THE *JOLI* WAY TO RESOLVING LEGAL PROBLEMS: A NEW VANUATU APPROACH?

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I INTRODUCTION

The recent Court of Appeal ruling in *Joli v Joli*[1] marks an important innovation in family law in Vanuatu, but it also offers the possibility of a new way of resolving legal problems, not just in the area of divorce but potentially in other legal areas as well. The case is the first Court of Appeal decision of its kind in Vanuatu to consider the interpretation of an area of family law where there is national legislation in place which does not entirely cover the same substantive subject area as the introduced legislation which was applicable before independence.[2]

The case concerned the settlement of matrimonial property after a decree nisi had been issued by the Magistrate's Court.[3] The decree absolute appears not to have been granted pending the resolution of disputes as to ownership of certain property. The parties to the case were asking the Court to rule whether the assets over which there was a dispute were assets which the Court could take into account if it was required to make a settlement order dividing the matrimonial assets between the two parties. The application was brought by way of a notice of motion for ancillary relief, which included claims in respect of custody, access and maintenance and 'further and other relief' – which is a term found in the schedules to the *Matrimonial Causes Act* [Cap 192] but not in the sections of that Act.

The case raised two fundamentally important issues. First did the Court of Appeal have the power or jurisdiction to consider the allocation of property separately from the divorce hearing and separately from questions of custody, maintenance and alimony? Secondly, if the Court had that jurisdiction what approach should the Court take to determine the division of property? The two issues were closely related because the underlying question was, if there was jurisdiction, how was the Court to exercise it to determine the allocation of property consequent on divorce, making if necessary, adjustments to the existing legal and beneficial proprietary interests.

II THE SCOPE AND APPLICATION OF THE COURT'S POWER

In the Supreme Court the question of jurisdiction does not appear to have been raised by counsel but by the judge who stated 'the Court has unlimited jurisdiction to 'hear and determine any civil or criminal proceedings' under Article 49(1) Constitution'.[4]

The issue arose because the application for the determination of matrimonial assets had been brought separately from the divorce application or any application regarding custody of the children, alimony or maintenance. In *Kong v Kong*,[5] referred to by the Supreme Court, it had been accepted that the Court did not have such jurisdiction under the *Matrimonial Causes Act* [Cap 192] and that separate proceedings were required. However, Justice Coventry in the Supreme Court ruled that the Court's jurisdiction did not arise solely from and subject to the limitations of the Act but was supplemented by the inherent jurisdiction conferred by section 29(1) of the *Courts Act* [Cap 122], and by Articles 47(1) and 49(1) of the

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Constitution.[6]

In the Court of Appeal it was stated at the outset that (1): 'The central issue in this case is the power of the Supreme Court of the Republic of Vanuatu to make orders regarding the settlement of matrimonial property ...' and (2) '*If* such power exists ... the approach which the Court should take when exercising it'.[7]

Indeed the appeal arose because the appellant challenged the power of the Supreme Court to make any order that had the effect of transferring any part of any of his interests in any property to the respondent. However the approach of the Court of Appeal was not to address the question of whether the Court had such power and if so, how it should be exercised as separate issues, but rather to first find a law and then identify the power it conferred on the Court.[8]

The route whereby the law is to be found is guided by the *Constitution* which states that at independence the applicable law was:

all Joint Regulations and subsidiary legislation made under the joint regulations which were in force immediately before independence... [and] British and French laws in force or applied in Vanuatu immediately before independence... which continue to apply *to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom*.[9]

The *Matrimonial Causes Act* [Cap 192] passed by the Vanuatu parliament commenced on 15 September 1986. That Act however does not expressly revoke or repeal the divorce laws in force at independence. The relevant British laws were the *Matrimonial Causes Act 1973*, together with certain residual sections of the *Matrimonial Causes Act 1965* and *1967*, and parts of the *Matrimonial Proceedings and Property Act 1970*.[10] As the Court of Appeal held, by implication provisions of the Vanuatu legislation which cover substantially the same ground as the legislation in force at independence will supplant the latter. So, for example, because the *Matrimonial Causes Act* [Cap 192] makes provision for the nullity of marriage and for the dissolution of marriage the former provisions found in the English legislation – or for that matter any French legislation – would no longer apply. This approach is in line with the words 'unless otherwise provided by parliament' in Article 95. Conversely, where the same ground is not covered by Vanuatu legislation, then 'existing law' remains in force.

