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## Changing forms of communal tenure

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Practices in relation to customary land are changing in the Pacific islands. The changes include a tendency for people to want to privatise, or individualise, control of holdings within the realm of customary land; for current practice to diverge from what is stated to be custom; and for practice to diverge from the law where tenure has been codified.

It is also necessary to question whether we are dealing with common property at all in Pacific island land tenure. We might also consider whether customary land tenure, especially as often practised, is necessarily the inhibiting factor for development which it often is said to be.

Does any one individual or entity, anywhere, really own land in the sense of having full personal control over its use and its disposal? There are few if any places or polities within which landholders have absolute and exclusive rights over the control, use, or assignment of land. Unencumbered ownership of land is extremely rare. Crocombe has pointed out that it may not be 'sufficiently recognised that human beings do not own land: what they own is rights to land, that is, rights *vis-à-vis* other human beings' (1972:220). And different people may hold overlapping rights over the same land. This is true for developed as well as developing countries. Even if we take the case of freehold

land within the general realm of British-derived law, which might be considered to provide a particularly strong form of control or ownership, it may still be subject to possible resumption by the state (the Crown in the British case). Other parties, such as the neighbours over the back fence, or agencies such as electricity or sewerage authorities, may have easements over it. Its use may be constrained by planning regulations. The extent to which the subsoil (and what it contains) is included in ownership rights may vary. Its disposal may be constrained by laws which limit the right to own land to members of specific groups.

It is often argued that some form of transferable landholding such as freehold tenure, or long-term transferable leasehold, is a requirement for successful development. Much of this argument hangs on the belief that land is the only, or the best, security for raising capital through loans, and that its transferability in the event of default is essential for successful development. But other mechanisms have been used successfully as the basis for credit, at least for smallholder farmers. Security and transferability of rights are certainly key features, but these can be provided under a variety of tenures. The extent to which these exist under customary tenure is often overlooked.

Some of the land problems in the Pacific islands arise because different groups or agencies may assert the power to confer legitimacy on rights which may be claimed over land, and do so on the basis of quite different ideologies, legal or cultural concepts. Such groups include customary landholders, governments, and land management instrumentalities. One has only to compare the different premises which have been used by colonial administrations, independent governments, and rural clans or kinship groups to see the scope for confusion. Given the weakness of state institutions in a number of Pacific island countries, and the limited understanding or acceptance of ideas of national sovereignty, it is unrealistic to assume that ideas and laws imposed at a national level on a matter as sensitive, as culturally loaded, and as variable as land tenure will be uniformly accepted or observed by claimants to customary land.

