



Linking Land Tenure and Use for Shared Prosperity

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USING THE PLURALITY OF REGISTERS TO INVESTIGATE CONFLICT OVER CUSTOMARY LAND.

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Abstract

In indigenous cultures there are two recognized paradigms in which land and property are managed in modern times, the customary and the western. This *Plurality of Registers* has to be navigated when attempting to articulate disconnected worldviews between indigenous values and capitalist interests. Where they meet, the inalienable notions of land held by the customary stewards (or guardians) are very much at odds with the commodity view of the West that emphasises individual ownership. This paper critically examines the *tensions* that result when common law attempts to establish a commercial right (i.e. a property right) over customary land. What our Plurality of Registers highlights are discrete conceptions of knowing and valuing, with different social relationships, behaviour, permissibility, and consequences – some of which are categorical (typified general rules) and others ideological (more generalised). The above phenomena are sanctioned and perpetuated by a significant imbalance of power, which we see as central to conflict and misunderstanding over customary land. We integrate theories of power to demonstrate the imbalance manifested in our Plurality of Registers – which, of itself, is a significant contribution to both the literature and policy prescription dealing with customary land.

Key Words: Customary Land, Property Rights, Pluralism, Law, Power

Introduction

Contemporary land dealings in Melanesia cannot be detached from their colonial past. Land policies of colonial administrators created profound and lasting legacies through introduced legal institutions that asserted sovereignty, effectively subjugating customary title to the paradigm of western property law... a paradigm that endures beyond Independence in the post-colonial era. The apparent disconnect that exists between indigenous values and capitalist interests goes beyond legal pluralism, and is part of the ongoing polemic over land use in Melanesia.

Influences of globalism and modernity are placing greater emphasis on individual economic wealth accumulation and related pressures to derive economic benefits from customary land. This Westernization means that at times decisions are made for personal gain rather than necessarily being in the best interest of the land-owning group as a whole. There is a recognized clash between indigenous values and capitalism, which has been seen as an impediment to business development within the region. Despite the impact of individualism, most indigenous people see their relationships as coming from the land rather than using it as a commodity (Boydell et al., 2002). We contest that the customary nature of land ownership and control in the Pacific, whilst acknowledged and respected, does not prevent the optimum use of the land for development (in its many forms).

Twenty years ago in the concluding page of their edited volume on *Land, Custom and Practice in the South Pacific*, Hooper and Ward (1995, 264) flagged that “in coming decades further changes will occur in the values to which Pacific Island peoples adhere (or ignore) when they organise their societies, arrange their settlement patterns, choose their political leaders, and decide how they use land”. They highlighted that in the early years of independence Pacific Islanders had “a breathing space in which to ignore the contradictions between practice, custom and law in land tenure, and between the rhetoric of 'tradition' and what actually happens in villages, towns, squatter settlements and farms” (Hooper and Ward, 1995, 264). Central to this ‘breathing space’ is a realization that current land tenure does not follow tradition, the Pacific way or custom. This is because, according to Overton (1992, 326), “the processes of social

change are complicated by the persistence of traditional or neo-traditional social relations and the uneven impact of capitalism”.

In indigenous cultures there are two recognized paradigms in which land and property are managed in modern times, the customary and the western. This *Plurality of Registers* has to be navigated when attempting to articulate disconnected worldviews between indigenous values and capitalist interests. This plurality is in many ways central to the conflict between the development agenda and notions of tradition and/or neo-tradition. Where they meet, the inalienable notions of land held by the customary stewards (or guardians) are very much at odds with the commodity view of the West that emphasizes individual ownership. In this research we take an innovative approach by attempting to leave the customary structure intact whilst finding less disruptive options for how the two registers can evolve and overlap to satisfy a pro-development and economic growth agenda.

Hence, our research design is one of phenomenological transdisciplinarity, which implies our goal is to build models to connect theory to observed reality, allowing us to inform potential policy outcomes and possible legislative refinements. The theory is grounded in legal discourse, which is drawn from the array of documented legislation, grey literature and case law. We test this evidence against the observed reality.

We apply these interpretations to what we refer to as the Plurality of Registers when attempting to articulate disconnected worldviews between indigenous values and capitalist interests. What our Plurality of Registers highlights are discrete conceptions of knowing and valuing, with different social relationships, behavior, permissibility, and consequences – some of which are categorical (typified general rules) and others ideological (more generalized). The customary value of land that is used for subsistence purposes and which retains strong spiritual ties to the ancestors whilst providing sustainable stewardship for future generations is intangible. Yet, in western neo-classical economic terms, which ground notions of value as economic rent, or surplus of production, such customary subsistence land has no value. There is no problem with these plural worldviews... until they meet. Moreover, where they meet, the inalienable notions

of land held by the customary stewards are very much at odds with the commodity view of the West that emphasizes individual ownership.

The above phenomena are sanctioned and perpetuated by a significant imbalance of power, which we see as central to conflict and misunderstanding over customary land. We integrate theories of power to demonstrate the imbalance manifested in our Plurality of Registers – which, of itself, is a significant contribution to both the literature and policy prescription dealing with customary land.

