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Law, land, development and narrative: a case-study from the South Pacific*

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Abstract

This article explores a primary source of legal studies, case-law, as a form of narrative in the context of indigenous land rights, and considers how this narrative negotiates pre-colonial land claims in a post-colonial context. Its case-study is the South Pacific island country of Vanuatu, a small-island, least-developed, nation-state, where laws introduced under Anglo–French colonial administration are still retained and sit uneasily alongside the customary forms of land tenure which govern ninety percent of all land in the islands. The article looks at the traditional and changing role of narrative presented as evidence by claimants and their witnesses against a context of rapid social and economic change, and asks whether the metamorphosis of narrative signals the future survival or imminent demise of customary indigenous land rights and what that might mean for these island people faced by the pressures of development.

Introduction

The role of indigene as narrator or the central figure of narrative, while not commonplace, is not unfamiliar in literature. If narrative is to be understood as the telling and interpretation of events, real or imagined, for the benefit of others, then the proposal here is that narratives of land, especially those narratives used to support claims to land, play a significant role in shaping and understanding the identity of indigenous people and their relationship to land. The focus of this article is the Melanesian country of Vanuatu, which is located in the south-west Pacific. It is a country of around eighty islands and more than one hundred languages.[1] The majority of its population of just over 200,000 are indigenous ni-Vanuatu.

Melanesian people are people of place.[2] A person's identity is closely bound with where he or she is from. Thus in Vanuatu, while a person may reside in the capital, Port Vila, they are 'of/from Tanna' (*manTanna/womanTanna*) or one of the other islands, and often more specifically a locality within that island. Narratives relating to land are therefore narratives of being and belonging, as will be seen by the importance of identity of place. They are historically narratives of origin and survival, as is evidenced by stories of descent and rationales for relocation. In the contemporary legal framework, narratives are used as evidence to support land entitlement claims in an environment in which rapid land alienation under leasehold is taking place, much of it to non-indigenous people, although narrative also reveals the long history of such alienation. These narratives are bridges, negotiating the space between the

* An earlier draft of this paper was presented at Birkbeck College in May 2009 at a conference entitled 'Narratives of Indigeneity: Law, Literature and Sovereignty'. I am grateful to helpful comments from my colleague Professor Janet Maclean.

1 Islands mentioned in this article include those of Ambrym, Efate, Erromango, Malekula, Paama, Pentecost, Shepherds, Tanna and Tongoa.

2 It has been stated that 'Land means life to the nation's indigenous population or, in other words, No Land, No Life' (Vanuatu Report to the United Nations HRI Core documents, 1998, para. 19).

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claimed past and the asserted present, and they are also lifelines for an uncertain future in a country where, despite the fact that approximately eighty percent of the population still depend on subsistence farming, land and its resources is increasingly seen as having commercial value, which should be exploited to meet development agendas. Indeed, the very existence of customary land tenure, with its uncertain and frequently disputed legitimacy, is seen as an obstacle to the smooth progress towards using land as a marketable commodity which can be freely traded.

The narratives under consideration are taken from recorded law cases. In recent years, disputes relating to land have been adjudicated by local, island and customary courts and the decisions recorded in law reports which are now being made publicly available. Although since 2001 it has been the Customary Lands Tribunals which have jurisdiction over land disputes, and indeed since their inception they have heard around 200 cases, most of the case-law for this paper has been taken from the Island Court reports.[3] Case-law is one of the primary sources of the 'literature of the law'. These narratives of indigenous claims to land provide insight into past and present customary law, which is one of the official sources of law applicable in the country. 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 custom and customary law must work alongside bills of rights in written constitutions and the provisions of international conventions without losing its way. At the same time, the recording of narrative as evidence to support legal claims, and which converts oral histories into written records, imposes a form on narrative which may reshape it for future generations. Thus, the narratives which are brought to support land claims, by the claimants themselves and their witnesses, are both the telling of stories (the local term *storian* is often used), and the interpretation of events in order to achieve a particular outcome. The purpose of looking at case-law as narratives of indigeneity is not only to arrive at a better understanding of customary forms of land tenure and why these are often seen as being inimical to development and incompatible with introduced forms of land tenure, but also to consider how the narrative negotiates the space between the past and the present, between tradition and change.

The article commences by considering the historical and legal background to the present context in which land claims are being brought to the attention of the courts. It then looks at the nature of indigenous or customary land tenure, which is both evidenced by narrative and determines the narratives to be presented. Because custom in the country is not homogenous, different forms of customary tenure emerge from the body of case-law, both confirming this state of affairs and illustrating it. However, the narrative also shows that despite the persisting theme of difference there are similarities, and also that, far from being uncertain and unascertainable as is sometimes claimed by those who would suggest that the elusiveness and uncertainty of customary land tenure is an obstacle to land development, the grounds for customary land claims in a particular custom area are generally clear. What are more often in dispute are questions of fact rather than customary law. The article then looks at the framework and institutions for the adjudication of disputed land claims, noting the uneasy alliance between mechanisms for dispute resolution introduced under colonial and post-colonial influence and traditional dispute resolution practices residing in the role of chiefs, local councils and the power of 'Big men'. The article then examines reported cases to demonstrate how this information, which is produced to support or refute land claims, works in two ways: as evidence of narrative of indigenous land claims, revealing in its telling the relationship of indigenous people with the land; and, as narrative of evidence, the way in which stories and histories are used to link the past with the present to assert land rights which will survive into the future. Here, consideration is given to the way in which the

3 Publicly and freely accessible electronically via <www.PacLII.org>, whereas the minutes of decisions of the Customary Land Tribunals are unpublished and only available on payment from the Department of Lands. Translations, where given, are the author's own.

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use and purpose of narrative, the forum in which it is used, the form in which it is presented and the background of those who hear it, may shape and change the narrative and consequently the customs which are related. The article concludes by reflecting on what can be learnt from these narratives and how pausing to listen to the stories might contribute to future dialogue on land issues in Vanuatu.