Equally significantly the Vanuatu *Matrimonial Causes Act* [Cap 192] does not make any reference to the division of property on divorce. While the court may not make any decree for divorce or nullity until it is satisfied that satisfactory arrangements have been made regarding any children of the marriage,[11] there is no requirement that the divorcing couple have made satisfactory arrangements regarding any property consequences of the marriage. There is however provision in sections 14 and 15 for the Court to make orders regarding alimony and maintenance and adjustment to property interests may be associated with orders made under these two sections. If the Court of Appeal was to find that the Supreme Court had any jurisdiction in this matter it had to look beyond national legislation.

III THE ALLOCATION OF PROPERTY ON DIVORCE

Most divorce legislation confers on the Court the power to adjust existing property interests in order to give effect to whatever policy informs current thinking about divorce, whether that be the 'clean break' idea or something else – such as a need to punish the 'guilty' party. There is therefore a lacuna in the Vanuatu divorce legislation with respect to property. Alongside the *Matrimonial Causes Act* [Cap 192] separate applicable law in force at independence and not yet repealed or replaced is the power of the Court to determine property interests either under the *Married Women's Property Act 1882* (UK),[12] or under its

inherent powers to determine property interests according to principles of law or equity. While the*Married Women's Property Act 1882* (UK) enables the Court to determine disputed property interests – not to adjust them or set them aside – the equitable jurisdiction of the Court would allow it to establish property interests under, for example, trust or estoppel principles. Even here, however, the Court cannot re-allocate property once the legal or beneficial interest is established.

Often the re-allocation of property will be effected as part of the provisions for the children, for example the family home maybe allocated to the parent with whom the children are resident, while other assets may be allocated to the person who must provide maintenance. An example of this approach is found in the case of *Molu v Molu,*[13] where the Supreme Court of Vanuatu appeared to have little difficulty in dealing with the property consequences of the dissolution of the marriage (albeit the respective interests of the parties to the property were not in dispute and the assets were relatively straightforward in nature). Similarly in *Kong v Kong*[14] it would appear that a property adjustment order may be made if it is an associated claim – presumably associated with questions relating to custody and maintenance of the children or the question of payment of alimony, as was the case in *Kong*. Where this is not done however, then the question remains, and is the one raised in *Joli v Joli* before the Supreme Court and the Court of Appeal, whether the Court has any power to adjust proprietary interests. In past cases such as *Fisher v Fisher*[15] this seems to have been done without directly addressing the question 'where does the Court get its jurisdiction from to do this?' Indeed in the case of *Fisher* the Supreme Court had awarded half of the matrimonial property to each spouse without reference to the grounds on which this division was made. The Court of Appeal in the same case adopted the principles of *Watchel v Watchel*[16] for the division of further assets which the Court considered to be assets of the marriage. However *Watchel* – as acknowledged by the Court of Appeal in *Joli* – was based on the *Matrimonial Proceedings and Property Act 1970* (UK) sections 1-5. These sections along with the rest of Part I of the Act were repealed by the *Matrimonial Causes Act 1973* (UK). They were not therefore part of the laws of general application in force at independence. While some of the dicta of Lord Denning in *Watchel* may provide useful equitable guidelines it is, it is suggested, a misleading case to follow in terms of legal rules for the allocation of property on divorce in this jurisdiction.

Further, in *Kong v Kong* it was clearly stated and accepted by the Court of Appeal,[17] that 'the Matrimonial Causes Act does not vest jurisdiction in the Supreme Court to make orders for the settlement of matrimonial property – at least otherwise than as part of a maintenance order', and that:

(T)he jurisdiction of the Court to deal with matrimonial property arises under the application in Vanuatu of the *Married Women's Property Act 1898* (UK). The Court also has in its general original jurisdiction power to make orders regarding legal or equitable interests which the parties may have in property.[18]

This was accepted as correct in the *Joli* case, although in the Supreme Court Justice Coventry expressed the view that 'the thinking behind the *Married Women's Property Act 1882* can have little application in Vanuatu today'.[19] This is of course debateable. The*Married Women's Property Act 1882* was part of a range of measures aimed at improving the lot of married women who lost their identity on marriage, by giving greater respect to their autonomy and individual status. In a country such as Vanuatu, where women are still struggling to be recognised as persons in their own right, the struggle of women at the turn of the nineteenth century in Britain is not so remote.

