INDIGENOUS LAND GRIEVANCES, CUSTOMARY LAND DISPUTES AND RESTORATIVE JUSTICE

ANITA JOWITT[*]

Author's note

A version of this paper was delivered as a plenary address at the New Frontiers in Restorative Justice Conference held at Massey University, Auckland, in December 2004. I am currently working to develop these ideas into an article on the future place of restorative justice in relation to land. Comments on this working paper are welcomed and can be sent to jowitt_a@vanuatu.usp.ac.fj

INTRODUCTION

In a country such as Vanuatu, where land is owned by the indigenous custom owners and the Constitution requires that the government arranges for appropriate customary institutions or procedures to resolve disputes, customary law and State law are necessarily brought together. The State is expected to find "custom-appropriate" systems to resolve disputes that are coming to the State system because, in the dispute at hand, custom has failed to resolve the dispute, or be accepted as being determinative. Both custom and State law are changed by this meeting, and policy makers must try to find a path that allows custom and State law to travel together.

This in itself is interesting, but the links to restorative justice are not immediately clear, unless one adopts a simplistic custom = harmony equation. However, there is a link - the potentially transformative meeting of both the State and custom law systems provides scope for the development of restorative justice – a new way forward out off the current confusion of clashing systems of law.

There are a lot of issues that could be talked about. In this paper I am going to consider three areas. First I will talk about the relationship between indigenous land grievances and customary land disputes. The conference theme that my paper was grounded in is indigenous land grievances. Customary land disputes in Vanuatu are very different to the land grievances that are found in New Zealand, Australia or North America. It is worth spending some time on the distinctions between land grievances and land disputes so that we can appreciate the dynamics of each, and maybe understand more clearly the degree to which discourses in one setting can be used by the other. Further, debates about land are potentially explosive – over the past few years coups in Fiji, civil war in Solomon Islands and disruptions to mining activities in Papua New Guinea have all involved issues of land ownership and land management. Land issues and the legitimacy of the State are clearly linked and examining the dynamics of such issues help make links to wider civil conflict issues.

From there I will move on to examine the dynamics of customary land disputes in Vanuatu. Here I will

look at the Constitutional framework of land law, then consider some case studies of land disputes that have come up in the USP law centre, a free legal advice clinic operated by students, in which I spend time as a supervisor.

Finally I will try to pull together some threads and consider the place of restorative justice in customary land disputes and indigenous land grievances, or what elements might be needed for there to be restorative solutions.

INDIGENOUS LAND GRIEVANCES VS CUSTOMARY LAND DISPUTES

To begin, what is indigenous or customary or native land? The concept is usually defined as 'land owning to indigenous people before and after colonisation'.[1] The idealised model of customary land is one of communally owned land to which people have close spiritual ties to. There is also a strong sense of guardianship of the land – land is handed down by ancestors and kept in trust for future generations.[2] During colonisation the colonial powers usually appropriated land and/or changed land tenure systems.

Post colonisation there are two basic options: either colonial land tenure systems can be continued, or land can be returned to the custom land owners. Where land is not returned indigenous land has to be "reclaimed" from the State by indigenous peoples through a grievance process, or a complaint that land was wrongly taken. Usually, in Australasia and North America at least, the indigenous population will be in the numerical minority, and may have no clear sense of being "post" colonisation. The coloniser's structures and systems continue to dominate society, and indigenous peoples are certainly a political or conceptual minority.

Where land is returned, as is the case for much of the land in Pacific Island countries, indigenous peoples do not need to take a grievance to the State in order to ask for their land back. State structures themselves are still largely coloniser's structures, but indigenous peoples are neither a numerical or a conceptual minority. The granting of Independence is still fresh in people's minds and there is a clear sense that indigenous peoples have the freedom to organise their own countries. These differences mean that land issues emanate from quite distinct causes.[3]

The dynamics of indigenous land grievances

With indigenous land grievances the most striking feature of the discourse is that it is racialised – it is not only about the return of resources, but also about identity, and a claim that indigenous identity be recognised in a specific way. Identity, of course, raises difference. In land debates, and indeed most race debates the relational difference is usually reduced to a majority/minority binary with indigenous peoples plural, being reduced to a single indigenous identity, and the Other being reduced to a caricature of Westernisation.

