CUSTOM, PLURALISM, AND REALISM IN VANUATU: LEGAL DEVELOPMENT AND THE ROLE OF CUSTOMARY LAW

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Most Pacific Island states are now developing modern legal systems that to some degree incorporate elements of indigenous customary law into the formal Western-style systems imposed during the colonial era (see, for example, Weisbrot 1982b). There are also a number of countries--mainly in Africa and Asia--where the legal systems have had to cope with multiple colonial laws owing to a succession of colonial powers (see, for example, Hooker 1975466-473). In Vanuatu however, the combination of a remarkable colonial history, a multiplicity of local cultures, and a determined effort at decolonization and constitutional development has resulted in a unique experiment in legal pluralism.

The condominium form of colonial governance, by which France and Britain jointly ruled the New Hebrides (as Vanuatu was then called), was organized on the basis of equality of government and co-existence of the respective jurisdictions. This sometimes took on comic opera aspects, as in the requirement that the British and French flag-poles be of identical height and that the flags be raised simultaneously (Ellis and Parsons 1983: 118). More fundamentally, the separate-but-equal policy led to separate educational systems (mainly mission-based), police forces, and medical services as well as two national anthems, two currencies, and three official languages, producing a rule "so inefficient and cumbersome that it was popularly known as the Pan-

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demonium. The Vanuatu people were neither consulted in its establishment nor involved in its operation" (Molisa et al. 1982:85).

In a territory in which there was already two of everything, schizophrenia would, perhaps, require the manifestation of quadruple personalities--and indeed the colonial legal order in the New Hebrides did so, accommodating French civil law, British common law, joint or condominium law, and indigenous customary law. The difficult task for the present government of Vanuatu is to fashion a coherent and appropriate legal system out of the chaotic colonial legacy.

The Colonial Condominium

The first European contact with Vanuatu came in 1606, but there were few visits from Europeans, even from the relatively proximate Australian colonies, until the 1840s when traders and missionaries began to arrive in force, particularly in the southern islands (Howe 1984:282).[1] Imperial partition came relatively late to Melanesia, but gathered momentum owing to European rivalries half the world away, with annexation moves aptly described as "incidental means of regulating the disorderly process of investment, land confiscation, and labour recruiting through the clientage networks already established in the islands" (Newbury 1980:23).

Pressure from within the New Hebrides for colonial annexation began in 1857, when chiefs of Aneityum island were prompted by the influential missions to petition Queen Victoria to establish a protectorate, to counter fears of French aggression from New Caledonia (Brooks 1941:239-240, 247). The churches continued to pressure Britain for protection for several decades (Standish 1984: 131).

Beginning in the 1870s French settlers in New Caledonia also pressured their government to annex the neighboring New Hebrides, notwithstanding the fact that most settlers and almost all missionaries there were British (Brooks 1941:405). French migration into the New Hebrides was steadily increasing, however, and considerable landholdings were being amassed; by the 1930s there were ten French settlers for every British settler (Standish 1984: 132). The essential nature of the British and French presence differed as well, with the British principally "interested in souls and the French in land' (Hours 1979:15).

In 1878 the British and French governments exchanged notes undertaking to leave unchanged the "independence" of the group. This did not allay the security fears of the settlers and missionaries in the New Hebrides or of the British colonists in Australia and New Zealand, how-

ever, who continued to lobby for a more conclusive arrangement. In 1886 France and Britain began negotiations regarding a system of joint police surveillance, leading to the Convention of 16 November 1887, which constituted a Joint Naval Commission with responsibility for protecting the nationals and interests of those two powers in the New Hebrides. The commission provided some measure of physical security, but failed to provide any administration, civil or commercial law (as land development companies boomed and busted), or investment security (O'Connell 1969:73-75).

In 1904 an Anglo-French declaration raised the notion of a "sphere of joint influence" and laid the groundwork for the Condominium, which was established by the Convention of 1906, ratified 9 January 1907. The convention merely added a number of joint services to those separately provided by the metropolitan powers and established a system of joint courts to deal with matters outside the separate national systems. The administration of justice operated poorly under this regime, and "was often as not ridiculed by the European population, and scandals and abuses multiplied' (O'Connell 1969:76). Further British-French negotiations resulted in the London Protocol of 1914, which together with the 1906 convention served as the constitution of the Condominium.[2]

In the Condominium, each of the two powers "[retained] sovereignty over its nationals and over corporations legally constituted according to its law" (O'Connell 1969:92). Accordingly, the British and French established separate systems of judicial administration, each with jurisdiction over its own nationals.[3] Persons present in the Condominium who were neither British, French, nor indigenous were required to opt for either the British or French legal system within one month of arrival, and were known as British or French "optants." Once made the choice was final. Persons who failed to opt were assigned to one system or other by a joint decision of the two resident commissioners, with "the governing consideration . . . whether the individual's neighbours [were] British or French" (O'Connell 1969:95). The determination of whether a matter went to the French or British courts was rather less clear. In criminal matters, the governing factor was the nationality (or ascribed nationality) of the defendant, normally straightforward except in the case of multiple offenders. Civil matters were more problematic, since English and French conflict of laws regimes do not mesh (O'Connell 1969:127-129).

The jurisdiction assumed by the Condominium to legislate for the indigenous population may be somewhat at odds with the constitutive documents of the Condominium. As O'Connell has stated:

> The effect of the Convention and Protocol was to subject the natives of the New Hebrides to an administrative regime while depriving them of the possibility of attaining equal civil status with the Europeans in the Group. It was, of course, envisaged that the natives would remain under the customary jurisdiction of the chiefs, and that all they would need would be protection against exploitation by whites, and against the aggression of each other. To this end they would be regulated by two separate texts, the provisions of the Protocol concerning native labour and the codification of native law. (1969:134)

The Condominium, however, did directly regulate native affairs. The source of this legislative power over the indigenous population was Article VIII(3) of the London Protocol of 1914, which differs materially in the English and French versions. The English text reads: "The High Commissioners and Resident Commissioners shall have authority over the native chiefs. They shall have power to make administrative and police regulations *binding on the tribes,* and to provide for their enforcement" (emphasis added). The French text reads: "Les Hauts Commissaires et les Commissaires-Residents auront autorité sur les Chefs des tribus indigènes. Ils auront, *en ce qui concerne ces tribus,* le pouvoir d'edicter des reglements d'administration et de police et d'en assurer l'execution" (emphasis added).

The emphasized phrases clearly do not correspond; the French version is closer to the spirit of the original understanding about indirect colonial rule, while the English version does seem to permit legislation regulating individual indigenous inhabitants (O'Connell 1969:96-97; see also Hooker 1975:474). In practice, the Condominium operated under the English version. For example, a Native Criminal Code was promulgated.[4] Indeed, some Condominium initiatives seemed to be aimed at undermining, rather than regulating, tribal organization and chiefly powers. No provisions regulated civil actions between indigenes or the rights of indigenes to form companies, to register a boat, or even (until 1967) to register births, deaths, and marriages (O'Connell 1969:136).

