

ISSUES WITH LAND REFORM IN VANUATU

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INTRODUCTION

Land is the principal economic resource available to indigenous Pacific Islanders, a fact directly attributable to national constitutions and legislation which enshrine in the Pacific the highest rate of customary land ownership in the world. Land issues, accordingly, and in particular attempts at land reform, have a vexed history in the region. In Vanuatu, the 2006 National Land Summit has initiated an ambitious program of land reform which aims to clarify policies, introduce new legislation and amend existing laws. This paper will identify the main reasons why land reform is required in Vanuatu and what some of the most pressing legal issues in this regard are.

THE PROBLEMS WITH THE EXISTING REGIME

The National Land Summit was convened in late 2006 in response to the widespread recognition that there were significant problems with the existing legal and administrative regime governing land dealings in the country. Problems identified at the National Land Summit centered around leases, the principal form in which land can be transacted under state law. Lease agreements between landowners and lessees require approval by the government,¹ which in turn has a constitutional duty to ensure such agreements are not prejudicial to the interests of

- (a) the custom owner or owners of the land;
- (b) the indigenous citizen where he is not the custom owner;
- (c) the community in whose locality the land is situated; or
- (d) the Republic of Vanuatu.²

By the early 2000's, it had become obvious that the government was failing in discharging this constitutional duty. Leases were being approved that were opposed by members of the communities living adjacent to – and in some cases, on top of – the land being leased. Premium payments were being approved that were a fraction of the known value of the leased land. Many leases contained illegal lease conditions and there was effectively no enforcement of lease conditions anyway. Statutory requirements for physical planning, foreshore development, and preliminary environmental impact assessments³ were being routinely ignored.

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¹ Article 79(1) *Constitution of the Republic of Vanuatu*.

² Article 79(2) *Constitution of the Republic of Vanuatu*.

³ *Physical Planning Act* [Cap 193], *Foreshore Development Act* [Cap 90] and Part 3, *Environmental Management and Conservation Act* [Cap 283].

This ‘high level of non-compliance with legal requirements’⁴ and blatant ‘abuse of laws’⁵ was being facilitated by a general lack of public awareness of property rights under State law, and had created in Vanuatu a model case study in the ineffective and corrupt administration of law. Most alarmingly, many aspects of the legal and administrative regime developing around land dealings seemed to be ‘against the spirit, and probably the letter, of the Constitution’.⁶

THE CONSTITUTIONAL CONTEXT

Under articles 73, 74 and 75 of the *Constitution*, the “perpetual ownership and use” of land is only possible according to the “rules of custom”. State law is activated only when land is transacted ‘between an indigenous citizen and either a non-indigenous citizen or a non-citizen’,⁷ when there is a dispute over the customary ownership of alienated land⁸ and when the government acquires land ‘in the public interest’⁹. These three situations were addressed, respectively, by the passage of the *Land Leases Act* [Cap 163] in 1983, the *Land Reform Act* [Cap 123] in 1980 and the *Land Acquisition Act* [Cap 215] in 1992. In addition, article 76 of the *Constitution* envisages a ‘national land law’ to implement the ‘rules of custom’ relating to land ownership and use, and article 78(2) envisions the creation of ‘appropriate customary institutions or procedures to resolve disputes concerning the ownership of customary land’.

Jim Fingleton, one of three expatriate advisers charged with assisting to formulate land laws in the run up to Independence,¹⁰ has identified “notable features” of the first Government’s land policy from the *Land Policy Communiqué* issued by the first Minister of Lands on the 24th of April 1980, the *Lands Reform Regulation 1980* and the statement made to Parliament by the Minister on 29th October 1980. These features are (emphases added):

- a) the Minister’s clear view that the “custom owners” of land in Vanuatu are *groups*, not *individuals*;
- b) the clear intention that the general maximum for lease periods in rural areas would be 30 years, and would *only* be for up to 75 years for *major* development projects, and *only* if the investor was prepared to enter into a *joint venture* with the custom owners;
- c) it is also clear that the Minister’s power to enter into agreements on behalf of custom owners under s.8 of the *Land Reform Regulation* (now *Land Reform Act*) was only intended to be exercised over alienated land, *not* land which had never been alienated;

⁴ Chris Lunnay, Jim Fingleton, Michael Mangawai, Edward Nalyal, Joel Simo, ‘Vanuatu: Review of national land legislation, policy and land administration’ (March 2007) 5
http://www.ausaid.gov.au/research/pubout.cfm?ID=9890_470_5909_2050_163&FromSection=Research&Type=All (Accessed 9 September 2008).

