

THE CONSTITUTIONALITY OF LAND DEALINGS IN VANUATU

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Introduction

The purpose of this paper is to explore the occurrence of dealings in customary land which occurred in Vanuatu, then known as New Hebrides, before it acquired independence, and to consider the constitutional validity of those dealings after the Constitution of that country came into force on 30 July 1980.

The first part of the paper will provide examples of dealings in customary land by the owners. Such dealings took place by way of gifts, given on the basis of affection, and also on the basis of gratitude for services rendered to the donors. Transfers of land are also recorded as having been made by way of custom sales, and also by way of exchanges. Forceful acquisition of land by right of conquest also occurred on occasions.

When the Constitution of Vanuatu came into force it stated that all land in the country belongs to the indigenous custom owners and their descendants. This raises the question, which the paper explores in the second part, as to whether people who acquired custom land otherwise than as by descent from indigenous custom owners, are now entitled to claim ownership of that land.

Custom Land Dealings in New Hebrides before Independence

There are some people who say that customary land cannot be alienated. An example is the statement issued earlier this year by the Melanesian Indigenous Land Defence Alliance (MILDA) at a meeting held at Buala, Isabel Province, Solomon Islands, known as the Buala Declaration

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2016: “In all Melanesian traditions, land is regarded as a non-alienable resource that cannot be parted with.” This is no doubt a fervent wish of persons making up MILDA.

But it is not the reality. When one looks at the court records of the transactions that occurred in earlier times before independence, one can see many instances before independence of land dealings between indigenous New Hebrideans, both *inter vivos* and by custom will.

Sales of land inter vivos Looking first at transactions of sale of customary land made between indigenous custom owners and indigenous purchasers, one sees cases such as the following:

(a) *Lale and Sipora v Silas* [1980-88] 1 Van LR 221- This case concerns land in Malekula, known as Peterevat, which was claimed by Nicholson Silas, but disputed by Simon Lale. The judgment contains reference to two sets of sales of customary land by custom owners – the first sales of custom land referred to were sales of portions of custom land to 5 different people, Paul, Italy, William, Eric Moses and Semino, and the second transaction of sale was to one person, Chief Bembi:

Cooke CJ, p222: “Nicholson Silas admitted that land within Peterevat was sold by him to Paul, Italy, William, Eric Moses and Semino and that he accepted such sales...He did not agree that Ephraim Maltok purchased land from him within Peterevat...I am of the opinion that he is the correct owner of the land at Peterevat.”

Cooke CJ, p223: “I considered the submission of Chief Willie, on behalf of his son, Willie, who was adopted by Chief Bembi, to the land in the north east corner of Peterevat. He stated that ...his father sold it to Chief Bembi and many people paid for the purchase of the said piece of land. He said that his son who was adopted by Chief Bembi should get the land...I was satisfied that this piece of land was in fact obtained by his ancestors and sold later to Chief Bembi, and later given to his adopted son....I therefore consider that this portion of land belongs to the adopted son of Chief Bembi (Willieson)....”

(b) *Family Mermer v August Taliban* [2003] VUICB 2 This case before the Malekula Island Court concerned a dispute between two different families, Mermer and Taliban, as to the ownership of land in Malekula Island, called Fali. As evidence that he was the custom owner of Fali, August Taliban relied on the fact that his father, Pierre Massing Wakon, had during his lifetime sold 14 pieces of that land to different purchasers:

“Taliban said when he was spending his life with Pierre he noticed the customs which other men made to Pierre that made him think that Pierre Massing Wakon, was the true owner of Fali. One other reason why he said this was that he saw Pierre sell many pieces of the land to people and to the Catholic Mission which is now located at Fali. There were 14 pieces of land which Pierre Massing Wokon sold as follows:

1. Poli Marmar he sold to the Catholic Mission,
2. Loli Taen he sold to Albert Baip,
3. Lone Bulbul he sold to Yalfang,
4. Lone Tinisam he sold to Tete Baip,
5. Poli Raholiman he sold to Dominique Sulol,
6. Lone Pato he sold to Tugon Jean,
7. Lone Jibak he sold to Noel Mermer,
8. Poli Tubu Nalili he sold to the Catholic Mission,
9. Poli Woeke Wo he sold to Bae Charlie,
10. Lonre Ho he sold to Lolten Alexis,
11. Loli Polwa he sold to Worwor Lino,
12. Ran Wap he sold to George,
13. Poli Peta Genegere he sold to Guleg Jose,
14. Poli weke Salsa; he sold to T Bak Lulu Stanislas.”

