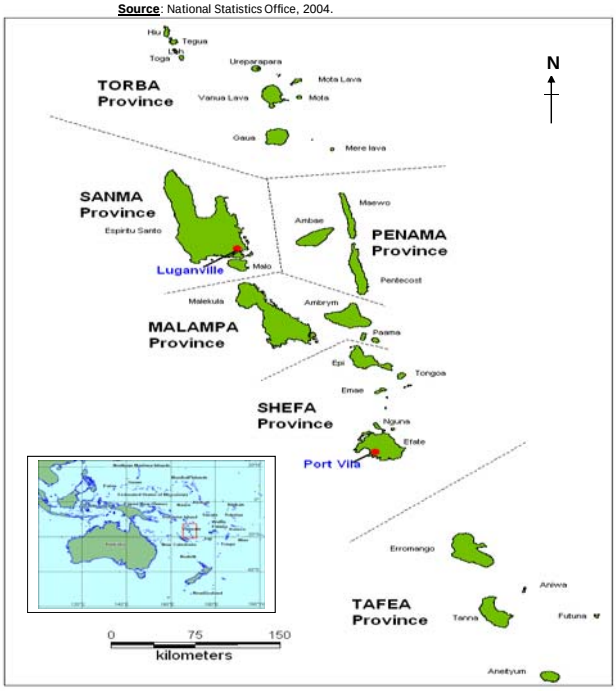
FRAGMENTING LAND AND THE LAWS THAT GOVERN IT

Sue Farran

Map of Vanuatu

Source: National Statistics Office, 2004.



Introduction

The legal pluralism which prevails in many South Pacific islands, especially those of Melanesia, is like an onion, multilayered and changing shape every time one investigates deeper. While the pursuit of understanding may not end in tears, it can certainly be a challenging experience. Take the issue of land tenure in the Republic of Vanuatu.

Prior to contact with outsiders in the late eighteenth and early nineteenth century, the Pacific islanders who inhabited these islands determined their relationship with the land, its resources and the marine environment that surrounded them according to customs and practices which may have been brought with them from elsewhere, or evolved according to need. Under colonial government for many indigenous people customs continued to be the governing force of their lives, although the incursions of English and French agents; the passing of joint regulations to control the relationships and transactions between indigenous and non-indigenous persons; the proselytising of Christian missionaries and contact with new forms of technology, language, economy and cultivation practices, all served to change the wider context in which customs and customary laws operated. There were therefore, even before the introduction of western laws, diverse customs, languages and practices. However I would suggest that legal pluralism really developed as an issue post-independence, when not only did a written constitution become the primary source of law, but all those laws introduced under colonial administration – from France and England under the Anglo-French Condominium government of the New Hebrides - which remained in force, applied to all citizens and residents of Vanuatu, as did, naturally, all laws made by the national parliament as well as existing customary law. Moreover independence provided the opportunity for greater assertion of a national identity, of which a personal system of law is one aspect, and placed the onus for resolving internal conflicts of laws on the national courts and legislative body.

This in itself might not have been a problem if different laws applied to distinct legal subject matters, but that was not the case. In particular it was not the case in respect of land. There are historical reasons for this but the consequence is contemporary. This paper considers the background to this plurality of laws, contemporary manifestations of it, and the advantages and disadvantages of this inner pluralism in the context of development and the recognition or denial of cultural diversity.

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In the hierarchy of laws which apply in Vanuatu the Constitution is supreme and therefore the starting point. The Constitution establishes not only the sources of law to be applied to land, but also the forums for dispute settlement, triggering at the outset a degree of confusion. These forums, however, also provide a key for exploring the plurality which is central to this paper. In particular the evidence presented to support land claims before the islands courts, as reported in the case-law, has been examined to investigate and illustrate the plural nature of customary land tenure.

Land, the law and legal process

The applicable laws

The 1980 independence constitution of the Republic of Vanuatu, restored at one blow perpetual title to all land to the indigenous custom owners (Constitution, Article 74),[1] and provided that the rules of custom should form the basis for the use and ownership of land. No further indication regarding the nature, extent or applicability of the rules of custom was given, and none has been forthcoming, although no doubt this was envisaged. Consequently the 'rules' that govern customary land tenure are inchoate. Nor is any guidance given as to when the observance of custom becomes a 'rule', a point to which I shall return.

