SOME THOUGHTS ABOUT CUSTOMARY LAND

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This paper has been prepared to try to highlight what appear to the author to be some principal issues with regard to customary land in countries of the South Pacific at the present time. It is not an attempt to deal with any one of these issues in extensive detail and great depth, but it does try to sketch out the main aspects of these issues and to suggest some steps that may be taken to remedy aspects of difficulty.

But before going further, it is necessary to make some preliminary explanations about the scope of, and the terminology used in, this paper. First, this paper is confined to the English-speaking countries of the South Pacific. It would be presumptuous indeed to claim to have sufficient knowledge or understanding of the customary land regime in the French-speaking countries of the South Pacific to include them in this paper.

Secondly, it should be mentioned that for convenience the term “colonial” will be used in this paper in a general sense to refer to a condition of constitutional dependency, whether technically and legally, that of a colony, a protectorate, a protected state, or a sphere of influence. Thirdly, the term “European” will, again for convenience, be used in a general sense to refer not only to people from the continent of Europe, but also to people from the United Kingdom and their descendants in Australia and New Zealand.

Determination Of Rights To Customary Land

It is clearly essential for the maintenance of peace and order within any community that there should be some method for resolving disputes about who is entitled to what rights to land that is both efficient and acceptable.

This proposition is no less true in countries of the South Pacific than it is in other countries of the world, but in countries of the South Pacific there are the special features of rights to customary land, which have to be taken into account in any system for dispute resolution i.e. that most customary land is owned jointly; that persons other than the owners may have subsidiary or secondary rights, less than rights of ownership, in customary land; and that the rights of persons in customary land are derived from and determined by rules of custom of the area in which the land is located and which are expounded by chiefs and elders but which are normally not written down or officially recorded, except in Kiribati and Tuvalu.

Clearly, if efficient and acceptable decisions are to be made about rights in customary land, there are certain criteria or requirements that the persons making these decisions must meet :

- knowledge of relevant customs - Since rights to customary land are based on the customs of the area in which the land is located, the persons making the decisions must either themselves have knowledge of the custom rules of that area, or they must be advised by people who do have such knowledge.

- independence and impartiality - It has become regarded as increasingly important that the persons authorized to determine rights in customary land, as other rights in law, must be completely independent of government, and impartial as between the disputing parties.

These I would suggest are the two essential requirements of persons who are authorised to determine disputes about customary land. There are however, some additional requirements, which although not so basic, are nonetheless important:

- accessibility - Since customary land constitutes 80% - 98 % of the total area of all countries in the South Pacific, and disputes about customary land may arise anywhere, it is obvious that persons who are authorised to determine these disputes must be readily available throughout the country. This means that such persons must either be stationed in different parts of the country, or be peripatetic and able to travel around the country.

- inexpensiveness: A system for determining disputes which is too expensive for government to operate, or too expensive for parties to avail themselves of it, is obviously not going to be very effective. So the factor of expense both to government and to the parties is an important factor for consideration.

- appeal. Although ideally the persons who are authorised to determine disputes about land should make correct decisions, everybody is human and is fallible, and it is recognised nowadays, although it was not a basic principle of common law or of most customary rules, that there should be opportunity for reconsideration of decisions which determine legal rights, including those relating to land, to determine whether an error has been made in the reasoning. The same criteria for persons determining appeals relating to customary land would apply as with regard to the original decisions at first instance i.e. knowledge of customary rules, independence and impartiability.

In countries of the South Pacific during colonial times, the British colonial practice was to appoint native land commissions, comprising members of the colonial administration assisted by indigenous assessors or advisers eg. the Native Land Commission of Fiji[2], and the Native Land Commission of Gilbert and Ellice Islands[3]. In Solomon Islands, land commissions were not appointed on a regular or standing basis, but only when there were sufficient numbers of serious disputes or general issues to be determined eg Native Land Commission, 1919-24 (Phillip Commission), Special Lands Commission, 1953-57 (Allan Commission).

On the other hand, the New Zealand practice, possibly modelled on the Maori land court system, was to establish land courts, and so in countries subject to New Zealand control land courts were established eg. the Native Land Court and Native Land Appellate Court of Cook Islands[4] and Niue[5], and the Lands and Titles Court of Western Samoa[6]. In the Anglo-French Condominium of New Hebrides, also, a court, called the Joint Court, was established to determine claims to land[7], although in practice it was almost exclusively concerned with claims by European to customary land by virtue of alienation by custom owners.

