WHAT IS THE MATRIMONIAL PROPERTY REGIME IN VANUATU?

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Introduction

This question was prompted by the realisation that although Vanuatu has legal provisions relating to divorce[1], the law relating to the division and allocation of matrimonial property is at best hazy. The answer to this question may only be of relevance to a small percentage of the population, i.e. those seeking divorce and having property capable of individual ownership, and it may be because of this, that the question has not been judicially considered. Nevertheless, as the pressures of a developing economy and changing society increase and with this, quite probably, divorce rates, and as people acquire more material wealth and disposable income a little more certainty may be desirable. In countries such as England and Australia rights to matrimonial property and quasi-matrimonial property[2], have become increasingly important as a result of greater earning capacity and increasing opportunities for men and women to acquire property as a result of individual efforts. Principles of equality between the sexes, the movement away from patriarchal control of matrimonial property and changes in perceptions of marriage and family have all contributed to the debate[3].

The question also highlights one of the challenges posed by a pluralist legal system, especially where the applicable laws are not either always clearly or easily ascertained. This is particularly true in the case of French laws which were in force in the period immediately prior to independence[4], but it is also an issue in interpreting the current domestic legislation, taking into account the various legal sources which inform it.

This paper seeks to ascertain what the answer to this question might be and what difficulties this raises. In particular the paper considers the different approaches of English common law, French law and the challenges these pose in the context of Vanuatu.

Background

Between the period of 1906-1980 Vanuatu was governed by an Anglo-French Condominium. French law applied to French citizens and non-French who opted to fall under such laws; English to English citizens and optants, and the joint-legislation provisions to those who fell into neither of the first two categories[5]. The High Court of the New Hebrides Regulation provided that British statutes in force were those of general application in force in England on the first day of January 1976. The Queen's Regulations for the New Hebrides remain in force except where they have been repealed or presumably where they are incompatible with local law. The French law in force immediately prior to independence is not know. This is because records were either destroyed or removed to New Caledonia at the time of independence. For the purposes of this paper it is presumed that the law in force in France at the time applies. It is recognised that future, further research may prove this assumption to be wrong.

At independence, in 1980, the Constitution provided that British and French laws which had been in force or applied immediately prior to independence, continued to be in force or applied: 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.

Similarly the principles of common law and equity would continue in force as part of the laws existing at the time of independence until revoked by Parliament[6]. It remains possible therefore for individuals to continue to be governed by pre-independence laws regardless of nationality[7].

Both English and French law prior to independence provided the court with power to adjudicate on divorce and to adjust the property rights of the spouses to meet some of the immediate and foreseeable financial consequences of divorce. However the approach and task of the court under these two different legal systems were distinct because of the different property rights held by spouses during the marriage.

Different approaches to matrimonial property

A fundamental difference in approach to matrimonial property can be found in English common law and French civil law. In English law, since 1882 married women have acquired no particular property rights on marriage. Separation of assets under the Married Women's Property Act 1882, meant that a married woman who brought no personal wealth to the marriage nor acquired any after it, remained virtually propertyless. As it was mostly the husband who either brought property into the marriage or acquired it through his own efforts or inheritance during the marriage, matrimonial property was primarily the man's. In English common law there is, therefore, no matrimonial property regime as such[8]. Inevitably, however, there is the pooling of property and resources, and there may be perceptions – despite the law – that certain property is jointly owned. One consequence of this lack of matrimonial property regime during the marriage is that on dissolution of the marriage there will need to be a framework of rules to resolve probable property disputes.

In France, the Napoleonic code of 1804 established a matrimonial property regime whereby there was community of movable property brought to the marriage, and community of any property – whatever its nature – acquired after the marriage. The Code also allowed marrying couples to draw up their own contractual regime if they chose not to follow the one in the Code[9]. Although the matrimonial property regime determined property rights from the outset and during the course of the marriage, the significance of this was of greatest importance on the termination of the marriage[10]. This paper is concerned with the significance of such property rights on divorce.

Under English common law agreements determining property rights should the marriage break down were in danger of being viewed as collusion and could jeopardise the possibility of obtaining a divorce at all[11]. Even between 1966 and 1971 an agreement could be a bar to divorce and would be regarded as illegal and void. Since the Divorce Reform Act of 1969, agreements have been permitted, but any purported arrangements regarding the financial consequences of divorce are subject to the approval of the divorce court.