Cultures are posited as self generated orders that are self-justifying and are incompatible to a greater or lesser degree. That society is unfinished, and that cultures are, to use the words of Andrew Sharp, dynamic, 'leaking vessels created, renewed, and transformed in endless contact with others'[4] is ignored. This is, maybe, necessary, as land claims are historical. Contemporary difference is produced on the basis of prior identities which were themselves relational or temporary, and acknowledgement of the changeability of identity and its relational positioning could be threatening to contemporary land claims that are tied up with identity and difference.

This is all part of political rhetoric, for land claims are clearly politicised. Property is a created structure that has no meaning outside of the meanings that we place on it. Concepts of property and ownership are the outcome of interactions between government, markets and communities.[5] Land claims are asking for

this interaction to change. As a rhetorical device people do adopt extreme positions in order to make their points, but rhetoric has an unfortunate habit of becoming reified with repeated use.

This whole dynamic leads to distancing. It also leads to silencing – with indigenous identity being constructed, kept and spoken by a central core of indigenous peoples and, frequently the dominant power, usually 'the white man', being ruled ineligible to speak on 'things indigenous'.[6] Whilst this silencing is understandable it is not helpful from a restorative justice perspective. Two wrongs don't make a right. Instead, the most obvious potential role of restorative justice is to start a dialogue that will lead to healing, or respect for different cultures that goes beyond mere lip service – not easy to do when you are dealing not with a small or localised dispute, as in an individual criminal case, but with entire nations.

The dynamics of customary land disputes

In contrast, customary land disputes do not have the same "oppressed minority against the State" flavour. Instead disputes are between people of the same, or different, indigenous cultures. Asserting a claim to land is not tied up with State recognition of indigenous culture. Because disputes are not racialised it is possible and often desirable to acknowledge the plurality of *kastom*.

Disputes are also often driven by development. Development may take the form of population pressures, people wanting to use customary land for income generating projects, or people wanting to sell the use of land to investors. All of these things alter demand for land. They also change what land means and how land can be used, and create conflicts whilst at the same time the dispute resolution system that has been dealing with custom land issues is required to evolve to cope with modern disputes.

This creates a different set of challenges for the country's law, and a different set of possibilities for the use of restorative justice. It is these challenges that I will be considering in the context of Vanuatu.

VANUATU

But first, where is Vanuatu? Vanuatu is a collection of just over 80 islands in the South Western Pacific Ocean. About 200,000 people live there. They are spread over about 60 islands, so it is geographically very dispersed. To complicate it further there are approximately 110 linguistically distinct cultures living within this small population. The nation gained Independence in 1980. Prior to that it was known as the New Hebrides, and had an unusual colonial history – being colonised by both the French and the English together in an arrangement known as the Condominium.

It now has a Westminster style of government, and although the legal system is based on English, French and customary law, the State legal system largely adheres to the English common law system. Land is the big exception to this.

The land tenure system

On Independence all land returned to the custom owners, and it was constitutionally guaranteed that the rules of custom shall form the basis of ownership and use of land. Customary land cannot be alienated or sold off. The *Constitution* requires the Government to arrange for appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land:

> Art 73: All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants.
> Art 74: The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.
> Art 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.
> Art 78 (2):The Government shall arrange for the appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land.

Most of the time custom deals with disputes, and the State never needs to get involved. However, custom is increasingly failing to resolve issues as uses for land are changing. People are no longer as willing to accept the legitimacy of custom settlements when settlements are not in their favour. This breakdown of acceptance could particularly be seen with the Island Court system that was in place from 1983 – 2001. This system was basically a modified and relaxed magistrate's court in which issues were adjudicated on by a panel of 3 island court justices, all of whom were knowledgeable in custom. If a custom settlement was not achievable or not to a party's liking he, she or they would run off to the Island Court. One hundred percent of claims that went through the island court were appealed to the Supreme Court – people were electing to use the Island Court and then appeal to the supposedly adversarial and foreign Supreme Court in the desire to seek a favourable outcome.[7]

Family Sope v Family Kalulu [1995] **VUMC 2**

To get an idea of the flavour of many disputes, I have an example – a dispute over land in Pango, very close to Port Vila town. In this dispute there were five different families involved. The catalyst for the dispute came in the early 1990s. Family Kalulu representatives allowed land to be leased to an investor. Four other families – the family Kaltabang, the family Toutak, the family Sope and the family Toro - all claimed an interest in the land. Their claims, and what the court decided, are below:

- The family Kaltabang claim was that Kalsei Kaltabang worked as teacher from 1930 - 1940 and never paid promised salary, so he was given land instead. The family has had a garden on the land since then. The court upheld this claim.
- The family Toutak claimed through birth right. This was upheld.
- The family Sope and family Toro were given land to use in 1937. Since then both families have used the land for gardens. They were never clearly given 'ownership'. This is unsurprising because issues of 'ownership' in a western land tenure sense simply do not fit custom land. Even if you call land communally owned this is more like a trusteeship – the trustee manages, the beneficiary benefits, but neither party actually owns the property. Ownership disappears. The court decided that usage of the land gave the family Sope and the family Toro a claim to customary ownership.

This dispute is interesting for a number of reasons. The Sope and Toro claim shows how there is now a necessity to crystallise previously ambiguous customary land holdings in order to be able to lease land to foreign investors. Changes in custom therefore necessarily arise. The Kaltabang claim is interesting because custom land was acquired as payment for a debt. Land took the place of money in a transaction, and this was recognized as giving custom ownership. It is also interesting because the case is reported – so you can read the genealogical way that claims are presented and get an idea of the complexity of land claims. The subtext also gives a clear indication of the opportunism that can be present in land claims.

The case can be found at http://www.paclii.org/vu/cases/VUMC/1995/2.html

The Customary Land Tribunal Act 2001- a restorative solution?

In the late 1990s when it was clear the Island Court system was not working the Chief Justice refused to allow the Supreme Court to hear appeals – after all the point of the *Constitution* was not to have the introduced law "trumping" or overriding more customary decisions, and a new land tribunal system was created.

At the end of 2001 the *Customary Land Tribunal Act* was passed. This Act sets up structures to deal with ownership and land boundary issues that build on existing structures of custom. First in acknowledgement of the multiplicity of custom the country has been divided into custom areas and custom sub areas. This was done by the chiefs of each area. A list of chiefs and elders who have sufficient knowledge to deal with disputes was then drawn up. If custom has not resolved the dispute people can apply to go to the village land tribunal, which may be joint if more than one village is involved. The meeting of the tribunal is widely advertised and there can be multiple parties to the dispute. The principal chief and two other chiefs or elders of each village involved form the village land tribunal. Parties can object to the tribunal members if, for example, there are clear conflicts – although neutrality is not sought; indeed, tribunal members will have connections with the parties to the dispute. Presentation of each side's case proceeds without rules of evidence, and there is considerable freedom as to questioning and who can speak. No lawyers are permitted to participate.

The procedure can be stopped at any time if an amicable settlement is reached. If this does not occur by the end of the hearing then the tribunal members must use custom law to make a decision. The decision can be appealed to another body – not an introduced State law body, but a different set of chiefs and elders from a wider region than just the village.

Is this restorative justice? It is participatory, and people get to tell their stories. These stories allow for emotional communication. Implicit in the idea that tribunals are to use custom to make their decisions is that custom will be affirmed. The remit of the Tribunals to use custom is left loose, so as to allow for variation in different regions, and for custom to evolve. Legitimacy for the Tribunals decisions is thought to spring from the power and legitimacy of the tribunal members themselves, which they have gained through their community standing.

But land is not infinitely divisible, and there will be winners and losers in many claims to land. Further, over the past couple of days we have heard that principled restorative justice promotes values including values of human rights, and Vanuatu is notoriously patriarchal. Should anything be done about equality for women, or is that neo-colonial interference with *kastom*?

We are going to have to wait and see how this Act works out – it has already been reviewed following resistance to implementation, this resistance being due, in part at least, to suspicion of any laws created and passed by the central State.

The problem of land leases

But there is clearly one area in which the Act, and custom, is inadequate to deal with land issues, and this relates to foreigners' use of land. In Vanuatu custom owners are permitted to lease land to foreigners. Rural leases are usually for 75 years, and urban leases for 30 to 50 years. Under the *Land Leases Act* [Cap 163], once the lease expires the custom land owner will take back the land. Although the Act does not specify the need to compensate for improvements to land, if the lease specifies that this be done then before the custom land owner can get the land back then this he, she or they will have to compensate the lease holder for any improvements to the land. Increasingly leases are specifying compensation for improvements.