Since independence there has been a move away from land commissions towards courts in some countries: Kiribati, Papua New Guinea, Solomon Islands and Tuvalu. In Kiribati modified ordinary have been substituted for land commissions, i.e. the Magistrates' Courts (Land), and the High Court sitting with assessors[8]; in Papua New Guinea Local Land Magistrates sitting with land mediators[9] at first instance, and Provincial Land Magistrates sitting together to hear appeals; in Tuvalu, Land Courts with appeal first to the Senior sitting with 2 assessors, and then finally to the High Court sitting with 2 or more assessors[10]; in Solomon Islands, Local Courts at first instance, and Customary Land Appeal Courts, on appeal[11]. In Fiji, however, the Native Lands Commission and Appeal Tribunal remain[12]. In Vanuatu, the Joint Court has been replaced by Island Courts at first instance and the Supreme Court on appeal[13].

The operation of the bodies established to determine disputes about rights to customary land, obviously needs to be kept closely under review to ensure that they are performing efficiently and in accordance with

the criteria referred to earlier which are necessary to ensure that the decisions are acceptable. There have been some concerns about this in recent years. In Fiji, where the legislation originally did not contain any express criteria for the appointment of members of the Native Land Commission or of the Appeal Tribunal, nor any express requirements as to the manner in which these bodies were to function, one important decision by the Native Lands Commission as to the headship of a very wealthy land owing unit was set aside by the High Court in 1989 on grounds of appearance of bias[14]. A year later, however, the power of the High Court to review decisions of the Native Land Commission was removed by the 1990 Constitution, and in 1994 the Court of Appeal acknowledged that the courts no longer had power to review decision of that today[15]. In 1998 legislation was introduced in Fiji, the Native Lands (Amendment) Appeals Tribunal Act, 1998, which specifies criteria for the chairman and members of the Appeal Tribunal, although not for the members of the Native Land Commission. In Solomon Islands[16], Kiribati and Tuvalu[17] there have been constant problems also of maintaining independence and impartiality on the part of members of the courts authorised to determine land disputes.

Both in Solomon Islands and Vanuatu the courts system established to determine rights to customary lands has virtually collapsed. In Solomon Islands, local courts to deal with land disputes at first instance have been established in only five locations throughout the six major and many more smaller islands, and all five of these have ceased to function during the last two years for lack of finance. So also have the customary land appeal courts which hear appeals from the local courts on land matters.

The position is similar in Vanuatu. Island Courts, which are supposed to determine customary land cases at first instance are operational only in seven islands, and many large islands have no functioning island court at all to determine land disputes eg. Ambae, Ambrym, Aneityum, Epi, Erromango, Maewo and Pentecost. Not only that, but in January 1997, the Chief Justice declared that the Supreme Court would not hear appeals in land cases, because he considered that it does not have sufficient judges or funds to deal with land cases[18], and since then no appeals have been determined by the Supreme Court. Such a situation, where the Island Courts are only operating partly, and the Supreme Court not at all, is clearly very unsatisfactory, and proposals have been made to remedy the situation by establishing customary land tribunals to be appointed by councils of chiefs in each custom area in each island[19]. These proposals have been approved by government and legislation has been drafted to give effect to them. A public workshop was held last week to explain and publicise the implications of these proposals, and it is hoped that they will become law shortly.

Management of Customary Land

Assuming that the law is able to make adequate provision for the determination of rights to customary land, and the resolution of disputes about these rights, should the law go further and regulate or control the way in which the right holders use their land?

Under custom, most land is owned jointly, and in theory at least, all persons having ownership rights to land are required to be consulted about the use to which the land is to be put, and they must all agree as to what is done with the land. If the land owners are relatively few in number, and live close together and harmoniously, the convening of a meeting and the reaching of a unanimous agreement should not be difficult, but the greater the number of owners, the further apart they live, and the less harmonious are their inter-relationships, the more difficult will it be for them first to meet, and then to reach agreement.

Also custom does not require that the landowners must have any or sufficient relevant information or materials before them, or have any or sufficient understanding of such information or materials, to make a wise or well-informed decision. Some decisions, of course may require no additional information beyond what is within the personal knowledge of the landowners themselves, but other decisions may require a great deal more.

There is also the consideration that, although in theory custom may allow every landowner an equal voice, in practice some of the landowners may be much more dominant than others, and may exert an excessive and unfair influence over the way in which decisions, about the use of land even although apparently unanimous, are reached. It may be that in fact the decision is manipulated or overborne by the more dominant members of the landowners to the detriment of the more passive or submissive owners. In some cases also, it may be that the chief, although not a landowner, may dominate the decisions of landowners or may assist the right to speak and to act in place on behalf of the landowners. The chief may in fact make the decisions and take the actions with regard to the use of land, which should rightfully be taken by all the landowners jointly.

