DON PATERSON AND THE LAW OF THE LAND

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INTRODUCTION

I first encountered Don fleetingly in Suva in 1996 while I was at the University of the South Pacific as a Visiting Fellow. He occupied an office to the right of the door to what was then the Law School. He was very reserved. Indeed, I'm not sure that he really enjoyed being in Fiji and must have been relieved when the Law School moved to the new campus at Emalus, Port Vila, a couple of years later. When I became a full-time staff member of the Law School in 1999, we gradually got to know each other better and over the years co-authored and co-edited two books: *South Pacific Property Law* (2004) and *South Pacific Land Systems* (2013). We also had numerous conversations about land law, both customary land tenure and introduced law. Our common ground was therefore the laws that governed property in general and land in particular. This contribution reflects this shared interest by drawing attention to some recent developments. Before doing so it might be useful for readers not familiar with land law in the region to sketch out some background.

BACKGROUND

In most Pacific island countries, the majority of land (80-90%) is held under customary land tenure.[1] This means that land rights are determined by kinship links and status within lineages. Claims to land are based on complex genealogies and customs rather than on documents of title. This often means that it is extremely difficult to identify who is entitled to interests in the land, or whose consents are needed for any transactions relating to the land. Land litigation is frequent and often lengthy and protracted. Some land is passed down through male lines of succession (patrilineally) some through female lines (matrilineally) and some via both – as in Cook Islands and Niue - or variably depending on historic events and circumstance. The situation in Fiji is slightly different in so far as all land owned by indigenous Fijians (iTaukei) – formerly referred to as Native land, is managed by the iTaukei Land Trust Board on behalf of the land-owning units. The situation is also different in Tonga where all land is owned by the Crown, with estates granted to nobles who in turn grant land to male commoners. In Fiji and Samoa there is a small percentage of freehold land. Elsewhere freehold has been abolished or in practice no longer exists. In all Pacific countries, except Kiribati and New Caledonia, there is very limited state owned or public law which constrains the ability of governments to construct infrastructure or provide land for utilities. Under customary land tenure land tends to

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[1] An exception is Kiribati where around 70% of the land is owned by the state. See Don Paterson and Batiwate Itibita, 'Kiribati' in Don Paterson and Sue Farran, *South Pacific Land Systems* (University of the South Pacific Press 2013) 93-105.

be held collectively rather than individually, although decisions regarding the management and use of the land may be made by individuals.

The laws which govern land were shaped by colonial influences in a number of ways. Firstly, the colonial administration tended to leave customary land tenure in place and in a number of Pacific island countries introduced measures to restrict the sale of land to outsiders, largely because of the fear of landless populations. Secondly, the alien concepts of freehold and leasehold were introduced. In customary land tenure, while the language of ownership may be used, the tenure is essentially that of custodians or guardians of the land in a chain or relationships that link ancestors and forbears with the present generation who hold the land for future generations. Where freehold has been abolished – as in Vanuatu at independence in 1980, or for all practical purposes no longer exists – as in Solomon Islands, the only way in which land can be formally alienated is by way of a lease, for a limited and defined period of time. In custom however there may be a variety of grants affecting land, for example occupation or the right to come on to the land to harvest certain crops, or to access other areas. Frequently there are a number of interests existing at the same time, often over many years. The movement of people, either because of natural disasters, civil unrest or voluntary migration – for example to urban areas, also gives rise to various forms of settlement ranging from squatting on land on the outskirts of municipal boundaries to long-term permissive occupation of land belonging to others. All these forms of settlement can be precarious and, in some cases, give rise to tension and civil unrest.[2]

In island countries of the Pacific where land masses are, with the exception of Papua New Guinea, small, there is inevitably pressure on land that is habitable or can be used for cultivation. Many Pacific islanders still rely on the land to feed themselves and their families from food gardens and through foraging. However, with the gradual shift away from subsistence cultivation towards monetary economies, especially in the growing urban areas, there is pressure on land for housing, for developing tourism, for commercial agriculture such as palm oil, sugar cane, coffee and livestock rearing. These activities generate revenue for public and private enterprises. Pacific island governments are faced with a dilemma. On the one hand there is respect for custom and customary land tenure, on the other hand there is a desire to facilitate economic growth and attract investors. This dilemma comes to the fore when land law reform is being proposed. This article considers three recent examples.