(c) *Family Tantan Amos v Family Maily Amos (Worwor)* [2004] VUICB 5 This was a decision of the Ambrym Island Court, 18-20 August 2004, relating to a dispute as to the ownership of land, called Sulol, near Craig Cove, in West Ambrym, which was claimed by Family Tantan Amos and by Family Worwor. The Worwor Family relied upon evidence of the following sales of Sulol land by their ancestors. Altogether 5 ancestors of Worwor family were claimed to have sold land from the Solul area: Willie Uleng, Kaonmal, Meleum Takon, Galine, and Mari, and of these, 1, Meleum Takon, was said to have sold 25 pieces of land:

“The spokesman of the Family Worwor stated also that there were reports which showed that some old people from earlier time had been selling land of Sulol, and none of these people were from the Family Tantan. There was old Willie Uleng and old man Kaonmal. The spokesman for the Worow Family said that there was one piece of land in the Sulol area which was bought by the Catholic Mission, and it holds a lease title to this day. The Spokesman said that there were three

old people who sold land at different times: there was old Meleum Takon, who sold 25 pieces of land in 1896, and later old Galine who sold land in the year 1898, and the last of the three ancestors was Mari who made sales in 1898. None of these people, said the spokesman of the Family Worwor, were from the Family Tantan. “

(d) *Arudare v Garae* [2012] VUIC 5 Several families were claiming ownership of a piece of land on the western end of Ambae Island, now known as Redcliff, roughly where the Redcliff airstrip is located. The Island Court described how part of that land, called Lo, was sold to the ancestor of another claimant family, Tariala:

“Around the 1800's tribal war escalated inland causing several tribes to move down seawards to find refuge at the land territory of chief Boe Sasavi and his tribesmen. These immigrants had been allowed to settle at the area and continued to till the land causing significant subsistence farming thereon to date with their descendants. None of these tribes had purchased or entered into some form of customary accord with his clan over their occupation of land areas, except Charlie Tariala who purchased a plot of land from his ancestor Qwak Vinat at Lo area in 1907 after returning from Queensland, Australia.Robinson Tariala is disputing ownership of a plot of land at Lo claiming it to have been purchased by his ancestor Charlie Tariala in 1907 from Quak Vinat son of chief Boe Sasavi, customary owner of the land. He had entered into such a transaction after returning from Queensland, Australia. His primary intention for securing such piece of land was to build a church for purposes of spreading the gospel of Jesus Christ....Our finding is that there is sufficient evidence proving that there was a land transaction that had taken place in 1907 between Charlie Tariala and Quak Vinat, owner of the land of Lo...”

(e) *Awop Family v Lapenmal* [2007] VUIC 2 This case was concerned with a dispute between several families about the ownership of an area of land in north east Malekula, known as Amelprev. The claimant, and also some of the ten counter claimants, brought evidence of earlier sales of land by their predecessors as evidence of their claims to ownership. Indeed so many of the claimants were selling pieces of land that the court considered that such sales could not be regarded as reliable indications of ownership.

“ Elsiem Utissets appeared for the original claimant ...led evidence that the land belonged to David Telvanu being the last survivor of the land of Amelprev and [the widow] Tolsie is the only surviving bloodline of the land of Amelprev.....

To re-enforce his history he provided that dwellers of the area have long recognised her tribe as the customary owners of Amelprev. For such recognition certain local occupants such as Alick Nawinmal, Etienne and others have purchased parcels of land from...inside the areaBut again this is another common transaction also undertaken by some of the parties in this context respectively. Almost all claimants to this case have sold land to other dwellers....