The protocol directed Condominium officials to "cause a collection of native laws and customs to be made," and customary law (where not contrary to the dictates of humanity and the maintenance of order) "should be utilised for the preparation of a code of native law, both civil and penal" (Art. VIII[4]). There is no indication, however, that such a project was undertaken; the Native Criminal Code, for example, was

based entirely on French and British jurisprudence (O'Connell 1969: 136; Pujol 1956:336).

Apart from the recognition of the dual national systems in the New Hebrides, the Condominium also provided for joint services and administration in such areas as postal and telegraphic services, public works, ports and harbors administration, public health, financial administration, land surveying and registration, and meteorology. The Condominium administration's policy of evenhandedness between French and British interests resulted in a rigid appointments policy in which department heads and their deputies were of different nationalities, and care was taken to ensure that control of the various departments was balanced. Thus the heads of treasury, postal services, radio, and meteorology were British; the heads of the auditor's department, mines, surveys, agriculture, and public works were French (O'Connell 1969:95, 101).

The London Protocol of 1914 also established a Joint Court for Condominium matters (Art. X). The three-person Joint Court was to be composed of the British and French judges who headed up their respective national jurisdictions, as well as a neutral president to be appointed by the king of Spain.[5] This Spanish involvement ceased with the advent of the fascist Nationalist government of Spain, and in late 1939 the British and French agreed to vest the president's authority and functions in the judges acting jointly. The absence of a tiebreaker meant that the British and French judges had to engage in a measure of negotiation and compromise, and in the event of a disagreement, "go arm in arm and metamorphose themselves into an arbitrator of their respective differences on th[e] issue" (O'Connell 1969:124).

Although the Joint Court had jurisdiction over all Condominium matters,[6] its raison d'être was to minimize conflict among the European settlers over the grab for land (Scarr 1967:218).[7] By 1980 the Joint Court had issued fourteen hundred judgments involving registration of European land claims, accounting for over 20 percent of Vanuatu's total land area. Of the settled land claims, French titleholders (including optants, missions, and government holdings) acquired over three times as much land as the British; counting controversial titles, the French controlled nearly five times as much land (Van Trease 1984:22-24, tables 1-3; Cole 1986:10).

The legal bases for the awarding of title by the Joint Court were often indefensible in terms of *either* settled English or French property law, "but by combining a little law from each with a lot of imagination, France, the major gainer, [came] up with registered title to about one half of the really fertile land in the New Hebrides" (Sope 1974:17).[8] The

Joint Court often awarded land title to Europeans on the basis of "flimsy . . . nineteenth century 'contracts', on which a few indigenous people had placed thumb prints or 'x's. These claims were not recognised under Melanesian custom . . . however" (Standish 1984:132). This had the effect of legalizing fraudulent land dealings by some unscrupulous Europeans and mistaken land dealings in which indigenous "vendors" were unaware of the nature of the transaction and unable to understand the written contracts (Regenvanu 1980:69; Sope 1974: 13-15). A Condominium administration survey in 1970 established that European residents in the New Hebrides, amounting to 3 percent of the total population, controlled 36 percent of the land, including more than half of all arable land (Sope 1974:19).

The Joint Court was directed by the protocol to take into account the interests of the indigenous population in the granting of land (O'Connell 1969: 141). The post of Native Advocate was created, but was never a sufficient safeguard owing to problems of expertise, conflicts of interest, and financial and logistical support. The Joint Court also required written documentation of claims by ni-Vanuatu, which was practically unobtainable (Van Trease 1984:24-27).

The Joint Court and the resident commissioners also had the power to set aside land as "native reserves," which could not be alienated without authority of the court or commissioners. This, however, did not adequately safeguard the interests of the local population either:

> The Protocol did not give any guidelines for allocating size or determining need. Such decisions were left to the judgment of the Court. Over the years the Court did indeed become more generous in its allocation of native reserves. However, in many cases the reserves proved to be inadequate for the needs of the local population, In addition, the Court often designated the less desirable land in the interior of islands as native reserves, while registering the coastal section in favour of the European claimant. (Van Trease 1984:24; see also Sope 1974:17-19)

Movement toward Independence

Not surprisingly, land grabs, fraud, and speculation during the colonial period provoked unrest and stimulated nationalist political movements. The dominant Vanua'aku Pati (literally, "My Land Party") was established specifically in reaction to this situation, and the return of customary land was the party's basic political platform as well as that of the Nagriamel Movement and other nationalist movements.[9]

This situation became more heated in the late 1960s, when American real estate developers (mainly based in Hawaii) sought to acquire large tracts of land for subdivision and sale, while a group of American ultra-conservative businessmen known as the Phoenix Foundation sought to acquire territory to establish a libertarian mini-state, after failed attempts in the Bahamas and Tonga. Several thousand lots were sold to Americans, mainly Hawaii residents and American servicemen stationed in Japan, Taiwan, South Vietnam and the Pacific Islands.[10] (Ironically, the island of Ambae was the inspiration for James Michener's heaven-on-earth, Bali Hai, in *South Pacific.*)

Local fears of a second generation of land-grabbing and resentment over the large-scale proposed developments prompted the two resident commissioners to act in August 1971, bringing in regulations (retroactive to January 1967) to control the subdivision of land and impose a value-added tax on certain subdivisions.[11] This action caused some division, with many resident Europeans angered over lost business opportunities, while a large delegation of indigenes took the unusual step of demonstrating in *favor* of the colonial administration.

The tide of decolonization, which had already swept through Africa and Asia in the 1960s, came later to the Pacific and gathered momentum in the 1970s, first in Polynesia and then in Melanesia (see generally Davidson 1971 and Larmour 1983). In Vanuatu, disengagement was much easier for the British, for the paternalistic nature of British colonial administration and race relations had left only a "thin super-stratum lacking close ties to the indigenous population" (Kolig 1981:58). For the French, extrication was more difficult as their policies of assimilation and association led to a "much higher degree of interpenetration" between the French and indigenous communities (Kolig 1981:58), and of course many French citizens had land and businesses in the New Hebrides.[12] No doubt the French were also sensitive to the effects of the winds of change on New Caledonia and French Polynesia. Apart from the general reluctance of France to decolonize, there was strong, direct pressure from the local French settlers *(colons),* some of whom had come to the Pacific after the French debacles in Vietnam and Algeria (Molisa et al. 1982:86-96; Lini 1980:18, 51-59).

The main pro-independence party was the Vanua'aku Pati, which had its roots in the English-speaking Protestant (Anglican and Presbyterian) mission system. The missions, which were also the main providers of education and social welfare services, served to unify the scattered rural population and provide a "natural foundation for political action on a national basis" (Ellis and Parsons 1983:117). The Vanua'aku Pati, led by a Western-educated political elite, was ideologically a Western-

style liberal political party, with "a smattering of Marxist ideology" on such matters as land nationalization, foreign trade, and major resources (Kolig 1981:58; see also Ellis and Parsons 1983: 115). Of the major political movements it displayed the least commitment to traditional custom.

To counter the influence of the Vanua'aku Pati, the French attempted to cultivate (and materially assisted) a coalition of all groups outside the Vanua'aku sphere of influence: the *colons*, francophonic and Catholic indigenes, and return-to-custom movements such as Nagriamel on Santo and John Frum on Tanna (Ellis and Parsons 1983: 118-119). This coalition of disparate--and sometimes antagonistic--elements was unsuccessful, however, as Vanua'aku and the other nationalist political parties won overwhelming support in 1975 and 1979 elections for the local representative assembly, even achieving majorities on Santo and Tanna islands (Molisa et al. 1982:87-88, 93-94).

