LAND TENURE IN VANUATU - THE OLD AND THE NEW

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1. INTRODUCTION

1.1 The Anglo-French Condominium of the New Hebrides became the independent Republic of Vanuatu on 30 July 1980. It consists of a chain of islands which form a single archipelago running southwards from a latitude of 13 degrees south for a distance of 800 kilometres. Its land area is 12,189 square kilometres comprised of 12 main and some 60 smaller islands, the largest being Espiritu Santo, Malekula and Efate. Port Vila, the capital, is situated on Efate.

1.2 The total population is approximately 130,000 of which an estimated 16,000 families farm the land. Farming methods are now above subsistence level and this transition to a cash economy has caused the role of land to change dramatically. Concepts of ownership and possession which were seldom in issue in our grandfathers' time are now of vital importance. Nevertheless, the social significance of land is not entirely lost: the constitution requires that the rules of custom shall form the basis of ownership and use of land. Custom and land are an integral part of life and, despite changes, both are as important now as they were when the first land was alienated in Vanuatu in the 1850s.

2. EARLY HISTORY - THE FIRST 100 YEARS

2.1 Traders and missionaries were the first foreigners to acquire land in Vanuatu. Their needs were modest and the parcels were small in size. Most of these early acquisitions took place on the southern islands which now fall within the TAFEA local government area; other parcels were also acquired on Efate. Efate later became the main target for the first settlers who arrived in the 1870s. These were mainly British subjects from Australia who were attracted to the flat coastal plains and set up permanent settlements at Havannah Harbour and Port Vila. Coconut plantations were established and an export trade in copra began.

2.2 During this period there was no system for legalising land claims in Vanuatu. The British government allowed its nationals to register their claims with the Western Pacific High Commission in Fiji and later, when the French arrived, they registered their claims in Noumea. Britain, however was not at that time in favour of settlement by its nationals and refused to guarantee any land claims. It also placed restrictions on the recruitment of labour with the result that many British planters went bankrupt by the late 1870s and early 1880s. Some simply abandoned their plantations but most sold them to other Europeans. These were predominately French settlers and France thus became the main economic force in Vanuatu in the 1880s - a position it maintained until independence.

2.3 Many of the British-owned plantations were acquired by a French land company known as the Compagnie Caledonie des Nouvelles Hebrides (CCNH). This also purchased large tracts of additional land in other islands throughout the group - a policy it pursued for two decades. The French government supported the company, reorganised it and renamed it Société Française des Nouvelles-Hebrides. By 1905 it had claims totalling over 55 per cent of the land area

of Vanuatu. Many of these were questionable and in the years that followed, and to this day, ni-Vanuatu have argued that much of the land which was alienated during the nineteenth century was sold by people who were not the true custom owners. They also argue that, when ni-Vanuatu did agree to a land transaction, it would have been for the temporary use of their land since in custom it is difficult or impossible for anyone permanently to alienate land.

2.4 The missions, especially the various Presbyterian churches operating in Vanuatu during the nineteenth century, also acquired tracts of land over and above the properties they required for their normal operations. In the late nineteenth century some Presbyterian missionaries urged ni-Vanuatu to transfer their rights to land to the mission as a means of preventing it from falling into the hands of land speculators and settlers. Mission trust lands were formed and large areas on different islands were registered in the name of the mission to be held in trust for ni-Vanuatu.

2.5 Owing to differing colonial philosophies, agreement between the British and French over the registration of land claims was difficult. Britain wanted a land commission to examine the validity of claims before allowing registration to take place. In keeping with the policy it had applied in other British colonies in the Pacific, it was less concerned with securing the land rights of Europeans than it was with protecting the rights of indigenous people. The French government, on the other hand, had traditionally encouraged permanent settlement by its citizens and therefore pressed for a system which would validate the claims of its nationals. In order to get an agreement which would reduce conflict and finally settle the problem of administering Vanuatu, the British agreed almost entirely to the French proposals. A convention was finally signed and a joint court was established. Based on the Torrens system of land registration, it provided for titles to land to be registered unless successfully challenged. The system's main purpose was to allow for the successful registration of European land claims. A successful challenge depended on the ability of the challenger to produce adequate legal documentation. Since ni-Vanuatu would not have possessed any documents to support their claims, the system clearly worked to the advantage of the Europeans. In addition, land deeds registered in Suva or Noumea prior to 1 January 1896 were specifically excluded from challenge in court.

