NAVIGATING CHANGING LAND USE IN VANUATU

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Among the least developed nations in the world, Vanuatu had the dubious distinction of being governed by an Anglo-French condominium prior to independence in 1980. Land, much of which had been alienated from customary control during colonial rule, was a key trigger in the political movements that led to independence. Like many Pacific islanders, ni-Vanuatu are "people of place." Land is central to identity, kinship, and, for many, survival. Increasingly, however, land is a commodity that can be converted to cash, primarily through the use of leases, and a growing percentage of land, especially near urban and coastal areas, is being leased, subdivided, or brought under strata-title, sometimes for use and occupancy by ni-Vanuatu but more often for developers, foreign investors, and tourism ventures. In 2006, awareness of the rate of postindependence leasing and associated concerns were brought to the attention of the public by way of a National Land Summit. Resolutions were passed and promises made. To date, little has happened at the formal level. Life (and leasing) goes on. Nevertheless, there is evidence that ni-Vanuatu are learning to navigate the choppy waters of land development in a variety of ways and with different outcomes.

Introduction

THE ARCHIPELAGO OF AROUND EIGHTY ISLANDS that make up the Melanesian Republic of Vanuatu have many languages and many customs, but they have two things in common: notionally, all land belongs to the indigenous people, and land is the primary resource that can be used to engage with the monetary economy. The first of these is a result of the independence Constitution, which, aside from very limited areas of state

Pacific Studies, Vol. 34, Nos. 2/3—Aug./Dec. 2011

land in the municipal areas of Port Vila and Luganville,[1] returned all land to custom owners. The second is a consequence of a lack of other natural exploitable resources, such as magnesium, as in neighboring New Caledonia; gold (as in Fiji) although in very limited quantities; hardwood timber resources, as in the Solomon Islands and Papua New Guinea; or nickel, as in Papua New Guinea. Nor does Vanuatu have the extensive tuna fishing ventures found in places like the Solomon Islands or land suitable for large-scale sugar production, as in Fiji. These two features, in combination, have created a situation of considerable tension between the desire or need to commercially exploit land in various ways and the desire or need to keep land within the customary framework of land tenure. This tension has been aggravated over a number of years by social factors, such as population increase and urban drift;[2] by political factors: internally by land practices that range from corrupt to merely inefficient and externally by pressures and policies from donor states to "make land work" better and to use land to meet development targets;[3] and by legal structures that are ill equipped to deal with contemporary land issues either because there is a mismatch between the laws and the way things are done or because the forums for dispute resolution are ineffective. Consequently, there are today—and indeed have been for some time—parallel systems governing land issues in Vanuatu and some evidence to suggest that various parties are becoming adept at navigating between these, either to achieve certain aims of their own or to frustrate the aims of others.

This paper proposes to sketch the postindependence background to present land issues and then to consider three features that have emerged from recent work undertaken by a project team under the organization of Jastis blong Evriwan (Justice for the Poor), which is part of a World Bank program encouraging research activities directed at examining land and natural resource management and access to justice on particular Vanuatu islands. I have been involved in the project as a peer reviewer. The project built on statistical research that I had undertaken—with the assistance of students from the University of the South Pacific, in 2001–2002—and subsequent research in 2006. The aim of the Jastis project has been to undertake empirical research to inform a better understanding of the leasing of land currently occurring in Vanuatu that could in turn be used to inform policy adopted to give effect to the Vanuatu Land Sector Framework 2009–2018. Besides undertaking a statistical review and analysis of current land records, the Jastis program also engaged in two field projects, one in Tanna and one in Epi, in order to map on the ground through interviews, observation, and analysis of formal records "the way customary groups negotiate and engage in land-lease dealings and the type

and effectiveness of mechanisms and strategies people use to resolve disputes."[4] The reports of these projects address a wide range of issues, but the features that this paper focuses on are myths and malpractices in registration, using leases to secure customary title, and doing things with land the ni-Vanuatu way. Approaching the topic from a legal perspective, the paper places the Jastis fieldwork done on the islands of Epi and Tanna within the legislative context, taking into account decisions of the courts, policy papers, and academic comment in order to use the case studies to highlight contemporary practices and issues relating to land and development in Vanuatu and to illustrate the way in which ni-Vanuatu are navigating between customary and introduced land laws.