In late 1979 and early 1980, on the eve of independence, secessionist movements presented a considerable threat to the emerging nation. The secessionist forces comprised the odd admixture of armed French *colons* and the traditionalist *kastom* groups, with moral and material support from American developers and conservative ideologues, and with the (at least) tacit support of France. The rebellions were most serious on Santo and Tanna, and were ultimately quelled just after independence only with the assistance of troops from the Papua New Guinea Defence Force upon the authorization of the South Pacific Forum (Molisa et al. 1982:95-96, 108-110).[13]

The rebellions and their aftermath again highlighted the contradictory nature of legal and political development in the colonial New Hebrides. The Santo Rebellion was led by the charismatic Jimmy Stephen, founder of the Nagriamel Movement, which was dedicated to the recovery of alienated customary land, self-help development, and the restoration of *kastom* and traditional culture as the bases of law and government (Lini 1980:47-48; Sope 1974:26-33; Kolig 1981:59-60). The indigenous secessionists on Tanna were associated with the well-known John Frum Movement, also a traditionalist group with a strong emphasis on customary law and land tenure (Sope 1974:22-25; see also Brunton 1981:357, 371-374). In opposing the modernism and centralization they feared from the independent state, the *kastom* groups were forced to align themselves with the European settlers and American businessmen who were seeking to maintain and expand the alienation of customary land. This apparently incongruous alliance of millenarian Melanesians and libertarian Americans may possibly be best explained as the marriage of two culturally distinct forms of cargo cult.

The stillborn "Constitution of the Tanna Federation" attempted to provide for both libertarian and traditionalist concerns. The preamble called for only a "limited form of government," and the constitution affirmed the sanctity of private contract[14] and recognized corporations in a declaration of rights.[15] At the same time, the customary resolution of disputes outside the formal legal system was recognized;[16] "custom chiefs" were given a formal role in the determination of political and judicial boundaries;[17] and "traditional items used for media of exchange" were also recognized,[18] although the monetary jurisdiction of the courts was specified in "troy ounces of gold."[19] The incipient constitution also contained at least one inherent conflict of interests and principles. While prohibiting any direct tax,[20] it provided that the funding for the government's operations would come from the leasing of customary land.[21]

The proposed "Constitution of the Na-Griamel Federation" on Santo did not expressly recognize customary law or institutions, but rather seemed to presume that strict limits on central government activity would provide communities with the opportunity to maintain their own "laws, customs and traditions" (see Doorn 1979:7; see also Larmour 1982: 141). This constitution also threatened customary land by providing that any person could acquire land by "staking a claim [to land] that has not yet been registered as belonging to someone . . ." (Chap. 1, sec. 42).

As with most existing Pacific constitutions, these failed constitutions seemed to accept as unproblematic the coexistence of group-based customary law and individuated civil rights; unlike most Pacific constitutions they failed to provide safeguards for customary land. The alliance between the *kastom* groups and their expatriate patrons seemed "destined to culminate in a sell-out of land and the surrender of political, economic and cultural autonomy" (Kolig 1981:60). Ironically, the victory of the "non-traditional" Vanua'aku Pati and the suppression of the rebellions proved instrumental in salvaging the interests of the traditional landowners of Vanuatu (Kolig 1981:60-61).

The Independence Constitution

The Vanuatu Constitution was drafted by a Constitutional Planning Committee, which included representatives from all political parties (including secessionist groups from Santo and Tanna), the churches, and traditional chiefs. In the Melanesian fashion no votes were taken, and a consensus was reached on all the main issues (see Bernast 1980; see also Molisa et al. 1982:92-93). Having satisfied French concerns

regarding decentralization of political power,[22] proportional representation to protect minority groups, and preservation of French as an official language and a medium of education,[23] the proposed constitution was approved by the two resident commissioners and their home governments in 1979. Official texts are available in both French and English.

The Vanuatu Constitution is fairly concise and straightforward, particularly as compared with its Papua New Guinea counterpart. Apart from establishing the framework of government, the largely programmatic Constitution also contains provisions of particular importance to legal development and pluralism (see generally Lynch 1981 and Bernast 1980:193-199).

Constitutionally, legislative power in Vanuatu is vested in a popularly elected unicameral Parliament with "an element of proportional representation so as to ensure fair representation of different political groups and opinions" (Chap. 4, sec. 17[1]). The Constitution also provides a role for the National Council of Chiefs (Chap. 5, secs. 27-30). Sec. 28 specifies that:

> (1) The National Council of Chiefs has a general competence to discuss all matters relating to custom and tradition and may make recommendations for the preservation and promotion of Vanuatuan culture and languages.
> (2) The Council may be consulted on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament.

Custom is also provided for in Chap. 8 of the Constitution, which concerns the administration of justice. The judiciary may resolve a controversy, in the absence of existing applicable law, "according to substantial justice *and whenever possible in conformity with custom*" (sec. 45; emphasis added). Thus the Constitution mandates that custom is the principal source in the development of an appropriate underlying law for Vanuatu. Sec. 49 provides that Parliament *may* enact legislation concerning "the ascertainment of relevant rules of custom" and the appointment of assessors knowledgeable in custom to sit with the judges. No legislation on this subject has emerged yet, however.[24] Sec. 50 requires Parliament to establish a system of village or island courts "with jurisdiction over customary and other matters and shall provide for the role of chiefs in such courts." A system of island courts has, in fact, been established (see below).[25]

Transitional provisions of the Constitution affirm that customary law '"shall continue to have effect as part of the law of the Republic" (Chap. 15, sec. 93[3]). Further, the reception of pre-independence British and French laws is expressly made subject to compatibility with the independent status of Vanuatu "and wherever possible taking due account of custom" (Chap. 15, sec. 93[2]). This provision contrasts markedly with arrangements in other independent Pacific Island states, wherein the recognition of customary law is made subject to compatibility with written (including received colonial) law, rather than vice versa.[26]

Given the colonial history of Vanuatu and the basis of the independence movement (and indeed, even the *anti*-independence parties), it was inevitable that land tenure (and the related topic of ownership) would be one of the preeminent issues before the Constitutional Planning Committee. After some negotiation, particularly over urban land (Bernast 1980:195), the committee unanimously supported the provisions that were to become Chap. 12 of the Constitution. As Ghai has written, the nature and strength of this action amounted to "an emphatic affirmation of the values of the customary system. As such they imply an alternative paradigm of development, based on communities rather than the state" (1985a:179).