Counter Claimant 4 Louis Ureleles representing Family Lolinmal...led evidence that...many local residents of Rano have purchased land from Louis Ureleles....It is accepted that local residents of Rano have purchased land from Louis Ureleles and others. However these documented deeds are no means exceptional. This is a common transaction also undertaken by other disputants of the land. Almost all claimants to this case have sold land to other dwellers. His ancestors could be selling land that does not belong to them. This point would apply to every other claimants involved in the sale of land.....

In the light of the foregoing deliberations, it is hereby this day adjudged...1.That Tolsie David and family be the custom owners of the land of Amelprev.”

Transfers of custom land by will

Transfers of custom land by custom will, or by statements made before death, were not common in New Hebrides, because normally custom owners relied upon the normal custom rules as to inheritance.

(a) *Taurokoto v Mormor* [1986] VUSC 7 This was a dispute about the ownership of land on North Efate near the island of Lelepa, which was sold to European settlers, and also devised by will. “The land in dispute are Lot 104 and 3078....[which] were sold by natives of Lelepa in 1904 to Messers Meeham and McCall....The ...Community in order to protect themselves against clan war and disease had to move to the island of Lelepa at least some two hundred years ago. They lived as a Community and appointed from time to time Paramount chiefs and Chiefs who, as they do today, had power over the Community even to the extent of holding land on their behalf. ...Tariliu Metapong...was the elected Paramount Chief of the Community of Lelepa made up of people from many places. He made a verbal will giving full rights over Lot 104 and 3078, Mangaliliu Plantation, the disputed land ...to the Chiefs and Community of Lelepa prior to his death, and.....later Chief Manarewo made a verbal will giving the same rights..... I therefore hold that

the true custom owner of the disputed Lots 104 and 3078...are the Community of Lelepa by virtue of the fact that the land was held by the Chiefs of Lelepa and left by them to the Community.”

(b) *Farasia v Yona* [2004] VUIC 2. In this case, there was a dispute as to the ownership of land called Erai or Ravaka on the island of Epi. The judgement of the Epi Island Court records that the land had been transferred by will on two occasions, first by Chief Willie to Chief Kangurnania, and then by Chief Kangurnania to William Farasia: “According to the custom of Epi when a man has no son there are two things that he can do to pass his right [of ownership of land]. First, he can adopt the child of his sister to stay with him so that when he dies, the boy can take over his right. Second, he can pass his rights in a ceremony of last man [will].... Now in this instance the court heard that ...Farasia had made custom ceremony with Kangurnania for his custom right to the land of Dendum...Dendum was not the land of Chief Kangurnania but was the land of Bob Masing and his son Chief Willie. Chief Willie had given the right to Kangurnania and the same right Kangurnania passed to William Farasia ...Kangurnania had acquired this right not by birth right but by a ceremony of last man, and this same right William Farasia acquired by a ceremony of the last man. So also with the land Bamande and Lamam. Farasia acquired the right through the last man ceremony. ...not through birth right. From his evidence it is clear that Farasia also buried and made last man ceremony for the land Lemam and Bamande with Harry Mankio....The Court Orders 1. The land of Dendum, Bomande and Lemam belong to William Farasia and all his children and family who exist at present and in times to come.”

(c) *Sanhabat v Salemunu* [2005] VUIC 6. This case is unusual in that three of the parties, Counter claimants 2,3 and 6, all relied, unsuccessfully, upon custom wills: “ Counter claimant 2 ...addressed the Court that the basis of his claim is by way of customary rights given by paramount Chief Tellie of Eldu prior to his death. He provided that chief Tellie’s brother was killed in tribal war...and in fear of his safety he escaped to Maek....While living at Maek he showed the chief of Maek all the land marks including the passage to the sea coast...Chief Tellie then duly declared that his custom chair ...root at Maek. It is acknowledged that such a customary will would be generally accepted provided it is arranged in conformity with custom procedures. The answer is in the affirmative having considered the ceremonies undertaken by the claimant’s grandparents. However such will not be conclusive as there are facts that cry out for

more explanation. In essence the claimed right cannot override the fact that land ownership only transfers through the chiefly blood line. The claimant is not part of that relationship.....”