Preferring to apply the fundamental principles of equality of treatment stated in the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), Justice Coventry, took the 'original jurisdiction' acknowledged in *Kong* a step further in the *Joli* case, and adopted the view that there was a rebuttable presumption that all the property under consideration was subject to joint beneficial ownership. The legal basis for this was not grounded in general principles of property law, where equity

must follow the law unless to do so would be clearly inequitable, but on the non-discrimination provisions of Article 5 of the Vanuatu *Constitution*[20] and the provisions of CEDAW to which Vanuatu is a signatory. While it is clear that the judge was trying to achieve equity between the parties it is suggested this takes principles of equality too far and ignores the protection afforded to individuals under Article 5(1)(j) - protection for the privacy of the home and other property and from unjust deprivation of property, and the balance articulated in the latter part of Article 5(1) namely ‘subject to respect for the rights and freedoms of others ...’ Followed logically, the equality line of reasoning would have meant that had Mrs Joli never lifted a finger to help build up the family assets, she would still have been entitled, albeit under a rebuttable presumption, to half of them.

This line of reasoning was not accepted by the Court of Appeal, which found itself unable to agree with either the process of reasoning adopted in the Supreme Court or the presumption of joint or equal ownership of matrimonial property.

Had it been argued that the marriage was subject to a matrimonial property regime of shared or communal property – which could have been the case with both parties being francophone – then the equal division of matrimonial property might have been a valid argument. However the possibilities of French law were not raised. Under common law there is no such presumption regarding matrimonial property. Indeed strictly speaking there is no such thing as matrimonial property, and it is unfortunate that the Court of Appeal continued to use this phrase albeit the Court clarified this to be understood as 'assets held by both parties to the marriage at the time of their separation'.[21] There is jointly owned or co-owned property – whether in law or in equity – but this may apply whether parties are married or not, and separate or individually owned property. Naturally during the course of a relationship of twenty or more years – as was the case in*Joli v Joli* the exact details of who owns what, who said what, or who contributed what may be lost or forgotten. In such cases there may in certain circumstances be rebuttable presumptions of joint ownership, for example, where assets are bought from funds held in a joint bank account, or there may be rebuttable presumptions of resulting trusts, or sufficient evidence to establish constructive trusts or interests on the basis of estoppel.

As indicated, in the case of divorce, the consequences of confusion as to who owns what, is not usually a problem because the divorce court has the power to adjust proprietary interests taking into account a range of factors other than legal or beneficial title.

IV THE *JOLI* CASE

In *Joli c*ounsel for the husband argued that since the passing of the Vanuatu *Matrimonial Causes Act* [Cap 192] the English legislation ceased to have any effect. Counsel for the wife argued that in the absence of any relevant provisions in the national statute, parts of the *Matrimonial Causes Act 1973* (UK) should be applied. The crux of the matter was therefore whether there was any law presently applicable in Vanuatu concerning 'matrimonial property' and its allocation on divorce.

Joli is not the first case to consider the allocation of property on divorce, but it is the first to squarely address the problem of what is the existing law that applies to regulate the settlement of property separately from questions of maintenance, alimony and custody of children. In the case of *Banga v Waiwo*,[22] it was held by Justice D'Imecourt that

(T)he Matrimonial Causes Act (CAP 192) ... was a completely new Act that came into operation on 15 September 1986. The passing of that Act *did away immediately* with the French and English laws of divorce that had applied side by side until that date.’[23]

Had Cap 192 been passed earlier it would have been included in the 1985 Consolidation of the Laws of

Vanuatu. The purpose of this consolidation was to 'have effect as a consolidation and as declaratory of the written laws.'[24] However it was also provided under a saving clause - section 5 - that 'no omitted law was to be deemed to be without force and validity by reason only of the fact that it is so omitted.' In 1985 then, this would have meant that the French and English laws on divorce remained in force. Arguably section 5 could be read as supporting the argument that where there was a gap in the written laws, French and English laws would still apply. However, the Chief Justice also remarked 'it must be remembered that many French and English Laws that did apply have either expressly been repealed or*have been repealed by the passing of express Vanuatu Laws'*.[25] The implication here is that even if national legislation does not state that it repeals a former Act, the fact that national legislation is passed has the effect of repealing previous law.

Another point made in *Banga v Waiwo* which the Court of Appeal might have used as a starting point, is the requirement in Article 49 of the *Constitution* which states 'If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.'

