

Exploring the Cultural Power of Land Law in Vanuatu: Law as a Performance that Creates Meaning and Identities

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Introduction – Contemporary land alienation in Vanuatu

1. Internationally there is a large and growing body of scholarly literature that describes problems of land access and discusses the 'exclusion' of people, often indigenous people, from landscapes. Exclusion connotes the removal of access of people from landscapes and the process by which this occurs; the interactions between legality (often termed regulation), force as acts of violence or threats of violence, the market and legitimation.^[1] Regulation (termed legality in this paper) is associated with legal and state instrumentality and is the 'rules regarding access to land and conditions of use.'^[2] The market is linked to commodification, the creation of incentives and pressure to individualise land tenure arrangements so as to make land transactions more efficient.^[3] Legitimation 'establishes the moral basis for exclusive claims, and indeed for entrenching regulation, the market and force as politically and socially acceptable bases for exclusion.'^[4] This concept of legitimation is comparable to the idea of 'the cultural power of law' explored in this paper. However, an exploration of 'the cultural power of law' allows an explicit focus on law as a force for the political and social acceptance of exclusion. It also provokes the question; acceptable to whom? This introduction will detail the extensive leasing of customary land that has occurred in Vanuatu post-independence. It will then return to a discussion of how legality and the embedded culture of the law has enabled this process of exclusion.
2. Vanuatu is an archipelago of eighty islands, located around 1750 kilometres to the east of northern Australia, between New Caledonia and the Solomon Islands. The total land area of Vanuatu is approximately 12,236 square kilometres. The latest census (2009) recorded the population of Vanuatu at 234,023, with 176,816 people located in rural areas and 52,207 in urban areas.^[5] Vanuatu is the most culturally and linguistically diverse country in the Melanesian region.
3. In the thirty years since Vanuatu became independent in 1980, 9.5 per cent of the total land area of Vanuatu has been leased with 13,815 registered leases recorded.^[6] On the main island of Efate 56.5 per cent of coastline has is now leased.^[7] Of the registered leases issued before 2010, 99 per cent of the land area that had been registered was located in rural areas, most of which was managed under customary arrangements prior to leasing.^[8]
4. Analysis of this process of exclusion suggests that leases in Vanuatu are often made without the consent of custom owners as a group. Consideration of exclusion must focus on processes and actors.^[9] A locus of investor-state relations exists around land sales with key actors within the Vanuatu state often acting in the interests of investors or their own pecuniary interests in allocating rights over land, often to the detriment of custom owners. The key actor representing the state in Vanuatu is the Minister for Lands. Where ownership of any custom land is disputed the Minister has the power to grant leases or conduct any other transactions related to the land. This power is to be exercised in the interests and on behalf of custom owners.^[10] The speculative land market coupled with the constant abuse of the Minister of Land's power to sign leases over customary land means that decisions to lease land are often made without the knowledge or consent of custom owners as a group. In the thirty years since independence 21.4 per cent of the leases in rural areas (6,803 rural leases) were signed by the Minister as lessor.^[11] At its highest point in 2004 the Minister for Lands was signing off on just under 250 leases per year over rural areas, often on previously held customary land.^[12] These figures however, probably underestimate the level of leases granted by Ministerial power as statistics for approximately 29 per cent of the leases registered in Vanuatu do not name the Lessor. If these additional leases are assumed to have also been granted by the Minister given that a Lessor is not named, then the total leases that a Minister has signed off on would be just under 40 per cent of all leases.
5. In a post-independence context the exclusion of ni-Vanuatu from access to land is often caused by investors engaging in land speculation by purchasing rural, customary land and then subdividing it and reselling it as residential housing for expatriates or foreign investors at substantially inflated prices. Land speculation is closely linked to Vanuatu's tax haven status and patterns of foreign investment.^[13] The speculative nature of land transactions in Vanuatu can be seen in the number of subdivisions that have occurred since independence. The act of subdivision involves registering a lease, usually as agricultural land and then applying for a subdivision of the larger land holding either through the *Strata Title Act* or through a transfer of a larger lease into small residential plots.^[14] These smaller plots are then resold as residential housing at inflated values. National leasing data for Vanuatu suggests that subdividing land is a common practice. Of the 13,815 leases in Vanuatu until 2010, 5,420 were for subdivisions and 78 per cent of these were for residential leases.^[15] The question then

becomes, how has the law worked to govern the way in which ni-Vanuatu have lost their land?

6. Sally Engle Merry has commented that 'the culturally productive role of law occurs only if the texts, the *performances* and the impositions of violence are seen as legitimate [emphasis added].'^[16] This paper explores the cultural power of the law as a performance that creates meanings and identities through text, performance and the imposition or threat of violence. Considering the cultural power of law is essential to analysing how the formal legal system has enabled the large-scale leasing and removal of land from the informal *kastom* system of land management. In brief, this paper offers three approaches to considering the cultural power of land law in Vanuatu: law as a performance of legality in which the cultural logic of colonial powers was backed by force; the continuance of a British common law colonial legacy in the post-colonial legal system; and, the implications of legally prescriptive 'custom owner' identities for the allocation of indigenous rights to land.
7. Drawing on the work of Jacques Derrida, the performance of legality is a term that I have created to recognise the 'culture' of the law and that law is at its core a cultural product imbued with authority. Applying the performance of legality to land transactions in colonial Vanuatu the execution of a land title in this context can be seen as a performance, a dance, in which two parties meet over papers and sign. This is designed as a destabilising narrative that calls into question the legitimacy of land dealings in this context. This paper will consider the relations of power and culture during the early colonial era when the first major land alienation occurred in Vanuatu. The large-scale land grab that occurred in the colonial period with an often ambiguous performance of legality backed by force provides an important reference point for considerations of the large-scale leasing that has occurred post-independence.
8. In this paper I will also consider how the culture of contemporary land law is informed by a British colonial legacy. Central elements in the performance of legality remain largely unchanged since independence, as the cultural power of the British common-law system has been retained. Law in Vanuatu is characterised by a plurality of institutions rather than *meaningful* legal pluralism which would allow proper recognition of *kastom* systems of land management. The tensions of Vanuatu's colonial legal legacy and the lack of meaningful legal pluralism are evident in the development of law relating to land. Contemporary land law in Vanuatu retains foundational contradictions around the nature of land ownership and dealings in land between the Constitution and contemporary land legislation. The Constitution was considered radical at the time of its drafting in the way it enshrines the notion of indigenous 'custom owners' as the 'owners' of all land in Vanuatu in perpetuity. However, an analysis of land law will show that subsequent legislation and judicial determinations have never adequately recognised these Constitutional declarations.
9. Finally, I offer an analysis of the legal identity of 'custom owners.' Vanuatu's formal legal system manufactures a prescriptive identity for people engaged in land transactions; that of 'custom owner.' This identity will be contrasted with ni-Vanuatu conceptions of *kastom* and *ples* (place). My final argument in this paper is that the cultural power of land law in Vanuatu is that it has the potential to reconfigure indigenous notions of person and *ples*.

Colonial land dealings – the performance of legality

10. Legal arrangements are instrumental in the process of exclusion of people from the landscapes in contemporary Melanesia, just as they were in the colonial period. Colonial encounters provide a powerful, important precursor to contemporary land dealings in Vanuatu. Consideration of Vanuatu's colonial legacy is important because, as Merry stresses, 'relations of power and culture forged during the colonial era have shaped the present' and have a continuing legacy in the legal institutions in Vanuatu.^[17] Accordingly, this paper will consider the relations of legality, force, the market and legitimation during the early colonial era when the first major land alienation occurred in Vanuatu.
11. Legal pluralism has been grounded in the study of colonisation and the way in which 'one society endeavored to rule and transform another.'^[18] Writing in *Law and Empire in the Pacific* Merry and Lawrence Brenneis compare the colonial history of Fiji and Hawai'i and the foundational role of law in the colonial project particularly with reference to land. 'The comparison highlights the role played by law, both in allocating control over land and power and in constructing ideologies of difference that render the system coherent and legitimate.'^[19]
12. Law was central to the colonial project as an embedded source of power and meaning.^[20] Law becomes a window into the colonial project in Vanuatu; the power dynamics created, the resources allocated and, above all, the way in which land is alienated as a means of production and 'development' in colonial enterprises. Law also becomes the measure of the 'civilisation' of a colonised individual, a key mechanism by which colonial subjects are coerced and controlled.^[21] Moreover, law was used in the colonial project in Vanuatu to construct the 'ideologies of difference' used to render the system coherent, often with particular characterisations of indigeneity in relation to settlers and migrants.
13. In 1878 'Notes' were exchanged between Britain and France agreeing to maintain the independence of the Vanuatu group of islands (then known as the New Hebrides). This position subsequently changed and colonial administration was formally established in Vanuatu in 1906.^[22] This joint administration took the form of a Condominium designed to reflect the joint interests of British and French missionaries and settlers. Land was central to the initial Condominium agreement with the British ceding to French pressure to create a legal

mechanism to confirm existing French land claims in the New Hebrides.^[23] Under the Condominium the British and French jointly ruled over the country with representatives from both foreign powers making up the Condominium Administration, which established joint laws and met as a joint-court over certain matters.^[24] Each country retained jurisdiction over their own citizens and a separate administrative structure, which led to duplication in many governmental functions and the creation of geographical enclaves of either French or British administrative control and therefore recognised as being either Francophone or Anglophone. The latter period of Condominium rule saw increasing tensions between Anglophone and Francophone populations particularly over the desire for independence.^[25]

