THE LANGUAGE OF LAND:LOOK BEFORE YOU LEAP

By Kenneth Brown[*]

INTRODUCTION

A browse through both the Solomon Islands Law Reports and judgments available on USP's Web Site drives home the dominance of land as a central *motif* of litigation. Litigation over land is also commonplace in Vanuatu but formally is less visible as the courts have recently declined to adjudicate in land matters due to lack of resources.[1] Nevertheless the Vanuatu Law Reports accommodate a significant number of land related judgments.

Equally striking, from an inspection of the judgments, is the persistent inclination to employ common law terminology, often directly or with little modification, to customary land disputation. Much of the scholarship on customary land in the Solomon Islands and Vanuatu has understandably concentrated on pressing practical issues. The return of alienated land, the setting up of procedures and *fora* to resolve customary land disputes, and the exploitation of the economic value of the land are but three of the most obvious.[2]

What has been all too often overlooked in the debate is the fundamental issue of terminology. Administrators and judicial officials alike have been so steeped in the concepts that underpin western patterns of landholding that it has become second nature for them to employ the western terminology that describes those concepts. It therefore comes as no surprise that the structure of legislation and the tenor of court judgments are dominated by the use of a language and phraseology culled from hierarchal systems of land tenure structured to buttress the rights of the individual. Doubt must be expressed that those charged with making and overseeing policy on customary land are alert to the dilemma.

Attention here will centre on Solomon Islands and Vanuatu but the thrust of the arguments pertain in equal measure to all Pacific jurisdictions where issues over customary tenure remain controversial. The theme at the heart of this article is that without a keen awareness of the pitfalls of adopting alien idioms to describe local landholding, politicians, land administrators and lawyers are unlikely to untangle the present confusion that governs land policy and its development. Furthermore land litigation will continue to over-monopolise scarce judicial resources.

The article seeks to pinpoint the areas of common confusion over terminology and briefly offer some thoughts on the nature of customary landholding. Unless those involved in decision making – at whatever level - on land are alive to the principles underpinning indigenous landholding then it is futile to hope for a cohesive and sensible resolution of the multiple dilemmas surrounding land policy. Whilst the theme centres on the theoretical aspects, some of the practical problems emanating from customary land will be outlined. An intended follow up essay will scrutinise selected judgements from Solomon Islands and Vanuatu. These judgments have often unthinkingly and maybe unwittingly, employed western terminology. In some cases judges have erroneously adopted willy-nilly western legislation as Acts of general application. This has bequeathed a catalogue of case law on land that is disordered. Passing reference will be made to some of these decisions here. The general problems that they illustrate, and in

some instances have engendered and compounded, will only be touched on here. The planned later article will undertake a more minute examination of them.

LAND AT THE HUB OF SOCIETY

The allocation, use and distribution of land loom large as a question of vital concern in all societies. Allied to this concern is the issue of landholding and tenure. Whilst physical observation of how land is held and utilised may not pose intractable problems the theoretical basis of land use and tenure in a society engenders a complex galaxy of uncertainty.

In 1963 Bohannen commenting[3] on the woeful lack of literature on land in Africa said:

> *We are still abysmally ignorant of African land practices.... The reason for this state of affairs is close at hand: there exists no good analysis of the concepts habitually used in land tenure studies, and certainly no detailed critique of their applicability to cross-cultural study. Thinking about land has been and remains largely ethnocentric.*

Several decades on, this observation could properly be adapted for and applied to Melanesia.

The axiom *'an Englishman's home is his castle'* is the resounding declaration of an individual right to property ownership coupled with the steadfast determination to assert exclusive possession over, and vigorously defend if necessary, the personal incidents of ownership. The statement eloquently encapsulates much of the underlying bedrock of common law land tenure.

No similar lay aphorism neatly embodies the essence of customary landholding. The Melanesian avowal by Dr (later Sir) Gideon Zoloveke that:

> *In effect land was an ancestral trust committed to the living for the benefit of themselves and generations yet unborn.*[4]

expresses most crisply the intrinsic nature of traditional land holding in Melanesia. He expands by adding:

> *Land thus was the most valuable heritage of the whole community, and could not be lightly parted with. This is based on the belief that the departed ancestors superintended the earthly affairs of their living descendants, protecting them from disasters and ensuing their welfare, but demanding in return strict compliance with time-honoured ethical prescriptions. Reverence for ancestral spirits was a cardinal point of traditional faith and such reverence dictated the preservation of land which the living shared with the dead.*[5]

This many-faceted nature of affinity to the land is, in a Vanuatu context, well-stated by Bonnemaison[6] thus:

In Vanuatu custom land is not only the site of production but it is the mainstay of a vision of the world. Land is at the heart of the operation of the cultural system. It represents life, materially and spiritually. A man is tied to his territory by affinity and consanguinity. The clan is its land, just as the clan is its ancestors... The clan's land, its ancestors and its men are a single indissoluble reality - a fact which must be borne in mind when it is said that Melanesian land is inalienable.