We present this paper in seven sections. Following this introduction, we elaborate in the second section on the ‘Plurality of Registers’. The third section engages with flawed notions of property rights, whilst the fourth section elaborates on our transdisciplinary approach. We present key data on the indigenous perspective and customary register in the fifth section, which we analyze in the sixth section. The seventh section presents our findings and conclusions, highlighting the need for caution when attempting to harmonize the plural registers.

The Plurality of Registers

The disconnect that exists between indigenous values and capitalist interests goes beyond legal pluralism (for example, on legal pluralism see Hooker, 1975, Griffiths, 1986), and is part of the on-going polemic over land use in Melanesia, with much of the debate driven by special interest groups seeking access to customary land (Anderson, 2006, 138). Hughes (2003, 346) argues that modern constitutionalism clouds the issue of identity emphasized in indigenous values. The state cannot be merely conceived of in abstract institutional terms, as the assumption of uniformity under a coherent body of law is at odds with the social and cultural reality of PICs. However, we do share the view of the von Benda-Beckmann’s (2006, 13) that “along with many anthropologists, we think that the term *law* can be used as an analytical concept”. They go on to articulate law in both cognitive terms (how things are, and why they are) and normative terms (how things could or should be). At the 2012 World Bank Land and Poverty Conference, Ulai Baya and Spike Boydell applied these interpretations to what they refer to as the *Plurality of*

Registers (Boydell and Baya, 2012) when attempting to articulate disconnected worldviews between indigenous values and capitalist interests (see Figure 1).

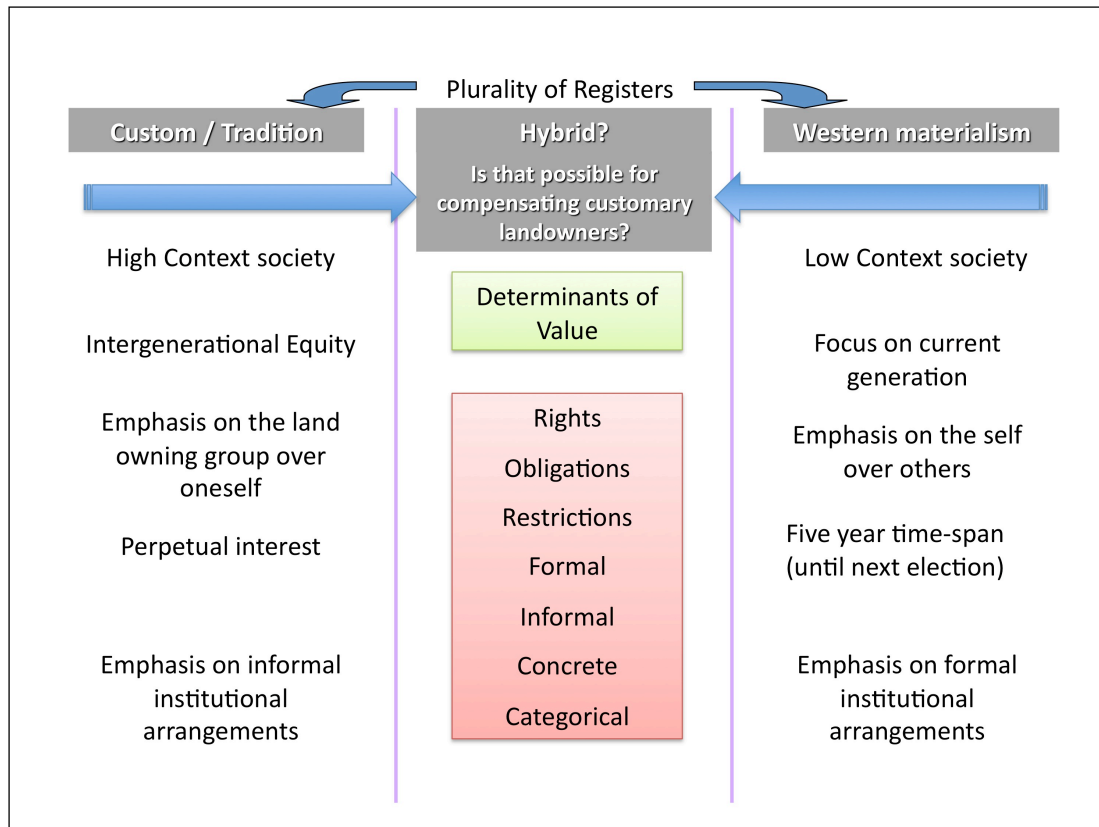


Figure 1: Plurality of Registers (Source: Boydell & Baya 2012)

To elaborate on our '*Plurality of Registers*' it is helpful to explain our summary content. When we speak of notions of high-context in customary and traditional societies and contrast this with notions of low-context in western societies, we are drawing on the distinction made between low-context and high-context cultures in conflict management (see (Burgess and Burgess, 1997)). There are major challenges to conflict management when a straightforward low-context (US, Canada, Western Europe, Anglo-Australian) approach is applied to a culturally sensitive high-context society (traditional, collectivist, honor based cultures e.g. Japan, China, Latin America, and Pacific Islands). The western approach identifies conflict as a struggle between competing interest and something to be addressed in a businesslike way. Language is explicit and the conflict is tackled head-on, adopting competitive (positional) bargaining or integrative (problem-solving) negotiation. This brash approach contrasts harshly with the high-context

identification of conflict as a problem of relationships as well as interests. In such circumstances, a relationship-oriented process must encompass indirect and non-verbal communication to protect relationships and face. Accordingly, traditional societies often prefer locals to act as intermediaries, even though they may be party to the conflict and partial to one or other side, based on community trust and respect. Such individuals are seen to have a longer-term interest in enduring solutions for the greater good of the society than impartial outsiders do.

