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Empowering Women through Recognition of Rights to Land: Mechanisms to Strengthen Women's Rights in Vanuatu

Vijaya Nagarajan and Therese MacDermott

ABSTRACT

Although the pluralist system of land tenure in Vanuatu does not directly discriminate against women, the operation of the system and contemporary interpretations of custom are increasingly marginalizing women from decision-making processes regarding land management and control. Commitment to the principles of gender equality through constitutional guarantees and the ratification of relevant international treaty obligations, while providing an appropriate legal framework for equality, have only had limited success in addressing discriminatory practices. This article analyzes alternative ways to overcome the barriers faced by women that are currently under consideration in many Pacific Island countries, including recording and registration, as well as legal vehicles such as incorporating customary land groups, trusts and community companies. This article concludes that while both existing and proposed mechanisms have the potential to secure for women a greater role in decision-making processes regarding land management and control, that potential will not be realized in the absence of knowledge, empowerment and the acceptance of the legitimacy of such rights.

KEYWORDS: Land, women, Vanuatu, equality, custom, rights.

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Introduction

Insecure access to land and uncertain property rights have been identified as major obstacles to achieving ni-Vanuatu women's economic empowerment.¹ They pose a threat to valuable sources of food and livelihood, as well as limiting the extent to which women can enjoy the financial benefits derived from renting and selling land. This inhibits

¹ Chakriya Bowman, Jozefina Cutura, Amanda Ellis and Clare Manuel, *Women in Vanuatu: Analyzing Challenges to Economic Participation Report* (Washington: World Bank, 2009), 46-50.

women's capacity to use land as collateral to gain access to credit, which restricts their ability to participate in entrepreneurial activities and private sector development. For Pacific Island countries struggling to find their place in the global economy, land has taken on a new meaning as a commodity to be exploited to drive economic growth.² There is also a growing global awareness of the importance of women's economic empowerment as a means of bringing economic benefits to developing communities as a whole.³

Rights to land in Vanuatu are governed by a pluralist system made up of both formal law and customary law.⁴ The formal law, as established by the Constitution and other legislation, provides the framework for the legal recognition of interests in land. But the contents of those interests are largely determined according to customary law, which is difficult to determine and at other times fluid. On its face, the pluralist system of land tenure in Vanuatu does not discriminate against women, although the system and contemporary interpretations of custom are increasingly marginalizing women from the decision-making processes regarding land management and control.⁵

Vanuatu, like many Pacific Island countries, has committed itself through its Constitution and through the ratification of various international treaties to upholding rights of equality. This provides a legal framework to promote gender equality, but progress is slow and there is limited evidence of concrete steps taken by the Vanuatu government to implement the Convention on the Elimination of Discrimination against Women (CEDAW). While the courts in Vanuatu have shown a preparedness to uphold principles of gender equality, they are faced with the difficulty of balancing the constitutional guarantee of gender equality with the constitutional requirement to defer to custom on land issues. Accommodating the competing claims for preserving customary law and implementing human rights norms has been identified as one of the significant challenges facing Pacific countries, particularly in relation to gender equality.⁶ The debate about whether a customary approach or state intervention is the better option for securing women's rights is contentious.⁷

² Bowman et al., *Women in Vanuatu*, 46-47; AusAid, *Making Land Work: Volume I, Reconciling customary land and development in the Pacific* (Canberra: AusAID 2008), xi, 1.

³ World Bank, *Gender Issues and Best Practices in Land Administration Projects' Synthesis Report* (Washington: World Bank, 2005), 3.

⁴ Jennifer Corrin and Don Patterson, *Introduction to South Pacific Law*, 2nd ed. (London: Routledge-Cavendish, 2007), 290-291.

⁵ Kristina E Stege, Ruth Maetala, Anna Naupa, Joel Simo and Elise Huffer, eds., *Land and Women: The Matrilineal Factor, The Cases of the Republic of the Marshall Islands, Solomon Islands and Vanuatu* (Suva: Pacific Islands Forum Secretariat, 2008), 79-122.

⁶ Kenneth Brown and Jennifer Corrin, "Conflict in Melanesia: Customary Law and the Rights of Melanesian Women," *Commonwealth Law Bulletin* 24 (1998): 1334.

⁷ Rebecca Monson, "Negotiating Land Tenure: Women, Men and the Transformation of Land Tenure in Solomon Islands' Traditional Justice: Practitioners' Perspectives," Working Papers no. 1, IDLO 2011.

This article looks at the existing land tenure system and highlights current problems with its operation. It examines how land interests are determined under customary law, how this impacts on ni-Vanuatu women, and the existing mechanisms to address discriminatory practices. It then analyzes alternative avenues for facilitating the recognition of women's rights to land currently under consideration in many Pacific Island countries or being advocated by various donor organizations. These include the legal recognition of women's land rights through recording and registration, as well as legal vehicles for furthering women's land rights such as incorporating customary land groups, trusts and community companies. It concludes by identifying the potential of existing and proposed mechanisms to improve gender outcomes, but highlights the social and cultural aspects that limit this potential.

The Existing Land Tenure System

Vanuatu's Constitution limits ownership of land to the indigenous custom owners and their descendants, and dictates that ownership and use of land is to be determined according to the rules of custom. This means that land in Vanuatu can essentially only be owned by ni-Vanuatu, whose customary laws determine the owner and other interest-holders in land. Working alongside this is the legislative framework for land management established at the time of independence, and subsequent amendments to that framework. This framework was designed as an interim measure to deal with the immediate concerns of the time, by removing land ownership out of the hands of the colonizers and returning it to the indigenous people,⁸ while at the same time encouraging investment through the establishment of a regulated land management system.⁹ The Vanuatu Constitution (Article 76) contemplates that a national land law would be developed for a comprehensive land administration system, but the initial framework remains largely in place.

The main transactions involving customary land are through leases of that land by the custom owner to another and the vesting of a leasehold interest in that person. Under the legislative scheme, certain conditions are implied in every lease, including the requirement that the lessee not dispose of the leased land or any interest in it without the written consent of the lessor, which shall not be withheld unreasonably. Lease terms are not supposed to exceed 75 years and rights of renewal for longer terms are intended to apply only to leases over public land. However, it is reported that these statutory requirements are routinely ignored and that the standard

⁸ Jim Fingleton, Anna Naupa and Chris Ballard, "Village land trusts in Vanuatu: 'one common basket,'" *Making Land Work Volume 2* (AusAID Report, 2008), 27.

