

Land Tenure Issues

Introduction and Questions

The key points to understand in these materials are first, the changes all over the Pacific in land tenure from a complex system in which many persons have rights to a system that more nearly resembles the Western concept of fee-simple ownership; second, the loss of rights of both the highest and lowest ranking persons who have had land interests; and third, the problems of inequitable distribution of land.

Unless specifically stated otherwise, the following questions DO NOT address issues relating to alienation of land to non-citizens, but rather relate to restrictions on any alienation at all. Please consider them in that light.

1. Should land in the Pacific Island nations be available as a commodity for sale? For lease?
2. If so, under what restrictions, if any?
3. How do you protect junior interest holders? The children of sellers? How do you protect the sellers themselves. from making unwise sales?
4. Should objective mechanisms be installed, e.g., a requirement for public notice of a prospective sale, so that others who want land can ask the seller to buy it, thereby bidding up the price? Or would this just put more land into the hands of the very wealthy speculators? A requirement for private notice, so that the seller's relatives can ask and pressure the seller not to sell?
5. Should preference in land purchases be given, by governmental regulation, to landless persons, all other aspects of the sale being equal?
6. Is it a violation of a human right to prevent a person from selling (or otherwise alienating) his or her land? What is that human right? On what basis do we presume that the land "belongs" in a Western, fee-simple-absolute sense, to a person?
7. If your view is that there is no such human right, would your opinion of the right be different if the person were childless, had no close relatives, and was elderly, ill, and penniless, and wanted to use the land as a means to reward someone who cared for him or her? Would your opinion be different if caregiver were a good samaritan as opposed to a commercial nursing home?
8. In certain Pacific societies, there is a traditional concept that any sales contract can be rescinded at the option of one party, even if the other party does not want to rescind.

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Should this principle apply to land transactions? For example, in Hawai'i, in the Marshall Islands, and in Pohnpei, the highest chief could always revoke a land grant. Now, however, persons holding land in something akin to fee simple believe that they have that power too.

9. If a prospective client comes to you and says he sold his land a year ago, but he had thought he had the right to rescind the transaction if he tendered back the purchase price, what would you say? No meeting of the minds?

10. How should the government protect the public against speculators acquiring large quantities of land if sales are allowed? Or should the government not care?

11. Would your opinion be different if the country or island involved had a severely unequal distribution of land? For example, on Pohnpei, from 1914 to the recent past, the entire island was owned 2/3 by the government, 1/6th by one family, and 1/6th by everyone else. What if the family that owned 1/6th of the land wanted to sell some of it off?

12. Should the family be required to sell some of it off? See Midkiff v. Tom, the Bishop Estate case. An excerpt from the DISSENT in the 9th Circuit is in the materials. The U.S. Supreme Court later adopted the position of the dissent, upholding the eminent domain power of the State of Hawai'i to condemn certain Bishop Estate (and other large estate) properties that had been leased out for single-family residences.

13. A number of Pacific Island nations' constitutions contain provisions guaranteeing to each citizen the freedom of movement and right to reside wherever the person wishes. Should an islander be able to invoke such a provision to abrogate laws that prevent alienation of land? What if the islander is a "non-indigenous" citizen of Fiji?

14. Can, and if so should, a traditional group be able to protect all the land in its community from alienation to outsiders -- even fellow citizens -- by placing all the lands into a perpetual trust with strict controls to be administered internally? In essence, privatizing their land tenure law, and insulating it from governmental control? Isn't this what Fiji did for its "native" population, to protect it from non-"native" citizens, most particularly the Indians?

15. Note how the Hawaii Supreme Court has moved to protect the rights of Native Hawaiians with respect to Hawaiian Homes Commission lands in Ahuna and in Bush v. Watson (only a news article is in the materials). Note, in Ahuna, what the trust duties are and are not.

16. If a group should be allowed to impose such restrictions, should the government be allowed to break into the

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trust, if it finds good reason to do so? See the Bishop estate case, above.

