DIVERSITY, UNITY OR DIVISIVENESS ? THE LEGACY OF THE ADOPTION OF FRENCH LAW AND ENGLISH LAW AS PART OF VANUATU'S LEGAL SYSTEM

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Abstract

On Independence in 1980 Vanuatu adopted a number of sources of law as part of its transitional provisions. These sources included "the British and French laws in force or applied in Vanuatu immediately before the Day of Independence'. Despite the diversity of sources of law, English has become the dominant language of the law, and English common law (as developed to fit local circumstances) is the primary source of legal principles. French law has not been completely subsumed, however. This paper surveys Vanuatu case law to determine the current place of French legal principles in Vanuatu's legal system. As well as providing a baseline study, the paper aims to determine whether: (1) unity has been achieved by "English legal principles [overtaking] the French by stealth'; (2) a diverse range of English and French laws are being drawn upon as contextually appropriate; or (3) whether French within the legal system is a vehicle for divisiveness, allowing longstanding anglophone/francophone conflicts to continue being contested.

Introduction

The New Hebrides legal system, a product of the Anglo-French Condominium, was an unusual colonial legal system. There was a court for British subjects and

non-British residents who opted to be treated as British subjects (or optants), which applied British laws. There was a court for French subjects and optants, which applied French laws. There was also the Joint Court that applied local regulations to natives. Customary law also continued to operate separately from the state legal systems. (Angelo, 1997) This colonial history presented particular challenges for the design of Vanuatu's post-Independence legal system. Other USP member countries (Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tuvalu; Tokelau remains a territory of New Zealand and Tonga was never colonised) faced the task of adopting English law as the State legal system on Independence and determining, in practice, the place of customary law in relationship to this legal system. Vanuatu's joint colonial history means that it faced a hurdle in its path to Independence that other Pacific countries did not have to overcome: how to take three different sets of state legal rules (English-imperial, French-imperial, and joint-colonial) and merge them into a post-Independence state legal system. The challenge of determining the customary law in relationship to this legal system, also remained. It is outside of the scope of this article to consider the place of customary law in Vanuatu's legal system. Instead this article focuses on the dual place of French imperial law and British imperial law as ongoing sources of Vanuatu's laws.

If one took a quick look at the day to day practice of Vanuatu's legal system one would, perhaps, come to the conclusion that French law no longer has any place within Vanuatu's legal system. Indeed, one of the more unusual cases in Vanuatu's legal history, which saw that plaintiff attempt to sue the judges of the Court of Appeal and almost the entire legal profession, was based, in part, on the argument that the legal system as a whole was biased against French people and legal principles and that "English Legal Principles have overtaken the French by stealth'. (Francois v Ozols [1998] VUCA 5.) Academic commentators have also found that, in practice French law has little place as a source of law in Vanuatu. In 2015 Farran stated that "French law and the legal system have faded into the shadows'. (Farran, 2015, 133.) In 1996 Angelo argued that "la place et l'influence minimes faite au droit français et on en retire un premier sentiment de déclin aussi rapide qu'inexorable.' This state of affairs led him to raise questions as to "la réelle portée de certaines provisions de la constitution et d'une manière plus générale à se demander si l'existence, même réduite, du droit français au Vanuatu, a encore sa raison d'être.' (Angelo, 1997, p 13.)

No comprehensive survey of the place of French law within Vanuatu's courts has been undertaken, however. This article fills a gap in knowledge by providing

a survey of the decisions of Vanuatu's courts that refer to French law. It also partially addresses Angelo's question as to whether there are good reasons for Vanuatu continuing to use French law as a source of rules, in the event that local legislation does not provide rules.

The article begins by considering reasons the drafters of the Constitution may have had for the choice of sources of law. It then surveys the use of French law in the courts, considering case law by decade. Finally the article turns to consider whether: (1) unity has been achieved by "English legal principles [overtaking] the French by stealth'; (2) a diverse range of English and French laws are being drawn upon as contextually appropriate; or (3) whether French within the legal system is a vehicle for divisiveness, allowing longstanding anglophone/francophone conflicts to continue being contested.

I – SOURCES OF LAW ON INDEPENDENCE

A – Constitutional provisions

Article 95 of the Constitution determined the law to apply immediately after Independence. It provides that:

(1) Until otherwise provided by Parliament, all Joint Regulations and subsidiary legislation made thereunder in force immediately before the Day of Independence shall continue in operation on and after that day as if they had been made in pursuance of the Constitution and shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution.

(2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day 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.

(3) Customary law shall continue to have effect as part of the law of the Republic of Vanuatu.

This provision is included in the chapter on transitional provisions, which implies that these sources of law were not intended to continue indefinitely, but were intended to be a temporary measure until Vanuatu determined the future of its legal system. This implication is further supported by Article 94, which referred to legal matters that had entered into the New Hebrides courts prior to

Independence but that had not been decided upon. In such situations matters were to "be disposed of… in accordance with general or specific directions given by the Supreme Court subject to any law which may be enacted for that purpose,' suggesting that the promulgation of further statutes to determine sources of law was envisaged.

Articles 94 and 95 did not address how the different sources of statute law should relate. By 1988 all Joint Regulations that had not been repealed by legislation were included in the consolidated Acts of Vanuatu, which resolved any possible question as to the relationship between colonial Joint Regulations, French and British law: Vanuatu Acts, as the law of Vanuatu, would prevail. Article 47(1) of the *Constitution* did give the courts broad discretion to deal with the question what should happen in the event that both British and French law could apply to a dispute by providing that:

"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.'

This then raises a further question of what "substantial justice" means in relation to determining sources of law.

1) Reasons for including both French and English laws as sources ?

Was the decision made in respect of the sources of laws for Vanuatu deliberately intended to be an expression of the notions that "l'unite ne doit pas exclure la diversite… facteur d'enrichissement' "unite et respect des differences qui font la richesse du pays'? (Discours des personalites, 11 janvier 1978, in *New Hebrides French Residency Reports.*) Or was it an ad hoc measure that was ill-thought out? Contemporaneous reasons as to why Vanuatu chose to adopt both French and British imperial laws have not been identified, so the answer to these questions is mere speculation.

There is an absence of material around the choice of a "common law style" (adversarial) court system. The explanatory note of the *Courts Regulation 1980*, passed by the New Hebrides Representative Assembly on 15 July 1980, two week prior to Independence does not discuss why the court structure was selected. The Courts Regulation leaves rules of procedure to be determined, leaving no clear intent as to how the courts would operate. In 1992 Chief Justice d'Imecourt suggested that it was more than mere coincidence that the courts were heavily influenced by the common law system, stating :

The answer is a simple one if one considers that the region, the other Melanesian nations of the Pacific, (bar one notable exception) the Court of Appeal under who's aegis Vanuatu falls, are all based on the Common law system and the rule of law.