In the Supreme Court in *Joli* it had been clearly stated that 'the parties in this case are not affected by custom law considerations'.[26] However, in the Court of Appeal there is reference to custom, but in a rather different way. Listing the criteria to be found in Section 25 of the *Matrimonial Causes Act 1973* (UK) - which are to be taken into account in determining the allocation of property on divorce or any adjustment of property interests, the Court stated '(I)t is not suggested that any of the matters which the court is directed to take into account are inconsistent with custom'.[27] This is a curious use of the term 'custom' in the Vanuatu context where it is generally interpreted to mean the custom of the people.[28] The Court of Appeal does not seem to limit its understanding of custom in this way because it goes on to state 'Those (the criteria in Section 25) are matters which are likely to be relevant in almost every marriage situation.'[29] This would suggest that 'conformity with custom' means consistent with practical reality or the usual circumstances of marriage rather than that indigenous custom is taken into account.

Admittedly the provisions of the second part of Article 47(1)[30] – 'in conformity with custom' - presents a number of problems when applied to personal laws and situations of marriage and property. First, whose custom? The parties in *Joli* were francophone, ni-Vanuatu citizens from a French cultural background. Arguably their customs were those to be found in France. This is not without significance because customary law was recognised as an important source of law in France. However, since Napoleon any customs regarding matrimonial property which may have existed have been absorbed into written law, namely the Civil Code. In fact the issue of French customs regarding marriage and property was not argued.[31] If it had been then the generally accepted view in France that there is always a matrimonial property regime might have been of some assistance to the wife. Could the customs of Vanuatu have been considered? Possibly, in line with Article 95 (3) which states that 'custom law shall continue to have effect as part of the law of the Republic of Vanuatu'. However, it is a well know fact that there is considerable gender inequality in custom as regards property rights, especially in respect of land. Although this inequality might be addressed by having recourse to Article 5 of the*Constitution* - as was done in the case of *Noel v Toto* [32]- and indeed as Justice Coventry appears to have tried to do in the Supreme Court[33] - it is probably just as well that the this route was not followed on the facts of*Joli*. Moreover it is arguable that although Vanuatu citizens, the customs of Vanuatu were not applicable to Mr and Mrs Joli.[34]

Could the Court of Appeal simply have decided the case 'according to substantial justice'?[35] This conjures up apparitions of Lord Denning determined to find beneficial interests where 'justice and good conscience' require it, and not too fussed about the tools used to achieve this, whether they be trusts or estoppel. However there is also dicta in B*anga v Waiwo* which supports such an approach: '(W)hat Parliament has not done so far ...is to do away with the element of 'British Common Law and Equity' that

apply in Vanuatu'.[36] The consequence of raising an estoppel or imposing a constructive or resulting trust will of course alter the property rights of the parties, and the court has the power to do this whether the parties are married or not. However once these property rights are established it is difficult to see how the court can then adjust them or re-allocate them without reference to any legal principles.[37] Establishing legal or equitable property interests must, therefore, precede any attempt to adjust these.

However, in *Joli* the Court of Appeal seemed prepared to go a step further – at least where the *Matrimonial Causes Act 1973* (UK) would not apply. Having stated that 'the Court might reach a conclusion...that matrimonial assets would be divided in roughly equal fashion',[38] the court went on to state that:

Even where the parties have never been married, the application of similar considerations (length of time of cohabitation and respective contribution) in equity may lead to the imposition of a trust on assets such that assets acquired by the parties during their co-habitation will be divided roughly equally.[39]

On the facts of *Joli* this comment must be taken to be *obiter*.[40] Even as *obiter* this suggests a considerable departure from established case law which does not confer on the courts any power to make property adjustment orders in the case of co-habitees except in so far as beneficial or legal claims to property are established. The consequence of this might be that coincidentally the unmarried parties are found to be entitled to roughly equal shares but there is no rule of thumb that where co-habitees separate each takes half of the property. Indeed the Court of Appeal rejected such an approach which was implicitly advocated by Coventry J in the Supreme Court following the equal right principles of the *Constitution* and CEDAW. Similarly, in the case of marriage the Court of Appeal indicated that it was not prepared to follow the 'equity is equality' path to reach the conclusion arrived at in the Supreme Court.