RECENT REFORMS TO LAND LEGISLATION

In the area of legislation there have been several developments that would have been of interest to Don. The first is the passage of an amendment to the iTaukei Land Trust Act in Fiji. The second is change to the process of appeals from the Lands Tribunal in Samoa. The third is a proposed amendment to land laws in Vanuatu to restore the power of the Minster of Lands to grant leases of land.

[2] This was one of the triggers for civil unrest in Solomon Islands at the start of the twenty-first century, but peri-urban settlements can also be cleared to make way for commercial and industrial developments, often with little notice.

Developments in Fiji

In Fiji around 87% of land is owned by indigenous Fijians (iTaukei) and managed by the iTaukei Land Trust Board.[3] Remaining land is either freehold or state-owned land. In 2021 the Attorney-General and Minister for the Economy, proposed a bill (Land Bill No 17) to amend the iTaukei Land Trust Act 1940. Under the existing law proposed applications to lease out iTaukei land or make changes, such connecting to utilities, or mortgaging the land required the approval of the iTaukei Land Trust Board.

The proposal specifically amended section 12 of the 1940 Act, inserting a new subsection after 12(1) which states that:

> Except as may otherwise be provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained;[4]

to read:

> Notwithstanding anything contained in sub-section (1), consent of the Board is not required for any mortgage, charge, pledge, caveat or for any such lease to be dealt with by any court of law or under the process of any court of law;

And inserted a new sub-section into the law requiring consent for land dealings such as sale, transfer, subleasing, assignment, subletting etc (12.2) which reads:

> For the purposes of this section, any such consent shall only be refused where there is a breach of any lease condition or where such application to deal with the land is not in accordance with any law.

This means that once a lease over iTaukei land has been granted the board cannot control what the land is used for. While this will not remove the constitutional safeguard that iTaukei land cannot be alienated (in the sense that allodial title will always remain with the iTaukei) it does make it more difficult to control the nature of developments that take place and may result in use of land that is contrary to section 4 of the 1940 Act which vests all iTaukei land in the Board to be administered 'for the benefit of the Taukei owners'. A further consequence may be to undermine the original purpose of placing land– which had been formerly and disparately managed by *mataqali* – under the management of the Board to ensure standardised management and administration of land for the benefit of native Fijians and Fijians of Indian descent.[5]

The major criticisms of the proposal were a) procedural: iTaukei landowners had not been sufficiently consulted nor had they given their informed consent to the proposed changes,

[3] Formerly known as the Native Land Trust Board and Native Land Trust Act the nomenclature was changed by Decrees in 2012.
[4] Considered and affirmed in *Lal v Native Land Trust Board* [2011] FJCA 37; *Seteo Rasau Cakobau v Sandjunes Management Group Limited* [2019] HBC 41 FJHC 540 http://paclii.org.vu
[5] Graham Leung, 'A discussion about Bill 17 of 2021' *Fiji Times* (Suva, Fiji) 30 July 2021.

and b) substantive: the removal of the safeguard of iTaukei Land Trust Board oversight. Nevertheless, the Board appeared to endorse the proposed amendment.[6]

Opponents were outspoken in their criticism and faced severe government backlash with a number being taken in for police questioning, including opposition members of parliament, and the former Prime Minister Mahendra Chaudry. An online petition against the bill attracted over 20,000 signatures, and petitions in parliament were tabled but rejected by the Speaker.[7] The heavy-handed suppression of criticism or legitimate democratic debate attracted negative press but failed to prevent the passage of the bill. The bill was passed by parliament as the iTaukei Land Trust (Budget Amendment) Act 2021 and came into force on 1 August 2021.