Why, therefore, would Vanuatu have chosen otherwise than it did! It is clear, that the legal system of this nation is intrinsically linked to the system of those nations of the world as apply the Common Law system and the rule of law. Counted amongst those are virtually all the nations of the Commonwealth of nations, of which Vanuatu is a proud adherent. (*In re the Constitution, Timakata v Attorney-General* [1992] VUSC 9)

Whilst this also helps to explain why, following Independence, "the laws as applied in Vanuatu were influenced by the Common law system', ((*In re the Constitution, Timakata v Attorney-General* [1992] VUSC 9) it does not clarify why both British and French laws in force at the time of Independence were adopted as sources of law.

The question of what written laws should apply after Independence was part of a questionnaire that informed the Constitutional Committee, (Constitutional Committee, 2009, p 190) so was contemplated to some degree. Sources of laws were not, however, considered to be a key area for the Constitutional Committee to consider. (Constitutional Committee, 2009, p 17.) However, the only recorded discussion about what the sources of law in Vanuatu should be is found in the minutes of 30 July 1979. These minutes state :

V BOULOKONE was worried by the fact that, on Independence, there would be no New Hebridean Civil, Criminal or Company Law. Whereas a court could refer to Custom when judging a Civil or Criminal case in the absence of relevant law, V. BOULEKONE felt it would be impossible to do so in a case concerning Company law as international dealings where often involved.

Prof. GHAI believed one solution would be for interim laws to be made until such time as Parliament made a new law ; he offered to work with V. BOULEKONE on this question. (*Constitutional Committee*, 2009, p 72.)

From this it appears that the question of sources of law was not resolved, or fully discussed, in background papers that guided the discussion of the Constitutional Committee.

Adopting both colonial and imperial laws as an interim measure is a pragmatic solution found across constitutions in the Pacific. However, these constitutions did not draw on the laws of two imperial countries. Adopting both French

and British law, when one would suffice to fill gaps, is less easy to justify as being pragmatic, given the potential for ongoing conflict between the content of French and British laws.

2) Colonisers concerns ?

It appears that the British had recognised, early on in the move towards independence that there was a need for unified laws and legal structures. However, a long process of development of a unified legal system appears to have been stymied by French policy of the late-1960s which was to resist the development of unified structures:

More and more openly Britain seeks to lead this territory to independence… The emphasis is on the necessity of providing the country with a manageable infrastructure, especially in matters of social equipment… These efforts are directed towards creating unified structures which can easily be handed over to the New Hebrides "Nation'…

The French Residency has not allowed unified structures to be created which could undermine our influence. It has refused to agree to the integration of laws and legal procedures…' (French Resident Commissioner Mouradian, quoted in Van Trease, 1995, 16.)

Concern was expressed by Lord MacNair in the House of Lords as to whether Vanuatu was ready for independence when the New Hebrides Bill was presented for the second reading in February 1980. Some of Lord MacNair's concerns focussed directly on the inadequacies of the proposed legal system:

We have given them our two languages, English and French. We have given them as least two religions or denominations. We have given them two educational systems, Anglophone and Francophone, two legal systems, two police forces, two currencies. I may have misled the House in saying that we gave them two legal systems. It is in fact, I think, three; one for the French, one for the British and one for the indigenous population. Some of these divisive gifts should be examined in a slightly more detailed way…

The tensions arising from this cultural schism are very real, and, I believe, dangerous. They divide families, they divide the population, they distinguish the political parties one from the other…

Even more potentially dangerous, it seems to me, is our failure to provide them before independence with either a unified administrative structure, a unified legal system or a unified police force owing clear allegiance to the Government

of the New Hebrides and to no other... In the matter of the law, attempts have been made, as I am informed, to unify the legal codes. On the criminal side there is a document known as the Wallace-Mouredièn Report, which I only heard about too late to obtain a copy, but which I believe was not found acceptable by the New Hebridean Government. On the civil side, we have not even made that much progress…

Normally, when we grant independence to a colony, we have already, before independence, provided it with what one might call the infrastructure of autonomous viability. In this case, as I have been trying to indicate, throughout my speech we have been unable to do that. (Hansard, 1980, p 1097.)

Although some of Lord MacNair's concerns may have subsequently been allayed by the promulgation of the Courts Regulation 1980, the broader issue of lack of unity in legal codes or sources of legal rules remained. This was further compounded by the lack of guidance as to how to choose between which source of legal rules to apply in any given disputes. These issues then became a matter for the courts of Vanuatu to attempt to resolve, in accordance with "substantial justice".

Whether the adoption of both laws was intended to be a pragmatic solution, or instead was the product of some other underlying intent remains a matter for further investigation. The sources above do not allow easy conclusions on this matter to be drawn.

II – USE OF FRENCH LAW POST INDEPENDENCE

Leaving aside why both sources of law were adopted, the next section of paper considers the extent to which French law has been used as a source of law in Vanuatu's courts, and the way in which the Vanuatu courts have determined substantial justice in respect of utilising French law as a source of law. It is based on an analysis of cases published on the Pacific Legal Information Institute (PacLII) website.

One way to examine the utilisation of French law is a simple numerical analysis. PacLII has published 151 decisions that Vanuatu courts made in the 1980s (113 Supreme Court, 30 Court of Appeal, 5 Magistrates Court and 3 Island Court decisions). The first thing that can be observed is that all but three decisions are in English. The three Island Court decisions are in Bislama. Unsurprisingly maybe, given the decision to appoint an English Chief Justice, English was adopted as the principle language of the courts. The second thing that can be observed is

the relative lack of reference to French law. Of the 151 decisions only 16 refer to French law, although commentary in the Court of Appeal was more common, with 5 of the 30 Court of Appeal cases referring to French law in some way. This simple numerical analysis does, however, support the contention that French law was "in the shadows" in court proceedings from the outset.