So how did the Court of Appeal resolve the matter in *Joli v Joli*? The Court stated that:

the 1973 English Act, *save in so far as its application has been overtaken by the provision of Cap 192,* is a law which applies in Vanuatu in accordance with the provisions of Article 95(2), and will continue to do so until Parliament otherwise provides.[41]

The Court considered that Part 1 of the UK Act which covers divorce, nullity and other matrimonial suits had probably been overtaken by Parts 1 and II of the Vanuatu Act. The Court also thought that probably the broadly worded provisions of sections 14 and 15 of the Vanuatu Act replaced the provisions in the UK Act regarding financial provisions for maintenance and alimony, which are found in Part II of the UK Act. Whether this is total or partial replacement will be considered shortly. What were not overtaken by the provision of Cap 192 were those parts of Part II of the UK Act which empowered a court to make property adjustment orders. These are found in sections 24 and 25. Section 24 of the UK Act empowers a court either at the time of granting a decree of divorce or nullity or judicial separation *or at any time thereafter* to order one spouse who has an interest either in possession or in reversion - in any property - *to transfer* that interest to the other spouse - or any child of the family, or to order the settlement of any property by one spouse in favour of the other, or to vary any benefit to which one or other party is entitled under an ante or post-nuptial settlement.[42] These orders can be made in combination or singly. Section 25 sets out the criteria which the court should take into account in making any of the property orders under Section 24.

V THE CONSEQUENCES OF *JOLI*

Looking elsewhere to fill any lacunae in the law is nothing unusual. The courts do it all the time with reference to the case law of other common law jurisdictions, notably England, but also elsewhere, including other jurisdictions in the Pacific region. In Vanuatu this is perfectly acceptable and in line with

the *Constitution* provided that those principles are either principles of general application as part of the body of law in force at independence or that reference to such cases and principles assists the courts in fulfilling their duty under Article 49 of the *Constitution*, namely that '(I)f there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice'. However, what the Court of Appeal has done is to raise the possibility of having parallel legislation in force, if not in whole, then in part. This approach is distinct from, for example, applying the whole of a pre-independence statute because no national legislation exists,[43] or where pre-independence legislation is applied because the action commenced before independence.[44] Nor is it quite the same as where the court refers to a Joint Regulation made for Vanuatu by the Condominium powers.[45]

This cut and paste approach to filling the gaps in the law is not altogether attractive but could have its uses. Creating a coherent body of law in this way is messy. Not all of Part II of the *Matrimonial Causes Act 1973* (UK) will apply, because some provisions have been overtaken by Part III of the Vanuatu Act. Section 14 of the Vanuatu Act provides that on a petition for divorce or nullity 'the Court may make such interim orders for the payment of alimony to the wife as the Court thinks just'. Under the same section the Court can make orders for the regular payment of maintenance for the wife.[46] Section 15 gives the Court power to make provision for the children of the marriage with respect to custody, maintenance and education. Although broadly worded these sections would appear to replace sections 21-23 of the English legislation, and indeed the Court of Appeal accepted that 'CAP 192 *does* replace those provision of the 1973 English Act which deal with topics addressed in sections 14 and 15'.[47] This might appear to be quite a neat solution. However it is not. Although section 24 of the English legislation - which deals with property adjustment orders in connection with divorce proceedings - would appear not to be covered by sections 14 and 15 of the Vanuatu Act, section 24 provides not only for property adjustment orders in favour of the other spouse, but also in favour of any children of the marriage or to trustees on their behalf. Provision for children and the adjustment of property interests are therefore muddled up in the same section. In so far as children are concerned it could be argued that the broad wording of section 15 in particular - which does not refer to the payment of monies but to 'provision' - can be liberally interpreted to cover such matters as adjustment of property of the parties in order to provide accommodation for the children, the wherewithal to earn maintenance payments and the means to care for the children, so the lacunae - if there is one - only arises where there are no issues relating to children or alimony to consider - which was not the case in *Joli*. Moreover, as there is cross reference in section 21 to section 24, and in section 25 - which sets out the matters to which the court is to have regard in deciding to exercise its powers - to both sections 23 and 24, it is difficult to see how one can say which section applies and which does not. In fact the Court of Appeal refers to provisions not applying rather than sections which means that each section must be dissected and its contents compared in scope with those of sections 14 and 15 of the Vanuatu Act, clause by clause.

As stated, this is messy, but could be useful and provide some pragmatic solutions. For example, financial provision and property adjustments orders under the English Act may be made 'on proof of neglect' by either party to the marriage,[48] which is a provision which goes considerably further than the Vanuatu *Maintenance of Family Act* [Cap 42]. Similarly under section 29 of the English Act the court can extend the payment of financial provision for children beyond the age of eighteen if the child is still in education or undergoing training for a trade or profession or for gainful employment. This offers considerably more scope than section 6 of the Vanuatu *Maintenance of Children Act* [Cap 46] which gives no additional discretionary power to the court to extend maintenance orders for a duration beyond the age of 18. These are just two examples of how judicious 'cut and paste' might be used not only to fill gaps but to accommodate changing needs and life styles.

