CUSTOMARY LAND TENURE: A KEY AREA FOR CONSIDERATION IN DEVELOPMENT OPPORTUNITIES AND CHALLENGES IN PACIFIC ISLAND COUNTRIES

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INTRODUCTION

Pacific Island Countries (PICs) are strategically placed within the Asia-Pacific region, one of the fastest growing regions in the world, but include some of the least developed countries. Increasingly, PICs are encouraged to work collaboratively to find solutions that advance individual economies and contribute to regional economic development. To this end, in 2016 the World Bank introduced new research referred to as *Pacific Possible* to understand the transformative opportunities that exist in the pacific island nations and to identify the crucial challenges requiring immediate action. Although majority of the seven *Pacific Possible* focus areas require access to property and despite land playing a crucial part in the transformative opportunities identified, these focus areas do not identify that customary landholding is common in PICs or that customary land tenure is an essential area that needs to be considered within a development context.

Using Solomon Islands and Vanuatu as examples, the purpose of this paper is to highlight the importance of customary land tenure within the context of development opportunities in PICs and to illustrate that opportunities for local and regional development in PICs must not be considered in isolation of customary land tenure issues. To demonstrate this, first, this paper will introduce the topic and examine the background of PICs. Second, the interaction between customary land tenure and development will be analysed with specific focus on the ongoing issues arising as a result of the co-existence of customary land tenure and formal systems. Third, the paper will consider some opportunities identified by *Pacific Possible* to

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illustrate the need for customary tenure to be considered and finally, conclude that this is an essential consideration.

PACIFIC ISLAND COUNTRIES: BACKGROUND

Cultural and economic context

Pacific region comprises of three sub-regions which include Melanesia, Micronesia and Polynesia scattered across a large area of the Pacific Ocean. The grouping of the Pacific Island nations differs according to the purpose and the source. For example, The World Bank, for the purpose of its regional *Doing Business* reports, places PICs within the Asia-Pacific Economic Cooperation (APEC) and East and Asia Pacific (EAP) groups. Despite the difference in groupings, there are approximately 22 Island nations within the three sub-regions.[1]

PICs rely mainly on agriculture and in some parts of Melanesia fishing, forestry and mining as their main streams of livelihood, although recent efforts at long-term economic policy aim to diversify sources of growth.[2] Diversifying sources of growth and finding opportunities for development are important for the Pacific region largely because island communities in this region experience a high frequency of natural disasters, which impact individual economies and the overall growth of the region. During 1980-2014 periods, the annual damage and loss from natural disasters in the Pacific islands was higher than in other countries and non-small states in the world.[3] For example, the annual damage and loss from natural disasters such as cyclones and flash flooding is US$108.8 million in Fiji in 2012, US$467 million in Vanuatu in 2015 and US$100 million in Solomon Islands in 2014.[4] The intensity of the natural

[1] 'Pacific Island' in Encyclopaedia Britannica Online, https://www.britannica.com/place/Pacific-Islands (Accessed 13 December 2017)

[2] World Trade Organisation, *Trade Policy Review Report by the Secretariat – Solomon Islands* (WT/TPR/S/349, 8 November 2016) Doc No 16-6111, 5. For example, as of 2015, the overall exports from Solomon Islands totalled US$400 million with timber, crude palm oil, cocoa beans, copra and crude palm kernel being the top five products exported. The World Bank, Country Snapshots, Trade Summary for Solomon Islands 2015 < http://wits.worldbank.org/countrysnapshot/en/SLB (Accessed 5 July 2017).

[3] Ezequiel Cabezon, Leni Hunter, Patrizia Tumbarello, Kazuaki Washimi, and Yiqun Wu, 'Enhancing Macroeconomic Resilience to Natural Disasters and Climate Change in the Small States of the Pacific' (WP/15/125, IMF Working Paper, 2015), 7.