14. Another major source of tension for the Condominium Administration was the different approach to land dealings, with predominantly French settlers involved in a large-scale land grab across the islands of the New Hebrides from the late 1800s and for much of the 1900s (discussed below). French colonial rule for the most part consciously enabled this land grab while the British were ineffectual in persuading the French to halt the large scale alienation of land which occurred mostly without the knowledge of ni-Vanuatu and almost beyond the 'performance of legality.'^[26] Land alienation in this early colonial period was also based on speculative investment and provides an important historical reference point for consideration of contemporary leasing, and a starting point for discussing how alienation is legitimated by claims to legality.
15. The performance of legality is a term that I have formulated to recognise the *culture* of the law, and that law is at its core a cultural product imbued with authority. This term draws on the work of Derrida who describes the origins of law in term of a performative force; 'the very emergence of justice and law, the founding and justifying moment that institutes law implies a *performative force*.'^[27] Derrida writes that 'there is no law without enforceability' and the authority for law is this performance.^[28] In this context, law can be viewed as self-authorising, requiring no outside authority and 'making law would consist of a *coup de force*, of a performative...violence that...no previous law with its founding anterior moment could guarantee or contradict or invalidate.'^[29] In terms of colonisation the imposition of one legal system upon another requires a 'founding.' Each time law is founded it 'violently resolve[s]' all the norms that have proceeded it so that they are 'buried, dissimulated, repressed.'^[30] The performance becomes the authorising discourse of this newly imposed law, of a new colonial system over an existing one. The performance backed by force becomes the act of legitimation, or what Derrida terms the 'mystical foundation of authority.'^[31] This is how the texts, performances and acts of violence associated with colonial land dealings are rendered legitimate.
16. Applying the performance of legality to the process of exclusion in colonial Vanuatu the legal execution of a land title can be seen as a performance, a dance, in which two 'parties' meet over papers and sign. Recognising the performance of legality as a ceremonial act allows us to consider the *meaning* of the ceremony, both in itself and to the actors involved. Performance in this sense reminds us that frontier relations were engagements between key actors and 'makes authority visual, palpable, bodily.'^[32] The importance of this idea of performance is as a destabilising narrative that calls into question the legitimacy of these early colonial land dealings and that law is an authoritative rendering of an act. It also allows for contemplation of the carefully structured power dynamics that often informed the performance of legitimation at the colonial 'frontier.'^[33] For example, these performances are gendered and raced in particular ways.^[34] It allows us to reflect on the cultural logic embedded in this legal performance, the way in which meaning was created and enforced. This is important for as Derrida notes,

it is unjust to judge someone who does not understand the language in which the law is inscribed or the judgment pronounced... We could give multiple dramatic examples of violent situations in which a person or group of persons is judged in an idiom they do not understand very well at all. And however slight or subtle the difference of competence in the mastery of the idiom is here, the violence of an injustice has begun when all the members of a community do not share the same idiom throughout.^[35]

It is cultural logic that informs 'the idiom' of the performance of legality over colonial land transactions. By reflecting on the cultural logic we become aware that the legality of these transactions tells us little about the justice of them.

17. It is important to acknowledge the degree to which the performance of legality associated with land dealings ignores the power relationship embedded in them, and instead wilfully assumes that both parties are equal. Transactions over land are legally recognised if they are established in accordance with the performance of legality—the ceremonial dance that takes place over the signing of a purported 'buyer and seller' in order to create the appropriate legal documentation. This ceremony, properly executed, gives effect to commodification but tells us little about the ethics of a transaction. Stuart Banner writes that land transactions 'at the frontier' in North America occurred along a continuum of the act of contract with more or less equal parties, as occurred at the beginning of land sales between 'Indians' and 'whites,' and that of 'conquest' when negotiations between the parties were clearly unequal.^[36] Even, at this point of 'conquest' the performance of legality is still at play. Banner writes that 'by the late nineteenth century, there was little pretense that land cessions were voluntary in any meaningful sense of the word, even as they retained the form of negotiated treaties.'^[37] Law in this context becomes the mechanism that is used to obfuscate the power dynamics at play in the colonial project, to make legitimate and create the basis for the 'politically and socially acceptable bases for exclusion.'^[38] It is law that offers the justificatory defense for a land transaction and it is law that it is used to mitigate against claims of injustice. The question then becomes, as identified by both Banner and Merry; how the law worked to govern the way in which dispossessed indigenous peoples lost their land.^[39]
18. Considering the processes of exclusion that occurred in Vanuatu in the colonial period, following Banner I would argue that land dealings in the colonial period in the New Hebrides occurred along a continuum of the act of

contract: at one end an act between equal parties, and at the other end a performance of 'conquest.' For example, Peter Milne's historical accounts of the Reverend William Watt's negotiations over a parcel of land in Nguna in 1870 show a schism in cultural logic that informed the land dealings between the missionaries and local people, to the detriment of the missionaries. After entering into negotiations with Chief Mariwota of Tikilaso'a a 'deed of sale' was drawn up describing the boundaries of the land, the deed was signed by three separate landowners and goods passed including calico, beads, knives, scissors and a small chest.^[40] While the missionaries were 'pleased with the ease with which they acquired the land on Nguna and carefully drafted a document to avoid future problems regarding ownership' they did not realise that the land they were allocated was the home of the devil spirit *Taloa*.^[41] Accordingly all the Ngunese avoided the missionary 'lest they should share in the fate they considered certain to overtake him.'^[42] A similar situation occurred in the siting of the Erakor Mission in the 1860s on a small island in the bay now named Erakor Island, on haunted land.^[43] These examples demonstrate that while missionaries were engaged in performing their own legal ceremony to create title deeds over land, they were completely unaware of the *kastom* resonances of the *ples* to local people in some cases to their own detriment in terms of attracting a congregation.^[44] For ni-Vanuatu there was probably little to be lost in a transaction over land that had no productive value because of the spiritual and metaphysical beings that inhabited the landscape. Many of the early transactions at the beginning of the colonial 'development' (envisaged by colonialists as spiritual and economic) of Vanuatu are marked by this complete miscomprehension between supposed 'buyers' and 'sellers' around the nature of *ples* (the Bislama term for place, concepts of *ples* are also discussed below). These transactions demonstrate the 'competing cultural logics' associated with colonisation and the way in which the performance of legality was used in an attempt to validate one cultural logic over another.^[45]

19. The early leasing by missionaries and traders illustrates completely different understandings of place as rendered in the transactions over land. Ideas of place are socially constructed, historically situated and contested. Conceptions of places 'like voices, are local and multiple...in which meaning is shared with other people and places.'^[46] These competing conceptions of place: colonial and indigenous, do not simply represent competing cultural logics, the history of these transactions have transformed the meanings associated with contemporary places and ni-Vanuatu attachment to *ples*. Colonial transactions continue to redefine *ples* in contemporary Vanuatu. Margaret Rodman writes that 'the links in these chains of experienced places are forged of competing culture and history.'^[47] Colonial transactions over land continue to define contemporary practices of leasing in Vanuatu, just as cartographic lines drawn on maps are often hard to erase. Many places that were alienated in the colonial period retained their surveyed boundaries and original titles making them easier to lease after independence, demonstrating how attachments to *ples* were transformed by these early colonial transactions. Contemporary ni-Vanuatu conceptions of *ples* can only be understood in the context of the colonial transactions over land that have shaped them.
20. Legal transactions with missionaries over land in the early colonial period can be contrasted with transactions between local people and European planters at around the same time. On the island of Tanna these transactions can be located towards the conquest end of Banner's continuum. Writing in 1871, after a trip to Tanna, the Reverend John Geddie states that 'it is very doubtful if these land transactions were not properly understood by the natives.'^[48] Similarly Captain Bridge wrote in 1882 after a special investigation into land sales between ni-Vanuatu and settlers that while these transactions were 'reasonably fair' it was difficult to discern who the real 'native owners' of the land were and 'occasionally there has been difficulty in getting the natives to understand the real nature of an out-and-out sale of land and its alienation in perpetuity.'^[49] While Bridge may have determined these transactions were fair, increasingly missionaries and other contemporary commentators began to question the legitimacy of these performances of land transactions in part because of misunderstood idioms.
21. The conquest nature of land dealings in the early colonial period is also evident in the operations of the Compagnie Calédonienne Nouvelles-Hébrides (CCNH). Spurred on by the colonial aspirations of the French Government, the Company, after buying up already existing land titles, began in 1882 to purchase land directly from ni-Vanuatu. Together company agents purchased an extraordinary 95,460 hectares of land, approximately 8 per cent of the total landmass of Vanuatu on the islands of Malakula, Efate and Epi over a two-month period.^[50] Howard Van Trease describes the processes used by the company agents on board the ship *Caledonnie* as follows, 'Unsuspecting islanders were enticed aboard with promises of trade goods or liquor, then persuaded to affix their marks on pieces of paper transferring vast amounts of the coastline, designating the hills as back boundaries.'^[51] Boundaries were arbitrary markers on maps often defined as the mountainous horizon as viewed from the ships of agents harboured below; a land grab in which the boundaries were defined as far as the eye could see.
22. Similar leasing practices although on a much smaller-scale were replicated by the Australian based South Sea Speculation Company. Agents of the Company travelled aboard the *Fairy Queen* around the islands purchasing vast areas of land.^[52] This Company was followed by the Australasian New Hebrides Company which was established to operate in the New Hebrides to trade and acquire land, 'by purchase, barter, lease, license, reclamation or otherwise.'^[53] This ominous sounding article within the registration documents of the Company seem to assume that agents should pursue any means to attain land almost regardless of legal process.
23. The performance of legality was clearly an artifice in many of these large-scale land dealings, as pointed out by contemporary commentators. An Australia journalist travelling around New Hebrides in 1887 wrote of the lease titles created in the New Hebrides and subsequently registered by the British colonial administration in Fiji, that 'the British flag was being used to cover transactions with the natives which would not be acknowledged in any

