NAVIGATING BETWEEN TRADITIONAL LAND TENURE AND INTRODUCED LAND LAWS IN PACIFIC ISLAND STATES

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Introduction

As in Africa and other parts of the world, islands in the South Pacific region experienced British colonial administration accompanied by the introduction of non-customary land laws and policies. In some cases colonial administrators took land which they deemed to be uncultivated or lying 'waste and idle' and claimed it for the Crown or later, the state. In other cases they reshaped customary institutions and structures in efforts to acknowledge local indigenous polities but at the same time understand them on their own terms. On independence and in the years just prior to and after independence, in many countries land which had been alienated to foreigners was restored to indigenous people, but the slate could not be wiped entirely clean of the colonial legacy. Indeed few countries rejected the colonial systems of laws and courts, so that even today, introduced laws and dispute resolution forums remain relevant and influential, despite the fact that in most Pacific island states over 80% of land is held under various forms of customary tenure. Persisting legal pluralism in respect of land, therefore offers opportunities to 'pick and mix' legal responses or develop new hybrid legal forms, and presents potential obstacles to those seeking to use land in new ways or harness its resources for development.

Alongside shifts from rural residency to urbanisation, from subsistence agriculture to cash-cropping and waged labour, there are other pressures both internal and external, to 'do' things with land, to make it more attractive for inward investment

and to exploit its resources commercially to generate income. There are demands for registration and demarcation of customary land interests, for the simplification of complex kinship rules which determine land rights, for greater individualization of land rather than communal access, and for the establishment of certainty through final court decisions rather than negotiated settlements which may be revisited and renegotiated. For some, both from within and without Pacific island countries, customary land tenure is seen as an obstacle to economic development, for others it is seen as essential for maintaining social stability and security and for ensuring the equitable distribution of resources in states where governance is weak and public provision virtually non-existent.

In considering how legal pluralism might be utilised to assist developing countries face the challenges of development in which land and its resources play a key role this paper moves away from the stagnant waters of theoretical debate to focus more on the ways in which "new, hybrid, or syncretic legal forms may emerge and become institutionalized" (von Benda-Beckmann and von Benda-Beckmann 2006: 19). Consideration of customary land tenure in those countries where it continues to be a significant feature of the legal landscape provides this opportunity.

Drawing on legal and anthropological research, this paper looks at contemporary examples of how Pacific islanders are negotiating the space between the two systems of customary land tenure and introduced land law, noting how the plural legal system provides an enabling environment.

The focus of this paper is on the Pacific island countries of Melanesia: Papua New Guinea, Solomon Islands and Vanuatu,[1] where, customary land tenure is the major form of landholding and traditional forms of social organisation and culture remain strongly influential. They are also countries experiencing rapid but unevenly distributed change and development which, while it can bring benefits to some, also threatens the livelihoods and social stability of others. Consequently adaptation strategies are required and where governments are weak, volatile, or under-resourced, people have to make these adaptations themselves.

[1] Fiji is also sometimes regarded as a Melanesian country but its customary culture and social organisation was strongly influenced by Polynesia due to its historical ties, especially with Tonga. New Caledonia although both Melanesian and in the Pacific region under consideration is not included here because it is not independent but remains an overseas territory of France.

The Context of Land and its Laws

The three island countries under consideration all came under the influence of British colonial rule in the course of the nineteenth century and with it, English common law.[2] They also shared the early-contact experience of land alienation to settlers – missionaries, traders and planters, which occurred initially with little restriction, and often with little formality. However, unlike the experience in some colonies, the existence of native land rights was recognised early on by the colonial administrators and by the last decades of the nineteenth century 'protective' measures had been put in place to prevent the wholesale alienation of land by indigenous people, and indeed to severely curtail indigenous land transactions. Although freehold titles granted to or acquired by non-indigenous settlers were generally upheld by the colonial administration and the Crown retained the right to acquire land where it was either deemed to be vacant and waste or where it was deemed to be necessary, by the time these countries became independent only very small percentages of land were held either by the state as public land, or under freehold title as private land.

Most land – around 95% in all three countries,[3] was held under customary land tenure and it may be this fact that led the respective governments of the newly independent states to leave unaltered the legal framework that underpinned many of the earlier colonial policies.[4] So for example, it is still the case that in the three

[2] Solomon Islands was not a colony but a protectorate, and Papua New Guinea (once united into one country of Papua) was a League of Nations Mandated Trust Territory (formerly a colony of Britain and Germany) and placed under Australian administration after 1918.

[3] In Papua New Guinea this is probably around 97%, in Solomon Islands this is about 90% and in Vanuatu around 98%. There are no accurate figures due to the lack of registration of land held under customary tenure.

[4] Some changes have of course been made. Freehold was abolished in Vanuatu at independence in 1980. In Solomon Islands, prior to independence in 1978, all freehold was converted into fixed term estates in the case of non-Solomon islanders and to perpetual estates for Solomon Islanders under the 1977 Land and Titles (Amendment) Ordinance. In Papua New Guinea, the Land (Tenure Conversion) Act 1963 authorised custom owners to apply to convert customary land into freehold. However ownership of freehold land is restricted by the Constitution and the Land (Ownership of Freeholds) Act 1976 to citizens, and it unclear how much land was converted in this way but it appears to be very little.