Likewise, we highlight the distinction between the long-term view of custom and tradition for intergenerational equity and contrast this with the western development driven focus on the current generation. Conceptually, custom and tradition is about sustainable livelihoods and lifestyles, which aim to leave the planet ideally in a better condition (and definitely no more depleted) than they found it. Inherently, at a spiritual level, this approach to sustainability respects the spirits of the ancestors and sees the current generation as the guardians or custodians (rather than 'owners' in a western context) of the land who have to ensure the enduring sustainability of the land for generations still to come. Conversely, western materialism sees land as a resource to be economically exploited to satisfy the needs of the current generation.

The group over self versus self over others has at its heart the distinction between collectivism in a customary/traditional society contrasted with the possessive individualism that is central to western economic theory. Whilst we offer the two extremes within Figure 1, there are obvious tensions at the nexus of custom and development, with family groups on both sides of the hypothetical divide striving to feed and educate their families and get ahead, whereas to some the collective experience in traditional societies can be seen as limiting familial development and taking the lowest economic denominator as the 'norm'. The situation is compounded (certainly in terms of conflict) when western commercial aspirations 'pick-off' individuals and families for favor without consultation with the wider clan or tribal group. Inevitably, whilst an approach sometimes favored by mining and commercial interests, it can result in political, tribal and familial conflict that can only serve to slow/limit access to land in the long term (as has been witnessed, for example, in the Goldridge Mine development in the Solomon Islands).

The timespan is critical. From a customary/traditional perspective, the relationship with the land is perpetual (for an elaboration on this point, refer to the soliloquy from Joel Simo included below) whereas commercial development is often limited by political timelines as short as an election cycle.

The final contradiction that we highlight is the dominance of informal institutional arrangements in custom and tradition versus the emphasis on formal institutional arrangements from the perspective of western materialism. As Farran and Paterson (2004, 3) highlight, one of the difficulties with any approach that looks at property as rights in the South Pacific is that “in English common law, the notion of property as rights is seen as the relationship between the individual – or legal person – and the thing”. A similar challenge is present in considering ownership from a Western and an indigenous perspective – the former being an individualistic paradigm, the latter often being grounded in communalism, prioritizing the relationship between native peoples and the land. Critically the dominant legal system is commonly that of the colonizer rather than that of the colonized, despite the paramountcy of customary laws being recognized in the constitutions of Melanesian countries at independence.

Flawed Property Rights

Imbedded in our ‘*Plurality of Registers*’ (see Figure 1 above) are the flawed property rights inhabiting the postcolonial Pacific Island countries and indeed almost all postcolonial countries globally. As Gandhi (1998, 5) highlights, the aftermath of colonization “is marked by the range of ambivalent cultural moods and formations which accompany periods of transition and translation”. Land as viewed through the lens of Western materialism does not cease with postcolonial independence, and this is the tragedy of the colonial aftermath. The selective mix of customary land with flawed postcolonial property rights in many (now) independent countries in the Pacific and elsewhere is the result of a persistent and pervasive colonial aftermath. Flawed property rights are derived from the postcolonial milieu, which Gandhi (1998, 22) reminds us is derived from two narratives “the seductive narrative of power, and alongside that the counter-narrative of the colonised”.

Fundamental structural flaws in postcolonial property have their root in the harsh reality there was no misunderstanding by European colonizers that dispossession hinged on the use of law to create or negate customary laws - notably the vast and complex array of cultural and spiritual values imbedded in customary/traditional land tenures. We share with Forman and Kedar (2004, 810) the view “one relatively constant element of dispossession has been the use of law in effecting and/or normalising the outcome. The central role of legislation in such situations derives from the fact that the provision, or, alternatively, the transformation or negation of property rights, is invariably institutionalized by some type of law”. In support, Diamond (2013, 99) contrasts state justice with non-state justice, which can be alternatively described as the contrast between Western state legal regimes with customary/traditional legal regimes, highlighting the sober fact that “the state has less or no interest in the overriding goal of justice in small non-state societies”. Hence, we view customary land tenures as a crucial expression of that society’s maintenance of interpersonal relationships, unlike the Western economic impulse behind any exploitative dealings with land. This contrast lies at the heart of the flawed property rights evident in our *‘Plurality of Registers’*, the genealogy of which is the continuing postcolonial aftermath.

We concur with Diamond’s view (2013, 45) that permission to access to non-exclusive land-based resources such as food or potable water in non-state customary/traditional societies is essentially an arrangement that “becomes an exchange based on reciprocity and mutual benefit”. The contrast with western materialism that sees land as a resource to be economically exploited to satisfy the needs of the current exclusive landholder is stark.