By contrast, French law encouraged parties to a marriage to determine property interest at the outset. To do so was not seen as advocating divorce – indeed until 1975 divorce in France not only carried social sanctions but also legal ones[12] - but a pragmatic approach. Marriage is a situation in which persons and property are brought together and measures are required to determine not only the personal obligations of the parties but property rights and liabilities, including powers of management and alienation and liability for debts. Property regimes cover all the property of the marriage whether brought into the marriage at the start or acquired thereafter, whether by individual or joint endeavour, inheritance or gift. The matrimonial property regime determines at the outset of the marriage the division of property on divorce[13]. Indeed French matrimonial property law has been described as: one of the most developed as well as one of the

most technical parts of the civil law of France[14].

In Vanuatu, these very different approaches must have existed prior to independence, at least in so far as French and English residents and optants into either systems were concerned. It is also clear that, under the Anglo-French Protocol of 1914, British and French laws were not applied to the indigenous inhabitants.

English law of application at independence

Matrimonial Property

Under the New Hebrides Regulations statutes of general application in force in 1976 and any thereafter up to 1980, together with any general principles of equity or common law would have remained in force provided they were not expressly revoked or found to be incompatible with the independent status of Vanuatu[15].

There is no reason to suppose that the Married Women's Property Act of 1882 was not a law of general application, therefore married women acquired no particular property rights on marriage. Under s. 17 of the Act the courts could determine proprietary interests where these were disputed, but could not alter established property claims. Statutory modifications under the Matrimonial Homes Act 1967, which was extended in the Matrimonial Proceedings and Property Act of 1970, gave a spouse who had no legal or beneficial interest in the matrimonial home, a right of occupation, but conferred no proprietary interest. Where one or other spouse had no legal title to property then the rules of equity or contract applied.

These general principles of equity and common law would also be applicable not only between those not seeking a divorce, but also those to whom divorce rules would not apply by reason of them not being married.

Divorce

The laws of general application relevant prior to independence would have been the Matrimonial Causes Act 1857 – repealed by the Administration of Justice Act, 1965; the Matrimonial Causes Act 1950 – repealed by the Matrimonial Causes Act 1965; the Matrimonial Causes Act 1965 – partly repealed by the 1969 Divorce Reform Act and the Matrimonial Causes Act 1973. The main U.K. legislation which would have been in force in 1976 was, therefore, the Matrimonial Causes Act 1973. Under this Act the court could alter existing property rights and rearrange the property according to present and future needs and circumstances. Under the Act the court may make orders: for unsecured periodical payments; for secured periodical payments; for a lump sum or sums; for the transfer of property; make or vary a settlement and for the sale of property. Much will depend on whether or not there are children. Whether one or both spouses is working or capable of working, the age of the spouses and any special needs either may have, the length of the marriage, whether either spouse has already entered into a new relationship and the question of fault, are all relevant considerations[16]. Periodical payments will usually be related to maintenance while lump sum payments or the transfer of a capital asset – such as the former matrimonial home – are capital provisions.

Besides the power of the court to resolve disputes relating to entitlement to property under s.17 of the Married Women's Property Act, later legislation empowered the courts to set aside ownership rights when re-allocating property on divorce, for example, the 1970 Matrimonial Proceedings and Property Act[17] and the 1973 Matrimonial Causes Act[18]. However, under the latter Act the court could not order the sale of property – in particular the matrimonial home. The problems posed by this were alleviated by the Matrimonial Homes and Property Act 1973[19]. The purpose of the earlier1970 Act had been to try and

maintain the status quo of the parties despite the breakdown of the marriage. Gradually the emphasis shifted from the need to maintain dependants to the redistribution of assets in order to facilitate the economic power of each spouse to re-establish his or herself[20].