countries under consideration very little land is public land, prohibitions and controls on the alienation of privately held land to non-indigenous persons have been retained, and there are very limited forms of formal non-customary tenure – primarily, various forms of leasehold. It might therefore be argued that little has been done politically to eradicate the impact of colonial land legislation despite the fact that independence provided the opportunity to strengthen traditional land tenure forms, either implicitly or expressly. This inaction may also be due to the fact that colonial land systems only ever impacted partially on indigenous people in these countries. Colonial authorities had limited geographical and legal reach; parts of the population would not have engaged with any or very limited colonial administration and there were subjects, such as many aspects of family law that in turn impacted on customary land tenure, which fell outside colonial interest. Moreover, the imposition of separate legal regimes for administering justice to the native population meant that a diluted common law system was introduced, and even within this system, members of indigenous populations either did not participate in the development of the legal system or had very limited input until the period immediately prior to independence. Also significant was the enduring persistence of customary land systems throughout the colonial period, so that although not entirely unscathed at independence, reforming land tenure did not present a pressing issue for the early governments of these new states.[5] Consequently, contemporary land law is a mix of customary and non-customary law, both of which are formally recognised as sources of law, and neither of which can be said to emanate fully from the state, because in the case of customary law this is not homogenous in any of these countries, so there is no 'national' customary law, and in the case of non-customary land law, much of this was introduced prior to statehood or modelled on laws drawn from the Common Law of other former colonies.

This post-independence dualism of land governance, between customary laws and introduced land laws, might well have continued indefinitely were it not for the global environment in which even the smallest of Pacific islands exist; the tug of money, and the 'winds of change' which, while they may have shifted direction since they blew through the colonies in the 1960s, bring new aspirations, values and ambitions, not just for islanders but for those engaging with them. New forms

[5] Vanuatu might be regarded as exceptional in so far as all land was restored to customary owners at independence, although this was a process that had been commenced prior to 1980, and it did not mean the eradication of all non-customary forms of land tenure because existing freeholds were convertible to leaseholds.

of colonialism are reaching the Pacific and law and legal frameworks accompany them – just as they did in the nineteenth century.[6] Consequently the limited formal changes that have been introduced in land law post-independence have been largely directed at the commercial exploitation of land and/or its resources.[7] Failure of national governments either to clarify the scope and extent of customary law or to draw up national land policies has meant that for many Pacific islanders the only option has been to use the 'legal' tools that are to hand. So how are Pacific islanders in the twenty-first century navigating between their traditional land tenure systems and non-traditional introduced ones?

Traversing Plural Systems

The traditional characteristics of land rights in Melanesia are that they are unregistered,[8] acquired through lineage and kinship links and are inalienable because present holders or beneficiaries of such rights are regarded as custodians of the land for future generations. In subsistence economies and among rural communities land represents a communal resource and association with the land reflects ties of ancestry and belonging as well as being important to identity.[9] Land and land rights have always been the focus of contestation, and the customary rules

[6] Merry and Brenneis have for example argued in their comparison of colonial Fiji and Hawaii that

> Law was a central mechanism in … colonial endeavours … critical to shaping colonial relations' and that its 'effect comes through its capacity to regulate (and)… in the resources it affords -or denies- communities for their own use in managing conflict and shaping local sociality … legal arrangements affect the shape of social life and social inequalities (Merry and Brenneis 2003: 6-7).

[7] See for example, the Strata Titles Act 2000 in Vanuatu.

[8] This remains the case despite various attempts by colonial administrators to encourage the registration of land held under customary tenure.

[9] It has been said that "Land … is what a mother is to a baby. It is with land that he defines his identity and it is with land that he maintains his spiritual strength." (Sethy Regenvanu, speaking of land in Vanuatu at the time of independence, quoted by van Trease 1987: xi).

that govern customary land tenure are open to conflicting interpretations and fluidity. While the persisting relevance and significance of this form of land tenure cannot be denied, the underpinning values associated with land are being challenged and are changing in many parts of the Pacific because the value of land in terms of its commercial potential is being realised. Also, in some countries and on some islands within countries there is considerable pressure on land, and securing land rights or rights to the benefits to be derived from land – for example, from logging or mining royalties, lease rental payments, government compensation pay-outs or other financial benefits -- is leading to new conflicts between custom claimants and the adoption of new strategies to manage land and disputes. There are therefore, both internal forces for change and external ones.

Externally, agendas for development funded by donor aid, have included expressions of concern that "communal land ownership has held back indigenous entrepreneurship in the Pacific as it has everywhere in the world" (Hughes 2003) and that communal landownership is "the principal cause of poverty" in countries such as Papua New Guinea (Hughes 2004). Among development concerns are that communal ownership inhibits mortgage borrowing which in turn prevents market development and leads to the under-utilisation of resources; that customary tenure is static and cannot adapt; that dealings with customary right holders are fraught with difficulties and uncertainties and are therefore unattractive to investors. Approaching land from a very different normative perspective these criticisms may be directed at the persistence of communal ownership and the plurality of uses and interests that may arise in respect of land; the lack of formal records; the procedures for determining who may represent the communal interest in land dealings or the forums for resolving disputes that arise. Ironically, some of these perceived obstacles are attributable to the formal legal system itself and legacy of various laws introduced under colonialism.[10] Some are attributable to fundamental flaws in understanding or accommodating different perceptions about the nature and value of land,[11] or in understanding the social framework in which land

[10] Among the development inhibitors identified for PNG for example Lakau included the plethora of different land laws (40+), many of which were outdated; the fact that customary land was not accommodated within these laws; a highly centralised land administration system and a failure to implement national land policy at the various different levels (Lakau 1991: 21).

[11] It has been said for example:

> Land 'in custom', is not simply the site of produce, it is the mainstay of a cultural vision of the world. Land is the heart of

interests are grounded.[12] Frustration with land development is not however limited to external agencies. Internally governments, individuals or particular groups may seek to develop their land or utilise it in non-traditional ways.

There are, consequently, several ways in which plural land systems are being 'bridged' or routes between the two are being facilitated or essayed. These include specific legislation which seeks either, to recognise and build on traditional features of customary land tenure or incorporate these in some way; formal dispute resolution mechanisms which seek to incorporate elements of traditional dispute resolution, or ways in which people themselves are navigating between systems in order to derive new benefits or accommodate changing objectives.