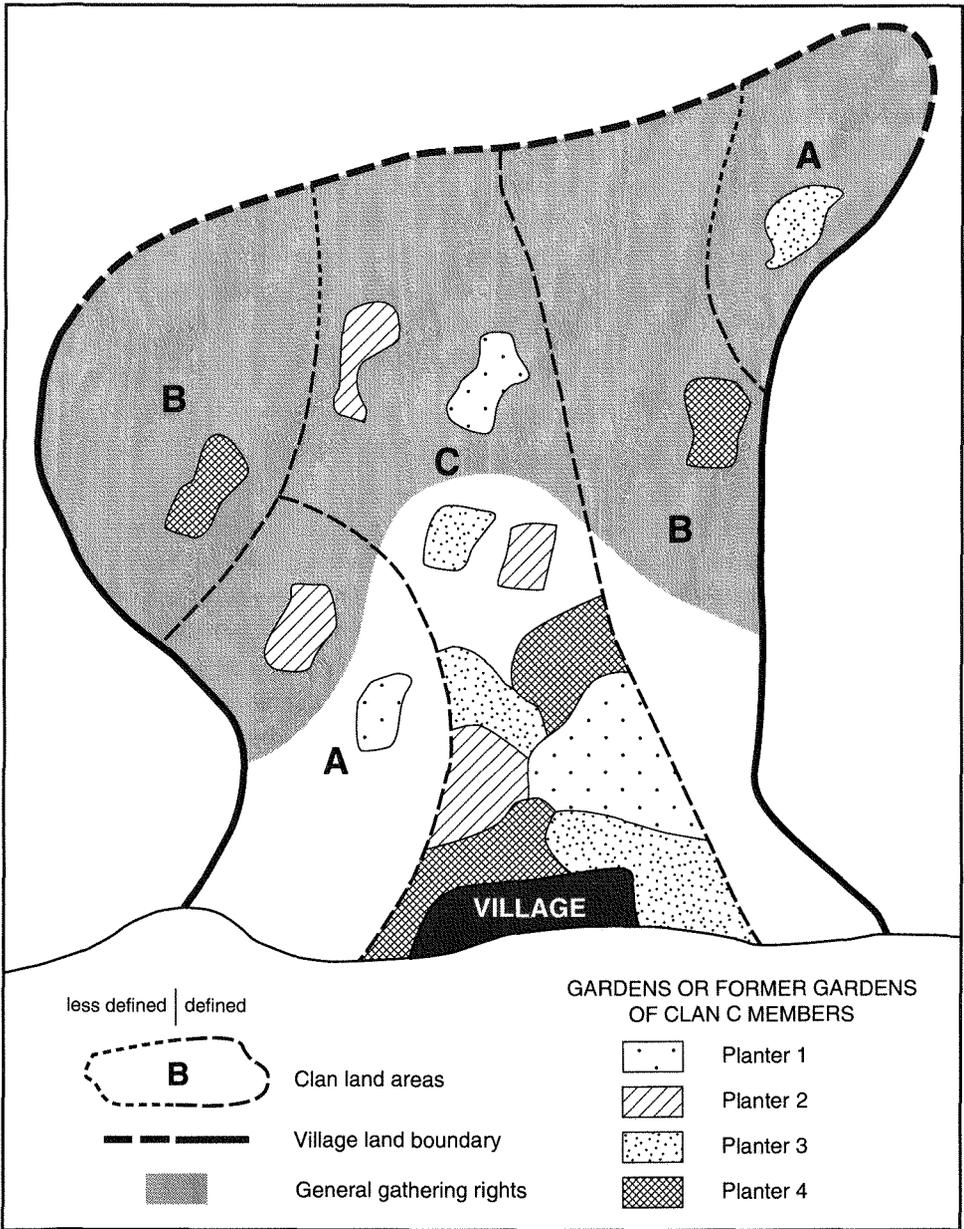
Thus great complexity of tenure arrangements may exist, even within the one state, and even where a codified version of traditional or customary tenure has been adopted. It is also necessary to recognise that 'customary tenure' changes over time, and at differing rates in different places, as custom itself changes in some uncertain relationship with technological, economic, social and political change.

Furthermore, practice in the allocation, holding and use of land may change long before it is given the imprimatur of 'custom'. Within most Pacific island countries it is probably misleading to speak of *the* customary system of tenure because of the differences between what different communities might accept as customary in their own case. Under a generally accepted framework of certain general principles, a great deal of pragmatic divergence occurs. Until the authority of the state is much stronger than it is in most Pacific island countries, it may be necessary for those who seek to foster specific development projects requiring long-term use and exploitation of land for agricultural, mining, industrial or other uses, to take heed of local attitudes and claims to rights over land.

### **Common property or common land?**

Most land in the Pacific islands is not common property in either the sense of open access to all people, or equal access to all members of a particular community which claims ownership. The same is usually true of reef and lagoon fishing grounds as well (see, for instance, Carrier 1987). Johannes and MacFarlane point to the contrast between Europe and European concepts in which marine resources were thought of as a common good, and the Pacific islands where fishing grounds were explicitly the property of individuals or specific groups (1991:73). It is generally true in the Pacific islands that amongst groups which occupy an area, all the core members will have some rights to exploit the products of the area, to reside within it, and to occupy parts of it under some form of usufruct. But it would be unusual for all to have equal rights within the whole area. Most groups will also include residents who are not core members but have been given some more limited, conditional rights which fall far short of equality of access.