The Postindependence Background to Present Land Issues

The 1980 independence Constitution of the Republic of Vanuatu restored perpetual title to all land to the indigenous custom owners[5] and provided that the rules of custom should form the basis for the use and ownership of land. No further indication regarding the nature, extent, or applicability of the rules of custom was given, and none has been forthcoming, although no doubt this was envisaged.[6] As will be indicated, customary land tenure practice has shown itself to be increasingly adept at using or adapting some of the rules and institutions introduced under "foreign" law. Moreover, the constitutional fiat has not meant that all land is held under customary tenure. Under colonial influence, freehold (and the equivalent in French law) and leasehold were introduced. Although all freehold was abolished at independence, as only indigenous people could have perpetual ownership, leasehold was retained as both an interim measure and to facilitate continued and future investment in land, primarily for agricultural purposes beneficial to the newly independent country. Those settlers who were in occupation of land at the date of independence were required to vacate it—subject to compensation payments—or could enter into fixed-term leases with the custom owners, provided that the latter could establish that they were the successors in title to the original customary owners.[7] New leases could be entered into either between indigenous people or between indigenous people and nonindigenous people, including noncitizens.

This overnight shift in landholding patterns created several practical problems. First, after a period of colonial settlement dating back to at least the mid-nineteenth century, if not earlier, the original custom owners could not always be ascertained, or their credentials might be challenged. Second, there were a number of potential legal regimes governing leases—French law, English law, and local unwritten practices. A national law was not

passed until 1983 and did not come into force until the following year.[8] In the interim, some land continued to be occupied by settlers without any formal lease, other land was cultivated or occupied by local people who either had been displaced at some earlier time from their own land by the incursions of settlers or natural disasters or took advantage of land lying idle when some settlers fled following the political upheavals surrounding independence, or it was occupied by those who claimed land to be theirs in custom, sometimes mistakenly or fraudulently. In order to address some of the uncertainty engendered by this transition from colonial settled state to independent, indigenous state, power was vested in the Minister of Lands to manage land where there was a dispute regarding the identity or validity of a custom ownership claim or where customary owners could not be found.[9] The relevant minister (whose title has changed from time to time) has continued to exercise this power, often in situations far removed from those envisaged in the enabling legislation. In particular, the power has been exercised over land that had never been alienated to foreigners and arguably, therefore, was not covered by the Land Reform Act.

Consequently, since 1980, a parallel system of land tenure has persisted. While approximately 90 percent of the land in Vanuatu is held under customary tenure (although disputes affecting such land are widespread and persistent) and cannot be alienated in perpetuity, it can be leased for a period up to seventy-five years, either to other indigenous people or to nonindigenous people. Once a leasehold is secured over land, the land can be subdivided, developed, and also used as security for mortgage finance. At the end of the lease, the land will in principle revert back to the customary owner, but in practice (although in most cases this remains to be tested), the customary owner may have to compensate for improvements (which they may not be able to afford) or offer to renew the lease.

Within this parallel and plural system of landholding, the land rights of indigenous people are determined by largely unwritten, customary law. This law, as elsewhere in the region, is closely related to social and family organization—to the tracing of lineages and the recounting of histories stretching back to stories of origin.[10] Land is held by one generation for the benefit of the next, and its management has to accommodate a number of different claims and obligations. While individual claims to land are not unknown, often these are contested, and, more usually, while the current management of land may vest in an individual, it is for the benefit of a number of people linked by lineage, marriage, adoption, and affiliation. Leases, however, and other introduced forms of landholding, such as strata-title, can be held by anyone and are premised on the free alienability of

land, the exercise of individual will, and a perception of land as a marketplace commodity that can generate income, fetch a price, and be burdened as security for financial loans that in turn might be used to improve or develop the land or be used for other projects, such as the purchase of a vehicle for a taxi or to establish a store, or simply be frittered away.[11]