Legislating for Hybridity

Examples of the first response can be found in specific legislation passed by national parliaments. The response of national governments (often at the behest of or responding to the pressures mentioned above) to the perceived inadequacies of the existing legal framework has led to the introduction of new legal structures that attempt to straddle the plurality of values and structures that govern land. For example, in Papua New Guinea the institution of the Incorporated Land Group was introduced to provide a means whereby a customary land group could register as a corporation.[13] The aim was twofold: to facilitate the restoration of plantation land to customary owners under the plantation redistribution scheme and to encourage customary landowning groups to use their land in ways which would allow them to engage with a developing and changing economy. Increasingly membership of

> the operation of customary systems; it represents life, both materially and spiritually ... that is why Melanesian men and villages are so extremely sensitive about their land and why they are so deeply rooted in the soil (Bonnemaison 1991: 17).

[12] As stated in *Kalmari v Titus* [2011] VUIC 2: 'land is not a commodity. It cannot be sold or converted. It is, to many Ni-Vanuatus a virtual book which keeps the sacred stories of the origin of their tribes; it feeds and protects them; and displays evidences of their own identity as a clan within the society. It is one's fate. It encompasses one's past, present and future from generations to generations.'

[13] Following a Commission of Inquiry into Land Matters in 1973, the Lands Group Incorporation Act 1974 was passed.

these groups have been recognised a means of claiming entitlement to royalties either from logging – such groups are required under the Forestry Act 1991, mining, or cash-cropping, or entitlement to compensation for damage to land from the activities of extractive industries. Consequently, drawing on complex patterns of kin and lineage based land rights, membership is frequently challenged and changed with incorporated land groups being formed, fragmented and reconstituted, in order to participate in the monetary and other compensatory benefits derived from these extractive industries. Several changes to traditional lineage and kinship patterns are emerging. Although in principle land group membership is meant to map clan and group membership and be administratively controlled by government, in practice membership is often controlled by resource companies in association with those putting themselves forward as land group leaders. Further, rather than identifying the membership of customary social groups, the incorporated land group is determining membership as people put themselves forward to be included in order to reap the benefits.[14] At the same time, because traditionally a person may hold land interests over land scattered geographically and through different lines of the family, customary land tenure provides the means whereby an individual or the representative of a social unit may belong to more than one incorporated land group.

Similarly, also in Papua New Guinea, the introduction of a lease-lease-back scheme under sections 11 and 102 of the Land Act, 1996, which was intended to provide a framework for the leasing of land held under customary tenure for enterprise development, either as agricultural or business leases, has been utilised in a way that was probably not intended. Under the scheme customary owners acquire a formal, non-customary leasehold title to their land, which can be used for attracting mortgage finance for agricultural or business development purposes beneficial to the lease-holders. There is also the potential for sub-leases or assignments of the leases to be made to a third party who in turn may develop the land or use it for cash-cropping. The intention behind the device was that the State acquires the land by lease (without payment or compensation) and then leases it back to the person or persons, or the land group, from which it acquired the land or, with the agreement of the customary landowners, leases it to a third party

[14] In a number of places the recording of group genealogies has been done, in order to ascertain membership of the incorporated land group. Although this does not amount to registration of the land itself and has been held not to be evidence of title – *Re Hides Gas Project Land Case* [1993] PNGLR 309, it creates a closed list for future purposes.

business group or other incorporated body. During the period of the lease – which may not exceed 99 years, all customary rights in the land (except for those which are specifically reserved in the lease) are suspended. This is intended to be a voluntary process that customary landowners initiate and drive. While the lease-lease-back process has been used successfully in some parts of Papua New Guinea to develop large agricultural projects, especially in the oil palm sector, the process has proved less successful in encouraging custom owners to engage in their own development schemes and has been criticised as encouraging a 'rent-dependency' approach to land utilisation because customary owners have realised that a lease-back to a third party generates financial benefits without the risk that markets will fall or crops fail if they cultivate the land themselves. The scheme has also provide an opportunity for enterprising individuals, who already have political and traditional status – for example, chiefs, ministers, Big Men, to enter into lease-lease-back arrangements without the consensus or even knowledge of their group. In some cases the members of the customary land group are ignorant of either the lease or its significance. This misuse extends to central government where there has been abuse of the lease-lease-back process in circumstances where the Government has leased directly to large-scale extractive enterprises such as forestry, without distributing any benefits to the customary landowners.

Innovations in the legal framework to facilitate logging in Solomon Islands have also tried to bring customary rights holders and commercial extractive agencies together, although with varied success (Farran 2008). The Forest Resources and Timber Utilisation Act (the Forest Resources Act) 1999, which was implemented with Regulations on 29 February 2000, was brought in to replace the previous unsatisfactory legislation - the 1969 Forest Resources and Timber Utilisation Act. The new Act was intended to put in place a number of procedural steps to safeguard the relative interests of all parties while facilitating commercial logging for national and local benefit. Importantly the Act recognises customary rights to timber resources by providing that any company interested in logging must negotiate with the local owners. Although there are a number of apparent safeguards within the legal framework, the reality of timber extraction in Solomon Islands has been characterized by disputes, corruption, the emergence of new elites and the inequitable distribution of any benefits, as well as the unsustainable extraction of hardwood timber – it is estimated that if logging continues at the rate experienced over the past decade, the natural forest in Solomon Islands will be commercially exhausted by 2013 (ADB 2010: 29). Nevertheless, what is interesting about the Solomons' experience is that disintegration of central government in a period of civil and political unrest at the turn of the century, meant that not only did the executive and logging companies circumvent, ignore

and short-cut the legal framework, but also that customary land owners took matters into their own hands, negotiating directly with logging companies. It has also been the case that logging, and the financial rewards attached to it, has provided a new milieu for the advancement of the traditional Melanesian 'Big Man' at local, provincial and central government level, so that traditional political status has been used to facilitate logging – through representation of custom owners and negotiation with logging companies, and has been enhanced by the new riches and power generated by logging contracts. Recognition of the customary owners in the legislation therefore, conferred a formal role on these but at the same time allowed traditional political structures to be manipulated so that some individuals could use customary forms of 'wantokism' and recognised forms of individual status to accumulate individual wealth, which while it might be subject to redistribution, would not necessarily go to all those who would be beneficially entitled in custom.

