A PROPOSAL TO ESTABLISH A LAND TRIBUNAL IN VANUATU.

by Sarah Hardy-Pickering
Senior Lecturer in Law
University of the South Pacific

> "Land is of fundamental importance to the Ni-Vanuatu. Land is the heart of the cultural system. It represents life materially and spiritually." (Bonnemaison, 1984;1)

This working paper is produced in the course of personal research to investigate the need, if any, for the establishment of a Land Tribunal in Vanuatu and to make recommendations for the setting up of such a Tribunal, including the possible format and composition.

However, this paper is not primarily concerned with the identification and explanation of the need for a Tribunal but rather is concerned with the possible format, composition and remit of such a Tribunal. It draws heavily on other South Pacific models of Customary land dispute resolution and is an attempt to design a more appropriate system than the existing one that will meet the needs of customary land owners and the Government. The proposed Land Tribunal would have jurisdiction over all customary land disputes involving ownership and customary use. It would not have jurisdiction over such land that had been leased. The leasing of land is currently governed by the Land Leases Act (Cap 163) of Vanuatu and it is submitted that such disputes are best dealt with within the established Court structure. This proposal is therefore concerned with the resolution of disputes over customary land.

In order to establish an effective alternate system one must first address the problems evident in the existing system. The current system of dispute settlement by reference to the Island Court and appeals to the Supreme Court is established by statute. It is suggested by Trease (1987) that the issue of land was the main factor leading to the push for Independence in the late 1970s. This is perhaps best evidenced by referring to the Constitution of the Republic of Vanuatu (1980) where Articles 71 and 72 state that all land belongs to the custom owners and that custom shall form the basis of all ownership and use in the Republic of Vanuatu.

This clearly illustrates the significance and fundamental nature of land to the Ni-Vanuatu - as all land was to be returned to the "True" custom owners and the introduced concept of freehold or absolute title was deemed both inappropriate and undesirable. Article 76(2) of the Constitution states that "the Government shall arrange for appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land". It is therefore imperative that any land dispute resolution system must base its decision making process on custom and practice - to do otherwise would question the validity of the process itself and could be described as unconstitutional. The design and development of such a system is a difficult task due to the fluid and organic nature of custom, the oral (as opposed to written) tradition and the fact that Vanuatu is a culturally diverse nation - Arutangi states that there are some 112 languages which reflect the variety of customs and land tenure systems (1987;261) The current system is perhaps not the most appropriate, efficient nor effective system that could be used and examples of difficulties inherent in the current system include

- Inappropriate adversarial nature of Court hearings
- Imposition of Court decision as opposed to a negotiated settlement
- Physical and Geographical inaccessibility of Courts
- Court personnel not appropriately knowledgeable
- Long delay between lodging and hearing of case due to "inoperation" of Island Courts
- Lack of confidence in the current system
- Insufficient involvement of Chiefs and Elders

Any proposal to establish a Land Tribunal must therefore address these issues and problems, rather than creating a whole new set of difficulties. The following model is still at the developmental stage and should not be seen as anything other than a proposal in progress. It is not intended to reflect the views or beliefs of USP, the Judiciary, Government nor Ministry and Department of Lands. The rest of this paper is therefore concerned with the establishment, format and composition of the proposed Tribunal. Included with the principal recommendations are justifications and reasons for the particular suggestions. However it must be stressed that these recommendations are not intended to be definitive.

PROCESSING A LAND DISPUTE

STAGE ONE: CUSTOMARY CHIEFS.

Under the proposed system, no land dispute claim can be lodged with the Tribunal until attempts have been made to settle the dispute at Customary Chief level. The present system does allow for the dispute to be referred to the village elders and chiefs for resolution but there is no strict requirement to do so. Many disputes are currently not so referred (Personal communication, Acting Chief Justice, July 1996) and therefore a very real opportunity for settling a land dispute - be it over ownership or some other usufructory right - is missed.

There is general acceptance of the idea that dispute resolution by consensus and by the parties directly involved leads to an acceptable and enforceable solution. Therefore parties to the dispute will be required to attempt resolution at Customary Chief level. It is not envisaged that this process shall be formalised nor subject to procedural rules but rather that it will "validate" the traditional and customary practice of negotiation and arbitration. This enforced negotiation could be held at the Nakamal within the area concerned or on "neutral" ground or alternatively at the Land Tribunal Offices. The choice of location is not considered to be a major issue, rather that all parties are able to attend. The customary land dispute settlement system in the Solomon Islands requires all disputing parties to attempt to settle the dispute at "chiefly" level by "exhausting all traditional means of solving the dispute" Act (section 8D of Local Courts Act Cap 93 Solomon Islands, as amended) and only allows disputes to proceed to the Local Court if the Chiefs have been "unable to make a decision acceptable to all the parties" (section 8D, Local Courts Act Cap 93 Solomon Islands, as amended.)