While there is no registration of title to customary land—and indeed there have been no attempts to do this—leases over three years do have to be registered. For researchers, this is a boon, as it should, in principle, be possible to get an accurate picture of how much land is under lease. When I first looked into this in order to establish a statistically supported picture of how much land on the island of Efate—excluding land within the municipal boundaries of Port Vila—fell under lease,[12] all the records for the land registry were in hard copy in well-ordered files in an efficiently run office. In the period between my own research and that of Jastis blong Evriwan, the records were boxed up and physically removed to new premises, where they sat waiting to be converted into electronic data using software and computers funded by donor aid in the belief that this modernization would deliver a more efficient and effective service. However, one of the initial aims of the Jastis project was to ascertain the current picture of land leases through the registration process in order to present an overview of the national leasing profile insofar as it can be ascertained from centrally held records. It was hoped that this would give hard currency for informing future land policy. This proved to be extremely challenging. Not only were there conflicting figures for the total number of registered leases, but it was clear that the figures did not represent all leases, as leases under three years do not have to be registered; there is a backlog of leases waiting to be registered; and there are inaccuracies in the information held on registered leases (e.g., duplication of leases, failure to remove canceled leases or merged leases, failure to remove old leases replaced by new ones as a result of boundary changes or subdivisions). There are, moreover, as many as six different government databases: the e-survey database, the Valuation Database, Saperion, the e-registry database, VLAMS, and the Cadastral GIS database.[13] These databases vary in quality and coverage, with missing data for many of the important variables; for example, Jastis research found that the period of time of the lease was missing for 24 percent of all leases; the year in which a lease was granted was missing in 12 percent, so it would be contentious as to when it expired; in 8 percent an indication of the land area covered by the lease was missing; 6 percent had the class of use to which the land could be put missing; and in nearly half the records, data for rent, whether by way of premiums or annual charges, was missing.

Although the data are incomplete, Jastis has estimated that there were, in 2010, approximately 13,818 active leases,[14] covering an area of 1,258.6 square kilometers, which represents about 10.5 percent of the total land area of Vanuatu. While there may be some debate about the statistics,[15] what is evident is that leasing is increasingly a feature of Vanuatu land use with varying percentages of land being brought under lease from island to island.[16] Although the use of leases can be beneficial to ni-Vanuatu, there are increasing concerns that these benefits are being received by a limited number of local people and that more often the benefits are being reaped by middlemen and overseas investors. The type of negative circumstances that surround leases and to which attention has been drawn through the Resolutions of the National Land Summit 2006 (Tahi 2007), local media, and consultancy reports (Fingleton 2005; Lunnay et al. 2007) are illustrated by case examples recorded by the Jastis field officers, such as secretive lease registration without consultation with all customary interests or the involvement of island council of chiefs; failure to comply with legal requirements for environmental impact assessments prior to granting the lease; failure to pay premiums, review rents, or observe employment or development covenants included in the lease; registration by the Department of Lands without the necessary supporting documents; payments of monies to only a limited number of those entitled to benefit; and mismanagement and squandering of lease monies so as to frustrate any equitable distribution. There have also been allegations of bribes and backhanders to facilitate the negotiation, approval, and registration of the lease; forged documentation; and the deliberate concealment of relevant information.

The Field Studies

Besides seeking to establish a national survey of lease activity, the Jastis program included two field studies, one on the island of Epi and one on Tanna.

Epi is an island just north of the island of Efate, where the capital Port Vila is situated. Although Epi is small, it is within easy reach of Port Vila by both boat and plane and is beginning to attract tourists. It provides a typical case study for leases. Epi has a population of 5,648 people, according to the 2009 national census, who make up just over 1,000 households. It has no urban center, so these households are grouped in scattered villages largely dependent on subsistence farming with a few families involved in tourism. There are twenty registered leases on Epi, which between them make up about 14 percent of the total land area. Most of

these leases (seventeen in total) are on land alienated prior to independence. However, more recent leases include subdivisions created over a surrendered preindependence lease and a large, purportedly agricultural lease of 5,343 hectares granted in 2007 representing a land area of 12 percent of the island.

Tanna is south of Efate and much larger than Epi with a land area of 570.70 hectares, of which about 2 percent is under lease. There were sixty-four registered leases on Tanna, but five of these were discounted, having been replaced or superseded by new leases, or having expired or been canceled, and a further ten were found to be inactive. In the 2009 census, it was estimated that the population was 28,799, making up 5,153 households. This marks an 11 percent population increase since the last census in 1999, and there is some pressure on land in east Tanna, necessitating relocation for gardening and access to timber. Volcanic ash fallout from the active Yasur volcano has aggravated the need for land resettlement. While there is some urbanization around Lenekal and Isangel, most households are dependent on subsistence agriculture. As in Epi, there is some tourism in Tanna, and the volcano attracts a number of visitors.