The value of land as a shared natural resource in the guardianship of the current members of the customary/traditional society sits in contradistinction with the postcolonial aftermath, which continues to reflect that the property of the conquered is to be regarded as “public land” for redistribution (Kedar 2003, 414). Further, the imposition of inappropriate colonial property rights or regimes freeze any redistributions of property away from customary/traditional tenure holders. Such redistributions are nevertheless maintained in postcolonial independence, Kedar (2003, 413) highlighting that “the founders control most land resources. Immigrants usually receive only a small part; while indigenous and alien groups, who often serve as the main contributors of

land, are generally denied a fair share of its allocation. By freezing this ‘initial’ spatial arrangement, the new property system facilitates the perpetuation over generations of the ethnocratic power structure”.

The resultant flawed property rights become remarkably robust in postcolonial independence with the received colonial law and post independence law “effecting and/or normalizing the outcome” (Forman & Kedar 2004, 810).

Transdisciplinarity

By taking a transdisciplinary approach, the *Plurality of Registers* highlights discrete conceptions of knowing and valuing, each with different social relationships, behavior, permissibility, and consequences – some of which are categorical (typified general rules) and others ideological (more generalized). “Law in this sense is a generic term that comprises a variety of social phenomena (concepts, rules, principles, procedures, regulations of different sorts, relationships, decisions) at different levels of social organisation” (von Benda-Beckmann and von Benda-Beckmann, 2006, 13). The customary value of land that is used for subsistence purposes and retains strong spiritual ties to the ancestors whilst providing sustainable stewardship for future generations is intangible. Yet, in Western neo-classical economic terms, which ground notions of value as economic rent or surplus of production, such customary subsistence land has no value. There is no problem with these plural worldviews... until they meet. Where they meet, the inalienable notions of land held by the customary stewards are very much at odds with the commodity view of the West that emphasizes individual ownership. The reality is that there is some overlap between the extremes we demonstrate in Figure 1. Put in context, it is this overlap between worldviews that we have to address if we are to seek equitable compensation when – supported by governments relying on their constitutional right to mineral resources (or not, in the case of PNG) – mining interests seek to exploit the resources in, on or under land held by customary owners.

At a time when external influences seek access to customary land in Melanesia for commercial gain (including mineral exploration, forestry, palm oil, agriculture and tourism), the question

arises as to whom, or what institutional arrangement, should help customary landowners administer their land. Currently, limited, moderate or substantive solutions are available and these differ significantly from country to country.

In general, Pacific Island countries retain the traditional belief that the superior interest in the land should not be sold, but retained to ensure intergenerational equity and connection to place. However, we question if it is really a contemporary belief rather than a traditional belief, given that as Ward (1995, 208) reminds us, the concept of inalienability was 'invented' in the 1870s in Fiji and became enshrined (that is, it became 'tradition') through an Ordinance in 1912. Whilst Ward offers an interesting contradiction to the accepted notion of contemporary tradition, there is no doubt that the issues surrounding alienability (or, for that matter, the creation of a subsidiary leasehold interest) give rise to on-going tensions.

Indigenous Understanding

These tensions have resulted in the establishment of the Melanesian Indigenous Land Defence Alliance (MILDA), as an advocacy collective for Pacific Islanders to question and challenge the imposition of the 'Western Way' over the 'Pacific Way'. The Alliance was formalized in 2009, and has gained traction internationally through speaking tours (supported by AidWATCH) of informed and respected Pacific Islanders who eloquently articulate the underlying ground swell of concern amongst grassroots islander communities. Below, we draw directly on the insights of two of the founders of MILDA, Joel Simo and Ralph Regenvanu – insights that attest to the challenges and concerns they confront in the face of development in its many forms.

The following transcript from Joel Simo, Director of the Land Desk at the Vanuatu Cultural Centre, is taken from his response to the question 'what is customary land?', posed at an AidWATCH meeting in Sydney on 14 November 2014, as part of the MILDA speaking tour.

“Customary tenure, why it's worth fighting for, to protect. It has a lot of meaning for us. At independence we struggled for that, we fought for it and then we got it. The main issue for us was that land had to return to the customary landowners. Our founding

fathers ensured that land is enshrined in the constitution and belongs to the customary people. The roots of custom form the basis of ownership, not modern laws.

So why we value traditional lands so much in Melanesia is because land belongs to every member of the family, or every member of the clan or every member of the tribe. It does not belong to an individual.

Land is 'our' land, not 'my' land. The concept of individual ownership is a new concept in the region and Melanesia. We do not own land. We have the right to look after land for the benefit of our children. Land is not a commodity. One of the big reasons that we have tried to defend this is because the large part of the population in Melanesia is rural-based – they live off the land. And everything that comes from the land sustains them.

The traditional economy, that is their gardens, their houses, then mats, their pigs, their chickens or whatever belongs to the community – which is what we call the traditional economy. This sustains them. If they do not have any money in their pockets they still survive – they have a roof over their head and they still have food on the table. These are things that are very important, and all these things are taken from the land – not cash.

One of the things that I think GDP fails to understand is that GDP is in monetary terms only but ignores what the bulk of the population is living off in the region. These people are still living happily. There may not be any hospitals out in the community but people still have food, they still have the basics – what they need in life. That is why people are so attached to land. Land and people are one. They are inseparable. Land is life for us in Melanesia, especially where I come from in Vanuatu.

The other part of it is this idea of saying that we have to bring development into the community so that it can provide employment, it can provide jobs to people. For us, land is the biggest employer as despite the fact that you do not have a job or you are not educated, you still have some place to work, to sustain yourself.