There is the possibility that some areas of customary land may be owned by an individual. This may occur because that individual is the original discoverer or purchaser or grantee of the land under custom, or is the sole survivor of a larger original land owning group. Alternatively, it may be that the individual is a chief, and under custom of that area, the land is regarded as owned solely by the chief. When land is owned by only one person, then that one individual landowner is entitled under custom to make decisions about the use to which that land is put. In such a situation there are not the practical difficulties of convening a meeting of the landowners, nor of them reaching a unanimous decision which arise when there are many joint owners. There is however, still the problem of whether the individual landowner will have any or sufficient relevant information or materials and will have any or sufficient understanding of that information and materials, to make a wise decision as to the use to which that land should be put.

There is also the further quite separate question, which is important when customary land is such a large proportion of the land in countries of the South Pacific, ranging from 83% to 98%, of whether custom owners whether they are many or few, will be able to, or be willing to, give adequate attention to the interests of the country as a whole, to the public interest, when they are making decisions as to the use to which significant areas of customary land should be put.

So there inevitably arises, in all countries of the South Pacific, the question as to whether the State should intervene by law to regulate, support or restrict the way in which decisions are made by the owners of customary land as to the management and use of these lands.

In most countries of the South Pacific, governments, both in colonial times and since independence, have preferred not to intervene and have preferred to allow customary processes and the principles of common law and equity to regulate decisions and actions taken in relation to customary land.

The one exception to that, and it is a very large exception, is in the case of Fiji where in 1940 the colonial administration enacted an ordinance, the Native Land Trust Board Ordinance, now the Native Land Trust Act, Cap 134 which removed all powers of control and management from the custom owners and placed them in the hands of a statutory body – the Native Land Trust Board. On that board there is no direct representation of landowners – only of government and chiefs, (section 3), and the Board is not required by law to consult with landowners, much less obtain their consent, as to the decisions it makes as to the use of their lands. It is required only to ensure that the owners have sufficient land for their use, maintenance and support (section 9). Subsidiary legislation under the Act[20], provide that 25% of the revenue obtained by the Board is to be allocated to administrative costs of the board, 25% of the remainder is to be paid to chiefs, and the balance, i.e. 52% of the total revenue, is paid to the landowners.

This system, which removes complete control of management of customary land out of the land of the custom owners and vests it in a statutory body, has been beneficial to the country of Fiji as a whole, because the Board was able to ensure that as much land as possible was made available for leasing or licensing to others, particularly for the production of sugar cane which became one of the country's main exports. Prior to 1940 many landowners had been reluctant to lease out their land, especially for sugar cane farms, which were mainly worked by Indians, and had delayed in doing so, or had insisted on very

onerous terms, but since 1940 the total control by the Native Land Trust Board of the management of customary land has meant that there has no longer been reluctance or delay in the granting of leases, which was to the great advantage of the national economy. Moreover, the leases have been able to be granted on terms which were uniform and not too onerous for lessees.

But for the Fijian landowners the removal of their power of management of their lands has not proved so satisfactory. There have been many complaints about the Trust Board's leasing of customary land, of which the following are the most common: that excessive amounts of land have been leased without leaving sufficient land for the maintenance and support of the owners; that land has been leased at rentals which are below their true market potential; that there have been delays and confusions about payments of rental monies; and, that generally the wishes and the interests of the landowners have been ignored or insufficiently taken into account. Charges of corruption, embezzlement or misuse of funds, or fraudulent misuse of the powers of management, have, however, fortunately not been heard.

A system of total control by the State of the management of customary land, such as has been adopted in Fiji, has not been, and is not likely to be, replicated in any other country of the South Pacific. For one thing, it may well now be unconstitutional, as amounting to a compulsory acquisition of property by the State or at least a deprivation of property, without the safeguards required by the constitutions of most countries. Moreover, landowners are now very conscious of their rights, and of the potential of their land, and would be unlikely to willingly agree to the surrender of their powers of management in the way that the Fijian landowners did in the late 1930's, and no democratically elected government is likely to be willing to force such a measure without the agreement of the custom owners.

Nor, I would suggest, is such a wholesale removal of the powers of management from custom owners necessary or desirable. Regulation and support of a more limited kind can be undertaken, which is directed at the most pressing problems with regard to the management of customary land. In some countries, there are vast areas of customary land, which are used solely for subsistence, and for which customary methods of management are at present adequate. It is only in those areas where there is settlement or commercial development of customary land, and areas where there are lengthy disputes about ownership, that customary methods of management have not proved adequate, and where there is the most pressing need for them to be supported regulated or supplemental.