Customary tenure however, is not the only form of interest in land. Under colonial influence leases were introduced – originally under French and English laws, and these have been continued post-independence along with more novel forms of land holding such as Strata Title.[2] While perpetual title to land vests in the custom owners, land may be alienated under lease for periods up to seventy-five years, either to other indigenous people, or to non-indigenous people. Once a leasehold is secured over land, then the land can be sub-divided, developed and also used as security for mortgage finance – banks and lenders are reluctant to lend against the

[1] Apart from relatively small areas of public land located in the two metropolitan areas of Port Vila and Luganville.

[2] Freehold estates or absolute ownership was also in use but as it no longer exists is not considered here.

security of land held under customary tenure for a variety of reasons.[3] Inevitably the lease requires that the leaseholder has exclusive possession thereby ousting the claim of the customary owner to use or occupy the land for the duration of the lease – which will span several generations. At the end of the lease the land will in principle revert to the customary owner, but in practice – although in most cases this remains to be tested,[4] the customary owner may have to compensate for improvements or offer to renew the lease.

The formal forums for dispute settlement

The Constitution also made provisions for the establishment of courts which would have – among other things, jurisdiction to determine land claims. Initially it was the Islands Courts with appeal to the Supreme Court that heard land cases. [5] The Island Courts Act (Republic of Vanuatu 2006: Cap 167) conferred power on the Chief Justice to establish such courts throughout the country. The jurisdiction of each court was to be determined by the terms of the Chief Justice's warrant for each court, although the Act envisaged Island Courts having both civil and criminal jurisdiction. They were to be supervised by a chief magistrate but it was the President of the Republic "acting in accordance with the advice of the Judicial Service Commission" who was to appoint "not less than three justices knowledgeable in custom for each Island Court at least one of whom shall be a custom chief residing within the territorial jurisdiction of the court" (s. 3(1)). The court was fully constituted when sitting with three justices and a clerk and the court was to

[3] For example, the lender may be reluctant or unable to come into possession to manage the land and will be unable to sell the land as customary land cannot be alienated. The land could be leased but if it is located in a customary land area this could cause social tensions.

[4] Vanuatu is only a young country so most of these leases still have many years to run.

[5] Island Courts Act 1983, supplemented by the Island Courts (Power of Magistrates) Order 2003; Island Courts (Supervising Magistrates) Rules 2005; Island Courts (Civil Procedure) Rules 2005; Island Courts (Criminal Procedure) Rules 2005; Island Courts (Court Clerks) Rules 2005; Island Courts (Amendment) Act No 29 2006.

> administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order (Island Courts Act, s. 10).

The procedure of these courts was established in subsidiary legislation (Island Courts (Civil Procedure Rules) 1984 as amended). The first courts were set up in 1984 and by 1999 there were eight such courts (Jowitt (1999)). This meant that a number of areas did not have a court to hear disputes relating to customary land. Indeed it has been suggested that

> [t]he most obvious problem is the fact that many of these courts exist in name and warrant only. Adequate funding and personnel are lacking, so most island courts are mere fictions. Those that do operate tend to do so sporadically, resulting in large delays for complainants. (Jowitt (1999)

Although some of these issues have been addressed, it is still the case that there are only eight island courts, which means that many islands, even large ones such as Pentecost, are without a court. Nevertheless, while the applicable law may have been uncertain, the forum and procedure was relatively clear.

However, the jurisdiction of those courts that were established under warrant encompassed not only people from different islands but also observing different customs. This was hardly surprising as

> Vanuatu is very ethnically diverse, with approximately 108 distinct linguistic and cultural groups … with such cultural diversity there is no such thing as a single custom law that applies to all of Vanuatu.… [A] person may therefore be judged by justices who operate under customary norms that they are not familiar with. (Jowitt (1999)

The courts that did exist were therefore likely to be faced with a plurality of customs informing land tenure practices, and even if those who sat on the bench were knowledgeable in custom it was unlikely that this knowledge could encompass great diversity. The probability of complainants not being satisfied with the adjudication of disputes was therefore, high. Consequently, almost all cases were appealed to the Supreme Court, creating not only an insurmountable backlog

of cases, but also subjecting customary land disputes to an adjudication process that was not customary (although assessors knowledgeable in land matters could be asked to assist the bench). Twenty years after independence the Supreme Court refused to hear any more land appeals. In 2001 the civil jurisdiction of island courts to hear customary land disputes was removed (Island Courts (Amendment) Act 2001, which came into effect in 2002).