These passages eloquently emphasise the spiritual element in customary land conceptualisation. Land has also significance economically as an agency of survival through agricultural production, and politically as the area binding together a kin group or alliance of families.

TERMINOLOGY IN RELATION TO CUSTOMARY LAND

Caution is axiomatically advisable in any debate of a cross-cultural character. In a discourse on customary land it is imperative. Common law property rules are complex, intricate and highly developed. They reflect the dominance of individual property rights in capitalistic systems. The ownership of a distinct ascertainable interest is fundamental to the contractual dealings upon which so much of western society is based. Customary law is more concerned with status. Gluckman adroitly expressed this in the context of property declaring that customary law emphasises *'not so much the rights of persons over things, as obligations owed between persons in respect of things.*'[7]

Many words, *'ownership'* furnishing a prime example, have no *a priori* meaning but are cultural constructs. The term *'ownership'*, one familiar to common law cultures and employed there both technically and in the vernacular, is culturally specific.[8] Another concept regularly imported inappropriately is that of the *'trust.'*[9] This has been applied to describe the relationship of the traditional chief in respect of his status as a landholder vis-a-vis his adherents. The thesis proceeds on the theory that the allodial title to the land rests in the group or tribe and that the chief's role is that of a fiduciary trustee.[10] This explains his theoretical inability to dispose of any interest in the land and why dealings with chiefs that purported to alienate customary land in early colonial days were disclaimed and vigorously denounced by later generations. Even the use of less technical property terms like 'interest' or 'right' in relation to customary land may pose some danger if applied thoughtlessly in any legalistic sense.

Intense debate on terminology reveals three schools of belief.[11] The first proposes that western terms can be adapted with facility to customary land tenure. This line of thought has been discredited by academics but its tenets are recurrently visited in some judicial quarters.

The second theory propounds that traditional land tenure should be elucidated in indigenous 'folk' terminology.[12] Local concepts should be expounded and analysed meticulously and the apt vernacular terms pertinent to them should be abstracted and then utilised instead of the English equivalents. This proves invaluable in relation to the exposition of the meaning of concepts within a society and how they operate in that society. However even Bohannen accepted that the approach he advocated lacked an essential quality in anthropological methodology in that comparison with cognate concepts and phenomena in other cultures was not possible without adopting a more culture free terminology.

Gluckman advocated a comparative approach avoiding western legal terms in their technical sense but endeavouring to match local terms to wider universal concepts. He contended that concepts such as 'law' and 'ownership' could successfully be transculturally described by the use of local expressions.[13] The problem inherent in its adoption is that indigenous words may be used when they have no exact correspondence in western language. Thus they are misapplied.[14]

The third way advanced by Allott advocated the use of a non-legal non-technical English vocabulary.[15] He sought to avoid the difficulties deep-rooted in the employment of conceptual terms like 'ownership' by seeking out universal ideas in reference to land tenure. He considered it universal that land usage in any society would involve the exercise of rights. This necessarily involved interests in land and pinpointing the extent and subject matter of the interest.[16] The exercise of these rights supposed that the rights were 'controllable' in that their exercise depended on who had the authority to decide who could benefit from the use of the land and in what circumstances they could do so. Ascertaining who has the authority to determine use of land and who has the benefit of the right to use the land and how they could do so thus became central.

This departure from any notion of the concept of ownership is vital to an accurate understanding of

customary land law. The ownership model so dominant in the common law system proceeds on the assumption that rights are stratified hierarchically.[17] At the apex is the dominant absolute owner and lesser rights are carved out from this absolute interest.[18] To grasp the essence of customary land the ownership paradigm must be mentally discarded. Analysis should proceed from observation of the concrete social practice.

The drawbacks of resorting to quasi-common law terms in relation to customary land are self-evident. Firstly they derive from the western ownership model and thus conjure up ideas of a stratified system of rights that may not exist in customary law. Terms such as 'interest' 'right' and 'trust' may have non-legal, non-technical and vernacular meanings but when applied in relation to land will trigger ideas and concepts embedded by years of training in the mind of lawyers and administrators. We have at best scant knowledge of customary concepts and alluding to them in even quasi-common law terms – which after all express western abstract ideas - may be misguided and misleading. This is because customary concepts may be so radically different from those of the common law that even the use of a watered-down common law terminology will not capture, and may indeed disfigure, the reality of the customary concept.