⁹ Chris Lunnay, Jim Fingleton, Michael Mangawai, Edward Nalyal and Joel Simo, *Vanuatu Review of National Land Legislation, Policy and Land Administration* (AusAID, 2007), 11.

length of any lease is 75 years, with rights of renewal written into many lease agreements.¹⁰

In the last few years, serious public concern has arisen in Vanuatu about this framework for land tenure. It has been seen as facilitating a rapid rate of land alienation through the transfer of leasehold interests to foreign investors and developers, and as not providing effective regulation of land dealings. Our focus is ni-Vanuatu women, who are seen as being increasingly marginalized in these processes. There is a sense that their use of land for food production and market gardens is being threatened. A National Land Summit was convened in 2006, which resulted in the passing of twenty resolutions, many of which were directed at strengthening customary land rights, and included measures to establish mechanisms to document custom.¹¹ Subsequently a National Land Steering Committee was established to work on an implementation strategy.¹² But concrete change to the system of land management has been limited, although an aid-funded Vanuatu Land Program has been established. However, community suspicion of government-directed and donor-funded programs of land “reforms” remains a problem,¹³ and may exacerbate social discord over land issues. A number of reports¹⁴ have highlighted how the implementation of the National Land Summit resolutions could include strategies to address the marginalization of ni-Vanuatu women, but progress in this area has been slow and the political commitment to a full implementation of the summit’s resolutions has not been forthcoming.

Determining Land Interests under Customary Law

Any examination of land in Vanuatu has to give consideration to the impact that the Christian missionaries, as well as business and plantation interests during the nineteenth and twentieth centuries and the British and French interests that ruled from 1906 to 1980, had on indigenous culture and life. This period saw much land being alienated by custom owners as well as by people without rights to the land, and later periods saw even greater alienation by government interests, colouring all dealings with land forever more.¹⁵ Although independence on July 30, 1980 meant that theoretically all formerly alienated land was returned to custom ownership, in practice it was much more complicated to determine customary practice and custom

¹⁰ Lunnay et al., *Vanuatu Review of National Land Legislation*, 20.

¹¹ Sue Farran, “Land as a Fundamental Right: A Cautionary Tale,” *Victoria University of Wellington Law Review* 40 (2009): 387, 399.

¹² Lunnay et al., *Vanuatu Review of National Land Legislation*, Attachment 5.

¹³ “Former Malvatumaauri head makes u-turn on Mama Graon,” *Vanuatu Daily Post*, 17 July 2012, see <http://www.dailypost.vu/content/former-malvatumaauri-head-makes-u-turn-mama-graon>.

¹⁴ See, for example, Stege et al., *Land and Women*, 79-122.

¹⁵ Howard van Trease, *The Politics of Land* (Suva: Institute of Pacific Studies, USP 1987).

ownership after many decades of being in European ownership.¹⁶ Indeed, while custom has been essential to the forging of national identity, it has not been without its difficulties and tensions.¹⁷ Rodman's study of Longana in Vanuatu illustrates the manner in which colonial history has shaped people's relationship with land and the manner in which an individual's actions continue to influence this relationship.¹⁸

There is no single, uniform body of customary rules governing land tenure in Vanuatu. Instead, the country has a wide range of customary practices that vary from region to region in their determination of the ways in which land is held and inherited.¹⁹ Although anthropologists have alerted us to the fact that with time custom will change, it is clear that this is at odds with the way law visualizes custom as a set of practices that are scrutinized for determining land rights.²⁰ In some regions custom dictates that land is inherited according to the maternal bloodline, while in others it is determined patrilineally. For example in Ambrym, Eriksen notes that although the understanding of kinship is flexible, allowing for relations to be maintained through maternal or paternal alternative links, this does not translate to land rights and the customary understanding of inheritance rules, which are strictly construed.²¹ She also points to the impact that land disputes and court decisions have had on the construction of these understandings, stating that after numerous land disputes were heard in the village court in Ranon and after a national court decision that favoured patrilineal descent as the basis for land rights, a strict interpretation of land rights was strongly advocated.²² In other regions, such as Vanua Lava, land transmission combines a matrilineal descent system with mostly patrilineal inheritance of land, which has led Hess to speculate on the impact that the male-centred practices of the Anglican Mission and colonial traders may have had on indigenous practices.²³ These uncertainties contribute to ongoing disputes and controversies about ownership and usage rights.²⁴

With contemporary attitudes towards land now encompassing its potential as a commodity for exploitation, custom is also at risk of being manipulated and reinterpreted to favour individuals' personal interests. For instance, the

¹⁶ van Trease, 261.

¹⁷ Margaret Jolly, *Women of the Place: Kastom, Colonialism, and Gender in Vanuatu* (London: Routledge, 1994).

¹⁸ Margaret Rodman, *Masters of tradition: consequences of customary land tenure in Longana, Vanuatu* (Vancouver: UBC Press, 1987), 33-35.

¹⁹ Bowman et al., *Women in Vanuatu*, 47.

²⁰ Margaret Jolly, *Women of the Place*, 257.

²¹ Annelin Eriksen, *Gender, Christianity and Change in Vanuatu* (London: Ashgate, 2007), 31.

²² Eriksen, *Gender, Christianity and Change in Vanuatu*, 46-47.

²³ Sabine Hess, *Person and Place: Ideas, Ideals and Practice of Sociality on Vanua Lava, Vanuatu*, vol. 2 (New York: Berghahn Books, 2009), 122.

²⁴ Justin Haccius, *Coercion to Conversion: Push and Pull Pressures on Custom Land in Vanuatu*, Justice for the Poor Working Paper Series 49322 (World Bank, 2009), 2; Fingleton et al., 29.

increasing commercial exploitation of land has been occurring alongside customary practices where women are marginalized from decision making and men dominate the process of determining how land is going to be utilized. In such situations there is the risk that the decisions made will be motivated by the men's self-interest and be detrimental to the collective interest.²⁵ Customary practices are also susceptible to modern interpretations.²⁶ There is no provision in the law that spells out methods of identifying who the custom owner is and proving what the custom is.