2.6 All this occurred in the period immediately before the first world war and land registration proceedures were formalised in 1913. These provided for applications for registration to be publicised and allowed a one-year period during which adverse claims could be lodged. A large number of applications were received in 1913 and 1914 but the war intervened and the filing of applications was suspended until 1919. Even then there were incredible delays by the British and the French in appointing court officials and the first claims were not dealt with until 1928. The court began its work by dealing with applications for registration of land on Efate and then covered the southern islands before turning north again to give attention to the large French claims on Epi. By the end of the 1930s the court completed the hearing of claims for the northern islands excepting Santo; but again war intervened and work was suspended until the late 1940s.

3. THE PRE-INDEPENDENCE PERIOD

3.1 Ni-Vanuatu opposition to the alienation of their land began in the nineteenth century and, whilst such opposition was controlled, it was never completely eliminated. By the 1950s land started to acquire political significance and by the mid 1960s it became the most important political issue in Vanuatu

and the catalyst for the nationalist movement which was to carry the country to independence.

3.2 When the joint court in the 1960s began its work of hearing land claims on Malekula there was a growing awareness among ni-Vanuatu of the significance of this work and the Malekulans actively sought to hinder the registration process by interfering with survey work. Surveyors were often denied access to areas and survey markers were removed. As a result the court was only able to give interim judgements on many of the land claims on Malekula. Again in the 1960s, confrontations occurred both on Malekula and on Espiritu Santo when large plantation companies and planters began to expand into undeveloped bush areas of registered properties.

3.3 Inevitably Britain and France had differing opinions on how to deal with the growing land problem in Vanuatu. In the 1960s and 1970s the British government brought a number of experts on land administration to the country to study the situation and advise on possible courses of action. All recommended significant changes in existing regulations relating to land and again proposals for a land commission were put forward. The French government did not agree to this suggestion since it feared that the registered titles already owned by its nationals in Vanuatu might be brought into question. Rather than raise the whole question of alienated land, the French government instead attempted to reach a compromise with individual land owners. French planters and companies involved in land disputes were pressed to relinquish parts of their undeveloped properties to ni-Vanuatu as a way of gaining the latter's acceptance of permanent alienation of developed portions. Whilst several thousand hectares of undeveloped dark bush were surrendered, this belonged predominately to either the French state or to a large company in which the French government had a controlling interest. With few exceptions, most French planters and companies refused to participate in the programme.

3.4 By this time it became clear that Britain and France could not agree on an appropriate course of action regarding land reform in Vanuatu. Any changes required the full agreement of both governments and the official position on the key issue of alienated land remained that the validity of registered titles was not a subject for negotiation. Members of the nationalist movement finally accepted that the crucial issue was indeed political power and that any real solution to the land problem in Vanuatu could only be achieved by an independent Vanuatu government.

4. THE POST-INDEPENDENCE PERIOD

4. On 30 July 1980 the New Hebrides became the independent Republic of Vanuatu. The terms of its new constitution ruled that all land belongs to indigenous custom owners except that which government acquired in the public interest. The land registry was closed. On the same day the land reform regulation 1980 was brought into force. Its purpose was to provide an interim measure to deal with land until a national land law was enacted.

4.2 In 1980, prior to independence, the joint court heard its last claims. After 52 years of operation it had handed down over 1,400 judgements covering a total of 241,678 hectars representing about 20 per cent of the land area in Vanuatu.

4.3 The new land reform regulation provided for persons who owned interests in land before independence to become 'alienators' with the right to remain on the land until they either reached agreement with the custom owners to lease

or received compensation for the improvements on the land. To qualify as an alienator a person had to have had -

(i) freehold or perpetual ownership to land whether alone or jointly with another person or persons; or

(ii) a right to share in land by inheritence through will or operation of law where no formal transfer of that land had taken place; or

(iii) a life interest in land; or

(iv) a right to land or a share in land at the end of life interest; or

(v) a beneficial interest in land.