The Matrimonial Causes Act 1973, contained a wide range of powers given to the courts as well as guidelines indicating what matters or factors should be taken into account in exercising those powers. Perhaps because of this certain "rules of thumb" emerged through the case law which gained a misleading importance. For example, Lord Denning suggested that spousal maintenance should be assessed on the basis of one third of the combined income of husband and wife[21]. Moreover this was to continue for the wife's life provided she was not at fault and did not re-marry or co-habit. Similarly, while the courts may start from the basis of a fifty:fifty split in the matrimonial property, there is no legal rule which stipulates that this must be adhered to and indeed there are many cases where this has been held not to apply[22].

French Law of application at independence

Matrimonial Property

The French law relating to matrimonial property in existence prior to independence in 1980 provides two options to parties on marriage. There is a statutory matrimonial regime, which applies in default of an alternative contractual regime being selected by the parties. The later is a matrimonial property regime drawn up by a lawyer (notaire) – provided certain essential elements relating to the underlying conditions of marriage are not excluded[23] - which reflects the particular wishes of the parties.

The applicable statutory matrimonial property regime is found in the Civil Code. It was changed in 1965[24]. However, for couples married prior to this date the old statutory regime applied. This pre-1965 regime, which became the statutory regime when the Civil Code was first drafted, was based on the principle of community of movables and property acquired during the marriage[25]. Three distinct categories of property were recognised: that of the husband; that of the wife; that of the community. Fundamental to the regime was the distinction between movable and immovable property[26]. Immovables acquired prior to marriage remained the recipient's. As regards immovables acquired after marriage, any such property acquired by way of gift or inheritance remained separate, individually owned property. However immovable property acquired for value or labour was classified as community property[27].

Within the community property further distinction was made between assets and liabilities. Assets were communal[28]. Liabilities incurred prior to marriage remained those of the individual, those incurred after marriage were shared. In the case of dispute over the categorisation of property a rebuttable presumption in favour of community arose[29]. Dissolution of the marriage resulted in the dissolution of the community property. The separate property of each spouse remained largely untouched.

Reform to this regime was motivated by criticism of the distinction between movable and immovable property in a changing economy, and the status conferred on the husband as head of the family and administrative head of the community property[30].

Change was introduced under the Law of 13 July 1965[31]. Under the 1965 statutory regime there are again three possible categories of property: the husband's separate property, the wife's separate property and the community. The latter was divided into a reserved share for the wife – determined by her earnings and acquisitions related to these – and the common fund. The common fund consists of the assets acquired separately or jointly by the efforts of either spouse during the marriage with no distinction being made between movable or immovable property. Assets acquired by gift or inheritance during the marriage remain separate property as do personal assets such as pensions or compensation payments[32].

Couples adopting the statutory regime may modify it, for example by reducing or enlarging the assets falling into the community or altering the division of the common fund on divorce. It used to be the case that a matrimonial regime, once agreed, could not be changed. Exceptionally the court might authorise a change if circumstances demanded it in the best interests of the family. Since 1975 changes may be made at any time after the first two years of marriage[33].

The French matrimonial property regime was subsequently modified in 1985. However, given the cut-off date of 1980 as the year of independence, it is probable that the 1985 reforms are not applicable in Vanuatu. It is however possible that there are married persons whose matrimonial property is governed by the pre-1965 changes, and by contractual regimes drawn up by notaries in France, New Caledonia or in Vanuatu.

Divorce

On divorce the matrimonial property regime in place will largely determine the property rights of the spouses. The courts do however, have some discretion to adjust the distribution of property taking into account any imbalance and taking into account the needs of the parties and in particular the needs of any children

The law on divorce in France can be found in the Law of 2 April 1941 and the Law of 11 July 1975. It can be argued that the latter would have been applicable to former French citizens and optants at independence, although it has probably now been ousted by the Matrimonial Causes Act of 1986 Cap 192- which is based on English law.

Prior to the 1975 Law, dissolution of the marriage resulted in the dissolution of the communal property fund, with each spouse taking a half share[34]. Debts were also apportioned and the court had the power to order the advantaged spouse to pay into a compensatory fund to create some kind of financial equilibrium. Under the Law of 1975 the court could also make interim orders such as the restitution of certain property, the division of property and the granting of exclusive use to one of the parties. The court could not ignore the matrimonial regime and if the home, for example, fell into the communal fund, then invariably it would have to be sold to achieve a division.

