EXPLORING SOME FUNDAMENTAL ASSUMPTIONS IN THE CONSTITUTION ABOUT CUSTOMARY LAND

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INTRODUCTION

After the country of the New Hebrides was in 1906 declared by the British and French Governments to be a "joint sphere of influence," and the administrative arrangements were confirmed by the Protocol of 1914, a Joint Court was established to investigate and register titles of foreign settlers to land which they claimed that they had purchased from, or been given by, the indigenous people of New Hebrides. By the 1970's about one third of the land of New Hebrides had been registered by the Joint Court in perpetuity in the names of European settlers, mainly British and French. The desire to reclaim this land was one of the strong motivating forces driving the demand for independence.

Accordingly, when the New Hebrides achieved independence as Vanuatu on 30 July 1980, the Constitution of Vanuatu, which had been drafted the previous year by New Hebrideans and came into force on the day of Independence, contained three very short, but very important, Articles about the ownership of land in Vanuatu:

> Article 73 "All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants."
> Article 74 " The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu."
> Article 75 "Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognized system of land tenure shall have perpetual ownership of their land."

These Articles have the advantages of shortness and simplicity and are ideal for rallying the cry for independence, but there must be some question as to whether some of the basic assumptions that underlie these three very fundamental provisions of the Constitution of Vanuatu are founded in reality, and the purpose of this paper is to explore and question some of these assumptions.

ARTICLE 73 "ALL LAND IN THE REPUBLIC OF VANUATU BELONGS TO THE INDIGENOUS CUSTOM OWNERS AND THEIR DESCENDANTS"

There are two assumptions that underlie this provision which are open to question: **Assumption 1 The first assumption that underlies Article 73 is that for all land in the Republic of Vanuatu it is possible to identify who were the indigenous owners.** This is an

assumption that is quite commonly made. For example: "Long evri ples long kantri i nogat wan graon istap bambae man I no save telem hemi stap nating o ino gat man I onem." – "Everywhere in the country there is no land which a man can say is vacant or has no owner."(Simo J, *Ripot blong Nasonal Stadi blong Skelem Program blong Kustomari Lan Traebunal long Vanuatu, Vanuatu Kaljoral Senta,* 2005, p3).

But there are some places in Vanuatu where it has not been possible to determine who were the indigenous custom owners of the land. This has arisen in three main situations:

(a) Unoccupied land In the following case, concerning Kakula Island, it was discovered that the island was originally uninhabited, and the Efate Island Court had to devise a method for determining what persons should be regarded as owning it:

***Chief Maserei v Family Malu* [2005] VUICB 4**: "Kakula is an island where there was no one in times before…All records that we have and all parties agree that people just went to the island in 1883 and 1884 when the missionaries brought the gospel of Jesus Christ. For this reason we can say that Kakula before 1883 and 1884 was not owned by any person or family. Everybody who came and stayed at the time of the missionaries were not land owners and came out of the mainland from areas that we call now Tanmiala, Malasa and Susau. ….All family trees and all evidence that was given show that all the parties are inter-related through inter-marriage and paternal and maternal relationship …Therefore the court declares that the family of Chief Mararei who was the original claimant…and the family of Chief Manlaewia….family Maripopongi… family Kalrongo and Tanmiala ….family Malu [all the counterclaimants] …..are all declared custom owners of Kakula Island ..and within 2 months must set up an Association …to work for the interest of all the parties who are declared to be the custom owners of Kakula Island."

(b) Alienated land Another situation which has arisen more than once, is where the land was, during the Condominium period, alienated to foreign settlers, and the custom owners have dispersed elsewhere, so that it is very difficult to trace who were the original custom owners of the land. This is illustrated by the following decision of the Supreme Court: ***Regenvanu v Ross and Abel* [1980-88] 1 Van LR 284.** This case related to land, called Metaven 2, which lies on the mainland of Malekula Island, opposite the small islands of Uri and Uripiv. Regenvanu, who lived on Uripiv, claimed this land, and this claim was disputed by Ross and Abel. It appeared from the evidence that a French settler had, over a period of years, purchased blocks of land, including the area known as Metaven 2, from various New Hebrideans , who had then gone to live on Uri and Uripiv. As a result, it was impossible at the time of the court decision to know exactly who had been owner of which block of land, and so who were their descendants of the true custom owners. The Supreme Court said at p.290: "The Court's conclusion on the evidence which takes into account all the material placed before it, is that this is not a case where an individual should be held to be the custom owner…of the disputed land, because it was purchased piecemeal by the alienator over a period of time from a large number of persons. Moreover not one of the parties has presented a clear cut claim in customary ownership to the disputed area...A parallel situation arose in the appeal relating to Mangaliliu Plantation on the North West coast of Efate…On appeal to the Supreme Court, the land comprised in this plantation was held to be the property of the Lelepa people, but as they could not all be declared custom owners…it was vested in the Paramount Chief of Lelepa in the capacity of trustee for the people of that island. The Court considers that this precedent should be followed in this appeal, as it accords with substantial and it is in conformity with custom…in the result, ….this Court holds that the land comprised in the

disputed area…shall henceforth be the property of the people residing in Uri and Uripiv islands. The custom owners of such land shall be the head chiefs for the time being of these two islands who shall hold that land on behalf of their people in the capacity of trustees."