The historical and legal background

In common with many Pacific islands brought under colonial influence, indigenous land holdings and traditional culture and customs were disrupted by contact with Europeans. In the case of Vanuatu this was an Anglo–French Condominium government established in 1906. In the narratives of land claims there is reference to the land agents of this colonial government and their role in adjudicating disputes. There is also reference to the alienation of land to missionaries to set up churches and to settlers to establish plantations and farms in the early days of contact with outsiders. Later, land was taken by colonial authorities for public and administrative needs, but disputes over public land rarely feature in the case-law. The picture that emerges is one in which traditional patterns of land tenure were disrupted and influenced by this period of contact. Each case is only a microcosm of the larger picture. In the New Hebrides, as it was called, about two-thirds of land at one stage was in the hands of foreigners, and at the date of independence about twenty percent of the land remained alienated. Demands to reclaim the land fuelled agitation for independence, which was achieved in 1980. Many litigated claims to land traverse the pre-independence and post-independence period, and indeed this continuum is often essential for establishing a valid claim. This sense of continuity and rupture is reflected in the independence Constitution of the Republic of Vanuatu which, overnight, restored title to all the land, apart from a very limited amount of public land, to the indigenous custom owners,[4] and provided that the rules of custom should form the basis for the use and ownership of land. To give effect to this, the Constitution stated that only indigenous citizens could have perpetual interests in land,[5] thereby abolishing the concept of freehold, which had been introduced by the imperial powers. It is this fundamental constitutional right which underpins land claims. Settler occupants were required to vacate the land – subject to compensation payments – or to enter into fixed-term leases, governed by introduced principles of law, with the custom owners. This sudden shift gave rise to two basic problems. First, after a period of colonial settlement dating back to 1830, the original custom owners could not always be ascertained and, even if they were, their claims might be disputed, especially if these purported owners negotiated leases which were subsequently challenged. Often identifying the custom owners took time. In the interim a number of people may have exercised rights over the land, either by occupation or cultivation, or under a lease or licence. The probability of disputes and the number of counter-claimants was high, especially in those areas historically most affected by colonial settlement. Second, while there had been a dual system of customary land tenure and introduced leasehold tenure under, and before, the period of Condominium government, the constitutional fiat necessitated retaining the legal institution of the lease in order to accommodate existing foreign settlers and to encourage the post-independence investment and development of land. Consequently, a parallel system of land tenure persists. While land held under customary land tenure – approximately ninety percent of the land in Vanuatu – cannot be alienated, it can be leased for a period up to seventy-five years, either to other indigenous people or to non-indigenous people. Once a leasehold is secured over land, that land can be subdivided, developed and also used as security for mortgage finance – banks and lenders are

4 Article 74.

5 Article 75.

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reluctant to lend against the security of land held under customary tenure for a variety of reasons.[6] Not only do different legal regimes apply, but disputes are heard by different courts. Under the Land Leases Act 1983, only the Supreme Court has jurisdiction to hear disputes concerning leases.[7] Disputes relating to customary land are, however, outside the jurisdiction of the Supreme Court and must be adjudicated by different courts (see below). Often, however, there are difficulties in drawing lines between customary land tenure matters and introduced land tenure matters, especially if the same plot or area of land is subject to a multiplicity of rights and interests. There are, therefore, parallel narratives taking place: those before the Supreme Court and Court of Appeal, where parties will usually be represented by lawyers, and where much may turn on the interpretation of legislation or the application of principles of case-law drawn from national or overseas jurisprudence; and those being articulated in the lower courts, where parties are frequently unrepresented, where the adjudicators may or must themselves be knowledgeable in custom and will invariably bring their own knowledge and views of custom to the process, and where there will be little if any written law to guide the parties. It is with this second category of narratives that this article is concerned.

The nature of indigenous land tenure in Vanuatu

The narrative of cases brought before the courts that adjudicate customary land claims reveals much about the principles of customary land law. These narratives, which are told and retold in contemporary settings, emphasise the importance of land to the identity of ni-Vanuatu, and demonstrate how the past informs the present and provides a continuum between tradition and the challenges of today. In recent years, concerns have been asserted that there is uncertainty regarding what the customary land tenure law is. For example, the '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, p. 24). Similarly, writing about the land tenure system of South Efate, Fingleton and colleagues have stated that 'there is confusion about what is customary and how far *kastom* can form the basis for modern land tenure' (Fingleton, Naupa and Ballard, 2008, p. 29).[8] Consideration of the case-law, however, suggests that this confusion is far less than might be claimed. While there may be dispute as to the weight to be attached to certain evidence, or dispute as to facts, the customary principles for establishing land claims are generally clear. So, for example, it is possible to learn from the narrative that 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 through the physical evidence of graves, boundary

6 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.

7 Land Lease Act (Cap 163) sections 1 and 100.

8 *Kastom* is the Bislama version of 'custom' or 'customary'.

9 *Nasara* – dancing ground or public area in a village (Crowley, 1995, p. 165). See, for example, *Manassah v. Koko* [2005] VUIC 3, in which it was explained, with reference to land tenure in Malekula, that 'In 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 'generally 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*.

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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 licensees 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 is often contentious. Similarly, there may be differences in interpreting the applicable custom.[11]

The reasons for claiming that customary law relating to land is uncertain or difficult to ascertain are unclear, but may well be influenced by the agenda of the claimant. Those who advocate facilitating the commoditisation of land may seek to avoid engagement with customary land tenure because it has a number of features which are unsatisfactory from a development point of view: for example, it is flexible, subject to different interpretations, unwritten, tricky to prove and subject to dispute. Others may find it convenient to present customary law as obscure and intelligible only to a select few, in order to preserve its manoeuvrability, or to maintain secrecy about certain aspects of knowledge which are central to customary land laws. Even in the narrative presented in court, there may be no way of knowing, at least as an outsider, what is being withheld or manipulated to meet the demands of the forum of presentation and the needs of the claim.

Knowledge and the ability to use knowledge is power. Indeed, one of the issues raised by using narrative as evidence in a public forum is that it breaks traditional secrecy and guardianship taboos surrounding custom knowledge.[12] It may therefore also be the case that the evidence narrated in court is incomplete or changed, not only due to faulty memory or for a teleological purpose, but because there may be worse sanctions than losing a case. Also, the way in which narrative uses and relates custom may vary depending on who is the narrator. Over time this knowledge may become weaker, either because the keepers of the oral knowledge of custom become dispersed or disempowered with increased urbanisation, migration and the breakdown in traditional social ordering, or because there is diminishing respect for the keepers of knowledge, or because the knowledge becomes diluted or polluted by other influences. The narratives of customary land claims are therefore presenting interpretations of customs which are legitimated by links to the past but which are serving present purposes. In particular, the content of the narrative may be influenced by the purpose for which it is being used and also by the arena in which it is presented. This can vary from a gathering under a tree or at a chief's house, to a formal court in the capital, Port Vila.