other part of the world.'^[54] This imagery of the British flag being used to cloak the true nature of these land transactions is a particularly evocative image for reflecting on the role played by the colonial powers at the time. Legitimacy for land transactions came from legality backed by force; it was this interplay that was the basis of the speculative land market in Vanuatu in the early colonial period. Ensuring the legitimacy of the 'legal transformation' from the *kastom* systems of land management to the imposed system of European land dealings required the threat and exercise of force by the colonial powers. Merry has described this process of colonial legal transformations, in which 'as new systems of rules are introduced or new institutions for enforcement are adopted, a gradual process of transformation takes place in which the force of the state is brought to bear.... Thus, law plays a critical cultural role in defining meanings and relationships, but it does so in the context of state power and violence.'^[55]

24. Law was crucial in reconfigurations of place in Vanuatu. Colonial powers exercised threats of violence, and actual violence, to create land dealings and subsequent settlements in Vanuatu. At the same time the large-scale land grabs were taking place in the 1880s both Great Britain and France agreed to naval patrols by gunboats to 'protect the lives and *property* of their nationals [emphasis added]'^[56]—property that had been only recently created under dubious 'legal' means. Colonial gunboats were not only in the New Hebrides to *protect* property; the threat of force was implicit in the *creation* of it. Van Trease notes that 'the Governor of New Caledonia ordered the Captains of French warships operating in Vanuatu waters to certify the dates of the purchases, thus giving them official Government recognition.'^[57] This act of recognition backed by the force of warships gave otherwise ambiguous legal documents legal effect. The British employed a similar strategy and in 1881 with the British High Commissioner for the Western Pacific issuing a notice requiring that land grants be registered in Australia and Fiji and to make this processes easier, 'a British warship was permanently stationed in the New Hebrides to administer the legislation, and its officers intervened in the making of grants of land to British subjects and supervised the drafting of the contract of sale.'^[58] The acts of the colonial agents on these warships were designed to create property backed by force in an attempt to render the ambiguous performance of legality associated with these early transactions somehow coherent. In Derrida's terms this is the exercise of a *coup de force* of performative violence necessary to 'found' law, to render it legitimate.^[59] The history of the colonial state in the New Hebrides and of colonial law began with the need to legitimate land transactions. The formation of authority and law required the presence of naval warships and the threat of violence in order to create the property rights of colonial agents over land.

Considering the colonial legacy in contemporary land law

25. The large-scale land alienation that took place in the colonial period with an often contentious performance of legality provides an important reference point for considerations of the large-scale leasing that has taken place post-independence. Central elements in the performance of legality remain largely unchanged as the cultural logic of the British common-law system has been retained. Signatures are still required, as is a 'buyer' and a 'seller.' Contract law requires that there is offer and acceptance, consideration (a payment of cash or goods however small must be in place to give effect to the transaction) and, a supposed *meeting of the minds* between two *equal parties*.^[60] What is also striking is this wilful presumption of equal parties against almost any rational assessment of the ethics of contemporary land transactions in Vanuatu, or the power dynamics embedded in them. Colonial echoes continue to resonate in contemporary land law and contemporary land transactions in Vanuatu. Boundaries of leases continue to be more part of the developer or speculative land dealer's imaginings than as a consequence of a negotiated outcome with custom owners. Colonial boundaries also continue to enable contemporary dealings over land as, even post-independence, lines and title numbers remain drawn on maps and lodged in the Department of Lands. Contemporary surveying for lease arrangements are often based on an assessment of the land area needed to facilitate 'development' rather than boundaries drawn with any reference to customary conceptions of *ples*. What often follows is the practice of a few men signing off rights over large tracts of land as 'custom owners.'
26. Continuance of the previous British common law colonial legal system post-independence is a key feature of the legal system of Vanuatu.^[61] The state legal system of Vanuatu essentially acts in accordance with a British common-law legal tradition. Merry and Brenneis comment on the importance of this common-law legacy noting that 'these colonial legacies of institutions and practices provide a matrix in which consciousness, identity, and life chances take shape.'^[62] Exploration of the influence of this colonial legacy on land law in Vanuatu is important for considering the cultural power of the law. This requires reflection on the cultural logic of law, the embedded set of norms that recreate sociality and the 'mechanics of the translation process in which non-Western cultural and social forms are incorporated and regulated by Western legal and statutory bodies.'^[63] Land law in Vanuatu is influenced by a colonial legacy of British legal culture, which creates particular identities for Indigenous people and relationships to land.
27. Legal pluralism offers insights into the dominance in Vanuatu of the formal state legal system, with its colonial legacy, over *kastom* systems of land management. Legal pluralism is defined as the 'situation in which two or more legal systems coexist in the same field.'^[64] Law in Vanuatu is characterised by a plurality of institutions, rather than *meaningful* legal pluralism which would allow proper recognition of the *kastom* system of land management.^[65] Outside of the normative state-based legal system there operate numerous non-state, *kastom* institutions. Some *kastom* institutions are recognised to a limited degree within the state system provided that they do not conflict with state-based sources of law. This situation itself does not give rise to strong, effective legal pluralism because the state is still central to the source of law in this system, as it is the state that offers the

recognition (the *grundnorm*, in legal doctrine) to other institutions or groups. The authority of the state is, of course, backed by force. Evidence of the institutional rather than effective legal pluralism existing in Vanuatu can be seen in the fact that while there are numerous articles within the Constitution of the Republic of Vanuatu that allow for *kastom* law to be regarded as a source of law (see Articles 47 and 65) this situation itself does not give rise to strong, effective legal pluralism because the legislature and judiciary have mostly failed to provide guidance as to how this recognition could occur.^[66] A similar situation has occurred in Papua New Guinea (PNG) prompting the then Chief Justice to reflect thirty years after independence that the idea of recognition of customary law and indigenous jurisprudence is 'meaningless rhetoric or cliché.'^[67] In reality, the judiciary in Vanuatu appears to be activist in protecting its jurisdiction to the exclusion of customary institutions.^[68]

28. The tensions of Vanuatu's colonial legal legacy and the lack of meaningful legal pluralism are evident in the development of law relating to land. Contemporary land law in Vanuatu retains foundational contradictions around the nature of land ownership and dealings in land between the Constitution of Vanuatu and contemporary land legislation. The Constitution was considered radical at the time of its drafting in the way it enshrines the notion of indigenous 'custom owners' as the owners of all land in Vanuatu in perpetuity. However, subsequent legislation has never adequately recognised these Constitutional declarations. Accordingly, the *Land Leases Act*, allows for the wholesale leasing of land across Vanuatu. Arguments that current legal practices allow for alienation are made because leases often include 'improvements clauses' which mean that at the end of the term of a lease (usually 75 years) landowners must compensate lessees for any improvements made on their land. While many leases have not yet reached full term as all are dated after 1980, it is already evident that many custom owners will not be able to compensate for improvements such as resorts or expatriate housing and will be unable to reclaim their land.^[69]
29. Customary land rights are purportedly enshrined in the Constitution with the provision that only ni-Vanuatu people can own land in perpetuity.^[70] Article 75 states that, 'only Indigenous citizens of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land.' Articles 73 and 75 of the Constitution recognise 'customary ownership' of all land in Vanuatu.
30. Custom owners' land rights are supposedly further protected by the constitutionally directed process of legislative enactment of land law, designed in consultation with the Malvatumauri (the National Council of Chiefs).^[71] This Constitutional provision recognises the centrality of land to the perpetuation of customary practice. Unfortunately, this prescribed process of legislative design has never been undertaken, and the stipulated Constitutional role for the Malvatumauri with respect to land dealings, has never been formalised. This means that the legal mechanisms for allowing customary processes to recognise interests in land and manage dealings in land have never been given proper legal effect.^[72]
31. The Customary Land Tribunal, created in 2001 in an attempt to offer limited recognition of customary law over land within the state system may now be unconstitutional due to a subsequent decision by the Supreme Court.^[73] Legal recognition of customary processes has only a very limited place in dealings with land in contemporary Vanuatu. Independence it seems has not created a radical overhaul of the legal cartography of land dealings in Vanuatu. The common law colonial legacy with respect to land law continues to prevail.