However, alienator status was disallowed unless -

(i) there was a person in physical occupation of the land, being an alienator or a licensee, tenant or lessee of an alienator; and

(ii) the land and improvements thereon had, in the opinion of the Minister, been, up to the day of independence, maintained in reasonably good repair and condition; and

(iii) rates or taxes due in respect of the land were not in arrears for six months or more on the day of independence.

Provision was also made in the regulation for persons other than alienators to seek a certificate of registered negotiator, to enable negotiations concerning land to be entered into with custom owners. All leases and other agreements relating to land between custom owners and non-indigenous persons required the Minister's approval.

4.4 In 1982 the Alienated Land Act was enacted. It sought to strengthen the land reform regulation, its main purpose being to regulate the manner in which alienators and custom owners negotiated lease agreements or agreed compensation for improvements. Special provisions were made to protect the interests of mortgagees and a deadline was set for the submission of applications for alienator status. This was to be three months after the Act was enacted. On 1 August 1982 the Act was brought into force and by the deadline date of 31 October an approximate overall total of 900 applications for alienator status to land in the rural areas had been received for consideration. Between 75 and 80 per cent of these applications were successful. They included expatriate individuals, companies, churches and indigenous ni-Vanuatu people.

4.5 The Minister has power under the land reform regulation to declare land to be public land. This can only be done in the public interest and the process requires that there shall be consultation with custom owners and that they shall be eligible for compensation. In 1981 two orders declaring land to be public land were made. These covered the town areas of Port Vila and Luganville, both of which are managed by urban authorities. Under another land reform regulation order the Vila Urban Land Corporation which manages the land in Port Vila, including the granting of lease, was established in May 1981. A further order established the Lugenville Urban Land Corporation in November 1981.

4.6 In addition to declarations, government has become the owner of land through a different process. Before independence there were many areas of land which were owned by the British, French and Condominium governments. This land was called 'state land'. At independence all state land became public land and now belongs to the government. These areas of public land are widely scattered throughout Vanuatu and a study of them is now being carried out. Government's policy on ex-state land is to surrender as much as possible so, unless the land contains a government building such as a school or a clinic or is earmarked for special development, it reverts to custom.

4.7 Several papers have issued from the Ministry covering government's policy as it relates to certain land matters. These have covered subjects such as the duration of leases, land for religious organisations, registration of alienators and recommended rent levels for government and for the private sector in rural areas. Their purpose has mainly been to assist lands officials in advising land owners on lease negotiations.

4.8 In April 1983 Parliament passed the Land Leases Act which provides in one piece of legislation a law and procedure for establishing and maintaining a register of title to leases of land and other interests such as mortgages and sub-leases. These interests are guaranteed by law, which means that the register will be the final and only proof of title and that registered titles are indefeasible. This is Vanuatu's most important land law. It took many months to prepare and was offered to the private sector for comment before it was tabled in Parliament. There it was debated for four days before finally being passed unamended. It has since been supported by two pieces of subsidiary legislation which provide prescribed forms to be used under the Act and general rules for the administration and operation of the Land Records Office. The Act, with its supporting laws, was brought into force on 1 March 1984. The Land Records Office, however, opened its doors in early January 1984. This allowed a run-up period during which the public was invited to lodge executed lease documents. These could not be registered until 1 March but an opportunity was thereby provided for the Director to examine documents, to establish where the more frequent errors were occuring and to advise the public accordingly. Special attention was given to mortgages, where concessionary proceedures were introduced to reduce the risk of conflicting priorities where charges were created prior to the commencement of the Act. These measures were of a temporary nature and were withdrawn as soon as their purpose was served.

4.9 All leases submitted for registration must be supported by a survey plan approved by the Director of Land Surveys. Accurate surveys are essential for registration and there is a need for better standards of land surveying. Until recently there was no legislation to control private surveys in Vanuatu and to remedy this a law providing for a Land Surveyors Board to be established to administer the surveying profession was approved by Parliament in May 1982.