Adjudicating land claims

The process of adjudicating land claims has become increasingly formalised. Traditionally, land disputes were resolved in custom, a process which seems to have survived the Anglo–French Condominium, except where such disputes were between indigenous and non-indigenous land

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' (*Holuon v. Edward* [2007] VUIC 4).

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* [2005] VUIC 6). Customs to do with marriage, adoption and burial are also frequently recalled.

11 For more detailed anthropological comment of customary land tenure in Vanuatu, see Guiart (1996, p. 1) and Rodman (1995, p. 65).

12 For example, in an unreported minute of the Malmetenvanu Custom Island Land Tribunal, one of the witnesses pointed out that the tribunal was breaking the custom law by talking about the chiefly bloodlines (*Metemal case* Land Appeal Case No. 1 2008. Ref. 09/09LT/111).

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users and occupiers.[13] At independence, in line with the constitutional provisions to give effect to the application of customary law to land,[14] Island Courts were charged with resolving land disputes, with appeals going to the Supreme Court.[15] Any Supreme Court judge hearing an appeal had to appoint two or more assessors, who were knowledgeable in custom, to sit with him.

The Island Courts Act 1983[16] 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 that 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'.[17] The court was fully constituted when sitting with three justices and a clerk, and the court was to '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'.[18] The procedure of these courts was established in subsidiary legislation.[19] The first courts were set up in 1984, and by 1999 there were eight such courts.[20] 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.'[21] 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 (out of the total of around eighty), even large ones such as Pentecost, are without a court.

More fundamentally the jurisdiction of those courts that were established under warrant encompassed not only people from different islands but also people 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'.[22] The probability of complainants not being satisfied with the adjudication of disputes or with the outcome was therefore high. As a result, almost all cases were appealed to the Supreme Court, creating an insurmountable backlog of cases. 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.[23]

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

14 Article 78(2).

15 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.

16 Cap 167.

17 Section 3(1).

18 Section 10.

19 Island Courts (Civil Procedure Rules) 1984 as amended.

20 Jowitt 1999.

21 Ibid.

22 Ibid.

23 Island courts (Amendment) Act 2001, came into effect in 2002.

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However, this did not remove the jurisdiction to consider cases pending before them, and eight years later Island Courts are still ruling on land cases.

The Customary Land Tribunal Act 2001 set up a new tier of courts to consider and rule on customary land claims. At present there is no appeal from the decisions of the highest Customary Land Tribunal to the ordinary courts, although the Supreme Court has a supervisory function under section 39.[24] Moreover, not all areas yet have Customary Tribunals, and the efficiency of those that do exist has been questioned.[25] 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,[26] while in a number of areas disputes about rightful holders of chiefly title challenged the eligibility of those entitled to sit on the tribunals. There has, moreover, been judicial challenge to the competence of the Customary Land Tribunals to adjudicate custom land claims, thereby casting a shadow over their competence to be a forum for the final determination of land disputes.[27] In particular, the jurisdiction of chiefs to determine land issues has been questioned. Uncertainty as to the authority of chiefs to determine land issues strikes at the core of customs relating to land, and reflects the challenges of acknowledging and accommodating custom in an increasingly formalised setting.

Informal dispute resolution and the role of chiefs

In Melanesian society, chiefs are appointed rather than succeeding to the position by inheritance, as is more usually the case in Polynesian societies. As is often referred to in the case-law, there is a hierarchy of chiefs, with eligible candidates acquiring status as 'Big men' through pig-killing and other grade-taking ceremonies. While women may be accorded chiefly status and engage in pig-killing, the social hierarchy is predominantly patriarchal, with brothers, uncles and sons all ranking above wives and daughters, even when succession to land rights is matrilineal. Within this traditional structure it is customary to try and resolve disputes outside the formal process. Indeed, where there are no formal courts there was, and remains, no alternative. Chiefs and other influential people, such as village priests, elders or, more recently, politicians, are often involved in this. Yet their status or right to make rulings and the effect of their rulings are unclear. 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'.[28] It appears, although it does not say so, that this includes making statements of policy on land or customs regarding land, and as a matter of practice such statements are referred to by Island Courts from time to time.[29]

The National Council of Chiefs (Organisation) Act 1985[30] 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 Councils of Chiefs are stated. These are: to resolve disputes according to local custom; to prescribe the value of exchange of any gift for a custom

24 Exercised in *Umou v. Erromango* [2008] VUSC 65.

25 See 'Customary Land Tribunal Progressive Report 2003' Republic of Vanuatu, Department of Lands.

26 Regenvanu, 2008, p. 65.

27 Mackenzie, 2006, p. 4.

28 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'.

29 See, for example, *Awop v. Lapenmal* [2007] VUIC 2.

30 Cap 183.

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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.[31] These provisions do not appear to give Councils of Chiefs at national, local or village level the power to determine land rights. Moreover, it remains unclear what the role or status of chiefs who do not sit on these various councils, but may nevertheless wield considerable local power, is. The formal incorporation of traditional structures into the national administration has, consequently, done little to create coherent and effective harmonisation between the custom of people and the state.

Even at the non-state level there are problems. In particular, the association of chiefly title with customary land tenure is difficult to separate. Indeed, it has been held that '[T]his chiefly system is attached or twined with the land tenure system'.[32] This is because (traditionally) '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.'[33] 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.[34] The paramount chief is responsible for ensuring that everyone within the territory he governs has land, and for distributing it equally to subordinate chiefs.[35] However, as illustrated by the practice on the island of 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.'[36]

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 lose popular support.

The ambiguous role of chiefs, as both figures of authority and customary land owners, is further complicated by the fact that today, disputed chiefly titles are heard by the Island Courts, while land claims are heard by the Customary Land Tribunals, the composition of which invariably includes chiefs.

Diverging views were considered in the Efate case of *Billy v. Ameara*,[37] in which the Island Court stated:

> 'It was raised elsewhere in the proceeding that the presence of Chiefs means (the) right to land. Thus a chief is assumed in this reasoning that he is the owner of the land in which he presides or has influence over . . . a contrary view which most Claimants support is that the best indicator to land ownership is obtained not by the presence of Chiefs, rather the presence of blood relationship. The second proposition would appear the better indicator to land ownership. Thus it would be true to say that not all Chiefs are of a bloodline who owns land, unless (a) Chief himself is from

31 Section 13.

32 *Mata v. Mata* [2003] VUIC 1.