Custom owner ideology

32. In Melanesia normative state-based law remains the tool used to commodify and establish rights over land.^[74] James Weiner and Katie Glaskin reveal the mechanistic nature of this state-based law, in the conversion of land from the *kastom* to the formal legal system. This is the process of legality or regulation by which legal mechanisms

do not, as they purport, serve merely to identify and register already-existing customary indigenous landowning groups in these countries. Because the legislation is an integral part of the way in which indigenous people are defined and managed in relation to the State, it serves to elicit particular responses in landowner organisation and self-identification on the part of indigenous people. These pieces of legislation actively contour the indigenous social, territorial and political organisation at all levels in these nation-states – or at least in the way that indigenous people present them to the wider society.^[75]
33. Land law is an active player in defining relationships between indigenous citizens and the state. It creates identities for indigenous people that can often become replicated as part of indigenous self-identity. The language of law is often used to assert rights and claims to land, as is increasingly the case with claims of 'customary owner' rights in Vanuatu.
34. Consideration of custom owner ideology is essential to studying the mechanistic nature of land law in Vanuatu, and the cultural logic embedded in the law. In Vanuatu the resource available for extraction is primarily not minerals or forests; it is land. The ideology of custom ownership is enshrined in Vanuatu's Constitution as the basis of indigenous identity. Despite rhetorical claims to the contrary central to this identity is a capitalist notion of 'ownership' of land. For commodification of land to be given effect, there must be a land *owner* with rights they are able to sell. It is this identity that gives rise to a very particular politics of land in Vanuatu; one which is dominated by a handful of powerful men—both within the state and at the local level.^[76]
35. My starting point for discussing 'custom owners' as holders of rights over land in Vanuatu is to consider Colin Filer's work. 'Custom landowner ideology' has been described by Filer as a central element of the political

discourse in Papua New Guinea around land law, customary land and resource ownership.^[77] Filer argues that the large-scale resource development in PNG has 'fostered an "ideology of land ownership" which portrays the customary landowner' as the very model of what it means to be an 'automatic' (or indigenous) citizen of that country.^[78] Customary landowners are thus the established beneficiaries of large-scale resource projects, in a Papua New Guinean context. Filer argues that the ideology of landownership informs us of the property based, transactional nature of resource extraction in which "development" is the compensation paid by "developers" to the customary owners of natural capital.^[79]

36. Confusingly customary land rights are defined in the Vanuatu Constitution as *both* communal (see Article 73) and individual (see Article 79 (1)). Article 79 (2) (b) of the Constitution takes this one step further identifying landowner rights as being gendered male and individualised.^[80] The Constitution also remains unclear whether the rights of custom owners are communal, individual or, as identified in Article 79 (2), both individual and communal. If it is the case that land rights are both communal and individual then there are no indications about how to resolve obvious tensions between individual and group-based decisions over land, or how this 'communal' group should be constituted. These matters are, presumably, to be determined by customary practice.
37. A key recommendation of the historic National Land Summit (2006) was that the land law of Vanuatu be changed so as to reflect the communal ownership of land.^[81] The recommendation states that, contrary to the practice of land sales which are seen as overwhelmingly gendered and individualised: 'there is no one individual *man* who is able to own custom land.'^[82] Instead, the recommendation urged the Vanuatu government to change the law so that 'every land in Vanuatu is owned by a group (tribe, clan or family).'^[83] In contrast, to the specific idea of an individual (male) custom owner articulated earlier in the recommendation, the final part of this recommendation stipulates that the decision-making customary group of landowners must involve women. 'All members of the customary ownership group (men and women) must decision-make together about their land.'^[84] This idea of a customary process to make decisions that involves women and men together, stands in stark contrast to the current practices of land sales which are overwhelmingly dominated by a handful of powerful men. Implicit in this resolution is a critique of the current idea of an individual custom owner being able to make decisions about land as often occurs under current legal arrangements, and the suggestion that this be replaced with a communal decision-making process that includes women. Such a suggestion is radical in the context of current practice of land leasing in Vanuatu in terms of the manipulations of formal legal arrangements, the role played by custom owners and in the contemporary practice of tradition termed *kastom* which is discussed in detail below.
38. Criticisms have been made of the idea of a 'customary owner' as a prescriptive identity under contemporary land law in Vanuatu. Customary management of land is dependent on holding, not owning, land.^[85] *Kastom* use rights to land in Vanuatu (as much as they are able to be generalised) form a complex tapestry of interconnected relationships to *ples* which include many land use rights including rights to garden or make collections of food and plants for other uses. These rights have been described as a recognition of land as a 'common basket' that sustains people.^[86] In legal terms this 'common basket' resonates with the discussion of interests in land as being a 'bundle of rights,' as was described in the early *Mabo* determinations of Native Title in Australia.^[87] While a 'common basket' is more appropriate as an imagery that resonates with the meaning of *ples*, even this idea ignores the spiritual connections to land, the bodily manifestation of land as identity and being and replaces them with an understanding of a collection of usufructory rights. As a 'bundle of rights' land remains an asset commodified through its many uses, rather than the basis of a spiritual and metaphysical self. Such expansive customary conceptions of land are incommensurate with the idea of a long term lease over land which requires an absolute legal right to all uses of land usually held by an individual or, as is often the case with contemporary leasing in North Efate, to a single legal entity designed by expatriate investors as a means of transferring assets and avoiding tax.^[88]
39. The ideology of custom owners offers an incisive lens for considering the absence of meaningful legal pluralism in Vanuatu. Filer maps the alternative roads of Custom (*kastom*) and Law (*lo*) in his discussion of the ideology of custom ownership. He argues that Custom and Law are conceptually separate, but are somehow conflated into the constructed identity of custom owners such that,

the State has been partially colonised by 'traditional' or 'customary' forms of society, the result is a debate about customary law, customary land, and customary groups which articulates the ideology of land ownership.^[89]

This *imagined* pluralism, in which legal identities are predicated on custom, creates dialogues and political spaces in which particular men can exercise their authority in manipulating the local politics of land.

Kastom, ples and custom owners

40. Just as Filer maps the roads of Custom (*kastom*) and Law (*lo*) in his discussion of custom landowner ideology in PNG, it is important to consider the meaning of *kastom* in Vanuatu, and the links between *kastom* and *ples* as a reference point for understanding the legal category of custom owners. *Kastom* is broadly defined as the contemporary practice of tradition. Margaret Jolly writes that: '*kastom* is the *Bislama* word which loosely translates as tradition, but evokes not so much the totality of ancestral practices as a particular selection of such practices for the present.'^[90] *Kastom* practices are fluid and, above all, contextual. *Kastom* forms much of the social fabric of peoples' lives in Vanuatu; it dictates the nature of relationships, gender and status, ways of mediating disputes, ceremony and meaning, beliefs and being, hierarchy and process. *Kastom* knowledge relates to the spiritual and

metaphysical configurations of a *ples* and establishes meaning and identity in a landscape.