As under English common law, French law allowed for the payment of alimony or maintenance, primarily in the case of children – the duty of support as regards spouses ceases on the termination of the marriage[35]. An important change introduced by the 1975 divorce legislation was to replace the payment of alimony with a compensatory lump sum payment. The purpose of this was to compensate, as far as possible, for the disparity of means caused by the divorce to the respective spouses. French law sought to achieve a clean break some ten years before English common law, changes to the latter not being introduced until 1984[36].

Customary Law, Matrimonial Property and Divorce

The Constitution of Vanuatu provides that the applicable law includes: customary law of the people of Vanuatu and, in particular, custom in relation to the ownership and use of land and to institutions and procedures for resolving disputes concerning ownership[37].

It has also been held that the provisions in s. 95 of the Constitution do not apply to indigenous Ni-Vanuatu. So where there are no domestic laws then customary law will apply[38]. Consequently, property rights acquired on marriage will be determined by the customary law of the region[39]. This is a large and complex area in which it is important to avoid making sweeping statements. Land may be transferred matrilineally or patrilineally depending on the area of the country under consideration. Even where land is

passed through the female line however, management may vest in males – brothers or uncles. Women generally live in the villages of their husband or their father until married, and acquire only use rights of land in their husband's village. Women may acquire limited personal property and married couples will acquire a range of household goods as gifts on marriage. In urban areas there may be greater accumulation of personal wealth.

Because marriage is a complex arrangement involving more than just the two individuals, local research suggests that customary divorce is rare. Pressure from family and the elders or Chiefs will ensure that despite domestic difficulties the couple stay together, if not for their own benefit then at least for the children. This is not based so much on concerns for the emotional welfare of the children as on concerns of who will provide for the children and the divorced parties if the marriage ends, and what land rights the children and separated spouses will have. Customary measures to resolve marriage difficulties may involve the payment of compensation or custom fines[40].

Nevertheless the Vanuatu Matrimonial Causes (1986) Act CAP 192 contains provisions which are specific and particular to Vanuatu, including the dissolution of customary marriage. Section 4 of the Act says that when two persons have been married according to custom, that marriage may be dissolved, only in accordance with custom[41]. Where parties have married in a church – even if this happens some time after a custom marriage, which is quite common – it seems that they may obtain court divorce[42].

Domestic Legislation

There is no domestic legislation relating to matrimonial property during marriage. Divorce, however is provided for under the Matrimonial Causes Act (1986) Cap 192, and the principles relating to the division of matrimonial property have been considered in the case of Molu v Molu[43]. Here the marriage had been dissolved by a decree nisi – presumably under the Matrimonial Causes Act Cap 192. The property is dispute was a block of land and some personal property on both sides.

In determining the rights to land the court first considered contributions to purchase price. The land had been bought in 1995 with a deposit deducted from an insurance payment of Vatu 400,000 for a taxi. It was agreed that this fund was matrimonial. The amount paid by way of deposit was in dispute as was the sum paid to the wife. Clearly however, part of the matrimonial fund had been used to make a deposit on the land.

The court also looked at the intention of the parties regarding the purchase. This was to provide for the children – again here was no dispute about this. If this intention was to be fulfilled then it made sense to retain the land and build on it[44].

The Court also looked at the means of the parties, in particular the ability to earn income. The husband had a kava bar on the land and this was his prime means of income, which he could use both to meet his obligations of maintenance and to pay off the loan for the land. If he lost the land or it had to be sold so that the proceeds could be divided, then he also lost his livelihood.

As regards the personal property the court again considered who purchased the property and also the purpose for which it was purchased. The court held that property purchased in anticipation of marriage – here a mattress – was joint property. This was awarded to the wife. Property which had been purchased as a gift was to be kept by the donee – again the wife. Gifts made to both of them in anticipation of marriage i.e. wedding gifts, were to be divided between them. However as the husband had destroyed some in a rage, he was to receive a smaller share. The deliberate or wanton destruction of personal items was also considered in the case of a claim for clothing by the wife, her husband having burnt all her clothes on two separate occasions. This was not in dispute although the value and quantity was. The court agreed to a compensatory payment for this destruction of the wife's personal property. Here the question of who paid

for the clothes was not raised, the implication being that these were the property of the wife however acquired.

