

Vanuatu Country Notebook 2013

Land, Corruption and Custom Rules: A New Episode Starts in Vanuatu's Eternal Struggle

By Marsden Lihira*

Few things exemplify Vanuatu's challenges after its 1980 independence as corruption related to land.

After decades of colonization in which locals were robbed of their land, all land in Vanuatu was to be returned to the customary owners upon the country's independence. This was required by the Vanuatu constitutional rule that land belongs to custom owners.

More than 30 years later, though, a flawed legal framework and less than effective implementation have facilitated a landgrab process that some describe as led by no less than the government itself.

"Vanuatu has been host to a 'land grab' whereby leases have been signed over customary land, often without the consent of custom owner groups. ... The key agent in this land grab has been the Minister of Lands," as Siobhan McDonnell, a lawyer who drafted recent land reforms, wrote in a blog post for the Australian-based Pacific Institute in early 2014.

Until new legislation came into effect in early 2014, the minister of lands had the unilateral authority to approve leases for land with disputed ownership. Rather than declining over time, the use of the ministerial power to sign off on rural leases actually increased, propelled by growing land speculation in the country.

Weak Foundations. Weak institutions and corruption have characterized the handling of leases. The government was supposed to set up a trust account in which rent from disputed lands would be held until proper customary ownership could be determined, but the funds were not held in any such trust.

In 2011, a former director general of lands, Joe Ligo, made public his report about how certain land deals went wrong. One case pointed to the sale of the former Marina Motel. Valued at more than Vt100 million (US\$1 million), it was sold by a minister of land to a political friend for Vt100,000 (US\$1,070). The property was almost instantly sold again for about Vt40 million (US\$426,000) to an investor.

The former motel had been forfeited two years earlier for alleged breaches of the terms of the lease.

The Ligo Report also spotlighted a case of landowners from Eton village on the east side of Efate, in which the land was sold for Vt5 million (US\$53,219) without the consent of the other landowners and then sold two years later without any development for Vt65 million (US\$691,857) to another investor. The transaction was facilitated by a then- minister of lands, who granted a 75-year lease for the 17 hectares.

Other land dealings in which proper procedures were not followed also were reported.

But land ministers were not the only ones to have come under public scrutiny for questionable land dealings. At the time of this report, lands minister Ralph Regenvanu announced the findings of an 18-month inquiry.

According to the special report, land officers of the Department of Lands — from directors and senior officers to cleaners — used their privileged positions to take on 33 state lands and properties in both Port Vila, the capital, and Luganville.

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The 41-page report listed their names and detailed how the public had been shortchanged.

The officers acted following a ministerial instruction from a previous land minister, who in August 2012 requested the then-acting director to find available plots and allocate them to those on the staff who could afford them. In his defense, the minister said it was meant to reward staff and that it was better than selling land to foreigners.

Certain terms were meant to be observed, such as paying 50 percent of the premium, covering the full value of administrative fees and having a lease for 50 years.

Such instructions were not strictly followed: Some lease terms were raised to 75 years, and some participants registered the land without paying fees. Some employees sensed the undertaking would be inappropriate, so they refrained from doing the registration or taking the land.

Regenvanu offered amnesty to those who returned the land to the state and, at the time of writing, six officers had been suspended by the Public Service Commission at half salary.

However, those involved in both the Ministry of Lands and the Department of Lands have denied the allegations, and no prosecutions have resulted.

Regenvanu said in an interview that he gives credit to the Ligo Report because it provides the details about what "everyone was aware of already," but he added that nothing has been done because it may "take many months to address" the cases.

What Regenvanu has been working on since he was appointed minister in early 2013 is a new land law. An artist and anthropologist who formed his own political party, Graon Mo Jastis (in English Land and Justice), he is the son of Vanuatu's first lands minister, Sethy Regenvanu.

The younger Regenvanu first became lands minister in 2011, but three weeks later, following a Cabinet reshuffle, he shifted to minister of justice and social affairs. During his brief tenure as lands minister, he announced that "New applications for registration of land leases of customary land would now require consent from an entire landowner clan, not just individuals." When he was moved back to the minister of lands in 2013, his interest in land reform persisted.