Myths and Malpractices in Registration

Under the Land Leases Act 1988 (Cap 163), registration is deemed to confer on the registered leaseholder an indefeasible right, subject only to previously registered interests or a limited number of interests that are deemed to be overriding and that are not on the register (listed in Section 17).[17] Whether the Vanuatu system of lease registration truly amounts to a Torrens system—as is found in New Zealand and in most Australian states, for example—is debatable. It appears to have been assumed to be so in *Ratua Development Ltd v Ndai* (2007), VUCA 23, but in the later case of *Solomon v Turquoise Ltd* (2008), VUSC 64, it was held that "the principle of indefeasibility is not so strongly entrenched in Vanuatu's Torrens system as elsewhere," suggesting that in Vanuatu there is a modified Torrens system.[18] However, although as will be seen, security of title may be challenged retrospectively to registration, a person to whom a registered lease is subsequently transferred is protected from any suspect dealings that may have surrounded the original registration (Section 23). This, of course, is a great advantage to the developer who may get in quickly and get out quickly, having acquired the land, established a modest infrastructure of dirt roads, and marked out subdivisions for resale.

While registered title is meant to be indefeasible, it can in fact be challenged, and part 15 of the Land Leases Act provided for rectification

of the register, either by the registrar or, more important, the court. Section 100 states the following:

1. Subject to subsection (2) the Court may order rectification of the register by directing that *any registration be canceled or amended* where it is so empowered by this Act or where it is satisfied that any *registration has been obtained, made or omitted by fraud or mistake*.
2. *The register shall not be rectified so as to affect the title of a proprietor who is in possession* and acquired the interest for valuable consideration, *unless such proprietor had knowledge of the omission, fraud or mistake* in consequence of which the rectification is sought, *or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.* (emphasis added)

In the case of *Naflak Teufi Ltd & Kalman Kiri Manlangai* (2005), VUCA 15, the Court of Appeal of Vanuatu held that the object of the above section was "to ensure that the land register and the process leading up to the registration of any instrument or interest is free of any mistakes, fraud or possible fraudulent activities. In other words, its purpose is to secure the integrity of the Register, and the internal processes culminating in registration." This raises two legal issues: first, does a claimant have standing to challenge the register, which is usually a case grounded in customary law, and, second, will the court order rectification, which is determined by the interpretation of the legislation, not customary law. This presents two challenges for the customary owner who has been excluded from lease negotiations in the first place, and overcoming the first obstacle will not necessarily lead to success at the second.

In meeting the first, although *locus standi*, or the right to appear before the court and make a claim, may be supported by reference to customary law, the case law suggests that a number of noncustomary arguments may also be put forward. For example, in *Ifira Trustees v Kalsakau* (2008), VUSC 25, the claimants argued that the custom owners of the land had decided to vest the legal ownership of the disputed land in Ifira Trustees Limited, who were to hold the land beneficially for all the members of their community. The truth of this claim was not challenged. However, there was a question of whether using the corporate trust was compatible with the constitutional provisions that stated that all land was to be held under customary tenure (articles 71–73). The trustees argued that "there is no inconsistency between the declaration (of trust) and the said articles because: 1. The said lands belong beneficially to the respective indigenous custom owners and their descendants; 2. They have applied their own rules

of custom in deciding the basis of ownership and use of the said land. 3. They have adopted and therefore recognise the concept of trust as being *'a recognised system of land tenure'* for the purpose of this custom in regard to Article 73 of the Constitution." The court accepted the *locus standi* of the claimants despite the fact that (1) the trust and therefore trustees of a trust are introduced legal concepts and (2) Section 1 of Land Leases Act refers to proprietor of a lease and defines this as "in relation to a registered lease the person named in the register as proprietor thereof . . ." In *Bouchard v Director of Lands Records* (2003), VUSC 6, it was pointed out that "the Act in various sections speaks of a '*person*.'" Strictly speaking, a trust is not a person, nor is the office of trustee—although it may be undertaken by a person. However, in the Ifira case, which concerned people and lands within the vicinity of the capital Port Vila, there is a trust corporation that may be deemed to be a "legal person." Nevertheless, it could be argued that such an introduced or foreign concept could never be part of the customary law envisaged under the Constitution in respect of customary land.

In *Kalotiti v Kaltapang* (2007), VUCA 25, the Court of Appeal accepted the ruling by a New Hebrides Native Court in 1972 that the claimants were custom owners and therefore entitled to raise a challenge to the registration of a lease even though it was not clear that the 1972 preindependence case had been decided according to custom or that preindependence court decisions were intended to remain of force and effect at independence, as no reference is made to this in the constitutional provisions for the transitional legal regime (found in article 95).[19] However, a prior court ruling may be useful evidence to achieve rectification and was successfully used in *Kalou v Traverso* (2003), VUSC 59 (and subsequently upheld by the Court of Appeal in *Traverso v Kolou* [*sic*] [2003], VUCA 18), where a lease of valuable coastal development land granted by the Minister of Lands to the defendant was found to have deliberately sidestepped an Island Court decision that the claimant was the customary owner of the land in question, and the court was satisfied that the lease had been obtained by dishonesty or by fraud and that rectification should take the form of cancellation of the lease. Although in this case the minister himself was not found culpable, there have been cases where this implication has been made.[20] For example, in the case of *Solomon v Turquoise* (2008), VUSC 64, the minister approved a lease that was then registered, knowing that there was a dispute affecting the land. The court, in a decision that was upheld on appeal (*Turquoise v Kalsuak* [2008], VUCA 22), set aside the registered lease on the grounds that the leaseholder was not yet in possession (see my emphasis of Section 100 above). According to the ruling in the Appeal Court