On the main island of Vanuatu, Efate, there is something of a land grab going on at the moment. Investors are coming in and buying leases to coastal land. These leases are sometimes being sold by 'custom owners' who have only a marginal right to that label. As well, people want short term gain – as Russell Nari of the Environment Unit put it, 'yu wantem mani kwiktaem be yu no priped blong swet'[8]- People want money fast but they are not prepared to work. Selling a land lease is easy.

But are people thinking about what future generations will have to do in order to be able to compensate

the leaseholder and get back their land at the end of the lease term? To me this looks like a circuitous route to de facto alienation of customary land and, most likely, civil unrest.

Let's have a look at some examples.

The first involves coastal land. In this family there were 8 children - 6 sisters and 2 brothers. When the father died he intended the land for the use of the 6 girls. The land was entrusted to 2 grandsons to look after for their mother and aunties. The grandsons are now selling the lease to the land and have some payment from the investors.

This illustrates the 'marginal custom owner problem' – the grandsons were trustees, not owners. It also illustrates the money without sweat dynamic with no thought to the future. A nearby subdivision has lots going for USD300,000. With improvements you could immediately be looking at double that price, or more. The money received for the land lease had better be invested very wisely if the further generations of custom owners want to be able to recompense the leaseholders for improvements.

Further, at the time when the dispute arose custom settlement and the customary land tribunal were not working because of a chiefly title dispute, so there was no clear legal avenue for protecting the sisters' interests against their sons and nephews.

Dubious lease granting leads to problems of insecurity of leaseholdings. Another case indicates one of the immediate problems of leases that are granted by someone whose authority to grant the lease is not definitively recognised. In this one the leaseholder complained about squatters on the leased land. The squatters from two islands left when asked to go. The people from the third island group have refused though, because they do not recognise the lease, or appreciate what it means. That one is going to court.

A third example -strata title has been introduced in Vanuatu and leaseholders can subdivide land horizontally as well as vertically. Custom land owners who have leased the land have no formal opportunity to object to the granting of strata title.

Erakor Island is being subdivided into 40 lots under the *Strata Title Act*. Or is it? The *Environmental Management and Conservation Act* 2002 now requires environmental impact assessements (EIAs) before developments can proceed. Can an EIA now be used to stop strata title developments which may not be in landowner interests? This is not its purpose – the Act sets up a regime of environmental impact assessments to protect the environment, but also provides the only mechanism for custom land interests to be taken into account in strata title developments, by allowing EIAs to consider how developments will 'affect important custom resources'. After all, strata title will increase lease compensation costs, so custom land owners are clearly being affected by strata title developments. Could the custom land owners' interest be considered an important custom resource? The use of EIAs to protect landowners interests in respect of strata title is flimsy - relying too much upon a small team at the Environment Unit "looking out" for landowners interests without clear legal mandate.

THE PLACE OF RESTORATIVE JUSTICE

It is in this area that I see real potential for the role of restorative justice concepts – not to restore relationships when they break down, but to prevent future problems over leases from actually occurring. One of the reasons that custom land owners are willing to lease their land for very small amounts is because there is no clear understanding of the benefits the leaseholder will get and/or the long term effects when the lease comes to an end. Lots of people don't even appreciate that when they lease land, they will no longer be able to walk along 'their' beach. Economists call this information asymmetry – it is not possible to form a fair contract when one party has much information and the other party has little.[9] Just talking rationally does not seem to help in reducing this asymmetry, for in Vanuatu land is far more than a

rational commodity – it also signifies spiritual links to place and links to kin. Can dialoguing processes from restorative justice approaches be used to reduce this information asymmetry given that it creates space for authentic communication which allows for both reason and emotion?

In this context restorative justice concepts are being used not to heal hurts, but to build new fair relationships where no relationship previously existed. This is what I consider to be transformative justice –using restorative justice concepts to build new relationships.

This is particularly needed in Vanuatu where the legitimacy of the State is not strong – people do not particularly respect its rules, and we cannot rely on automatic adherence to state values of justice that are incompatible with people's own values. Experience elsewhere in Melanesia indicates that it is a short step from lack of respect of the rule of law to civil disorder. Instead we have to fall back on older forms of cohesion.