An example from the realm of family law illustrates this danger. The colonial authorities adopted various English language terms of a non-legal nature such as 'brideprice' 'bridewealth' 'marriage payments' to describe the practice of some exchange of goods, livestock or the like being made upon, or ancillary to, a customary marriage. Of course vernacular terms for the institution existed but these were incomprehensible to the western mind. Consequently a recasting of them in fresh terminology was essential for the administration to contend with what they observed. This remoulding of the tradition in alien terms evokes in the western mind the lucid picture of wife buying and demotes the institution to the level of a commercial transaction. Undoubtedly the adoption of imported terminology has misconstrued and distorted the true nature of the institution.[19]

This summary of the terminology/concept debate is condensed and bears the shortcomings of any abridgement in that compression often results in a lack of according the discussion the depth and breadth it may merit.[20] Awareness of the varied standpoints is required for any examination of the case-law material. Decisions on disputation concerning customary law have been bedevilled by the lack of familiarity of judges with the problems of translating and transplanting English ideas and concepts to societies bound together by different norms.[21] Only by remaining alert to this danger can the pitfalls be avoided.

The planned later article will hand out brickbats for the uninformed reflexive espousal of common law terms and ideas so it is fitting to hand a bouquet to at least one judge. In *Lilo and Another v Ghomo*[22] Daly CJ, demonstrating acute local awareness of the lurking dangers observed:

> *Before I turn to these grounds I must say something generally about the difficulties that have arisen. They arise, in my view, from what is always a problem in dealing with Customary Land Cases in modern Solomon Islands. That problem is how can one express customary concepts in the English language? The temptation which we all face, and to which we sometimes give in, is to express these concepts in a similar manner to the nearest equivalent concept in the law received by Solomon Islands from elsewhere, that is the rules of common law and equity. The result is sometimes perfectly satisfactory in that the received legal concept and the Solomon Islands custom concept interact to give the expressions a new meaning which is apt to the Solomon Islands context.*
> *It is thus with the use of the word "trustees" which has arisen in this case. This word is used in Solomon Islands in the customary land context in a different way to its use in relation to the principles of equity elsewhere. However other concepts of received law have not developed a customary law meaning and the use of expressions which denote those concepts can produce*

> *difficulties of some complexity. This is particularly so when the custom concepts which they are said to represent are themselves undergoing modification to fit them to the requirements of a changing Solomon Islands which is now concerned not only with the use of land for subsistence farming but with the sale of timber on land and enclosure of land for cattle and so on.*[23]

The judgment has been quoted *in extenso* as it highlights not only the concept/terminology dilemma but presciently anticipates the critical post-independence quandary of accommodating economic development on customary land in a way that maintains the integrity of customary society and its traditional values. The Chief Justice suggests that customary law in some cases has already adapted received terms and concepts and imbued them with a local signification. This may be so but in the absence of extensive groundwork and research it would be premature to invoke the concept of trusteeship too readily to customary land.[24]

In his recent judgment in *Kasa and Kasa v Biku and Commissioner of Lands,*[25] Muria CJ noted with approval Daly CJ's above-recited caution. The Chief Justice graphically pointed out that the incorporation of the concept of trusteeship to customary land was misconceived. He considered[26]:

> *The concept of trust is not known in customary law and hence, the use of such expression when describing a relationship between the parties in a customary land dispute must be carefully guarded. Not only that the parties have resorted to the trust concept in support of their cases at times but the Courts too, have the tendency, whether consciously or unconsciously, of adopting and applying the concept as applied under received law. Blindly adopting legal and equitable principles under received law must be avoided where such concepts do not apply or cannot accommodate the fundamental principles of customary law jurisprudence.*

This admonition is salutary. The Chief Justice noted that the unthinking espousal of the trusteeship concept had led to *'confusion and unnecessary litigation in this area'.*[27] The use of a terminology free from culturally loaded common law or quasi-common law expressions may herald the start of an attempt to solve land issues in a way that reflects accurately local ideas and thus avoids the problems that have plagued them hitherto.