Arguably addressing the procedural bottlenecks of the 1940 Act could have been done without taking away the safeguards that existed. It is clear from case law that the Board does seek to find reliable tenants for leased land including those who will develop the land in ways which will ensure a return for the land-owning unit,[8] and researchers have suggested that Fiji has benefitted commercially from the establishment of the Board.[9]

It is also notable that the amendment was passed through parliament using the fast-track procedure – which allows for little parliamentary debate or public scrutiny of legislation – and under a Constitution which abolished the Great Council of Chiefs – which had been instrumental in approving the 1940 Act. As Fiji squares up to an election in 2022, opposition parties are not only indicating that the Great Council of Chiefs may be reinstated but also that this legislation will be abolished.

Developments in Samoa

In 2020 the previous government of Samoa proposed three controversial and interrelated pieces of legislation: the Constitutional Amendment Bill 2020, the Judicature Bill 2020 and the Lands and Titles Bill 2020.[10] The last replaces the Land and Titles Act 1981, while the other two remove the Land and Titles Court from the current court structure. The proposal relevant to this article was to entrench the Land and Titles Court system in the constitution and to confer final appellate jurisdiction in land and titles matters on a new land and titles court, taking away the appellate jurisdiction of the Supreme Court to hear matters pertaining to land and titles,

[6] Ritika Pratap, 'TLTB management endorses proposed Land Bill' *FBC News* (Suva, Fiji) 25 July 2021 https://www.fbcnews.com/fj/news/tltb-managment-endorses-proposed-land-bill/ accessed 5 April 2022.
[7] Kelvin Anthony, 'Fiji's political turmoil: everything you need to know' *The Guardian* 4 August 2021 https://www.theguardian.com/world/2021/aug/04/fijis-political-turmoil-everything-you-need-to-know accessed 4 April 2022.
[8] See for example *Nalukuya v iTaukei Land Trust Board* [2021] FJHC 138 http://paclii.org.vu
[9] Spike Boydell and Ulaisai Rodoke Baya, 'Using trust structures to manage customary land: an analysis of the iTaukei Land trust board in Fiji' paper presented at the Integrating Land Governance into the Post-2015 Agenda, Annual World Bank Conference on Land and Poverty, March 24-27, 2014 https://www.oicrf.org/documents/40950/43224/Using+trust+structures+to+manage+customary+land+an+analysis+of+the+iTaukei+land+trust+board+in+Fiji.pdf/74477780-0a5f-c824-af19-e5972a42e250?t=1510229364932 accessed 5 April 2022.
[10] See Anna Dziedzic, 'Critics claim Covid-19 is used as a cover, but proposed changes to raise the status of custom have a long history' *The Interpreter* (Canberra, Australia) 5 May 2020.

even where issues such as constitutional human rights were raised.[11] The right of appeal to the Samoa Supreme Court has been significant for upholding the rights of applicants to a fair trial and the right to be heard,[12] and judicial review of the decisions of the Land and Titles Court,[13] including the jurisdiction of the Supreme Court to review decisions of the Land and Titles Court on the common law grounds of illegality and irrationality.[14]

The arguments put forward for this proposal were that land and titles were essentially within the domain of Samoan custom and usages and that the current Supreme Court was ill-equipped to understand or rule on such matters. In Samoa around 80% of land is held according to Samoan custom and the 1962 Constitution defines law to include 'any custom or usage which has acquired the force of law'. Quite what that phrase means is unclear and has been subject to a number of different interpretations.[15]

The proposal was reflective of broader issues, both procedural and substantive. Procedurally the Land and Titles Court is slow, under resourced and overburdened. A 2016 special Committee of Parliament had highlighted these issues and recommended the introduction of a three tier Land and Titles court system with time limits for resolving matters. In 2019 these proposed reforms were caught up in a more substantive issue, which was how Samoan custom and usage could be better recognised formally within the Constitution,[16] and as a result be applied more strongly by the courts which were being seen by some as too 'Western' in their approach.[17] Indeed, the former Prime Minister of Samoa was particularly outspoken in his criticisms of the independence constitution.

