Coercion to Conversion: Push and Pull Pressures on Custom Land in Vanuatu
by Justin Haccius

Introduction
Custom land-holding remains the foundation of land-ownership in Vanuatu. Over 98% of land remains under custom-landholding, and over 80% of the population live on custom held land. Other forms of land-ownership derive from custom. Custom land may be converted into registered leases (limited to 75 yrs) as has already happened to much valuable land on the two main islands of Efate and Santo as well as in coastal areas of the outlying islands, or it may be converted into State land for government use.

Developed areas are located around prime tourist spots and beachfront properties near the main towns. These areas are generally leased by foreigners or citizens of foreign extraction and sub-divided into allotments to build holiday homes and resorts for foreigners. This is a process often associated with acrimonious land disputes and accusations of exploitation of ni-Vanuatu, amid murmers of a post-colonial land grab. On the other hand, tourism and construction are two of the biggest private sector employers in a country short of paid employment.

The return of land to the indigenous custom land-holders became the rallying cry that united diverse ni-Vanuatu interests to achieve Independence. In 1980, the Constitution of the newly-established republic returned all land to custom-owners, at a stroke revoking rights to land held by settlers and plantation-owners. This has been the start, rather than the end, of many problems.

Land ownership and use in the new republic was to be based on the rules of custom. The constitutional recognition of custom, however, has struggled to find a workable manifestation in practice. Ni-Vanuatu reflect, with some bitterness, that temporary legislation introduced to manage the return of land to custom-owners, today continues to facilitate the conversion of land back into registered title and foreign ownership.

This paper describes some features of custom landholding. It evaluates elements of the process by which custom land is converted into registerable form, and considers how the judicial system is placed to resolve disputes involving custom landholders in a context where the framework for the recognition of custom is under-developed.

Certain commentators argue that custom-landholding is inherently incompatible with economic development. Others disagree pointing to success stories and arguing that a purely economic analysis dismisses the benefits, also inherent in custom-landholding, of community and culture. Wherever one stands on this debate, what is clear is that the process of converting custom land into registered leasehold is fraught with dispute, disillusionment and controversy. The current process is sharply tilted toward the structures of the formal system and the interests of those who have access to that system with the result that (i) custom landholders are often excluded from equitable participation in the development of their land, and (ii) attempts to use the legal system to respond to these problems are frustrated.

1 Thank you to Daniel Adler for helpful comments and editing support.
3 Article 74, Constitution of Republic of Vanuatu.
4 See response of Dr Jim Fingleton et al ('Privatising Land in the Pacific – A defence of customary tenures') to Prof Helen Hughes et al ('Aid has failed the Pacific')
Accessing Land under Custom

The great variety of custom is rightly held up as a unique and astounding feature of Vanuatu culture. Rules of land ownership, use, transfer and inheritance vary considerably. Emphasis on the variety, complexity and fluidity of custom, however, tend to undermine its claims as a feasible basis for a national system of land administration. While Article 74 of the Constitution promised that “The rules of custom shall form the basis of ownership and use of land” it did not specify which rules these would be.

It is also unclear what exactly is custom. Christianity and colonialism transformed existing structures. They undermined traditional leaders authority, and established chiefs with new powers over larger villages whose people were collected from their lands to facilitate both administration and proselytising. Much of the vacated land was given over to copra plantations further confusing boundaries and ownership. Many landowning families simply died out as series of epidemics ravaged islands with fatalities up to 95%. Such is the background to many land disputes in Vanuatu.

In fact, however, there are commonalities in custom systems of land-holding to build on, particularly when contrasted to the formal land registry system introduced by the colonial administration. Most clear, is the strong cultural and spiritual affinity that ni-Vanuatu have with their place of origin. Land is generally owned by a family group, with allocations for use made by a patriarch, although moving northward in the country it seems that land is owned within a larger community than in the south.

Another common feature is of the contrast between land-use rights and land-ownership. Land ownership is important but is in a sense unassailable and cannot, in the ordinary course of events, be transferred or sold. The multiplicity of land use rights, however, allows interests in land to be divested, creating bonds between groups. It permits access to different resources and allows for shifts in power between groups and individuals. Under custom, surplus land could be divested to build power bases, the flexible transfer of land-use rights allowing for and maintaining the fabric of social relations.

On the other hand, where a system is based on multiple, transferable land use rights, there are more interests and individuals involved. The shifting cultivation practised in Vanuatu means that new garden plots need to be created every few years. In a system based on subsistence agriculture once a family has enough land to use what land they own becomes less of an issue. This flexible system changed when the colonial system of landownership was introduced. The contrast is between the modern system with its emphasis on clarity and land as an economically productive asset and the flexibility and social embeddedness of custom.

This contrast explains the terminology used in this paper. Where land is wholly within the custom-system, it makes sense to talk primarily of 'custom land-holding' and 'user-rights', once the formal colonial system impacts upon it, 'custom-ownership' becomes more pertinent.