33 Referring to the custom of Tongoa, Shepherds and North Efate.

34 Not dissimilar to the feudal pyramid introduced under Norman rule in England in the eleventh century.

35 *Sanhabat v. Salemunu* [2005] VUIC 6.

36 *Welwel v. Family Rorrmal* [2007] VUIC 5.

37 [2004] VUIC 3.

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> the bloodline that owns or (is) entitle(d) to the land. In this circumstance issue of Chief Title is secondary to issue of land ownership, notwithstanding that both issues may overlap such as in the present case. The issue of Chief Title may be considered independently of (a) land claim.'

This confusion can be aggravated where trusts exist to manage the development of land for the purported benefit of custom owners.[38] For example, in the case of *Malas v. Tretham Construction Ltd*,[39] it was argued that the Chief of Mele (a village on Efate) had given his consent to an opposed development, in his capacity as representing the Mele Trustees, whose role was 'to represent the custom owners of the disputed land and . . . act on behalf of the Mele village in all land matters relating to Mele Land'. However the Island Court held that the Chief:

> 'could not substitute himself (for) . . . the custom owners and give right to a body such as the Trustees to act on behalf of the custom owners. The Mele Land Trustees . . . representation is made on the basis that all custom owners consented to that effect. If a custom owner refuses to be represented by the Mele Land Trustees Limited the Mele Chief and his assistant could not give any authorisation to the Trustees to act on the custom owner's behalf without his final consent. The Chief has no authority to do that in the eyes of the Law. The authority of the Chiefs (if there is any) on his people and community is one thing and the rights of custom owner on the land is another thing. It is important to distinguish one from another.'[40]

There is, therefore, the possibility of confusion between the role of chiefs as adjudicators of land disputes, as trustees of land for the people they represent, and as figures of status holding and controlling land rights. This presents a conundrum for law reformers. For example, a Customary Land Tribunal requires those who sit on its panel to be knowledgeable in the custom of the area, but it excludes as ineligible to sit anyone having an interest in the outcome of the case. In rural areas it is unlikely that a chief who carries any authority will not have any interest in the outcome, if only because the litigants or some of them are his supporters or relatives. Moreover, even if an adjudicator is not a chief, he (very rarely she) may have opinions about the applicable custom. For example, in a non-land case, the magistrate could not prevent himself from demonstrating his own familiarity with the customary view of adultery, stating that 'adultery is considered in Vanuatu Society *"founded on traditional Melanesian values . . ."* as being a serious offence on the bases of Custom, and that, subsequently, any damages claimed therefrom against Co-respondents were customary punitive damages'.[41] While this demonstration of custom knowledge may be more acceptable than either a non-indigenous judge or magistrate claiming to know what the custom is, or ignoring the custom because it is not sufficiently proved according to introduced standards of proof, it does nevertheless raise the question of the role of the adjudicator in shaping the narrative, either through the interpretive process of the individual adjudicator or because the narrative which is presented is modified for the particular audience. This leads to a consideration of the narrative used in land cases; its content, purpose and contribution to the contemporary role of custom in determining outcomes of land disputes.

38 Some aspects of these trusts are similar to the equitable concept of trusts, others are not. There are a number of trusts in place for the management of land which generates income around the capital, Port Vila. Often they are poorly regulated, the rights of beneficiaries are precarious and the trustees rarely held to account.

39 [1995] VUIC 1.

40 Lunabeck Senior Magistrate (now Chief Justice).

41 *Waiwo v. Waiwo* [1996] VUMC 1. On appeal the court took a rather less customary view of punitive damages for adultery, although it upheld the principle of the award while reducing the quantum.

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Evidence as narrative

While it is difficult to divorce the narrative from the people who use it and hear it, and from the purpose for which it is being presented, it is suggested that the reported cases can be read in two ways. First, as evidence of narrative of indigenous customs relating to land, revealing in its telling the relationship of indigenous people with the land. Second, as narrative of evidence, reflecting the way in which stories and histories are used to link the past with the present to assert land rights which will survive into the future. At a basic level the cases which come before the courts are stories about people and events. Stories are told and unfold. Some are more credible than others. The evidence led in land cases tells many things, even when translated through the law report. In particular, the narrative illustrates ideas of being and belonging, of origin and survival, and the roots which anchor people to place. This history distinguishes customary land tenure from introduced ideas about land and land use and control. It is therefore fundamental to an understanding of the divergencies of approaches to land in a system in which there is a plurality of laws which govern it.

Narratives of origins

The strongest claimants are those who can establish that their family tree goes back furthest. This may mean not simply listing genealogies which stretch back many generations but also being able to narrate stories of origin. So, for example, a claimant in the case of *Alanson v. Malignman*,[42] claimed that he could trace his roots to a founding creator. This consisted of 'three rocks that produced the first humans to live the land in which two of them are in the nature of humans a woman and a man. These two stones begat a bitch who then gave birth to the first twin humans, a male . . . and a female.' The claimant argued that his family tree was traceable to these first humans. This story was elaborated upon by another witness, who stated that these early humans had been raised by a non-human – an alien.[43]

In *Sanhabat v. Salemunu*,[44] the story of origin presented to support a claim was that the:

> 'first ancestors were originated from two cone shells. These cone shells were once living in a cave . . . At one time they had a row which resulted in one of the shells losing its tail. The broken tail changed into a turtle and swam to (a local place on the coast). There it gave birth to a female baby. While (the other shell) changed into an eel fish and swam up the river . . . and finally formed into a male human.'

After a time these two humans met and formed a union, from which the ancestral line descended. In the same case, however, an alternative origin story was related, which was that the first two humans came from a liana or vine. The counter-claimant's origins were from a wild plant, from which came two males, who discovered two females in the location of a volcano (fire smoke) and formed a union with them.[45]

What is interesting about stories of origin is not only that they are included in the first place as evidence of the ties that a claimant has with the land, but also that counter-claimants do not challenge these narratives, although they may seek to establish their own, prior, or superior origins.[46] Similarly, despite the strong influence of Christianity introduced by missionaries from

42 [2004] VUIC 2.

43 Origins from stones are also found in *Metenesel Amileacos Land Appeal Case* No 1, 2008. Malmetenvanu Custom Island Lands Tribunal, 28 October 2008, unreported minute.

44 [2005] VUIC 6.