In Vanuatu it is not so much legislation that has changed land tenure, as the policy and practices of successive governments and especially Ministers of Lands, since the 1990s. As with other Pacific island countries, on independence the common law lease for a fixed period of time – up to a maximum of seventy-five years, was retained in Vanuatu, and secured in subsequent legislation. Although originally intended to encourage continued agricultural development by settlors who had lost their right to freehold in 1980, in recent years, especially through the last decade of the twentieth century and the first decade of this century, the approval of leases and particularly sub-leases of sub-divided leased land, has been much more liberal, resulting in a noticeable increase in the percentage of land alienated under leases to foreign investors either for residential purposes, for tourism or for commercial purposes. Recognition of this as a result of published field work in 2002 (Farran 2002), and subsequent awareness raising, informed resolutions emerging from a National Land Summit in 2006 (Tahi 2006). Although this has yet to yield positive results, it provided a platform for highlighting the challenges posed by changing land use, which in turn has manifested itself in localised strategies to use a variety of legal avenues for improving land security. Some of these will be considered below.

Traversing a plurality of forms and forums

Examples of the development of hybrid forums traversing plural legal systems for dispute resolution, can be found in the structure of courts and tribunals which hear and determine land issues and in the procedural forms which are adopted within

these. In all three countries there is a degree of parallelism and cross-over between the forums that hear disputes over land governed by non-customary law and those that hear land held under customary tenure. Because the same parcel of land may be affected by inter-connected disputes, for example arguments over customary rights which impinge on arguments over who can grant a lease or receive financial benefits generated by the land, litigants move between these fora and in doing so adapt and adopt different ways of presenting arguments and substantiating claims.

In all three countries the formal courts – which are modelled on the English system of higher and lower courts, have jurisdiction to hear disputes regarding non-customary land. In Papua New Guinea, disputes about ownership or use of common law freehold, statutory freehold of converted customary land, and State owned land, are determined by the National Court, with appeal to the Supreme Court. In Solomon Islands, disputes about ownership or obligations of owners of perpetual or fixed term estates, and also about leases, are determined by the ordinary courts, i.e., the High Court and Court of Appeal, as are disputes about what land is public land, and disputes regarding the alienation of public land. In Vanuatu, disputes about ownership of government land, and disputes about non-customary dealings with customary land, are determined by the Supreme Court, with appeal to the Court of Appeal. Characteristic of these formal courts is the reliance on sworn evidence and oral testimony, strict procedural rules regarding the order of pleadings and the teleological aim of arriving at a final, binding ruling under which one party will be the winner and the other the loser. The process is adversarial and the parties may or may not be represented by lawyers who will often be strangers. Decisions, which are meant to be impartial and based only on the law, are made by judges who may, in the case of the appeal courts, be foreigners. The principles that influence the court will be previous decisions of the highest level of courts or the equivalent level if there is no higher court decision, and often the persuasive authority of decisions drawn from jurisdictions outside the region, such as England and Australia.

Within the formal system however, as indicated, separate dispute forums for customary land claims are also formally recognised – in whole or partially,[15] for

[15] For example, in Papua New Guinea disputes about ownership or use of customary land are often resolved by customary processes of: discussion; mediation; chiefly decisions, usually with the advice of elders, and occasionally force. Although these are recognised as legitimate processes in custom for determining disputes about land, and can be enforced by customary processes, they are not enforceable by the State, and often will not be regarded as conclusive by

example the Customary Land Tribunals of Vanuatu, the Customary Land Appeal Courts and Local Courts in Solomon Islands and the Land Courts in Papua New Guinea. Although these courts have separate jurisdiction the barrier between these fora and the ordinary courts is not absolute. In particular evidence derived from introduced land law may be put forward in customary land courts to support claims; for example, documents of contract and sale, or prior court decisions are used to support purported title to customary land or claims to land settled in custom. Alternatively, the ordinary courts may be involved in judicial review of the conduct of customary land courts or tribunals, or become involved because non-customary legal issues are being raised, for example the validity of a lease, the management or distribution of monies arising from the land, questions of succession or mortgage.

While a plurality of courts/tribunals hearing land disputes can lead to forum shopping it also reflects the different ways in which land is being used. For example, in Vanuatu while the ordinary courts have no jurisdiction to hear disputes relating to land held under customary tenure, they do have jurisdiction to hear any disputes regarding leases. So where the former land is leased then there may be issues that fall into the jurisdiction of two separate forums. Similarly, in Solomon Islands, the ordinary courts will not adjudicate customary land disputes but will adjudicate in timber rights disputes. So, for example, where there is a dispute regarding a timber rights agreement between different representatives of the customary land group, the High Court may grant an injunction to protect the logging company engaged in timber felling on the land, or may grant an injunction to order logging to cease, pending the outcome of the land dispute. Indeed it has been realised by the High Court that:

> in all of these cases involving logging on customary land, the propriety of the logging license cannot be entirely separated from issues of ownership of customary land. As those involved in the process of administering the law on forest and timber know, sensitive issues of custom do very much affect the procedure of obtaining a logging license on customary land in this country. Thus where the issue of ownership or other rights in custom over customary land is in dispute touching on the propriety of the logging license, a party cannot simply isolate the issues of custom and come to this (court) on the sole issue of the legality of the

the opposing parties, leaving open the possibility of further, future disputes.

license.[16]

Parties also realise that forum shopping can delay the resolution of a dispute – often for a number of years, which can be advantageous because the status quo may prevail pending a final outcome. In this way plural dispute fora can be exploited.