41. Links between identity and *ples* are foundational to ni-Vanuatu. While rejecting the word *kastom* John Taylor is clear that *ples* is a defining narrative in sociality for the Sia Raga in North Pentecost. Instead of the politicised Bislama word *kastom*, Sia Raga use instead the Raga language words *alenan vanua*.^[91] *Alenan vanua* means not just cultural practices but 'a more deeply felt sentiment of correctness of human behavior and thought, one that is importantly merged with place...[meaning] all the correct ways and ideas belonging to a place.'^[92] Being is tied to landscape and encapsulated in *ples*. Land is part of the socio-spatial construction of self, where self is bounded to place (*ples*). By contrast, a man without land is not a man in the sense of the sociality of *ples*. This informs the idea of the contemporary Bislama use of *man ples* the person, or group, who has land rights over a *ples*. These rights correspond to rights to use and work the land, to grow gardens and maintain houses, to look after and visit sacred ancestral sites.
42. This terminology of *man ples* also has important political meanings in that 'such imagery was not only crucial in reclaiming the land as inalienably attached to the people of the place, but proclaiming local people as rightfully in control of it.'^[93] *Man ples* is thus the emplaced person, identity joined to a *ples*. Increasingly this politicised terminology is articulated as the rights of *man ples*, in comparison with *man kam*; groups of people who have moved onto the land, whose rights are secondary and whose ultimate right to occupy and garden in a landscape is dependent on the agreement of *man ples*. The terminology of *man ples* is an important referent for considering ni-Vanuatu constructions of *ples*. The embedded, symbiotic definition of person and *ples* means that everyone in Vanuatu must come from a *ples*. To be without *ples* is irreconcilable with ni-Vanuatu identity.^[94]
43. The description I have offered of *kastom* and *ples* may appear deceptively lucid and somewhat essentialising. Equally important is the recognition that *kastom* and *ples* are important political narratives used in the construction of the indigenous self. Anthropological discussions on the use of *kastom* narratives in the period before and after independence highlight the opposition between *kastom* and *skul* (where *skul* includes church) the 'two sides' that represent the 'time of darkness' before the arrival of the missionaries and the coming of 'the light.'^[95] In contemporary use *kastom* is increasingly a 'matter of selective perpetuation from past to present to future, of distinguishing good from bad *kastom* between those practices thought worthy of continuity or revival and those which should be left to expire.'^[96] *Kastom* narratives are a conscious and selective representation of key aspects of emplaced self. Rodman writes that in Vanuatu the connection between place, voice and authority is direct. 'Followers who lacked the power to voice their objections also lacked the power to regain their land.'^[97] Nowhere does the fraught and political nature of opposing narratives of *kastom* and *ples* become more transparent than in the legal entanglements related to opposing claims over land. Here the narratives of emplaced self are fought over by a handful of powerful men vying for authority over a landscape. It is men who are often the agents of these *kastom* narratives of *ples* as it is the men who speak in court and in *nakamals*. Without allowing for the voices of women in these spaces the construction of *kastom* and *ples* is overwhelmingly the domain of men. As Jolly reminds us, it is this aspect of *kastom* that prompted Grace Mera Molisa to offer her prescient warning that the narrative of *kastom* could become 'a Frankenstein's corpse used to intimidate women.'^[98] While place is as Rodman contends 'multi-vocal' the danger is that too often the voices that dominate *kastom* conceptions of *ples* in both land transactions and legal contests over land, are the voices of men to the exclusion of other members of the community.
44. In considering the competing political narratives associated with land cases it is my conjecture that the ni-Vanuatu conception of 'self' connected to '*ples*' may be radically altered and reconfigured by legal nomenclature of 'custom ownership.' This is because it creates an authoritative meaning for what is allowable as a landholding identity, and what is not. An exploration of land law in Vanuatu shows the ideology of 'customary ownership' requires the juxtaposition of *kastom* relationships to *ples* with something largely outside of *kastom*—the ownership of land in an absolute sense. This idea of ownership is itself a colonial legal cultural product that began with the early English titling system. The colonial legacy apparent in Vanuatu land law means that this legal cultural product has been transplanted onto a completely different landscape, potentially forever changing indigenous conceptions of *ples*. The idea that this landownership is based in 'custom' creates a legal nomenclature that at once looks like offering a model of recognition for the 'other' indigenous identity while at the same time destabilising the foundation of that identity, reconfiguring indigenous relationships to land by asserting that land must be 'owned.' This illustrates 'the cultural power of law' and its ability to reconstruct indigenous identities in ways that are socially transformative.^[99] It is the power to impose one cultural logic over another.
45. Custom landowner ideology is socially transformative because it is the basis of asserting claims to land even within the *kastom* system. The language of 'custom owner' rights are a fixture in dialogues about land in Vanuatu. Custom owner rights are replicated as part of indigenous self-identity and are foundational to the politics of recognition and statements of claims. Even the resolutions of the National Land Summit, while proclaiming the importance of customary law in the management of land and critiquing the operation of contemporary land law, refer to rights or processes in the context of the legally defined 'custom land owner' and 'land owning group.'^[100] Filer argues that the ideology of 'customary landowners' are divorced from *kastom*, because they have 'intensified the legal attachment of the landowner to the land for reasons which are *not* "traditional" or even "cultural".^[101] This intensified attachment is understandable given the way law is able to coerce and offer a model for recognition, while at the same time obfuscate *kastom* relationships to land in favour of established property relations. In this sense

law is not simply a set of rules exercising coercive power, but a system of thought by which certain forms of relations come to seem natural and taken for granted, modes of thought that are inscribed in institutions that exercise some coercion in support of their categories and theories of explanation.^[102]

Vanuatu's formal legal system manufactures prescriptive identities for people engaged in land transactions; that of 'custom owner.'

46. The cultural power of land law in Vanuatu is that it has the potential to reconfigure indigenous notions of person and *ples*. This occurs because contemporary land law in Vanuatu offers only limited options for the recognition of indigenous relationships to land and has the potential, where applied, to truncate the complex and dynamic relationships of people to *ples*. Into the vortex of perhaps well-intentioned but incomplete and problematic constitutional customary arrangements over land, legislation plays a pivotal role in allocating rights, managing dealings and administering the all-important procedural arrangements with respect to land registered for leasing outside of the *kastom* system. An exploration of contemporary land legislation is therefore necessary in considering the mechanistic nature of law in giving effect to this legal transformation from *kastom* meanings to those defined by the formal legal system, thereby redefining relationships of Indigenous people to land in Vanuatu.
47. Given the many vagaries of the Constitution, the identity of 'custom owners' has been interpreted through the legal lens of land legislation and its court-based determinations. This consists of nineteen separate Acts, but is primarily comprised of: *Land Leases Act*, *Land Alienation Act*, *Land Reform Act*, *Valuation of Land Act* and *Land Acquisition Act*. While a detailed analysis of this legislation and its judicial interpretation is beyond the scope of this paper it is important to make a few key points around the construction of 'custom owners' as 'lessors' under contemporary Vanuatu land law.^[103]
48. Evidence of ongoing influence of the British colonial legacy and of the cultural logic embedded in land law can be seen in the type of land registration that exists in Vanuatu. The Torrens system of land registration originated in South Australia in the 1850s and is itself a product of 'colonial knowledge' exported from the colonial administration in Australia to Vanuatu, as well as Fiji, PNG and the Solomon Islands.^[104] The purpose of the Torrens system of registration is to create indefeasible title to land—a form of title that is literally 'unable to be defeated.'^[105]
49. Contemporary land legislation in Vanuatu is designed purposefully to give effect to land sales which are an important source of income for key figures in the Vanuatu state, including the Minister for Lands. Numerous court cases and Ombudsman decisions suggest that almost since the time of Independence onwards, nearly all Ministers for Lands have been engaged in abusing their Ministerial powers by approving leases over *kastom* land without the consent of custom owners either in their own interests, or in the interests of investors, presumably with appropriate recompense. Numerous court decisions describe abuse by Ministers of their powers to grant land to themselves, close family members, kin, *wantoks*,^[106] as well as political associates,^[107] and close business associates.^[108] Accordingly the entire fabric of contemporary land legislation is designed to protect the interests of someone who has purchased land, almost regardless of the circumstances in which that interest was negotiated and whether the actual customary landowners have been involved in, or benefited from, the land sale. Legally, the effect of registration is to create a repository of interests in land and to 'protect persons dealing in registered interests in land'^[109] regardless of 'the circumstances in or the consideration for which such proprietor or any previous proprietor was registered.'^[110] Furthermore, the Director of Lands is also exonerated from any facts relating to a registered interest.^[111] These provisions and the way they protect the person holding the interest in land and the state, are particularly important given the contested nature of many dealings in land in Vanuatu. Legality in this context ensures the rules of land ownership and access backed by the force of the state, often work against the interests of custom owner groups.

Institutional pluralism rather than legal pluralism: turning *kastom* into custom

50. Land sales are regularly contested by custom owners in contemporary Vanuatu. Consistent with the discussion of Vanuatu's legal system as one defined by institutional pluralism, there is a plurality of state and non-state institutions that determine ownership or decision-make about land related matters. In the state context these include all courts in Vanuatu.^[112] Tensions over land sales are pursued in numerous forums including many outside of the formal, state-based legal institutional arrangements. However, the cases that have been pursued in a formal state-based context are illuminating in that they demonstrate about the judicial interpretation of contemporary land legislation. For example, in *Ratua Development Ltd v Matthew Ndoi* two custom owners began proceedings on the grounds that a lease had been fraudulently or mistakenly registered by others. The Court of Appeal held that custom ownership of leased land does not constitute an 'interest in land' (under s 93 of the *Land Leases Act* and s 100 did not apply). The power of the court to rectify the registration of a lease is extremely limited—the title of the lessee will remain indefeasible (unless they can be demonstrated to have substantially contributed to the fraud or mistake) the only remedy that is available is for the custom owners to be substituted as the lessor in the lease title over the land (*Ratua Development Ltd v Matthew Ndoi*). The custom owners will not be entitled to any compensation for the dealing made over their land without their consent (*Ratua Development Ltd v Matthew Ndoi*). This decision means that custom owners whose land is registered by another person have, at best, the right to be named as the correct lessor of the land. However, they are not able to rescind the lease and are not entitled to compensation under current law.