Another area which could be addressed using the *Joli* method is that of judicial separation. Under the *Matrimonial Causes Act* [Cap 192], there is only reference to separation in respect of persons married

according to custom whose marriage may be 'dissolved, annulled or *separation ordered only in accordance with custom*'.[49] There is no reference to the possibility of a judicial separation by a court in the case of civil or a church marriage. However, Part 1 of the *Matrimonial Causes Act 1973* (UK), does include provision for judicial separation.[50] Following *Joli* it is suggested that the courts - except in marriages entered into under custom - can make order of judicial separation, thereby relieving the spouses of some of the incidents of marriage, in particular cohabitation, without terminating the marriage entirely.

VI CONCLUSION

It is suggested that the *Joli* approach opens up the possibility that a number of parts or sections of UK legislation might be relied on to supplement or fill gaps in existing Vanuatu legislation. By extension French law could be used to do the same. This could be quite a useful way of fleshing out an area of law where there has been comparatively little national legislation, the subject area not being one of pressing political or parliamentary interest. Of course three *caveats* must be borne in mind, all of which were raised in the course of the *Joli* case. The first is that laws in force at the time of independence can only be used 'to the extent that they are not ...incompatible with the independent status of Vanuatu'.[51] This raises some interesting issues about legislative sovereignty as well as concerns about separation of powers.[52] If the national parliament has passed legislation relevant to the subject area – even if it does not cover all of it – should the courts rely on the pre-independence legislation of other sovereign powers? The second is that in using such laws there must be, wherever possible, 'due account of custom'.[53] Thirdly that they are 'construed with such adaptations as may be necessary to bring them into conformity with the *Constitution*'. This last would include the need to bear in mind the fundamental rights provisions of the *Constitution* which were alluded to in the judgment of Coventry J in the Supreme Court in the *Joli* case, in particular the equality and freedom from discrimination provisions.

A new post-*Joli* approach to legal research therefore is to first find if there is provision on the subject area by the Vanuatu parliament. If there is then check to see if it expressly or impliedly repeals or replaces any other laws in force in Vanuatu at independence.[54] If there is a Vanuatu law on the matter, read it carefully. Are there any gaps or lacunae? If there are and the Vanuatu law does not expressly repeal the whole of a previous law, look at the previous law and take the *Joli* path, comparing the Vanuatu law with that in force at independence. Check the proposed route against the three caveats: compatibility with independent status; custom; *Constitution*. Additionally it is important to check if there are any international instruments binding on Vanuatu – a point raised by Coventry J with reference to CEDAW – which might have a bearing on the acceptability or not of a proposed line of reasoning.[55] This approach puts the ball firmly in Parliament's hands to make any necessary changes to national law and – incidentally – put a stop to judicial law-making. The black letter approach to legislation also prevents too much argument about justice and equity.

Are there any drawbacks to the *Joli* approach? Apart from the 'bitty' cut and paste picture which may emerge, there are disadvantages of retrospectivity and the exercise does limit the range of possible legal solutions to the laws in force over two decades ago – which in many cases will have been replaced, or repealed and updated on their home ground. The *Joli* approach is also legislation based, and it is regrettable that the Court of Appeal limited itself in this respect. While the Court of Appeal clearly rejected the rather novel approach proposed by Coventry J in the Supreme Court, it could have seized somewhat more robustly the power given to it in Article 47(1) of the *Constitution*. 'Rule of law' need not be limited to legislation and the Court of Appeal could have adopted D'Immecourt's view that Cap 192 replaced the French and English laws of divorce.[56] Determining the matter according to substantial justice the Court could probably have arrived at much the same result using as D'Immercourt J suggested in *Banga v Waiwo*: 'the common law that binds all the Commonwealth countries under one legal system, thus creating a pool of authorities from which we can borrow in order to create our own jurisprudence'.[57]

Alternatively it was also an opportunity - unfortunately missed - for the lawyers to explore the French law options and thereby bring to the table a wider range of possibilities. What has happened instead is that the allocation of property on divorce is, until Parliament acts, to be determined by a law which is twenty years old, passed for a different country in a different social context. One wonders if the *Joli* judgment is a positive development in the law or not?