Despite the variation in customary practices across Vanuatu and the uncertainties that exist, these practices are said to share a few general features. First, ownership is determined by tracing one's genealogy back to a region's first occupants, although the courts in Vanuatu have determined that it is irrelevant to rights of ownership that those first occupants or their descendants later left the region.²⁷ Second, customary ownership of land is rarely vested formally in individuals, although control over that land may reside with them. It is more common for members of a group or a community to own joint, undivided interests in the area of land where they live. Even where an individual appears to own land, this is more likely to be in a representative capacity and is more often a right to control the land rather than a right of ownership. Generally, customary practices dictate that the individual will act in the best interests of the group.²⁸ Third, whereas the common law of many Western countries conceives of land as a commodity to be owned and sold, custom law gives land a much more cultural and spiritual significance. Under custom, land is a continuum connecting ancestors, current users and future generations. It is the nature of custom ownership that land cannot generally be disposed of, but is retained for the benefit of future generations.²⁹

Fourth, custom recognizes a system of user rights that are distinct from rights of ownership. User rights may be granted to those who do not own the land, including men and women, and are commonly termed usufruct rights. These rights may allow use of certain areas of custom-owned land or access to its resources, or to occupy, cultivate or otherwise enjoy the land and can be held by individuals or smaller family units.³⁰ The significance for women is that they may exercise these usufruct rights in order to cultivate

²⁵ Justis Blong Evriwan, *Vanuatu Program Framework*, Justice for the Poor Working Paper Series 51818 (World Bank, 2009), 6; Sue Farran, "Land rights and gender equality in the Pacific region," *Australian Property Law Journal* 11 (2005): 131-132; Bowman et al., *Women in Vanuatu*, 47-51.

²⁶ Fingleton et al., *Making Land Work*, vol. 2, 29.

²⁷ See, for example, *Bue Manie and Kenneth Kaltabang v. Sato Kilman* [1983] VUSC L5/1984 (5 July 1983).

²⁸ Corrin and Paterson, *Introduction to South Pacific Law*, 295-296.

²⁹ Haccius, *Coercion to Conversion*, 2.

³⁰ Corrin and Paterson, *Introduction to South Pacific Law*, 295-296.

land for their family's food production or to grow additional produce to sell at markets. Such rights do not fit well within any formal legal system. Even though there is provision in the relevant legislation to make a lease of customary land subject to conditions, the existence of usufruct rights are not generally noted when a lease is registered.³¹ The effect of registration means that the leasehold interest is indefeasible and free from all other interests except those recorded. As a result, women may lose the benefit that they had under customary laws to use the land, for example to grow crops, because of the priority given to the registered lease.

Disputes between people claiming to be the custom owners of land may be dealt with by traditional dispute settlement mechanisms, with parties turning to the formal court system where such attempts to resolve the disputes have failed. The formal legal structure originally involved adjudication by Island courts, with a right of appeal to the Supreme Court. This was altered in 2001 and today a hierarchy of customary tribunals hear customary land claims under the Lands Tribunal Act 2001. This act has been generally criticized for being poorly understood and perceived by chiefs to undermine customary rules, and as a body other than a court, the legality of its decisions has been questioned.³² Research in this area indicates that few women are actively engaged in the adjudication process, and that most claimants through this process are men.³³ The tribunal system has been subject to a number of reviews³⁴ and a new legislative scheme was recently proposed in which the existing Customary Land Tribunal Act would be repealed and replaced with the Customary Land Disputes Management Act. Other reform proposals that have also been mooted include arrangements to recognize group ownership of land and a mechanism for landowners to mark their boundaries in the absence of any dispute.³⁵ Under this scheme such boundaries and ownership would be recorded with a designated body (the National Coordinator of Land Dispute Management). This body would be consulted before a lease of customary land was accepted for registration by the Department of Lands to ascertain where a land dispute existed and to verify details of ownership and boundaries. However, consideration of the implementation of these measures has been delayed by a change in ministerial responsibility for the relevant portfolio and other political instabilities. Finally,

³¹ Bowman et al., *Women in Vanuatu*, 48.

³² *Valele Family v. Touru* [2002] VUCA 3; Lunnay et al., *Vanuatu Review of National Land Legislation*, 23-24.

³³ Stege et al., *Land and Women*, 112.

³⁴ Joel Simo, *Report of the National Review of the Customary Land Tribunal Program in Vanuatu* (Research Report, Vanuatu Cultural Centre, 2005); Howard Van Trease and Joel Simo, *Report on the Activities of the Vanuatu Customary Land Tribunal and the 2001 Act* (NZAID, 2011).

³⁵ Joel Simo and Howard Van Trease, *The Vanuatu Customary Land Tribunal System* (Justice for the Poor, World Bank, 2011).

even where a land dispute is brought to the formal dispute resolution system for determination, enforcement can also be a challenge.³⁶

Existing Mechanisms to Address Discriminatory Practices

Vanuatu has committed itself through its Constitution and through the ratification of various international treaties to upholding rights of gender equality. However these legal obligations have only had limited success in addressing discriminatory practices and, to a significant degree, put the burden on individual women to have the resources and capacity to challenge discriminatory practices.

The principle of gender equality is enshrined in Article 5 of the Constitution of Vanuatu, which guarantees specified rights and freedoms that are to be enjoyed without discrimination, including on the basis of sex. But there is a perceived tension between these human rights principles and the constitutional mandate that customary law shall continue to have effect as part of the law of Vanuatu and, more specifically, that the rules of custom are to form the basis of ownership and use of land. The conflict between the right to equality and custom has confronted the courts in Vanuatu on a number of occasions, and on the whole the courts have decided in favour of the principle of gender equality. The most apposite of these cases is that of *Noel v. Toto* [1995] VUSC 3, in which women of a particular family grouping sought a share of the profits generated from tourists using a beach. Their claim was met by the assertion that it was customary practice to recognize men's rights to land only, that the women would not necessarily share in the income derived from the land, and ultimately that any benefit they might gain was at the respondent's discretion. The Court rejected this argument, holding that the customary practice was discriminatory and that female members of a family must have equal rights to men. The Court found that the customary practice of differentiating between men and women was inconsistent with the Constitution. However it decided that customary laws of the community still determined land ownership of the group, but subject to the limitation that any custom that discriminated against women was unacceptable.