The ratio of the case is enlightening because the court appears to combine a number of approaches. The property is divided into moveable and immovable property; the question of who provided the purchase price is important – especially with the land - but not paramount. Certain property is presumed to be personal by its nature, such as the clothes; other property is presumed to be jointly owned, such as wedding gifts, and interestingly (although why, is not apparent) the insurance money. Earning capacity and the needs of children are also taken into account. It is not clear why the wife ends up with the movables or where the wife is to live thereafter, but there seems to be some effort at apportionment and a desire for a clean break in terms of the property consequences of the divorce.

An interesting feature of the 1986 divorce legislation is that it gives both parties the right to claim damages for adultery[45]. A provision permitting a husband to sue for such damages had existed in the UK legislation of 1950 and 1965, but were not found in the 1973 legislation. The domestic legislation thus marks a departure from the U.K. legislation. French legislation, until 1975, did allow for the award of damages to an aggrieved, innocent spouse[46]. However, after 1975, not only was the law of divorce changed[47], but also the crime of adultery was abolished[48]. Thereafter, fault based damages could not be claimed, and the payment of a compensatory sum was no longer limited to the innocent party but could be ordered to off-set any imbalances caused by the division of the matrimonial property[49].

The provision for such an award is therefore without immediate precedent in French or English legislation[50] and the pragmatic approach taken to resolving the property issues raised on divorce can be contrasted with the approach taken regarding damages payable under the same Act in the case of Waiwo v Waiwo. Here, although the court adopted the view that the Act appeared to be based on the UK's Matrimonial Causes Act of 1965, it held that: it is not necessarily true to say that strict interpretation of the Vanuatu Act would be based on the U.K. (1965) Act[51].

Justification for interpreting the Act in a different way rested on section 8 of the Vanuatu Interpretation Act CAP 132, which provides that: An act shall be considered to be remedial and shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

In the above case it was held that the Act, must be interpreted on the basis of Vanuatu circumstances which reflect the intention of Vanuatu Parliament. The court went on to state that the intention of Parliament was to legislate for the dissolution of marriage by divorce in the context of Vanuatu.

The issue was damages for adultery. The gravity with which adultery was viewed was determined by local circumstances rather than the case law of the U.K, the court holding that: adultery is considered in Vanuatu Society 'founded on traditional Melanesian values.... ' as being a serious offence on the bases of Custom, and that, subsequently, any damages claimed therefrom against Co-respondents were customary punitive damages.....The adulterers are held to be responsible and would be punished for their wrongdoings.

This interpretation is significant because the court went on to state that:

When (the) Vanuatu Matrimonial Causes Act was enacted by Vanuatu Parliament in 1986, it has, in effect, automatically repealed the United Kingdom Matrimonial Causes Act of 1965 (which applied only to British nationals and optants). Therefore, it has to be understood that whether the customary punishment imposed on the adulterers are in certain amount of cash money, calico, mats or pigs etc..., depending on the area/ island. However, the fundamental basis is that throughout Vanuatu there is a common basis,

adultery is a serious offence in custom and thus, customarily punishable so that damages claimed in that respect are punitive but not compensatory.

It would seem therefore that once there is domestic legislation this applies to all persons, on the basis that the Vanuatu parliament has resolved to provide for the dissolution of marriage in Vanuatu against a particular context. Although the judgement only refers to the repeal of the UK legislation, by implication the same might be said of French legislation.

What is the current law on Divorce and Matrimonial Property in Vanuatu?

The case of Waiwo v Waiwo was appealed to the Court of Appeal of Vanuatu in 1996[52]. Although most of the judgement is taken up with consideration of the award of damages and not directly applicable to this article, in the course of his judgement Justice D'Imécourt reviewed the applicable law on divorce, stating:.