⁵ Chris Lunnay *et al*, above n. 4, 20.

⁶ Chris Lunnay *et al*, above n 4, 4.

⁷ Article 79(1) *Constitution of the Republic of Vanuatu*.

⁸ Article 78(1) *Constitution of the Republic of Vanuatu*.

⁹ Articles 80 and 81 *Constitution of the Republic of Vanuatu*.

¹⁰ Howard Van Trease, *The politics of land in Vanuatu* (1987) 240.

d) finally, it is clear that the *Land Reform Regulation* was only intended to be an “interim” measure, until such time as the National Land Law was prepared as required by Article 76 of the Constitution.¹¹

LEGAL DEVELOPMENTS SINCE INDEPENDENCE

As noted by the ‘Review of national land legislation, policy and land administration’ (the Review) commissioned as a result of the National Land Summit, ‘it is apparent that many of these early principles have been seriously undermined’.¹² The Review characterises the years since independence as being ‘marked not by land policy development, but by land policy decline’.¹³

The powers and requirements of the *Land Reform Act* [Cap 123], which were originally intended to be used only with alienators in the transitional period after independence, have been used until today *solely* for the negotiation and granting of leases by the minister over customary land that has *never* been alienated.¹⁴ This is a clear-cut case of the law being used in a manner that not only goes against its original intention, but also goes ‘against the letter of the Constitution’.¹⁵

Beginning soon after its passage in 1983, leases were being routinely granted under the *Land Leases Act* for the maximum period of 75 years, and by approved lessors who were often ‘one or two senior males’.¹⁶

The *Freehold Titles Act* [Cap 233], which allowed indigenous citizens to acquire freehold title in urban areas, also seems to be contrary to the provisions of the *Constitution* and, tellingly, has never been used. The *Strata Titles Act* [Cap 266] of 2000 has probably been the most publicly controversial of the new land laws, given that it has facilitated subdivisions of leasehold titles on customary land without requiring the landowners’ consent and its implication in some of the more notorious subdivision developments on Efate.

The *Customary Land Tribunals Act* [Cap 271] of 2001 was promulgated to address article 78(2) of the *Constitution*. Pertinently (given my earlier comments about policy decline), the legislation was promoted not proactively but reactively, after the Chief Justice refused to allow the Supreme Court to hear any more land appeals after a full 100 percent of claims going through the Island Court were being appealed to the Supreme Court.¹⁷ A New Zealand Aid funded review of the operation of the Act in 2004, however, found that it was poorly understood and perceived by many chiefs to be undermining customary rules.¹⁸ Questions about the implementation of the Act were also raised by a 2002 decision of the Appeal Court that ‘the only bodies that have lawful jurisdiction and power to make a determination [over customary land

¹¹ Chris Lunnay *et al*, above n 4, 10.

¹² Chris Lunnay *et al*, above n 4, 10.

¹³ Chris Lunnay *et al*, above n 4, ii.

¹⁴ Chris Lunnay *et al*, above n 4, 18.

¹⁵ Chris Lunnay *et al*, above n 4, 4.

¹⁶ Chris Lunnay *et al*, above n 4, 19.

¹⁷ Anita Jowitt, ‘Indigenous land grievances, customary land disputes and restorative justice’ (2004) 8(2) *Journal of South Pacific Law* 4-5 <http://www.pacii.org/journals/fJSPL/vol08no2/8.shtml> (Accessed 16 April 2008).

¹⁸ Cited in Chris Lunnay *et al*, above n 4, 23-24.

ownership] that binds everyone are the Courts, in the first instance the local Island Court, and if there is an appeal, the Supreme Court'.¹⁹ This precedent has already been followed in a number of cases heard in both the Supreme Court and the Court of Appeal²⁰ and the resulting contradiction between the common law and the *Customary Land Tribunals Act* [Cap 271] remains to this day.²¹

Despite these deficiencies in the laws, it seems the most significant source of public dissatisfaction with the existing land regime was not the laws themselves (of which the public is generally ignorant) but rather the Government's poor management and administration of these laws. As stated by the Review,

There is ineffective regulation of land dealings, failure by the Government to protect the interests of the public and customary owners, poor or non-existent enforcement of regulations, incorrect interpretation of government legislation and a lack of defined responsibilities for numerous administrative activities that should be undertaken to ensure adequate and appropriate management and administration of land.²²

KEY ISSUES FOR REFORM

The National Land Summit produced a set of twenty resolutions which addressed the major areas requiring reform.²³ A key recommendation of the Review that followed was the promulgation of the national land law envisioned by article 76 of the *Constitution*, to deal with issues such as identification of customary landowners, issuing of negotiating certificates, social and environmental impact assessments, public access and mandatory conditions for leases. Significantly, the Review did not address the administration of the land laws, this being left for the government to deal with. The reform process, funded by the Australian government, formally commenced in early April 2008.