51. 'Customary ownership' in the legislative and judicial context just described does not require any meaningful assessment of *kastom* management or *kastom* process for decision making over land. I have argued that legally, all that is required, is the assertion of a 'custom owner' almost regardless of the truth of the circumstances and the actual decision of the appropriate *kastom* managers of the land. This shows clearly another example of what Benedicta Rousseau has called 'the elision'; the difference in meaning in legal interpretation between the English term 'custom' and its supposedly synonymous term in Bislama *kastom*.^[113] This discussion illustrates law's sleight of hand; the 'cultural power' of the law in purporting to recognise *kastom* interests in land while at the same time rendering these interests, legally and practically, unimportant. It is this term 'custom owner' that is in Derrida's conception 'an experience of aporia' of the contradicting intent of the idea of *kastom* and owner.^[114]
52. The elision of *kastom* into 'custom' has another important implication: the redefining of connection to *ples* to give effect to land sales. Custom owner ideology is the basis of asserting claims over land and other resource rights in Melanesia. Weiner and Glaskin comment that,

If 'customary law' and 'customary social groups' are elicited as responses from indigenous people to pressures placed on them by the state and developers, then we should be aware that different conditions and stimuli will call forth different versions of 'customary' and hence different versions of 'customary groups'.^[115]

Similarly Filer argues that in PNG establishing legal relationships to landholdings are less important than creating 'social relations of compensation' with government and developers.^[116] Elsewhere Filer writes that land boundaries and group boundaries are closely aligned to benefit distribution, and 'the manipulation of a thing called "custom" in the name of another thing called "development"'.^[117]

53. As legal identities are manufactured to give effect to development so are connections to *ples* circumscribed to fit within definitional boundaries. This is illustrated in PNG by the creation of corporate group identity established to manage property rights and royalty payments that show little recognition of *kastom* relationships with *ples*.^[118] Similarly in Vanuatu, while land sales are individualised, recognition of relationships to *ples* are increasingly being conceptualised by legal 'customary' institutions dominated by powerful men who are the self-proclaimed arbiters of *kastom* as patrilineal alone, in landscapes with previously established matrilineal structures.^[119] These *kastom* claims of rights to land must be interpreted in their legal, socio-political and historical context; they must also recognise the rupture to *kastom* structures that occurred in the period of colonisation. In relation to this point Filer argues that 'custom' is something that 'makes its appearance at the end of the colonial period when "truly traditional: or pre-colonial forms of social practice had already been consigned to the far horizon of the late colonial imagination".^[120] Filer goes on to state that custom is something 'which develops *out* of law, not something which develops *into* it'.^[121]
54. Filer here, unlike Rousseau and my argument in this paper, does not make a distinction between custom and *kastom*. The project of developing *meaningful* legal pluralism is impossible according to Filer because 'Melanesian custom does not *really* exist in a form which would allow us to ask how it could or should be recognised by modern national law, because it was actually born out of the armpit of Australian colonial law'.^[122] In this paper I have argued for the importance of distinguishing between *kastom* and custom because it helps to guide us in considering the legacy of the colonial system and the way it continues to distort *kastom* meanings associated with attachment to land. This distinction is essential for reflecting on the ongoing tension in cultural logic between the formal legal system and the *kastom* system for the management of land. In these ways, it also allows us to recognise the cultural power of the law. While 'custom' is a legal product born out of colonial law, *kastom* is something that retains enormous significance in the management of land disputes across Vanuatu in ways largely unrecognised by the formal legal system, demonstrating again the limitations of legal pluralism. Meaningful recognition of the *kastom* management of land may provide new alternative ways of constructing meaning and allow for new more appropriate identities that reflect the connections between people and *ples*.

Conclusion

55. Much of the work produced by Sally Engle Merry is concerned with the 'effects' of law or 'the culturally productive role of the law, on the ways in which the law produces *cultural meanings and identities* as an aspect of power'.^[123] This paper has built from this idea to offer three different lenses for discussing the cultural power of the law as a performance that creates meanings and identities. Considering the cultural power of law is essential to any analysis of how law has enabled the large-scale leasing and removal of land from the *kastom* system in Vanuatu.
56. Informed by the work of Merry this paper has considered the links between legal identities as informed by cultural meanings and the exclusion of ni-Vanuatu from land. In particular, it has examined how contemporary land law in Vanuatu transforms indigenous *kastom* relationships to *ples* and sociality as connected to *ples*. In guiding the reader through these categories of legal identity, *kastom* and *ples* I have demonstrated the mechanistic nature of the cultural power of law in purporting to recognise *kastom* interests in land while at the same time rendering these interests legally and practically unimportant. The key question remains: whether *kastom* is recognised by legal institutional arrangements or whether the modes of legal recognition in turn redefine *kastom* and the attachments to landscape embedded in *ples*. This I fear is the cultural power of contemporary land law in Vanuatu.

Notes

[1] Derek Hall, Phillip Hirsch and Tania Murray Li, *Powers of Exclusion: Land Dilemmas in Southeast Asia*, Singapore: National University of Singapore Press, 2011, p. 5.

[2] Hall, Hirsch and Li, *Powers of Exclusion: Land Dilemmas in Southeast Asia*, pp. 4–5.

[3] Hall, Hirsch and Li, *Powers of Exclusion: Land Dilemmas in Southeast Asia*, p. 5.

[4] Hall, Hirsch and Li, *Powers of Exclusion: Land Dilemmas in Southeast Asia*, p. 5.

[5] Vanuatu National Statistics Office, *National Population and Housing Census Vanuatu 2009*, Port Vila: Vanuatu Government, 2011.

[6] 'Justice for the poor,' *Vanuatu National Leasing Profile: A Preliminary Analysis*, Port Vila: World Bank, 2013, p. 3, online: <https://openknowledge.worldbank.org/handle/10986/10839>, 18 December 2013.

[7] My own experience based on five-years work in North Efate as a land lawyer and a researcher suggests that the leasing of the Efate coast has continued at a rapacious pace since these leases were recorded at 2010, with significantly more of the North Efate coast now under lease. Further information suggests that across Vanuatu there is a backlog of some additional 4,000 leases that are dated after this 2010 period.

[8] 'Justice for the poor,' *Vanuatu National Leasing Profile*, p. 5.

[9] Hall, Hirsch and Li, *Powers of Exclusion: Land Dilemmas in Southeast Asia*, p. 5.

[10] In interpreting this power the Vanuatu Court of Appeal said, 'this section does not empower the Minister to issue a certificate, or take any other action, which would have the effect of deciding the dispute as to custom ownership. The power is confined to one of management intended to preserve the interests of the custom owners until the dispute is otherwise resolved.' See *Valele Family v Touru* [2002] VUCA 3.

[11] 'Justice for the poor,' *Vanuatu National Leasing Profile*, p. 12.

[12] 'Justice for the poor,' *Vanuatu National Leasing Profile*, p. 12.

[13] Greg Rawlings, 'Villages, islands and tax havens: the global and local implications of a financial entrepot in Vanuatu,' *Canberra Anthropology*, vol. 22, no. 2 (1999): 37–50; Greg Rawlings, 'Taxes and transnational treaties: responsive regulation and the reassertion of offshore sovereignty,' in *Law and Policy*, vol. 29, no. 2 (2007): 51–66; Greg Rawlings, "'Once there was a garden, now there is a swimming pool": Inequality, labour and land in Pango, a peri-urban village in Vanuatu, Ph.D. thesis, the Australian National University, 2002.

[14] While 'Strata Title' is a used in other jurisdictions where properties have shared walls and are thus jointly managed, for thirty-three years in Vanuatu the Strata Title Act has applied to rural land so as to provide a mechanism for subdividing land without requiring the consent of the custom owners. This has helped facilitate subdivisions and therefore the speculative land market in Vanuatu. Investor interests regularly petition the government to maintain this unique legislation in Vanuatu without amendment. However in October 2012 amendments that I was involved in drafting to the *Strata Titles Act* [Cap 266] were passed by Parliament so that strata title arrangements will now only apply to buildings and not to areas of land.

[15] While the majority of these subdivisions are located in the rural areas of the main commercial islands of Efate and Santo, speculative subdivisions have also been registered for outer islands such as Aore (with 243 registered subdivisions). Interest in the speculative land market continues to grow in spite of the resolution of the National Land Summit of 2006, which called for a moratorium on subdivisions. Between 2006 and 2010 a further 1989 subdivisions were registered, of which the overwhelming majority were located in rural areas.

[16] Sally Engle Merry, 'Resistance and the cultural power of law,' *Law & Society Review*, vol. 29, no.11 (1995): 11–26, p. 14.

[17] Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law*, Princeton: Princeton University Press, 1999, p. [11].

18 Sally Engle Merry, 'Law and Colonialism,' *Law & Society Review*, vol. 25, no. 4 (1991): 889–922, p. 890.

[19] Sally Engle Merry and Donald Lawrence Brenneis, *Law & Empire in the Pacific: Fiji and Hawai'i*, Oxford: School of American Research Press, 2003, p. 6.

[20] Merry and Brenneis, *Law & Empire in the Pacific: Fiji and Hawai'i*.

[21] Merry, *Colonizing Hawai'i*, p. 8; see also, Merry, 'Law and Colonialism.'

[22] D.P. O'Connell, 'Condominium of the New Hebrides,' *The Brit. YB Int'l L*, vol. 43 (1968): 71–146, p. 73.

[23] Howard Van Trease, *The Politics of Land in Vanuatu: From Colony to Independence*, Suva: University of the South Pacific, 1987, p. xii.

[24] O'Connell, 'Condominium of the New Hebrides'; see also Margaret Rodman, *Houses Far From Home: British Colonial Space in the New Hebrides*, Honolulu: University of Hawai'i Press, 2001.