A caveat should be placed on this claim. Electronic reporting of judgements did not exist in the 1980s. The majority of cases from this era on PacLII were originally contained in the Vanuatu Law Reports. This process of selection selected by the editors of law reports in itself shapes the development of laws, with law report editors effectively determining which cases are valuable precedents. It may be that editorial bias led to cases using English law being preferred, with cases using French law not being selected for publication. Banga v Waiwo [1996] VUSC 5 does refer to a number of unreported cases that did use the French Civil Code to decide divorce matters (Jimmys v Pourouoro Civil Case 5 of 1980; Toulet v Toulet Civil Case 23 of 1980; Bonavita v Bonavita Civil Case 50 of 1980; Trenus v Ratu Civil Case 79 of 1980; Lecourieux v Lecourieux Civil Case 195 of 1981; Lebovic v Lebovic Civil Case 231 of 1981; etc). Clearly there were Vanuatu cases that used French law but went unreported. With the Port Vila Supreme Court burning down in 2007, unreported case files have now been lost and it is not possible to determine the extent to which the selection of cases included in the Vanuatu Law Reports has shaped the perception that French law was rarely used in Vanuatu's courts.

That said, the numerical analysis (which only gets more profound as the volume of reported cases increases in later decades) establishes that French law does inhabit a state of Otherness within the legal system. Whilst English common law (case law) is assumed to be part of Vanuatu's legal system without question, French law is not accorded the same position. This is, maybe, due to its codified nature; codified English statutes are also rarely used within Vanuatu's legal system. The qualitative difference between common law and codified law makes the use of any statute law, be it French or English, a rarity. This raises a separate question, which is not explored in this paper, as to whether the common law nature of the courts, and the acceptance of English as the usual language of the courts and the legal profession means that English statutes may be preferred on the rare occasions when imperial statutes are required to fill gaps in the law. The question of how the courts determine substantial justice on the rare occasions when codified law is argued to be part of Vanuatu's legal system arises.

Two watershed cases occurred around 1996, the SELB cases and Banga v Waiwo. The paper first considers what the courts had done prior to SELB and Banga v Waiwo. It then looks at these two decisions before examining the subsequent case law.

"Substantial justice" and French law prior to SELB & Banga v Waiwo

From 1980 – 1996 the courts took a number of, at times conflicting, approaches to the place of French law within Vanuatu's legal system. The table below summarises the various approaches :

French law to be used in matters started pre-Independence Colardeau v Mamelin [1980] VUSC 1 Barclays Bank Int Ltd v Societe Huilerie des Nouvelles Hebrides [1984] VUSC 3 My v Societe Civile Sarami [1985] VUSC 2	Local law to override French law Public Prosecutor v Guyette [1984] VUCA 6 Luthier v Kam [1984] VUSC 9
French law used by agreement of parties Luthier v Kam [1984] VUSC 9	French law for French matters T v R [1980] VUSC 3
French law for French citizens (choice determined by nationality of defendant) Pentecost Pacific Ltd v Hnaloane [1984] VUCA 4	Universal principles from both French and English law to apply Development Bank of Vanuatu v Seagoe [1985] VUSC 6 Prevot v Prevot [1987] VUSC 13 Societe Civile Familiale Gaudron v Prouds South Seas Ltd [1984] VUSC 6
English and French law as sources of enrichment Attorney-General v President of the Republic of Vanuatu [1994] VUSC 2 Plantations Reunies de Vanuatu Ltd v Russet [1996] VUSC 7	French law as a source of law discussed but not used In re the Constitution, Timakata v Attorney-General [1992] VUSC 9
French law used, but then use overturned Leigh v Societe Civile Inter-Continental [1984] VUSC 1 Societe Civile Intercontinental v Leigh [1984] VUCA 3	

Some of the first cases referencing French law involved situations that had arisen before Independence (either proceedings had been commenced or contracts made under French law had been entered into), when French law applied to French citizens. In these cases French law, uncontroversially, continued to apply. These examples of the application of French law were very much creatures of the transition period and do not contribute to non-transition jurisprudence about the ongoing application of French law.

The second cluster of cases relate to the relationship between French law and local (Vanuatu) law. Given the manner in which the plural legal system operated prior to Independence it is, maybe, unsurprising that part of the transition process was reiterating how adopted laws (whether French or English) and local laws would relate. The cases in this cluster all reiterate the principle that where local statute law exists, it will prevail over French law. There were also similar cases about the relationship between English law and local law (see, for example Namatak v Public Prosecutor No 1 [1986] VUCA 4.)

Luthier v Kam [1984] VUSC 9 accepted that French law could be applied by agreement of both parties to matters started after Independence, an apparently common sense decision.

The first decision that offers some insight into the relationship between French and English adopted law in the event of a dispute as to what law should apply is T v R [1980] VUSC 3. In this case, which was heard in December 1980, a woman was seeking a divorce from her husband. The woman was a French citizen. The husband's citizenship is not stated in the decision. The marriage had occurred in Port Vila in 1967. Two ceremonies had occurred – the first before the French Registrar of Marriages and the second before the British Registrar of Marriages. The legal point was conceded that only the first (French) marriage was valid, and parties could not marry twice. On the facts there were no grounds for divorce under either British or French law, so the judge did not have to decide what the law was. The judges did express some relief at not having to resolve this matter, but did make an obiter comment that if parties are married under French law, thereby making the case a "French matter", then French law applies to divorce, regardless of the what citizenship status the parties have.

The view that, in the event of a conflict, French law should apply to French citizens, as determined by the citizenship of the defendant, appeared to be established by the Court of Appeal in *Pentecost Pacific Ltd v Hnaloane* [1984] VUCA 4, an employment case in which the trial judge had allowed parol evidence of an oral variation of the written contract contrary to the rules of evidence laid down

in Article 1347 of the French Civil Code. As there was no procedural code specified the Court of Appeal stated that "procedure must therefore be decided by interprétation of Article 93(2) of the Constitution and the choice between French law and English law will be decided according to the nationality of the defendant, in this particular case French law".

Not all cases applied French law to French citizens or French arrangements. Some decisions sought to identify similarities in legal principles between French and English laws and did not automatically assume that French law would apply to French citizens. One example of this is Development Bank of Vanuatu v Seagoe [1985] VUSC 6. This case involved a pre-independence loan agreement that was made in the French language, with payment to be made in French francs. The loan was transferred, post- Independence, from the Caisse Centrale to the Development Bank. Of Vanuatu[1].

The Court considered both English and French law and found that under both sources of law the rights of the assignor and assignee are the same.

Prevot v Prevot [1987] VUSC 13 took a similar approach in a case involving the division of matrimonial property and Societe Civile Familiale Gaudron v Prouds South Seas Ltd [1984] VUSC 6 also applied the same approach to a case involving a claim for damages in respect of a residential tenancy agreement.