A number of key issues will need to be addressed by the reform. One will be how to ensure the government fulfils its constitutional mandate to ensure land dealings are in the best interests of landowning communities and the country. This is a question of capacity but also one of oversight. Given the government's poor record in this regard (which many identify as the root cause of most of the problems addressed by the Summit), the Malvatumauri has recommended the establishment of an independent "Ombuds-committee" to give final approval for all land transactions.²⁴ Perhaps a better suggestion is Don Paterson's recommendation that a Land Court be established

¹⁹ *Valele Family v Touru* [2002] VUCA 3 <http://www.paclii.org>.

²⁰ Debra Mackenzie, 'Case note: *Valele Family v Touru* [2002] VUCA 3: The legality of customary land disputes in Vanuatu' (2006) 10(2) *Journal of South Pacific Law* 4 <http://www.paclii.org/journals/fjspl/vol10NO2/7.shtml> (Accessed 15 April 2008).

²¹ Personal comment, Professor Don Paterson.

²² Chris Lunnay *et al*, above n 4, 30.

²³ Government of Vanuatu, *Ol Intarim Transisional Strateji mo Fiuja Plans blong Implimentem ol Resolusens blong Nasonal Land Samit 2006* (2006) <http://www.vanuatuculture.org/documents/interimstrategy.doc> (Accessed 15 April 2008).

²⁴ Malvatumauri National Council of Chiefs of Vanuatu, *Recommendations to the Lands Summit, September 2006* <http://www.vanuatuculture.org/documents/Land%20Summit%20Recommendations.doc> (Accessed 15 April 2008).

for this purpose.²⁵ At any rate, final approval should not rest with the minister (as it does at present), nor with any office within the Lands Department.

In the light of the decisions in *Noel v Toto*²⁶ and *Valele Family v Touru*,²⁷ the proposed national land law will need to unambiguously enshrine the *Constitution's* intention that land use should be determined by customary owners according to customary rules, to provide the courts with guidance in the application of customary law as envisioned by article 51 of the *Constitution*. The 'minimalist tenurial shell'²⁸ approach to the recognition of customary land tenure (as reflected in articles 73 and 74) needs to be preserved in the legislation, however, in order to accommodate the diversity and fluidity of customary regimes. Such an approach will also avoid the problem inherent in codifying customary law, that 'once the technique of law reform is applied to a rule of customary law, it instantly converts the form of the law and changes its entire juristic nature. It objectively becomes either statute law or common law'.²⁹

Determining customary land ownership has become an obsession of government, reflecting its own obsession with promoting capitalist development. One of the principal resolutions of the National Land Summit was that the ownership of land by groups and *not* individuals was a 'rule of custom' described in article 74 of the *Constitution* that was common throughout Vanuatu,³⁰ a view that is consistent with all anthropological accounts of Vanuatu's culture. Given that ownership by the current generation of landowners is shared with 'their descendants',³¹ the question of how to provide for the unexpressed wishes of unborn descendants when dealing with land under State law remains unanswered.

Another issue that needs to be addressed in legislation is what happens at the end of a lease. The common law position is that the owner of land is the owner of all things attached permanently to the land, without payment of compensation.³² Clearly this is not a "fair dealing" aimed for in the reform process, but neither is full compensation for all improvements undertaken on land. If this matter is not simply to be won by the best lawyer in court on the day, it needs to be addressed now as part of the national land law.

²⁵ Personal comment, Professor Don Paterson.

²⁶ *Noel v Toto* [1995] VUSC 3 <http://www.paclii.org>.

²⁷ *Valele Family v Touru* [2002] VUCA 3 <http://www.paclii.org>.

²⁸ Daniel Fitzpatrick, "'Best Practice" Options for the Legal Recognition of Customary Tenure' (2005) 36(3) *Development and Change* 458.

²⁹ M.A. Ntuny, 'The dream of a Melanesian jurisprudence: The purpose and limits of law reform' in Jonathan Aleck and Jackson Rannells (eds), *Custom at the Crossroads* (1995) 10.

³⁰ Government of Vanuatu, above n 23, 1.

³¹ Article 73 *Constitution of the Republic of Vanuatu*.

³² *Holland v Hodgson* (1872) LR 2 CP 328; *Harman v Towson and Harman* (1943) 3 FLR 334.