Chap. 12 of the Constitution, on land, followed recommendations from the 1979 Ad Hoc Committee on Law Reform and implemented a fundamental transformation of the colonial land tenure system by reverting to the customary position:

> While the approach invariably taken elsewhere in the Pacific was simply to facilitate the future introduction of reforming laws, Vanuatu's approach has been to go behind the whole land tenure system imposed during the colonial era and reinstate the pre-colonial land tenure system. It did this by probably the only means available to a country which adheres to rule of law principles, that is by accomplishing it under its Independence Constitution. (Fingleton 1982:338, see also 323, 327)

Sec. 71 states simply, "All land in the Republic belongs to the indigenous custom owners and their descendants." Furthermore, "[t]he rules of custom shall form the basis of ownership and use of land in the Republic" (sec. 72), and only indigenous citizens "who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their lands" (sec. 73). The Council of Chiefs is to be consulted by Parliament in the drafting of a national land law implement-

ing the above principles, under sec. 74. Disputes over ownership of customary land are to be resolved by "appropriate customary institutions or procedures" as arranged by the government (sec. 76[2]). Considerations of custom, ethnicity, linguistics, and geography are also to be taken into account in any public-land redistribution.[27]

Land transactions between ni-Vanuatu and nonindigenous citizens or noncitizens require government consent under sec. 77(1) of the Constitution. Such consent shall be given unless the transaction is deemed to be prejudicial to the interests of the custom owner(s) of the land, or indigenous citizens who are nonowners, or the community in which the land is located, or the republic generally.[28] Leasing of customary land is possible, then, with government compliance in the specified cases, and leaseholds have already attracted foreign investment.

Pluralism in Practice

In the Formal Courts

In conjunction with Chap. 8 of the Constitution, the Vanuatu Courts Regulation of 15 July 1980 establishes the system of mainly Western-style courts currently in use. The magistrates courts deal with relatively minor criminal (up to two years' imprisonment) and civil matters. The Supreme Court, presided over by a single judge, is the major trial-level court as well as the appellate court from decisions of the magistrates courts. The Supreme Court sits with two assessors, who have a deliberative but not adjudicative role.[29] Given that there has been only one judge in Vanuatu, the chief justice,[30] the Court of Appeal sits on an ad hoc basis and is arranged by the chief justice when necessary,[31] relying on visiting justices from neighboring jurisdictions. Continuing the Condominium tradition there is usually one English common law judge and one French civil law judge.

The 1980 regulation gives the courts broad powers to meet local circumstances: "For the purpose of facilitating the application of any written law or custom, any provision may be construed or used with such alterations and adaptations as necessary and every court shall have inherent and incidental powers as may be reasonably required in order to properly apply such written law or custom" (sec. 44[2]). Unfortunately little evidence is available to determine whether the courts are utilizing these powers. One indication of a sympathetic approach is found in the case of *Jonah Robert Namatak v Public Prosecutor* (unreported, Vanuatu Court of Appeal Case No. 7 of 1985) in which the con-

struction of the definition of "theft" in the Vanuatu Penal Code 1981, sec. 122(1)-(2), was at issue. At trial, the defense counsel noted that the wording of the Vanuatu provision was indentical to sec. 1(1)-(2) of the English Larceny Act 1916, and proceeded to adduce a large number of English cases on the point. The Vanuatu Court of Appeal, however, sought to discourage this practice and wrote:

> We do observe that Vanuatu has its own Penal Code. No matter what laws the draftsmen used for guidance, they are nevertheless to be construed in Vanuatu and against its background and not the learned lawyer's references to interpretations of similar enactments in foreign countries with much different standards and cultures. . . .
>
> We are in a newly emerging nation which was jointly administered by France and England according to French and English laws. Vanuatu no longer relies upon westernised sophistication and must develop its own approach. The Courts should not be quick to grasp at hair-splitting technicalities. At the same time, they should never endeavour to "manufacture laws" to cover some difficult situation unless they keep within the provisions of the Constitution. (At pp. 2-3)

A major obstacle to legal development of any kind in Vanuatu is the paucity of primary legal materials and the virtual absence of secondary materials. There is no formal law reporting system, even for the superior courts, nor is there even any digest or index of judgments. A lawyer or researcher attempting to trace the development of an area of law must either rely on memory or anecdote, or mechanically search every file in the Supreme Court registry in Port Vila. Naturally this works against the coherent development of a local jurisprudence. It is far easier to ascertain English or Australian common law in Vanuatu than it is to ascertain Vanuatu common law or custom.

As already noted, there are general statements found in the Constitution about the role of custom, culture, and traditional values, and custom is specifically employed as the basis of land tenure. Although sec. 49 of the Constitution calls for parliamentary action regarding the promulgation of rules for the ascertainment, recognition, and application of customary law, no general legislation of this sort has eventuated. While the Island Courts Act 1983 specifies the role of custom in those quasi-traditional institutions (see below), nothing provides guidance on the process of integrating custom into the Western-style court system.

Missing are: (1) the definition of "custom," (2) the subject areas in which custom is or is not applicable, (3) the modes of ascertainment and rules of evidence and procedure with respect to adducing custom in the courts, (4) an elaboration of the standards against which the recognition of custom must first be tested,[32] (5) the regime to be followed in the event of a conflict of customary laws, (6) the method by which a person must establish (or refute) membership in a customary group, and so on.

The experience elsewhere in the Pacific suggests that in the absence of strong guidelines and incentives to utilize custom it is very difficult for customary law to develop in a coherent and comprehensive manner (see Weisbrot 1982b, 1988). One major aid to the recognition of customary law in Vanuatu is the use of assessors, but further assistance is likely to be necessary if Vanuatu is to have an integrated pluralist system rather than a dual system (as is largely the case in Papua New Guinea).

The legislative base in Vanuatu is also very diverse and in desperate need of consolidation and revision. As noted above, pre-independence British and French laws applicable in the Condominium were rolled over by sec. 93(2) of the Constitution and are part of the laws of the republic. The pre-independence Joint Regulations, or "Condominium Law," also form part of the new law.[33] These cover areas in which the dual administration was required to present a unified legal regime, such as in regulation of motor traffic, drugs, shipping, customs, and quarantine; public order and policing; radio communications; and town planning and conservation. The Parliament has also, of course, been enacting legislation for the republic since independence. Discussions with local lawyers suggest that there is considerable uncertainty over which pre-independence foreign laws are still in operation, and to what extent, especially where there is some dissonance but not quite direct conflict with later law.

The perennial problem of "finding the law" also takes on a special meaning in Vanuatu, where legislation is often physically unavailable, even in the capital and even to the most senior officials. There is no formal legal depository in Vanuatu and thus no complete collection of written laws.[34] A good example of the problem is the case of *Public Prosecutor v Mahit Tom Mathias* (unreported, Vanuatu Court of Appeal Case No. 3A of 1984), involving the sentencing of an offender for theft and unlawful entry. At trial, counsel and the chief justice were unable to find any statutory provisions governing suspension of sentences and alternative penalties. The chief justice then proceeded to formulate a new rule of underlying law under sec. 45(1) of the Constitution, in the belief that there was no relevant existing law. On appeal, the Court of Appeal found that there was in fact a relevant law, Joint Regulation

No. 24 of 1971, which covered the situation, The Court of Appeal lamented the absence of properly printed, bound, and published statutes and cases, noting that legal materials in Vanuatu are "scarce and precious to those possessing them, Parts of some files are missing in some departments. Finding the law applicable requires expenditure of valuable time" (at p. 2).