45 Other claimants indicated similar stories of origin – from plant materials or from shells.

46 Similarly narratives about dwarfs, devils or sorcerers are not challenged.

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about 1830 onwards (considered below), narratives of land claims include stories of magic and sorcery, indicating not only a pre-contact link to the land but also reminding the audience that there are matters beyond the control of humans, or persisting powers which can be called on which are external to the court, the magistrate or judge, to determine outcomes. The decision of a court of tribunal may not, therefore, bring finality to the matter.

Narrative of magic and sorcery

While references to magic are not frequent, they are not entirely absent, and it is important to note that belief in the power or practice of sorcery is not just historical but of contemporary significance.[47] For example, in *Alanson v. Maligmen* there is reference to a tree, the leaves of which, when they fall, turn into snakes. Knowledge of this was presented to support the claimant's case to a particular place (*nasara*) marked by this tree. However, his claim was weak, not because of this story, but because he could not correctly name and identify other *nasaras* in the area or relate the different grades of chiefs. A competing claimant held that his family had been forced to leave the land because of 'a custom spell upon his tribe whereby flocks of rats . . . devoured all their subsistence crops'. This was put forward to justify a break in the link to the land, which was beyond the power of men to control. In *Rory v. Rory*,[48] it was claimed that a 'magical man' had 'caused a tidal wave' which sank an island, thereby explaining why claimants had been forced to move; in *Hiatong v. Tavulai Community*,[49] magic had been used to kill a dwarf and to persuade certain parties to commit adultery; while in *Houlon v. Edward*,[50] 'a chief got very ill after walking over a human bone cursed with a cast of death spell'. Similarly, in the case of *Manassah v. Koko*,[51] there are three different versions of how a barren wife was helped to have a child. One is that she saw the vision of a child in a tree and went into labour; another is that a child was found at the roots of a special tree wrapped in a coconut mat; and a third is that, while digging yams she found a baby by the yams. Each story was raised to justify the name given to the child, which linked the child to the relevant lineage, thereby providing evidence of the necessary generation chain.

Such events, presented in the contemporary setting, were relied on to explain disrupted chiefly lines, mixed genealogies and failures to remain in occupation of land now being claimed. While some of the narratives of magic may be used to explain natural events, such as tsunamis, volcanoes or earthquakes, these narratives cannot be lightly dismissed as mere fabrications to gloss over gaps in the evidence, because they are presented as fact and go unchallenged. Moreover, there appears to be no recognised incongruity between these narratives being used alongside claims based on modern legal ideas, such as fundamental rights, gender equity, documents of title, court rulings or modern case precedents.

Interrupting both the content of narrative and the lines of claims are incidents of early contact with outsiders. Although framed historically, these factors continue to be of crucial relevance to present land claims, not only because land use and occupation was disrupted but because the legacy of missionaries, settlers and colonial administration shaped and informed contemporary language and concepts of land interests, in respect of the legal determination of land rights.

47 For example, the case of *Selnangi v. Donna* [2005] VUIC 2, is entirely about black magic – although not a land case.

48 [2007] VUIC 6.

49 [2007] VUIC 3.

50 [2007] VUIC 4.

51 [2005] VUIC 3.

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Early colonial contact

There is no great debate that the arrival of Europeans, especially missionaries, impacted on the lives of Pacific islanders and that the consequences of this continue to be evident today, especially in the way in which missionary teaching influenced and became integrated with custom. The narratives of land claims are therefore narratives of Vanuatu's history,[52] and an explanation for much of the present. For example, missionaries changed the way in which chiefly titles were determined and transferred.[53] Missionaries also strengthened the patriarchal ordering of society, which some feminists in Vanuatu assert was much more egalitarian under pre-contact custom. For example, in the case of *Awop v. Lapenmal*,[54] the Bible's Book of Numbers, 27:8, was relied on to support a claim that only in the event of there being no male heir should a daughter inherit. Contact with Europeans also had a physical impact on land rights because outsiders introduced diseases which decimated populations, causing their relocation and subsequent land disputes regarding the nature of their occupation rights on land where they had taken refuge or occupied as licencees permitted to cultivate the land.[55] In some places, the arrival of missionaries and settlers prompted the migration of custom owners to other parts of the islands where they held land,[56] especially where these missions physically gathered converts around them or drove the non-converted away.

The involvement of colonial officers also muddied the waters in land disputes, for example, by becoming involved in boundary disputes,[57] or the adjudication of land claims.[58] Decisions made by one colonial agent were not always followed by another, especially if one was French and the other English, with resulting inconsistencies claimed by contesting custom owners. There is also evidence of early land alienation,[59] sales of land to settlers and missionaries,[60]

52 There is, for example, reference to cannibalism. In *Rory v. Rory* [2007] VUIC 6, the original claimant's narrative includes the statement: 'A child was killed and eaten during a . . . a customary rite to commemorate . . . (a) brother who died during the fight.' There is also reference to the fact that people tended not to move much outside their land boundaries because of tribal fighting and cannibalism in a number of Malekula cases.

53 See *Tenene v. Kalmarie* [2002] VUIC 1, in which it was observed: '*Olgeta itokabaot tu olsem wanem Missionary ikam mo jenesim olgeta fasin ia mo mekem se olgeta inomo folem hemia blong appointem wan niu Jif mo replacement blong olfala Jif tru long kastom fasin*' (translated as 'Everyone knows how the missionaries came and changed all the customary ways and made it so that people no longer followed the traditional procedure for the appointment of a new chief or the replacement of an old one'). In *Alanson v. Malingman* [2004] VUIC 2, there was evidence that the missionaries forbade pig-killing to mark custom adoption, insisting instead on a money payment.

54 [2007] VUIC 2.

55 For example, in *Mata v. Mata* [2003] VUIC 1, it was reported that 'sometime(s) during the colonial era a dreadful disease *sisit blad* [probably cholera] has largely affected the people of Lupalea village. In consequence, a vast majority of the population was wiped out. To prevent the spreading of this disease, the remaining villagers were advised to move to the nearby village . . . only 6 people of (the) . . . village were evacuated without being affected.' Natural disasters were also a cause of relocation, for example famine in *Mulon v. Maltape* [2004] VUIC 1, volcanic eruption in *Mata v. Mata* [2003] VUIC 1, and tribal warfare in *Alanson v. Malingmen* [2004] VUIC 2.

56 *Tabi v. Tabisari* [2004] VUIC 5.