17. Even if not all lands should be available as commercial commodities, should an exception be made for lands in towns? Note that towns are established only in a few areas, and residence in towns may be essential for people for education, medical care, work, business, and other pursuits. Often, people will not have relatives in towns or, if they do, tensions may arise if people must live with relatives for extended periods, dependent on them and potentially seen as burdens by the hosts.

18. Should Pacific Island nations adopt Western Samoa's solution, which is to divide lands into categories -- customary, freehold, and public? If so, should the boundaries be immutable? What process would be best for switching lands from one category to another? What standards should be applied? Are concepts akin to those used zoning laws appropriate -- e.g., variances, periodic reviews, effects on neighboring properties? Is such a classification merely an invitation for eventual erosion of all customary titles into freehold?

19. What rules of inheritance make the best sense -- assuming that the "best sense" test can be applied in a manner that is not culturally biased. Is the headman/headperson model of traditional Pohnpei a better approach than inheritance by equal shares? What good and bad effects occur when a large number of people own small, undivided fractional interests in a parcel of land -- a growing phenomenon on Guam, for example, and among some Hawaiian properties.

20. Should Pacific Island governments have eminent domain power? If they should have some such power, should the power be limited to the taking of leasehold or other less-than-fee interests? If the power should not exist, how should the government resolve the perceived need to acquire land interests as against the refusal of owners to sell or lease? What if the owners will lease, but not sell, and what if the government insists on a sale because the lease would break the budget and create major financial problems for future generations?

21. In most Western countries, the owner of condemned land can, at least in theory, promptly buy comparable land with the money received in compensation for the condemnation. What if the islander owner cannot do so because of legal restrictions or the lack of any actual market in the area where he/she wants to continue living?

22. One of the great scholars of Pacific Islands land tenure systems, Ron Crocombe, points out that (this is a paraphrase): "In the Pacific Islands, the question is not 'who owns the land?,' but rather, 'who has what interests in land?'"

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23. One of the changes arising through modernization is the loss of subtle interests in land, such as the junior interest rights in Pohnpei and usufruct rights in Hawai'i. Should these rights be preserved? See Opispo v. Mesileng and PASH v. Hawai'i County Planning Commission. Did Sarihna Opispo win her case? What would have been the result if she had been a man?

24. What about the objection that reviving recognition of such rights will suddenly make land titles unmarketable, and thus drive land values down? Is this objection more legitimate in a place like Hawai'i, where a market economy in land has existed for at least a hundred years, than it would be in a place like Pohnpei, where land prices have been suppressed by the longstanding prohibitions on sales to outsiders?

25. Traditionally, chiefs have had a role in land "ownership" and in dispute resolution among persons of lower social standing. See Jatios v. Levi in the materials.

26. Should chiefly roles in land matters continue? Traditionally, chiefs had roles that, in Western terms, involve two distinct types of powers: (1) as "owners" of "interests" that entit led them to first fruits, and other material benefits from the land, and (2) as holders of the power to assign rights to others, in effect as judges.

27. Do the chiefs have land rights of "ownership" or land "interest" rights, whose denial or revocation would constitute, in Western terms, a violation of due process of law? Or are the chiefs in essence government officers who have no vested right to continue in political office?

These Western rubrics may well be inadequate to define the problems, although they help describe them. Use your own analytical categories if you find the Western terms unsatisfactory. What categories or descriptions do you consider to be better?

28. Should the "commoners" be able to select their chiefs? In ancient days, popular support and wars sometimes, but not always, would override strict rules of seniority in inheritance. Would election or votes of no confidence be an appropriate modern adaptation? See Jatios v. Levi and compare it to the "Customary Law (Restoration) Act" of the Marshall Islands.¹

¹ The Customary Law (Restoration) Act purported to invalidate the trial court's decision in Jatios v. Levi. Through what must have been an oversight, the Marshall Islands legislative body (Nitijela) failed to mention the appellate court's decision. The appellate decision is in the materials because it gives a better description of the case and it also touches on issues such as the "prior wrongs doctrine."