French Jurisprudence

Notwithstanding the constitutional position on the sources of law,[35] as a practical matter there is some doubt about the continued development --even viability--of the French strand of Vanuatu jurisprudence. Of the nine ni-Vanuatu lawyers as of January 1988, seven are English-speaking and were trained in the English common law tradition, most of them receiving their law degrees from the University of Papua New Guinea. These lawyers are mainly found in the Attorney-General's Office and provide legal advice to the government and governmental agencies.

Virtually all lawyers in private practice are anglophone expatriates--mostly from Australia and New Zealand--and the laws applicable to the tax haven/offshore banking finance center (such as the Companies, Trust Companies, and Banking regulations) are based on English law (similar to the regime in the Bahamas), while the flag of convenience maritime law is based on the nonstatutory maritime law of the United States. Business associations in Vanuatu may still be formed under French law, but commercial law generally follows common law models and is largely run by anglophone lawyers. Similarly, the judicial officers in Vanuatu mainly have common law backgrounds. All three senior magistrates are anglophone expatriates, and the single judge of the Supreme Court is British.

French legal materials are almost nonexistent. Local legend has it that French officials burned all of their papers on the eve of independence in 1980. More likely the papers were repatriated to France. In any event, there are no French legal materials left in the Supreme Court Library or the National Archives.

The Island Courts

The Island Courts Act 1983[36] established a system of grass-roots, customary-based courts, modeled on the village courts of Papua New Guinea and the local courts of the Solomon Islands. Island courts are presided over by three justices "[k]nowledgeable in custom . . . at least

one of whom shall be a custom chief residing within the territorial jurisdiction of the court" (sec. 3[1]). Appointments are made by the president (the head of state) acting on the advice of the Judicial Services Commission, which includes a representative of the National Council of Chiefs.[37] Supervising magistrates are nominated by the chief justice,[38] who also holds the power to establish, suspend, cancel, or vary the warrant of a particular island court.[39]

According to the act, the island courts have broad jurisdiction over civil and criminal matters within their territorial boundaries. The court may punish a litigant (where a matter is deemed to be "criminal") by a fine of up to VT24,000 (approximately US$250), or imprisonment of up to six months,[40] or by ordering a period of community service.[41] In civil matters, the island courts may award up to VT50,000 in compensation or restitution and also have the important power to make orders regarding the use or occupation of land.[42]

Island courts are bound to "administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order" (sec. 10). Lawyers are not permitted to take part in any proceedings,[43]and the courts are instructed not to apply technical rules of evidence but rather to "admit and consider such information as is available" (sec. 25)

Appeals may be made from an island court to a magistrates court in all matters except land ownership, which goes directly to the Supreme Court.[44] Courts hearing appeals from the island courts "shall have two or more assessors knowledgeable in custom" sitting with them in an advisory capacity (sec. 22[2]).

Island courts have been operating for only a few years now and a detailed assessment of their success is premature. Some aspects of their jurisdiction and practice, however, deserve immediate attention.

As of late 1986, seven island courts had been established. Each court covers a whole island, which may contain a diversity of customary groups. This has created some jealousies and problems, but the supervising magistrates[45] endeavor to select appropriate island court justices from the panel in major or controversial cases. Another significant problem involves training and support. At present there is virtually no training for island court clerks and magistrates apart from a two-hour session with the chief justice upon appointment. There is no agency responsible for monitoring operations, collecting statistics, or providing training and support services.[46]

The most important feature--and failing--of the island courts as currently operating, though, is the absence of any general customary-law

jurisdiction. Each island court is established by warrant by the chief justice under sec. 1 of the Island Courts Act 1983. The Warrant Establishing the Efate Island Court[47] is typical. It specifies the territorial jurisdiction of the Efate Island Court (coextensive with the boundaries of the local government council); limits the court's criminal jurisdiction to specified offenses in the Penal Code (such as assault, offensive behavior, minor property offenses, trespass, adultery, and witchcraft)[48] and related legislation (such as those regulating firearms and liquor licensing and consumption); and limits its civil jurisdiction to relatively minor (under VT50,000) tort and contract claims, civil claims brought under Efate regional laws, applications for child maintenance, and "disputes concerning ownership of land irrespective of value of land."

Apart from jurisdiction over land--which under Chap. 12 of the Constitution means *customary* land--the island courts are thus given no role in general matters of customary law and dispute settlement. This situation appears to conflict with the spirit of sec. 50 of the Constitution and sec. 10 of the Island Courts Act 1983, and results in the courts' operating as somewhat less formal magistrates courts rather than as officially sanctioned custom courts. According to local lawyers, the island courts have been most successful in dispensing quick, grass-roots justice in the exercise of their criminal jurisdiction.[49]

Even the jurisdiction over land is much less significant in practice than it would first appear. In virtually 100 percent of cases the unsuccessful litigants in land matters in the island courts exercise their rights of appeal to the Supreme Court.[50] It is no wonder that, after many years of colonial dislocation, disputes over customary land ownership are "Vanuatu's most widespread cause of internal tension" (Standish 1984: 147; see also Bakeo 1977:76-77). The Supreme Court has recently doubled the filing fee for land appeals in an attempt to reduce the numbers, but is nevertheless inundated with such appeals. Because the record of island court proceedings is usually inadequate,[51] the "appeal" to the Supreme Court is effectively by way of a *de novo* rehearing.

In sum, the island courts have not been given any general customary-law jurisdiction (over such matters as recognition of customary marriages and divorces, adoption, succession, and purely customary offenses),[52] and their jurisdiction over customary land has been reduced in practice to merely a preliminary hearing of disputes.

The National Council of Chiefs

As discussed above, Chap. 5 of the Vanuatu Constitution affords a role in governance for the National Council of Chiefs (also known as

Malfatu Mauri, in the vernacular), investing in the council "a general competence" to discuss and make recommendations upon matters concerning local custom, culture, tradition, and languages, and providing that the council *may* be consulted by Parliament on prospective legislation, particularly on matters relating to tradition and custom.[53] Further, Parliament is *required* to consult with the National Council of Chiefs on the development of a national land law,[54] and representatives of the council are involved in certain appointments, such as to the judiciary,[55] to the offices of public prosecutor and public solicitor,[56] and to the position of ombudsman.[57]

Although the Constitution was designed to give the custom chiefs a leading role in national affairs (Lynch 1981:50-51), in reality they have had considerably less influence than their counterparts in Tonga, Western Samoa, and the Marshall Islands, for example.

Since independence, the Vanua'aku Pati government has rarely seen fit to consult the National Council of Chiefs on pending legislation or policy matters, sometimes pointedly noting that the council has no special expertise and need have no role in determining such "modern" matters as policing, finance, social services, commerce, and the media (Lini 1980:53); and that it is Parliament and not the council that is the democratically elected, national deliberative body (MacClancy 1984:102). For example, the government chose not to consult the council on the Penal Code Bill 1981,[58] which contained provisions on such matters as sorcery and witchcraft, and arranged marriages. In Parliament, Vanua'aki Pati members explained the failure to consult by asserting that, among other things, the council amounted to a collection of local interests while a national basis was necessary for the formal criminal law, and that the council would take some years to decide on universal customary standards while the need for the bill was immediate.[59]

Even more contentious was the failure of the government to consult with the National Council of Chiefs on the development of important land laws in 1982-1983,[60] despite sec. 74 of the Constitution that seems to require such consultation. The council complained to the chief justice about this, but did not receive a response (MacClancy 1984:102-103).