Durkheim talked about two forms of societal cohesion – mechanical solidarity and organic solidarity.[10] In "primitive" society cohesion is mechanical. Societies are small scale and homogeneous. Because of this there is a large set of shared beliefs, or a collective conscience. The collective conscience legitimates authority – people go along with decisions because they have a shared idea about what justice is. This, I believe, is why indigenous society is so rich in restorative practice- because it still has a sense of mechanical solidarity.

In contrast, modern society relies on organic solidarity. In a large society with increasing specialisation we become strangers to each other in the sense of shared values, but relate to each other on the basis of complementary differences. More complex rules (or state law) take the place of fluid small scale customary law. Mutual interdependence is meant to supplant the collective conscience as the legitimating force. In the west the longstanding State tradition certainly helps support legitimacy.

In the post colonial Pacific, in contrast, the colonial tradition helps to destabilise legitimacy because there is still a deep mistrust of the central state, and there simply has not been time to develop mutual interdependence. Instead, in order for society to go ahead and to be given time to evolve (in whatever direction that it wants to go) we need to ensure that mechanical solidarity – which, it should be noted, is not the same as maintaining the status quo - is encouraged.

The process of building this shared sense of values need not be “one off”. If land is then developed beyond the original lease agreement – through strata title for instance - further authentic communication could take place. We already have environmental impact assessments, or EIAs; why not also have custom impact assessments, again in a dialoguing manner.

So, restorative justice concepts can play a role in developing a sense of mechanical solidarity, or shared values about justice in areas where land is moving beyond the customary. Whilst people may argue that such an approach would make Vanuatu less attractive to investors, and thereby slow development, I would argue that allowing developments to go ahead without there being any real commitment to the process of land leasing is simply creating a large future problem that will be much more detrimental to long term development.

To conclude by coming back to indigenous land grievances – the problem of the disenfranchised disillusioned minority against the state, trying to claim back what was unfairly taken - is the customary land dispute experience of any help? I am not sure. Looking at the New Zealand situation I see so much pain and ugliness on both sides of the dispute – to adopt the majority/minority binary as a form of shorthand. I dislike the silencing that seems to go on on all sides and the essentialist and reductionist dimensions of the debate. Maybe the Vanuatu experience could be used to help to reintroduce the complications of the changeability of relations and of cultures. But, more importantly, maybe the more

forward looking concept of transformative justice is what is needed here. Instead of looking backwards – which is what reparative justice seems to do far too much, maybe restorative justice concepts can be developed to help create a truly shared vision of a just society.

[*] Lecturer in Law, University of the South Pacific

[1]Matthew Myers & Krishn Shah, 'Why native lands are worth less than freehold' (2004) 38(2) *Australian Property Journal* 135, 135.

[2] Spike Boydell, 'Evolving a Pacific property theory.' Paper presented at the Cutting Edge 2001 conference, Oxford, UK, 5-7 September, 2001.

[3] It is, of course, possible for there to be a combination of alienated land and customary land existing within one State, in which case both land indigenous land grievances and customary land disputes may arise.

[4] Andrew Sharp, 'Why be bicultural' in Margaret Wilson and Anna Yeatman (eds) *Justice and Identify, Antipodean Practices* (1995) 118.

[5] This point is not limited to debate about indigenous land, but is a feature of debate even within the English legal tradition. See, is Paul Kobler, 'The death of ownership and the demise of property' in Michael Freeman (ed) *Current Legal Problems vol 53* (2000).

[6] See, ie, Paul Spoonley, 'Constructing ourselves – the post-colonial politics of Pakeha' in Margaret Wilson and Anna Yeatman (eds) *Justice and Identity, Antipodean Practices* (1995), particularly at 111.

[7] Sarah Hardy Pickering, 'A proposal to establish a land tribunal in Vanuatu' (1997) 1 Journal of South Pacific Law http://www.vanuatu.usp.ac.fj/journal_splaw/Working_Papers/Hardy_Pickering1.htm at 22 December 2004.

[8] Russell Nari, Presentation at Vanuatu Update Conference, Santo, Friday 26 Nov 2004.

[9] See Rod Duncan and Ron Duncan, 'Improving security of access to customary-owned land in Melanesia: mining in Papua New Guinea' in Peter Larmour (ed) *The Governance of Common Property in the Pacific Region* (1997).

[10] For a quick introduction see *The Emile Durkheim Archive* http://durkheim.itgo.com/solidarity.html At 22 Dec 2004.