A New Era for Land in Vanuatu? The new Customary Land Management Act intends to correct loopholes of the previous Land Leases Act. The reforms concentrate the decisions about who owns a piece of land in the customary institution level, without recourse to the courts.

While eliminating the ministerial power over state land, the new legislation establishes the Land Management Planning Committee to oversee the leasing process, once custom ownership has been determined through traditional means, or nakamals. If the nakamal fails to make a decision, then the dispute can be taken to the Area Land Tribunal.

The reform package also includes a constitutional amendment that requires Parliament to consult the National Council of Chiefs about future changes to land law.

The National Council of Chiefs, or Malvatumauri, created by the Constitution, is composed of more than 30 chiefs representing most of Vanuatu's islands. Its main role is to "discuss all matters relating to custom and tradition and make recommendations for the preservation and promotion of ni-Vanuatu culture and language."

Vanuatu's six provinces all have their own councils of chiefs, which are affiliated with the Malvatumauri at the national level. In addition, most islands have chiefs councils, as well as area councils.

The new leasing process also requires that environmental and planning safeguards be met and that the access of custom owner groups to gardens, coastal and sea estates be maintained.

However, the reforms fail to comprise a well-rounded legal framework and were the result of a legislative process that was rushed in the context of Vanuatu's political instability – Vanuatu has had five prime ministers since 2008.

Even though consultations were carried out throughout all six provinces, and the National Council of Chiefs gave its support to the proposals, there was wide consensus that the reforms still needed fine-tuning. In late 2013, Parliament

approved them with the understanding that the gazetting (which would put them into effect) would be postponed until several concerns were addressed and the institutions were ready for the implementation.

Regenvanu waited a few months after parliamentary approval. However, when it became imminent that Prime Minister Moana Carcasses Kalosil would be dislodged by a vote of no confidence – which put the reforms at risk with a new government assuming power – the minister outmaneuvered his opponents by instructing the country's State Law Office to gazette the new Customary Land Management Act.

He also joined the vote against Carcasses and was kept on as lands minister by the new prime minister, Joe Natuman.

To Trip Over the Same Stone Twice. This is not the first time a land law in Vanuatu has been passed despite needing significant fine-tuning. Professor Howard Van Trease, honorary research fellow at the University of the South Pacific and author of the book "Politics of Land in Vanuatu" about the colonial land tenure system, said he agrees with Regenvanu's efforts, but he offered a historical perspective on how land ministers got their unilateral power in Vanuatu.

"I was around at the time when they formed the legislation. Because I was in the lands office, they often called me in [to meetings]. I can remember a discussion about this issue and somebody said, 'Well, we just hope that we have honest ministers,' because they could see that that was a power that opened the door to potential corruption, and of course that has been the problem," he said.

As the new laws move more power to the local level, the question arises of whether local power is more vulnerable to corruption. Are the reforms simply opening a new door for corruption at the customary level?

On many islands, the customary setups lack legitimacy. Questions emerge about who are the rightful chiefs and the extent to which they can exercise their powers, said Joel Simo, who works on the Land Desk within the Vanuatu Cultural Centre.

By eliminating the court's role in determining customary ownership of land under dispute, the power returns in full to the traditional system. Regenvanu said this follows the Constitution, of which Article 74 states: "The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu."

Simo believes that "formal courts so far have done nothing in favor of custom" and that people or organizations with economic means usually get better results. On the other hand, "a lot of these chiefs have also facilitated bad land dealings," he said in an interview.

Marie Noelle Ferrieux Patterson, president of Transparency Vanuatu and former Vanuatu ombudsman who has operated a real estate company for two decades, is wary of the change. "My first impression is that for the people not to have recourse to the court for such important decisions would not be fair. ... Justice could be denied and it might be a breach of other constitutional rights," she said.

"We all know also that the local authorities or the chiefs are not nowadays as objective as expected when money is involved. I am aware of cases where chiefs in land tribunals now agree with each other and deal with each other's land with a pre-agreement: I decide in your favor and when you are appointed to the neighboring tribunal, the favor will be returned," she added.