While this case is an important precedent in giving primacy to the equality argument, a constitutional claim is not a readily accessible option for many women. Nor do isolated decisions from the formal court system necessarily change community attitudes to the interactions between customary practices and gender equality. Few women would have the resources or be in a position to challenge their entitlements in such a way. They would also risk strong

³⁶ Daniel Evans, Michael Goddard and Don Paterson, "The Hybrid Courts of Melanesia: A Comparative Analysis of Village Courts of Papua New Guinea, Island Courts of Vanuatu and Local Courts of Solomon Islands," Justice and Development Working Paper Series 13 (World Bank, 2011), 23.

family and social pressures not to do so. Legal advice and representation is not readily available, and many women who have taken action over human rights issues in the Pacific have only done so with the assistance and support of NGOs. In addition, claims of this nature are less likely to be heard through the formal court system now that the customary land tribunal system has been established. As Naupa and Simo observe, “despite national legislation providing a human rights basis for women’s lands in practice this is not realised.”³⁷

Another mechanism by which gender equality principles can be pursued is through the mandated reporting process regarding a state’s compliance with its convention obligations, and the consequent observations made on a state’s implementation of its obligations by the relevant United Nations committee. Vanuatu ratified CEDAW in 1995, and it acceded to the Optional Protocol in 2007. However, compliance with the reporting requirement has been slow, with a combined initial, second and third report only made in 2004, and a joint fourth and fifth periodic report requested by late 2012.

In response to these reports, the committee expressed its concern that the Vanuatu Constitution fails to give primacy to the principle of equality and the prohibition on discrimination over contradictory norms of customary law, with the result that traditional practices that discriminate against women could be found to be lawful in some circumstances.³⁸ It advised Vanuatu to put in place a comprehensive strategy, including legislation, to modify or eliminate cultural practices and stereotypes that discriminate against women.³⁹ It also recommended that the government undertake awareness-raising measures in customary or island courts so that these courts are familiar with the concept of equality in order to ensure that their rulings are not discriminatory against women, especially with regard to land ownership and inheritance.⁴⁰ Finally, it noted that the right to own, manage, enjoy and dispose of property is central to a woman’s right to enjoy financial independence, and that at present women in Vanuatu do not enjoy equality in relation to the ownership, administration, enjoyment and disposition of property.⁴¹

These statements emphasize the shortcoming in Vanuatu’s implementation of its CEDAW obligations and highlight the potential for custom to operate in a way that discriminates against women in the land context. However,

³⁷ Stege et al., *Land and Women*, 112.

³⁸ United Nations, CEDAW, *Combined Initial, Second and Third Periodic Reports of States Parties, Vanuatu, CEDAW/C/VUT/1-3* (2005).

³⁹ United Nations, CEDAW, *Concluding Comments: Vanuatu, 38th session, CEDAW/C/VUT/CO/3* (2007), [10]-[11], [22]-[23].

⁴⁰ CEDAW, *Concluding Comments*, 39.

⁴¹ Vedna Jivan and Christine Forster, *Translating CEDAW into Law: CEDAW Legislative Compliance in Nine Pacific Island Countries* (Review Report, UNDP Pacific Centre and UNIFEM Pacific, 2007), 30.

enforcement of these observations presents real difficulties. The status of the committee's comments and recommendations are merely recommendatory,⁴² and ultimately it is for the state to address the compliance issues raised. Even if an individual was to pursue a complaint under the Optional Protocol, this also has limited enforcement and raises concerns regarding resources and access to the formal justice system.

The crux of the committee's observations is the need for states such as Vanuatu to bridge the gulf between gender equality and custom, with different methods put forward for achieving this. There are those that see the problem as not custom itself, but the reinterpretations of custom that marginalize women.⁴³ Some have advocated a rights-based approach that would see the Constitution amended to stipulate that custom law must be subject to the constitutional prohibition against discrimination on the basis of sex.⁴⁴ Others have taken a custom-tenure approach that emphasizes the importance of implementing all the resolutions of the National Land Summit, which include measures that could address women's participation in land decision-making processes.⁴⁵ Alternative avenues for facilitating the recognition of women's rights to land include recording and registration of women's interests in rights and the use of certain legal vehicles, as examined in the discussion that follows.

Legal Recognition of Women's Land Rights through Recording and Registration

There are two ways for the law to facilitate the recognition of women's rights to land: either by recording these rights or by providing for a system for the registering of these rights. While these two options have much in common, namely the creation of a state-backed system that establishes a register of the kinds of rights held, there is a fundamental difference. Recording of rights is a process to ascertain the rights held under custom at any point in time, and does not alter these rights or prevent them from changing with time. Registration of rights, on the other hand, is usually seen as a process of formalizing rights over land in the Western tradition. Such processes usually allow for land to be registered in the name of a group and can also provide for all dealings, be they leases or charges and mortgages, to be registered and available in the public domain. The manner in which each of these processes can be used to further the articulation of women's rights is discussed below.

⁴² Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, eds., *International Human Rights Law* (Oxford: OUP, 2007), 406-409.

⁴³ Grace Mera Molisa, *Black Stone* (Suva, Fiji: Mana Publications, 1983).

⁴⁴ Jivan and Forster, *Translating CEDAW into Law*, 393.

⁴⁵ Stege et al., *Land and Women*, 112-115.

Recording Rights

Although Vanuatu has entrenched constitutional provisions that protect against alienation of customary land, these have not been successful in protecting customary owners as discussed above. The process of recording rights may allay the concerns that both men and women have about the erosion of their customary rights in the wave of development, as well as increasing shifts of population from rural areas to urban centres that may result in groups losing their links to the land.⁴⁶ Recording customary land rights allows for the capturing of existing rights at a point in time and could be recorded in the names of customary groups. Such rights could record both primary and secondary rights, including usufruct rights. Access to these records could be made available to potential financiers and leasers.