With this, I think this is one of the main reasons that we have to defend what has been sustaining us for thousands of years. What we are seeing now is this idea that you have to free up land for development purposes. In order to do that we have to register those lands. And that is taking away the land from its traditional tenure to a new model of land that is 'ownership'. But land is 'our' land, not 'my' land. Once we take it out of traditional tenure to this new system it becomes my land, and no longer our land. That's where disputes arise. That's where conflicts arise. Because one person in the community gets the land title and becomes a land owner, so other members of the community will retaliate because they cannot survive without the land.

So these are the new things that are coming and that are gradually displacing people off their land. In Melanesia, specifically for the rural people, there is no landlessness. Everybody has somewhere to build a house. Everyone has somewhere to make a garden to survive. So that, in Melanesia land is our safety net. You take it away from us and you only have one option – to find a paid job. Good luck with finding that. And if you do, you have nowhere to go.

I guess that this is one of the main reasons that there is no real poverty, if I can put it that way, in the rural community. And there they have houses, they have food, they have water – maybe it's not coming from the tap, but still it's a running stream, it's everything. These things are life. If the land is taken away from these people it raises the question of survival. How are they going to survive, when they have not been taught how to survive in monetary terms. They are not taught how to be independent when using money. This has impacted on the community in many negative ways, when you put land into an individual realm – when it is no longer our land, it excludes others. You hold a lease, alienating the land and excluding others – excluding people from the land that has been part and parcel of their life for generations.

The model of registration is being pushed by states, it is being pushed by government, it is being pushed by aid donors, to free up land so that developments can come in. Then again this raises the question of development for whom? What do we mean when we talk

about development in our communities – this is a question that needs to be addressed properly? With this sort of model of land registration the argument is that it will push development in the country. But if you look at this carefully, you have to displace people from the land so that these things can take place at the expense of the customary landowners so that others can benefit while the bulk of the population have been feeding off of land – and their land, not my land – are displaced.

These are the reasons why in Vanuatu and Melanesia we talk a lot about land issues, because land is our life. Land is ours, not mine. When you put it into an individual realm it becomes saleable, transferable. You put it in a legal framework and it becomes transferable and you will never ever get it back to its traditional understanding where it is indivisible. Once it has gone, it's gone.”

Ralph Regenvanu (currently the Minister for Land in the Government of Vanuatu) speaking at the launch of the Melanesian Indigenous Land Defence Alliance in June 2009 (Regenvanu, 2009), highlights:

“Development has become a very terrible word because it means, it can be used in a way that covers up so much hidden agendas and mainly agendas to do with recolonisation and people coming in. These days development means basically foreign investment. The kind of development that we need in Melanesia and in Vanuatu is locally controlled development, I mean locally controlled enhancement of our opportunities – better cash incomes, better education, better health outcomes, improved food security that kind of thing. It is only possible for landowners in that in Melanesia to get those types of outcomes if they retain control of the land. As soon as they engage with Western laws and land alienation, they are getting into deep water in terms of not understanding what these laws are and what their rights are in terms of these laws.”

What these candid insights from Simo and Regenvanu highlight are the *tensions* that result when common law attempts to establish a commercial right (i.e. a property right) over customary land. They also allow us to identify several *contradictions*:

- Traditional legal research can be distinguished from the research approach used for property rights, which of necessity is at a jurisprudential level indistinguishable as a part of broader social sciences. Economic rights can be contrasted from legal rights permitting the identification of flawed often-contradictory property rights, which are a legacy of colonial history. As stated earlier, property rights in many postcolonial common law countries in Melanesia (and elsewhere) evidence cultural blindness with fundamental flaws in property relationships. An extraordinary depth of research is required to comprehend the complex matrix of embedded property rights further requiring an interdisciplinary appreciation of colonial history, customary law and culture, and the pragmatic albeit often inappropriate or inadequate responses of post-colonial legal regimes.
- The opportunistic selection of local customary laws to advance commercial exploitation of natural resources such as minerals and forests is rooted in the legacy of colonial history. The adoption of selected or rebadged customary laws to suit economic exploitation of natural resources has been justified on the grounds of complexity or inappropriateness of the overall customary milieu. The integrity of customary values is not respected, nor worthy of respect in such capitalist endeavors, merely a hindrance to exploitation.

Indeed, the reflections and lived experiences of ni-Vanuatu customary owners on tensions arising from the interplay of the plurality of registers is neither an isolated event nor a rare one. It is also not limited to the Pacific and Melanesia alone. Given the rising wave of cultural renaissance, confirmation of cultural identity and frequent dealings with communally owned resources, similar rhetoric can be heard amongst New Zealand Maoris and Australian Aborigines today. The same holds true for customary owners around the world.

Given the pervasive nature of the complex interplay between the registers, one must not lose sight of the conceptually perfect existence of each of the individual registers (the customary and the western) standing alone. However, within each there are multiple levels of complexity when one views the inherent relationships through rules of subordination and the powers of recognition. This is especially manifest when subjected to forces that determine and limit the

rights, obligations and restrictions on respective stakeholders, i.e. what is deemed transferable and acceptable from the customary register to the western register.