At the same time some of the features of distinct fora for hearing customary land matters are being lost through a process of hybridisation. For example, usually the procedures in the courts which hear customary land matters include modified formal rules of evidence so as to accommodate customary claims based on hearsay, oral evidence and narratives of genealogies. For example in Vanuatu, until 2000, land disputes affecting customary land were heard by the island courts.[17] Provision was made that each island court was to have at least "three justices knowledgeable in custom … at least one of whom shall be a custom chief residing within the territorial jurisdiction of the court" (Section 3(1)),[18] and the courts were expected 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" (Section 10).[19] However, in determining land disputes (as in other matters) these courts are presided over by a magistrate, and as magistrates have become more professional and immersed in the non-customary law through university education and the practices and procedures of the magistrates courts, the island courts have been

[16] *Halu v JP Enterprise Ltd* [2003] SBHC 123.

[17] The establishment of these is provided for under the Islands Courts Act 1983, which confers on the Chief Justice the power to establish island courts by warrant.

[18] Prior to contact, 'chiefs' were not generally a feature of Melanesian social organisation but the colonial authorities found the role a useful one and promoted it to the degree that it is now an entrenched feature in Vanuatu (Bolton 1998). The existence of 'custom' chiefs and 'mission' chiefs (or condominium chiefs) confuses the land picture as explained in *Kalmarie v Titus* [2011] VUIC 2, which is considered below.

[19] There are also provision relating to orders of community work in lieu of fines or imprisonment and the power to order payment of compensation to victims, both of which find some resonance in customary practices. The legislation also provides that 'an island court shall not apply technical rules of evidence but shall admit and consider such information as is available' (Section 25).

increasingly influenced by state law, rather than customary law.[20] Although the island courts lost their land jurisdiction in 2000,[21] they have continued to hear a backlog of land cases and have been instrumental in the changing articulation of land claims.

In the two systems of courts different rules of procedure and evidence apply. For example, litigation involving leases which come before the formal courts – usually the Supreme Court, rely for evidence on documents of contract, registration, mortgage and so on. If custom is pleaded then it must be proved, it is not accepted as law,[22] and indeed it may be necessary to establish that the custom is one that is generally recognised rather than one that is merely local or particular to the plaintiff and/or defendant.[23] Disputes which come before the customary land tribunals on the other hand, or even the island courts, rely on oral evidence, much of it hearsay and unsupported. However, close analysis of what happens in courts where customary land disputes are being heard suggests that some litigants, and indeed those presiding over the court or tribunal, are adopting or adapting the language,[24] concepts and institutions of the introduced colonial system when litigating,[25] and presenting evidence in ways which have some characteristics of the formal courts. What is emerging therefore is a procedural hybrid in which certain aspects of the introduced, former colonial, land system is being merged with customary land tenure and vice versa.[26]

[20] For an assessment of the Island courts see Jowitt 1999; Weisbrot 1989.

[21] A new tier of courts was established under the Customary Land Tribunal Act 2001, "to provide for a system based on custom to resolve disputes about customary land" (Section 1). Although various customary practices are incorporated into the Act, in practice these tribunals have not been a success and are now under review.

[22] See more generally Zorn and Corrin Care 2002: 612, 638.

[23] The decisions of the courts are not consistent on this; for example, in the case of customary adoption it appears that different local customs are acceptable. However, fear of the rule of precedent may deter a judge from accepting an argument based on custom – see *Boe and Tage v Thomas* [1987] VUSC 9.

[24] For example, of 'ownership', 'occupation', 'rights': see Guo 2011.

[25] For example, the institution of the trusts is used quite commonly in Vanuatu and in Papua New Guinea by the incorporated land group.

[26] Reflecting Levi-Strauss's 'bricolage' theory cited by Westmark 1986: 131.

For example, in the Final Report of the National Land Summit it is stated in respect of the identification of legitimate custom landowners, 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 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 et al. 2008: 29). However consideration of a recent case heard by the Island Court suggests that not only are there clear customary rules being articulated and recorded, but that evidence is being presented in non-customary ways. The case of *Kalmarie v Titus* [2011] VUIC 2, concerned a land dispute between the original claimant - Kalmarie, and ten counter-claimants. The Island Court Civil Procedure Rules section 8, states that the courts are empowered "to apply customary law of the area in dispute when determining customary ownership. However the decision must not stand against the spirit of justice, reality and good order." So, although the Constitution declares in Article 74 that "the rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu", acceptance of those rules is subject to "the spirit of justice, reality and good order". Two things flow from this: first establishing the custom rules – presuming that custom can be identified as 'rules', and then applying these in such a way as to comply with the caveat. In Kalmarie the applicable custom was that of North Efate (the island of the capital Port Vila). At the outset the court stated what the rules of this custom were:

> North Efate custom dictates that inheritance over customary ownership of land passes through patrilineal system. However the following are the exceptions:
> a) Matrilineal system if the only surviving descendant is a woman.
> b) PUMAS or custom will;
> c) Compensation;
> d) Adoption, (but the adopted person must be biologically related to the adopted family).