57 *Mata v. Mata* [2003] VUIC 1, where it was observed that the dispute dated back to the 1920s without resolution, British agents and the local council of chiefs coming to different decisions.

58 *Awop v. Lapenmal* [2007] VUIC 2, which refers to French and British agents adjudicating a land dispute in 1963.

59 For example, a sale of the land to a French Planter, Barthelemy Gaspard dated 15 March, 1886, in *Family Mokono v. Peter* [2003] VUIC 2, although there was some concern that the sale or at least the documentary evidence of it may have been fraudulent; the sale of land for trade goods to a settler in 1907 in *Alanson v. Malingmen* [2004] VUIC 2.

60 For example, Christian missionaries at Port Stanley in the early twentieth century in *Alanson v. Malingmen* [2004] VUIC 2; the Seventh Day Adventists in 1931 in Ambrym, in *Tomoyan v. Shem* [2007] VUIC 1; and the Catholic Mission in *Family Mermer v. Taliban* [2003] VUICB 2.

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and the unequal bargaining power that existed between indigenous custom owners and the incomers.[61]

These are some of the histories which emerge from the narrative, and demonstrate the way in which stories and histories are used to link the past with the present in order to assert land rights which will survive into the future. The role of narrative as evidence, the forum and form in which it is presented, shapes and may change the narrative and consequently, although perhaps imperceptibly at first, the customs which are related. In this way, custom adapts and is adapted, the narrative constructing a bridge between past and present, between what is traditional and what is necessary to accommodate changed circumstances and future challenges.

Narrative as evidence

The rules of evidence that apply in Vanuatu are based on laws introduced under colonial administration. However, in the case of Island Courts and Customary Land Tribunals the normal rules of evidence are modified. The Island Courts Act states that: 'In any proceedings before it, an island court shall not apply technical rules of evidence but shall admit and consider such information as is available.'[62] It is not unusual, therefore, for evidence to be hearsay, or based on opinion rather than fact. In the case of land claims, the procedural rules also provide that each claimant and defendant – or counter-claimant – can call five witnesses. These witnesses give written evidence in advance of the hearing and are then questioned on this evidence. The process is therefore one of translation and re-translation. Witnesses may write their own statements or they may dictate them prior to the hearing. They are then subject to oral examination and may elaborate on the evidence previously given in their written statement.

Evidence of fact: boundaries and genealogies

The two main types of evidence that tend to be offered in land disputes are narratives of boundary descriptions and narratives of bloodlines. 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 and churches. 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.[63] Narratives 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.[64] 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. It is rare that documents are produced to support genealogical claims – for example, birth or death certificates – although occasionally letters or documents relating to land transactions are used. These are, however, rarely

61 For example, a sale for 'some Tobacco, a Musket and other goods' in *Manassah v. Koko* [2005].

62 Section 25 Island Courts Act Cap 167.

63 Rule 9.

64 To the extent that the court is unable to reach a conclusion, as happened in *Billy v. Ameara* [2004] VUIC 3, in a dispute that had been pending for twenty years.

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treated as conclusive evidence. The ability to provide evidence which links the physical aspects of the land with people and their genealogies determines the strength, or weakness, of any claim.

Evidence to support witness credibility

One of the interesting features that emerge from the reported cases is how the credibility of a witness is assessed in a customary context. With boundaries, attention to detail is important, with that detail being repeated or corroborated by other witnesses. Statements that are too general or lack specificity are suspect. Witnesses who are migrants or recent arrivals – even though their ancestors may have been there for several generations – are considered less reliable than those who can trace their family trees back many generations and can provide correct names and sites for *nasaras* or *nakamals*. Similarly, a shared dialect or familiarity with the local names for trees, people and places is important, as well as knowledge about local customs and customary ceremonies. Good witnesses must be able to link different evidence, for example chiefly systems with land tenure systems, or custom ceremonies with land rights, and must be able to distinguish different hierarchies of chiefs and the different forms of ceremonies appropriate for conferring different rights or obligations. In weighing the evidence, the Island Courts appear to be looking for discrepancies, contradictions and lack of sufficient corroboration by witnesses to support claimants. While previous decisions made by various local custom courts or hearings may be mentioned, there is no sense of being bound by them, especially as the records of these decisions are usually unwritten. However, a succession of adjudications favouring a claimant will add weight to the claim, not because of the formality of the adjudication but because it is evident that the claimant's story has been tried and tested on several occasions.

Evidence as narrative of *kastom* and customary law

Where land falls to be governed by the 'rules of custom', the evidence presented in these land cases gives us some indication of what this custom is, although it is not always clear whether the custom referred to amounts to a 'rule'. For example, the case-law reveals much about 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. To amount to a rule, however, there needs to be evidence of expectation and compliance. An example can be found in the custom of Tongoa, Shepherd Islands and parts of North Efate, 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 [sic] to generation throughout the Shepherd Islands.'[65]

The 'leases' referred to here appear to be the payment of tithes or rents and not an estate in land for a period of time, as understood in the common law. Similarly, in Epi '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.'[66]

Sometimes it is difficult to determine where a custom ends and a rule begins, suggesting that traditionally there is no clear distinction between practices which are followed and those customs which are rules. For example, the cases reveal that in central Malekula the communal ownership of

65 *Mata v. Mata* [2003] VUIC 1.

66 *Family Mokono v. Peter* [2003] VUIC 2.

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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'.[67] Patrilineal inheritance through the eldest son predominates. However, the eldest son is expected to provide for equal distribution among his siblings. Matrilineal inheritance only comes into play if there are no male heirs, and then only as an interim measure.[68] However, there are 'customary obligations that requires [sic] strict performances in order that the right to own the land can be transferred to the mother's children'. These are explained in *Tomoyan v. Shem*:

> '[T]he 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.'[69]

Through observation of this ritual, the paramountcy of patrilineal succession appears to be preserved and the inferior position of matrilineal succession confirmed. Further, 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.'[70] Here, the inferior status of an adoptee is reinforced by inferior land rights.

The above suggests a practice or rituals and customs which have very clear consequences if not complied with. However, similar practices elsewhere may not be matched by similar consequences. There are no national rules of custom but rather a lack of homogeneity of traditions and customary forms, as is evident from the case-law. For example, the island of Malekula has two main tribes, *Big Nambas* and *Smol Nambas*, and there are variations in customs within these.[71] For instance, in the case of *Kaising v. Kaites*,[72] 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*).'