Simply stated, there is no impetus for the transfer of incidents of property if notions of property are not institutionally acceptable and recognizable as “a thing” within the other register. For example, in the customary register there is a strong emphasis on intangible value that is at odds with the focus on economic value in the western register. In this context, the all-inclusive nature of customary ownership has not changed since time immemorial. It has always been observed and consistently acknowledged through the ages. Quintessentially, it lacks the definitive and practical certainty that is fundamental to commercial ventures. This subsisting generalization is in fact theory and does not preclude the ability of land held under customary tenure or informal institutional arrangements to adequately support long term commercial undertakings as proven in most long term commercial leases in Fiji. Indeed, when properly drafted in a way that recognizes the perpetual superior interest of customary landowners, leases offer a key tool to bridge the plurality of registers.

We would contest that the justified criticisms of leases as institutional arrangements proffered by Simo and Regenvanu are attributable to the inappropriate drafting of leases to favor western and expatriate interests that are manifest in Vanuatu. In Fiji, the Native Lands Trust Board (now iTaukei Lands Trust Board) was established in the 1940s to act as a trustee for the customary landowners and provide a workable interface between both the customary and western registers. Vanuatu, like its Solomon and PNG neighbors have lacked such an intermediary with professional expertise in land management and valuation. Papua New Guinea has attempted to use the Minister of Lands as a way of taking informal institutional arrangements and formalizing them through a Lease-Leaseback system, which sadly has been abused as witnessed by the controversy over Special Agricultural and Business Leases (SABLs) and disputes over the authority of Incorporated Land Groups (ILGs).

As consistently observed, relations between the plurality of register burdens the customary context with connections, dimensions, relationships and values that are unrecognizable from a contemporary western ideology. Such unrecognized incidences of property rights, obligations,

traditions and restrictions simply fail the transfer eligibility test. Critically, it is essential that the dimensions of difference (i.e. the unknown or intangible) must remain dormant in residual state until such time as new paradigm thinking emerges that pushes the boundaries of what is considered 'property' within a western concept – thus deeming customary dimensions both convenient and acceptable. The emergence of property in thin air (e.g. the right to broadcast) and the emergence of carbon sequestration are contemporary examples of the western register being flexible and adapting to changing notions of property. Essentially these are merely incidents of the traditional customary property matrix, providing the centerpiece of its all-inclusive definition, before the expansion, acceptance, and dominance of recent western concepts of commoditization and possessive individualism. In order to inform the understanding of observers and practitioners alike as a possible diagnostic tool for the amicable resolution to future land and property conflicts, all parties must have an open mind. Definition and dogma in terms of detail and definitive description must be therefore discouraged in favor of embracing transdisciplinary logic with the quest to understand notions of both self and other.

The above backdrop then provides an interesting canvas for the value considerations of property within the customary register. Valuation methodologies aside, the appropriate question to ask is what are we valuing in terms of the constituents parts of the customary register? For example, is the valuation representative enough of the other unknown (rights and interests) that are attached to land by virtue of inalienability – these are inherent values and dimensions central to the notion of custom and tradition of any given parcel of land but not necessary aspects that a prospective lessee may use or even be aware of.

Commonly these unknown values and dimensions are not inventoried, and can catalyze significant tension and conflict when physical disconnection (through exclusive possession) is enforced on the customary owners and others who have special standing traditional arrangements with the traditional owners of the property. This highlights the complexity associated with the customary register *per se* and the limitations to which it is subjected, initiated by way of dealings with customary interests through the western register. Whether the value / compensation assigned during such dealings is representative enough of customary property rights and all its complexities, only time will tell. Importantly, recent improvements in value consideration has

come about through willingness of some investors and tenants to afford customary properties an open mind regarding the understanding associated with its composite make up.

Despite the evolving advances in the valuation customary lands, one cannot confidently refer to statements of value as near absolutes. Perhaps, the first challenge is to understand the fluidity of constituent parts of the customary register together with the recognition of its multi-dimensional spatiality and associated property rights. In this regard there are examples of innovative land use agreements to secure the interest of both customary and western parties that have worked seamlessly in part of native title Australia. This has come about through nationwide recognition of native title with properly funded institutions to help in its understanding and facilitation into the wider community. Customary land therefore is not inimical to promising commercial enterprise.

Complications, contradictions and tensions associated with commercial endeavors using formal institutional arrangements over customary land will continue well into the future. Where land is held under a customary system (or register) and is protected under the formal institutional structure of Constitution arrangements, as in the case of most Pacific Island States and Latin America and for the African Continent, the authority and perpetual nature of customary ownership becomes a non- negotiable inviolable item. To advocate for the conversion of customary interests into the western register through subtle packaging of title registration as a vehicle to facilitate commoditization is an exercise fraught with danger and rarely ends in positive intergenerational benefits for the stewards of customary land. Herein lies the conundrum of having good intentions for today's needs whilst speculating on the likelihood of its impact on the future of your people. For example, the landowning group that traditionally own Suva Peninsula, the current site of Suva city, Fiji's capital today is a case in point. The tide of colonial history has severed all but historical written reference to major parts of their traditional country. Today the traditional stewards of Suva are settled on a token area squeezed upon a rocky headland across the bay from the city. Whilst attempts to redress historical actions that saw the transfer of their traditional lands into the western register remain locked in the formal institution of the courts, it is psychologically disturbing for the customary rights holders to live with the disconnect with that land as a moment that will never return, especially when this decision was

not their own. In the words of a customary landowner disenfranchised from the Suva Peninsula, *“it is a beautiful view, but every morning for breakfast - it is a bread of sorrow”*.