A generalised example, drawn largely from Fiji, but in its essential features common to other areas may illustrate this point (Figure 1.1). A community of several clans may claim an area of land as its territory. In places the boundaries may not be clearly defined. Within that territory, each clan is acknowledged or, where the system is codified, recorded as the controllers or owners of particular areas. The whole is not the common property of the community for more intensive uses, despite the fact that, by custom, all residents may be free to gather forest products from most of the uncultivated parts of the territory.



**Figure 1.1 Landholdings in a hypothetical village.** Drawn by J. Sheehan, Cartography Unit, Research School of Pacific and Asian Studies.

Although some limited rights may approach commonality within this forest or uncultivated land, individual trees or products may be recognised as the property of individuals and control of hunting and gathering may rest with particular people or sub-groups. Within the land of one clan, members may not all have equal rights to clear and cultivate any part because specific individuals, or families ( in Figure 1.1, planters 1–4) may hold residual and relatively exclusive rights to occupy, which stem from the last period of cultivation of the particular piece. The land of a house site may be very specifically under the control of a particular nuclear or extended family. Specific resource sites, such as a spring or a source of clay, although within the boundaries of a clan's land, may be controlled by specific members of that or another clan, with relatively free access being allowed to almost all, but under 'grace and favour'.

A superficial examination of this type of system, perhaps influenced by a framework of ideas stemming from nineteenth century sociology, may note that all members appear to be able to hunt, gather, or collect water from any area or site within the community's broader territory, and that many people cultivate gardens scattered throughout the territory, and not only on the land of their own clan, and then jump to the conclusion that land is common property. Few Pacific islanders would accept such an interpretation. The situation is not one of free and equal access for all. It is not directly comparable to the forms of access found on, say, English common land, and even there, commoner's rights are not held by all.

Neither is it generally true that those members of the community who use specific pieces of land are insecure in their continued use of that land. Indeed the very security of that right to continued occupation under customary tenure is what many now use as validation in a process of privatisation currently taking place in a number of island countries. If security of occupation or usufruct is a feature of land tenure systems which is considered desirable for development purposes, then most Pacific island customary tenure systems have this. What may not be possible is the transfer of those occupation rights to others who are not community members, but in practice one finds many instances where such transfers have occurred in both former and recent times.

## **Communal tenure or 'customary' tenure?**

Communal land may be considered to be a variant of the category 'common property' with the assumption that all within the 'commune' or the 'community' have rights of access. To apply this title to customary land in the Pacific islands also overemphasises the degree of shared access. True, ultimate control over land may be vested in a group but, as suggested above, that group may be a specific sub-set of the whole community so that, as O'Meara (1995) has suggested for Samoa, the phrase 'corporate family ownership' may give a clearer impression of the reality of some forms of customary tenure, with the role of the family head somewhat analogous to that of the managing director of a company or corporation. Therefore I think it best to avoid the term 'communal land', preferring the vaguer term 'customary' land. The crucial point is that customs change, and so does customary land tenure.

### **Older variations in customary tenure**

The discourse of the post-independence Pacific island nations, and particularly the political rhetoric, tends to imply that traditional ways were and are unchanging, handed down from time immemorial. That this is patently not so is obvious from the way Christianity has been incorporated into tradition. An example in the case of land tenure is the way the current land tenure system of Tonga, based on inheritable leaseholds from Crown or nobles' estates, is now thought of as 'traditional' when in fact it is a late nineteenth century product. The 1875 constitution abolished customary land rights as the Crown took control of all land, allocated much of it to nobles' estates, and gave all adult men the right to inheritable usufruct over holdings allocated from those estates. In effect these were perpetual, heritable, individual, but inalienable leases. It was a land reform which, in its sweeping nature, was almost without equal outside the old Soviet bloc. This recent, rather individualistic system, with European feudal overtones, is now Tonga's 'traditional' system.