As was the case in Fiji, these bills were passed under fast-track procedures facilitated by COVID19 emergency orders and utilising the dominant majority of the governing party. The bills were introduced to parliament on 17 March 2020 and the three days set aside for progressing to a second reading was set aside on a motion from the Prime Minister. By 18th March all three had proceeded through their second reading and the select committee stage was avoided by the appointment of a special parliamentary committee of MPs. There was no further consultation and the bills were passed into law on 15 December 2020.[18] Concerns about the proposed bills, particularly the process by which they became law, were expressed within Samoa and beyond,[19] including by the Samoan Law Society, the International Bar Association

[11] On the prior legal structure see Jennifer Corrin, 'Resolving Land Disputes in Samoa' in *Making Land Work*, Volume 2 199 (Australian Government, Department of Foreign Affairs and Trade 2008) 199.
[12] *Faalafua v Land and Titles Court and Land and Titles Appellant Court* [2018] WSSC 136; *Esekia v Land and Titles Court* [2017] WSSC 145 http://paclii.org.vu.
[13] For example: *Cleverley v Land and Titles Court* [2020] WSSC 49 http://paclii.org.vu.
[14] Referenced by Chief Justice Sapolu in *Penaia v President of Land and Titles Court* [2012] WSSC 39 http://paclii.org.vu.
[15] See for example, Elise Huffer and Asofou So'o, 'Beyond governance in Samoa: Understanding Samoan Political Thought' (2005) 17(2) *The Contemporary Pacific* 311.
[16] Samoa Law Reform Commission, 'Fetuunai Muniao' 2019 https://www.samoalawreform.gov.ws/wp-content/uploads/2020/04/1.-Final-Fetuunai-Muniao-Lipoti-o-Suesuega-Galuega-Faatino-1-English....pdf accessed 5 April 2022.
[17] Anna Dziedzic, 'Debating constitutional change in Samoa' *The Interpreter* (Canberra, Australia) 5 May 2020.
[18] International Bar Association. 'IBAHRI condemns Samoa Parliament's passing of controversial constitutional reforms' 23 December 2020.
[19] See for example, Fiona Ey, 'Samoa's constitutional crisis: Undermining the rule of law' *The Interpreter* (Canberra, Australia) 8 May 2020.

and members of legal profession and judiciary in Samoa.[20] The proposals also triggered the formation of a new political party led by Fiame Naomi Mata'afa after she quit the ruling party over the proposals which she saw as a slide away from the rule of law in Samoa.[21]

Apart from the motivation to de-westernise legal process and values it is unclear what the reforms are intended to achieve. One of the key reasons behind not codifying Samoan custom and usage (or indeed any custom and usage) is lack of consensus about what this is and a danger that custom will cease to be evolving and 'living' but rather become fossilized if reduced to a formal written form. It is also the case that whereas title and with this the power to control land might once have been bestowed on a single individual, today it is not uncommon for titles to be shared as is the power to manage land, so agreeing on questions of lease, the use of land or its development are far more difficult to agree.[22] This can be aggravated by factoring in the opinions of family members in the diaspora and those who live in urban areas and are no longer under the control of local councils. If removing oversight of the Supreme Court is intended to strengthen the role of custom then not only may constitutional rights be negated but opportunities to develop land held under customary land tenure, for example through leasing, may also be diminished. A further concern expressed by the President of the Samoa Law Society, was that under the changes the Land and Titles Court could have power to declare any land – including freehold and state-owned land – customary land.[23] Any such moves would have severe repercussions for development in and around Apia and set-back government development initiatives on state-owned land.