decision in the *Turquoise* case, the date at which possession will be assessed is "the day when the issue of fraud or mistake was first asserted against the registration"—evidence of which will be strengthened by the registration of a caution—"or, if not then, at the latest when proceedings were issued claiming rectification" (2008, VUCA 22: 41). There is therefore the opportunity to challenge registration of lease where the leasee is tardy in taking up possession—as may be the case where land is acquired for speculative investment or development is delayed.

In the *Turquoise* case, the Supreme Court held that the possibility of retrospective cancellation of registration, provided in the legislation, is deliberate and has been included in order "to accommodate Vanuatu's circumstances" (Judge Tuohy 2008, 67). In particular, if there is a title dispute going through the Customary Lands Tribunal system, which has jurisdiction to hear customary land claims, then

> if rectification is not ordered and the custom ownership of (the claimant) is later upheld . . . he will have lost for his own lifetime and probably the lifetime of his children, the possession of his traditional land, completely against his wishes. The land may in all likelihood have already been subdivided and homes or other buildings constructed and occupied. That would be a very unfortunate result. (Tuohy 2008, 72)

Consequently, where the minister makes a "mistake" as to his or her power to grant a lease—for example, by ignoring the views of custom owners, accepting a bribe, taking into account matters that should not be taken into account, or ignoring those matters that should be taken into account—indefeasibility of title is at risk, provided that a causal connection can be made between the minister's "mistake" and the registration. This was elaborated on in the case of *Roqara v Takau* (2005), VUCA 5, where it was explained that while an Island Court order is binding only on the parties to it and not on the minister, if a minister registers a lease concerning land over which there is an order restraining the disputed customary owners from dealing with it, then this is a highly relevant fact that the minister would be expected to take into account.[21] If he does not or if the order is not brought to his attention, then that mistake could have led to the registration being made and would be grounds for rectification once the mistake came to light.

Therefore, while purchasers may believe that they have indefeasibility of title, in fact in Vanuatu it is possible to cancel or amend the registration

of a lease if either the leaseholder is not in actual or constructive possession—which requires more than a mere right to come into possession, which is implied in every lease—or there is fraud or a mistake that has been instrumental in the registration going ahead.

Increasingly, it would seem that registration itself is being challenged by those whose claims to customary land pre-date any registration. Often these are triggered when the monetary value of land becomes apparent in the course of lease negotiations or thereafter. The system of registration is being used, therefore, not only to secure leases for lessees—which is its intended purpose—but also to indirectly assert customary claims against lessees and often those who granted the lease. This may be done at the time of registration but equally may be done some time afterward.[22]

Using Leases to Secure Customary Title

The registration of leases does not provide for the registration of the interests of the custom owners of the land leased. Indeed, it was pointed out in the case of *Ratua Development Ltd v Ndai* (2007), VUCA 23, that

> there is indeed no specific place for the identification of lessors in the register. Although we assume that their names are recorded as part of the brief description of the lease in the property section of the register, it is clear that the property section is intended to record and identify the details of the lease not the lessors. It follows that the Land Leases Register does not purport to and does not declare the custom ownership of the land subject to a registered lease. There is no Torrens system in respect of those to whom the land belongs, namely the custom owners. (paragraph 26)

So, registration of leases does not directly provide any register of customary landownership. Indeed, many ni-Vanuatu regard proposals for the registration of land with considerable suspicion, believing that this may be a means whereby the government (or foreigners approved by the government) will take away their land. However, some ni-Vanuatu see registration of leases as advantageous. In both Epi and Tanna, researchers found that in some cases registration was viewed in a positive light because it afforded an unchallengeable right to the land and thereby conferred a security of title that was not available under customary tenure. If a lease is to be utilized to secure customary claims to land, not only does a lease have to be created over it, but it has to be in favor of the customary owners, in which case the

lessors and lessees may be one and the same parties or at least represent the same family interests. The use of registration in this way can apply to formerly alienated land where continuing disputes since independence have meant that registration has been delayed or be used to secure new leases (over nonalienated land) where there are ongoing customary disputes.