The approach to using English and French law in respect of constitutional cases first arose is *Attorney-General v President of the Republic of Vanuatu* [1994] VUSC 2, a case involving the extent of the President's constitutional power of pardon. The Court found that constitutional cases cannot adopt approaches from the colonising authorities as :

The nature of the powers and position of the President of Vanuatu can be determined only by a consideration of the Constitution itself. No doctrine of immunity based on the position of the British Crown can be imported into the

[1] The case is a classic land-transition case. As the text of the judgement summarises: "Like many people caught up in changes of government consequent upon independence the defendants feel that the French Government, through its agent, Caisse Centrale, should bear the financial losses caused to them by changes in land ownership and in land tenure. They say that the money was loaned to them in order to develop land ; the lender was in effect the French Government ; the French Government has transferred the loan to the Vanuatu Government ; the Vanuatu Government has by its Constitution deprived the defendants of their title to the land they wished to develop. They infer that the Vanuatu Government is grasping the benefit of the loan made to the defendants whilst demanding that the defendants repay the loan. ... (suite TSVP)

Constitution of Vanuatu. Further, the courts of Vanuatu are not the President's Courts; they are set up by the Constitution.

However, both French and English sources were considered in determining what Vanuatu's law on the matter is. This approach was also found in the civil case of *Plantations Reunies de Vanuatu Ltd v Russet* [1996] VUSC 7, which involved, in part, a discussion of the standard of proof required in a civil matter. The judge noted :

It must be said that although this Court is not bound by any decisions of any other Courts, save the decisions of our own Court of Appeal, I nevertheless, share the view that it can allow itself to be guided and influenced by decisions of Courts within the Common Law system and indeed decisions of French Courts to the extend of their relevancy within the meaning of Article 95 (2) of the (Vanuatu) Constitution. In that sense, it can thus enrich its own jurisprudence by putting to good use and effect, those rules of Law which have proved wise and successful and to have been well tested in other jurisdictions.*

Whilst these cases suggest that both French and English law can be looked at for sources of enrichment, with wide latitude on the courts to then determine the appropriate rules for Vanuatu, the preponderance of English authority, and the relative dearth of French authority suggest a preference for common law as a source of enrichment. This preference is, perhaps, illustrated in *In re the Constitution, Timakata v Attorney-General* [1992] VUSC 9, a case involving the determination of whether particular Bills were constitutional. Having referred to common law courts and the adoption of the common law tradition in Vanuatu, the court went on to say:

If the defendants" source of income, namely cultivation of the 420 of land is removed, from what source will they derive the income in order to repay the loan ? They contend that the French Government should compensate them for the loss of their land, and they draw attention to promises allegedly made by France to compensate such persons for financial loss caused by the advent of independence. To date the French Government has not taken any steps to implement that promise. Mrs Seagoe complains that the Vanuatu Government proposes to take away their 420 h.a. of land and replace it with a lease of 92 h.a. She says that the arrangement is most unfair because the 92 h.a. to be leased to the Seagoes is substantially undeveloped, and that the 330 h.a. being taken over by the Vanuatu Government is the land which has been developed by cocoa planting with the aid of the loan from the Caisse Centrale. The moral problem is complex but the legal issues are clear although the application of the law may produce harsh consequences".

In real terms it means that, although the Courts of Vanuatu are not bound by any decisions of any of those courts, it can, nevertheless, allow itself to be guided and influenced by decisions of Courts such as those of the U.K, Canada, Australia, New Zealand, India, Papua New Guinea and others, within the Common law system. It can thus enrich its own jurisprudence by putting to good use and effect, those rules of law which have proved wise and successful and to have been well tested in other jurisdictions.

French law was not mentioned as a source of rules of law for enrichment. Later in the judgement the judge recognised the influence of French constitutionalism in the drafting of Vanuatu's Constitution, but French legal approaches were not then applied.

The final "pre-watershed" case to be considered Leigh v Societe Civile Inter-Continental [1984] VUSC 1 is more difficult as the decision was overturned. The case involved an Australian who was injured while on holiday in Port Vila. The plaintiff claimed damages for personal injury due to negligence. Both English cases and the French Court de Cassassion were referred to, although again specific authorities were not mentioned. The French principle that "future damage can be compensated for now as being damage which is bound to happen even if it does not exist now' was used to calculate damages. On appeal this decision was overturned on the apparent basis that under English law "the maximum that can be awarded under such heads of damage are those claimed in the pleadings and the Court has no power to exceed them.' Only one Court of Appeal decision is published, that of Williams, J. The apparently leading decision of Cazendres, J. is not published so it is not possible to analyse the full reasoning of the Court of Appeal.

"Watershed cases"?

Two cases can, maybe, be considered watershed cases that helped to establish clear legal principles about the place of French law in Vanuatu's legal system. The first, the SELB cases are a cluster of related decisions in a number of proceedings, and includes Court of Appeal decisions. The second, *Banga v Waiwo* [1996] VUSC 5 has been cited with approval in some subsequent cases. Quite why *Banga v Waiwo* has attracted attention as a (maybe the) leading case on the matter is not clear, but may simply be because it had attracted academic commentary.

The SELB cases

The SELB cases involved SELB a large building company that had been established pre-Independence in the New Hebrides. At time of the case the Managing Director of SELB was Andre Francois, a ni-Vanuatu citizen who arrived in 1971 from France. Daniel Mouton was recruited in France through family connections. He was employed as a "Conducteur de travaux', or project manager in English. His employment contract was written in French. The first case, *Mouton v SELB Pacific Limited* [1995] VUSC 2 occurred when there was a breakdown in the relationship between The Managing Director and Mouton, leading to Mouton's termination. The plaintiff claimed for wrongful dismissal whereas the defendant claimed that termination was on the grounds of serious misconduct. One issue was what the phrase "tacite reconduction' meant, and whether French law could be used to interpret this phrase. In holding that French law did apply to the interpretation of this phrase the Court said :

It has been quite common since independence, in the absence of other laws applicable to Vanuatu, in the terms of Article 95 (2), to apply in these Courts either common law principles, precedents or Statutes laws of England. It would never occur to anyone practicing law in Vanuatu to submit that this was other than in conformity with the Supreme law of Vanuatu. Yet it is submitted on behalf of the plaintiff that, since French laws have not been applied by these Courts in Vanuatu (largely as a result of the ignorance of those that were practicing it or would have been called upon to apply it here), they no longer apply and should not be applied in the present case. To accede to this submission would be tantamount to saying that time can prescribe the Constitution and that these Courts can ignore the Supreme law of the land and set itself up above Parliament. It cannot be done. In the instant case, there is a lacuna in the Vanuatu law. This Court has to fill it from laws applicable to Vanuatu. The Court has not been referred to any English authorities on the subject. Indeed the words to be interpreted are French words. It would not be right to translate them into English and then to give to that translation an interpretation that it would not have had in French or in French law. In that context French law is the law of Vanuatu, just as there are instances when English law is the law of Vanuatu.