This is a relevant model to evaluate due to the similarities in part of the cultural and land tenure systems in the two Melanesian countries. However, although this model is useful, it is not without certain disadvantages including the fact that "traditional means of settlement" could be said to include physical aggression or remonstrations. It is also evident that scant or cursory attention is often paid to this level of settlement. There is some anecdotal evidence (personal communication, Charles Levo, May 1997) that the negotiations at Elder level are not always carried out in good faith but rather are seen as a paper exercise that needs only to be addressed by a "nod and a wink". The advantages of making the Customary Chief negotiations compulsory do outweigh the possible disadvantages of a party to the dispute refusing to take this level of the negotiations seriously, not least because they build into the process an appropriate and efficient form of alternative dispute resolution that is currently commonly used in custom.

It is recommended that this strategy used in the Solomon Islands is adapted to local needs, that is the use of Elders to facilitate and encourage settlement of the dispute in the villages concerned. This is the best and most appropriate level at which to resolve the dispute.

It is proposed that if the Customary Chiefs are able to facilitate a settlement that is wholly acceptable to all parties, then the decision of the Elders can be registered with the Land Tribunal. This settlement must be in writing and signed by all parties before it can be recorded at the Land Tribunal, at which point it is taken as a decision of the Land Tribunal. It may be advisable to have a time limit for such recording. The time limit in the Solomon Islands for such a registration is three months (Section 8E of the Local Courts Act Cap 93 Solomon Islands, as amended.)

Such a registered decision cannot then be brought before the Land Tribunal as in effect the Land Tribunal has handed down it's decision. The parties under dispute cannot gain access to the Tribunal without proving that they have genuinely attempted to negotiate a settlement but were unable to reach agreement. The reasons for failure to reach an agreed settlement would have to be provided on the requisite form and the Tribunal may refuse to allow an unsubstantiated complaint or claim to be lodged.

There is, of course, always the possibility that one or both of the parties to the dispute may attempt to sabotage the negotiation by refusing to take part. It would be possible to "discourage" this activity by only allowing the party who did attend with the Customary Chiefs to lodge a claim at the Land Tribunal. This would mean that the party who refuses to negotiate, perhaps from a perceived position of strength, cannot then proceed to the Tribunal to lodge a claim, but must wait for the other party to do so. The other party could, of course, be too "scared" to proceed. However it is difficult to see how any system can remove the possibility of the reluctant or fearful claimant.

It is important that this level of arbitration and negotiation is not seen as a funneling system or gateway into the Tribunal. It should be viewed as a valid and effective method of dispute settlement in it's own right. It should not be regarded as a stepping stone to the Tribunal. Ownership of the dispute itself and its subsequent settlement will be more acceptable to the parties who have utilised a culturally relevant and appropriate means of negotiation. It should be remembered that the parties have to live and work closely together after the dispute has been resolved and that a consensus agreement is therefore always to be preferred to an imposed decision.

STAGE TWO - LAND TRIBUNAL

Not all disputes will be able to be solved at the Customary Chief level. Thus a Central Office of the Land Tribunal shall be established to settle unresolved claims. It is important to note however that under the proposed system no party can lodge a complaint at the Land Tribunal until Stage One (Customary Chiefs) has been completed. Unresolved disputes can only be lodged with the Land Tribunal once the Tribunal is satisfied that resolution at Customary Chief level has been genuinely attempted but cannot be achieved. To prove that Stage One has been completed, claimants must fill in a form indicating the names of the parties involved, including the names of any witnesses called, the names of the Elders and reasons why the dispute could not be resolved at Customary Chief level. Nor can any complaint can be lodged without the accompanying fee. This fee must be fixed at a high enough rate to discourage vexatious claims but not so high that parties to the dispute cannot reasonably afford to lodge a complaint. The Land Tribunal, once it has received a properly lodged claim on the relevant form, is then obliged to Gazette the claim, by displaying appropriately placed public notices. These notices of claim shall provide information concerning the land in dispute, the parties involved and the date of the hearing concerning the disputed land. Currently, by section 8 of Order 6 of the Island Courts (Civil Procedures) Rules, claims must be publicised. However the usual means of Gazetting such as via newspaper advertisements are of little use

in rural areas which may have no electricity and only limited access to Newspapers. Gazetting, however, is important as it informs people of possible claims that they may be affected by and serves them with notice. Therefore the issue of publication of impending claims needs to be addressed. The current system of announcements via the radio is effective however and this method should be retained.