In 2021 Samoa went to the polls and after protracted wrangling a new government was formed under a new party and new Prime Minister,[24] who has promised to review this legislation.

Developments in Vanuatu

In 2021 the Vanuatu government proposed to introduce a bill into parliament which would essentially undo reforms to the Land Reform (Amendment) Act (CAP 123) 2013, (as amended in 2014, 2017 and 2020). The 2013 Land Reform Act was introduced to address a number of concerns regarding the use, development and alienation of land.

The 2013 Act had amalgamated the physical planning functions formerly found under the Physical Planning Act (CAP 193), the issue of negotiator's certificates, formerly governed by the Land Reform Act (CAP 123), the determination of who the customary landowners were, which was formerly under the Custom Land Management Act (Act No 33 of 2013) and the creation of leases, formerly under the Land Leases Act (CAP 163). The 2021 Amendment

[20] See for example, Craig Land, 'One boat, Two Captains: Implications of the 2020 Samoan Land and Titles Court Reforms for Customary Law and Human Rights' (2021) 52 *VULWR* 507.
[21] Don Wiseman, 'Samoa court changes would undermine rule of law – Fiame' *RNZ News* 14 (New Zealand) September 2020 https://www.rnz.co.nz/intrnational/pacific-news/425961/samoa-court-changes-would-undermining- rule-of-law-fiame accessed 6 April 2022.
[22] Malama Meleisea and Penelope Schoeffel, 'Culture, constitution and controversy in Samoa' *The Interpreter* (Canberra, Australia) 23 July 2020.
[23] Matai'a Lanuola Tusani T-Ah Tong, 'Land and Titles Court overhaul could redefine land' *Samoa Observer* (Apia, Samoa) 26 April 2020.
[24] Sue Farran, 'Has Samoa Weathered a Constitutional Storm and Reached a Constitutional Compromise Between Tradition and Democracy?' *IACL Blog*, 1 July 2021 blog-iacl-aidc.org.

proposed to limit the Land Reform Act to the issuance of negotiator's certificates, ensuring the informed consent of parties willing to engage in new lease agreements and oversight of the terms and conditions of lease negotiations.

The rationale for the proposal was that the current system was cumbersome, slow and costly. Examples were the requirements for notices firstly, to bring to the attention of the public the custom owner's intention to apply for a determination of ownership, and then – once granted – secondly, for an intention to register a lease; and the very low number of approvals granted by the Land Management and Planning Committee (the Committee) (of which Don Paterson was for some time a member). Between 2014 to 2020, the Customary Land Management Office (CLMO) had received 1,392 applications of which only 751 were approved by the Committee. Once approved these had been returned to the CLMO for the determination of who the true custom owners were and to set in train the lease creation process. Only 73 of these had completed the subsequent procedural steps and been returned to the Committee and on average it had taken two years for these applications to get to this stage. Over a six-year period 58 negotiator certificates had been issued to negotiate rural leases and only 5 of these had been approved by the Committee for the grant of leases and only 3 had been registered.

Part of the problem was that the administrative machinery to support the Land Reform Act had been under-resourced. At the outset in 2013 it had been estimated that the Ministry of Lands and that of Justice would need additional funding amounting to around a 25% increase in budgets to implement the Act. However, in the period 2014-2020 available funding had been considerably below this. Similarly, the government considered that the funding of the Office of the Land Ombudsman created under the Land Reform Act to act as a watchdog of the Department of Land and the CLMO should cease, not least because by the end of 2020 not a single case had been dealt with by that office. What the government has not appeared to do is to enquire why this was the case.