In addition to stating that the context of the case would determine whether French of English law applied, the Court went on to make an *obiter* statement about other contexts which would give rise to the application of French law :

French laws would also apply to cases of intestacies of the estate of French nationals or "optants', in contracts, donations inter vivos or to last surviving spouses, trusts, adoptions, guardianship of minors etc, where French nationals or "optants" are involved, there being no Vanuatu laws covering those subjects, the Courts of Vanuatu would be bound to apply, the French laws that existed prior to independence.

This decision was later upheld in the Court of Appeal (*Mouton v Selb Pacific Ltd (Judgment 1*) [1996] VUCA 4). The Appellants argued that "One cannot import bits and pieces of French or English law into Vanuatu [and] Without specific legislative authority isolated provisions of French jurisprudence cannot be added to the Vanuatu legislation". This argument was rejected, opening the possibility to a case being decided in part on French law, in part on Vanuatu law, and in part of English law.

The next case that arose was *SELB Pacific Limited v Mouton* [1996] VUSC 4, a bankruptcy application under Bankruptcy Act 1914 (UK). The defendant (Mouton) challenged proceedings on the basis that English bankruptcy law should not apply to him, as he was French. The Court rejected this proposition, stating :

Article 95(2) of the Constitution simply adopts as a Law of Vanuatu the French Law and English Law that applied before independence for the benefit of everyone living in Vanuatu or coming to Vanuatu. It is clear that there are instances where British and French Laws are in conflict with each other. There is no evidence before me that there is any such conflict here. The Court of Appeal in 1988 in the Appeal Case No.2 of 1988 which is now reported in our Law Reports of Vanuatu in Volume 1, the case of Clements v Clements made it quite clear that the Bankruptcy and Insolvency Act of 1914 applied in Vanuatu as part of the Laws of Vanuatu. I agree with Mr Ozols when he says that they did not have to consider nor did they consider the effect of whether French or English Law ought to apply at any given time to any particular foreign nationals, be they English or French, nor where they invited to consider whether the French law of Bankruptcy was also a Law of Vanuatu. Nevertheless I have no doubt that if they had been asked about it, they would have come to the obvious decision that both the French and English Laws of bankruptcy applied equally to everyone in Vanuatu. This raises the problem of which Law should apply at any given time. Mr Ozols says that of course with regards to his client only French Law should apply because only French Law would have applied to him prior to Independence. It is clear that since independence both French and English Laws apply to everyone in Vanuatu.

Not French Law to the French and English Law to the English but French and English Laws apply equally to all in Vanuatu, irrespective of nationality because that is the intention of the Constitution and that is what it says in Article 95. The Constitution makes laws for Vanuatu, not for individual foreign nationals in Vanuatu.

In this case the Court decided which law should apply based on the election of the plaintiff (in direct contrast with the earlier Court of Appeal decision in *Hanaloane*). As SELB had commenced proceedings under English law, English law applied.

The *SELB* cases also gave rise to a constitutional petition. (*Francois v Ozols (Judgment*) [1997] VUSC 43.) Ground 4 of the petition alleged that both lawyers and judges had discriminated against the Applicant on the grounds of race and/or place of origin, traditional beliefs and/or language, in part on the basis that "English Legal Principles have overtaken the French by stealth'. When the initial petition was dismissed as frivolous and vexatious it was appealed (*Francois v Ozols* [1998] VUCA 5). The Court of Appeal also dismissed this petition.

Banga v Waiwo

This case involved a claim for damages due to adultery. In the Magistrates' Court damages had been awarded in accordance with custom. The Chief Justice set the award aside, ignoring possibilities of using customary law as a source of law.

In an extensive obiter the Chief Justice discussed the legal heritage of Vanuatu. This part of the decision appears to be a reaction to the Magistrate's assertion that "the pre-independence French and British laws would not apply to Ni-Vanuatu nationals after the Date of Independence.' The Chief Justice went on to say:

[The Magistrate's] construction of Article 95 limiting the application of French and British laws to the manner in which they had applied before Independence is, in my opinion, unnecessarily restrictive and not in conformity with the clear intention of the Constitution. As indicated above, the Constitution purports to make laws for Vanuatu not merely for a section of the population. The intention of the drafters of the Constitution would have been to put in place as full a set of laws and regulations as would be necessary for Vanuatu to operate as a nation, until such time as Parliament got around to drafting its own legislation in its own good time.

As I have said above, it is clear that under Article 95 of the Constitution, the French and English Laws that applied on the day before the Day of Independence applied to everyone in Vanuatu, irrespective of Nationality and irrespective as to whether they were Indigenous Ni-Vanuatu or not. They were no longer French or English laws but they became the law of Vanuatu. All those English and French laws that still now apply in Vanuatu, (but 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) form part of the law of Vanuatu and apply to everyone in Vanuatu irrespective of creed, colour or Nationality. There cannot be a law for the English and another for the French and yet another for the Ni-Vanuatu in the Republic. Article 95 of the Constitution created laws for Vanuatu as a gap filling process. That gap has taken many years to fill and will continue to take many years to fill entirely, but it is gradually narrowing. There are for instance no specific laws of adoption made for Vanuatu, or laws of inheritance regarding intestacy. Does that mean that the Ni-Vanuatu have no laws of Adoption that apply to them, or no laws of intestacy that apply to them ? I think not. They can choose to proceed under the existing Vanuatu English or French laws. Indeed they do. In events of conflict, the Courts have the duty to resolve the matter and do substantial justice. Again, as I pointed out above, there is no right of election in the parties.

This decision seems to suggest, contrary to some previous case law, that parties cannot mutually agree the law to govern the matter, and instead this is to be determined by the courts. Exactly how courts are to determine the substantial justice is not clear, however.

Discussion

Both Banga & the *SELB* cases ignore previous case law. It is not clear why earlier approaches to determining whether French or English laws apply should have been ignored. Both are therefore troubling in respect of development of Vanuatu common law.

The *SELB* cases are also somewhat difficult in that they suggest different rules to determining which law applies – in one case allowing circumstance to determine the law to apply, and in another allowing election of the plaintiff to determine the law to apply.

Accepting that *Banga* has attracted more academic commentary and has also been cited more frequently, one might think that Banga settled the matter.