Analysis

We share the view of the von Benda-Beckmann's (2006, 12) that 'the term law can be used as an analytical concept' to articulate law in both cognitive terms (how things are, and why they are) and normative terms (how things could or should be). We apply these interpretations to what we refer to as the Plurality of Registers when attempting to articulate disconnected worldviews between intrinsic indigenous values and postcolonial capitalist notions of land in particular. Arguably, the Pacific Island countries have been the most consistent recipients of the colonial legacies of flawed property rights, producing some of the worst unsustainable use of natural resources, especially of land, timber and fisheries. The European vision of the South Pacific was both romantic but also firmly resource driven, Smith (1988, 2) observing that “so well known did the islands of the South Seas become following the publicity given to Cook's voyages that the natural productions and native peoples of the Pacific became better known to European scientists than the natural productions and peoples of many less distant regions”.

Further, in contrast to colonies elsewhere Smith notes “the archipelagos of the Pacific yielded information of value to the ocean-going scientist far more readily than did the continental masses of Asia, Africa, and America to their land-travelling colleagues”.

The natural fecundity of the Pacific Islands was quickly recognized by the early European explorers, and it is instructive traditional owners occupying the various major Pacific islands such as Australia, Papua New Guinea and New Zealand were rapidly dispossessed by the settler societies. Again, we see the thesis of Forman and Kedar (2004, 810) being revealed with disconnected settler law ensuring that the outcome would benefit the colonizers, and not the Indigenes. Australia, adjacent Papua New Guinea and New Zealand all share a history of European colonization, the Australian and New Zealand legacy being wholly British, while Papua New Guinea was variously annexed by Britain, Germany and subsequently Australia.

Importantly, the historic roots of property rights in many countries beyond Europe are the legacy of a measured colonial process that resulted in the issue and registration of flawed property rights. How these legal property rights were created in the colonial (settler) milieu will reveal these rights have either been reinforced or modified by subsequent post-colonial statutes and case law. Furthermore, property rights in many postcolonial countries have been created with cultural blindness resulting in a hiatus of sometimes bizarre, fundamentally flawed property relationships between modern sovereign nations. Plurality or duality of property rights under such legal regimes is merely a recognition of the imperfect legal translation that has occurred and the diffusion of law from the colonizing settler society, notably the uncomfortable reality of a mostly uni-directional transfer of institutions and rules.

We recognize the pervasive impact of flawed postcolonial legal regimes is not evident just in the Pacific Island countries but notably in post apartheid South Africa where endemic gender disadvantage is readily apparent. In particular, conflict emerged over extraordinary powers that were conferred on traditional male leaders when the *Communal Land Rights Bill* was passed in 2004. The legislation was broadly criticized in the press (African Business 2004, 29) at the time as “it will effectively place land in the hands of traditional leaders, sideline ordinary land-hungry citizens and have severe gender implications. The bill seeks to rectify the inequities of the 1913 Land Act but, say its many challengers, it will merely entrench them, The groundswell of opposition to the bill ranges from state institutions, non-government organizations, trades unions, academics, lawyers and women’s rights movements”. The gender implications of the 2004 *Communal Land Rights Bill* were frankly not unexpected, given the continuing parlous state of pan-African women’s land rights rooted in the continuing postcolonial aftermath.

Malcolm Voyce (2003, p.250) argues that “property developers” do not simply take advantage of property rights in the legal (formal) sphere, but also refers to the “social side of property”. They do so to achieve socially approved power over a socially valued resource, with the institutional arrangements controlling and shaping the social relationships and experiences of people. As such, Voyce (2003, p.250) draws a distinction between “legal notions of property (such as ownership, alienation and exclusion)” which he terms the “narrow view” and “property in the sense of a social idea” (or the wider view).

Everingham (2001), who appears influential in the work of Voyce, argues that spatial practices govern social spaces through both material practices and spatial representations. As Everingham argues, while inclusion is fundamental to contemporary neoliberal policy, such social policy “has exclusionary, ideologically-grounded effects”.

The legal geographer Nicholas Blomley (2008) acknowledges that there are many examples across the world where both the state and private actors use the power private property to exclude, displace, evict and remove the poor. But, Blomley goes on to note (at pp.319-320), that if “private property means the right to exclude others from the benefits of a resource, common property can be understood as the right to not be excluded from the use of a thing”.

When discussing this ability to exclude and displace based on the institutional arrangements, we must turn to an inquiry of ‘power’. We can begin by extending Max Weber’s (1978, p.53) classic definition of power as “the probability that one actor within a social relationship will be in a position to carry out his [or her] own will despite resistance...” by also understanding power as the ability to do something or act in a particular way, to control the environment, including influencing the behavior and the actions of others.