The government's justification for the 2021 proposal was that 'The low land lease registration on rural land is due to a lengthy and inefficient land lease making process, weak custom governance system, and limited capacity and resources to fully support the implementation of the 2013 land law reforms.' It argued that 'This Bill will restore the confidence to parties who wish to engage in the lease making processes. The Bill will also provide the platform for the Government policy of developing the productive sector and utilising lease as a tool for development'.[25] Other supporters of the proposed reforms advocate them as a win-win for developers and land-owners, and it seems clear that the aim is to attract investors.

The proposal was met with considerable opposition.[26] Firstly, it was opposed because of the lack of prior consultation – although the government argued that there had been

[25] Republic of Vanuatu, Bill for the Land Reform (Amendment) Act No. of 2021 Explanatory Note https://parliament.gov.vu/images/Bills/2021/1st_Ordinary_Session/English/Land_Reform_Amendment.pdf

[26] Richard Ewart, 'Civil society in uproar over proposed land law changes in Vanuatu' *ABC Pacific Beat* (Australia) 25 May 2021. https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.abc.net.au%2Fradio-australia%2Fprograms%2Fpacificbeat%2Fvanuatu-government-land-reform-proposals-under-fire%2F13358172&data=04%7C01%7CSue.Farran%40newcastle.ac.uk%7C879e6fd3fe8644a944f208da1724425c%7C9c5012c9b61644c2a91766814fbe3e87%7C1%7C0%7C637847741733773070%7CUnknown%7CT

consultation in three of the six provinces. When the Land Law Reform Act was introduced changes were also made to the Constitution, notably Article 30 to require consultation with the *Malvatumauri* about any changes to land law in the country. It was held this had not been done. Secondly, because the reform essentially proposed to remove a number of the safeguards that had been introduced to put brakes on what was become an escalating land lease problem, with customary land, especially in coastal areas, being alienated under leases that were often of little benefit to custom owners and often secured without fully informed consent.[27] The Land Reform Act also incorporated environmental and planning safeguards aimed at protecting customary rights of access to the coast and the marine resources local people rely on and gardening land.

Of particular concern to critics was the proposal that lease creation and other lease transactions would revert to the Director of Lands and possibly the Minister for Lands. One of the key motivations behind the 2013 Land Reform Act was to put a stop to Ministers exercising this power because of concerns regarding lack of transparency and wrongdoing on the part of former Ministers of Lands.[28] In the period between 1980 and 2010 the Minister of Lands had signed 1,458 rural leases (out of a total of 6,803 rural leases) ie 21.4%.[29] Increasingly the Minister had used power, originally intended to deal with alienated land for which no customary owner could be found in the years immediately after independence, to grant leases over land where ownership was in dispute, or over state land, without securing the approval of the Council of Ministers. The misuse of Ministerial power to grant leases is something Don wrote about in the years before his death.[30]

While the reforms introduced in 2013 have not been without criticism and problems, particularly the Customary Land Management Act which received a mixed press at the time,[31] the 2021 proposals appear to be an attempt to wind the clock back. Criticism of customary governance is unlikely to be well-received and begs the question what aspects are particularly weak and how could they best be strengthened. Moreover, it might be argued that the failure of the legislation is largely due to the lack of resources allocated to its implementation or poor management of those resources. For the moment, vociferous opposition, including the suggestion that the proposals are unconstitutional and could open the door to corruption,[32] has persuaded the current government to pause and reconsider. What the future holds is however uncertain.

WFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000&sdata=yCY3KCjRvnZMea1%2BZC4EGis8Gy7YVrUhLj0CcDry%2FDg%3D&reserved=0 Accessed 5 April 2022.

[27] Sue Scott, Milena Stefanova, Anna Naupa and Karaeviti Vurobaravu, 'Vanuatu National Leasing profile: A Preliminary Analysis' Briefing Note May 2012, Volume 7 Issue 1, Justice for the Poor, World Bank.

[28] Sue Farran, 'Land Leases: Research: Ministerial Leases in Efate, Vanuatu' (2009)13(1) *JSPL*.