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[1] [2003] VUCA 27 (Unreported, Lunabek CJ, Robertson J, von Doussa J, Fatiaki J, Saksak J, Treston J, 7 November 2003) http://paclii.org.vu/vu/cases/VUCA/2003/27.html (Accessed 19/1/04)

[2] There have been cases where national legislation has covered the substantive area of law but not the procedural, for example, *Pentecost Pacific Ltd v Hnaloane* [1980-1994] Van LR 134, where the French Procedural code of December 15 1952 for the French overseas Territories was applied to the Vanuatu *Employment Act* [Cap 160] because the defendant was French. Where national procedural law covers the area even if previous legislation is not repeal, it may be excluded: *Leingkone v Deamer* [2000] VUCA 2 (Unreported, Lunabek CJ, Robertson J, von Doussa J, Fatiaki J, Saksak J, Coventry J, 12 May 2000) http://paclii.org.vu/vu/cases/VUCA/2000/2.html (Accessed 19/1/04) – where it was held that Cap 2 of Volume 1 of the *Queen's Regulations* and the *Magistrate's Court Rules* which had application between 30 July 1980 and the 30th April 1981, were ousted by *Magistrate's Court (Civil Jurisdiction) Act* [Cap 130] and the *Courts Act* [Cap 122].

[3] The Magistrate's court decision is not reported but the sequence of events is referred to in the Supreme Court case *Joli v Joli* (Unreported, Supreme Court of Vanuatu, Matrimonial Case No. 08 of 2002, 25 March 2003) [30].

[4] *Joli v Joli,* above n 3, [34]. Article 49 (1) reads as follows: 'The Supreme Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings, and such other jurisdiction and powers as may be conferred on it by the Constitution or by law'.

[5] [2000] VUCA 8 (Unreported, von Doussa J, Fatiaki J, Saksak J, Coventry J, 6 December 2000) http://paclii.org.vu/vu/cases/VUCA/2000/8.html (Accessed 19/1/03).

[6] *Joli v Joli,* above n 3, [34-35]. Article 47 (1) states: ' 47. (1) The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.' See note 4 for Article 49 (1).

[7] *Joli v Joli*, above n 1, [1]. Emphasis added.

[8] Indeed there seems to have been some confusion in legal argument presented to the Court on the question of the Court's power – se, *Joli v Joli*, above n 1, [5].

[9] *Constitution* Article 95, emphasis added.

[10] Schedule 3 *Matrimonial Causes Act (UK) 1973*. These Acts would only apply in Vanuatu if they were Acts of 'general application'. A UK Act cannot apply even if there is a gap in national legislation if the former is not an Act of general application: see *Harrison v Holloway (No 2)* [1980-1994] Van LR 147, *Police Act 1948* (UK) not applicable to fill a gap in the *Vanuatu Police Regulations 1980* regarding police torts.

[11] Section 16.

[12] Section 17.

[13] [1998] VUSC 15 (Unreported, Lunabeck ACJ, 15th May, 1998) http://paclii.org.vu/vu/cases/VUSC/1998/15.html (Accessed 19/1/04)

[14] Above n 5.

[15] [1991] VUCA 2 (Unreported, Morling, J, Ward, J, Martin, J 5 September 1991) http://paclii.org.vu/vu/cases/VUCA/1991/2.html (Accessed 19/1/04).

[16] [1973] 1 All ER 829.

[17] Above, n 5, [37].

[18] Above, n 5, [63]. In the Court of Appeal in *Joli* it was claimed, at paragraph 37, that this statement from *Kong* was 'premised on an understanding that the Supreme Court was empowered to make orders for settlement of matrimonial property under the provisions of the 1973 English Act. There is however, no evidence of this premise in the *Kong* judgment.

[19] Above, n 3, [14].

[20] Article 5 (1) '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 list of rights follows.

[21] Above, n1, [33].

[22] [1996] VUSC 5 (Unreported, d'Imecourt CJ, 17 June 1996) http://paclii.org.vu/vu/cases/VUSC/1996/5.html (Accessed 19/1/04).

[23] Above, n 22, [15]. Emphasis added.

[24] Above, n22, [14]. The reference is to the *Revision and Consolidation of the Laws Act 1985*, Sections 2, 8, and 11(2).

[25] Above, n 22, [14]. Emphasis added.

[26] Above, n 3, [28].

