

Chapter 9

LAND LAWS AND THE PRIVATE SECTOR

This chapter is based on materials presented to the Port Vila Workshop. The section on Land Tenure and Resettlement is a paper by Sarah Hardy Pickering, Head of the School of Law, The University of the South Pacific, Port Vila Campus. The section on the implications of the land tenure system on the private sector is based on a presentation made by Douglas Patterson from the firm Island Property Consultants Ltd, Port Vila. While the material presented and the specific examples are drawn from experience in Vanuatu, the broader principles have applicability to other Pacific countries as well as to developing countries elsewhere.

Land Tenure and Resettlement

The subjects dealt with in this section include land tenure, the meaning of land in Vanuatu, and the resolution of ownership disputes. The brief technical information about customary land tenure is, perhaps, only directly applicable to Vanuatu. However, the information concerning the determination of ownership, the inadequacy of financial compensation for compulsory acquisition of land and the need for full consultation with all interested parties, should be applicable elsewhere.

Determining the ownership and use of customary land is a very difficult and sensitive matter. It involves many social, political, economic, and spiritual issues. To illustrate the complexity of the issue, consider the following quotations:

"To many, land is not a quantifiable entity. Rather, land is a reflection of a human cosmic and genealogical relationships with a set of social beings."¹

It is of fundamental importance in Melanesian culture for a man to have deep roots in his land. Even the colonization and recent history of Melanesia have not been able to change this attitude. What is called custom has obviously changed in some important ways but, even before the first contact with Europeans, Melanesian culture was emerging. Custom is not a legal system that was set once and for all, but a system of attitudes and values which are differently expressed in different islands at different times. However, the relationship between a man and his land in Vanuatu is the most fundamental and most permanent aspect of Melanesian culture."²

As land is a limited entity, it cannot be manufactured (unless you define reclamation as manufacture) and thus the ownership and use of land is a fundamental issue.

Vanuatu's land tenure system has been evolving since time immemorial. Prior to the bloodless coup in 1980, much of the land on Efate and Santo—in particular the central business

¹ Bernard Narokabi, 1981. "Culture Law and Ideology" in *Land, People and Government*.

² Joel Bonnemaison, 1984. "Social and Cultural Aspects of Land Tenure" in *Land Tenure in Vanuatu*.

district and prime coastal sites—were alienated to Europeans and other *palangis*. Whether the person or group of people who purported to so alienate were entitled to do so is of academic interest only. The fact remains that huge tracts of land fell into the hands of colonizers and particularly to the French and British during the condominium government. Clashes of interest between the jointly governing powers led to the period being more colloquially known, not as that of the condominium, but of the pandemonium.

In 1980, the colony of New Hebrides ceased to exist and Vanuatu achieved independence. In *The Politics of Land in Vanuatu*, Van Trease suggests that much of the push for independence was based on the dissatisfaction with the loss of land and the ensuing loss of usufructuary rights. The Constitution adopted at that time speaks eloquently on the subject of land and its administration:

Article 71 *All land in the Republic belongs to the indigenous custom owners and their descendants.*

Article 72 *The rules of custom shall form the basis of ownership and use of land in the Republic.*

Article 73 *Only indigenous citizens of the Republic who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land.*

So all land in Vanuatu is custom land. In some sense, even the public land is custom land. It belongs to the custom owners. These may be, as Gerard Ward sets out in Chapter 8, residual rights. But it is arguable that they are more than that. The Constitution provides that 100 percent of all land in Vanuatu belongs to the indigenous people of Vanuatu. Only a short period of not more than six months was allowed at independence for individuals believing they held non-custom rights over land to register these claims.

What the Constitution does not provide is:

- how to determine who are the custom owners of the land;
- the appropriate rules of custom in relation to land; or
- what constitutes a recognized system of land tenure.

It may be argued that the Constitution should be interpreted as written in the spirit of hope. On this interpretation, it would be regarded as a statement of intention that, as all land once was, it would again be custom land.

Leaving aside the regulations for dealing with alienation of land, any compensation payable and the possible negotiation of new leases, which are largely technical matters, it would appear that the central point at issue is how the custom owners are to be determined and by whom. In the case of resettlement, the ADB guidelines suggest that negotiations with all interested parties should be energetically and honestly entered into. But, with whom to negotiate? Vanuatu has a number of major problems:

- Determining the owners of custom land;
- Deciding where to resettle the displaced people; and
- Calculating compensation for lost rights.