[4] *Ibid*, 8.

disasters and the level of resilience of PICs to such disasters are some reasons why some PICs experience higher damages and losses than others.[5]

In this background, in response to the question of what is possible in the Pacific, the World Bank introduced *Pacific Possible,* a new research initiative, which focuses on transformative opportunities and development challenges in PICs over the next 25 years.[6] The *Pacific Possible* participating countries are Federated States of Micronesia, Marshall Islands, Fiji, Kiribati, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. A few of the main focus areas for *Pacific Possible* deep-sea mining such as fisheries, tourism, and climate change and natural disaster preparedness[7] are linked to having access to and considering rights attached to property. This is further illustrated by the information contained in one World Bank draft report, which predicts that an additional one million tourists will arrive in the Pacific region by 2040 providing opportunities for growth especially for Vanuatu and a few other countries.[8] To accommodate the increase in tourists on the one hand and to encourage tourist visits on the other hand, this reports identifies that one avenue is to increase the number of luxury resorts.[9] But six research papers focusing on seven key areas or a draft overview report published between April 2016 and March 2017, do not consider customary land tenure in any greater length. Although customary land tenure does not exist in the same domain as formal property rights, it still impacts the use and access to property as will be considered in this paper.[10]

Pluralism, custom and customary land tenure

Pluralism

The majority of PICs have pluralistic legal systems, where two or more formal and informal systems coexist. The development of customs and law, and the interaction between formal and informal, or customary and state law can be traced to the custom and law discourse, which is beyond the scope of this paper. Very briefly, one group supports a hierarchical perception that law is superior and custom are a mere positive morality, and that custom and

[5] *Ibid*, 7.
[6] Pacific Possible <http://www.worldbank.org/en/country/pacificislands/brief/pacific-possible>.
[7] *Ibid*.
[8] The World Bank, 'Pacific Possible: Long-term Economic Opportunities and Challenges for Pacific Island Countries' (Discussion Draft, World Bank, 20 March 2017), xiv.
[9] *Ibid*.
[10] *Ibid*.

formal law cannot co-exist.[11] Another group supports the thinking that a more inclusive approach, which considers custom as influencing laws and customs should therefore not be validated only by the sanction given to it by courts.[12] The co-existence of customary law and formal law is the very basis of legal pluralism although, the conceptual analysis of the term includes the distinction between strong and weak pluralism. Many scholars have carried out extensive conceptual analysis of legal pluralism with a growing body of scholarly work in this area.[13] One such scholar Griffiths, who provides a comprehensive analysis of the concept of legal pluralism, states that pluralism in the 'strong' sense is 'a situation in which not all law is state law nor administered by a single set of state legal institutions, in which law is therefore neither systematic or uniform.'[14] According to him, pluralism in the 'weak' sense is, 'when the sovereign (implicitly) commands' different bodies of law for different groups in the population.[15]

Although Griffith's views have been critically analysed by other scholars,[16] a comprehensive analysis of the opposing nature of the interaction between the state-centric view that state-law is the only law and legal pluralism, which asserts the inclusion of non-state law,[17] is still a developing area within legal pluralism. More recently, Jayasuriya suggests that state and non-state institutions should not be considered as two opposing options but rather as forming a hybrid. He offers a regulatory perspective to legal pluralism by diverting the debate from the question 'what is legal pluralism' and from what he considers the 'ideological framework of

[11] John Austin, *The Province of Jurisprudence Determined* (1832), 21.
[12] Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (2nd ed, 1898), 31-32; Sir Carleton Kemp Allen, *Law in the Making* (1964), 70.
[13] There is significant literature that analyses 'legal pluralism'. For an exposition on 'legal pluralism' see Sally E. Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869, 870, M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975), John Griffiths, 'What is legal pluralism' (1986) 24 *Journal of Legal Pluralism* 1-55, John Griffiths, 'The Idea of Sociology of Law and its Relation to Law and to Sociology' (2005) 8 *Current Legal Issues* 49, 63-64, Brian Z. Tamanaha, 'Understanding Legal Pluralism: Past, Present, Local to Global' (2008) 30 *Sydney Law Review* 376, and David Pimentel, 'Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique' (2011) 13 *Yale Human Rights and Development Law Journal* 59. For an introduction to South Pacific law, see Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (4th ed, 2017) and R. Gerard Ward and Elizabeth Kingdon (eds), *Land, Custom and Practice in the South Pacific* (1995).
[14] John Griffiths, 'What is legal pluralism' (1986) 24 *Journal of Legal Pluralism* 5.
[15] *Ibid*. See also Sue Farran and Jennifer Corrin, 'Developing Legislation to Formalise Customary Land Management: Deep Legal Pluralism or a Shallow Veneer?' (2017) 10(1) *Law and Development Review* 4-8.
[16] For example, Brian Z. Tamanaha, 'The Folly of the "Social Scientific" Concept of Legal Pluralism' (1993) 20(2) *Journal of Law and Society* 192-217 and Brian Z. Tamanaha, 'Understanding Legal Pluralism: Past, Present, Local to Global' (2008) 30 *Sydney Law Review* 375–411.
[17] William Twining, 'Legal Pluralism 101' in Brian Z. Tamanaha, Caroline Sage and Michael Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (2012) 114.