The only divorce laws that applied to Vanuatu immediately before the Day of Independence and until the Vanuatu Matrimonial Causes Act 1986 CAP 192 became law were: the French Divorce laws under the Code Civil Article 242...(and) ... the British laws concerning divorce that applied to the New Hebrides was for all intent and purposes the Matrimonial Causes Act 1973

There was no law on divorce for indigenous people – although the New Hebridean Act under the Joint Regulation 16 of 1970 governed marriages of indigenous couples and recognised customary marriages[53]

Domestic legislation has been passed for marriage and divorce. It has not however been passed for matrimonial property. If, as held in the Supreme Court in the Waiwo case, the effect of Article 95 of the Constitution is to make all the English and French laws that still now apply in Vanuatu ... form part of the law of Vanuatu and apply to everyone in Vanuatu irrespective of creed, colour or Nationality,. the French and English laws of general application (along with principles of common law and equity) remain effective. This state of affairs does not seem to have changed even with the Revision and Consolidation of the Laws Act of 1985 (which came into effect in 1987) as section 5 provides that omission of any law did not affect its validity simply because of such omission. As the Chief Justice also held that the right of election was abolished with the repeal of Protocol of 1914 on Independence, then it is not for individuals to choose which laws they wish to fall under but for the court to determine. For example, in the case of Kong v Kong[54] the Court of Appeal clearly held that the Matrimonial Causes Act did not confer jurisdiction on the Supreme Court to make orders for the settlement of matrimonial property. The Court went on to hold that the Married Women's Property Act 1898 – as an Act of general application presumably- applied, but gave no reason why it should apply to the parties before the court[55].

And this is one of the problems. Assumptions are made that English laws of general application apply without any guidance from the court or legal argument as to why this should be so. No rules on the domestic conflict of laws emerge. This may well be due to legal familiarity. Indeed as pointed out by Justice D'Imécourt in Banga v Waiwo: One need only to consider the fact that virtually all the country's lawyers, including the Ni-Vanuatu lawyers are common law trained. As a result even Francophone clients seeking legal assistance are likely to be led down the common law track. The consequence is death by default for the French law that remains applicable in the country. This is unfortunate. Not only does it deprive a percentage of the population from a legal heritage from which they are entitled to benefit, but also it excludes the possibility of taking what is good from both systems to shape laws for Vanuatu. Matrimonial property regimes are a case in point.

ENDNOTES:

[1] This is the Matrimonial Causes Act 1986, Cap 192. This is based on the Matrimonial Causes Act (UK) of 1857, not the Divorce Reform Act (UK) of 1969. A review of the divorce law of Vanuatu can be found

in the case of Banga v Waiwo Unreported, Supreme Court 1/1996, 17/6/1996

[2] Where the parties are not legally married but in a de facto relationship – including in recent years same sex relationships.

[3] A large body of literature has been written on the subject, which extends across number of legal areas including succession, divorce, pension law, as well as family law, equity and trusts and property law. See for example, Atkins S & Hoggett B Women and the Law 1984 Blackwell Press, Cretney S & Mason J Principles of Family Law 1990, Sweet & Maxwell, Finlay HA Family Law in Australia 1983 Butterworths, Parker S Informal Marriage, Cohabitation and the Law 1750-1989 1990 MacMillan.

[4] At independence many documents relating to French law and its application were either destroyed or removed, making access to the law impossible. Recent enquiry has revealed that many valuable documents are housed in the Archives in Noumea in New Caledonia, including the Journal Officiel of the period which would indicated which French laws had been gazetted for the New Hebrides up until independence.

[5] The Convention signed between the governments of the United Kingdom and France in 1906, and the Protocol of 1912 (as amended) provided for this dualism.

[6] Art. 93 of the Constitution of Vanuatu.

[7] This has been confirmed by the Court of Appeal – see below.

[8] This does not exclude the possibility that special arrangements have been made to transfer or confer property rights either jointly or individually on marriage, for example by way of marriage settlements or trusts.

[9] In England contracts in the form of marriage settlements were also found, especially among those who had land and money, and these were governed by the Settled Land Act of 1882.

[10] During the marriage property rights can be important where claims are made against the matrimonial property by third parties, e.g. creditors, but this area is not the subject of this paper. Matrimonial property regimes are also important where marriage is terminated by the death of a spouse.

[11] The two stages of decree nisi and decree absolute in the Matrimonial Causes Act 1860 allowed the court time to investigate any such suspected collusion and to rescind any decrees if this was found.