Determination of Ownership

In respect of this issue, the current system for resolving land disputes is to proceed to the Island Court with a right of appeal to the Supreme Court. There is no institutionalized involvement of the chiefs or knowledgeable elders of the village concerned.

Both courts are supposed to determine the dispute using custom law. Unfortunately, not all members of the courts are knowledgeable about customs even in general, let alone the customs applying in a particular locality. There is at the moment a five-year backlog of land cases waiting to be listed at the Supreme Court. Every single land case that has been heard by the island courts has been appealed to the Supreme Court. The current system for resolving disputes does not seem to be working. Add to that the collective nature of most custom ownership and land use, and the problem can appear insoluble.

In an attempt to establish custom rights and titles, there is no indication of how far back in history one is obliged to delve. The year 1979 would seem to be one possible date, but why not 1879? Then there is the additional complication of there being a myriad of ways in which title or use rights might have been transferred. It is possible to acquire rights over land through custom and practice (even if not title to it) by any of the following:

- service to the community
- immigrant status
- being the first to clear bushland
- marriage
- kinship
- subsistence land use for gardening
- warfare
- custom reparation and settlement

The presence of taboo sites, burial grounds, boundary markings, and the oral recitation of genealogies may evidence ownership and use, but there are often competing claims over the same land either for the same use or for different, often complementary uses. For these reasons, it can be important to understand what it is that the claimant actually wants. It could be recognition of a primary or secondary right, a combination of the two, or, perhaps, just the principle of being declared to have rights.

Where to Resettle the Displaced People

As all land is custom owned in Vanuatu, the provision of new land for those to be resettled will inevitably mean taking land from somebody else. Occupied or not, determined or not, the site of resettlement does belong to someone. Logically, all the problems set out above will arise once again on the alternative site.

Monetary Compensation for Lost Rights

Whether the land lost is that required for a public facility or that required to resettle those thereby displaced, the issue of compensation has to be considered in the light of what land can mean to its customary owners. The following partial list of meaningful characteristics of land has been compiled by students at the University of the South Pacific:

- Means of survival
- Source of income
- Political power
- Spiritual and cosmic connections
- Status
- Close tie to ancestors
- Shelter
- Power
- Religious significance
- Safety

All of these meanings attaching to land have great cultural, social, political, and economic significance. The Government may be able to provide custom owners with new land to cultivate, financial compensation for loss of livelihood, and the means to build a new home. But no amount of money can compensate a person for the loss of land of which they themselves were a part. In many places in the Pacific and elsewhere, links to land are spiritual and physical in nature. Nothing can compensate for having to leave the land in which one's umbilical cord has been buried; or where live the spirits of my forebears and those of succeeding generations yet unborn. Involuntary resettlement is not a strategy that should be entered into lightly. The resettlement that occurs voluntarily and within the ambit of customary practices, including those involving the transfer of property rights and use rights, is quite another topic. As with many issues in life, choice is paramount.

Implications for the Private Sector

Acting as a real estate agent on behalf of potential investors needing access to land and buildings under existing land practices in Vanuatu can be a daunting task. Private sector interests are convinced that serious land reform measures are needed to facilitate investment, especially foreign investment, in Vanuatu.

The main facts of the present situation are that:

- There is no freehold (or even perpetual leasehold) land in Vanuatu
- All registered land is leasehold
- Most land is not registered
- Leases are for 50-75 years and most commenced in 1980
- On expiry of a lease, all improvements revert to the lessor (custom owner)

In dealing with prospective investors, the most common questions asked relate to the actions that the lessor might take to alter or terminate the lease conditions prior to expiry and the answers to these concerns are uncertain because each would have to be tested in an overloaded court system. The remainder of this section sets out some of the difficulties faced by potential investors along with the approaches being adopted to try to improve the situation.

Lack of Perpetual Leases

Without a system of either freehold or perpetual leasehold, potential investors who are accustomed to such facilities may be unwilling to invest and this is especially true for really large scale investments. Since independence, a freehold land act has been passed. However, in the belief that it may be unconstitutional, the act has never been gazetted so its constitutionality cannot be tested in the courts. The constitutionality issue revolves around the fact that the act provides that only indigenous people, the ni-Vanuatu, are eligible to own freehold land. But lawyers have not been able to devise a definition of such indigenous people that is not racist and, for this reason, unacceptable under the Constitution which is nondiscriminatory.