state centralism', to consider it as a regulatory project.[18] According to him, a regulatory focus recognises and gives authority to local legal and social norms in order to 'implement the rule of law.'[19] He states that the prominence needs to be placed on institutions and not the multiplicity of legal culture.[20] Jayasuriya perceives legal pluralism as 'a set of templates and models through which the non-state orders are regulated and authorized.'[21] Considering legal pluralism through a regulatory perspective provides a fresh approach in the context of development that considers opportunities and challenges in the Pacific region.

The multiple social and legal norms, which form a pluralistic order present challenges to development as examined in detail by some scholars.[22] One of the key questions in this regard: what are the appropriate conditions that are necessary for multiple social and legal norms to co-exist? To this end, McAuslan[23] who examined the property law system in some countries in Africa for a few decades presents conditions necessary for pluralism to succeed. He states that the question of pluralism as against a single unified system with respect to land law is not a land tenure issue but an issue of power, that is, it is a question of who has power and over whom is that power exercised in respect of land.[24] As Julio Faundez points out,[25] McAuslan does not identify the actors of the issue of power leaving this observation open to the assumption that his preconditions can only sustain if the power issue is settled.

Similarly, some of McAuslan's preconditions are not practical in some settings although in theory they are appealing. One such suggestion is the ability to opt from one system to another.[26] In some pluralistic legal societies, this is impractical and in some cases impossible. Despite the unsuitability of some preconditions, majority of the preconditions for legal pluralism to succeed identified by McAuslan are useful at least to the extent of considering the nature of the interaction between customary law and state law. McAuslan states that land tenure and legal systems must operate on equal platforms while communal and collective

[18] Kanishka Jayasuriya, 'Institutional Hybrids and the Rule of Law as a Regulatory Project' in Brian Z. Tamanaha, Caroline Sage and Michael Woolcock, *Ibid*, 145.
[19] *Ibid*, 145.
[20] *Ibid*.
[21] *Ibid*, 146.
[22] For example, Doug J. Porter, 'Some Implications of the Application of Legal Pluralism to Development Practice*'* in Brian Z Tamanaha, Caroline Sage and Michael Woolcock above n 17, 162-174.
[23] Patrick McAuslan, 'Legal pluralism as a policy option: Is it desirable, is it doable?' (Paper presented at the UNDP-International Land Coalition Workshop: *Land Rights for African Development: From Knowledge to Action,* Nairobi, October 31-November 3, 2005) 1.
[24] *Ibid*.
[25] Julio Faundez, 'Legal Pluralism and International Development' in Brian Z Tamanaha, Caroline Sage and Michael Woolcock, above n 17, 180-181.
[26] Patrick McAuslan, above n 23, 3.

ownership must be accepted and built upon.[27] While he advocates for an equal platform and that both customary and state law must adhere to constitutional and international norms such as gender equality,[28] it is hard to strike a balance between these two when what is equal in customary setting is not similar in a state setting. For example, landholding is considered according to patrilineal and matrilineal descent depending on the location within the Island of Ambae in Vanuatu.[29]

There is danger in setting out preconditions because they appear to generalise options for pluralistic societies and generalising does not work in pluralistic settings because state law norms and customary norms differ just as much as each situation differ. Tamanaha points out that 'each situation is different, making it risky to generalize, the transplanted state law norms – invariably different from indigenous lived norms.'[30] From a legal pluralism and development perspective, what this means is that the interaction between customary law and state law is an intricate matter.