The principle that appears to emerge from the rules is that succession to land – and this is how claims are established, is patrilineal with some exceptions. This appears to be a clear statement of law. However, the court goes on to recognise that these rules do not exist in isolation but are closely associated with social organisation, which makes the application of the rules rather less clear. Customary land tenure is shaped by the management and allocation of rights and that depends on a system of chiefs, associate chiefs, family leaders and a local council of

chiefs.[27] The Head Chief allocates a parcel of land to his assistant chief(s) who subdivides and allocates plots of that land to leaders of familis. The allocated lands become the properties of the receivers. However a tribute or tithe (*nasautong*) must be paid annually to the Head Chief. Thus, two customary aspects interact with the fairly clear principle: land powers associated with customary status, and observance of custom. The court refers to this payment as a 'custom lease' although formally there is no such thing and in practice it has the characteristics of a rent or tribute rather than a lease, but the phrase is an interesting example of hybridity across forms and language.

In establishing rights under the stated principle the court expected claimants to show:

1. That their tribe began on the land. And that there are descendants of the same tribe; going back through generations as far as he/she could.
2. That they are knowledgeable in the past and present cultural practices of the area in dispute; and
3. That they are confident with the boundaries of the land in dispute.

The Island court is not required to apply "technical rules of evidence but shall admit and consider such information as is available" (Section 25 of the Island Court Act, CAP 167), and each claimant is entitled to call five witnesses who are meant to submit a written statement on which they can then be cross-examined. Corroboration of evidence goes towards building a 'probable' case, which is the

[27] This is set out in the Kalmarie judgement and can be summarised as follows:1. Head Chief: Controls manages and protects lands in the interest of his people. The Head Chief appoints an Assistant Chief or head of each tribe/clan/Naflac (Naflac is a group identified by a common totem); 2. Assistant Chief(s): assists the Head Chief in the management of the land. He/they performs specific custom duties such as being: Warriors, Munuwei or custom spirit/clever/witch**,** messenger, etc. The brothers and/or brothers-in-law of the Head Chief hold this position and are answerable to the Head Chief; 3. Leader of Family, who is immediately under the Assistant Chief. He is responsible for the family affairs in a unit or household. These leaders are answerable to the Assistant Chief**;** 4. Council of Chiefs, which is a group of Assistant Chiefs chaired by the Head Chief of the village to discuss and make decisions in all matters for the good governance of the community.

burden of proof. This evidence focuses on genealogies, knowledge and identification of boundaries, recollection of cultural events and practices. However, it has been recognised in the Island Courts that most evidence is hearsay, often incomplete and sometimes framed at the request of one of the claimants. In the case of *Family Sope Imere (Mele Village) v Mala* [1994] VUIC 2, the present Chief Justice (then a magistrate) referred with approval to a decision of the Supreme Court (which at the time had appeal jurisdiction of customary land cases) in which it had been stated:

> When there is a conflict in tradition, custom story about land, one side of the story must be right and the other side must be wrong. This does not mean that both parties are no honest in their belief, both may be honest in the belief, however in cases like this, the behaviour or the way in which evidence is given in court may help reach the truth. Therefore, the best way to test custom history or tradition is to refer back to the happenings of the recent years as presented in the evidence, and consider one of the history given in court which that would most probably be close to the truth.[28]

In determining probability of truth demeanour under cross-examination – rather than the respect afforded in custom to status, becomes important, and although not essential, supporting documentary evidence is becoming increasingly relied on, especially documented family trees and sketch maps of boundaries and physical evidence of events or landmarks, such as photos and artefacts, or permanent markers for custom graves on the land such as concrete slabs (mission graves are discounted as are decisions of the Joint Court under the condominium).[29] In the *Kalmarie* case, for example, the presiding magistrate commented with approval on the 'comprehensive' family tree of the tenth counter-claimant, which linked him to

[28] *Malas Family v Songoriki Family*, [1986] VUSC 12.

[29] *In Family Sope Imere (Mele Village) v Mala* [1994] VUIC 2, it was stated: 'The court would like to clarify the fact that Joint Court Judgement on registration of the disputed area, is not binding to the court in any way, Joint Court decisions were based on the legal basis of land ownership of the white settlers. Furthermore, as a result of those decisions, rights of the native land owners were taken away. The Joint Court decisions took place [long] ago, because at that time the Condominium Government of New Hebrides failed to consider the views of the custom owners'.

four of the other counter-claimants, and noted with similar approval that the fifth counterclaimant "has put tremendous effort in presenting this case before us".[30] Indeed in presenting his evidence to establish his ancestors' spiritual and cultural attachment to the land his evidence seems – somewhat improbably, to have dated back to 1330. The credibility of his claim rested on several factors: his ability to show the court traditional sites and cultural attachment to the place in dispute, through traditional stories and sacred places within the land; the transplant of place names from place of origin to place of residence; the retention and practice of certain construction skills; and paper evidence in a French book describing the movements of islanders in which there was cross reference to persons and events relied on by the claimant. Despite his convincing evidence, however, this claimant was unsuccessful. The crux of the matter was whether absenteeism – by the claimant's ancestors, from the land was a matter to which the court should have regard. In a previous case it had been held that long possession could not prevail over customary ownership even of absentees,[31] and a line of reasoning adopted in the Solomon Islands,[32] that the concept of acquisition of ownership by adverse possession, or loss of rights through failure to bring an action after the elapse of a certain period of time, were incompatible with custom. However, in Efate, the island council of chiefs has drawn up a document of customary law: the Vaturisu Customary Land Laws. Ironically, impetus for this was as a result of the resolutions of the National Land Summit, referred to earlier, and the failure of the national government to take any steps to more clearly articulate what customary law, referred to in the constitution, was to apply to land. This statement of laws, contrary to the previously outlined position, stipulates that "customary ownership of land on Efate is determined by physical occupation which can be realistically proven going back at least 6 generations of the descendant of the original occupier utilising the land in question". This clearly departs from the prior position but is arguably a pragmatic solution that draws from the customary tradition of establishing genealogies while seeking some form of certainty, especially on Efate, which as the capital island has long had a history of immigration and land occupation.