4.10 The Land Leases Act has also increased the need for the services of a land referee. The post was created by Act of Parliament in 1982 and the law was brought into force in October 1983. It provides for a qualified valuation surveyor experienced in the management of land who will have jurisdiction over the amount of rent payable for a lease, the value of improvements and the interpretation of any provisions in a lease. He accordingly deals with disputes between custom owners and alienators in these matters and his decision is final. An officer is now at post and his formal appointment is expected shortly.

4.11 May 1984 saw the 100th urban lease being signed in Port Vila and over 120 leases already signed in the rural areas. These are steadily being submitted to the Land Records Office for registration. Among those signed is one for a major cocoa development project comprising 3,000 hectares on the island of Malekula. This is a joint venture enterprise between the Vanuatu government, the Commonwealth Development Corporation and the local land owners who gain equity participation in the company by their contribution of land. Government favours joint ventures of this type and others are being considered, including a 470 hectare coffee estate on the island of Tanna.

5. PROBLEMS

5.1 The advent of the constitution with its ruling that all land belongs to indigenous custom owners immediately brought the question of original ownership into issue and bitter disagreements have arisen between competing groups. These have escalated dramatically and in some areas ownership of over 90 per cent of the once-alienated land is in dispute. Some of the earlier leases were executed with locally appointed land committees acting for and on behalf of the land owners. In many cases the land had been continually occupied by alienators since independence so the first payment was for two and a half to three years' back rent. Consequently considerable sums of money were involved and, regretably, there were instances where land committees misused these funds. The result was an outcry against the system and increased bitterness between disputing claimants. Fortunately the Minister has power under the land reform regulation to conduct transactions in respect of land on behalf of the custom owners. He normally only does so with the consent of the competing claimants; but it did offer a means of entering into lease negotiations, allowing development to proceed and holding rental payments in trust pending settlement of disputes. It was, however, inadequate to cope with a situation which threatened the development of the nation and it was realised that there was an urgent need for an effecteve system of adjudication which could be enforced by law.

5.2 In December 1982 the Prime Minister chaired a meeting on the subject. A decision was taken on a framework for courts over and above the customary village court. This was for a two-tier system introducing island courts staffed by local justices in each local government council area, with appeals on land cases lying direct to the Supreme Court.

6. THE SOLUTION

6.1 The Island Courts Act was passed by Parliament in April 1983 and brought into force immediately. It provides a system of adjudication in customary matters which has the force of law. As a permanent arm of the judiciary, the island courts have jurisdiction in both criminal and civil matters, including disputes over the ownership of customary land.

6.2 In hearing land cases island courts must base their decisions on custom as it relates to the land in dispute. Their decisions must also clearly establish the ownership of the land. To achieve this special procedural rules have been prepared which provide for all claims to a parcel of land to be heard at the same time. An appeal lies to the Supreme Court whose decision is final.

6.3 A training course funded by New Zealand aid was held in February and March 1984 in Port Vila. The first of a series, it was attended by 10 justices and eight clerks. The first island court for the island of Efate was opened by the Prime Minister on 30 April 1984.

7. CONCLUSION

7.1 Vanuatu has now reached a stage where, four years after independence, a legal framework exists which provides for development to take place under registered leasehold title to land whilst the underlying title still rests with the indigenous custom owners. The widespread disputes over customary ownership must be settled in custom and the island courts provide the means to do this. However, the question arises: what is custom? Is it what our grandfathers did in 1900 or is it what we are doing now? This is what the people must decide. Government cannot dictate on this issue.

7.2 It has been said that the land belongs to the people and the people belong to the land: bound by custom they cannot be separated. Custom is part of life but, as our way of life changes, therefore custom changes. Its strength lies in its flexibility.

7.3 What has been achieved in Vanuatu has only just happened. It has still to be put to the test and no doubt there will be need for improvements. Also, efforts to date have been directed at the tip of the iceberg: the one-fifth of the total land area which is or will be encumbered with leases. The balance remaining is large and has considerable development potential. A lot of work and effort therefore still lies ahead; but nevertheless, since independence, promising progress has been made.