An example of the first is illustrated by one of the Epi cases where alienated land was returned to custom owners at independence, but some twenty years afterward a dispute arose between the custom owners and others claiming the land. Although the local council of chiefs ruled in favor of the custom owners, the aggrieved other party went to Port Vila and registered a lease over the land. Apparently, the registered leaseholder hopes to secure a mortgage over the land to develop it for tourism and to subdivide the remaining land. Here the use of registration to attempt to silence or bring to an end a long dispute suggests that frustrated custom owners wanting to develop their land may see registration as a useful tool in their endeavors to do so. In this case, the family registering the lease were historically incomers allowed to use a small portion of land that over time grew to 115 hectares. The registered lease, which was between members of the family as, respectively, lessors and lessee, was to secure title over this enlarged area against those claiming to be original settlers of the land. The use of leases to secure customary land is not new. The Epi research also includes a case where although local chiefs accepted that the family occupying the land were the custom owners at independence, a lease was nevertheless registered in their favor in 1984, and the land peacefully occupied under a lease by these recognized custom owners until 1999, when disputes over entitlement to trochus shells arose because of nonpayment of rent. Following court hearings in 2008, the lessees became registered as the lessors, thereby merging the identity of the two parties among different family members. In principle, this would mean that there was no need for a lease, but here the family in question was not originally indigenous but had married into the indigenous community and over a number of generations been assimilated into it. The use of the registered lease helped to secure land rights for them in what might otherwise have been a continuing precarious situation.

In the second case, where a lease is used to secure nonalienated land, there are two ways in which a lease may be achieved. The first is where the Minister of Lands intervenes and uses his power under the Land Reform Act, possibly wrongly, to act as lessor. This technique is illustrated by an Epi case where a long-running dispute between customary land claimants led to the involvement of the minister of lands becoming lessor

at the instigation of some but not all of the disputing parties. The minister then exercised his power under the Land Reform Act to grant a lease to some of the disputants despite the fact that the Supreme Court had already made a ruling regarding ownership of the land so that, in principle, there was no need for the minister to exercise his powers under the Land Reform Act. In Tanna, four leases had been entered into in this way in the course of the past few years (2007–2009). In all of them, there were disputes affecting the land, and the lessees were custom owners involved in the dispute, so the registered lease afforded them security while the lengthy and often drawn-out court procedures went on.[23]

The Court of Appeal of Vanuatu has indicated that where the Minister uses his powers in this way over land that was not alienated prior to independence, this is an abuse of the powers conferred under the Constitution. Indeed, the Resolutions of the National Land Summit called for the abolition of such ministerial powers. Nevertheless, it appears that custom owners see some merit in using the minister's powers to their advantage. It may also mean that regardless of any dispute resolution, the lessees are in occupation of the land and that further measures will have to be taken to enforce any court judgment that goes against them, thereby protracting the likely litigation. However, the creation of lease over land to which the lessees already have a customary albeit possibly disputed claim means in principle that they may be subject to the payment of rent and/or a premium. Indeed, if the Minister of Lands is the lessor, he is obliged to collect rent and hold it on trust for the eventually determined custom owners. In only two of the Tanna cases was such rent was being paid, and in other cases where the minister has exercised his power, there has been concern that monies received were not being properly accounted for or could not be extracted once it was clear, as a result of a court order, who was beneficially entitled.

The second way in which a lease may be used in respect of nonalienated customary land is where a lease is negotiated between members of the same family, often for no payment of premium and no or very little rent—five of the seven leases falling under this heading in Tanna generated no rent. The advantage of this is that the lease not only confers security of title but also transforms the land from a nonmortgageable asset to a mortgageable one, thereby allowing the custom owners to secure finance for development or other entrepreneurial activity. It is also one way in which women can secure an interest in land in their own name or as a co-lessee with other members of the family, although examples of this happening in the Epi and Tanna research are few. A lease in these circumstances can be advantageous to family members; for example, where they are lessees in

occupation of land required by the government, they may entitled to compensation (as demonstrated by at least one lease on Tanna), but it may equally be disastrous. Where monies are secured against the land default can mean repossession by the lender. If the family members fall out, there is always the possibility that the lessees will sublease or assign the lease to nonfamily members, often foreign investors, as demonstrated in four of the five tourist leases on Tanna.