I will now turn to consider what seems to me the aspects of customary land which are in most need of some legislative intervention:

Decision making by custom land owners

As indicated earlier, in countries of the South Pacific, with one exception, Cook Islands, the legislature has not concerned itself with how the owners of the customary land meet, or how they conduct their meetings, nor with what information or materials they have before them to guide them in their decision making. This means that decisions may be made on the basis of inadequate or partial or inaccurate information. It means also that it is very easy for the dominant members of the land owning group to influence decisions, either subconsciously or quite deliberately.

It means also that one member of the group or a small member of members may be able to prevent any effective decision making by refusing to agree, or making their agreement dependent upon a number of conditions that are burdensome and unreasonable.

The time may well have come when, at least in certain parts of the countries of the South Pacific, legislation should be introduced to regulate the meetings of land owners.

Part II of the Land (Facilitation of Dealings) Act 1970 of the Cook Islands supplies an example of what

such legislation could provide: it could enable applications for the commencing of a meeting to be lodged with a statutory authority by members of the land owning group; it could authorise the way in which notices were to be given to members of the land owning groups; it could provide who would chair such a meeting and record the minutes of the meeting. It could allow for resolutions at such a meeting to be passed by a majority, either a simple majority or a special majority, and it could require that such resolution must be ratified by a court or other statutory authority, before coming into effect; and it could enable a minority to lodge an objection to the ratification.

This legislation shows the way forward, I believe, for exercising some supervision over meetings of landowners in many countries of the South Pacific, at least in critical areas of the country where new developments are proposed and important decisions have to be made as to the way in which the land is developed.

Agents or trustees of land owners

In some countries, custom landowners in particular localities, have appointed persons or committees to act on their behalf to manage their lands. In Niue, such persons are called leveki, in Solomon Islands they are often called caretakers, in Vanuatu they are usually called land committees or land trusts.

Such institutions clearly can be advantageous for the landowners in that they can provide a contact point for negotiating with persons wishing to develop the land, and for receiving revenue from the land on behalf of the various owners, and paying it out to such owners. Such bodies can also be beneficial for persons wishing to develop the land because they provide a stable point of contact for negotiations about the land owned by various owners in the area.

Experience shows, however, that such bodies cannot operate effectively without some legislative support and control. We do not need to go far from here to see very clear examples of this. The four main villages around Port Vila all established land committees for the management of village lands at the time of independence. Of these four committees, one land committee no longer exists, having been abolished and replaced by the chief who controls the lands of the village himself; two other land committees have suffered serious embezzlements and misuse of funds, and disposal of very valuable properties for inadequate consideration; and in the fourth village there are now two other rival groups each claiming to be entitled to manage the lands of the village, so that there are three different groups claiming to represent the custom owners of the village. Needless to say, none of these committees provide audited financial reports to custom owners, nor is there any systematic and thorough reporting to the custom owners of the activities and transactions undertaken by the committees.

It is evident that the principles of equity relating to trusts, and the general provisions of the Trustee Act are not enough. Clearly there needs to be legislation specifically dealing with bodies formed to manage customary land. Such bodies should, I suggest, be required to be registered so that they are readily identifiable, even though their lands are not necessarily registered; elections for membership of these bodies should be required and should be regulated in a way that secures their efficiency and independence; regular meetings with landowners to report upon the activities of the management body should be required; regular financial reports should also be obligatory, and should be audited. These would seem to be the very basic requirements that legislation should provide to ensure a proper legal framework for these land management bodies and failure to comply with such requirements should result in de-registration, and removal of the authority to deal with customary land.

In some countries, e.g. Cook Islands[21], New Zealand[22] and Papua New Guinea[23], legislation has been enacted which allows for the owners of customary law to be incorporated, and to be managed by a management committee which is subject to requirements about regular meetings and audited financial reports. Incorporation is a further possibility, but incorporation can be a lengthy and costly exercise, and

registration of a land management body may be all that is necessary to ensure that the bodies are sufficiently identified to be able to be placed under sufficient supervision and control.

Leasehold land

A lease is a very convenient way of enabling customary land to be used for a commercial purpose. It provides the lessee with exclusive possession for a fixed or an identifiable period of time, it specifies the conditions and terms under which the possession can be held, and it provides the custom owners with an income for a fixed indentifiable time without affecting their ultimate rights of ownership.

But there are clearly some areas of difficulty with regard to the practical operation of leases. One is in respect of those people who were, at the time the lease was granted, holding secondary rights under custom to the land, such as rights of passage or usufruct. Although the owners of the land will probably be indentified and will receive rent in respect of the leasehold, the persons who held secondary rights to the land may not have been identified, and will not receive any rental from the lessee. They may therefore find themselves deprived of their customary rights to the land, without receiving any share of the rent for the lease to compensate them for their loss.