Counter claimants 3: “These claimants are also claiming under a customary will made by chief Aklin of Eldu, a subordinate chief under the control and supervision of the paramount chief of Tenmaru. Given this facts(sic), the issue for determination is whether such custom will qualify the claimant’s claim to prevail. As emphasised earlier in this judgment it is commonly recognised in the big nambas area that any smol faea or chief’s land having no surviving issue must reverse or referred back (sic) to the paramount chief as governor of the full boundary for his consideration.”

Counter- claimant 6: “John Ephraim is claiming the land of Eldu by way of a customary will given by chief Aklin the last surviving blood of the nasara of Eldu.... The question posed for consideration is whether such will be considered sufficient in custom in justification of the claim. Was there any ceremony undertaken in recognition and support of this will? It is commonly recognised in big nambas that any smol faea or chief’s land having no surviving issue, the subject of ownership must be referred back to the paramount chief as governor of the full boundary for his consideration. It is the function of the big chief to decide amongst other disputants as to who should own the land.”

Enough has been said to show clearly that there were many dealings in custom land between indigenous New Hebrideans, both by way of sales by indigenous owners inter vivos, and by way of testamentary dispositions made by indigenous custom owners before their death.

Effect of Articles 73 and 74 of the Constitution of Vanuatu

On 30 July 1980 the Constitution of Vanuatu came into effect, and article 73 provided that all the land in the country belongs to the indigenous custom owners and their descendants:

“ALL LAND IN THE REPUBLIC OF VANUATU BELONGS TO THE INDIGENOUS CUSTOM OWNERS AND THEIR DESCENDANTS”

The word “descendant” is not defined by the Constitution, but it is defined by the Oxford Dictionary of Current English, 1985, as “person descended from another,” and the word “descend” is defined as “pass by inheritance to.”

This suggests that the meaning of Article 73 is that land can only be owned in Vanuatu by people to whom it passes by inheritance.

There are, indeed, several decisions of Island Courts which have held that transactions between an indigenous custom owner and an indigenous purchaser who has provided consideration, are to be regarded as of no effect, because the purchaser was not a descendant of the custom owner, and therefore the purchase is inconsistent with the Article 73 of the Constitution, and of no legal effect:.

***Arudare v Garae* [2012] VUIC 5:**

“Robinson Tariala is disputing ownership of a plot of land at Lo claiming it to have been purchased by his ancestor Charlie Tariala in 1907 from Quak Vinat son of chief Boe Sasavi, customary owner of the land. He had entered into such a transaction after returning from Queensland, Australia. His primary intention for securing such piece of land was to build a church for purposes of spreading the gospel of Jesus Christ....

Our finding is that there is sufficient evidence proving that there was a land transaction that had taken place in 1907 between Charlie Tariala and Quak Vinat owner of the land of Lo.

The relevant articles of the Constitution regarding land ownership and use....Articles 73-75 have been taken into consideration. In custom land cannot be transferred to another tribe or family. It makes no difference whether it was sold, leased or contracted through some other means of tenure. It will still be designated by law and custom and is returnable to the indigenous customary owners and their descendants. In principle, the land’s ownership would perpetually remain under the authority of the clan and its descendants for an indefinite end of time. In light of the foregoing facts, this party would only be granted a right to use the land in consideration of the land purchasing agreement.”

***Willie Halia & Family v Viratangatanga & Family* [2012] VUIC 4**

“The land in dispute is situated at the western part of ...Ambae Island....The rules of custom forming the basis of land ownership practised in the area are founded on the patrilineal system. Meaning rights to claim ownership is acquired from the father’s line....Land is also acquired through other traditional processes. For example a family who takes charge in meeting funeral expenses of a person would as a matter of reciprocity be given land for use for certain period of time only if concensus is reached by both parties.....

Counter claimant 1 Hensley Vira is appearing on behalf of family Viratangatanga. He led evidence that the land originally belongs to Vira Halia and his brother Vira Longa whose chiefly

name is Moli Hara. However, ownership has been given or transferred to late Robert Viratangatanga upon the owner's death through an agreement and reached promises.

He went on to provide that his family had carried out certain activities qualifying them the right to take ownership of the subject land. He argues that Hannah Halia had failed to take care of her father Vira Halia when he was sick. It was his family whom had taken care of Vira Halia. Secondly, Hannah Halia and his surviving children have no right in custom to claim land from the father's line. No ceremony was performed to acquire the rights of land use from the *patrilineal line* of the father.