That same year (2001) the Customary Land Tribunal Act set up a new tier of courts to consider and rule on customary land claims. In part this new structure was designed to address some of the problems identified above. At the lowest level the village tribunal is meant to encompass a particular custom area, so that the chief who chairs it and the two other members co-opted to sit on it (chiefs or elders) are knowledgeable about the custom affecting the land within its jurisdiction – although they are not meant to have a personal interest in the outcome. Where land traverses village boundaries then there is scope for a joint tribunal. Appeals from this local level are to a custom sub-area land tribunal, which represents a larger jurisdictional area in which there may be a number of villages sharing similar customs, and from there to a custom area tribunal and ultimately the island land tribunal. The panels for these tribunals are drawn from chiefs sitting on the area, or sub-area council of chiefs, or island council of chiefs. However, not all areas yet have customary tribunals and the efficiency of those that do exist has been questioned (Republic of Vanuatu Department of Lands 2003). A review of the Customary Land Tribunal system in 2004 found that there were considerable problems including the fact that people were unaware of the tribunals and did not understand how they functioned; there was lack of support for them; and a general lack of ownership of them. Moreover, it was found that the new system was perceived by many chiefs to be undermining customary rules – partly because of the process of appeals and possibility of rehearings (Regenvanu 2008: 65), while in a number of areas disputes about rightful holders of chiefly title raise challenges about the eligibility of those entitled to sit on the tribunals. Further review of the operation of the tribunals is currently underway.

Despite land dispute jurisdiction being transferred to the Customary Land Tribunals, Island Courts continue to hear and rule on land disputes which have been pending prior to the change in the law. Similarly, although apart from the possibility of judicial review or appeal on the grounds of procedural irregularity (exercised in *Umou v Erromango*) the jurisdiction of the Supreme Court over customary land matters ceased, in practice land cases still come before the Supreme Court – and from there to the Court of Appeal, not only on procedural

grounds but also because land which is the subject of dispute concerning customary interests may also be subject to leasehold interests or claims.

Under the Land Leases Act (Republic of Vanuatu 2006: Cap 163) only the Supreme Court has jurisdiction to hear disputes concerning leases, pursuant to sections 1 and 100. However, an existing and even registered lease may be affected by a dispute that is pending before the Island Court or Customary Land Tribunal. For example, in the case of *Solomon v Turquoise*, the Court set aside a registered lease because there had been an attempt to register it while there was a title dispute going through the Customary Lands Tribunal. Although the Minister of Lands has statutory power to enter into leases over disputed land, the Supreme Court has held that where he does so ignoring the views of custom owners of which he is aware, then the lease may be held to be defeasible. Similarly, where an existing lease is transferred or sold on, failure to obtain the consent of the custom owners where this is required (for example under Land Leases Act, s. 36), or where there is a dispute between custom owners as to whether the lease should be sold on or not (see for example *Vanuatu Fisaman Cooperative Marketing Consumer society Ltd v Jed Land Holdings*), could lead to the subsequent lease being ruled invalid, especially if the original lease was granted in breach of the required consents.[6] Magistrates courts too may encounter land disputes in the course of dealing with other related matters, for example family issues concerning succession, legitimacy and beneficial entitlement to income generated by land.

There is therefore a plurality of formal forums for determining land issues.

Informal forums

To complicate matters further however, besides these formal forums for hearing

[6] It is not entirely clear if this is mandatory as the section reads:

> Upon the registration of a lease containing an agreement by the lessee that he will not dispose of the land leased or any part thereof or interest comprised therein without the written consent of the lessor, the agreement shall be noted in the register of the lease, and no dealing with the lease shall be registered until the written consent of the lessor verified in accordance with section 78 has been produced to the Director.

land disputes there are also informal forums held at the village or family level, where a single chief or a committee may hear land matters and adjudicate these, usually with the aim of arriving at a negotiated settlement, maintaining the peace and harmony of a village or local area or arriving at an equitable distribution of resources. This traditional process of resolving land disputes pre-dates independence and seems to have survived the Anglo-French Condominium - except where such disputes were between indigenous and non-indigenous land users and occupiers.[7] For many people these local forums are the only ones to which they have access. The contemporary role and function of chiefs within this legal system is unclear. On the one hand, at a national level, the Constitution states that the National Council of Chiefs

> has a general competence to discuss all matters relating to custom and tradition and may make recommendations for the preservation and promotion of ni-Vanuatu culture and languages (Constitution, Article 30(1)).