[25] Van Trease, *The Politics of Land in Vanuatu*, pp. 127–68; Jimmy Stevens, 'The Naiagramel Federation: new country, old story,' in *New Hebrides: The Road to Independence*, ed. C. Plant, Suva: University of the South Pacific, 1977, pp. 49–57.

[26] Howard, *The Politics of Land in Vanuatu: From Colony to Independence*.

[27] Jacques Derrida, 'Force of law: the mystical foundation of authority,' *Cardozo Law Review*, vol. 11, nos 5–6 (1990): 920–1045. p. 941.

[28] Derrida, 'Force of law,' p. 925.

- [29] Derrida, 'Force of law,' p. 941.
- [30] Derrida, 'Force of law,' p. 963.
- [31] Derrida, 'Force of law.'
- [32] Julie Stone Peters, 'Legal performance good and bad,' *Law, Culture and the Humanities*, vol. 4, no. 2 (2008): 179–200, p. 180.
- [33] It was of course only a frontier to those who had not previously lived there for countless generations.
- [34] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, New York and London: Routledge, 1990. It should also be noted that Butler herself engaged in scholarship analysing many of the philosophical frameworks introduced by Derrida in her article, 'Deconstruction and the possibility of justice: comments on Bernasconi, Cornell, Miller, Weber,' *Cardozo Law Review*, vol. 11, nos 5–6 (1989): 1715–18.
- [35] Derrida, 'Force of law,' p. 951.
- [36] Stuart Banner, *How the Indians Lost their Land: Law and Power on the Frontier*, Cambridge: Belknap Press of Harvard University Press, 2005, pp. 3–4.
- [37] Banner, *How the Indians Lost their Land*, p. 4.
- [38] This is a reference to the earlier quote from Hall, Hirsch and Li, *Powers of Exclusion*.
- [39] Banner, *How the Indians Lost their Land*, p. 6; see also Engle, *Colonizing Hawai'i*.
- [40] Don Alexander, *Peter Milne (1834–1924): Missionary to Nguna, New Hebrides from the Presbyterian Church of New Zealand*, Dunedin: Foreign Missions Committee, 1927.
- [41] Alexander, *Peter Milne (1834–1924): missionary to Nguna, New Hebrides.*
- [42] Alexander, *Peter Milne (1834–1924): missionary to Nguna, New Hebrides.* p. 90.
- [43] Presbyterian Mission New Hebrides, Annual Report of the Missionary Ship *Dayspring*, nos 1–38, 1864–1892 which later became the *Annual Report of the New Hebrides Mission, 1893–1902*. Report for 1864.
- [44] Later reports from Nguna suggest that these early problems were short-lived with a substantial congregation established on the island by 1890.
- [45] See brief discussion of cultural logics in Merry, *Colonizing Hawai'i*, p. 28.
- [46] Margaret Rodman, 'Empowering place: multilocality and multivocality,' *American Anthropologist*, vol. 94, no. 3 (1992): 640–56, p. 643.
- [47] Rodman, 'Empowering place: multilocality and multivocality,' p. 643.
- [48] Roger Thompson, 'Natives and settlers on the New Hebrides frontier, 1870–1900,' *Pacific Studies*, vol. 5, no. 1 (1981): 1–18, p. 2.
- [49] Captn. Bridge, *Letters Bridge to Des Voeux, Inwards Correspondence, Western Pacific High Commission (WPHC)*, 16 August 1882.
- [50] Van Trease, *The Politics of Land in Vanuatu*, pp. 26–27.
- [51] Van Trease, *The Politics of Land in Vanuatu*, p. 27.
- [52] Van Trease, *The Politics of Land in Vanuatu*, p. 27.
- [53] Australian Association of the New Hebrides Company, *Memorandum of Articles of Association Australian New Hebrides Company Ltd*, 1889.
- [54] Van Trease, *The Politics of Land in Vanuatu*, p. 27.
- [55] Merry, *Colonizing Hawai'i*, p. 17.
- [56] Van Trease, *The Politics of Land in Vanuatu*, p. xi.
- [57] Van Trease, *The Politics of Land in Vanuatu*, p. 27.
- [58] O'Connell, 'Condominium of the New Hebrides,' p. 73.
- [59] Ultimately the legality of many of these deeds remained contentious and became central to the ongoing struggle between the colonial powers as well as becoming the major work of the Condominium Joint Court when it began dealing with land claims in 1927. See Van Trease, *The Politics of Land in Vanuatu*, p. 63.
- [60] This is also termed the 'will theory of contract.' See discussion in *Household Fire and Carriage Accident Insurance Co Ltd v Grant* [1879] 4 Ex D 216; also in *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256, comments by Bowen L.J.
- [61] This is often termed the Anglo-Australian common law system.
- [62] Merry and Brenneis, *Law and Empire in the Pacific: Fiji and Hawai'i*, p. 26.
- [63] James Weiner and Katie Glaskin, *Customary Land Tenure & Registration in Australia and Papua New Guinea: Anthropological Perspectives*, Canberra: ANU E Press, 2007, p. 2, online: <http://epress.anu.edu.au/?p=99961>, accessed 18 December 2013.
- [64] Sally Engle Merry, 'Legal pluralism,' *Law and Society Review*, vol. 22 no. 5 (1988): 869–96, p. 870; John Griffiths, 'What is legal pluralism?' *Journal of Legal Pluralism and Unofficial Law*, vol. 24 (1986): 1–56.

[65] See extensive discussion in [Miranda Forsyth](#), *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu*, Canberra: ANU E Press, 2009, online: <http://epress.anu.edu.au/?p=49351>, accessed 18 December 2013; and [Miranda Forsyth](#), 'How can the Theory of Legal Pluralism Assist the Traditional Knowledge Debate?', *Intersections: Gender and Sexuality in Asia and the Pacific*, issue 33 (December 2013), online: intersections.anu.edu.au/issue33/forsyth.htm.

[66] Forsyth, *A Bird that Flies with Two Wings*, pp. 139–74.

[67] Amet Arnold, 'Severing the umbilical cord from the common law,' in *Custom at the Crossroads*, ed. Aleck Jonathan, Port Moresby: University of Papua New Guinea, 1995, pp. 62–67, p. 62.

[68] See for example the discussion of the limited role of chiefs and customary institutions to determine disputes over the ownership of custom land and the decision that these matters are within the jurisdiction of the formal court system in *Valele Family v Touru* [2002] VUCA 3.

[69] See documentation of the Resolutions of the National Land Summit in Chris Lunnay, Jim Fingleton, Michael Mangawai, Edward Nalyal and Joel Simo, *Vanuatu Review of National Land Legislation, Policy and Land Administration*, Canberra: AusAID, 2006.

[70] Article 73, Constitution of the Republic of Vanuatu.

[71] Article 30, Constitution of the Republic of Vanuatu.

[72] This is not to suggest that recognising these interests is unproblematic.

[73] *Valele Family v Touru* [2002] VUCA 3.

[74] It must be recognised that in many countries in Melanesia the overwhelming majority of land is managed by custom, outside of the formal western legal system.

[75] Weiner and Glaskin, *Customary Land Tenure & Registration in Australia and Papua New Guinea: Anthropological perspectives*, p. 4.

[76] Siobhan McDonnell, 'Possessing paradise: explorations of land, law and authority in Vanuatu,' Ph.D. thesis, the Australian National University, forthcoming.

[77] Colin Filer, 'Custom, law and ideology in Papua New Guinea,' *The Asia Pacific Journal of Anthropology*, vol. 7, no. 1 (2006): 65–84, p. 66. Colin Filer, 'Compensation, rent and power in Papua New Guinea,' in *Compensation for Resource Development in Papua New Guinea*, ed. Toft Susan, Port Moresby: Law Reform Commission of Papua New Guinea, 1997, pp. 156–89.

[78] Filer, 'Custom, law and ideology in Papua New Guinea,' p. 68.

[79] Filer, 'Custom, law and ideology in Papua New Guinea,' p. 76.

[80] Article 79 (2) of the Constitution states that, with respect to the powers of the Minister:

- consent shall be given unless the transaction is *prejudicial to the interests of*:
- a) *the customary owner or owners of the land;*
 - b) *the indigenous citizen where he is not a custom owner;*
 - c) *the community in whose locality the land is situated; or,*
 - d) *the Republic of Vanuatu [emphasis added].*

[81] The National Land Summit was a high-level summit held in Vanuatu to address concerns over land dealings. It was attended by hundreds of chiefs from all provinces across Vanuatu, as well as government officials, representatives from women's and young people's groups, real estate agents and representatives from the property industry and representatives from civil society. The National Summit also followed on from consultations held across the provinces in Vanuatu.

[82] See documentation of the Resolutions of the National Land Summit in Lunnay et al., *Vanuatu Review of National Land Legislation, Policy and Land Administration*.

[83] See documentation of the Resolutions of the National Land Summit in Lunnay et al., *Vanuatu Review of National Land Legislation, Policy and Land Administration*.

[84] See documentation of the Resolutions of the National Land Summit in Lunnay et al., *Vanuatu Review of National Land Legislation, Policy and Land Administration*.