Once the Tribunal has been established it is suggested that all hearings should ideally be 'listed' within six months of receiving the claim. This will not be possible immediately as there is currently a five year backlog of land cases requiring resolution. (Personal Communication, Acting Chief Justice, September 1997.) This recommendation will be hard to implement as it is a relatively short period of time in which to process the claim. However, until the dispute is settled, the land is likely to be lying dormant and as many Ni-Vanuatu are subsistence farmers the effect of the unresolved dispute is magnified. It is for these reasons that the time delay between the lodging of and hearing of the claim should be as short as is feasibly possible.

The suggested composition of the Land Tribunal is as follows:

There shall be President and a Deputy President of the Land Tribunal and a panel of custom law advisors. The President and Deputy President shall be appropriately qualified. The President and Deputy President of the Land Tribunal shall be appointed by the Chief Justice upon recommendation by the Judicial Services Commission.

Each hearing of the Land Tribunal shall be held in the relevant Province and shall be presided over by the President or Deputy President as Chairman and two custom law advisors from the relevant Province or Island in which the dispute originates from.

Whilst it is suggested that each Island has it's own fully manned Land Tribunal the administrative costs are likely to be unbearable. Thus it is proposed that there is a Central Office of the Land Tribunal in Port Vila. This Office shall be required to establish a Land Tribunal in each Province that is supported with a full time Clerk and Administrator. The President and Deputy President shall therefore be peripatetic. Thus all Land Tribunals are equal in status.

The Central Office of the Land Tribunal shall maintain the 'panel' of custom law advisors. It is envisaged that the custom advisers will be chiefs and elders who are qualified due to their good standing in the Community, reputation and knowledge of customary matters. These are similar to the criteria used in Samoa for the selection of Matais eligible to sit in the Land and Titles Court. Custom Advisors shall be appointed onto the panel by recommendation from the National Council of Chiefs and appointed by the President of the Land Tribunal. There should be at least four custom advisors for each Island or Province to allow for one 'objection' to be made by either party to the dispute on the grounds of possible or perceived bias in favour of the opposing party to the dispute.

Bias, or the appearance of bias is a difficult issue to resolve in the South Pacific and perhaps more difficult in Vanuatu when a claim of possible favouritism could be made on a number of grounds. The four most obvious being that the custom law advisor is from the same family, in a wantok, Island or nafka as one of the disputing parties.

The Clerk of the Provincial Land Tribunal shall make recommendations to the Chairman concerning the selection of which two custom law advisors from the panel will sit on that Tribunal. The names of the custom law advisors shall be supplied to the disputing parties within 28 days of the claim being lodged. Each party is then allowed 28 days in which to lodge an "objection". Failure to "object" within the stated time will mean that the party has waived the right to "object" and cannot therefore raise the possibility of bias at a later date. This proposal is intended to recognise the likelihood of there existing some connection,

perceived or otherwise, between a custom law advisor and a claimant and to allow the parties to the dispute some control over who will sit on the Tribunal to hear their claim. It is hoped that by restricting the number of "objections" to one that the process of settling disputes will not be unduly delayed. If a "reserve" list is also published then the disputing parties can view the possible replacements and assess them too: allowing the claimants to perhaps avoid jumping out of the frying pan and into the fire!

By choosing custom law advisors from the relevant Province, but not necessarily the same village or Island, there is obviously the possibility that the custom law advisors may have no inherent or innate knowledge of the relevant customs and practices concerning land tenure and land use in that village or Island. This should be seen as an advantage. The possibility of bias is reduced and there is less chance of a Tribunal member prejudging the issue before them on the basis on specific but perhaps incomplete or obsolete knowledge.

Each party to the dispute is permitted to bring one custom ‘expert witness’ to the Tribunal, along with other witnesses. The Tribunal are not expected to know of the custom in that particular area, but instead have been chosen for their integrity and knowledge of custom generally and their ability to judge who has the ‘better’ claim. By using custom ‘expert witnesses’ the organic and fluid nature of custom and practice is taken into account and Tribunal members are encouraged to ask questions to facilitate their decision making. The Custom Advisors are, along with the Chairman of the Tribunal, there to adjudicate and judge who, in their opinion, is the "better" owner. The concept of complete ownership is particularly inappropriate for the South Pacific and the doctrine of Relativity of Title fits more easily with concepts of collective title and ownership and the recognition of the myriad forms of usufructory rights.