He went on to list a number of rations in form of food stuff and other items provided during the funeral ceremony of Vira Halia's death. The outlined items comprised of 1 bag flour, 1 bale sugar, 1 bull (cattle), 1 bag rice, a traditional woven mat (*hakwea*) and New Zealand timbers utilised to construct the deceased's coffin.

In addition, after Vira Halia's death his brother Moli Hara had continued to strengthen social relationship with his family. Vira Longa had borrowed a tusked pig (valued as Ala) from his father Robert Vira towards a pig killing ceremony (*Hungwehungwe*). Later followed by an amount of VT 20,000 and a pig's tusk from his father. During these transactions he had appointed his father to take charge of all his funeral expenses and other mourning rituals. He had made promises that the land at Saraboevutu would be given to Robert Viratangatanga in return for such service and good relationship they had far enjoyed.

Again upon Moli Hara's death, he donated 1 tusked pig (*Boevota*) and some local food. Only after his death he decided to take possession of the land in question. An amount of VT 20,000 was also offered to Hannah Halia whom on the other hand re confirmed to his (sic) father that she has nothing to say more over the land given all performed rituals and promises made by her fathers. The village court had also recognised his right and declared his family as the rightful owner of the land.

He called 3 witnesses to testify in support of his claim. Peter Bue provided that he heard from his father stating that Moli Hara had asked Robert Vira and his relatives to take charge of Vira Halia's funeral expenses because Hannah had failed to take good care of her father when he was sick. James Tari claimed that his father Samuel Banga had also told him that James Tariburu had constructed Vira Halia's coffin. While, Hubert Karu in his address to the court said that Hannah had received an amount of 100 pounds as proceeds from cocoa production harvested on the land.

Upon receiving the sum, Hannah had indicated to them that she no longer wishes to dispute the land given the promises made by the parents.....

Turning to the defendant's case; the basis of his claim is completely founded upon promises or agreements alleged to have been made by the forefathers of the original claimant to Robert Vira and his relatives.

First and foremost, it is quite obvious that this party is claiming land which is not originally owned by his forefather or ancestor. He has made confirmation to that fact in his statement in court. The tribunal's consideration and determination of this traditional claim relied upon cannot prevail by reason of the following points of taught.

The starting point is to go back to the relevant laws of this country as enshrined under the constitution of 1980 and other legislations. Article 73 stipulates that all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants. It simply means that land must always be seen to belong to the original and indigenous custom owners and their descendants. In our case, it is the original claimant and his descendants who are the rightful and classified owners but not Counter claimant 1 and his family.

Although, Article 95 (3) of the Constitution stipulates that customary law be applied as part of the law of the Republic of Vanuatu that mandate cannot conclusively operate on its own effect in isolation of other guiding provisions. The court is guided as well by section 10 of the Island Court Act which states that customary matters and beliefs prevailing in a territorial jurisdiction of an Island Court are applicable in the court; so far as they are not in conflict with the written law and are not contrary to justice, morality and good order. Literally, it is implying that the rule of custom or customary processes should not be accepted or applied if it comes to light that it is discriminatory, depriving or denying rights, unfair etc on grounds of gender, sex or other social integration as seen in this case.

For instance, it is evident that the original claimant and his family being the rightful owners of the land had been evicted and denied rights from their forefather's land and property for a number of decades soon after Moli Hara's death. The defendants had been using and enjoying the fruits of their land to date without any rights of access to the original claimant.

Equally, it is reminded that all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants. Referring back to our case situation and in application of the law, Hannah's sons are the surviving children of this patrilineal line of Vira Halia the original owner of the land. The descendants have by right in law and custom to claim the land of their forefathers.

Further, the alleged pronounced verbal promises and agreements made in conformity to customary processes cannot override the objectives of rule of law as stipulated and safeguarded under the Constitution in particular Articles 73,74 &75. In our case, it cannot be justified that Hannah Halia or her siblings have lost their rights to claim land ownership. The law protects such right and they cannot be deprived off its enjoyment or benefits.