[85] See Joel Simo, *Report of the National Review of the Customary Land Tribunal Program in Vanuatu*, Port Vila: Vanuatu National Cultural Council, 2005.

[86] [Jim Fingleton](#), [Anna Naupa](#) and [Chris Ballard](#), 'Village land trusts in Vanuatu: "one common basket",' in *Making Land Work: Volume Two: Case Studies on Customary Land and Development in the Pacific*, Canberra: AusAID, 2008, pp. 21–45, p. 21, online: http://aid.dfat.gov.au/Publications/Documents/MLW_VolumeTwo_CaseStudy_2.pdf, accessed 18 December 2013. See also Anna Naupa and Joel Simo, 'Matrilineal Land Tenure in Vanuatu: *Hu i kakae long basket*,' Case Studies of Raga and Mele,' in *Land and Women the Matrilineal Factor*, ed. Elise Huffer, Suva: Pacific Islands Forum Secretariat, 2008, pp. 73–122.

[87] See the Linking of the idea of a common basket with a 'bundle of rights' in Naupa Anna, 'Kastom, women and land in Vanuatu,' Paper presented to the World Bank, Justice for the Poor Symposium, Jakarta. 2009.

[88] See for example the discussion of the sale of Samoa Point and subsequent multiple resale to various companies owned by David Russet, allegedly as a means of avoiding tax in the report by the current Director General for Lands, Joel Ligo, *Report on the Complaints of ALLEGED CORRUPTION in the Ministry of Lands and the Department of Lands*, Port Vila: Government of the Republic of Vanuatu, 2011.

[89] Filer, 'Custom, law and ideology in Papua New Guinea,' p. 73.

[90] Margaret Jolly, "'woman ikat raet long human raet o no?' women's rights, human rights and domestic violence in Vanuatu,' *Feminist*

Review, vol. 52 (1996): 169–90, p. 176; Margaret Jolly, 'Custom and the way of the land: past and present in Vanuatu and Fiji,' *Oceania*, vol. 62, no.4. (1992): 330–54.

[91] John Patrick Taylor, *The Other Side: Ways of Being and Place in Vanuatu*, Honolulu: University of Hawaii Press, 2008, p. 10.

[92] Taylor, *The Other Side*, pp. 10–11.

[93] Jolly, 'Custom and the way of the land: past and present in Vanuatu and Fiji.'

[94] Towns are unlikely to be considered a *ples* by rural migrant ni-Vanuatu populations who have no *kastom* attachment to the landscape. Towns, to this group of people, represent displacement and *man-Vila* is a term of insult, a declaration that a person is without a *ples*. See discussion in Greg Rawlings, 'Foundations of urbanisation: Port Vila town and Pango village, Vanuatu,' *Oceania*, vol. 70, no. 1, (1999): 72–86. p. 76. '*Man ples*' and '*man kam*' are terms used with increasing frequency, politically, to separate the land use and occupation rights of groups across Vanuatu. As populations grow, and land becomes increasingly scarce due to land deals, agreements made with ancestral '*man ples*' and dating from three, four or five generations ago to live in a landscape are increasingly called into question, often with little reference to the intermarriage that has taken place between groups.

[95] See discussion in Jolly, 'Custom and the way of the land.' Taylor, *The Other Side*.

[96] Margaret Jolly, 'Material and immaterial relations: gender, rank and Christianity in Vanuatu,' in *The Scope of Anthropology: Maurice Godlier's Work in Context*, ed. Dousset Laurent and Serge Tcherkezoff, New York: Bergahan Books, 2012, pp. 110–54, p. 123.

[97] Rodman, 'Empowering place: multilocality and multivocality,' p. 648.

[98] Molisa Grace Mera, *Colonised People*, Port Vila: Blackstone Publications, 1987; Jolly, 'Material and immaterial relations,' p. 125.

[99] This phrase is, of course, designed to echo the title to Merry's formative work: *Colonizing Hawai'i: The Cultural Power of Law*.

[100] See documentation of the Resolutions of the National Land Summit in Lunney et al., *Vanuatu Review of National Land Legislation, Policy and Land Administration*. I have had numerous conversations with ni-Vanuatu men where they habitually refer to their rights to land as those of a '*kastom lan owna*.'

[101] Filer, 'Custom, law and ideology in Papua New Guinea,' p. 72.

[102] Merry, 'Legal Pluralism,' p. 889.

[103] McDonnell, 'Possessing paradise.'

[104] See *Land Leases Act*, Cap 163 (Vanuatu); *Land Transfer Act*, Cap 131 (Fiji); *Land Registration Act*, Cap 191 (PNG); *Land Leases Act* Cap 133 (SI) Part VIII.

[105] See *Land Leases Act* Sec. 15; see also *Land Reform Act* Sec. 14. A registered title over land legally cannot be defeated except on very limited grounds of fraud, mistake or because it is recognised as an 'overriding interest.' See *Land Leases Act* Part IV; see also *Land Reform Act* Sec. 14.

[106] See *Ifira Trustees Ltd v Kalsakau*, Office of Ombudsman Report, *Improper Sale of Government Houses by the Office of the Prime Minister under Maxime Carlot Korman* [1998] VUOM 7 (Vanuatu Ombudsman); Office of Ombudsman Report, *On the granting of leases by the Former Minister of Lands Mr Paul Barthelemy Telukluk to Himself, Family Members and Wantoks*, [1999] VUOM; Office of Ombudsman Report, *Improper Granting of Land Lease Title 11.OE22.016 by the Department and Ministry of Lands* [1998] VUOM 10.

[107] Office of Ombudsman Report, *On the Mismanagement of the Tender Sale of the Ten (10) Deportees' Properties by the Former Minister of Lands, Mr Paul Telukluk* [1999] VUOM.

[108] Office of Ombudsman Report, *Conduct of Messrs Vohor, Dope and Boulekone Regarding an Attempt to Contract with Volani International Ltd* [1998] VUOM 4; Office of Ombudsman Report, *On the Improper Conduct by Public Officials in dealing with the Mondragon's Proposed Free Trade Zone in Big Bay, Santo* [2001] VUOM.

[109] *Land Leases Act* Sec. 23.

[110] *Land Leases Act* Sec. 23(a).

[111] *Land Leases Act* Sec. 24.

[112] The highest court is the Appeal Court which is constituted by judges from neighbouring countries in the South Pacific, as well as those from the Vanuatu Supreme Court. On the next level in the court hierarchy is the Vanuatu Supreme Court comprising four judges (one located in Santo and the others in Port Vila). Below the Supreme Court is the Magistrates Court. These Magistrates are all ni-Vanuatu, have law degrees and are located in Port Vila, Luganville and Malekula although they often travel to neighbouring islands, subject to available funding and court case loads. Under the Magistrates Court are the Island Courts (which still have some limited jurisdiction over pre-existing cases, but have been replaced largely by the Customary Land Tribunals). The final state institution is the Vanuatu Ombudsman who historically has investigated administrative breaches and, in particular, repeated breaches of Ministerial powers over land. In a non-state context, customary institutions include the Malvatumauri (although this is given some limited recognition in the Constitution, discussed below). *Kastom* institutions include regional Council of Chiefs, locally based chiefly negotiations and land dealings and negotiations between families. Finally, there is the Customary Land Tribunal which was created in 2001 in an attempt to offer recognition of customary law over land within the state system although, this has been declared unconstitutional by the Supreme Court.

[113] Benedicta Rousseau, "'This is a court of law not a court of morality": *Kastom* and Custom in Vanuatu State Courts,' *Journal of South Pacific Law*, vol. 12, no. 2 (2008): 15–27.

[114] Derrida, 'Force of law: the mystical foundation of authority,' p. 947.

[115] Weiner and Glaskin, *Customary Land Tenure & Registration in Australia and Papua New Guinea*, p. 6.

[116] Colin Filer, 'Compensation, rent and power in Papua New Guinea,' in *Compensation for Resource Development in Papua New Guinea*, ed. Susan Toft, Port Moresby: Law Reform Commission of Papua New Guinea, 1997, pp. 156–89.

[117] Colin Filer, 'Local Custom and the Art of Land Group Boundary Maintenance in Papua New Guinea,' in *Customary Land Tenure & Registration in Australia and Papua New Guinea: Anthropological Perspectives*, ed. James Weiner and Katie Glaskin, Canberra: ANU E Press, 2007, pp. 135–74, p. 136; Filer, 'Custom, law and ideology in Papua New Guinea.'

[118] Weiner and Glaskin, *Customary Land Tenure & Registration in Australia and Papua New Guinea*; Filer, 'Local custom and the art of land group boundary maintenance in Papua New Guinea,' p. 135.

[119] McDonnell, 'Possessing paradise.'

[120] Filer, 'Local custom and the art of land group boundary maintenance in Papua New Guinea,' p. 138.

[121] Filer, 'Local custom and the art of land group boundary maintenance in Papua New Guinea,' p. 138.

[122] Filer, 'Local custom and the art of land group boundary maintenance in Papua New Guinea,' p. 137.

[123] Merry Sally Engle, 'Resistance and the cultural power of law,' *Law & Society Review*, vol. 29 (1995): 11–26, p. 14.

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