(It also has the right to "be consulted on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament" (Constitution, Article 30(1)). It appears, although it does not say so, that this includes making statements of policy on land or customs regarding land, as these policy statements are referred to by Island Courts from time to time (see for example *Awop v Lapenmal*). However, the National Council of Chiefs (Organisation) Act (Republic of Vanuatu 2006: Cap 183), says nothing about their powers, dealing only with the composition of the Council. Under the more recent National Council of Chiefs Act 2006, the functions of Island and Urban Council of Chiefs are stated. These are to: resolve disputes according to local custom; prescribe the value of exchange of gift for a custom marriage; to promote and encourage the use of custom and culture; to promote peace, stability and harmony, and to promote and encourage sustainable social and economic development (s. 13). On the other hand, none of the above provisions appear to give Councils of Chiefs at national, local or village level adjudicative powers as such. Nor is it clear where chiefs who do not sit on these various councils, fit in. In a number of reported Island Court decisions reference is made to informal dispute resolutions and the decisions of chiefs, but these do not invariably determine the outcome any

[7] In such cases British and French agents seem to have intervened, at least until the Joint Court was established under the Condominium government under the 1906 Convention.

more that written documents are taken as *prima facie* evidence of title or transactions.

Moreover chiefs have a number of roles. They are not merely the adjudicators of disputes. They also hold and often control interests in land which in a hierarchical social structure may confer considerable power on them as well as obligations. Indeed it may be difficult to disassociate chiefly title from customary land tenure. It has been held that

> [t]his chiefly system is attached or twined with the land tenure system ... [because] a chief once ordained by his paramount chief is always allotted a land to work. In return, such head chief must perform custom leases to the paramount chief or other subordinate chiefs who had allocated them Land" (*Mata v Mata,* referring to the custom of Tonga, Shepherds and North Efate).

Moreover, in some parts of Vanuatu, such as north-west Malekula, rank and land rights are hierarchal, with a paramount chief granting land within his land to lesser chiefs who in turn grant land to others within his bloodline. The paramount chief is responsible for ensuring that everyone within the territory he governs has land and for distributing it equally to subordinate chiefs (*Sanhabat v Salemunu*). However in Ambrym it is clear that while the person who originally settled on the land and exerted control over it was likely to become the paramount or senior chief,

> [t]he community as a whole would have other chiefs beside the land owning chief. A chief would normally be nominated by the community based on wealth, bravery and other common characteristics. The land owning unit would also have a chief, a nakamal and a nasara. There would be other chiefs as well within his controlled land. (*Welwel v Family Rorrmal*)

As these chiefs progress up the hierarchy of chiefly titles through pig-killing ceremonies so their power and influence can increase, but equally it can be challenged, for example if they loose popular support. Chiefs today, moreover, may combine political power with traditional power, or assert their authority on the basis of preferment conferred under colonial administration – which often misinterpreted the traditional social organisation of indigenous societies.

The ambiguous role of chiefs, as both figures of authority, adjudicators of disputes and customary land owners is further complicated by the fact that disputed titles are heard by the Island Courts, while land claims are heard by the Customary Land Tribunals. The competence of chiefs to adjudicate land claims within and outside the formal system has been challenged (Mackenzie 2006: 4), and the possibility of transferring from an informal system to the more formal one of the Customary Land Tribunal – in which the same chief(s) may sit, means that disputes can continue over an extended period of time. Nor should it be overlooked that judges in the formal courts may claim familiarity with custom that they bring to bear in non-customary courts, or may claim a familiarity with custom that might be questionable, at the very least on the grounds that they are seeing that custom as an outsider, or through translation, or through the lens of a person educated in a different system.

There are therefore not only many forums, but also many possible adjudicators. Added to this there are also many laws, if customs have the force of law. It is to the evidence of these customs that this paper now turns.