The judgement is likewise welcome as not only does it bury the persistent proclivity to transplant the western notion of trusteeship to customary landholding but it also dismisses the tendency to unthinkingly reach out for and apply UK statutes as Acts of general application. The Chief Justice ruled:[28]

> *In this regard, my respectful view on the Trustee Act 1925 of the United Kingdom is that, even if it is an Act of UK Parliament of general application and applies as such in Solomon Islands, it cannot be applied to customary land in terms of ownership and disposition of such land.*

Such a declaration is crucial if debate on customary land issues is not to be adulterated by the ideology of the received law.[29]

THE NATURE OF CUSTOMARY LAND TENURE

The second difficulty demanding some study is inter-related to the terminology debate and encompasses the character and nature of customary land tenure. Imperial perceptions of the customary landholding pattern find their clearest expression in *Amodu Tijani v The Secretary, Southern Province Nigeria*[30] where at 404 the Privy Council pronounced:

> *The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or headman of the community or village, or the head of the family has charge of the land, and in a loose mode of speech is sometimes called the owner.*

This thesis received an uncanny echo of endorsement 60 years on in the Solomon Islands when Commissioner Crome affirmed[31]:

> *It is well established that in custom land is owned not by a person, but by a line or family or tribe. Other persons, families, lines or tribes may have secondary rights in the land. Rights to grow crops, make gardens, take the fruit of trees, even to take the trees themselves to make canoes or houses, and so on. The permission of other lines having interests in neighbouring lands may be required, in custom, before a line can develop its own land in case that development affects adjoining land in any way. There are chiefs or bigmen, but they may only behave in a customary way and if they give away or sell interests in customary land against custom it is possible that not only willing (sic) the deal be void but the chief may lose his right to be chief.*

An intriguing aspect of this stream of theory is the proposition that the only remedy members of a line of landholders may have against a chief for breach of his authority or 'trusteeship' is to oust him from his position. Common law remedies for breach of trust such as compelling the rendering of an account would have no place in a traditional society where money was unknown. The crucial point here is that the economies of most Pacific nations are increasingly propelled by a push for development and the need to export local natural resources. These are invariably on customary land. Large revenue flows into customary communities so if elders, chiefs or 'bigmen' abuse their power, can or should they be held accountable to the community for funds received by them from the fruits of development on customary land? It is difficult to argue they should not. This is a vexed yet pressing matter of concern. Litigation over royalties earned from natural assets is ubiquitous and the trustee-like nature of the relationship of leaders to their kin may be evolving to include remedies that would have been alien a generation ago.[32]

Is the oft-expounded theory that customary tenure is communal tenable? The theory pervades colonial jurisprudence and the notion that customary land is not owned by any individual but vests in a wider ill-defined community has served as a opportune stepping stone to rationalise the acquisition and expropriation of customary land by the imperial powers. If there is no ownership of customary land but the determinant of an interest in it is only evidenced by use, it follows, that if such land was perceived to be not actively used it could be appropriated as vacant or wasteland and reallocated by the colonial power.[33] An extension of this stratagem justified the annexation of a whole 'nation.'[34]

The appellation 'communal' indicates that landholding in pre-colonial societies was primitive, unevolved and therefore undeserving of recognition. Of course it did have distinct communitarian features, for example the duty of shared support. Also grazing rights might be exercised communally and major agricultural schemes undertaken in concert but land allocation remained largely individual. Moreover, as Bennett has observed, although land entitlement flowed from membership of a political community its allocation to members was not communal but discharged by the group's political heads.[35] He additionally contends that the use of the term 'communal' imports a value judgment. Thus 'communal' tenure implies something less than the 'sophisticated' tenure of western regimes. This in turn justifies the appropriation of customary land without attention to the rights or needs of indigenous holders. It may, he suggests, even lead to the temptation to regard these rights of less deserving of protection under modern constitutional fundamental directories than individual rights of ownership.[36]

It might be a grave mistake to designate customary land tenure as communal at all. Family, group or even individual interests may be so distinct and non-contestable as to border on the allodial. If family or individual rights to use particular land verge on the exclusive or are exercisable within concrete well defined and community respected limits how far in essence do they differ from 'absolute' ownership in common law systems?[37]

Clearly the importation of the technical vocabulary of western land law and endeavouring to fit customary law into its straightjacket produces confusion. The use of non-technical language is preferable and words like 'interest', 'right' and 'use' are certainly less value-laden than 'trust', 'title' or 'ownership'. Notwithstanding, care must be exercised in the use of this more neutral terminology so that the terms do not assume the specific meaning they may register in common law jurisdictions. For example, interests in customary land, whilst analogous to interests in common law property systems, may retain their own distinct characteristics. The duty of the courts must be to ascertain and describe the precise nature of the actual interest or benefit, rather than seeking to define or outline it by reference to received concepts. The latter course has been an unfortunate and tenacious tendency hitherto.