The role of custom chiefs in local government has also been substantially diminished. The Constitution originally provided for decentralization on the basis of regional councils,[61] and the representation of custom chiefs on those councils.[62] Regional councils were abandoned in favor of English-style local government councils by the Decentralisation Act 1980.[63] In 1983, the government introduced the Decentralisation (Amendment) Bill, which sought to make members of national, district, island, or area councils of chiefs ineligible for election to local govern-

ment councils. The bill provoked considerable opposition, and by way of compromise the ineligibility was "limited" to chairpersons, vice-chairpersons, secretaries, and treasurers of district, island, and area councils of chiefs, and all members of the National Council of Chiefs (Ghai 1985b:61).[64]

This episode and the lack of consultation clearly demonstrate the government's unease over the political role of custom chiefs. For their part, the custom chiefs are angry and disillusioned that their former prominence has not been restored with the end of colonialism and that their views are not sought by the government, or are disregarded when proffered (Ghai 1985b:71; see also MacClancy 1984:102). The ability of the National Council of Chiefs to offer a clear, alternative voice or to exert political influence is hampered by several factors, including a lack of resources and organization, diverse local customary regimes, and disunity owing to conflicting views over qualifications for "custom chiefs." As in other parts of Melanesia some communities have hereditary leadership (usually those with some Polynesian influences), but many "chiefs" or "big-men" reach that status through personal accomplishment. "Sometimes so-called 'chiefs' have been entrepreneurial local 'big-men' who have merely bought their way up the graded ceremonial ladder in societies where traditionally there were no chiefs, or else men who have achieved other distinction--such as clergymen" (Standish 1984:141; see also Ghai 1985b:70; Ellis and Parsons 1983:126; Hours 1979: 19). This situation compromises the legitimacy of the council's role as a repository of custom and tradition.

There is also significant potential for rivalry and conflict between the local councils and custom chiefs, particularly now that the participation of chiefs has been limited by the 1983 amendment. Local councils have already

> shown particular interest in codifying customary law and giving effect to it through regional law. The regional law committee of one particular council has already made considerable headway in harmonising the local differences in customary offences and penalties, with a view towards a regional law. Many of the offences are criminal law under national legislation (although customary penalties are stiffer); while some offences under custom do not attract any sanction under national law.[65] (Ghai 1985b:68)

The councils, however, have tried to avoid a direct conflict of roles, promoting the dispute settlement functions of chiefs (including on impor-

tant land matters) and encouraging chiefs to produce codes of customary law (Ghai 1985b:70-71).

Conclusions

In Vanuatu, as in most of the island Pacific, customary land tenure is one of the last refuges of custom in the official legal system. The attachment of ni-Vanuatu (and other Pacific Islanders) to the land goes well beyond the developed world's view of land as a commodity and factor in production (Ghai 1985a:177-178), and includes essential elements of social relations, political and economic organization, and metaphysical concerns.

> In Vanuatu custom land is not only the site of production but it is the mainstay of a vision of the world. Land is at the heart of the operation of the cultural system. It represents life, materially and spiritually. A man is tied to his territory by affinity and consanguinity. The clan *is* its land, just as the clan *is* its ancestors. . . . The clan's land, its ancestors and its men are a single indissoluble reality--a fact which must be borne in mind when it is said that Melanesian land is not alienable. (Bonnemaison 1984:1-2; see also Sope 1974:6-9; Vanuatu 1982:1)

The prime minister of Vanuatu, Fr. Walter Lini, has also commented on the difference between the land-owning cultures of the West and the land-using cultures of the Pacific: "The western concept of regarding land as a marketable commodity is not just alien to the Melanesian, but considered impractical and immoral" (1982:6).

Given the integral nature of land, the legal transformation achieved by Chap. 12 of the Constitution in restoring custom as the basis of all land tenure also achieved "a major socio-economic reorganisation" (Fingleton 1982:340). As intended by the Constitution's planners (Ghai 1985a:179), the provisions on land would support legal pluralism, since customary land tenure systems are regionally, and even locally, distinct[66] and disputes over customary land use would be resolved by customary courts at the island level. Further, the constitutional plan would emphasize the social organization--rather than the bureaucratic management--of land, strengthening the hand of custom chiefs and elders and others with special influence over the allocation of land-use rights at the expense of surveyors, planners, lawyers, and government officials. Finally, the customary land regime would achieve some measure of political decentralization, since the government would have to con-

sult and negotiate with local communities over land acquisitions for major projects (Ghai 1985a:180-181).

The preoccupation with land matters has meant that, to a large extent, issues of "custom" and "land" are thought to be synonymous, with the consequence that other significant customary law issues (such as the recognition of marriage, divorce, adoption, child custody, and succession regimes) have not been the subject of formal consideration or official action. Given the limited penetration of the colonial legal systems in this rural country and the inevitability that in Vanuatu, as elsewhere, most people will conform their behavior and informally resolve their disputes according to commonly understood customs, usages, and mores, it is likely that custom is more important outside of the formal courts than inside them--although the island courts may yet provide the medium for combining customary law in its procedural and substantive aspects with official sanction.

The demography of the islands and the nature and incongruity of British-French joint colonial rule meant that the penetration of Western legalism in Vanuatu was limited, protecting traditional life to a somewhat greater extent than occurred in other parts of the Pacific (Hours 1979: 15-16). The degree to which custom is not universally accepted at the local level in Vanuatu, however, is referable to the conflict with a variety of other powerful foreign influences: (1) settlers who saw custom as a barrier to land acquisition, (2) capitalist entrepreneurs who viewed traditional life and communal social organization (including land tenure) as basically unsuited to the market economy (see Ellis and Parsons 1983:112; Ghai 1985a:175), and (3) missionaries who "fought against custom as a kind of different humanism" (Hours 1979: 15).

The missions initially found their work much more difficult in Melanesia than in Polynesia because of malaria, the numerous small, isolated, linguistically distinct societies, and the general absence of a chiefly system (Howe 1984: 120,307). Despite this, the missions have for some time been important providers of educational and social services as well as pastoral services. Representatives of the major missions were included in the Constitutional Planning Committee, and the preamble to the Vanuatu Constitution proclaims that the republic is "founded on traditional Melanesian values, faith in God, and Christian principles."

In earlier times some of the missions condemned customary practices as "pagan primitivism" and "immoral and subversive" (Standish 1984: 133; Lindstrom 1982:316). In more enlightened times a substantial Melanesianization of the major local churches has taken place, accommodating customary values in such areas as marriage, land, rank, and prestige while emphasizing Christian values in such areas as standards

of social behavior and community development (Hours 1979:16). Nevertheless it is still true that "the recent rehabilitation of *Kastom* has posed adjustment problems for Melanesians long accustomed to viewing their 'traditional' culture in almost wholly negative terms," requiring them to "adjust to the notion that not only was 'tradition' not all bad, but some of it was an essential component of their shared identity as ni-Vanuatu" (Tonkinson 1982a:302; Tonkinson 1982c:86).