Such a process brings numerous benefits, of which three should be emphasized. First, it is the initial step in attracting the services of financial institutions that seek to finance economic growth, as it provides greater certainty of ownership, which can be ascertained through the land records. Financial institutions are currently reluctant to engage in transactions involving customary land because of the large number of contested titles and the failure of the Customary Lands Tribunal to resolve these disputes. Second, it provides certainty for members of the customary groups who can rely on the recording processes to assert their rights, even in cases where individuals or families have moved away from these lands. Third, it has the potential to reduce disputes as recording such rights may provide potential investors and users with enough confidence that land boundaries have been accepted and that there is no anticipated basis for disputes over title. Such a process may also protect women's rights where these are usufruct rights. However this potential can only be realized if women are able to articulate and assert their rights in a manner that will facilitate recording of such rights.

The possible negative impacts cannot be ignored, particularly as moves are afoot to reform the land sector, which is predicated on providing certainty of land tenure.⁴⁷ One important consequence of recording would be to freeze rights at a specific point in time, which is clearly altering the organic nature of customary law that currently allows for the tapering and moulding of rights in accordance with the needs of the community and the will of the chiefs.⁴⁸ Currently the flexibility of the system allows for new garden plots to be created, accommodating the needs of individuals or for land to be divested,

⁴⁶ Daniel Fitzpatrick, "The Legal Recognition of Customary Tenure," *Development and Change* 35, no. 3 (2005): 450-475, 453.

⁴⁷ AusAid, "Land Sector Framework 2009-2018: A prosperous, equitable & sustainable land sector for Vanuatu," July 2009, see http://www.ausaid.gov.au/Publications/Pages/6594_7378_869_2974_4662.aspx.

⁴⁸ Farran, "Land Rights and Gender Equality," 132.

creating bonds between different groups.⁴⁹ Moreover it works to maintain the fabric of social relations. Recording of rights may adversely affect women who rely on their families or groups to accommodate them in case of marriage breakdown or widowhood as it may restrict the use of discretion by the village chiefs. Any attempt to record land rights needs institutional involvement, financial commitment and the trust of the community and must fit as part of an overall land management scheme. The involvement of governments and donor bodies to organize the surveying of land and to develop a system for record keeping is essential for any such system to operate effectively. Furthermore, efforts have to be made to record the customary laws used to determine land rights, which may later be contested. This is not an easy task in Vanuatu, with a culture that is in transition and a huge internal variety in its culture's practices and languages, which may have conflicting norms that need to be reconciled in any disputes. Lynch and Crowley have documented the disappearance of a number of languages in Vanuatu, along with the customary practices that exist among the group.⁵⁰ Finally, the system has to generate trust within the community, which requires trustworthy governments and ministers who voluntarily commit to the process, thereby adding to its integrity. The system of recording that was considered and partially implemented in the Solomon Islands demonstrates the importance of all these factors, primarily by their absence.

In 1994 the Solomon Islands passed the Customary Land Records Act, which provides a system for the voluntary recording of customary land holdings in the name of groups. This system operates in conjunction with the Land and Titles Act, which provides for the registration of titles to land and allows interests in customary land (as well as Crown and privately-owned land) to be registered in the name of the custom owner, which could be a specific community or tribe. Once recorded under the act, interests in customary land cannot be legally defeated. The act established the Central Land Record Office, which is responsible for keeping all records of customary land holdings and the appointment of recording officers responsible for checking claims and the necessary documentation within such claims, as well as publicizing and recording the claim, and settling disputes as a last resort. Although the Customary Land Records Act recognizes that primary rights and secondary rights can exist in relation to land, the Land and Titles Act only allows for the registration of the former rights. The act provides for a customary land holding group or a person, who claims an interest in customary land, to apply to the Land Record Office for the recording of primary rights and the demarcation of the boundaries of the land. The record of customary land holding must include the name of the group

⁴⁹ Justin Haccius, *Coercion to Conversion*, 2.

⁵⁰ John Lynch and Terry Crowley, *Languages of Vanuatu: a new survey and bibliography* (Canberra: ANU, 2001), 57-59, 97-99.

claiming the primary rights over the land, the genealogy of that group showing the basis for membership of the group, the names of the persons who will represent the group and those claiming secondary rights and the extent of the rights claimed.

Although the design of the act has many advantages, it appears that by 2007 no rights to land had been recorded under it. Failed attempts to use the act in the past revealed a number of problems with its recording procedures, including the fact that there was generally poor understanding of the requirements of the act among the community, as well as with lawyers and bureaucrats, deterring compliance. Further, the recording system did not readily accommodate a clan or tribe with large or incompletely known membership. Moreover, the requirements on documenting genealogies that included explicit usufruct or secondary rights went beyond the capacities of most landowning groups, and thus were rarely recorded.

Recording has numerous advantages, which are relevant to Vanuatu. However, if any of these benefits are to be realized, particularly for women, it will require more than just a system of recording of land rights. It will require women being made aware of their rights within their communities and for such rights to be accepted by community members. As the act does not record secondary rights, and given that women's rights to land are often secondary rights, any rights women have need to be expressed as primary group rights. Such a process requires women and communities to be made aware of the importance of this process and commit to recording the rights that exist.

Registration of customary law rights

There can be two types of registration processes: the first is one of recording interests as outlined above, and the second type is one where the state provides for all the customary land to be registered and in doing so provides conclusive evidence of title to the land. Formalizing property rights in the Western tradition of exclusive rights to land has been viewed as the primary pathway to economic growth in Africa and Asia.⁵¹ The two main benefits it promises include the clarity of legal rights, where land is viewed as property that can be alienated, and access to state-based dispute resolution systems in the case of land disputes. The importance of customary laws, particularly viewing land as communal, has been the impetus for Vanuatu opting for a pluralist system of land tenure, where land ownership is governed both by formal rules and custom and where customary land is inalienable. But this has not been without problems and women have fared poorly, as discussed

⁵¹ Penny Lee, "Individual Titling of Aboriginal Land in Northern Territory: What Australia can learn from the International Community," *University of New South Wales Law Journal* 29, no. 2 (2006): 22-37, 33.

in the above sections. Registration of all lands, including customary land, provides one answer to these issues by allowing for the formalizing of all rights to land.