Another frequent source of discontent is in respect of rent payments. Assuming that all the persons having ownership or other rights have been identified, do they in fact all receive their share of the rent? Frequently rental payments are made to chiefs or to the heads of families or to others who claim to be entitled to receive the money on behalf of those entitled, but the money that is paid to them never finds it way to the hands of all those who are entitled to it. This is not a difficult legal issue, but it does require that some firm legal procedures are set in place, more than are provided at present, to ensure that the right persons receive their due share of the rentals.

Disgruntled members of a group who hold rights to customary land, either of ownership or secondary rights, will not merely express their annoyance to those members of the group who have signed the lease, but will often take physical action against the lessee to prevent the land being used, despite the terms of the lease. Near Port Vila, at this very moment, a lessee who has a signed and registered lease of land for development purposes for 75 years, has been forced to give up his project, because some disgruntled members of the land group have put a heavily padlocked chain across the only access road. An investment of 25,000,000 vatu has ground to a halt, because of the dissatisfaction of some of the custom rights holders. This is exacerbated by the reluctance of police to become involved in disputes relating to customary land, unless there is an express court order.

It is, I suggest, essential that legislation is introduced to ensure that all person having rights to customary land, whether as owners or as secondary right holders, are informed of any proposals to lease the land, and are able to participate in the making of the decisions with regard to the land. It is essential also that the full implications of the leasing proposal is explained to the right holders, and that any decision that is made is fully recorded and publicised; and further that procedures are set in place to ensure that all right holders receive their due entitlement. Once these procedures have been followed and finally recorded, the police have some substantial basis for action.

Another problem that may arise in relation to leases of customary land is with regard to improvements made by the lessee. At the expiry of the lease, who is to responsible for these? What compensation, if any, is the lessee to receive for them and who is to be responsible for paying that compensation? If, as is usually the case, the landowners are to be responsible for paying for permanent improvements, how is that going to be achieved, when the custom owners are unlikely to have the funds to make such payments? Responsibility for improvements which outlive the term of a lease is something that needs to be very carefully considered, and provided for, in order that injustice is not done to the lessee or to the custom owners. It may be that some statutory requirements and direction should be provided. In Vanuatu

legislation was enacted to authorise the apparent of a Lands Referee for that purpose[24], and although this office has not been filled since 1991, moves are now being made to appoint a person to that post.

Somewhat similar is the problem of mortgages or charges of leased land which are taken out by lessees, but are still outstanding at the time the lease comes to an end, either by expiry of time or by premature termination by one party or the other. The unpaid mortgagee or chargee will normally wish to try to enforce the mortgage or charge, and develop the land or put someone on the land who can develop it to pay off the amount of the loan. Even if this is approved by the High Court or Supreme Court, as is usually required, the appearance on the land of the mortgagee or someone placed there by the mortgagee, who would normally be a complete stranger to the family and relatives and neighbours of the owners, may well provokes hostility and resentments which may degenerate into disorder and violence.

Legislation can play some role here to prevent such situations arising. One possibility would be legislation which requires that the enforcement of mortgagees must have the approval of the High Court or Supreme Court (which is normally the case), and that a condition of that approval is that information has been circulated to family and neighbors, and a meeting has been called under the supervision of the Court, and attended by the mortgagor and mortgagee, at which the rights of the mortgagee and the implications of these rights are fully explained to all.

Land which is under dispute for lengthy periods

The resolution of disputes as to primary rights of ownership and secondary rights of passage and usufruct frequently take years, even decades, to resolve. During this period, the land cannot be used either by the disputing parties, or by third parties, except at risk of forcible removal and or violent attack, so that the land remains idle, contributing nothing to the subsistence of indigenous people or to the development of the national economy.

Clearly, there is a strong argument for providing that land which is under dispute for lengthy periods should be placed in the hands of a statutory manager, who could arrange leases and licenses of the land, and hold the revenue in trust for whoever are ultimately found to be entitled to rights in the land.

Provision to this effect has been made in Vanuatu where section 8 of the Land Reform Act, Cap 123, provides that the Minister of Lands has power to manage land the ownership of which is in dispute.

But there are serious dangers in placing the management of customary land in the hands of a Minister, unless there is a strong department to advise the Minister, and the Minister is required to accept the advice of the Department. Without both such limitations, a Minister will be under great pressure to make grants of land, and may grant concessions reductions of rent and other to family, to friends and to political allies, and may not be able to un that pressure. Reports by the Ombudsman of Vanuatu have revealed how a former Minister of Lands have granted leases of land to his wife, to his son, to his friends and associates for inadequate rentals, and in disregard of the recommendations of the departmental advisory committee[25].