The *kastom* movements, such as Nagriamel and John Frum, have remained suspicious of any invocation of custom by elements (such as the Vanua'aku Pati) associated with the churches, but at the same time the Vanua'aku Pati has promoted a "Kastom-with-Christianity" concept that evokes traditional ways as symbols of independence and unity while testing custom against modern Christian values (Tonkinson 1982c:86; see also Lini 1982:9). This use of custom, however, compels a softening of focus, for "*Kastom* would have to simultaneously represent and transcend local and regional diversity if it was to successfully symbolize ni-Vanuatu unity. . . . [A] major problem with *Kastom* as a dominant unifying symbol [is that] it is inherently divisive if treated at any level more analytical or literal than an undifferentiated and vague symbolic one" (Tonkinson 1982c:85; see also Tonkinson 1982b; Jupp and Sawer 1982:552; Ellis and Parsons 1983:133).

The particular political history of Vanuatu points to another problem in securing a central legal role for custom: the ambivalence with which the new political and bureaucratic elite view "*kastom,*" given its sometime political role as a code word for antigovernment dissent. That elite is mindful of the fact that while custom and land restoration were unifying factors against colonial rule, the "*kastom* movements" on Santo, Tanna, and elsewhere threatened the drive to independence and the unity and sovereignty of the new republic. As Standish has stated, "Kastom as an ideology is now being used in the emerging political power struggle between the chiefs (some of whom are well educated, modern clergy) on the one hand, and the bureaucrats and elected politicians on the other" (1984:148).

This ambivalence is clearly reflected in the writings of Prime Minister Lini, an Anglican priest.

> Traditional custom and culture, which are important and vital influences in our society, provide another challenge for us. Some people, mainly politicians, have used culture, custom, and custom chiefs for their own aims.
>
> Custom and culture must develop freely, and should not be

> encouraged or forced by any European system of legislation. Contemporary leaders have to be on the watch to ensure custom is not clouded by politics or modernisation. . . .
>
> People have used the idea of "custom" to totally contradict the idea of development and democracy in this country. On Santo and Tanna custom has been carried to extremes by people who incorrectly claim they respect traditional ways. It has become a political weapon and this has made it into something that is not Melanesian at all. (Lini 1980:41-42; see also Hours 1979:19)

Unlike many parts of the Pacific, in Vanuatu the lack of full integration of customary and Western legal systems is not based simply on inertia or a failure to face the difficult issues of legal development. On the contrary, the Vanua'aku Pati government in Vanuatu has, more than any other in the Pacific, expressly recognized that the issues go well beyond the technical legal problem of integrating Western and indigenous forms of law (however difficult that may be). Rather, the main point is perceived to be one of political philosophy: reconciling the conflicting demands of *kastom* and Christianity, social democracy and traditionalism, Melanesian socialism and international capitalism, unity and diversity.

Customary law will continue to be very significant in such areas as land tenure, dispute settlement, compensation, rank, and ritual (Tonkinson 1982c:87). However, indications are already present that suggest "[c]ustom will have to operate increasingly in an environment whose dynamics are defined by the state and the market[,] and its ability to cushion the effects produced by the harsh inequalities on the international and national levels will diminish" (Ghai 1985a:185). With the expanding influence of the state and the market, as well as the other disincentives to fully embracing custom described above, it is likely that the main jurisprudential thrust in Vanuatu will be a form of progressive Western legalism, with custom, culture, and traditional values invoked in a general sense as powerful symbols of national unity and legitimacy and in affirmation of the worth and distinctiveness of Melanesian ways.[67]

NOTES

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1. For a good, brief history of Vanuatu, see Gardissat 1980:22-35.

2. With the interruption of World War I, the protocol was not ratified until 18 March 1922. The protocol was meant merely to amend the 1906 convention, but in its final form amounted to a complete (if modified) restatement (see O'Connell 1969:76-77, 92). As discussed further below, the English and French texts differed somewhat in several important provisions. For example, the Supreme Court of Vanuatu in *Dinh Van Tho v Etat Français* (unreported, Civil Case No. 200 of 1981) pointed out that in Article I(1) of the protocol, "[the English text] avoids the notion that the territory is, for British citizens, British territory, and refers to 'jurisdiction' but the French [text] accepts the proposition that the territory is, for French citizens, French territory (at p. 8)." The court expressed surprise that "the British representatives to the agreement allowed the French version to stand" (at p. 9). See also O'Connell 1969:94-95. On the administration of the Condominium generally, see Belshaw 1950:49-56.

3. The 1906 convention referred to "jurisdiction" over nationals; without explanation the protocol replaced this with "sovereignty" over respective nationals. For the British basis of competent jurisdiction, absent territorial sovereignty, and the complex reception of law issues, see O'Connell 1969:107-118; for the French position see O'Connell 1969:118-121. Litigants in the British system could appeal to the Court of Appeal in Fiji and then to the Privy Council in London. Litigants in the French system could appeal to the higher French tribunals (the Cour d'Appel and the Cour de Cassation) in New Caledonia. See Pakoa 1977:47.

4. Joint Regulation No. 6 of 1927, later replaced by Joint Regulation No. 12 of 1962. See Pakoa 1977:47.

5. Art. X(1) and (2). The king of Spain was also requested to appoint the public prosecutor. Neither the president of the court nor the public prosecutor could be British or French nationals.

6. Regarding the complex sources of law arrangements, see O'Connell 1969:125, 139-141.

7. See also Van Trease 1984:23; Cole 1986:10; Sope 1974:12-16; and Bakeo 1977:76. O'Connell has described the 1906 convention and 1914 protocol as being "pre-occupied with devices for minimizing national conflict in the grab for land. The Joint Court was given an elaborate jurisdiction to confer title on claimants and to adjudicate between rival titles" (1969: 138-139).

8. Registration was effected under Joint Regulation No. 3 of 1930.

9. See Van Trease 1984:24-27; Sope 1974:22-39; Ellis and Parsons 1983:115; Hours 1979:16-17; Standish 1984: 137-139; and Kolig 1981:59-61.

10. See Plant 1977:49-51, 52-57; Sope 1974:40-45; Van Trease 1984:29; Molisa et al. 1982:96; Jupp and Sawer 1982:558-560. Advertisements extolled the New Hebrides as "the world's newest and SAFEST TAX HAVEN" and American servicemen were assured that Asian wives would feel welcome (Plant 1977:49).

11. Joint Regulations No. 15 and No. 16 of 1971; subsequently repealed and replaced by No. 22 of 1971. The developers blamed the British for the regulations, and the former and acting British resident commissioners were sued, in both their official and personal capacities, for damages in the High Court of the Western Pacific. The litigation was never resolved. See Sope 1974:42-45.

12. On French colonial policy and administration generally, see Hooker 1975:196-203. On French attitudes in the New Hebrides, see O'Connell 1969:142-145. Association, or collaboration, recognized the need for consultation with the colonial population in the process of development.

13. For an excellent fictional treatment of the short-lived rebellions, see Astley 1986. The manner of the dispatch of troops was controversial within Papua New Guinea, although Vanuatu's independence was universally supported; see Supreme Court Reference No. 4 of 1980 (the "Vanuatu Case") [1981] P.N.G.L.R. 265.