However, the *Banga* approach raises a number of questions. The Court indicated parties can elect to use either French or English laws in commencing proceedings, so does this mean they do not have to raise other, possibly conflicting imperial laws ? If this is the case, then who is to raise French or English law ? Does the court then have a duty to inquire into sources to identify and resolve any conflict ? If courts were to act inquisitorially this would be a considerable shift from their current role as decision makers in an adversarial process. And would this inquisitorial process need to arise in every case where there is a gap in Vanuatu law ? Given the number of cases that apply English common law to fill gaps, this could be a considerable burden. It can be concluded that a strict application of *Banga* may unnecessarily complicate proceedings. Further, it does not address the question of why shouldn't substantial justice reflect election of parties, where parties are not in conflict as to the choice of law to apply ?

The law post the watershed cases

It is, maybe, a reflection of the practical difficulty of applying *Banga* and the conflicting case law on the issue of how to reconcile both English and French law that neither the SELB cases nor Banga led to a more consistent approach to the use of French law in the Vanuatu legal system. Indeed the table below indicates that since 1996 French law has barely been used in the Vanuatu courts.

French law expressly mentioned as not being relevant S, An Infant v Moti [1999] VUSC 38 Ombudsman v Leymang [1997] VUSC 29	Article 95(2) mentioned but then only English law considered (French law implicitly deemed irrelevant) Public Prosecutor v Adams [2008] VUSC 12 Newman v Ah Tong [2007] VUSC 102 Cyclamen Ltd v Minister of Lands [2007] VUSC 51 Nalau v Mariango [2007] VUSC 64 Diniro v Minister of Internal Affairs [2006] VUSC 2 Zuchetto v Republic of Vanuatu [2014] VUCA 17 Turala v Republic of Vanuatu [2013] VUCA 20 Joli v Joli [2003] VUSC 63; Joli v Joli [2003] VUCA 27 Joli v Joli [2004] VUSC 91
Precedent relying on French law discarded Obed v Kalo [2008] VUSC 47	French law not used for "French" contracts Center Garage Ltd v UAP Assurance [2003] VUSC 38 Furet v Rene Ah Pow [2014] VUSC 57
French law excluded by contract term Kontos v Dinh [2010] VUSC 158	French law pleaded in appeals against summary judgement but not accepted by court Gallo v Bernard [2013] VUCA 17 Traverso v ANZ Bank (Vanuatu) Ltd [2013] VUCA 8
French law as one source of law, amongst many common law countries President of the Republic of Vanuatu v Speaker of Parliament [2008] VUSC 77	French law considered Ohlen Estate cases In re MM, Adoption Application by SAT [2014] VUSC 78

In the last two cases of the 1990s, decided soon after the watershed cases, the courts expressly indicated that French law was irrelevant. *S, An Infant v Moti* [1999] VUSC 38 involved a matter of criminal and civil procedure. No Vanuatu rule of law existed. Reference was made to Article 95 of the Constitution, but French law was "not relevant to this case" so was not considered. No discussion of why French law was not relevant was undertaken, however. The courts reasoning may have been that French law had not been pleaded, but this is mere speculation. *Ombudsman v Leymang* [1997] VUSC 29 involved contempt of court proceedings. The question of which British laws applied was central to the case. Again the court found that "French Laws which are not of our concern in this case", but did not elaborate on this statement.

A number of other cases that mentioned Article 95 of the Constitution but failed to discuss French law were not quite as overt in dismissing the applicability of French law. The Joli cases (*Joli v Joli* [2003] VUSC 63; Joli v Joli [2003] VUCA 27; Joli v Joli [2004] VUSC 91) acknowledged that both parties were francophone and came from a culturally French background but, because neither party pleaded French law it was not used. There is indication in the last case that the respondent wanted to use French law but did not, beuase the applicant wanted to use English law, so this may be an example of election by the applicant/plaintiff. *Newman v Ah Tong* [2007] VUSC 102 only used English law, on the basis that "the will of the late Oscar Newman is in English and it is assumed that the British law will apply to it". *Cyclamen Ltd v Minister of Lands* [2007] VUSC 51 only considered English defamation law, on the apparent basis that neither party made reference to French law. *Nalau v Mariango* [2007] VUSC 64 also used common law, this time from New Zealand, due to the absence of submissions relating to French law. *Public Prosecutor v Adams* [2008] VUSC 12 referred to English law and associated Australian and New Zealand law only. *Zuchetto v Republic of Vanuatu* [2014] VUCA 17 adopted the English common law of mistake without referring to French law, or providing any reasoning for adopting English law only. *Turala v Republic of Vanuatu* [2013] VUCA 20 similarly used the Civil Evidence Act 1968 UK without referencing French evidence laws or explaining why only English law should be adopted.

None of these cases adopt an approach, suggested in *Banga v Waiwo*, wherein the courts must consider both English and French legal principles and then derive appropriate principles for Vanuatu, based on substantial justice. Indeed, some of the cases indicate that the country of origin of the parties and/or the law under

which the parties elect to proceed will determine whether French or English law should apply.

One case goes further than simply ignoring French law, and apparently denies the validity of precedent that derived from French law. *Obed v Kalo* [2008] VUSC 47 was a personal injury case, as was the case of *Societe Civile Intercontinental v Leigh* [1984] VUCA 3. The Court stated "The case of S. C. International & GFA v. Leigh is of no real precedent value. First, it was decided under French law, as is clear from the leading judgment (delivered in French by a French judge). Secondly there was no discussion of this point…' This was a Vanuatu case, establishing Vanuatu precedent. The fact that the legal principles it drew on were derived from French, rather than English law, as permitted by the *Constitution*, should not in itself be grounds for denying the precedent value of a case.

Even in cases involving French contracts French law has not been used. *Center Garage Ltd v UAP Assurance* [2003] VUSC 38 involved a contract made in the French language. The defendant insurance company was based in Noumea. The dispute centred on the interpretation of the term "attentats". No reference was made to French law, with the term simply being translated into English using a dictionary.

Furet v Rene Ah Pow [2014] VUSC 57 is both factually and legally interesting. The parties had had a contractual agreement from 1978 that was governed by French law. When the premises being leased was destroyed by an earthquake in 2002 the need to develop a new lease arose. A new lease was drawn up in the English language. When the defendant sought to terminate it using a clause in the contract allowing for termination on 6 months' notice the issue as to whether a minimum term in the contract, as existed in French law, could be implied. "[A]n argument was foreshadowed by Furet that the tenancy was governed by French law principles such that the lease by law had to be for a minimum term of 9 years (though subject to the right of a lessee to terminate on notice at the end of each 3 year period of the lease, and subject to limited rights in the landlord to terminate for specific purposes). However at the conclusion of the trial counsel for Furet announced that no distinction between French law and English law principles would be pressed, and the closing submissions adopted English law principles.' It is not clear why counsel chose to do this. Ultimately English common law contract construction principles were used to hold that there was a minimum term, before which the lessor could not terminate by giving notice.