In Fiji the current codified system, widely accepted as traditional, is also a colonial creation under which the variety of pre-1874 tenure arrangements was reduced. The plea of a number of leading chiefs for individual allotments was ignored as it did not fit current anthropological theories. Ownership groupings were simplified to aid recording and the scope for modification in the face of demographic or other change was virtually eliminated (see France 1969, Ward 1995).

Furthermore, the doctrine of inalienability of Native Land, which is a major plank of current Fijian tradition, is itself a product of colonial codification under an ordinance of 1912, rather than a true reflection of older practice (Ward 1995:206–8). As France noted ‘permanent alienation of land is a common feature of Fijian culture and the concept can be easily and unambiguously expressed in the Fijian language’ (1969:52).

As in Tonga and Fiji, many of the changes in customary tenure in other countries in the late nineteenth and early twentieth century were colonial government initiatives. The Land Court in the Cook Islands, ‘owing to its misunderstanding of the significance of lineage affiliation in determining ownership of and succession to land rights...awards title in common to all children of a previous owner, thus creating excessive fragmentation of ownership’ (Crocombe 1987a:60). In this case the problems of ‘common property’ which arose, and which a number of attempts have been made to solve, are not so much a result of customary tenure, but of colonial intervention. In French Polynesia major changes were imposed by the French administration (Tetiaraahi 1987) often ‘based on misinterpretations of how the land tenure system worked’ (Joralemon 1983:97). In New Caledonia (as in Fiji) ownership was registered by relatively large groups when in fact cultivated land was held by relatively small family groups (A. Ward 1982:3–4). Other examples can be cited from around the region, many of which illustrate that what is now considered ‘customary’ is of relatively recent origin. What they also tell us is that, if political conditions are right, or a government is strong, major changes can be made, and accepted, in customary land tenure systems, and that many of the current problems attributed to customary tenure stem from European misinterpretations of the tenure forms which existed in the late nineteenth and early twentieth centuries. More thorough understanding might well have avoided many current difficulties, particularly if the variability and scope for change had been recognised.

### **Current changes in custom**

Custom, as accepted behaviour, usually contains a large component of pragmatism. Close examination of pre-colonial events in the region shows that this pragmatism was reflected in many changes in land tenure arrangements, due to warfare, changing population or other pressures, migration, obligations, and even acts of grace and favour. Mobility was common and when people claim to have occupied an area from ‘time immemorial’ their own traditions often describe

movement from some other place. One result of the codification of land tenure systems, as in Fiji, Tonga or the Cook Islands, has been to impose a much more static situation, at least in legal terms. Because holdings were surveyed, and owning groups specified and their members recorded, the processes which formerly allowed land to be reallocated as needs changed ceased to operate (officially at least). Greater rigidity has also occurred or is likely, where the 'traditional' land tenure system has been given status in national constitutions without precise codification or survey. Western Samoa and Vanuatu are examples. Cases which come before the Western Samoa Land and Titles Court have tended to be settled on the basis of arguments which draw on older conditions rather than current practice and for many years it was the case that the Court could be 'regarded as a mechanism integral to the maintenance of chiefship' (Powles 1986:206). This is less true today and there are signs of a more pragmatic approach but, as O'Meara (1995) shows, the decisions of the Court still draw on custom which lags a long way behind practice.

In Vanuatu, where the independence constitution vested the ownership of all land in the 'custom owners' there is an implicit assumption that such ownership is identifiable, generally accepted, and relatively unchanging over time. Rodman (1995:92-102) has shown that this is not necessarily the case. On the island of Ambae, for example, major changes occurred in the nature of customary holdings in the early twentieth century in response to the reduction of warfare and the adoption of copra production as a road to power and as a role for big men. Such men established relatively large and permanent holdings, in contrast to the smaller and less permanent holdings of previous times. Therefore a basic question remains for Vanuatu if recording of landholdings is to proceed. What is to be the date for which the landholdings are to be formally recognised by the state? Should it be the time of contact, the beginning of the present century or the establishment of the Anglo-French Condominium, the date of independence or the date of survey? Each could be justified. Each would give a different pattern of ownership. And will there be mechanisms for transfer of ownership which might stand in lieu of older and no longer acceptable mechanisms such as force? An issue under political consideration in 1995 was how to adapt the customary land system to the needs of expanding urban areas. Should leaseholds be allowed and if so, on what conditions? Elections and political turmoil have left the matter open in Vanuatu in 1996 but the same questions may also be asked in other countries and also remain unanswered.