(c) Written documents indicating ownership Another situation where a court may not attempt to trace the original owner is where there is a written document that indicates that at a particular time certain persons owned the land in question. Courts tend to prefer the certainty of written documents, and so if there is a deed of sale, a court may go no further back to seek the original custom owners, and assume that those people whose names appeared in the deed were the original custom owners or their descendants, as in the following case:

***Manie & Kaltabang v Kilman* [1988] VUSC 9; [1980-94] Van LR 343.** This case related to other land on Malekula located at Lakatoro, and the Supreme Court said at pp 346, 352: "In this case I am asked to decide who is the custom owner of Lakatoro which is the land in dispute…In custom, it is accepted that the custom owner is the descendant of the person who first came here and built a nasara. It makes no difference whether they left again for one reason or another, the fact that they were the first occupants of the land and built a nasara there gives them the right to be designated as the custom owners…I have researched dealings with the land in dispute and have found the first deed of purchase was executed in 1883….I regard the date 1883 as the crucial date in deciding ownership as I have proof that all these persons were alive at that time. ….I am of the opinion that as there is proof that the three ancestors of the three parties were alive in 1883, and were instrumental in selling the land to the French company, I should hold that the three parties are equally the custom owners of the land. The question of who arrived first and built a nasara has not been proved to my satisfaction. Therefore I cannot hold that the appellant's ancestors were in fact the first persons to arrive and build a nasara there."

Assumption 2 The second assumption that underlies Article 73 is that all the land which did have a custom owner or owners was inherited by descendants of that custom owner or owners.

But in many areas, there is evidence that custom land was transferred by the custom owners during their lifetime or at their death to other New Hebrideans or to Europeans, and so was not inherited by the descendants of the custom owners.

The practice of inter vivos transfer of custom land by custom owners to other New Hebrideans or to Europeans is illustrated by the following decisions – one of the Supreme Court, and another five decisions of Island Courts:

(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 two separate examples of sales of customary land by custom owners:

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 many pieces of that land:
"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: "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: "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 area ….But 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."

Also there are authenticated instances, when custom land was transferred by the indigenous owners, at, or close to, the time of their death to other New Hebrideans who were not their descendants This is illustrated by the following two decisions, one of the Supreme Court, the other of an Island Court**:**

(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] VUICB 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."

ARTICLE 74 "THE RULES OF CUSTOM SHALL FORM THE BASIS OF OWNERSHIP AND USE OF LAND IN THE REPUBLIC OF VANUATU."

The assumption that underlies this Article, and indeed all three Articles relating to ownership of customary land in the Constitution, is that the rules of custom are appropriate to determine ownership of custom land.

But some rules of custom have been held to be inappropriate to determine ownership of customary land. The Malekula Island Court has held that there is certainly one rule of custom recognized in earlier times for the acquisition of land which is not acceptable today – acquisition by force of arms. In the following case, the Malekula Island Court refused to accept that the Tavulai tribe, which conquered the neighbouring Lehili tribe in south west Paama, and confiscated their land according to custom, and occupied it "for many decades," could be permitted to own it according to custom, but must give it back to the Lehili people from whom it had been confiscated in accordance with custom, as it was understood at the time:

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 undoubtedly have taken heed of Article 74 which provides that the rule of custom shall form the basis of ownership and use of land in Vanuatu. 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."

This decision seems somewhat surprising in that it applies to custom of earlier times the standards inscribed in the Constitution in 1980. In other countries, courts have held that these standards are to be applied only to recent forceful acquisitions of land, forceful acquisitions made after force was provided by the law of a country to be a criminal offence. The decision does illustrate, however, that certain customs may be held by courts to be not appropriate for recognition now as a basis for ownership of land.

ARTICLE 75. "ONLY INDIGENOUS CITIZENS OF THE REPUBLIC OF VANUATU WHO HAVE ACQUIRED THEIR LAND IN ACCORDANCE WITH A RECOGNISED SYSTEM OF LAND TENURE SHALL HAVE PERPETUAL OWNERSHIP OF THEIR LAND."