Customary land tenure

Traditionally the writings of anthropologists have provided an insight into customary land holding patterns and practices. (For more detailed comment on customary land tenure in Vanuatu see: Guiart 1996; Rodman 1995.) For the lawyer, however, the reported decisions of local courts provide a rich repository of information relating to land claims, in which can be traced some of the earliest land alienation to colonial settlers and missionaries right up to the present day alienation and sub-division of land to developers, as well as changes in use from subsistence agriculture to tourism entrepreneurship. Indeed the evidence led to support or refute indigenous claims to land may provide insight into past and present customary laws, although they tend to be claims of fact or opinion rather than law. In particular, free from the rules of procedure and evidence that constrain the more formal court system, these case studies reflect value systems in a shifting environment, where the claims of custom must work alongside bills of rights in written constitutions and the provisions of international conventions without losing its way. Although not presented as rules, the process of creating law reports may itself be seen as shaping and articulating customary law by converting oral histories into written records for future generations. So, while the recording of land disputes in writing is one way of ensuring that customs and

customary forms of land tenure are not lost, at the same time this process changes custom, not only in form, but also in substance.

The Nature of Indigenous Land Tenure in Vanuatu

As indicated, customs are not presented as a set of rules or principles in the reported cases but as evidence of fact. The two main types of evidence that tend to be offered in land disputes are evidence of boundary descriptions and evidence of genealogies. Boundary descriptions involve tracing the physical boundaries of land by reference to physical objects, such as paths, streams, trees rocks, rivers, and later gates, roads, fences, airstrips, schools, churches etc. Names given to places – especially in the local language, are also significant, as is the ability to identify them on a site visit. These visits are required by law in the case of land claims (Rule 9). To the outsider, evidence of bloodlines are extremely complex and often confused by factors such as custom and baptismal names applying to the same person, or an accumulation of names over the course of a lifetime through the acquisition of titles through grade-taking; polygamy; adoption and the misspelling of names when committed to writing. It also clear that genealogies can be manipulated and selectively created to achieve desired outcomes. These problems may be so pervasive that the court is unable to reach a conclusion, as happened for example in *Billy v Ameara*, in a dispute that had been pending for twenty years. Challenges on the grounds of falsified or fabricated family trees are common. Genealogies will often need to be corroborated by supporting genealogies, or may be undermined by challenging the number of generations recalled or weaknesses in related evidence such as custom ceremonies linked to awards of status, or claims to long histories which are not supported by physical evidence – for example the number or size of stones used to mark pig-killing rituals.

The link between claims of fact and the emergence of custom rules arises when the court has to decide what weight to give to the evidence. Something is deemed to be a custom carrying authority when it amounts to a

> *rule blong law we ifomem fasin mo conduct blong pipol long wan society we hemi establish bifo finis mo ino replacem any kastom. Law ia oli no writem daon mo pipol iliv wetem*. [A long-standing legal rule which determines the way in which people of a society conduct themselves and act, which informs but does not replace custom. Such a law is not written down but lived]. (*Tenene v*

Kalmarie)

In the Shepherd Islands a customary obligation is similarly defined as "an existing principle which informs/shapes the way in which the people in one society conduct themselves and on which customs are based. The rule/principle is unwritten but people live according to them" (*Mata v Mata)*.

Although, as is common in Melanesia, the customs relating to land are not homogenous, there are similarities which emerge though the case-law. Indeed claims of difference may be over emphasised – possibly for other reasons.[8] Traditionally rights to land were created by settling on the land and building the first '*nasara*' or meeting place there.[9] Subsequently title could be established

[8] For example, to distinguish political allegiances to different 'Big Men' or to ensure that marriage is to those within or outside a particular clan depending on what rules prevail in any one area.

[9] 'Nasara' – dancing ground or public area in a village (Crowley 1995: 165). See for example *Manassah v Koko* in which it was explained, with reference to land tenure in Malekula, that

> [i]n this region, land is communally owned based on common descent, residence within a nasara and participation in common activities. A tribe or a bloodline is identified with the land through its nasaras . Within an original or big nasara there are small nasaras or *Smol faea* which are associated in some respect with the original nasara and its paramount chief. The same word *smol faea* is interchangeably used for referring to a subordinate or lower chief. The same token is applied with the word *Big faea* meaning higher chief. Individuals within a tribe are closely tied up with his territory by affinity and consanguinity through blood and marriage.