CONCLUSIONS

The historical legacy and political policy

The repercussions of historical events are a significant force in the formulation of present land policies but any accurate measurement of their impact remains elusive. We know that the colonial imprint of land alienation to foreign planters, farmers, and property developers and speculators was keenly felt. In both countries it simmered as a burning political issue. Reclaiming indigenous control of land was at the hub of constitutional prescriptions for land ownership.[38] These bear the indelible hallmark of the desire to stake out the prominence of customary ownership. The restoration of alienated land to its original controllers is an issue that has flared up intermittently into dramatic incidents of serious violence and destruction.[39]

An element of schizophrenia has driven policy decisions in the post-independence era. The need to sustain political support demands adherence to the popular desire for the primacy of customary templates of land use and this calls for a conservative agenda. Conversely the political preoccupation with the exploitation of the natural potential of the economic value of customary land heralds a radical interference with the rights of traditional users.

Those exercising political power walk a delicate tightrope when confronting the demands of the economic development of the modern-day nation state. The blandishments and promises of those wishing to exploit the natural resources often seduce them.[40] Concurrently they may profess a concern to protect and even restore traditional values. Local politics has been plagued by the complexities of this dilemma.

The danger is that the constitutional pledges may only be honoured in terms of political rhetoric. In Vanuatu despite constitutional declarations[41] that all land was to be returned to indigenous ownership, effective use of and control over formerly alienated land still rests in foreign hands. In Melanesia untangling the intricate web of interwoven land rights and satisfying indigenous dreams is a complex task, one that has proved beyond the present structure.

Statement of Dilemmas

These are broached without offering answers but in the hope of stimulating debate. Far too little is known of precise land holding patterns of Melanesia to lay down dogmatic rules. Detailed legal research in this domain is meagre. The period since independence has been marked by a dramatic emphasis on rapid economic expansion. The *laisser faire* cavalier nature of much of this surge of activity has resulted in a

significant transformation of much of physical environment of Melanesia.[42]

What is less evident is the repercussion of this change on social and cultural values. Scant attention has been paid to the impact of progress on social structures and land holding and use. The flat truth is that precious little fieldwork has been undertaken in this sphere. Consequently idle surmise on custom landholding is presumptuous and dangerous. For all we know recent economic forces may have wrought a radical upheaval in land holding. A simple catalogue stating some of the present quandaries serves to underline the need, not only for caution, but also for meticulous painstaking and properly resourced and funded investigation into the effects of economic expansion and the development of capitalistic relations.[43]

> Are the values of global capitalism with their accent on individual ownership of property undermining traditional modes of landholding and use?
> • As land acquires a more strategic and enhanced value will patterns of use that have prevailed for centuries be modified?
> • If a trend towards discrete individual ownership is revealed what does this auger for the wider community?
> • What of the blueprints often enshrined in founding constitutions mandating gender equality? Do, or should, these pierce the patriarchal shield of customary land control?[48]
> • Will, and if they do, should, political notions of nation building prevail in the property field over the fragmented, diffuse and small-scale character of Melanesian society?
> • Will the spectacular rates of population growth in both polities create a demand for the finite supply of land, which overstresses the ethos underlying customary land?
> • Do the judicial structures established to resolve customary land disputes operate effectively?
> • In particular are western-style courts suitable *fora* for the determination of such contests, functioning as they do in an adversarial and winner/loser mode that may promote disharmony?

All these issues merit a major thesis of their own.[45]

A concluding example endorses my thesis that we must look at the fundamentals of customary land before we leap into legislation. In 1985 the Solomon Islands Parliament enacted the Local Courts (Amendment) Act.[46] The cornerstone of this radical and bold legislative experiment was that no party to a customary land dispute should be allowed access to the formal court system until they had exhausted traditional channels of dispute resolution through *'chiefs or other traditional leaders*.' The twofold aims of the Act were laudable: firstly to divert, and hopefully remove, cases from an already overstrained judicial system and secondly to return the settlement of land disputation to its indigenous roots. No detailed study has been undertaken as to the operation of the Act but scepticism must be expressed as to its success. The flood of land litigation shows no observable signs of abating and any true assessment of successful resolution through historic agencies is impossible to measure. It may well be that the Act has simply added another rung to the ladder of litigation.[47]

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[1] Confirmed by Acting Chief Justice Lunabek in a discussion with the author in July 1998.