Steven Lukes (1978, p.653) suggests power is an “asymmetrical relationship that can be conceptualized in terms of control, dependence or inequality”. He challenges Weber’s definition as being “incompatible with all three”. In his earlier work, Lukes (1974) outlines two dimensions through which power had been understood in the earlier part of the twentieth century [notably from a western rather than customary perspective]. The first two dimensions were limited to power that could be seen and possibly measured. Lukes’ (1974) first dimension is power through decision-making that is often exercised by formal institutions with the desired outcomes measured. The second dimension includes power in not only decision-making but also agenda setting, influencing both formal and informal institutions by both inducement and coercion.

To this, Lukes added a third form of power that built on the work of Gramsci (1971) and Althusser (1977). In many ways this work evolved alongside of the writing of Foucault (1977) and serves as a good introduction to his thoughts on power. Beyond the analysis of what is observable, Lukes saw this third dimension as being about studying hidden forces that constrain the agenda and make it ideological in nature. Lukes (1974, p.28) noted that:

“Is it not the supreme and most insidious exercise of power to prevent people, to whatever degree, from having grievances by shaping their perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things, either because they can see or imagine no alternative to it, or because they see it as natural and unchangeable, or because they value it as divinely ordained and beneficial?”

Within Lukes’ third dimension, there is a sense that as we forsake our power and relinquish the decisions to others so this becomes the norm, or routine. Yet in Melanesia there remains a tension between customary institutions (chiefly, tribal, familial and clan groups) and the supplanted political administrations of post-colonial island states. The latter are grounded in the understanding of the west and thus often interpreted as low-context, in contrast with the high-context institutional arrangements that endure in the register of custom and tradition. Critically, and in contrast with Lukes’ western influence thought, customary ‘landowners’ are strongly averse to forsaking their power or relinquishing their decisions. The only country where the relinquishment of decision-making has to a degree been normalized is Fiji, where customary land has been held in trust and administered by the Native Lands Trust Board (now the iTaukei Land Trust Board) since the 1940s.

Conclusions

The research in this paper identifies:

- In terms of capacity building, the need to uncover and explain the spatiolegal milieu within which flawed property rights persist in many post colonial common law countries in Melanesia (and elsewhere). Between nations and within nations, legal pluralism can be both similar and yet markedly different (Tamanaha 2007, 374) reflecting the moment (or moments) of transplantation and diffusion of property law in particular.

- As post-colonial common law countries seek to achieve greater economic independence, there is a crucial (and necessary) interaction between received legal institutions and values, and the local customary legal institutions and values. Selective or even fictitious interpretation of the customary dimensions has only increased the need for a genuine accommodation of plurality.
- Natural resources such as minerals, forests and marine stock are usually held under local customary law and values, and yet their sustainable exploitation aimed at greater economic independence now requires this accommodation of plurality to be achieved through focused legal and policy innovation.
- The necessary overlay of globally accepted commercial law and rules to permit genuine shared prosperity requires a complex interaction between the received colonial (settler) law as reinforced or modified by subsequent post-colonial statutes and case law. The extant legal pluralism currently creates uncertainty, yet has raised a need for alternative legal approaches which provide security of tenure for sustainable exploitation of natural resources within a regime that does not jeopardize local customary law and values.

At the outset, we noted the legacy of previously dominant colonial tenure models dramatically impinge upon postcolonial independent Melanesian countries. It is often asserted the primary legacy of European colonization was transplanting of the settler society law, however a less generous interpretation is a pervasive paradigm of flawed property rights in natural resources to the continuing disadvantage of Indigenous peoples.

Property rights in former colonies evidence fundamental structural flaws that are being exploited to accommodate the demands of manifest external self-interest. Similarly, we recognize the peremptory imposition of systems of tenure for natural resources substituting for traditional/customary settled property rights, to meet the demands of international business investment.

In Australia, New Zealand and elsewhere in the Pacific milieu, the ancient legal regimes of the Indigenous peoples of such countries have been marginalized with traditional rights and values effectively proscribed except when the settler societies deem otherwise. The use of law by such

societies in “effecting and /or normalizing” (Forman and Kedar 2004, 810) the dispossession of Indigenous peoples continues apace in the Pacific, albeit more subtly.

All of the above is the undeniable aftermath of colonialism, and candidly no amount of *émigré boosterism* will transform post-colonial property rights into a simulacrum of English or European land law. The legacy of previously dominant colonial tenure models only has relevance and worth if it can provide overall utility *ex pede Herculem*,¹ and our paper demonstrates such property rights are now so broadly problematic that they should be dispensed with. Such relinquishment appears overdue. These flawed rights whilst a legacy of colonization and arguably Western hegemony expose a pervasive cultural and value divide between settler and Indigenous societies.

To advocate for the continuing parallel symbiosis of the two registers is a decision that policy makers need to ponder on the grounds of avoiding landlessness with zero option poverty. To counterbalance that with the ever-increasing need to access and use potentially economically productive land requires innovative solutions that do not compromise the integral parts of the customary property systems. The co-existence of rights and interests was achieved during pre-colonial days in a way that fostered community spirit and collaborative effort for a common purpose. The existing multitude of rights over a common aspect of customary property, such as fishing grounds and farmlands, were historically properly managed with minimal fuss. There is room for possible adaptation and adoption of the lessons of traditional relationships into contemporary commercial relationships today where the liberation of customary land for economic production purposes must be diligently appraised and designed fit for purpose.

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¹ From a part we can divine the whole.

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