Thus the Custom ‘expert’ witnesses – one for each party – appear before the Tribunal to attempt to persuade the Tribunal members that the party they represent and assist has a better right to the land.

Articles 72 and 73 of the Constitution state that custom shall form the basis of all land use and ownership. It is therefore imperative that the system chosen for settlement itself is based upon, and applies, custom. The choice of a Tribunal of three, including two custom law advisors and a Chairman (who shall be suitably knowledgeable about procedure, concepts of natural justice and the right to a fair hearing) therefore reflects this need.

The custom ‘expert witness’ shall present the genealogies of the parties and any other information they consider relevant and necessary. This evidence shall be presented in Bislama (unless all parties agree to the use of another National language) and there shall be no restrictions on the type of evidence that is admissible – i.e. hearsay evidence. Due to the tradition of oral history in Vanuatu and the status of such "stories’ handed down from generation to generation it would be inappropriate, if not ridiculous to exclude such evidence from the Tribunal. The Tribunal shall not allow representation by legally qualified Solicitors or Barristers as introduced concepts of land law are irrelevant to the settling of a customary land dispute. As stated, the Land Tribunal shall be chaired by either the President or the Deputy President who are appropriately knowledgeable about matters of procedure and natural justice. This should mean that the number of ‘appeals’ to the Supreme Court for Judicial Review of a Land Tribunal decision on the grounds of procedure or perverse decision are limited.

The decision of the Land Tribunal shall be binding on all parties and not just those who are party to the dispute. In the Solomon Islands only those who are party to the dispute are bound by the Local Court and Customary Land Court decisions. This has led to a proliferation of claims rather than a settlement of claims (Personal Communication, Jeffrey Davy, May 1997.) This pattern is to be avoided and thus the decision will bind all. Decisions of the Land and Titles Court in Samoa bind all parties and this model is to be preferred. By making it obligatory to display notices in public places - such as outside the Land Tribunal, local shops and Church Notice Boards and announcements via the radio - all interested members

of the public are informed of the dispute and are thus given an opportunity to attend the hearing and submit evidence if they so choose. This may remove any objections to the binding nature of the decision on the grounds of being unaware of the hearing and thus disadvantaged. It is therefore envisaged that the format of the Tribunal will be somewhat informal. This is to be preferred over a formal hearing whose format does not sit well with customary traditions of consensus negotiation.

STAGE THREE: SUPREME COURT

It is envisaged that there will be only a very limited right of 'appeal' to the Supreme Court from the Land Tribunal. This will avoid the proliferation of claims and the reluctance to accept a decision of the Customary Chiefs and Land Tribunal. It has been stated that 100% of unsuccessful litigants in land matters currently exercise their right of appeal to the Supreme Court (Rodman, 1995; 105 and Personal Communication, Acting Chief Justice: September 1997.) This is an unacceptably high rate of appeal and perhaps illustrates the inappropriateness of the current system and the lack of confidence in decisions made by the Island Courts. The Supreme Court should not, therefore, be seen as another layer in the appeal structure but a place of recourse for Judicial Review. Thus the Supreme Court cannot replace the decision of the Land Tribunal with its own decision. It is envisaged that Judicial Review will be available only on matters of procedure and for the review of perverse decisions. If the Supreme Court finds that there was an error in procedure or the decision was so perverse that no reasonable Tribunal could have come to that decision, then the claim is referred back to the Land Tribunal for a re-hearing with a differently constituted Tribunal. Thus the Supreme Court neither provides a re-hearing (as is the case in Samoa) or an appeal proper (as in the case of the Customary Land Appeals Tribunal in the Solomon Islands).

To conclude, the above recommendations must be seen in the light of a unique set of circumstances present in Vanuatu. The current system of settlement is both inefficient and ineffective, not least because it is uses inappropriate and introduced concepts of law and results in the imposition of a decision. These proposals are suggestions for the format of a Land Tribunal that would provide for a customary land settlement system that is both Constitutionally and customarily appropriate. It must be emphasised, however, that this is a working paper and it is in the process of constant revision. It is within this light that the author welcomes any constructive suggestions for improvements to the model proposed.

A NOTE ON COPYRIGHT

Sarah Hardy-Pickering.