By contrast, in the south of the island of Pentecost, where the arrival of settlers and missionaries dislocated and uprooted the indigenous people, it appears that land use and ownership rights may be acquired not only by bloodlines but also 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.[73] In this way, land roots for uprooted people can be established. In contrast,

67 *Alanson v. Malingmen* [2004] VUIC 2; confirmed in *Sanhabat v. Salemunu* [2005] VUIC 6.

68 Reiterated in *Abel v. Timothy* [2005] VUIC 5.

69 [2007] VUIC 1.

70 *Alanson v. Malingmen* [2004] VUIC 2. 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.

71 A *nambas* is a traditional penis sheath.

72 [2006] VUIC 1.

73 *Tabi v. Tabisari* [2004] VUIC 5. In this case it was held that land could pass through both sides of the family.

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where people were left relatively undisturbed in their enjoyment of land, such as in the island of 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.'[74]

As will be noted, this diversity of applicable and observed customs presents challenges for developing either a coherent body of custom law, or a national land policy which can demonstrate its appreciation of customary practices by integrating them into proposals for land development. Pinpointing custom can be time-consuming and frustrating for land development advocates, even when that custom can be 'captured' through the process of formal hearings and recording.

Narrative as record

Despite the modification of rules of evidence indicated above, the fact that parties are unrepresented by lawyers and so represent themselves, and that those who sit to hear customary land claims are expected to be knowledgeable about custom, it is inevitable that committing the record of the court or tribunal deliberations to writing will change the narrative. Much will depend on the degree of articulateness of witnesses, the literacy skills of the court clerk or tribunal secretary, and the accuracy with which statements are recollected and recorded. This process of recollection and recording is part of the organic development of narrative. It is also bringing custom into the twenty-first century.

Converting oral histories

The recording of oral evidence creates a permanent record of testimonies. In some cases the witnesses are very old and their histories, which cover the pre-independence and post-independence period, may otherwise be lost.[75] Indeed, in *Selangi v. Donna*,[76] it was held that merely giving evidence in court of customary practices – here black magic – was not enough; '(a)ll the defendants in Court, needed someone of old age to explain further and into detail the ways and practices of the black magic in the olden days' in order to compare past custom with alleged current practice. Current practice, whether in sorcery or land claims, would appear to have no validity unless it can be shown to have evolved from past practice. In the case of customary land tenure, these narratives, imperfect as they perhaps are, may be the closest we can get to first-hand accounts of customary land tenure in the early days of contact with introduced legal systems, untainted by the lens of the colonial historian/administrator or missionary. At the same time, however, there is the danger that this 'codification' through court/tribunal recording, will rob custom of its essential and necessary flexibility.

Setting precedents

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

74 *Welwel v. Family Roromal* [2007] VUIC 5.

75 For example, in *Family Mokono v. Peter* [2003] VUIC 2, a witness in her early 80s; in *Mata v. Mata* [2003] VUIC 1, a male witness who was 72; while in *Alanson v. Malingmen* [2004] VUIC 2, one of the witnesses was reputed to be over 100.

76 [2005] VUIC 2.

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decisions. In this way, previously oral evidence may become frozen in time and less adaptable to changed or changing circumstances. The development of certainty 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' – a standard heading in the report – is being repeated almost verbatim from previous cases even where the land is situated in different places, probably because the clerk to the Court is copying it each time from a previously recorded case.

Translating narratives

It is also probable that the language of the court may change the narrative. Court proceedings are in Bislama, a form of 'pigeon English', which is 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 formal education are English or French, so the ability to write Bislama tends to be learned informally – with consequent variations in spelling. This process of literal interpretation and recording, which inevitably shapes and changes the narrative, also reflects the cultural hybridisation that has taken place in Vanuatu, from the early arrival of missionaries to the recorded minutes of the Customary Land Tribunals.

'Legalising' language and concepts

It is also the case that as more parties resort to litigation before the formal courts or tribunals, there is a greater likelihood that legal language or concepts may be adopted.[77] In some cases, this has a significant effect on the application of customary practice. For example, in *Awop v. Lepenmal*,[78] consideration of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),[79] read with the written provisions of the Constitution,[80] 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.[81] Similarly, in the case of *Haitong v. Tavulai Community*,[82] 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 – when the opposite seems to have been the case in several areas – but also that 'This is a selfish idea and cannot find favour in this modern world with laws upholding principles of natural justice, fairness and equality'. Consequently, land obtained by conquest had to be returned to the original owners – even where these had been decimated or scattered by the tribal

77 For example 'time immemorial' used in *Awop v. Lapenmal* [2007] VUIC 2, while the transfer of land as a consequence of a bet was rejected in *Haitong v. Tavulai Community* [2007] VUIC 3 on the grounds that it had not been made in 'a goodwill manner' and was not a 'legitimate' or 'binding' agreement.

78 [2007] VUIC 2.

79 This was integrated into domestic law by the Convention on the Elimination of all forms of Discrimination Against Women by the Ratification Act of Parliament No. 3 of 1995. It is one of the few human rights conventions that has had widespread publicity in Vanuatu.

80 Article 5(1).

81 Thereby distinguishing it, on the facts, from the case of *Noel v. Toto* [1995] VUSC 3, which was referred to. A similar line of reasoning was followed to support a matrilinially based claim in *Haitong v. Tavulai Community* [2007] VUIC 3.

82 *Haitong v. Tavulai Community* [2007] VUIC 3.

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warfare. Arguably, this retrospective application of contemporary legal principles to fact-based claims of historical events is inappropriate and was not intended under the provisions of the Constitution.[83] This approach may also be inconsistent with the fundamental meaning of custom, which has been defined by the court to be '*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*' (translated as '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').[84] Magistrates and others involved in these hearings are, however, illustrative of the nature of development happening in countries such as Vanuatu. On the one hand they are adjudicating customary land claims based on custom laws, on the other hand they are often university educated, or do not wish to appear ignorant or uninformed. They must walk the tightrope between tradition and modernity.

As the value of land as a marketable commodity increases, 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.[85] This in turn is likely to further emphasise inequalities in access to justice and distribution of economic benefits which are already prevalent in Vanuatu. It may also give rise to more appeals, including appeals to the Supreme Court for non-compliance with procedural requirements, especially if 'legal advisers' can find procedural loopholes to exploit, with the related consequences of delay, expense and the possibility of self-help measures being taken in the interim. Indeed, one of the adverse consequences of developing wider access to formal courts is an increase in litigation, particularly by those who feel that they have lost out under the informal, traditional system.