Custom relies on the practices of people and accordingly can change over time. By contrast any proposed registration process has the effect of fixing rights at the time of registration, which could have the effect of inadvertently constraining the inherent flexibility of customary law. Registration processes can rob customary property relations of their underlying characteristics of negotiability and indeterminacy,⁵² which in certain circumstances may impact adversely on women. Usufruct rights, for example, which allow for the accommodation of widows to the land of their brothers-in-law to cultivate crops or their fathers' land to live, may not be as easily created under a registered regime of property relations.

In Vanuatu, where over 90 percent of land is customarily owned, there is no movement to develop a system for the registration of customary land. Although a system for registration of leases for up to 75 years exists, this is distinguished from a system that allows for all customary land to be registered. Registration of interests in land is generally viewed with suspicion as there is concern among communities that registration could result in the alienation of title.⁵³

A different legislative approach has been adopted in Fiji, where land tenure is divided into three categories: native land holding, freehold tenure, and state land holding. Interests in freehold land and state land are determined according to the Torrens Title registration system, whereas interests in native land are determined according to custom. A centralized system of land management, set up by the colonial administration, records customary title. As in Vanuatu, native land can only be held by the indigenous peoples and rights to own and use native land are determined according to their customs and traditions. However, unlike Vanuatu, custom landowners in Fiji do not have the power to manage and control native land. This control over dealings in native land is vested with the Native Land Trust Board, which acts for the benefit of the indigenous owners. The board has a general power to grant a lease or licence and is not required to consult with the indigenous owners but must be satisfied that the land to be leased is not otherwise needed for their use, maintenance or support.

The Native Lands Commission, established in 1880, has been responsible for surveying native land to determine the boundaries of the land held by native-land-owning units, for resolving disputes about ownership and boundaries, as well as recording any encumbrances or easement to which

⁵² Daniel Fitzpatrick and Susana Barnes, "The Relative Resilience of Property: First Possession and Order Without Law in East Timor," *Law and Society Review* 44, no 2 (2010): 205-238, 215.

⁵³ John Cook and Genesis Eddie Kofana, "Recording land rights and boundaries in Auluta Basin, Solomon Islands," in *Making Land Work*, vol 2, 47-63, 56.

the land is subject, and the individuals comprising the land-owning unit. The Native Lands Act provides for a collective notion of ownership over native land and recognizes the customary right to use and occupy the native land in question, thereby at least partly overcoming problems of distinguishing between rights of ownership and usufruct rights. The advantage of this system is that it provides for the systematic recording of tribal land ownership, which allows for all indigenous Fijian births to be recorded within the genealogical framework set up over 150 years ago. As a result, all indigenous Fijians know their own tribal land inheritance, and the boundaries of all tribal lands are recognized. However, it is important to acknowledge the criticism that such definitions are artificial and contrary to the customary rights attached to land and recognized by indigenous Fijians.⁵⁴

Such a system is unlikely to be replicated in Vanuatu, where landowners are conscious of their rights and would be unwilling to surrender their powers of management over their land to a government authority. Further, introducing such a process could be unconstitutional as it may amount to a compulsory acquisition of property by the state.⁵⁵ Nevertheless it is clear that this is a matter of central importance to donor bodies and the government, as demonstrated by the focus on the sustainable development of land and its link with economic growth, stability through the region and the welfare of citizens.⁵⁶ Improving the processes for custom groups to make collective decisions about their land, and establishing land registries that provide participatory pathways to facilitate dealings in land are considered essential steps to constructing a framework that enables the development of land. However, these are no easy tasks. Rather, they involve the translation of universal principles of equality into the language of customary groups, as well as the facilitation of women's participation in land management mechanisms, which are both new and transformational.⁵⁷

Legal Vehicles for Furthering Women's Land Rights

There have been several attempts made to develop legal structures that facilitate customary ownership of land, while being cognizant of the need to ensure that women's rights are articulated in accordance with equality principles. Here three main vehicles are examined: incorporated land groups, trusts and the newly proposed community company. While all these vehicles

⁵⁴ John Crosetto, "The Heart of Fiji's Land Tenure Conflict: The Law of Tradition and Vakavanua, the customary 'way of the land,'" *Pacific Rim Law & Policy* 14, no. 1 (2005): 71-101, 95.

⁵⁵ AusAid, *Making Land Work, Volume I*, 85.

⁵⁶ AusAid, "Land Sector Framework 2009-2018: A prosperous, equitable & sustainable land sector for Vanuatu," July 2009, see <http://www.ausaid.gov.au/countries/pacific/vanuatu/Documents/vanuatu-land-program-design-document.pdf>, 12.

⁵⁷ Sandra Freeman, "Beyond the Dichotomy of Formal and Substantial Equality: Towards a new Definition of Equal Rights" in *Temporary Special Measures*, ed. I. Boerefijn et al. (Antwerpen: Intersentia, 2003), 111-118.

attempt to overcome some of the inherent discriminatory effects of customary laws by providing identical pathways for men and women, their promise cannot be overrated. Essentially these vehicles have to operate within the social, cultural and political fabric of society, and these factors can promote or constrain women's agency. It has been suggested that the transplantation of laws from developed countries to emerging nations is only likely to be successful if these laws are consistent with the ideology and institutions in the country and if the laws are supported by stakeholders.⁵⁸ This partly explains why each of the three vehicles examined below has been plagued by difficulties in fulfilling their objectives.

Incorporation of customary land-owning groups

Using an incorporated entity to allow members of a customary group to hold, manage and deal with land as a group, blends the advantages of a separate entity with custom. In Papua New Guinea, the Land Groups Incorporation Act provides for such a process. It was introduced with the aim of facilitating greater participation by Papua New Guineans in the economic development of their nation by using their customary land.⁵⁹ Although it was not aimed at empowering women, it does have the potential to be used in this manner.