In conclusion, while balancing the arguments as advanced by the respective parties, this tribunal could only find the original claimant's evidence consistent and more constructive and thereby outweighing the opponent's case. That is to say that the plaintiff's case has been established and proven more than probable concluding that they are the true and rightful owners of Vira Halia's land.”

The words of Article 73 of the Constitution have also been used to overturn an acquisition of ownership of custom land that had been gained as a result of armed conquest, an acquisition which was recognized as effective in custom, but was held to be void because it was inconsistent with Article 73 of the Constitution.

Haitong v Tavulai Community [2007] VUIC 3 “The land in dispute is situated on the south western part of the island of Paama... Chief Paul Vurevur [who] appeared for the Tavulai community...provided that...Chief Mael [of Lehili village] ...entered Tavulai land areas where he found Chief Sale of Tavulai gardening with his wives. Without hesitation at point blank he shot chief Sale to death... War eventually broke out ...The whole population of Lehili was wiped out by the Tavulai warriors. Given the triumph ...they then conquered the [Lehili] land and occupied it....for many decades.... [W]e must ..be guided by the supreme law of this country. The relevant provision is Article 73 of the 1980 Constitution...We...have taken heed of Article 74...Yet it could not be accepted that by custom practice any land conquered through a fight will continue to remain in the victor’s hand. This is a selfish idea and it cannot find favour in this modern world with laws upholding principles of natural justice, fairness and equality....Given the circumstances...and in application of the custom practices and the law...the land must return to the original owners.”

The closest that the Supreme Court has come to discussing this question was in *Noel v Toto* [1995] VUSC 3; Civil Case 018 of 1994 (19 April 1995) where Kent J said:

The Constitution provides -Article 73 'All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants.' Article 75 'Only indigenous citizens of the Republic who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land.' I assume that 'recognised system of land tenure' equates with custom ownership.

Article 81 provides for purchases of land from custom owners, for redistribution to indigenous citizens or communities from over populated islands. I think that these provisions mean in combination, that apart from the circumstances referred to in article 81, a custom owner cannot permanently dispose of custom land. That is, descendants of custom owners cannot be deprived of land by decisions of their ancestors. This appears to be somewhat inconsistent with some evidence I have heard as to custom disposal and acquisition of land and with some judgments I have read of this court in the past. For example, it has been previously held that an individual has acquired custom ownership of land from a pervious[sic] custom owner, by way of sale. Although this may have been permitted in custom, it seems to me that the effect of the Constitution, is to prevent this from happening in the future. The Constitution, being the supreme law of the Republic of Vanuatu (Article 2.), would override custom. I point out that this matter has not been argued before me and I have not fully considered the effect of Article 74.

Article 74 provides that 'The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu'. I think that it is sufficient for the purposes of this judgment, to act upon the basis that the land in question is in the perpetual ownership of the descendants of Crero Toto.

It will be recalled however that one of the earliest cases of recognition and acceptance of acquisition of ownership of customary land by purchase was *Lale and Sipora v Silas* [1980-88] 1 Van LR 221 (see earlier) where Cooke CJ showed no qualms in accepting that the son of a chief who had purchased land was the owner of that land.

Conclusion

It can be seen from this paper that there were many occasions before independence when ownership rights to custom land were recognized in custom as acquired by persons who were not the descendants of the original owners, either as a result of voluntary sale and purchase, or as a

result of voluntary testamentary disposition by the custom owner before death, or involuntarily, by way of conquest and seizure by way of force of arms of a conquering tribe. It seems clear that customary sale and purchase of custom land and seizure of custom land by conquering force were recognized in custom as methods of transferring the rights of ownership to the purchaser and to the conqueror respectively.

When the Constitution of Vanuatu came into effect in 1980, it has thrown doubt upon the validity of these transactions which were valid at the time they were undertaken, and until the advent of the Constitution in 1980. The reason for this doubt is that article 73 of the Constitution states that all land in Vanuatu belongs to “the indigenous custom owners and their descendants.” Unless the term “descendant” is given a wider meaning to include “successors” or “successors in custom” there must be a serious element of uncertainty about the validity in custom of the rights to own custom land of those whose ancestors purchased such land or forcibly acquired such land at a time when such alienations of customary land were accepted as binding in custom.