[27] Above, n 1, [40]. The criteria in section 25 are (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; (c) the standard of living enjoyed by the family before the breakdown of the marriage; (d) the age of each party to the marriage and the duration of the marriage; (e) any physical or mental disability or either of the parties to the marriage; (f) the contributions made by each of the parties to the welfare of this family, including any contribution made by looking after home or caring for the family; (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

[28] *Interpretation Act* [Cap 132] Schedule, 'custom' is stated to be 'the customs and traditional practices of the indigenous peoples of Vanuatu'.

[29] Above, n 1, [40].

[30] Article 47 (1) 'The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom'.

[31] The only case found by the writer where French custom has been referred to is that of *Francois v Ozols* [1998] VUCA 5 ((Unreported, von Doussa J, Fatiaki J, Marum J, 25 June 1998) http://paclii.org.vu/vu/cases/VUCA/1998/5.html (Accessed 19/1/04)) where it was argued that there had been a refusal to take into account customary employment practices of the French community. However this argument was never examined as the claims failed on other grounds.

[32] [1995] VUSC 3 (Unreported, Kent J, 19 April 1995) http://paclii.org.vu/vu/cases/VUSC/1995/3.html (Accessed 19/1/04).

[33] See paragraphs 8 and 9 of the Supreme Court judgment, above, n 3.

[34] The problem of when and whose customs will apply in a given situation has been considered by Paterson ,D, in a paper entitled 'South Pacific Customary Law and Common Law – Their Interrelationship' (1995) *Commonwealth Law Bulletin* 661. Prof. Paterson himself indicates that there are often no clear guidelines on this matter especially in Vanuatu.

[35] Article 47(1).

[36] [1996] VUSC 5, para 15.

[37] There is a fine line to be drawn between pragmatism and creativity. See the dicta of the Court of Appeal in *Namatak v Public Prosecutor* [1980 – 1994] Van LR 274: 'We are in a newly emerging nation which was jointly administered by France and England according to French and English laws. Vanuatu no longer, relies upon Westernised sophistication and must develop its own approach. The Courts should not be quick to grasp at hair splitting technicalities. At the same time, they should never endeavour to "manufacture laws" to cover some difficult situation unless they keep within the provisions of the Constitution'.

[38] Above, n 1, [48].

[39] Above, n 1, [48].

[40] Although the facts themselves confuse the distinction between spouses and cohabitees. The parties had cohabited from 1980 to 1992, then married and remained so until 2002. However Coventry J in the Supreme Court chose not to distinguish the different legal status of the parties but to regard the couple 'to all intents and purposes married' – Above, n 3, [19].

[41] Above, n 1, [41]. Emphasis added.

[42] Emphasis added.

[43] As has been done with the English Adoption Acts*: In Re the Constitution of the Republic of Vanuatu in Re the Infant Vorango* [1984] VUCA 2 (Unreported, Cooke J, 12 December 1984) http://paclii.org.vu/vu/cases/VUCA/1984/2.html (accessed 19/1/04), and English Bankruptcy law: *Selb Pacific Ltd v Mouton* [1996] VUSC 4 (Unreported, D'Imecourt CJ, 30 May 1996) http://paclii.org.vu/vu/cases/VUSC/1996/4.html (Accessed 19/1/04) where it was held that the *Bankruptcy and Insolvency Act 1914* (UK) applied because the action had been brought under the English law.

[44] As in *T v R* [1980-1988] 1Van LR 7.

[45] As was the case in *Public Prosecutor v Mathias* [1980 - 1994] Van LR 140, where it was found that the *Penal Code* [Cap 135] made no provision for suspended sentences. The *Joint Regulation 24* of 16 November 1971 did make such provision and as this was not repealed by the *Courts Regulation 1980*, was held to still apply.

[46] Under the *Interpretation Act* [Cap 132], this presumably means husband as well.

[47] Above, n 1, [31]. Emphasis added.

[48] Sections 27 and 21.

[49] Section 4, emphasis added.

[50] Sections 17 and 18.

[51] Article 95(2).

[52] Both topics are beyond the scope of this paper.

[53] Article 95(2). See above for comment on this in the context of the *Joli* case.

[54] Vanuatu legislation is notoriously silent on this. There are rarely schedules of repealed statutes or clear indications in the preambles to statutes, and even the title – as in the case of the *Matrimonial Causes Act* [Cap 192], may not be conclusive. For comment see *Public Prosecutor v Mathias*, above, n 45.

[55] *Joli v Joli,* above, n 3, [10-13].

[56] *Banga v Waiwo*, above n 22, [15].

[57] Ibid.

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