It is preferable that an independent person or body of persons such as a statutory trustee or a trust board, is established by legislation with powers to manage the customary land which is dispute. Management of customary land which is under lengthy dispute is something that needs to be provided by legislation, but provided in a way that will ensure the management is independent of government and of personalities.

Care will also obviously have to be taken to ensure that the management of such land is not to the detriment or prejudice of the persons who are ultimately ascertained to be entitled to rights on the land. It may therefore be necessary to place some limits on the periods of leases or licenses that may be granted, and the purposes for which they may be granted. But even within such limits, the land would be able to

make some contribution to the economy of the country, and not lie idle and unproductive, during the lengthy period of time which is often necessary to resolve uncertainties about the persons who are entitled to ownership and secondary rights.

Absentee right holders

With increasing facilities for transport and communication, it has been possible for members of land owning units, and others having interests in land less than ownership, to move away from the locality of the land, but still to keep in contact, and maintain a lively interest with what is done with the land.

This has some advantages in that the absentee right holder may make contributions of money, and of food which is not available locally, e.g. rice, tinned fish, and of clothes, to the members of the landowning unit who remain with land. The absentee right holders can also provide space in their homes where the right holders on the land can go to visit and spend holidays as a diversion from the tedium of their life bound to the land, or when they are sick and need medical treatment, or when their children need to attend schools which are far from the land.

There are however disadvantages about absentee landowners. They cannot physically assist with the gardening, housebuilding or other regular work on the land. They must be consulted and their agreement obtained to any changes in the use of the land, and this causes delays in decision making, and may even result in decisions being unable to be taken. In other words they operate as a brake, or, to change the metaphor, a dampener, on proposals for change and development in the use of the land.

In some parts of the country where there is not much change or development of customary land, the effect of absentee right holders may not matter. But in areas of customary land which are under pressure to change, such as these in or near urban settlements, and or where commercial farming or logging of the land is proposed or is being undertaken, the “braking” or “dampening” effect of absentee landowners may not be in the best interests of the landowners who are present on the land, nor of third parties who are wishing to use of the land, nor of the national economy which could benefit from developmental use of the land.

The situation with regard to absentee right holders calls for review. One possiblity might be to provide that persons who obtain citizenship or permanent residence in another county should automatically lose they their rights to customary land, both of ownership and secondary rights. Probably also persons who have been absent from the land for more than a certain period of time e.g. 5 years, 10 years, 15 years, 20 years, should forfeit their interests in land, or, at least, their right to be consulted about the use to which the land is put.

There are legislative provisions in place already in Fiji[26] and in Kiribati[27] that allow for a Minister to cancel the rights of a custom owner after a certain period of absence. But in Fiji this requires first a request from members of the land owning unit, which is very unlikely to be made because no one wishes to be the cause of a relative losing rights to the land. In Kiribati, it results in the land being compulsory acquired by the State, and no Minister of a democratically elected government is likely to be anxious to take such a step to deprive landowners of their land which is certain to provoke resentment and hostility, and cost votes at the next election. Consequently, not surprising, these legislative provisions seem very rarely to have been utilised in either Fiji or Kiribati.

From this, one can deduce that any legislative provision which is made for the abolition or reduction of rights to land of absentee right holders should provide for the abolition or reduction to be automatic, and not dependent, either upon an application from members of the land owning unit or upon a decision by a Minister of Government.

Land as a security for loans by the owners

The usual method for making land a security for a loan is for a charge or lien to be placed over the land, or for the land to be mortgaged to the lender for the duration of the loan. There are two major difficulties in using customary land as a security for commercial loans made to the custom owners. One difficulty relates to the granting of the charge or mortgage. So far as a charge or lien of customary land is concerned, these are feasible only when there is a comprehensive and accurate registration system of customary land in which the charge or lien can be recorded. If there is no such registration system no one dealing with the land will know of the charge or lien, and so the charge or lien can be easily evaded. In some countries such as Fiji, Kiribati and Tuvalu, there is a registration system which does allow for charges on customary land to be registered, but in Papua New Guinea, Solomon Islands and Vanuatu there is no such system, (except in regard to leases of customary land) so that charges or liens over customary land are not a realistic possibility in these three countries. In these countries, however, selected registration of customary land in certain designated areas could be instituted, in those areas where land is most likely to be needed to be charged or made subject to a lien.

