Island rural constituency where he was considered to be part of the community. This was made possible through a customary ceremony according to which the chiefs of the Island accepted and received him as part of their community.

To determine whether the provision in question discriminated against the complainant, the Supreme Court established a test that is to be applied when analysing the art 5 of the Constitution of Vanuatu. The Court explained that in assessing whether the right to equality has been infringed, the complainant must prove:

- (1) That one of the rights guaranteed under art 5 of the Constitution has been infringed (the distinction is based on enumerated or analogous grounds of prohibited discrimination). Concerning the protection or benefit accorded by the law, the complainant must show (a) that he or she is not receiving equal treatment under the law or (b) that the law has a differential impact on him or her;
- (2) That the legislative impact of the law is discriminatory.⁴⁰

It is important to note that the test or the analytical framework of the right to equality established by the Supreme Court in *Bohn* is similar to the one elaborated by the Canadian Supreme Court in *Andrews* except the idea that the legislative measure must have aimed specifically to apply to a kind of discrete and insular minority (rightly because the idea would not be relevant in the *Bohn* case). In *Bohn*, the Supreme Court held that the s 23(A) of the Act was inconsistent with art 5 of the Constitution because it discriminated against the complainant on the basis of his origin and infringed his right to equal treatment under the law.

The Court then proceeded to the next step which was to determine whether the said discrimination could be justified. Indeed, according to art 5 of the Constitution, some restrictions can be justified by 'the legitimate public interest in

39 Representation of the People (Amendment) Act, s 23A.

40 *Bohn v Republic of Vanuatu*, above n 3, at 9.

defence, safety, public order, welfare and health'⁴¹ or in the situations where the legislative measure in issue 'makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas'.⁴² The Court concluded that the legislative measure in issue did not aim to improve the situation of these disadvantaged groups and therefore the discrimination was not justified.

Most importantly, in *Bohn*, the Vanuatu Supreme Court cited exactly the same words in *Andrews*. According to the Vanuatu Supreme Court, equal treatment implies 'the promotion of a society in which all persons are secure in the knowledge that they are recognised at law as human beings equally deserving of concern, respect and consideration'.⁴³ There is however a nuance that must be underlined here. The Vanuatu Supreme Court attributed this definition to the notion of equal treatment under the law and not to equality as such. In *Andrews*, this definition was attributed to the concept of equality. Defining the right to equal treatment as the Vanuatu Supreme Court did can raise questions because sometimes it is necessary to treat individuals differently (in other words accommodate them) in order to achieve real equality (or substantive equality). In *Andrews*, McIntyre J stated "It must be recognized [...] that every difference in treatment between individuals under the law will not necessarily result in inequality, and as well, that identical treatment may frequently produce serious inequality".⁴⁴

V VALUE OF THE SUBSTANTIVE EQUALITY APPROACH

More complex cases are needed to require Vanuatu courts to examine and clearly adopt the approach of substantive equality. I think for instance of the case where a special legislative measure providing for reserved seats for women in Municipal Councils⁴⁵ would be challenged before Court. This is yet to happen.

In order to achieve the added value of substantive equality in Vanuatu, art 5 of the Constitution should be amended. Considering that the equality clause only mentions 'equal treatment under the law or administrative action', 'protection of the law', Vanuatu courts may sometimes be tempted to apply the art 5 in a very formal

41 Constitution of the Republic of Vanuatu, art 5(1).

42 Constitution of the Republic of Vanuatu, art 5(1)(k).

43 *Andrews v Law Society of British Columbia*, above n 6, at 171; *Bohn v Republic of Vanuatu*, above n 3, at 10.

44 *Andrews v Law Society of British Columbia*, above n 6, at 164.

45 Municipalities (Amendment Act) 2013 (Vanuatu).

way, that is to say to simply determine if the individuals are treated identically under the law.⁴⁶ Our suggestion is that article 5 should be modified to include new expressions such as 'every individual is equal before the law', 'every individual is equal under the law' or 'every individual has the right to equal protection and equal benefit of the law'.⁴⁷ In this way, it may be easy for Vanuatu Courts to interpret art 5 in a substantive way in order to counter all measures which discriminate directly, indirectly or in their application against individuals, notably vulnerable or minority groups. In its recent concluding observations, the United Nations CEDAW committee has made the same remarks and recommended that Vanuatu amend its equality clause in order to prevent direct and indirect discrimination against individuals.⁴⁸

The substantive equality approach could be useful for Vanuatu vulnerable and minority groups. Its application could show that several legislative measures significantly disadvantage them even if they seem to be neutral. Below are two concrete examples concerning women as a vulnerable group and francophone jurists as a minority group in Vanuatu.

Under ss 38 and 39 of the Penal Code (Amendment) Act of 2006⁴⁹, when rendering their judgments, the courts may take into account any compensation or reparation made under custom. This legislative measure seems to be neutral because it equally applies among men and women. However, in practice and with regard to sexual offences in particular, one can notice this legislative measure discriminates against women in its application because in most cases, women are victims of these sexual offences. Often, the customary reconciliation according to which compensation and reparations are made, does not take into consideration the rights of the victims but rather the interest of the community (that is to say the re-establishment of peace and harmony in the community after a wrongdoing).

Secondly, there is reg 2 of Legal Practitioners (Qualifications) Regulations⁵⁰ which provides for the qualifications required of a person to be registered as a legal practitioner in Vanuatu.⁵¹

46 *In Re MM Adoption Application by SAT*, above n 2.

47 See for example the Canadian Charter, s 15 of which defends a substantive equality approach.

48 United Nations CEDAW Committee "Concluding Observations...", above n 19, 2-3.

49 Penal Code (Amendment) Act 2006 (Vanuatu), ss 38 and 39.

50 The Legal Practitioners (Qualifications) Regulations.

51 The Legal Practitioners (Qualifications) Regulations, reg 2.

With regard to Ni-Vanuatu citizens, this rule appears to be neutral because it equally applies to everyone including anglophone and francophone jurists. However, in practice, this regulation discriminates against francophone jurists. In most cases, given that they are educated either in New Caledonia or France, francophone jurists will not meet the criteria of being admitted as a barrister and/or solicitor in a Commonwealth jurisdiction. Again, the concept of substantive equality shows that a rule such as this is not neutral and discriminates against the francophone jurists.

VI CONCLUSION

The fact that the definition of the substantive equality was used in the *Bohn* case and that an analytical framework of the right to equality was adopted in the same case demonstrates that Vanuatu courts have begun to realise the importance of this approach. This is to be encouraged because substantive equality is likely to better take into account the differentiated needs of vulnerable and minority groups. Finally, it is important that lawmakers amend art 5 of the Constitution and put forward a new wording that will make it possible for the courts to identify and correct all kinds of discrimination.