[2] See eg, Larmour, P, (ed.), *Land in the Solomons,* 1979, Suva: Institute of Pacific Studies, USP; Larmour, P, (ed.), *Land Tenure in Vanuatu,* 1984, Suva: Institute of Pacific Studies, USP; Crocombe, R,

and Meleisia, M, (eds.), *Land Issues in the Pacific,* 1994, Christchurch, New Zealand: Macmillan Brown Centre for Pacific Studies, University of Canterbury, and Institute of Pacific Studies, USP; Tiffany, W, 'Disputes in Customary Land Courts: Case Studies from the Solomon Islands' (1979) 7 Melanesian Law Journal 99; Talasasa, F M, 'Settlement of Disputes in Customary Land in British Solomon Islands Protectorate' (1970) 1 Melanesian Law Journal 11; Smiley, P, 'Settling Land Disputes in the Solomon Islands' (1980) 9 Pacific Perpectives 24; Larmour, P, 'Alienated land and Independence in the Solomon Islands' (1984) 12 Melanesian Law Journal 101; Larmour, P 'The Return of Alienated Land in Melanesia' in H Reynolds and R Nile (eds), *Indigenous Rights in the Pacific and North America: Race and Nation in the late 20th Century*, 1992, University of London: Sir Robert Menzies Centre for Australian Studies and Hardy-Pickering, S, 'A Proposal to Establish a Land Tribunal in Vanuatu' WP. 4 (1997) 1 JSPL. The following list does not pretend to be exhaustive, nor does it include the valuable *corpus* of work dedicated to the issues in Papua New Guinea.

[3] " 'Land', 'Tenure' and 'Land Tenure' ", in Biebuyck D (ed) *African Agrarian Systems*, 1963, London, OUP, at101.

[4] From 'Traditional Ownership and Land Policy', in Larmour, P, *Land in Solomon Islands* above, 1-10. The remark is resonantly echoed in an African context by the statement of a Nigerian chief to the West African Lands Tribunal in 1912 asserting that "*I conceive that land belongs to a vast family of which many are dead, few are living and countless numbers are unborn."* quoted by by Elias, T O, *The Nature of African Customary Law,* 1956, Manchester: UP at 162.

[5] Zoloveke in *Land in Solomon Islands,* above, 4.

[6] Bonnemaison, J, 'Social and Cultural Aspects of Land Tenure', in Larmour (ed), *Land Tenure in Vanuatu*, above, at 1-2.

[7] Gluckman, M, (ed), *Ideas and Procedures in African Customary Law,* 1969, UK: OUP, 263.

[8] For a fascinating comparative discourse on the concept of ownership see MacCormack, G, 'Problems in the Description of African Systems of Landholding', (1983) 21 Journal of Legal Pluralism 1.

[9] Most notably by the Privy Council in *Amodu Tijani v The Secretary, Southern Province Nigeria* [1921] AC 399 at 404 where they proposed that the chief '*...is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. '".* In a regional context note the helpful comments on the adoption of the concept of trusteeship at 54-55 in James, R W, 'The Challenges of Equity in Developing the Underlying Law' in Aleck, J and Rannells, J (eds), *Custom at the Crossroads,* 1995, Waigani: Faculty of Law, University of Papua New Guinea, 43.

[10] The doctrine of trusteeship received a signal, even if dubious, seal of judicial approval in *Allardyce Lumber Company Limited, Bisili and others v Attorney General, Commissioner of Forest Resources, the Premier of the Western Province and Paia* [1988/9] SILR 78 AT 97. Chief Justice Ward ruled that the Trustee Act 1925 (UK) applied as an act of general application by operation of paragraph 1 of Schedule 3 of the Constitution to the regulation of those declared to be the customary owners of timber rights. This seems problematic, as any such regulation must *prima facie* be determined by customary rules. In any event, the 1925 Act is arguably not an act of general application. This judgement will be analysed in more detail in a later article.

[11] My apologies to Tom Bennett if my summary is an inaccurate distillation of his excellent exposition in 'Terminology and Land Tenure in Customary Law: An Exercise in Linguistic Theory' (1985) Acta Juridica 173.

[12] Bohannen, P J, *Justice and Judgment among the Tiv*, 1957, London: OUP. Bohannen pioneered this method in this influential work.

[13] Gluckman, M, *Ideas in Barotse Jurisprudence,* 1972 (reprint), Manchester: UP and *The Judicial Process among the Barotse of Northern Rhodesia,* 1967, Manchester: UP.