Fiji is one country where such questions were answered in the late 1930s and the Native Land Trust Board (NLTB) was set up explicitly to regularise the leasing of Native Land, to protect Fijian interests, and to make unused land available for use by non-owners amongst both Fijian and other ethnic groups. A system of sanctioned leases was introduced and is controlled by the NLTB. The Board and the recorded owners receive specified shares of the rents. Some other countries have considered introducing comparable systems. Niue is a current example. But there is little uniformity within the region, except that in a number of countries outright alienation is not permitted and leasehold arrangements may be complex and difficult to establish.

Despite the rigidity which has been introduced into codified or constitutionally sanctioned customary systems, extra-legal change has occurred in many areas. Pragmatism has often outweighed legality. The NLTB system worked relatively well in Fiji for some decades but is now under strain for several reasons. On the owners' side many feel that the system is too rigid, the rents they receive are too low in relation to the land's productivity, the chiefs receive too large a share of the rents, and the leases lock up the land in the hands of lessees for too long. Some have also voiced concern that the relevant act removes ultimate control of Native Land from the hands of the owning groups themselves. Lessees or would-be lessees have concerns about the difficulty of obtaining land, the security of leases and particularly the chances of renewal as large numbers of leases expire within the next few years. As a result, a whole range of extra-legal arrangements are now found. They include tenancies arranged directly between land-owners and farmers outside the NLTB system, with much higher rents and much shorter terms. Sharecropping is common though its legality may be questionable. Native Reserve land, which cannot be leased legally to non-Fijians, is rented and occupied by non-Fijians with the informal consent of the owners. And Fijians from outside the land-owning group may be allowed, under pseudo-traditional conventions, to reside on land over which they have no traditional rights. This last is a modern version of the old customary right of owners to accept outsiders as members of their community, but today the relationship may be basically commercial.

Within areas held under customary tenure and used by members of the owning group, change in practice has also occurred in several countries. The details vary but there are some relatively common features. Most reflect changing technological, economic and social

needs and are related to the changing context for individuals and groups who are involved in commercial rather than subsistence agriculture; who wish to employ wage labour rather than rely on the mechanism of reciprocity; who need land for urban housing; who seek to migrate to areas where they have no immediate kin; who wish to take advantage of the monetary value of land near urban areas; or who wish to ensure adequate land is available and inheritable by their immediate family.

One of the most common changes is what may be described as a process of privatising the customary land. This is usually based on the common traditional custom that if people have cleared and planted land, they may continue to control it as long as they continue to have it planted or in use, or intend to re-use it after a current fallow period. The adoption of long-term tree crops such as coconuts, cocoa, or coffee for commercial agriculture, or of pastoralism, placed an entirely new time span on this convention. Where a family's coconut requirements in a subsistence economy could be met from a few palms, the convention of separation of ownership of the palms and that of the land on which they grew created few problems. Others might plant food gardens under the scattered individually-owned palms. But once large areas were closely planted in a monocrop, say of coconuts, which might continue to be harvested for 50 years or more, the process of return to fallow and the possibility of reallocation was interrupted.