29. If chiefly roles should continue, what limitations if any should be imposed on their traditional powers of land-dispute resolution? What if they take a bribe from a party? Or seek an inappropriate type of favor in expectation of a ruling for the favor-giver? What if the chief in question is simply totally incompetent to perform the adjudicative task?

30. If chiefs are to continue, or resume, having adjudicatory powers, should they be expected to apply principles of law? Should they be expected to justify their decisions on the basis of written or enunciated oral opinions?

31. Should litigants/contestants be expected or allowed to have lawyers or others to speak for them? If not, who is to protect the "ignorant" and inarticulate subsistence farmer in a dispute with his/her educated, wealthy, and worldly cousin who has gained so much from having left the home village long ago, and now wants to come back and take over?

32. Should discovery be available to the parties? Should rules of evidence be used? Should parties be able to question one another or only to submit questions to the court, which may or may not ask the questions? See Efati p. 585.

33. Presumably, in one fashion or another, each party should be able to plead and prove that the applicable customary law supports the party's position. Is that presumption correct?

HOW should a party be required or allowed to prove custom? Should parties be obliged to enlist elders in their community to testify as "expert witnesses" on the applicable custom?

34. Should chiefs act, in essence, as trial-court judges, whose decisions can be reviewed and overruled? If so, does this not vitiate their traditional authority?

35. Should chiefs receive a salary for adjudicating land cases? Be subject to appointment procedures? Disciplinary procedures for misconduct?

36. What alternative process should be instituted, if the chiefs don't want to participate in dispute-resolution, for fear that being forced to choose between two factions of their "subjects" will further undermine their already precarious social authority?

37. In a 1980 forum on whether to reinstitute traditional, chiefly dispute-resolution processes in Pohnpei, one traditional chief stated that courts had become the new tradition, and should not be displaced. What do you think of this comment?

38. Should a hybrid model be adopted whereby an attempt is made to apply traditional law, but with a non-traditional adjudicatory body, such as the Marshall Islands Traditional

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Rights Court? Would it surprise you that lawyers, especially non-Marshallese lawyers, want to stay as far away as possible from that court? Would it surprise you that many, if not most, of the cases decided in the Traditional Rights Court result in split decisions? Before you laugh smugly, think of the split decisions in the U.S. Supreme Court about what our Constitution means.

39. Should persons who are NOT from the village make the decisions instead? (Such persons could be Westerners or indigenous people from far away.) Think of the evolution of the Anglo-American concept of the jury. In Norman times, the jury was chosen from among the witnesses to the case: Who better to judge the case than the people who saw the events? Now, of course, the jury must be the most ignorant of the facts, and "protected" from hearing any "inadmissible" evidence.

40. Would your opinion be affected if you learned that the people most likely to favor using outside judges are women, younger siblings in disputes against their older siblings, and members of the "lower classes," who feel that traditional law and the traditional decision-making process are biased against them, or at least that the process is more likely to be biased against them than a system of Western law and Western procedures?

41. If lands can be leased or sold, who should be "in" on the decision-making, and what kind of "vote" should decide the matter? If a large number of family or clan members have interests, is it proper to allow a group of leading interest holders to speak for all of them? See, e.g., Marshall Islands Constitution, art. X, § 1(2), for a "yes" answer.

42. Or is it important to have mandatory administrative or judicial review of a proposed transaction to ensure that all junior interests are being adequately protected in the deal? Compare Marshall Islands P.L. 1993-54 to the constitutional provision.² Is the statute unconstitutional? Note how the law initially speaks of foreign investment and then establishes a commission to review all leases. What would you do if your client was engaged in making a lease (as lessor or lessee) and you learned that the commission has never actually been established?

² Or a legislative act in the nature of a private bill, as in Western Samoa. If a legislative act were used as the process, what procedural safeguards ought to be used to prevent improper influences on the legislators? What appellate procedure, if any, should be available to a person aggrieved by the legislative act that allows land to be sold in which s/he has an interest?