[14] See MacCormack, 'Problems in the Description of African Systems of Landholding', above, 8-11 who points out that Gluckman's adoption of the word *bung'a* as corresponding with 'have' or 'own' in western terminology is mistaken and misleading.

[15] Allott, AN, 'Towards a Definition of Absolute Ownership', (1961) 5 Journal of African Law 99.

[16] For a valuable extension of the debate on 'interests' in land see Bentsi-Enchill, K, 'Do African Systems Require a Special Terminology', (1965) 9 Journal of African Law 114. The author defines 'interests' comprehensively in terms of actual and potential user. His thesis is a brave practical attempt to discover a broad measure of correspondence between western and customary systems of landholding.

[17] The hierarchical model is persistent. Instances of classification of rights in customary land as primary and secondary are common: an admirable example is offered by *Uraghai Land: Tagatado v Reinumi* [1984] SILR 84.

[18] See Bentsi-Enchill, 'Do African Systems Require a Special Terminology', above, 114, who indicates that the fee simple absolute estate in common law land tenure is held of the Crown or State and thus not truly absolute but part of the hierarchy of interests. To achieve correspondence with customary landholding he proposed at 124-5 that the counterpart of the Crown holding the allodial title at common law was that title *'was vested in the community as a whole - or in the chief as "trustee for all the people."*

[19] See Bennett, 'Terminology and Land Tenure in Customary Law: An Exercise in Linguistic Theory', above, 182. Pollard, A A, '"Bride Price" and Christianity', 1998, Seminar Paper, State law and Government in Melanesia Project on Women and Christianity in Solomon Islands, Canberra: Australian National University, Research School of Pacific Studies, points out that the use of the quasi-common law term 'bride price' to describe the Areare institution of *horia keniha* misinterprets the idea the expression evokes in the mind of an Areare speaker.

[20] For a consummate extended dissertation see Bennett, 'Terminology and Land Tenure in Customary Law: An Exercise in Linguistic Theory',above.

[21] See Bennett, 'Terminology and Land Tenure in Customary Law: An Exercise in Linguistic Theory', above, 175 notes the court's '.. *persistent tendency to apply customary law in common-law or modified common-law terms and concepts'.*

[22] [1980/1] SILR 229 at 233.

[23] [1980/1] SILR 229 at 233-4.

[24] For example, it is doubtful if in custom there would be any remedy for breach of the so-called trust. See Bennett, 'Terminology and Land Tenure in Customary Law: An Exercise in Linguistic Theory', above, 176.

[25] Unreported, High Court, Solomon Islands, Civ Cas 126/1999; 14th January 2000. This important

judgment will be commented on in more detail in a future article.

[26] Unreported, High Court, Solomon Islands, Civ Cas 126/1999; 14th January 2000, at 3.

[27] Id, at 10.

[28] Id, at 10.

[29] See the *Allardyce Case* [1998-9] SILR 78, endnote.10 above, where the then Chief Justice reflexively adopted the 1925 Trustee Act to govern the position who had the right to sign a logging agreement in respect of timber on customary land. This ruling is now at best extremely doubtful.

[30] [1921] AC 399.

[31] *Fugui and another v Solmac Construction Company Limited and Others* [1982] SILR 100 at 108.

[32] This is a vexed yet pressing matter of concern. For a pertinent decision from neighbouring Papua New Guinea see *Nimp v Rumants* [1987] PNGLR 96 where the sale of shares by leaders in a 'trustee' position in a company managing customary land was set aside as the leaders had not consulted and obtained the consent of all clan members. Muria CJ tackled the problem in *Kasa's Case,* endnote 26 above, by declaring that those who received money in respect of customary land stood in broad equity as representatives of all those entitled to whom they were under a duty to account.

[33] See the classic observation of Resident Commissioner Woodford in 1899 on South New Georgia, Solomon Islands, '*I have never been there but I believe it to quite uninhabited',* quoted in Bennett, J, *Wealth of the Solomons,* 1987, Honolulu: University of Hawaii Press, 131. Woodford's 'survey' as Bennett notes was largely conducted by telescopic observation from the foredeck of the *Rob Roy.*

[34] See the judgment in *Re Southern Rhodesia* [1919] AC 211(PC), at 223-4, which represents the arrogant apogee of imperial attitudes towards the acquisition of customary land. In *Sobhuza II v Miller* [1926] AC 518 (PC) the Council reiterated its opinion that individual ownership was alien to all systems of customary law. For further discussion see Okoth-Ogendo, HWO, 'Property Theory and Land Use Analysis - An Essay in the Political Economy of Ideas', Discussion Paper 209 (1974) 5 Institute of Development Studies, Nairobi, 291. The expropriation of Aboriginal land in Australia under the fiction of *terra nullius* illustrates a further device to validate acquisition. The exercise of the *terra nullius* concept was rare and only used where local political organisation was perceived as non-existent: see Klug, H, 'Political Power, Indigenous Tenure and the Construction of Customary Land Law', (1995) 35 Journal of Legal Pluralism 119.