Regenvanu has said he is aware there have been documented instances of corruption by the local customary authorities, such as councils of chiefs: "Yes, many, which are the subject of land tribunal appeals and Supreme Court cases." However, he added, the decisions of nakamals and custom area land tribunals can be appealed to the island court for judicial review if corruption is suspected.

According to Simo, "there are no documented instances of corruption in the communities," but he agreed "there are anecdotes of chiefs who have sold all their community land without proper due consultation with their people, who have become victims.

"There are cases of these in Pango, Erakor, Eratap and Tanoliu in North Efate," he said.

Another problematic issue, which is acknowledged by McDonnell, the legal drafter of the reforms, refers to the inclusion of voices within the communities.

"Safeguards around appeal rights have been included in the legislative package in an attempt to allow the voices of women and young men in particular to be heard in meetings of nakamals. Whether these protections are enough remains to be seen, and the Act includes a reference to regular review periods," she wrote in the blog post referenced above.

Institutions Lag Behind. Good intentions aside, Regenvanu is also criticized for fast-tracking the process at the moment the country lacks the institutions for proper implementation. One of his most vocal critics has been the Efate Vaturisu Council of Chiefs.

The chiefs have said in public communications that local-level authorities are not ready to implement the new measures because work is yet to be done on identifying customary boundaries and proper customary authorities. Efate, like the rest of the islands, had yet to write its own customary rules and regulations, in accordance with Resolution 19 of the National Council of Chiefs.

Questions have also been raised by the regional think tank Pacific Institute of Public Policy. "Though the new Customary Land Management Act is characterized as a law that supports *kastom* (traditional custom), a number of provisions are inconsistent with that assertion," the institute said in calling for a delay in implementation of the reforms.

"The Act begins with recognition of customary institutions' authority to determine the rules of custom. But then it goes on to define these institutions as nakamals and 'custom area land tribunals,' and specifies their role as being able to make legally enforceable decisions regarding land within a state institutional hierarchy for managing land. These provisions undermine the authority of nakamals, putting them at the bottom level of a hierarchy of institutions, and making the state the arbiter of what is a customary institution and what is not," according to the institute.

In addition, it said, the law fails to provide protections against false customary institutions; does not address situations where chiefly authority is complicated, contested or being decided; and lacks a way to determine or limit who is under the control of a nakamal.

"In fairness, Mr. Regenvanu accepts that further work is needed to address issues such as these," the institute said.

Russell Nari, former director general of lands who initiated the Land Summit of 2006 (which resulted in recommendations taken into consideration while drafting the reforms), accepts "the good intentions behind the new law," but he questions the practicality.

During his tenure in lands, Nari tried to get all the provinces to establish their proper customary institutions. These institutions would help identify legitimate traditional authorities, who would then start setting up area land boundaries for each island. Until this is done, he said, it will be difficult to fully implement the new laws.

He estimated that obtaining a lease could now take up to 17 months and be an expensive process. Hence, no investor would want to spend any money without some guarantee that the lease would be granted, he said.

Robert Sugden, an Australian lawyer who lives and practices in Vanuatu, predicted an end to new leases. "If people cannot alienate their land, yes, they get to keep their land. They have no choice. If it has no value, how are those people going to raise money to conduct their own businesses?"

Yet, many in Vanuatu have celebrated the change and think it was time something was done about the country's land problems. Land plays a special role in Vanuatu. It is not only the source of sustenance for the ni-Vanuatu; it is also intrinsically linked to their culture and sense of identity. As described by the Pacific Institute of Public Policy on its website: Unlike people elsewhere who see land as belonging to them, the ni-Vanuatu think that people belong to land.

With land perceived as one of the top corruption problems in the country, along with election corruption and nepotism, and deeply tied to the country's weak institutions, sorting out how to handle land issues seems all the more urgent.

But as Professor Van Trease said, "Land has been an area of contention for decades. You always have land disputes. In the Constitution, land belongs to the custom owners, but I don't think they realized how difficult that would be to sort out."

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