[30] Similarly, with the eleventh claimant the presiding magistrate observed: 'This claimant has done a marvellous work of art and research'. Although perhaps more in line with the customary narration of claims, most of this was rejected as being historical relating to stories of origin rather than the piece of land in question.

[31] *Manie v Kilman* [1988] VUSC 9, where the Chief Justice said: 'long possession cannot prevail over the true custom ownership of the land'.

[32] *Buga v Ganiferi* [1982] SBHC 4.

Looking at the evidence presented and challenged in the 2011 Kalmarie case, also suggests a shifting dynamic. A number of the witnesses were elderly, and many had gaps in their knowledge. Given the changes taking place in Vanuatu, it is also probable that over the next decades the type of evidence that can be presented by witnesses will change. Knowledge of traditional practices is being lost. Many urban dwellers do not have close links with their ancestral lands and may seldom visit. Although many bodies are returned for burial in their ancestral lands, increased urbanisation means that ties with these lands are increasingly attenuated, especially among younger people. Landmarks are changed and changing, either due to natural occurrences or because of changes in land use and cultivation. In a changing media environment, oral histories may be lost and some indigenous languages have already disapperared, and therefore place names have already been lost or are endangered. Where custom is reduced to writing then that process too, may change the custom – as with the statement of laws of the Vaturisu. These changes are just part of a larger, although fragmented picture of the ebb and flow of plural legal systems.

Navigating with a Purpose

This process goes further and brings us to the third way in which plural systems are being experienced. At a pragmatic level people are adapting and adopting legal forms and frameworks to meet their own objectives. Woodman has suggested that the customary law observed by the courts and that observed in social practice may be different (Woodman 2001). However, I would suggest that the 'transformation' to which he refers to describe the process that occurs when "a body of norms which has been observed as part of the social order and enforced outside and independently of any modern state institutions is then adopted and enforced by the courts and other institutions of a state" (Woodman 2001: 27), can operate in reverse. In other words, Pacific Island people are adopting the body of norms and their manifestations (or elements of them) that are observed in the courts and formal legal system, and incorporating these in ways that have consequences for social ordering. Guo, for example, in her research among the Langlanga in Solomon Islands found that narratives of lineage were being adapted to meet evidential requirements acceptable to the courts hearing land claims, so that 'law' had become a genre of discourse appropriated by people to frame their relationship with land and incidentally their relationships with each other because land and kinship are social inseparable. She refers to this co-evolution of the local and the legal as creating a new "legalscape" (Guo 2011). While the law is regarded as only one aspect of this shaping and reshaping of peoples' relationship with land,

which itself is subject to constant modification as strategies are tried and tested in court, and succeed or fail, the process of litigation provides a creative forum for adaptation.

In Vanuatu, my own research into narratives of land claims suggests a similar selective process for the presentation of evidence to support kinship and origin claims, whereby the strength of evidence is measured by corroborative narrative of events and geographical knowledge, as well as hard-copy evidence, and the number of generations back that can be convincingly named (Farran 2010). There is a tendency towards a simplification of lineage histories with the exclusion or inclusion of certain kinship ties depending on their utility as evidence that is both comprehensible and acceptable to the court. Extended networks of kin are excluded unless they can usefully link to co-claimants (as demonstrated in the Kalmarie case considered above), and the narration of boundaries is reduced to sketch plans. Indeed a reading of land dispute cases coming before the island courts or more recently, the customary land tribunals suggests that the 'obscurity' and 'complexity' of customary land tenure may be a myth propagated by those seeking to develop the land or to avoid the complexities of understanding how the system works. In this way aspects of customary land tenure can be used as a shield – by those resisting development, or misused by those seeking to circumvent the interests it protects. Alternatively there are those who can see the advantages and disadvantages of customary land tenure and those of other land tenure forms and manoeuvre accordingly.

This process of interlegality or interaction between two systems[33] is illustrated by the manipulation of lease registration in Vanuatu. In Vanuatu only leases are subject to registration. There is no system of registration of customary interests in land, and even the registration of leases does not directly provide any indication of customary ownership. Indeed many custom land owners are suspicious of proposals for any such registration believing that this may be a means whereby the Government (or foreigners approved by the government) will take away their land. However, some ni-Vanuatu see registration of leases as advantageous. In field studies undertaken in 2010,[34] researchers found that in some cases registration was

[33] This is a term used by Svensson 2005: 74.

[34] These were field studies undertaken on two separate islands, Epi and Tanna, by a World Bank Programme *Jastis blong Evriwan* (Justice for the Poor). The reports of their research can be found on the World Bank site http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/E

viewed in a positive light because it afforded an unchallengeable right to the land and thereby conferred a security of title that was not available under customary tenure. The use of registration in this way can apply to formerly alienated land where continuing disputes since independence have meant that registration of any pending leases has been delayed. Registration can also be used to secure new leases (over non-alienated customary land) where there are or may be customary disputes. In such a case registration of a lease will effectively trump any unwelcome customary claims, at least for the duration of the lease because of the indefeasibility of title conferred by registration. Tactics for securing such leases vary. In some cases the present occupants may take it upon themselves to go to the capital and register a lease in favour of other members of the family, or may approach the Minister of Lands with a request to exercise his power to grant leases over disputed lands,[35] even where the land is subject to pending court actions or the conflicting claims have been ruled on.[36] In this way registration of a lease may be used to secure present occupancy in the face of threatened dispute – particularly where land is being occupied and used by 'incomers' even if they have been there for several generations, or to secure mortgage finance over the land for development purposes such as tourism, or to facilitate sub-division, or to silence or bring to an end a long running dispute which has not been resolved by the various customary and non-customary forums. Women may also use leases to secure rights for themselves in patrilineal societies or to secure rights for their children if such rights seem precarious, perhaps because of family breakdown or land shortages.