[35] Bennett, TW, *Human Rights and African Customary Law,* 1995, Cape Town: Juta, 131.

[36] Bennett, *Human Rights,* above, 132. Locally demonstrated in *Fugui's Case* [1982] SILR 100, where the Commissioner regarded a customary right as outside the regime of constitutional protection as that regime only afforded protection in respect of an acquisition by right of statute or statutory regulation. For lucid comment on this element of *Fugui* see Farran, S, 'Customary law and the protection of human rights: Conflict or compromise', (1997) 21 J PacS 103, where she suggests that a narrow construction of the fundamental rights catalogue in the Constitution may result in customary rights being unprotected. As she notes the Commissioner at 117 referred without elucidation to '*landowners in the fullest sense.':* is this to include or exclude customary rights?

[37] Bentsi-Enchill, 'Do African Systems Require a Special Terminology', above, 137-8, who puts forward

the challenging opinion that those who maintain the traditional notion that customary land cannot be owned in the western sense, and so is incapable of being sold or alienated, are mistaken.

[38] For a useful review of the history and developments in land policy around the time of independence in neighbouring Papua New Guinea see Fingleton's, JS, 'Land Policy in Papua New Guinea', in Weisbrot, D, et al, *Law and Social Change in Papua New Guinea,* 1982, Sydney: Butterwoths, 105-125.

[39] The sacking and destruction of a Levers Solomons Ltd logging camp in the mid 1980's is a striking example. For a lucid explanation of the history and modern policy directives on alienated land, Larmour, 'Return of Alienated Land in Independent Melanesia', above, is instructive.

[40] Inevitably anecdotal allegations of the corruption of Cabinet Ministers and senior civil servants in a position to influence licensing for logging abound. See the trenchant comments of the Commissioner in *Fugui's Case* [1982] SILR 100. Recently four ex-Cabinet Ministers in the Solomon Islands were put on trial for corruption. They were all acquitted.

[41] In Chapter 12, Articles 73 *et seq*.

[42] The shocking impact of uncontrolled logging is instantly observable by the naked eye in large areas of the Solomons.

[43] These comments illustrate that terms are not value-free. The terms, 'progress', 'development', 'expansion' and 'growth' all possess positive overtones in western economic ideology. Whether they have had a beneficial effect socially or culturally (or even economically) in Melanesia is a matter of conjecture. This further underscores the burning necessity for research.

[48] See the classic observation of Resident Commissioner Woodford in 1899 on South New Georgia, Solomon Islands, '*I have never been there but I believe it to quite uninhabited',* quoted inBennett, J, *Wealth of the Solomons,* 1987, Honolulu: University of Hawaii Press, 131. Woodford's 'survey' as Bennett notes was largely conducted by telescopic observation from the foredeck of the *Rob Roy.*

[44] This has particular resonance in Melanesia where women's rights are not prominent. See the introductory comments of Crocombe, R, in Crocombe and Meleisea (eds), *Land Issues in the Pacific,* above, 8-9.

[45] Furthermore the catalogue is not exhaustive: see generally Crocombe and Meleisea (eds), *Land Issues in the Pacific,* above, for additional concerns. They pay particular attention to the constant problem faced by planners of releasing the development potential of customary land.

[46] Colloquially referred by its eponymous title, 'Nori's Act', after Andrew Nori, a member from the island of Malaita, whose brainchild it was.

[47] See Smiley P, 'Settling Land Disputes in the Solomon Islands', above, 24, who notes that shortly after their establishment in 1977 the Solomon Islands Customary Land Appeal Courts were quickly dubbed the 'middle court' by land litigants, a demonstration that they would exhaust all avenues provided to pursue their cases. Dedicated litigants had a further field day when the ill-advised Timber Utilisation legislation dubiously declared that the rights to trees on customary land might vest in someone other than the settled customary landholders. This importation of the western notion that timber rights could vest in someone other than the land owner has provoked a storm of litigation initiated by those determined to reopen land cases they had lost and so share in the supposed bonanza of logging royalties. This ill-thought out and hastily passed legislation adds additional fuel to my thesis.