Under this legislation the process for incorporation requires the preparation of a group's constitution, including the usual details of the name of the group, qualifications for membership of the group, the title, composition of the committee or other controlling body of the group, and the way in which the group acts and how its actions are recorded. Information about any custom under which the group operates and the details of the group's settlement authority have to be included. The registrar of Incorporated Land Groups is required to publicize the application, check the group's suitability for incorporation and consider any objections prior to the granting of an incorporation certificate.

Customary land in Papua New Guinea cannot be registered and accordingly is not protected by the principle of indefeasibility of title, which has restricted the way in which such entities can be used.⁶⁰ Title to land secured through incorporation of the landowning group cannot be used as security for commercial borrowing. Instead, the incorporated group must give the land to the state and the state then leases it back to the group. The lease becomes a tradeable asset that can be used by the group and is valuable collateral.⁶¹

⁵⁸ John Gillespie, "Globalization and Legal Transplantation: Lessons from the Past," *Deakin Law Review* 6, no. 2 (2001): 286-311.

⁵⁹ John Mugambwa, "A Comparative Analysis of Land Tenure Law Reform in Uganda and Papua New Guinea," *Journal of South Pacific Law* 11 (2007): 39-55, 49.

⁶⁰ Mugambwa, "A Comparative Analysis of Land Tenure Law Reform," 49.

⁶¹ AusAid, *Making Land Work, Volume I*, 8.

This vehicle has been primarily used as a means of entering into arrangements for distributing the financial gains from developing resources on customary land, namely logging, petroleum and oil palm. The incorporation of land-owning groups is used to distribute royalties, rent or compensation from the developers to the customary landowners.

It has been recognized that incorporation can be an important tool for customary groups to enable them to use their land in the formal economy. However, incorporation is costly and time consuming, with extensive genealogical investigations required to determine group membership. Further, determining the land over which the group has rights involves conducting surveys to determine land boundaries, obtaining approval from the surveyor general and then registering the land with the Land Registry. There has been very little government support for the indigenous owners to acquire the necessary skills for managing an incorporated land group, and the groups have been used mostly as vehicles for receiving income rather than generating income and social development, with incorporation in some circumstances being imposed on groups, granting them little or no control over the decision.⁶²

Although there has been no assessment of the manner in which women fare under these entities, it appears that women are rarely selected as members of the management committee or as chairman of the committee, positions usually occupied by men. Even where the group is a matrilineal one, control of land may still be male dominated.⁶³ It appears that in incorporated groups the participation in decision-making positions is also dominated by men.⁶⁴ As the act does not prescribe the manner in which the royalties from the entity has to be distributed, it would appear that women are again disadvantaged, as frequently the people who make the decisions at the community and clan level also dominate the decision making and profit sharing within the incorporated land group. Any attempt to introduce such an entity in Vanuatu has to consider the inclusion of rules dealing with equal participation in decision making and income sharing that may be able to forge changes in the manner in which the group functions over the longer term. It also requires that the introduction of any such new entity be supported by an education campaign to increase awareness among both men and women about their rights and responsibilities.

Trusts

Trusts are a well-known legal arrangement used to hold property or conduct business. Once created, the trust is managed by the trustee, who can be a

⁶² Jim Fingleton, "Pacific Land Tenures: New Ideas for Reform," Food and Agricultural Organisation Papers, <http://www.fao.org/legal/prs-ol/lpo73.pdf>, last accessed 2 March 2012.

⁶³ Stege et al., *Land and Women*, viii-x, 111-112; Maria Lepowsky, *Fruit of the Motherland: Gender in an Egalitarian Society* (New York: Columbia University Press, 1993); Fingleton et al., 29.

⁶⁴ Vijaya Nagarajan, "Finding the right fit for economic growth and private sector development in Vanuatu," *Pacific Economic Bulletin* 23, no. 3 (2008): 35-49.

person or a company, who is bound by the terms of the trust established, and is required to act in the interests of beneficiaries of the trust. A common example of the way a trust has been used is the land trust. Such trusts have been used to own land that is obtained either by purchase or gift and can then be used for the benefit of those specified in the trust deed. In more recent times, non-profit groups have been using trusts for conservation or negotiating community rights, as well as articulating rights and monitoring the exercise of those rights.

In Australia the trust has played an important role in holding land for Aboriginal people and the first Australian example of using land trusts comes from the Northern Territory. Here communal title to land that is formally handed back to Aboriginal owners is vested in Aboriginal Land Trusts. These trusts are statutory corporations and hold the title to the land and are governed by legislation. The trust is directed by a land council, whose role it is to ensure that decisions are in accordance with the custom group taking into account Aboriginal culture, traditions and law. Land councils are created by statute and have statutory functions which include ensuring appropriate dialogue with community members is carried out and that decisions are adequately reported. Negotiations have included the lease of land for mining and commercial purposes and the distribution of the income received from these activities.⁶⁵

Vanuatu's experience with trusts goes back to colonial times, when the Presbyterian Church used such an arrangement to manage its landholdings.⁶⁶ Later, in the seventies, the Vanua'aku Party encouraged villages to set up village land trusts whereby a trust company could be established under local legislation and could then be vested with village lands held for the benefit of the community. The trust was required to engage with the village community in major decisions, representing an attempt to blend customary practices within a foreign trust framework. It has been argued that although this structure worked well for a decade, it "broke down when a younger generation of villagers overthrew the role of the traditional authorities."⁶⁷ Use of such trusts has not spread through Vanuatu and it has been pointed out that this may be because the village may not be the appropriate level for a trust to be established. Although the village may be a settlement unit, it is not the unit which owns customary land and makes decisions about land management, which usually occurs at a clan or group level. The two main trusts that have enjoyed success are the Ifira Trust and the Mele Trust. Both these trusts are comprised of a number of land-holding groups and the purpose of these trusts is to manage land for the benefit of the people of the respective villages.

⁶⁵ Fingleton et al., "Village land trusts in Vanuatu."

⁶⁶ Fingleton et al., "Village land trusts in Vanuatu," 31.

⁶⁷ Fingleton, "Pacific Land Tenures: New Ideas for Reform," 10.