As regards mortgages, the mortgaging of land under the common law usually took the form of transferring the land to the lender, with a covenant that the land would be transferred back again to the borrower when the loan was repaid. In all countries of the South Pacific the transfer of customary land is prohibited, except in accordance with custom, and so that form of mortgage of land, i.e. mortgagee by way of transfer to the lender, is not possible without special legislative provision.

One form of mortgage which was adopted under the common law in earlier times, and which is provided for in Tonga, where the sale of land is prohibited, is mortgage by way of lease i.e. the owners lease the land to the lender for the period of the loan, and the lender can then use the land during the period of the loan either for personal occupation or for sub-lease or license to a third party.

A rather more complex alternative is for the owners to acquire a leasehold interest in their own land, and then transfer that leasehold interest to the borrower for the duration of the loan as a security for the loan. A leasehold interest in land cannot as a matter of common law be granted by the owners to themselves directly, because the law regards the leasehold interest as being merged into the greater rights of ownership. But the owners can lease the land to someone else who can lease it back to them, or some of them, thus providing them with a leasehold interest. This method has been adopted in Papua New Guinea, where it is known as the “lease-lease back system”. In Papua New Guinea customary land can be leased by custom owners to the Minister of Lands who leases it back, free of charge, to the custom owners, thus providing them with a lease-hold interest which they can then mortgage to a lending institution[28]. Alternatively, a statutory trustee or other body could be established to whom customary land could be leased, and then leased back to the customary owners.

The second major difficulty with regard to using customary land as a security for a commercial loan is the enforcement of the charge or mortgage. If the borrower does not pay the loan, the chargee or mortgagee will obviously wish to use the land so as to recover, if possible, the amount of the outstanding loan. A chargee or mortgagee will obviously not be able to sell the land, as is the usual practice with freehold land, because that is prohibited under the law of all countries in the South Pacific. But the chargee or mortgagee could enter into possession, either personally, or by placing some other person on the land, and try to obtain some income in that way to pay off the outstanding balance of the loan. As mentioned earlier, this may, and often does, provoke a very hostile reaction from family, friends and neighbours of the borrower, who see a stranger enter into land which is known to belong to the custom owners. Threats of violence, and actual violence, may occur which will seriously impede the efforts of the mortgagee to recover the outstanding loan.

It is important therefore that there is some provision in the law which requires that all persons interested in

customary land under mortgage, whether their interest is as owners, family of owners, or friends or neighbours of owners, are fully informed of the rights of the mortgagee to enforce the mortgage. One way of securing this would be for legislation to require that a meeting must be held in the locality where the land is situated such meeting to be convened by, or under the supervision of, the Minster of Lands or of the High Court or Supreme Court, at which the rights of the mortgagee are explained. Such a meeting could be required by law to be convened both at the time when the mortgage or charge is being negotiated, and also later at a later time if it is necessary for it to be enforced, or only at the latter time. It is very important, however, to ensure that family, neighbours and friends of the custom owners of the land are aware of, and understand, the rights of a mortgagee or chargee if the loan is not repaid.

Urban and peri-urban Land

When large numbers of people settle close together and form extensive settlements certain services must be provided in order that the people can live both healthily and harmoniously. At the very least, drainage, sewage disposal, and supply of drinking water are required, and also some control over habitations, is necessary. In addition, access to stores and/or gardens, to street lighting, to education, to transport, to electricity, and to security is highly desirable.

The provision of these necessities for healthy living is normally beyond the ability or the wish, of the owners of the customary land upon which the people have settled, even when their settlement has been undertaken with the permission of the landowners, and when the landowners are receiving some rent by way of services or money. When people have been attracted to urban areas and have settled on land without the permission of the landowners, there is even less ability or willingness on the part of the custom owners to provide such services, and there is the additional need to resolve the disputes that must inevitably arise.

In most urban areas, the land is usually declared public or state land and placed under the control of a municipal authority which is authorised to provide the necessary services for the settlers. But sometimes the municipality is not effective in controlling settlements of people within the municipal boundaries, and providing adequate services to these settlements. Shanty towns within municipal boundaries have developed in Apia, in Honiara, in Port Vila, and in Suva. In such cases, clearly there needs to be some strengthening of the will, and of the legal machinery, of the municipal authority.

In the areas just outside the boundary of the municipal authority, the peri-urban areas, even more serious problems are likely to arise. These problems are often aggravated and manipulated by ambitious “bigmen” or politicians, and can result in serious social conflict as we have seen in recent months in the Solomon Islands.

Once human settlement on customary lands exceeds a certain density around the boundaries of urban areas, there should be some control established by legislation to ensure that the basic services are provided for the people living there. One possibility would be a requirement that the land must be declared public land, and brought under the control of the municipality. Another possibility would be that the national government or an agency of the national government is required to exercise planning and other control over peri-urban settlements. Such actions may not always be popular with the custom land owners, and it may desirable for legislation to provide a machinery for compulsory consultations and discussion with custom owners before the legislative controls are brought into effect. But some greater degree of control than exists at present, I suggest, requires to be provided.