Custom System vs Formal System

The classic modern response to the contrast described above is to build 'the rule of law'; that is a formal regulatory system (either unitary or federal) in which there is a clear hierarchy of norms. The Constitution of the Republic of Vanuatu represents an attempt in this respect with its recognition of custom ownership under the state system. In practice, however, custom has its own legitimacy separate from state law and conversely the state has struggled to devise practical ways to affirm and recognize custom. Vanuatu thus displays a situation in which “several legal orders coexist irrespective of their mutual recognition” or “strong legal pluralism” (von Benda-Beckmann 2006:59). Far from being a matter of mere ethnographic curiosity, legal pluralism in Vanuatu is a significant development issue.
Vanuatu custom landholders are keen to access the benefits of development, to achieve schooling for their children, to improve their land, build better houses and own mobile phones. Accessing such benefits means entering the cash economy. As banks will not lend against land where the ownership cannot be clearly verified and paid jobs are scarce a significant route to cash is to ‘sell’ land to an investor who will register a lease.⁵

The formal system dislikes diffuse groups of owners with unclear rights. Registration requires that an owner or owners be identified out of the group of custom-rights holders. This can be extremely complicated, for example, if a patriarch controls land that is inherited along matriarchal lines, ie by his wife or through the female line; who should be the owner? There are no wills or clear sub-divisions of land between progeny in Vanuatu custom systems. The problem is exacerbated by a breakdown in the system of arranged marriages which controlled the pool of people who could make claims to the land (to those with compatible custom(s)). The erosion of this social practice means that outside groups can come in with claims, perhaps according to different custom practices. Features of Vanuatu society such as adoption and migration further complicate matters. Absent an agreed hierarchy of norms, there is no institutional way to resolve these issues.

Another set of issues emerge among the custom right holders to a particular piece of land. When formal transactions (leases) are registered it is generally the case that only the closer family of the person registered as the custom owner benefits. This group may endorse the transaction but family members with less strong ties and non-owners with usage rights will be dispossessed as leases inevitably give rights to exclusive possession. Thus a land holder with non-exclusive rights becomes a ‘land owner’ and sells something he never had – a right to exclusive possession. Others with custom rights to the land will need to find other areas from which to sustain themselves and may be aggrieved. The legal system offers little prospect to challenge the lease so disputes end up being played out within and between custom groups.

Verifying the Custom-Owner

The procedure that has been adopted by the Department of Lands to ascertain the custom owner is to request verification from the relevant chiefs. This introduces a new problem for there are many disputes as to who has the right to carry the title of chief. As the formal system gradually assigns more powers to chiefs, so the position becomes more desirable. Disputes over whether the right chief has been identified may end up in the courts and take years to resolve. Some chiefs are known to charge fees for signing the required forms, and are clearly open to inducements. In short the process offers little assurance as to whether the correct chief signed, whether the correct custom owner was identified, or whether the land was correctly delineated.

Push and Pull to Conversion

At Independence, legislation was introduced allowing the Minister of Lands to deal in disputed lands. The purpose was to allow the Government to protect the agricultural production, on which the country’s economy rested, by leasing plantations back out to the previous owners even while custom-owners where disputing who the land should be returned to. The power of the executive to deal in land is now applied to any land considered to be in dispute. From the nature of custom land-holding described above, it is clear that there are potential disputes with regard to almost any piece of land. Absent effective checks and balances this wide ranging power is open to abuse. A dispute can be created and the matter referred to the Minister for action. A recent attempt to remove this power by Private Members Bill in December 2008 was rejected on the grounds that disputes could not be allowed to hinder development.

Various other features of Vanuatu legislation act to disempower custom landholders. For example, depending on the conditions of a lease, leased land may be sub-divided into plots and built on without the land owner’s consent. Protective conditions exist in the legislation but these can be excluded from leases by negotiation.¹

¹ Leasing land is called ‘selling’ perhaps reflecting the view of most ni-Vanuatu that it will not be returned.
The above describes a situation where law and administrative procedure have failed to provide a framework for equitable dealings in custom land. Because this structure is enshrined in legislation and government procedure, however, it is very difficult to challenge the leases it produces. They are considered lawful within the formal system although they may be deeply unjust in custom. As the courts see custom as subordinate to the formal law they will generally confirm leases and dismiss grievances based on custom.

Custom-owners need a quick sale. Seeking better offers, marketing land or prolonging negotiations is as likely to produce contesting claimant owners attracted by a cash sale. At best, this may put off an investor or plunge the contesting custom-owners into an expensive dispute. At worst, the Minister of Land may step in to do the deal, cutting out the custom-owner. The situation in effect creates tenure insecurity for the custom owner and thus puts in place incentives for secretive or sub-optimal transactions.

There is also an absence of freely available information on Vanuatu land law and procedure which custom owners could access. For custom-owners in the outer islands, lawyers are not available without an expensive visit to one of the urban centres. For all but a small elite of ni-Vanuatu, costs of expert advice are prohibitive while opportunities to earn cash income are few. Most legal information is passed informally, by word of mouth. This has allowed certain legal ambiguities to be perpetuated which mislead custom-owners, but not land developers who have long-standing relationships with the legal profession and good access to accurate legal advice.

Substantial inducements may be offered that appear to be for the benefit of the whole community. Property deals are sweetened with promises of 5-star hotels that will offer employment to whole communities. Such promises are rarely fulfilled and often unenforceable. Land remains empty in the hands of a developer waiting for more lucrative opportunities that are unlikely to include the custom-owners.

It is true that unscrupulous land developers and ni-Vanuatu can collude in exploiting ignorance and inequities to deprive custom groups of their land. Less remarked, however, are well-intentioned investors and custom-owners seeking equitable development who are frustrated by a legislative architecture that does not support the representation of group interests in a way that allows land to be developed free of acrimonious disputes.

Justice for the Poor aims to play a supporting role in the land reform process. To do this the program is supporting research on ways in which customary ownership could be engaged to facilitate equitable development. At the same time it proposes a dialogue to highlight the ambiguities and inequities in legislation and processes which impede fair negotiation at the interface of custom and formal systems.

**Bibliography**


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