Similarly in Paama it was stated:

> [G]enerally the island of Paama is predominantly a patrilineal society. Ownership of customary land is communal or collectively owned based on common descent, residence within a nasara and participation in common activities. A tribe or bloodline is identified with the land through the nasaras. Individuals within the clan are closely tied up with their territory

through the physical evidence of graves, boundary markers, the planting of trees, and oral evidence of lineage and certain ceremonies.[10] In some cases people from one island were allowed to settle on land in another island, either because of established blood or affinity links or as licencees fleeing disaster or fighting on their home island. These migrants came under the guardianship of the custom land owners. The transfer of land from one generation to the next was, in some areas, matrilineal, and in others patrilineal. Sometimes it would change from one system to the other, and then back again, or be ambi-lineal. Tracing genealogies therefore was, and still is, an important aspect of land claims and often contentious. Similarly there may be differences in interpreting the applicable custom.

At the same time, consideration of the case-law reveals much about the various facets that make up customary land tenure, including: cosmology and rituals that inform human associations with land; the importance of ancestors and kinship structures; the significance of physical features; and the importance of oral history. So for example, from the reported cases of the Island Courts we learn that the custom in Tongoa, Shepherd Islands and parts of North Efate is that where a paramount chief grants land to use to a lesser chief, the latter must

> ... perform custom leases to the paramount chief or other subordinate chiefs who had allocated them Land. There are two types of custom leases namely *'Fanga Sokora'* (first harvest of vegetables) and *'Nasau Tonga'* (harvest of animal) paid to the chief. This is a customary obligation that is practiced from generations to generation throughout the Shepherd Islands. (*Mata v Mata*)

Similarly in Epi

> by affinity and consanguinity through blood and marriage. A group of persons belong to a family line and a territory is sometimes identified with a totem, such as a plant or an animal. (*Holuon v Edward)*

[10] For example where pig-killing is the standard custom ritual for ascending through the ranks of chief stones may be used to mark pig-killing sites (*Sanhabat v Salemunu*). Customs to do with marriage, adoption and burial are also frequently recalled.

> … there is a customary obligation for a Paramount Chief to allocate land to his assistants together with their boundary limits. As a matter of reciprocity a custom lease is normally paid to the paramount Chief. .. any isolation or absence of these founding aspects to land would prove an invalid custom. (*Family Mokono v Peter*)[11]

In central Malekula the case law demonstrates that the communal ownership of land is based on three elements: "common descent, residence within a nasara and participation in common activities". Individual rights are dependent on a person's association with a tribe or a bloodline – through affinity or consanguinity, which in turn is "identified with the land through their nasaras" (*Alanson v Malingmen*, confirmed in *Sanhabat v Salemunu*). Patrilineal inheritance through the eldest son predominates. However the eldest son is expected to provide for equal distribution between his siblings. (A similar obligation is found in parts of Santo: *Noel v Toto.)* Matrilineal inheritance only comes into play if there are no male heirs and then only as an interim measure (*Abel v Timothy*. Note however that 'interim' may span several generations.) However, there are "customary obligations that requires strict performances in order that the right to own the land can be transferred to the mother's children". These are explained thus:

> … the mother's line … is under customary obligations to provide some genre of customs gifts or payment of recognition to the patrilineal line. Such sort of ritual would in return allow and guarantee the children of the mother having blood connection to the patrilineal line to secure some rights of use of the land of their male heirs. (*Tomoyan v Shem)*

Anyone adopted into a bloodline has a lesser right than a natural member of that bloodline: "adoption is only a sign of acceptance to live under the guardianship of another family … this acceptance or recognition would only exten(d) to the right to use the land excluding ownership" (*Alanson v Malingmen)*.[12]

[11] The use of the word 'lease' here is confusing. A 'tithe' or 'tribute' might be more appropriate.

[12] This is distinguishable from the view of the National Council of Chiefs – the Malvatumauri which suggests that adoption after a period of four or six generations would confer full rights of ownership. In central Malekula this would only be the case if there were no bloodline male heirs.