Doing Things with Land the ni-Vanuatu Way

In Vanuatu, land can be developed for two income generating purposes: tourism or agriculture. On both Epi and Tanna, there was evidence of agricultural projects. In Epi, postindependence agricultural projects appeared to have failed. Although there were promises of new employment opportunities associated with the granting of a large agricultural lease, these had yet to materialize, and employment opportunities under older agricultural leases arising from preindependence titles had diminished because of land becoming neglected, falling copra prices, and failure to develop land as promised.

In Tanna, a coffee agribusiness had been established shortly after independence by the Commonwealth Development Corporation on leased land of 466.01 hectares. At first, coffee was grown by the Tanna Coffee Development Corporation on the leased land, but over time centralized coffee growing using paid labor has given way to smallholding coffee growing whereby landowners have either take over plots of land under the lease or grow coffee on their own land that they sell to the corporation. Management of the leased land has passed to the customary owners, the lessors, while the role of the corporation has been to assist local growers and purchase their beans. Although not the original purpose of the lease, this arrangement seems to have worked well, and there has been support for retaining the land under the original lease in order to provide secure land for future generations within the community. However, in 2010, new coffee buyers entered the market, providing competition for the Tanna Coffee Development Corporation. Growers now have a choice as to where to sell their beans. Moreover, while management of the land has passed into the hands of custom owners through the formation of a cooperative, there is dissatisfaction among some that monies are not being appropriately handled and that the executive of the cooperative is planning to lease the land or some of it to other lessees. This is causing disquiet, as, should they do so, this would mean that there was no longer security of (leased) land available for coffee growing for future generations.

Although limited, these examples of agribusiness leases suggest that unless local land groups are engaged in the cultivation/agricultural processes and see a fair economic return for their efforts, there are likely to be failures and/or disputes. However, as the possibility of returns increases—either through commodity competition or the possibility of land use change, such as agriculture for tourism or subdivision, or the possibility of participating in some form of compensation payout, such as for environmental damage—the whole edifice is in danger of collapsing, leaving those affected without security of land tenure either in custom or under leasing arrangements.

Conclusion

In this paper, I have tried to place the contemporary picture of land issues within its historical background, focusing especially on the legal framework that has emerged to inform present difficulties. A plurality of laws can have positive benefits because it allows maneuverability; it can also lead to lack of cohesion, confusion, and certainty. It also encourages "forum shopping," for example, going from one court to another or dipping in and out of the formal system to engage with the informal system. While Vanuatu may be fortunate compared to some of its neighbors that the Constitution declared that "all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants" (Section 73), it is perhaps unfortunate that more has not been done to ensure the security of this principle. Similarly, although the Constitution states that "the rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu" (Section 74), clearly this is not the case, at least as far as use/occupation is concerned. Noncustomary forms of land tenure are unlikely to disappear while they are supported by national land policies (often shaped by donor advisers) and find favor among many local people.

The future picture of land in Vanuatu is pretty grim. Most leases granted in recent years have been for the maximum period of seventy-five years. The population is growing rapidly with a large percentage under the age of twenty-five. Opportunities for outward migration are very limited. Some people are already landless insofar as they have leased out their land and cannot use or occupy it for the foreseeable future. Others are landless because they have lived in the urban areas for so long that they have lost their claim to lands in their islands and have little wish to return to subsistence farming in rural area. Others have land to use and occupy, but their right to do so is precarious either because they are incomers (*mankam*),

even if they have been there for several generations, or because they are squatters living in overcrowded and badly serviced settlements in and around the urban areas. Despite assertions to "clean up" corruption or improve land administration, gross mismanagement of power and resources at central and provincial levels continues.[24] Dealings with land are also characterised by considerable imbalances of power in transactions between non-indigenous (usually ex-patriate) developers and/or investors and indigenous ni-Vanuatu, and between local people themselves, some of whom have access to lawyers, the machinery of land registration and the benefits of education, while others are poorly educated, lack resources, live in rural areas, and are denied sufficient information to be able to make well-informed decisions regarding their land, as well as being denied access to sufficient funding to develop it under customary tenure.

Nevertheless, despite this gloomy picture, there are grounds for optimism. The natural adaptability of people accustomed to weak central government and to looking to local laws, practices, and forums for determining their daily lives demonstrates a resilience to total disaster and an ability to make something of the present muddle. This is evident in the way that leases are being used to secure, at least in the short term, customary land rights in order to minimize social disruption; in the way that landholders are forming informal trading cooperatives to market produce; and in the way that individuals and groups are prepared to increasingly question and in some cases challenge proposed land commoditization through challenges to leasing either at the outset or at the registration stage. Rather than being passive in the movement to "develop" land, some ni-Vanuatu are beginning to fight back and to take control of the process to make it work for them.