Growing awareness of the advantages of leases for securing their own rights to land has also been demonstrated by a greater willingness to challenge leases registered to others and the case law suggests that increasingly registration of leaseholds itself is being challenged by those whose claims to customary land predate any registration. Often these challenges are triggered when the monetary

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[35] Under the Land Reform Act 1980. This Act, which was originally intended to apply to land that had been alienated prior to independence continues to be used even where land that has never been alienated is in dispute.

[36] Although the exercise of the Minister's powers in the face of court rulings or where he knows litigation is pending have been challenged this continues to happen. See V*alele Family v Touru* [2002] VUCA 3, and the Resolutions of the National Land Summit 2006.

value of land becomes apparent in the course of lease negotiations or thereafter. The system of registration is being used therefore, not only to secure leases for lessees – thereby fulfilling its intended (state) purpose, but also to assert customary claims against lessees and sometimes against those who granted the lease, or to secure customary land rights within the customary structure. These dynamics of change in plural legal systems are not state-led – although they may be directly or indirectly state-endorsed, or the outcome of any conscious policy, but rather the result of people using the plurality of legal tools available to them to secure desired ends.

In some cases even unsuccessful colonial policies appear to be being re-invented by indigenous people. For example, in Papua New Guinea, Goddard has written about the re-drawing of kinship narratives to support land claims among the Motu-Koita people who live near the capital Port Moresby and who have increasingly come to feel marginalised and under-compensated for the urban sprawl on their traditional lands (UNESCO 2001; Goddard 2010). This has led to an increase in litigation in the formal and informal courts as the commercial value of land becomes more important (although land alienation has been experienced by these people for over one hundred years). This is turn has had two consequences: it has influenced land discourse and practice among villagers, and it has changed legal constructions of custom. Notably, Goddard asserts that "patrilineal idioms which were once only a small part of the consideration of rights to land use among the Motu-Koita are becoming transformed into legal rules" (Goddard 2011). This shaping of kinship rules has come about because of the legal preference for consistency when courts engage with customary land claims, in a legal environment in which courts accept oral history, legends and mythology as legitimate evidence in the investigation. Attempts to engage with the vicissitudes of oral narratives and understandings of customary land holding were made in the colonial period, notably by Land Commissioner Bramell.[37] A preference was given to interpreting kinship structures as unilineal (patrilineal) which was both pragmatic – because colonial administrators dealt only with men, and less complicated than taking into account various other possibilities.[38] Despite its

[37] This resulted in a document: 'Native Land Custom' composed by J.C. Bramell in 1964.

[38] Although Goddard points out that Bramell did record the 'cognatic' element noticed by anthropologists (Goddard 2011), Bramell also acknowledged that 'land custom' did not remain constant and that the word 'ownership' was not an altogether appropriate interpretation of local traditional understandings of

colonial antecedents which might have been rejected by now, Goddard suggests that the version of custom now being used in the land court demonstrates the process of a gradual transformation of a patrilineal idiom into a rule, as "customary behaviour becomes increasingly subjected to Western juridical principles".

By contrast, Eves writing about the Lelet people – also in Papua New Guinea, has indicated how a shift to long term crops, notably coffee, has motivated some villages to move away from customary plural inheritance rights to land, to focus on unilineal rights, here matrilineal rights, in order to rationalise the number of possible claimants over the land whose claims might disrupt the long tenure needed for coffee cultivation. Legal, and consequently kinship changes are being proposed by way of village constitutions abolishing certain land claims, notably patrifilial claims (Eves 2011). Perhaps paradoxically, the present land tenure reforms are not dissimilar from those proposed during colonial times. Then and now the proposed reforms posed a threat to the flexibility and fluidity of customary land tenure systems and potentially threatened to undermine social relationships. This might still happen and if the proposed reforms succeed communities may become more fragmented and new forms of land conflict could arise. Nevertheless, this selective adjustment to the kinship underpinnings of customary tenure marks a conscious effort to adapt the former because of changes in land use being brought about by development – here mono cash crops which require long-term security of tenure for a limited number of people.

Conclusion

What do these shifts in the accommodation of different forms of land tenure in the Pacific region tell us about legal and cultural pluralism? Merry has suggested that "state law penetrates and restructures other normative orders through symbols and through direct coercion" and, at the same time, that "non-state normative orders resist and circumvent penetration or even capture and use the symbolic capital of state law" (Merry 1988: 881). There is some evidence to suggest that this is happening is these Pacific island states. It is also clear that the law relating to land is illustrative of Moore's theory of semi-autonomous social fields in which a legal system may have "rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and

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landholding, and he recognised that the introduction of a cash economy had affected Motu-Koita approaches to land-use.

does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance" (Moore 1978: 56). Clearly in Melanesian countries to suggest that customary and state law are two separate systems in a plural whole or are the antithesis of each other is over-simplistic, as is distinguishing between law and other forms of social ordering especially in the context of land. Nor is it helpful to seek a hierarchy of normative orders when so much land is held under customary tenure or to suggest that there is a clear dichotomy between the colonial past and the post-colonial present. Pacific Island people are navigating between tradition and modernity every day, and for some this involves reshaping the legal landscape. The pattern is piecemeal with the result that new hybrids are adding to, rather than reducing, the plural framework. Arguably, however, it is because of this plurality that this navigation is possible.

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