The assumption that underlies this Article, and also the preceding Article, is that the recognised systems of land tenure are customary systems of land tenure developed by the indigenous people of Vanuatu.

But some systems of land tenure that have been recognised by the courts are not really indigenous, they are hybrids created by a court, ie they are judicial constructs. This has occurred particularly where land has been found to be unoccupied, or where land has been alienated by custom owners, and the owners dispersed, and it has been difficult to determine who were the original custom owners. The three cases that were discussed at the beginning of this paper are very good examples of situations where the Courts developed rules of their own for determining who had perpetual ownership of land in Vanuatu, because of the difficulty of applying the recognized rules of custom. These cases have already been discussed but they will be repeated again here for ease of reference:

***(a) Chief Maserei v Family Malu* [2005] VUICB 4**: "Kakula is an island where there was no one in times before…All records that we have and all parties agree that people just went to the island in 1883 and 1884 when the missionaries brought the gospel of Jesus Christ. For this reason we can say that Kakula before 1883 and 1884 was not owned by any person or family. Everybody who came and stayed at the time of the missionaries were not land owners and came out of the mainland from areas that we call now Tanmiala, Malasa and Susau. ….All family trees and all evidence that was given show that all the parties are inter-related through inter-marriage and paternal and maternal relationship …Therefore the court declares that the family of Chief Mararei who was the original claimant…and the family of Chief Manlaewia….family Maripopongi… family Kalrongo and Tanmiala ….family Malu [all the counterclaimants] …..are all declared custom owners of Kakula Island ..and within 2 months must set up an Association …to work for the interest of all the parties who are declared to be the custom owners of Kakula Island."

(b) ***Taurokoto v Mormor*** **[1986] VUSC 7**. "The land in dispute are Lot 104 and 3078….[which] were sold by natives of Lelepa in 1904 to Messers Meeham and McCall… The case for the Appellants…..was the evidence of Peter Taurokoto…..Briefly he said that during at least the last two hundred years there was clan fighting and disease on the mainland which resulted in many people going to Lelepa Island for safety. They came from many areas of Vanuatu. He admitted that his ancestors came from Tongoa and stated that the Respondents ancestors came from Makira, which evidence is not denied by the Respondent. ……The land in dispute are Lot 104 and 3078….[which] were sold by natives of Lelepa in 1904 to Messers Meeham and McCall…[D]ue to circumstances beyond the control of all, persons living in the area of Lelepa Island and indeed from outside Efate (both Mormor and Taurokoto came from islands outside Efate) 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."

(c) ***Manie & Kaltabang v Kilman*** **[1988] VUSC 9; [1980-94] Van LR 343, Cooke CJ, 11, 343, 346, 352:** "In this case I am asked to decide who is the custom owner of Lakatoro which is the land in dispute…In custom, it is accepted that the custom owner is the descendant of the person who first came here and built a *nasara*. It makes no difference whether they left again for one reason or another, the fact that they were the first occupants of the land and built a *nasara* there gives them the right to be designated as the custom owners…
I have researched dealings with the land in dispute and have found the first deed of purchase was executed in 1883….I regard the date 1883 as the crucial date in deciding ownership as I have proof that all these persons were alive at that time. ….I am of the opinion that as there is proof that the three ancestors of the three parties were alive in 1883, and were instrumental in selling the land to the French company, I should hold that the three parties are equally the custom owners of the land. The question of who arrived first and built a *nasara* has not been proved to my satisfaction. Therefore I cannot hold that the appellant's ancestors were in fact the first persons to arrive and build a *nasara* there."

CONCLUSION

What then should be done if one finds that some of the assumptions upon which Articles 73,74 and 75 of the Constitution do not correspond with reality? One possibility is that amendments should be made to the Constitution so as to allow its terms to be more consistent with reality:
Thus Article 73 could be amended to read: Article 73 "All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants *and successors according to custom, except that land which has been shown to be not owned by indigenous persons."*
Article 74 could be amended to read: Article 74 "The rules of custom, *except those permitting*

confiscation of land by force of arms since 1906 or in other respects contrary to Chapter 2 of the Constitution, shall form the basis of ownership and use of land in the Republic of Vanuatu."
Article 75 could be amended to read: Article 75 "Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a system of land tenure, *consistent with this Constitution,* shall have perpetual ownership of their land."
Such additional words detract somewhat from the crisp, assertive words of these Articles in their original form, which were so appropriate as a rallying cry for independence. But perhaps now that independence is fully secured, and the heady days of 1979-80 are now behind us, it is timely to consider ensuring that these three fundamental Articles are, in their simplicity, not misleading.