Learning from narratives of land

Land claim disputes arise for a number of reasons and are not solely of recent origin. It is evident from the narratives of land claims that customary land tenure reflects a process of adaptation and survival, seeking to accommodate a multiplicity of land usages and to tolerate different interests. Customary land claims tend not to be linear but to change direction according to necessity and circumstance. Nor are they temporally certain – as a lease might be. For example, rights of use may be until crops can be re-established after cyclone devastation – a matter of months or years – or granted and enjoyed for several generations. While the antecedents of land interests may be claimed to be from as far back as can be recounted (certainly not time immemorial), it is not clear that future rights are seen as persisting in perpetuity. Certainly no individual or present incumbent could claim to have rights in perpetuity owing to the communal nature of land rights and the temporal and spiritual nature of those rights. It is also evident that indefeasibility of title based on a state register is inherently alien to customary land tenure,[86] and even if documents are produced to support a

83 It 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*' (translated as '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') (*Kalmatalu v. Wit* [2003] VUICB 3). See similarly *Family Mermer v. Taliban* [2003] VUICB 2.

84 *Tenene v. Kalmarie* [2004] VUICB 1.

85 For example, law students and recent graduates from the University of the South Pacific which has its Law School in Vanuatu.

86 See on this, Mugambwa (2001).

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claim they may be viewed with suspicion, regarded as unreliable, and at best only one aspect of evidence that may be taken into account. Registering title or an interest, does not, in custom, make it absolute.

Against this background there is the challenge of the increasing prevalence of land disputes as a consequence of claimants seeking either to develop the land themselves, or to negotiate a lease with investors who will develop the land.[87] The intervention of a legal process which tends to arrive at winners and losers may also have increased the tendency to litigate and to appeal against the decisions of chiefs, informal courts or lower tribunals.

The transition between an adjudication system which seeks to defuse disputes by negotiation and compromise and one which seeks to establish certainty and finality is evidenced by the remedies which are found in land claim cases. These are a mix of introduced remedies, such as injunctions,[88] and customary remedies, such as allowing continued joint usage of land.[89] Sometimes the remedy awarded leaves itself open to future problems. For example in *Mata v. Mata*,[90] the unsuccessful claimants were ordered to vacate the land within twelve months unless other proper arrangements were made. What these were to be was left unspecified by the court, leaving a wide margin of discretion to the parties themselves to negotiate an acceptable outcome. In *Tabi v. Tabisari*,[91] although the land dispute was settled, no orders were made regarding other rights, such as the right to collect coconuts, make gardens and graze cattle enjoyed by the counter-claimants. In *Sanhabat v. Salemunu*,[92] an order was made regarding those unsuccessful claimants who remained on the land but it was left to these respective parties to make appropriate arrangements with those whom the court had declared to be the custom owners. In *Rory v. Rory*,[93] no finding of ownership was made, leaving the various parties with their continued, shared, right of use over the land claimed, leading, one would have thought inevitably, to renewed dispute at some point. This lack of conclusiveness is perhaps a reflection of the desire to arrive at a decision which is fair to everyone and a pragmatic recognition of the need for compromise in a plural legal system. Indeed, one of the reasons why appeals occur is that if a decision favours one claimant, it is perceived as not being fair to other claimants, and that the tribunal failed to take into account equally the evidence of all the parties. In custom therefore, there seems always to be the possibility that rights can be renegotiated or disputes reopened.

Conclusion

Post-colonial narratives of land presented as evidence in reported cases are illustrative of a negotiated space, both temporally – between the historical past and the contemporary present – and formatively – through a process of reporting and interpretation tempered to meet the demands of an imposed forum: the court or tribunal established by legislation. This process may be seen as undermining or distorting customary forms by insisting on compliance with an introduced dominant form, with a

87 See, for example, *Malas v. Tretham Construction Ltd* [1995] VUIC 1.

88 See, for example, *Chief Manua v. Kerry* [2004] VUIC 7.

89 For example, in *Alanson* there was declaration of custom ownership for four of the claimants, but those who were unsuccessful were entitled to 'have the right to work the land provided that proper arrangements are accommodated in consultation with the declared custom owners, since they have been working the land for generations and made vital developments thereon'.

90 [2003] VUIC 1.

91 [2004] VUIC 5.

92 [2005] VUIC 6.

93 [2007] VUIC 6.

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consequential corruption of the narrative. However, bringing narrative of customary land claims into the public domain may be a way of manipulating contemporary forms to preserve the traditional past. The use of adaptive communication provides an opportunity to make accessible to others what might not otherwise be accessible, and in this regard could be seen as a way of strengthening the role and relevance of custom. In particular, customary narrative, however modified or constrained, is engaging with the rule of law to present a contemporary sense of identity in respect of land. This aspect of narrative may be particularly important where customary land tenure is under threat and the nature of indigenous identification is facing multiple challenges.

This is as true of Vanuatu as of other least-developed small-island states. The communal and custodial nature of customary land tenure, which sees the rights of individuals to deal with the land as curtailed by their obligations to look after the land for future generations and to maintain links with past generations, is often perceived as being an obstacle to development, a barrier to attracting inward (foreign) investment, and an underlying cause of failure to achieve economic growth. At the same time the emergence of indigeneity as a matter of considerable significance both globally and regionally is prompting traditionalists and emerging modern activists to assert aspects of national uniqueness and difference. Among such assertions is the importance of customary forms of land tenure and resource management.

While narratives of land claims through case-law are presented in a disputative context, it might be argued that present pressures to arrive at finality and legal certainty are the underlying cause of much of the litigation, because it is clear that traditionally adaptation and survival strategies in the use and management of land have created a multi-layered system of land-holding in which grants of land use, rights of cultivation or occupation, or both, may be conferred on a succession of groups or individuals for a variety of reasons over an extended period of time. If the achievements of customary land tenure as demonstrated by the narrative of land claims are not realised, and a new, imposed narrative is advocated or adopted to obliterate indigenous narrative without allowing for an organic process of adaptation, then there is the danger that the customs that hold people together will disintegrate, and that they will lose their sense of identity with place, and their sense of self, because they will have no stories. It is suggested therefore that law reformers, policy-makers and aid-donors with foreign agendas should look beyond the basic legal and administrative framework and consider the many different narratives of land, including case-law, which provide a continuum between the past and the present and can be used to inform the future direction that land policy and land law should take.

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