It has also been recognised that contracts can include a term that provides for the law governing the contract to be "the laws of Vanuatu excluding such French

Laws as may otherwise have application within the jurisdiction by virtue of the constitution. (*Kontos v Dinh* [2010] VUSC 158.) This decision probably reflects the general principle of freedom of contract, rather than reflecting any particular undermining of French law as a source of law, though.

In two recent cases French law was pleaded in appeals against summary judgement but not used by the judges. *Gallo v Bernard* [2013] VUCA 17 involved an appeal against a summary judgment as to breach of contract. The respondent argued that the contract should be governed by French law, on the basis of Article 95 of the Constitution and the facts that the vessel that was the subject of the contract was registered and present in New Caledonia, and that the second defendant was a company registered in New Caledonia. The Court of Appeal noted that this argument was inconsistent with the respondent's claim for common law damages. It also was "not satisfied to the degree required for summary judgment that French law is the proper law of the contract' or that the French law established the general proposition that the respondent asserted. When summary judgement was overturned the matter returned to the Supreme Court, where it would have been open to the claimant to argue that French law applied. Proceedings stalled, and were ultimately struck out (*Benard v Gallo* [2016] VUCA 19) so the argument never arose.

In Traverso v ANZ Bank (Vanuatu) Ltd [2013] VUCA 8 appeal was against summary judgment entered in respect of bank loan that was made in Vanuatu. "Mr Traverso stated that he believed the bank was not entitled to charge interest above 10% per annum on any of the loan facilities because the loan contracts were governed by French law and that the ANZ Bank had agreed not to charge interest at more than 10% per annum.." This argument was rejected without discussion, probably because Traverso acknowledged that he owed the bank a considerable sum of money, and the property that was security for the loan was less than the amount owed the exact interest rate to be charged was somewhat academic. The appeal failed.

There has, been some use of French law though. *President of the Republic of Vanuatu v Speaker of Parliament* [2008] VUSC 77 involved the constitutionality of the Family Protection Bill. One argument was about whether the preamble is a provision of the Constitution that Bills must conform to. French constitutional interpretation was referred to, along with reference to legal principle in many other common law countries. The French approach to constitutional interpretation was given any particular weight. The case can, however, be viewed as an example of drawing on French law, along with common law from other jurisdic-

tions, as sources of enrichment for the evolution of Vanuatu's common law. The two more significant cases, *the Ohlen Estate cases and In re MM* are discussed in more detail below.

The Ohlen Estate cases

This cluster of cases relates to the estate of Madama Ohlen, who died in 2005. De Gaillande was the executor of the estate. The first case, *De Gaillande v ANZ Bank* (Vanuatu) Ltd [2008] VUSC 61, involved the termination for serious misconduct of De Gaillande from her employment at the ANZ Bank. The termination was done in accordance with Vanuatu's Employment Act [Cap 160] on the grounds that De Gaillande had not followed the bank's code of conduct in respect of deceased accounts. One ground was that De Gaillande had used a joint account (account #768856) in both her and Mme Ohlen's names as her own. Confusion as to what was both French law and common law on the use of a joint account in the event of the death of one account holder clearly affected decisions. Ultimately the court did not have to decide the issue of whether French or English law applied, or what either law meant, as it was held that there had been no breach of the ANZ Code of Conduct, so the termination was wrongful.

Account #768856 came up again in *Montgolfier v Gaillande* [2013] VUSC 39. By this stage Montgolfier was the executor of the Ohlen estate, and claimed that account #768856 was part of the deceased estate. De Gaillande argued that French law should govern the dispute for a number of reasons, including that most parties were French, documentation was in French and "The issue of donations made by the deceased is an ancestral French tradition which is systemized by the Code Civil and that there is no law in Vanuatu governing donations. Counsel further submitted that the "inter vivos gifts" were made under the French law and accordingly this issue shall be considered in accordance with the enactments of the French law and its jurisprudence". Montgolfier's lawyer attempted to argue that "this Court has been proceeding under procedural law as determined by the Common Law and the Civil Procedure Rules since the case began in 2007 with the full acquiescence and active cooperation of the Defendants. Counsel further submitted that it is now too late for the Defendants to claim to be governed by French law and that the change to substantive law after almost 5 years" delay would cause immense expense and waste of time". In resolving the matter the courts referred to *Banga v Waiwo* and *Joli v Joli*. The Judge then sought substantial justice, and decided :

It appears to me that, in a bid to resolve the matter and do substantial justice, I would need to take a pluralistic approach to this case and apply both the Common Law and French Civil Code as and when necessary. With reference to the contentious area of "Des donations entre vifs," I am of the considered view that a more vigorous inquisitorial approach using French law may be useful in determining the issue.

In the circumstances, I hereby make the following Orders:

a) The sole issue of "Des donations entre vifs" (inter vivos gifts) shall be dealt with in accordance with the enactments of the French Civil Code and its jurisprudence if it comes to be an issue in the trial through relevant amendment of the pleadings.

b) With reference to all the other issues raised in the pleadings, the Court shall continue its proceedings in accordance with the Civil Procedure Rules 2002 as interpreted according to Common Law Principles.

This decision is particularly interesting because it does not only adopt substantive law, but also French procedural law, despite the existence of Vanuatu Rules in this area. It also suggests that a piecemeal adoption of French law based on circumstances, as provided in the *SELB cases*, remains a suitable approach to resolving any conflict between French and English law.

Ultimately issues relating to inter vivos gifts were not pleaded in accordance with the Civil Procedure Rules so not considered when the court made its judgment as to the dispersal of the deceased estate. (*Montgolfier v Gaillande* [2013] VUSC 122.) This decision was then appealed in *Gaillande v Montgolfier* [2013] VUCA 28. One of the grounds was that the trial judge had improperly identified the applicable French law. The Court of Appeal rejected this argument on the baseis that "There was little material to support the assertion that French law in relevant respects was any different from the common law applied by the trial judge". This suggests that the attempt at adopting a pluralistic approach as determined *in Montgolfier v Gaillande* [2013] VUSC 39 ultimately failed to have any impact on the legal rules used to decide the case.