NOTES

1. Probably less than 2 percent of the total land area of 11,880 square kilometers (915 square kilometers) is public land.

2. The population is approximately 221,506 (2006 Census of Agriculture) with an average annual growth rate of 2.6 percent.

3. See, for example, the AusAID publication *Making Land Work 2008* and *Pacific 2020* and comment in Farran (2009).

4. Porter and Nixon (2010, 5). On Tanna see Nixon et al. (2010).

5. Article 74 (apart from relatively small areas of public land located in the two metropolitan areas of Port Vila and Luganville).

6. Section 76 of the Constitution states, "Parliament, after consultation with the National Council of Chiefs, shall provide for the implementation of Articles 73, 74 and 75 in a national land law . . ."

7. Governed by the Alienated Land Act Cap 145, which was not brought in until 1982.

8. Land Leases Act Cap 163.

9. Section 78 of the Constitution and the Land Reform Act 1980, Cap 123, Part 5. See Farran (2003).

10. See Farran (2010).

11. There are cases in the Jastis project that support this.

12. See Farran (2002).

13. The application number comes from e-registry and Saperion; lease type from VLAMS, e-Registry, Saperion, and cadastral GIS; cadastre from e-Survey; lease term from the old valuation database, e-registry, and Saperion; area from e-survey and cadastral GIS; and rent from e-registry (Calculation formulas) and Saperion. These databases exclude strata-titles that are recorded manually and appear not to be linked in to any electronic database.

14. However, Jastis blong Evriwan research into leasing on the island of Tanna found a number of inactive leases that had not been canceled by the Department of Lands. This situation may also apply in other islands, which would mean that there are fewer leases than this.

15. Lunnay et al. (2007), for example, come up with different figures that suggest that by the time of their report in March 2007, 7,070 leases had been registered under the Land Leases Act since 1980, of which 5,392 were leases of public land in urban areas and 1,678 were rural leases, whereas Jastis found that there were 9,444 active leases as of December 2006, 5,361 of which were urban and 4,083 rural.

16. See Porter and Nixon (2010).

17. These, especially if confirmed by a court, may result in the leaseholder finding that subsequent to purchase of the lease, the land is subject to occupation or other rights of others; see *Williams v AHC (Vanuatu) Ltd* (2008), VUCA 16.

18. There are two features of the system that are important. The first is that it is the land as such that is registered, not the person in occupation; the second is that legal title does not pass until registration. This means that if there is no registration or the registration is set aside, the transferee will hold only an equitable interest not a legal one—following introduced common law principles—and any equitable interest is subject to the doctrine of notice; that is, did the transferee know or have reason to suspect that the transaction was flawed in some way, for example, because there was a pending customary dispute affecting the land?

19. The principle has, however, been subsequently upheld in *Kalo v Malsungai* (2008), VUSC 46.

20. There have also been a number of ombudsman's reports on ministerial abuse of power in this regard; see, for example, Improper Granting of Land Lease Title 11. OE22.016 by the Department and Ministry of Lands (1998) VUOM 10; 1998.10 (April 9, 1998).

21. Prior to the establishment of Customary Land Tribunals, it was the Island Courts that had jurisdiction to hear customary land disputes with appeal to the Supreme Court. Because of the backlog of cases, some Island Courts are still hearing land cases, and not all islands have Customary Land Tribunals; see Farran (2008) and Simo and Van Trease (2010).

22. The Limitation Act No. 4 of 1991 places a 20-year limitation on an action to recover a principal sum of money secured by mortgage or other charge on property or to recover proceeds of transfer of any interest in land. However, it is questionable whether this applies where merely rectification is sought.

23. One of the features noted by the research team on Tanna was the high prevalence of recourse to the formal court system rather than customary dispute settlement despite the strong claim of custom on Tanna. See Draft Report Tanna Island Leasing Report November 2010.

24. See, for example, coverage in the *Vanuatu Daily Post*, Kiery Manassah, "Vanuatu Cabinet Minister Cleared of Bribery," August 11, 2008; Radio New Zealand International, January 20, 2011, "Report Alleges Illegal Land Deals in Vanuatu"; and the news release of Transparency International branch in Port Vila, December 14, 2010, "Hard Questions from Transparency Vanuatu," at http://archives.pireport.org/archive/2010/december/12-15-rl.htm

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