An old Chinese proverb states that 'long tenancy becomes property' (Elvin 1970:107) and this is what has been happening in a number of places in the Pacific islands. The usufruct of land now remains in the same family for decades, and as agricultural activities are increasingly carried out within the nuclear family, or with paid labour independent of the wider kin or residential group, holdings are increasingly seen as being under the long-term control of individuals or nuclear families. As Macpherson (1988) has said in the title of a paper on Western Samoa, 'the road to power is a chainsaw', and some use a chainsaw to clear a large area which is then put under pasture in order to gain personal, secure, family tenure. In effect traditional features of customary tenure are being used to produce non-traditional results, namely the establishment of long-term individual holdings. The process is not new in the region. Keesing (1934:280–281) noted such tendencies in Samoa in the 1930s and they were more clearly evident in the 1950s (Ward 1962); Chatterton (1974:15) reported such trends in Papua in the 1970s; they were evident in some forms in

Fiji in the late 1950s (Ward 1960); and I have already referred to the emergence of such forms in Vanuatu early this century (Rodman 1995). Elsewhere the process may be less clearly developed but shows signs of emerging, as in Solomon islands where Larmour (1984:8) suggests that 'trustees' named of behalf of their owning group may 'in time appropriate rights of ownership to themselves', as some have done in Papua New Guinea.

In the rather different case of Tonga, practice has also diverged from the post-constitutional 'custom' (James 1995). An extra-legal land market has developed. A number of older customary practices have been exploited to control and channel the succession to allotments. Informal leasing of parts of allotments is common. To counter problems of the inalienable nature of allotments in relation to provision of credit against the security of land, arrangements have been made for lending institutions to take control over of the management of enterprises or allotments in cases of default, but only until the loan involved has been worked off.

These evolutionary changes within customary systems provide a dilemma for governments. The individualisation of holdings of customary land may be extra-legal or illegal, but may reflect what more and more people want, and may be more in accord with the concepts of those fostering 'development'. But it carries the risk that a few will attain control of the majority of the land, and leave some community members virtually landless. Allied to customary ways of transferring control of land to others, such processes could well meet many of the supposed requirements for effective development. But few Pacific island governments seem to have the will to accept that customary tenure practices change, or to give some validation to such processes.

Having limited the extent to which customary land could be alienated, usually for the good paternalistic reason of protecting indigenous people from the socioeconomic effects of losing their land, colonial and independent governments have subsequently faced the need to make land available for enterprises which were not previously envisaged under customary tenure. Because of the rigidity installed into customary tenures it has usually been assumed that such land requirements had to be met outside the customary systems. Hence the use of the power, taken to itself by the state, to alienate customary land for state purposes and arrangements, such as those of the NLTB in Fiji, to regularise leases. In a number of countries it has proved difficult for

governments to manage the dual tenure systems and provide land for urban expansion or other non-customary activities. Vanuatu, Western Samoa and Niue have all been considering the problems at a political level in recent years but at present only Niue is endeavouring to introduce a new system.

One factor which tends to hold the official view of customary tenure in a backward-looking posture is the extent to which its maintenance has become an integral part of both the process of creating national or ethnic identity, and the maintenance of the status and power of élites, including political leaders. Politicians use customary land and the associated tenure arrangements as markers differentiating their own people from others, and as important components of custom and national identity. Land and tenure systems are seen and trumpeted as key elements in the 'Fijian way of life', *kastom, fa'a Samoa*, and custom which has been followed 'from time immemorial'. In arguing the need to maintain traditional ways, barriers are erected to official acknowledgment of the existence of, and the need for, change.

There are political risks in advocating changes in customary land tenure. There may also be advantage in maintaining the rather fluid *status quo* if one is able to use traditional mechanisms for personal benefit. How long the current divergences between custom, law and practice can be tolerated is an open question. Official recognition of the *de facto* changes, and their acceptance into a new widely accepted version of customary land arrangements, may be slow. Yet the fact that they are occurring shows how adaptable customary tenure can be in the face of new needs. Perhaps more scope exists to build on this flexibility, to examine current practice and try to give it recognition, rather than to try and replace customary systems on the false assumption that they allow open access and hence are likely to have damaging or inhibiting consequences. As McCay and Acheson (1987:34) say, 'by equating common property [or, I would add, customary tenure] with open access, the tragedy-of-the-commons approach ignores important social institutions and their roles in managing the commons. Moreover, its policy solutions—government intervention or privatisation—can weaken or demolish existing institutions and worsen or even create 'tragedies of the commons [or of customary land]'.

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