Family trusts are also being more commonly used to hold land, where land is registered in the name of a trust and then leased back to one or more family members. Currently this process is primarily being accessed by groups with business acumen or access to legal advice. Although our interviews suggest that women do participate in such trusts, this is driven by the norms of the custom groups, which once again illustrates the manner in which laws are framed by social trends and belief systems.

Relying on democratic principles to encourage the use of trusts on a wider scale will not, generally speaking, be easy in Vanuatu, particularly where these principles do not reflect social norms or custom. As with the incorporated land groups, the most practical way forward is to introduce strict rules dealing with membership based on gender quotas and combining these with education campaigns to shift social norms. This will be a slow process that needs institutional commitment from both public and private sectors.

Community Company

The use of the corporate form by not-for-profit organizations has a rich history, attested to by the number of incorporated associations whereby a separate legal entity with limited liability is created. The Companies Act, introduced in 2010 in the Solomon Islands, follows these leads, but goes further by allowing for the registration of a community company which has the potential to be used by women's groups for owning land. This model is currently being considered in Vanuatu.

The main objective of this legal vehicle is the promotion of a community interest. Its membership is limited to 50 shareholders and all shareholders must be members of one community. A fundamental feature of community companies is that they have an asset lock, restricting the ability of shareholders to withdraw assets from it, thus ensuring that benefits remain with the community. The purpose for incorporating must be the community interest, and shares cannot be offered to people outside the community. It is expected that women's groups may be able to use this business form to put communally held land to productive use, including growing cash crops such as vanilla, coffee or cocoa. Further, there is the potential for this vehicle to be used for larger-scale businesses involving the processing and marketing of agricultural produce. While micro finance is available to ni-Vanuatu women for small-scale enterprises through VANWODS (the Vanuatu women in development scheme), this does not necessarily facilitate larger-scale entrepreneurial activities.⁶⁸

Clearly there are many advantages to such an entity as it allows members, including women, to use land as security for borrowing money for business development. However, membership and participation within the community

⁶⁸ Bowman et al., *Women in Vanuatu*, 55.

company is not guaranteed to all members. Accordingly, accessing economic benefits through such a vehicle will require, first, the inclusion of women as shareholders and more importantly as directors who participate in the decision making of the corporate entity. Allowing women to use land as collateral will be a decision made by the clan or community. Accordingly, like the incorporated land groups or trusts, the creation of the entity does not necessarily guarantee a role for women in management or profit sharing. The proposed legislation does not mandate any such participatory rights or profit sharing and leaves it to the clan to determine these questions, which may in effect simply reflect existing customary practices. Currently eight such companies have been incorporated in the Solomon Islands where the law has been in place for three years.

The community company is not a transplanted law. It is an attempt to create a law that can fit the domestic context where it will be used. However, it ignores a number of fundamental issues. First it relies on the gender norms of Western developed states, where women are able to start businesses, make financial decisions and enter into negotiations with a diverse range of institutions, including financial institutions, to inform its structure. These norms do not apply across the board in Vanuatu. Although they may have relevance to some urban women who are members of business-oriented families and are supported by men in their communities to conduct negotiations with both public and private institutions, they have little relevance to rural women who are more tightly bound by customary norms. Further, these reforms ignore the reluctance among financial institutions to lending money on the basis of customary land as collateral. Currently there is great reluctance to make loans as the rights of possession and sale upon default are not available to the lender. Shifting these business practices is unlikely to be easy. Unless there are rules that prescribe membership and allocation of profits, it is unlikely that women will reap any benefits, with the company merely replicating the existing discriminatory hierarchies.

Conclusion

In this article we have analyzed a range of possible methods to facilitate the recognition of women's rights to land in Vanuatu with the aim of furthering their economic empowerment. The constitutional commitment to gender equality and the ratification of relevant international obligations in Vanuatu provides a legal framework for pursuing women's rights to land, but this avenue is not easily accessible or affordable to many women. Nor do legal outcomes from the formal court system or international treaty bodies necessarily change community attitudes to the tensions that exist between equality and customary practices in many Pacific Island communities.

Different methods have been put forward for effecting the necessary change. For example, the constitution could be amended to stipulate that

customary law must be subject to the constitutional prohibition against discrimination on the basis of sex. However, this is unlikely to be more than a symbolic victory, and has not proved particularly effective in other Pacific Island countries. A full implementation of all the resolutions of the National Land Summit could go some way towards facilitating women's participation in land decision-making processes and ensuring women are consulted on land management issues. But the question of a comprehensive land management scheme has been an outstanding issue since independence, and the current donor-funded Vanuatu Land Program is regarded by some with suspicion. Moves are also afoot to amend the customary land tribunal system, which might incidentally benefit ni-Vanuatu women, but changes to the customary land tribunal system also need to directly address the lack of engagement by women in its processes.

Alternative ways of furthering recognition of women's rights include systems for the recording and registration of women's interests in land. In this article we have canvassed some of the recording and registration schemes that exist in other Pacific Island countries and the advantages and disadvantages that emanate from both. The proposed changes to the customary land tribunal system in Vanuatu include a recording aspect, but its effectiveness will depend on institutional commitment from private and public bodies. The implementation of a full registration system along the lines of the system operative in Fiji is unlikely to gain support in Vanuatu as it is founded on shifting power from the customary land owners to a public institution. Finally, this article assesses the option of using three legal vehicles, namely customary land groups, trusts and community companies, to provide a legal structure in which women's interests in land could be more appropriately acknowledged, but there is the risk that they will replicate existing discriminatory hierarchies.

Looking at the various mechanisms examined in this article, each has some potential to secure better outcomes for women. But that potential will not be realized in the absence of knowledge of such rights, empowerment of women within communities to assert such rights, relevant advice and assistance to do so, and acceptance of the legitimacy of such rights by wider community members. To move forward in this area, women's participation in decision-making processes regarding land management and control in Vanuatu must be a core consideration in the broader land reform agenda and in any associated legal reforms to tribunal processes, registration systems or corporate arrangements. The participation of ni-Vanuatu's women is a fundamental tenet of all land issues, whether one adopts a gender equality or a custom lens. Debate on land matters in Vanuatu must articulate that gender dimension.

Macquarie University, Sydney, Australia, March 2013