[29] Siobhan McDonnell, 'Better protection for custom owners: Key changes in Vanuatu's new land legislation' *Outrigger: Blog of the Pacific Institute* 4 March 2014.

[30] Don Paterson, 'Some recent interesting cases relating to land in Vanuatu' (2019) *JSPL*.

[31] See comments on the Blog of the Pacific Institute, McDonnell above and Sue Farran and Jennifer Corrin, 'Developing Legislation to Formalise Customary Land Management: Deep Legal Pluralism or a Shallow Veneer?' (2016) (10)1 *Law and Development Review* 1.

[32] Hilaire Blue, 'Regenvanu: Land law amendment may be unconstitutional' *Vanuatu Daily Post* (Port Vila, Vanuatu) 20 May 2021.

REFLECTIONS

All of the above recent developments have provoked controversy and all concern the place of customary or traditional land rights in the context of development and legal pluralism but with policy apparently pulling in different directions.

Government arguments in Fiji and Vanuatu are largely along the lines that these changes will facilitate the alienation and development of land. Cumbersome and protracted land dealings, it is argued, get in the way of development. Investors want to be able to obtain land speedily and easily and enjoy security of tenure. The complexities of customary land tenure are an obstacle to this. Making land too difficult to alienate may fetter the autonomy to which customary land- owners are entitled in dealing with their land, or it may mean that they lose out on opportunities to capitalise on this asset. The converse is that making the land easily alienable can mean lack of consultation with those that have interests or rights over the land.[33] Consents may be given by those who lack authority to give such consents. The benefits obtained from alienation may not be equitably distributed or may be paid to those who are not entitled to these benefits. Striping away procedures intended to safeguard legitimate interests may result in landlessness – especially as populations grow and there is pressure on land occupancy and use.

In Samoa the rationale behind the law reforms appears to have been not so much about the land itself but about redressing the balance between 'western' influences in the formal law and custom and usage in the informal law. Achieving this balance in plural legal systems such as those found in Pacific island states is an ongoing challenge. For many Pacific islanders, custom and the informal law is the predominant regulatory force in their daily lives. However, entry into the market-place, whether this is of land or other resources, changes the rules. Those who control those rules – whether they are formal or informal rules - have power: the *matai* allocating land in Samoa, a Minister signing leases in Vanuatu, or the Trust Board approving a mortgage over land in Fiji. Changing the rules shifts the power which may be positive if there is a greater likelihood that this power is exercised in a transparent and beneficial manner; or may be negative if the exercise of that power is now less fettered by safeguards. The role of formal law (and ARGUABLY customary law) is to regulate transactions of scarce commodities – and in island countries land is a scarce commodity. The role of the courts is to ensure that the correct procedures are adhered to and the rules are enforced. Whether they are able to do this successful depends on resources, independence, the skills of judges and lawyers and the ability of ordinary individuals and peoples to have access to justice. All of these factors are subject to variability in the Pacific region. Moreover, the law tends to be slow to change to meet need, and in a rapidly changing world that tardiness is not always helpful.

CONCLUSION

The relationship of Pacific islanders with their land is fundamental, not only for survival but for identity. Don had a keen and practical interest in land and the laws that governed it. He also had a strong belief that Pacific island scholars should be encouraged to research and write about

[33] See for example, on Vanuatu, Milena Stefanova, 'The Price of Tourism: Land Alienation in Vanuatu' Justice for the Poor Briefing Note 2(1) 2018 (World Bank, Washington) htto://hdl.handle.net/10986/30541

their own lands. In this he followed the example set by Professor Ron Crocombe who was also an eminent Pacific academic writer, teacher and mentor. Development imperatives will continue to put pressure on natural resources, including land. There will therefore be a continuing need for researchers to share knowledge, raise arguments and keep alive the spirit of enquiry and genuine concern that epitomised Don's interest in this area of the law. Above all researchers should be prepared to challenge the status quo and proposed changes and following Don's example, do this in a measured, calm and well-reasoned way.