While Malekula has two main tribes 'Big Nambas' and Smol Nambas' there are variations in customs within these. For instance in one case it is explained that

> … the custom practiced in this locality varies from that habitually observed by the smol nambas tribe in the central part of the island of Malekula. A nasara is divided into three nakamals. It is often described in the following words: "A nasara is like a house which has three main parts, the front, the body and the back or tail". Authority or respect is always paid to the head or front of the mansion. The head of the house or nasara is traditionally called *(Amai)*, the body (*Amahai*) and the tail *(Amesuwe)*. (*Kaising v Kaites)*

In south Pentecost, where settlers and missionaries caused people to relocate within the island, it appears that land use and ownership rights may be acquired not only by bloodlines but through the appropriate performance of custom ceremonies, for example pig killing, observing funeral duties and rituals, and ensuring that infant children are reared on the land (*Tabi v Tabisari:* in this case it was held that land could pass through both sides of the family). Similarly in Ambrym it has been explained that

> ownership of customary land is communal or collectively owned based on common descent, residence within a nasara and participation in common activities. A tribe or bloodline is identified with the land through the nasaras. Individuals within the clan are closely tied up with their territory by affinity and consanguinity through blood and marriage. A group of persons belong to a family line and a territory is sometimes identified with a totem, such as a plant or an animal. (*Welwel v Family Roromal*)

Totem associations are also found in South Efate.

Fragmenting the land

Cases brought before the courts and tribunals reveal the multiplicity of interests over land that can exist in custom and which have co-existed over many

generations. Sometimes it is this multiplicity of traditional interests which cause disputes, and often these are resolved in traditional ways. In recent years however, tension is more likely to arise because those who claim to be the custom owners are seeking to develop the land or negotiate with investors for a lease (for example, *Malas v Tretham Construction Ltd)*, and seeking to exclude thereby, the non-ownership rights and interest of others. The nature of land use is therefore changing the cause of disputes. This potential for disputes is aggravated by a number of factors. These include the power of the Minister of Lands to intervene to manage land where ownership is in dispute, the growth of individualism whereby group interests may be sacrificed for individual gain and advancement, a largely unregulated market populated by middlemen which encourages and brokers land alienation and land acquisition between indigenous and non-indigenous parties, and pressure by external agencies for Vanuatu to develop its opportunities for inward investment, to capitalise its limited resources and put in place frameworks which promote economic development, often at the cost of sustainability.

Not only is the climate and environment of land transactions and land use changing. The procedure of dispute settlement is also changing the way in which land interests are presented and perceived.

Despite the modification of rules of evidence, indicated above; the exclusion of legal representation; and the expectation that those who sit to hear customary land claims are knowledgeable about custom, it seems inevitable that committing the record of the court or tribunal deliberations to writing will change customary land tenure, distinguishing oral custom which has not been subject to court or tribunal scrutiny, from that which has. This will give rise to a duality of custom: the recorded and the unrecorded.

Once there is a written record then there is the possibility that this will be referred to in future cases, partly due to the rule of precedent which informs the jurisprudence of the courts in common-law-influenced systems, and also because similar fact cases will lend themselves to recollected former decisions. In this way previously oral evidence may become frozen in time, codified, and less adaptable to changed or changing circumstances. The development of certainties through case-law is part of the common-law mind-set, which dislikes in particular uncertainty as to ownership of property, the idea of land lying waste or idle, or the possibility that a case once decided upon, could be reopened by subsequent parties. Evidence of this process can be found in some of the more recent judgments of the

Malekula Island Court, where the narration of 'the Law, Custom and History' is being repeated almost verbatim from previous cases even where the land is situated in different places and the history and customs are different.