All leases are less than 18 years old and transfer prices have been increasing despite the diminishing term. This is a reflection of generally improving economic opportunities. Eventually, the trend must change as the life of the leases runs out and improvements are neglected in the latter years of the lease. Unless some provision is made for the renewal of

leases well before their expiry, security of tenure will decline, values will fall, and this will be reflected in reduced interest in land-based investment. There is also a related problem of who would manage improvements such as buildings at the end of a lease in the case that lease terms are disputed.

Perpetual title would not just benefit foreign investors, but ni-Vanuatu as well, both in business and in private home ownership. Most suburban home sites are on leased land at present as they are occupied largely by people from other islands who have no custom rights on Efate or Santo where the major urban centers are.

Lack of Strata Titles

There is at present no legal basis for the subdivision of a property to provide even leasehold titles to parts of a registered property. The usual vehicle in other countries is provision of a strata title that attaches to a self-contained unit such as an apartment, the floor of a building or a semi-detached part of a building. The lack of such a facility is a real constraint on most kinds of development, including large projects, tourism, and local home ownership.

There is a willingness in the Government to consider the introduction of strata titles. It could result in more property sales at more affordable prices, increasing the number of home owners. It would provide a vehicle for a more active home loan mortgage industry and, incidentally, raise a lot more revenue for the Government through associated fees and charges.

Lack of a Land Court and Lands Referee

Land disputes are to be heard by the Island Court sitting as the Land Court. But, for lack of financial resources and trained personnel, the Land Court has not been convened for two years. Even so, there is already an estimated five-year backlog of cases that have been appealed from the Island Court to the Supreme Court. This is a serious problem as only the Land Court can hear land claims and only it has the power to establish "declared custom owners" of land. This leaves potential lessees in doubt as to whether they have truly identified the rightful owners of the land they wish to lease and leaves them nervous of the possibility that any lease they negotiate will be later disputed by others who claim custom rights over the same property. The problem is mainly a financial one and the Government has agreed that action must be taken to overcome the problem.

The Lands Referee is a public service position that represents the only means of officially adjudicating disputes and claims without resort to the courts. The position has been vacant for several years. It is now anticipated that a new appointment will be made in 1999 and that a dispute resolution department will be set up within the Ministry of Lands.

Need for Enhanced Capacity in the Lands Ministry

As is often the case in recently developed bureaucracies, there are too few staff with the requisite knowledge and experience. This is compounded by the fact that they must handle a very large work load created by such a complex approach to land questions. Not only is there a lack of familiarity with the local legal framework and its regulations, but there is also a lack of understanding of the situation as it would be seen by a foreign investor coming from a totally different land culture. This is seen by the private sector as resulting in procrastination and obfuscation to hide the lack of capacity.

Among the steps that are envisaged to address this problem are a comprehensive reform program that would result in fewer, better qualified staff, and streamlined procedures. There

would be a need for more delegation by the Minister who, at present, personally signs every determination. As a result, it can take 2–3 months just to get a mortgage consent signed. A major training program would be required to strengthen the qualifications and experience of ministry staff.

Urban versus Rural Sector Problems

Most of the investor interest so far has been in terms of urban or near urban localities. When it comes to rural landholdings, the situation has been further complicated by the existence of people who have set themselves up as trustees for rural landowners and who act as intermediaries in the negotiation of leases. This approach is not favored by the present government and the Minister prefers to negotiate directly with the rural owners. There have been cases in which, to resolve an excessively disputed lease, the Minister himself has signed as Lessor. It is planned that, early in 1999 a custom land recording office, that was authorized in an Act of 1994, will be opened. It seems likely that, as in some other Pacific countries, such as PNG, the registration of lands will remain voluntary rather than adopting the Solomon Island model of universal registration.

Residency Rights

Of course there are many other aspects of the customs and culture of Vanuatu that appear as obstacles to commercial interests anxious to enter the local markets. However, one that is most awkward is the lack of a “permanent resident” status for foreign nationals. All foreigners are issued with annually renewable visas. This is despite the fact that long-term leases over property may be entered into by a foreigner. Some more permanent form of residency permit, say after two or three years, would encourage a greater sense of identity with the long term interests of Vanuatu.