Conclusion

To conclude this paper I would like to summarise the main points that I have endeavored to make:

1. There should be, in each country of the South Pacific a system for resolving disputes about rights to customary land, both primary and secondary rights, that ensures the application of the custom relevant to the land in question, and is independent and impartial, is accessible, and is not a financial burden either on the parties or the government.

2. There should be greater control by legislation over the management of customary lands at least in these areas where significant charges of use are occurring or are likely to occur e.g. peri-urban areas, and areas of agricultural, pastoral, forestry or other commercial development:

- agents or committees of customary right-holders should be registered, and

also subject to specific statutory control;

- meetings of customary right-holders should be regulated by legislation;

land which is subject to dispute so that the customary right holders cannot be ascertained should be managed by a statutory authority subject to specific statutory control.

- the various methods of mortgaging and charging of customary land should be explored more fully, and regulated and supported by specific legislative provisions.

3. In those areas of customary land that continue to be used for only subsistence purposes, there is no need for legislative intervention , except to ensure that the mechanisms for resolving disputes are operating effectively.

ENDNOTES:

[1] Member of the academic staff of the School of Law, University of the South Pacific, Vanuatu. This is the text of a conference paper given at the Australasian Law teachers' Association Conference in Port Vila 1st-4th July 2001.

[2] Section V, Native Lands Ordinance, 1880; section 6 Native Lands Ordinance, 1892; section 4 Native Lands Ordinance 1907, section 2, Native Lands Amendment Ordinance 1912, Fiji

[3] Native Lands Commission Ordinance 1922, Gilbert and Ellice Islands

[4] Section 367 Cook Islands 1915, NZ; section 14 Cook Islands Amendment Act 1946, NZ

[5] Section 335, 386 Niue Act 1966

[6] Samoan Land & Titles Protection Ordinance 1934, Samoa

[7] Article 10, Protocol Respecting New Hebrides by British and French Governments, August 6, 1914

[8] Sections 7-10, 75-78 Magistrates Court Act, Cap 52, Kiribati

[9] Sections 23, 45-47 Land Disputes Settlement Act, Cap 45, Papua New Guinea

[10] Section 6, 25-27, Native Lands Act, Cap 22, Tuvalau

[11] Sections 8-12, Local Courts Act, Cap 19, section 255-257 Land and Titles Act, Cap 133 Solomon Islands

[12] Section 4-7, Native Lands Act, Cap 133, Fiji

[13] Section 3-6, 22 Islands Courts Act, Cap 167, Vanuatu

[14] Butou Eta KacalainiVosailagi v Native Lands Commission (1989) 35 FLR 116

[15] Ratu Nacanieli Nava v Native Lands Commission (1994) 40 FLR 252

[16] Talsasa v Paia [1980-81] SILR 93; Kavesi v Talasasa [1983] SILR 87; Manedetea v Kulagoe [1984] SILR 20; Rade and Soso v Sautuana [1985/86] SILR 55; Tetea v Harani CLAC 8/1990 (unreported); Maenu'u v Lamani CLAC 2/1992 (unreported).

[17]Atanraoi P, "Customary Land and Development in an Atoll Nation – the case of Kiribati" in Customary Land Tenure and Sustainable Development: Complementarity or Conflict ? 1995, Noumea, SPC, p63.

[18] "Lunabeck" Pas de litige foncier devent les tribunaux cette annee" Vanuatu Weekly Hebdomadaire, 22 February 1997.

[19] "Custom Owners back Land Tribunal plan, "Vanuatu Weekly, 28 October 2000.

[20] Native Land (Leases and Licences) Regulations

[21] Part I, Land (Facilitation of Dealings) Act 1970, Cook Islands

[22] Part IV, Maori Affairs Amendment Act, 1967, New Zealand

[23] Land Groups Incorporation Act, Cap 147, Papua New Guinea

[24] Land Referee Act, Cap 148, Vanuatu

[25] Public Report of Ombudsman of Vanuatu on Granting of Leases by former Minister of Lands, 22 April 1999; Public Report of Ombudsman of Vanuatu on mis-management of Tender Sale of 10 Properties by former Minister of Lands, 28 May 1999.

[26] Section 20, Native Lands Act, Cap 133, Fiji

[27]Section 8, Neglected Lands Act, Cap 62, Kiribati

[28] Section 11, 102 Land Act 1996, Papua New Guinea