The language of the court may also change custom. Court proceedings are in Bislama, one of the three official languages of the Republic of Vanuatu. Where a witness or claimant does not speak Bislama then an interpreter may be used. The language of the court record however may be in English or Bislama (or potentially French). However the languages of education are English or French, so the ability to write Bislama tends to be learned informally – with consequent variations in spelling. Moreover legal language or concepts may be adopted.[13] In some cases this has a significant effect on the application of customary practice. For example in *Awop v Lepenmal*, consideration of the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW),[14] read with the written provisions of the Constitution (Article 5(1), led to the court holding that advancing the traditional superiority of land claims based on patrilineal descent and affiliation over matrilineal ones was discriminatory, despite the fact that the claim being sought was a historical one, not a contemporary one, thereby distinguishing it on the facts from the case of *Noel v Toto*, which was referred to. A similar line of reasoning was followed to support a matrilinially based claim in *Haitong v Tavulai Community*. Similarly in the latter case, evidence was led that indicated land had been taken by force and settled on by the victors, who later alienated some of it to foreigners. The court held that not only was the idea that land taken in battle became the victors contrary to customary practice, but also that "[t]his is a selfish idea and cannot find favour in this modern world with laws upholding principles of natural justice, fairness and equality" (*Haitong v Tavulai Community)*. Consequently even land obtained by conquest had to be returned to the original owners – even where these had been decimated or scattered by the tribal warfare. Arguably this retrospective application of contemporary legal principles to fact based claims of historical events is inappropriate and was not intended under the

[13] For example the expression 'time immemorial' was used in *Awop v Lapenmal*, while the transfer of land as a consequence of a bet was rejected in *Haitong v Tavulai Community* on the grounds that it had not been made in 'a goodwill manner' and was not a 'legitimate' or 'binding' agreement.

[14] This was integrated into domestic law by the Convention on the Elimination on Discrimination Against Women by the Ratification Act of Parliament No. 3 of 1995.

provisions of the Constitution. This approach may also be inconsistent with the fundamental meaning of custom, indicated above, but also marks a departure from earlier case law where it was made clear to the parties that:

> *Kot imas mekem iklia long ol patis se ol storian we bae oli talem long Kot blong pruvum se whu nao iraet ona blong graon ia bae kam aot nomo long ol kastom blong yumi long Efate mo Pango. Hemia imin se ol patis oli no save tokbaot loa blong waetman blong pruvum kes blong olgeta. Oli mas tokbaot nomo wanem we kastom italem se olgeta nao oli tru kastom ona long graon ia*' [The court must make it clear to all the parties that the stories they narrate to support their claim to the land must derive from the customs of this place. That means that the parties must not talk about or rely on white man's law to support their claim, but only the true custom of this area. (My translation)]. (*Kalmatalu v Wit*. See similarly *Family Mermer v Taliban*.)

As the value of land as a marketable commodity increases, so it is likely that more litigation will ensue and while representation by lawyers before the customary land tribunals is not permitted by the legislation, it is highly probably that those who can afford to will seek professional or quasi-professional assistance. The language of the law will then creep in and it too will change concepts and meanings.

Conclusion: Development and the Recognition or Denial of Cultural Diversity

This plurality of laws which may apply, forums which may be seized and procedures which may be followed are seen by some as an obstacle to development. In particular they are seen as inhibiting the commoditisation of land for which clarity of ownership and indefeasibility of title is desirable. For example, the 2006 *Final Report of the National Land Summit* states in respect of the identification of legitimate custom land owners, that one of the problems was that there were "no clear custom rules available for chiefs to go by" (Tahi 2006: 24). Similarly writing about the land tenure system of South Efate, Fingleton et al. have stated "there is confusion about what is customary and how far kastom can form the basis for modern land tenure" (Fingleton et al. 2008: 29). At the same time however, this complex plurality of land interests may operate as a bulwark against too rapid land alienation. Both sides may lay claim to the obscure and

elusive nature of customary land tenure – versus the certainty of introduced land interests and estates such as lease, freehold, registered title and surveyor's maps. In an arena where there is little equality of bargaining power, and where developers are likely to have financial and legal resources, the confusion of customary land tenure may operate to protect indigenous interests. This may of course be a charade, a masque. For while there is a plurality of customs which determine land interests, a reading of the case-law suggests that this plurality is not indecipherable, unknown or uncertain, except where a party who desires it to be so makes it so. Maintaining a pluralism within pluralism may be, either consciously or unconsciously, a way of maintaining indigenous integrity and cultural diversity against the onslaught of globalisation and universalism; a way of frustrating the fragmentation of land that is alien to and often in conflict with, the fragmentation that takes place in custom, especially when the emphasis is on individualism and monetary economies and ignores the need for inter-generational equitable distribution of land and its resources and the importance of social cohesion and community support in a country where the state provides virtually no social welfare of security. Pluralism within pluralism may therefore be not just a shield, but a sword.

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