[12] For example, an aggrieved innocent spouse could be awarded damages (Article 1382 C.C. and the Law of 2 April 1941).

[13] To a lesser extent it also determines the division of property at death.

[14] Ancel M in Freidmann (ed) Matrimonial Property Law (1985) p. 3.

[15] S. 95(s) The Constitution.

[16] Fault based divorce meant that the spouse who had committed a matrimonial offence received nothing.

[17] S. 4.

[18] S. 24

[19] S. 24(A) (Subsequently further amended in 1984 by the Matrimonial and Family Proceedings Act, which would not however, be of force in Vanuatu).

[20] See for example the dicta in Watchel v Watchel [1973] Fam. 72 at 77.

[21] Watchel v Watchel [1973] Fam. 72. The formula is to add together the income of husband and wife, calculate one third of this and subsidise the wife's income with the difference between her actual income and this one third. This rule has subsequently been criticised in English law.

[22] See for example Harnet v Harnet [1973] 2 All ER 593

[23] Articles 213-22c of the Code Civil apply. These fundamental principles relate to the distribution of powers in marriage and to domestic arrangements and are referred to as régime primaire impératif.

[24] Articles 1393-1400 C.C.

[25] Communauté de meubles et aquêts.

[26] This is a fundamental division in the French law of property.

[27] Being either conquêts or acquêts.

[28] Which included movables brought to the marriage or acquired thereafter (including earnings), immovables acquired for value, rents and/or profits flowing from individually owned immovables.

[29] Exceptionally a stipulation could be made regarding movable property acquired after the marriage, that it was to remain separate or to be regarded as personal e.g. family portraits, artistic and literary products, correspondence and clothes.

[30] Articles 1421 and 1388 C.C.

[31] Subsequently found in Articles 1400-1491 C.C.

[32] If these are converted, for example by investing insurance monies in a house, then they become part of the community

[33] Article 1397 C.C. and Articles 1300-1302 Nou. C. Proc. Civ, and the Law of 11 July 1975.

[34] This would include movables brought into the marriage, everything acquired through their industry during the marriage and the beneficial interest of any immovables. It was presumed that all accumulated assets fell into the common fund.

[35] Unlike in English common law, however, obligations incurred under a court order pass to the heirs.

[36] By the Matrimonial and Family Proceedings Act 1984. The difference in time frame is of course significant in Vanuatu, with independence occurring in 1980.

[37] Ss. 73-79.

[38] Waiwo v Waiwo Civil Case No 324 of 1995

[39] See Rodman M "Breathing Spaces: Customary land Tenure in Vanuatu" in Land, Custom and Practice in the South Pacific C.U.P. 1995. p. 65.

[40] See for example, the case of Ilaisa v Ilaisa Civil Case No. 4 of 1997 and Waiwo v Waiwo Civil Case No 324 of 1995.

[41] Waiwo v Waiwo Civil Case No. 324 of 1995.

[42] Ilaisa v Ilaisa Civil Case No 4 of 1997.

[43] Molu v Molu No. 2 Civil Case No 30 of 1996.

[44] Somewhat unusually both parents had custody of the children.

[45] Section 17 A petitioner may on a petition for divorce claim damages from any person on the ground of adultery with the respondent

[46] Law of 2 April 1941, and Article 1382 C.C. This was not just limited to the husband, because if both parties were to blame the property awards would cancel out or be modified.

[47] Law of 11 July 1975.

[48] Law Naquet, 22 July 1975.

[49] The return of gifts or other benefits might be order, not as damages, but because the motive or cause for them had ceased to exist – i.e. the marriage. This is an aspect of the law of contract and not limited to spouses. See Dadomo & Farran French Substantive Law: Key Elements 1997, p.36.

[50] There was, indeed, no precedent in English law for allowing either the husband or the wife petitioner to sue for damages.

[51] Ibid.

[52] Appeal Case No.1, 1996 cited as Banga v Waiwo. The appeal against the sum awarded as damages was successful although the appeal court upheld the principle that exemplary or punitive damages could be awarded.

[53] This Regulation became the Marriage Act CAP 60.

[54] Civil Appeal Case No.10 of 1999.

[55] The date given in the unreported judgement must be an error as the date of the Act is 1882.