14. Art. II, sec. 13.

15. Art. II, sec. 14.

16. Art. VII, sec. 12.

17. Arts. V, sec. 2, and VII, sec. 5, respectively.

18. Art. VII, sec. 2.

19. Art. VII, secs. 4, 6, and 7.

20. Art. X, sec. 1.

21. Art. X, sec. 3.

22. The French minister for overseas territories, M. Dijoud, called for the most decentralization possible, "to enable the customary authorities in each island, in association with the community councils, to manage local affairs in a very autonomous fashion" (Premdas and Steeves 1984:70-71). Sec. 81 of the Constitution provided for regional councils (including representation of custom chiefs) and sec. 94 provided transitional arrangements regarding their establishment and election. After independence, however, the government amended the Constitution and passed the Decentralisation Act 1980 (No. 11 of 1980), which divided Vanuatu into eleven local government regions and devolved very little power. See Ghai 1985b:44, 50, 57-60; Premdas and Steeves 1984:75-84.

23. Sec. 3(1) of the Constitution declares that Bislama is the "national language" of Vanuatu; Bislama, English, and French are the "official languages"; and English and French are the "principal languages of education." Sec. 62 grants every citizen the right to obtain administrative services in the official language of his or her choice, and authorizes the ombudsman to inquire into alleged breaches of this right. The ombudsman is also directed to report to Parliament annually "concerning the advance of multilingualism and the measures likely to ensure its respect" (sec. 62[3]). Unfortunately, the ombudsman's position has never been filled. Applications were once called for, but the government

decided appointment of an expatriate was inappropriate and no qualified indigenous candidates were available.

24. Papua New Guinea has also failed to enact legislation in this regard despite the direction of sec. 20 of its constitution, but the situation is covered, if inadequately, by the "transitional" provisions of Schedule 2 of the PNG Constitution and the extant colonial-era Customs Recognition Act (Chap. 19 of the Revised Laws). See Weisbrot 1982b:67-70, 89-103; and Papua New Guinea Law Reform Commission, *Report No. 7: The Role of Customary Law in the Legal System* (Port Moresby, 1977).

25. For an outline of jurisdiction of the Vanuatu courts, see Corrin 1986:225, 229-231.

26. See, e.g., Schedules 2.1 and 5 of the Papua New Guinea Constitution.

27. Sec. 79(2). For a commentary by Vanuatu's attorney-general on these provisions, see Hakwa 1984:72-74; see also Narokobi 1981:149-156.

28. Sec. 77(2). Apart from legislation and the granting or withholding of permission under this provision, the government may also influence land use through such mechanisms as the provision of loans and credits, agricultural extension advice, and price and marketing controls. See Ghai 1985a:184.

29. Vanuatu Courts Regulation 1980, sec. 29.

30. The Hon. Frederick G. Cooke.

31. Sec. 40 of the Constitution.

32. For example, Schedule 2.1 of the Papua New Guinea Constitution prohibits recognition of custom considered by the courts to be "repugnant to the general principles of humanity." The Vanuatu Island Courts Act 1983, sec. 10, tests custom against "justice, morality and good order" for those informal courts.

33. Condominium law was quite complex. In addition to the main Joint Regulations, there were also rules, decisions, and joint standing orders. All of these statutory instruments were in both French and English, and there were often differences between the two. See O'Connell 1969:102-104.

34. See Williams 1984:6. Joint Regulation No. 36 of 1974 covers legal deposit, but is in urgent need of revision. The National Archives of Vanuatu is the likely site of a legal depository, with the University of the South Pacific (which has a Pacific Law Unit in Vanuatu) as a back-up center.

35. Sec. 93(2).

36. No. 10 of 1983. Made pursuant to sec. 50 of the Constitution.

37. See sec. 46 of the Constitution.

38. Sec. 2.

39. Sec. 1.

40. See secs. 11 and 17. A supervising magistrate must confirm sentences of more than fourteen days.

41. Sec. 16.

42. Secs. 12-13.

43. Sec. 27.

44. Sec. 22(1).

45. There are currently two supervising magistrates, one based in Vila and the other in Luganville, Santo.

46. In Papua New Guinea, for example, the under-resourced but energetic Village Courts Secretariat provides these services.

47. Dated 30 April 1984.

48. Act No. 17 of 1981. The Vanuatu Penal Code is a substantially modified version of the Indian Penal Code, 1860. See secs. 88, 89, 97A, 107(a), 121, 125(a), 126(b), 131, 133, 136, 144, 148, and 151.

49. On the northern islands, where the chieftainship system is weakest, there is a greater tendency to use the Western-style courts rather than the island courts when jurisdiction overlaps, as in most nonland matters.

50. The establishment of an intermediary Land Appeals Tribunal was provided for in Part 1 of the Vanuatu Courts Regulation 1980, patterned on the customary land appeal courts of the Solomon Islands. The tribunal was opposed by the chief justice, however, and never was constituted; it was subsequently effectively abolished by the Island Courts Act 1983, sec. 22(1)(a), which provides for appeals directly to the Supreme Court in land matters.

51. See sec. 28 of the Island Courts Act 1983.

52. Cf. sec. 12 of the Village Courts Act 1974 (Chap. 44 of the Revised Laws of Papua New Guinea), which confers on the village courts of PNG jurisdiction over "any dispute" within its territorial boundaries, as well as certain specified criminal matters. See also sec. 16 regarding the primary function of village courts ("to ensure peace and harmony . . . by mediating in and endeavouring to obtain just and amicable settlements of disputes"), sec. 22 regarding the courts' general criminal jurisdiction, and sec. 26 regarding the application of relevant customs.

53. Chap. 5, sec. 28 of the Constitution.

54. Sec. 74.

55. Secs. 46-47.

56. Secs. 53-54.

57. Sec. 59.

58. Subsequently enacted as No. 17 of 1981.

59. The council did, however, manage to arrange for a Private Member's Bill to be passed, adding adultery as an offense under the Penal Code. See MacClancy 1984:102.

60. The Alienated Land Act 1982, No, 12 of 1982; the Land Referee Act 1982, No. 15 of 1982; and the Land Leases Act 1983, No. 4 of 1983. See Corrin 1986:233.

61. Chap. 13. This was to meet French concerns about preserving regional autonomy and thus minority interests. See Ghai 1985b:50-55; Premdas and Steeves 1984:68-71.

62. Sec. 81(1).

63. No. 11 of 1980.

64. Members of the National Council of Chiefs are elected by their peers at the district level, under sec. 27(1) of the Constitution.

65. As Ghai notes, "It is clear that the enactment of such a code is outside the formal competence of the council and will involve various inconsistencies with national laws" (1985b:68).

66. There are significant differences between the land tenure systems in the northern islands and those in the central and southern islands. Among other things there are some matrilineal systems in the north, whereas the central and southern regions are exclusively patrilineal. Details differ even with regions, however. See Bonnemaison 1984:3-4. See also Cole 1986:7-8; Haberkorn 1985:2.

67. The Vanua'aku Pati *Platform* (1983:18) calls for "the development of one unified law." The party's stated long-term aim is the "[c]reation of a body of law which is easily identified and accessible and which is certain and which is appropriate to the Republic's communal and social outlook."

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