In re MM

The case of In re *MM, Adoption Application by SAT* [2014] VUSC 78 involved an attempted adoption by a male French citizen resident in Noumea of a ni-Vanuatu child. He was in a homosexual relationship. The mother of the child agreed to the adoption, and the father of the child did not want to have anything to do with the child. Social work authorities in Noumea had approved the adoption as had a psychologist in Noumea[2]. SAT (the person desiring the adoption) had used French law, rather the more usually applied UK Adoption Act 1958 which has been used in all other Vanuatu adoption cases, as he was a sole male applicant and section 2(3) of the UK *Adoption* Act 1958 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.*" The French Civil Code has no equivalent restriction.

The judge, after referring to Banga v Waiwo stated:

However in this case, there is at least an indirect conflict between the two laws (it would be direct if the French law expressly said an adult male may adopt a female child). One law contains what is essentially a prohibition on this application succeeding and the other does not directly address the issue of that disqualifying relationship. I approach the matter on the basis that the French and British laws *together* form the law of adoption of Vanuatu, at least until the Republic enacts its own legislation. This is not to give primacy to one or the other but the effect of it is that an applicant for an adoption here in Vanuatu has to meet the criteria of *both laws* (or more accurately all aspects of the post-Independence law of adoption in Vanuatu), at least where there is any conflict between them….

In my view, where there is a conflict of this kind, an applicant must meet the criteria in both laws. If that is not done, and relevant criteria in one part of the Vanuatu law on a topic are ignored, then inconsistency and unfairness will result. The days of opting for which law a party wishes to apply to their case finished at Independence.

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[2] It can be noted that a previous adoption of a ni-Vanuatu child by a French family, using *the Adoption Act 1958* (UK) where all parties agreed, had been denied by the judge on the basis of no independent third party assessments (*In re Child M* [2011] VUSC 16).

The judge then went on to use the English legal principle of statutory interpretation, *generalibus specialibus non derogant*, explaining that "The maxim means that where there is inconsistency between a general and a specific statutory provision on an issue, the latter is usually held to apply over the former; the general yields to the specific.' A the English law contained a specific provision prohibiting adoptions of girl children by sole male applicants and the French law did not make any reference to the matter, English law prevailed. The judge did acknowledge that silence in the French law was "clear implication (by absence of any reference) there is no impediment to that kind of adoption", and the English principle applies to statutes made *within* the same jurisdiction, so the judicial reasoning is a little difficult. The judge also referred to custom, although he did not attempt to use customary law as a source of law to determine the matter.

As with *Banga v Waiwo* this case is difficult because it does not answer who is to raise conflicts in law if the parties themselves do not do it. Is it for the judges to enquire ? Having to satisfy two sets of laws may also be unduly burdensome.

Discussion

One would have hoped, maybe, that issues of the application of French law would have been settled through more than 30 years of case law. The same points continue to be argued, however. It may also be that, as the Vanuatu judiciary experiences high turnover, with foreign judges often staying for terms of about 2 years, these new judges keep coming to the same matters fresh, without a sense of the weight of precedent on the matter. Maybe the only conclusion as to Vanuatu's on when adopted laws are to apply is that there is no clear precedent that applies in all cases.

Turning to the questions posed in the introduction, has unity been achieved by "English legal principles [overtaking] the French by stealth ? It can be said that Vanuatu's legal system is almost entirely dominated by the common law approach. French law is occasionally used though and, depending on the desires of the parties and their lawyers, could be used more frequently. It can also be noted that common law principles are not, in themselves unified. There are many cases in which Vanuatu faces a choice between English and Australian or New Zealand common law, so adopting common law is never going to be an exercise in unity in the sense of legal principles deriving from one country only.

However, in response to the second question, are a diverse range of English and French laws being drawn upon as contextually appropriate, it can be said that there is no clear evidence of this. The possibility of using French law is paid lip-service at times, but French legal principles are not regularly drawn upon to help determine what the suitable legal rules for Vanuatu are, or should be.

The third question, is French within the legal system is a vehicle for divisiveness, allowing longstanding anglophone/francophone conflicts to continue being contested, is difficult. Questions about the legitimacy of sources of law tend to arise when French law is used. However, the legitimacy of English law as a source of law is largely not questioned, which may be an indicator of unconscious bias. The issue is much broader than just French law as a source of law. French language issues (and also Bislama language issues) also arise. The language of court judgements is English, as is the predominant language of superior court hearings. The quality of legal services to francophones is an area that probably needs attention. Further, whilst Vanuatu goes to great expense to translate all statutes into French, the English texts, rather than the French texts, have been used in all but one case since Independence. (*In re the Constitution, Kalpokas v Government of the Republic of Vanuatu* [1994] VUSC 9.) Different language versions of the same law can bear slightly different meanings, and this is an issue that other jurisdictions with laws officially published in multiple languages often have to face. Whilst acknowledging Vanuatu's constitutional commitment to multilingualism, given the expense and possible legal difficulty created by translation, the reason for translating laws into French (but not Bislama) may need some consideration. It is, arguably, these issues – and particularly the issue of legal services for francophones – that are more important than the question of the place that French (imperial) law has or should have within Vanuatu's legal system.

Moving ahead it seems that Vanuatu has a number of options. First, Vanuatu could accept that having multiple sources of law has the potential for creating too much confusion, and simplify sources of law. Given the dominance of English law, amending the *Constitution* to remove French law as a source of law would seem to be the obvious choice here. Second, Vanuatu could leave the conflicting sources of law, but reduce areas where disputes might arise by passing its own laws in areas of conflict, such as adoption and intestacy. Third, Vanuatu's Parliament could provide certainty by passing a statute explaining how courts are to deal with conflicts. If Parliament wanted to encourage diversity by having Vanuatu's evolving common law draw on both English and French law as poten-

tial sources of enrichment, there are a variety of measures that could be considered. If French Codes were put on the same basis as English common law and equity then the relationship between sources of law might be clearer or easier to conceptualise, and allow more scope for raising French legal principles. Judges could be empowered to take a more inquisitorial role into French legal principles. Lawyers could be required to plead French law to assist in this process. None of these measures are without drawbacks. Because they create additional work for lawyers and courts they will add to the time it takes for legal proceedings and also their cost. They also complicate the training needs of legal personnel. There is, of course, a fourth option – allow the current confusion to continue, in the hope that the issue will eventually fade away as people stop using French law. Whilst this approach has worked, after a fashion, for 36 years, avoiding the question of what is best for Vanuatu's legal future as an independent sovereign nation does not, on the face of it, appear to be the best approach that a maturing country could take to the issue of what sources of law it needs and wants.

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