Custom

The terms "custom", "customary", "tradition" and "traditional" are often used when referring to pluralistic societies or plural legal systems in PICs. "Custom" is described as a usage or practice that may be shared by some communities or among a class of people or specific to a geographical location.[31] Although, sometimes used interchangeably, "custom" is not the same as "tradition". "Tradition" refers to the mere transmission of usage, practice or belief, from generation to generation.[32] The term "customary law" in a broad sense refers to laws and rules, whether written or unwritten, that have developed as a result of or are found on customs and traditions of local communities.[33] 'Customary law' is defined as '[t]he traditional law of indigenous peoples, generally oral, sometimes narrative or based on established performative practice, including song and dance, rather than in written codes or

[27] *Ibid*, 2.
[28] *Ibid*.
[29] R. Gerard Ward and Elizabeth Kingdon (eds), *Land, Custom and Practice in the South Pacific* (1995) 69.
[30] Brian Z. Tamanaha, above n 17, 210.
[31] 'Custom' in Merriam-Webster Dictionary Online <https://www.merriam-webster.com/dictionary/custom?utm_campaign=sd&utm_medium=serp&utm_source=jsonld > (Accessed 20 July 2017). See also Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (4th ed, 2017), 51.
[32] *Ibid* Corrin and Paterson, 51. See also 'Tradition' in Oxford Dictionary Online < https://en.oxforddictionaries.com/definition/tradition > (Accessed 18 July 2017).
[33] In this paper, 'customary law' is used in the context of customary land tenure. 'Customary land law' and 'customary tenure' are used interchangeably. See generally Jennifer Corrin, 'Customary Land and the Language of the Common' (2008) 37 *Common Law World Review* 1.

principles.'[34] Customary land tenure refers to the manner in which communities' own, possess and have access to land or the manner of holding land according to customs, traditions and customary law.[35]

Early scholarly pursuits on the law and custom discourse focused mainly on the origin of custom, its growth and transformation into law and the appropriate description of custom. Holland, a well-known early 20th century British scholar and jurist, describes custom as a usage or 'the spontaneous evolution by the popular mind of rules the existence and general acceptance of which is proved by their customary observance.'[36] He identifies it as 'the oldest form of law-making', which 'marks the transition between morality and law.'[37] Holland asserts that the main characteristic is 'a generally observed course of conduct.'[38] According to him, it originates from 'a habitual course of action.'[39] This entails 'the conscious choice of the more convenient of two acts, though sometimes doubtless in the accidental adoption of one of two indifferent alternatives; the choice in either case having been either deliberately or accidentally repeated till it ripened into habit.'[40]

Both Merry[41] and Hooker[42] examined the distinction between law and custom considering Diamond's description of the dichotomy between law and custom. According to Diamond custom is:

> spontaneous, traditional, personal, commonly known, corporate, relatively unchanging-is the modality of primitive society; law is the instrument of civilization, of political society sanctioned by organized force, presumably above society at large, and buttressing a new set of social interests.[43]

In a persuasive article, Diamond considered rule of law as against the order of custom.[44] Diamond considered custom to be a "social morality" and that "the relation between custom

[34] 'Customary law' in Oxford Dictionary Online < http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095654898 > (Accessed 18 July 2017).
[35] *Ibid*, Corrin.
[36] T.E. Holland, *Jurisprudence* (1950), 56-57.
[37] *Ibid*, 57.
[38] *Ibid*.
[39] *Ibid*.
[40] *Ibid*.
[41] Sally E. Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869–870.
[42] M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975), 16.
[43] Stanley Diamond, 'The Rule of Law Versus The Order of Custom' (1971) 38(1) *Social Research,* 47.
[44] *Ibid,* 44.

and law" to be one of contradictory nature rather than of continuity.[45] This is also reflected in the ongoing question of how best customary law and formal law can co-exist.

On face of it, this issue is settled in the Pacific region. Custom is a source of law in most PICs as constitutional provisions retain customary law as a central aspect of constitutional rights. But customary law itself is not adequately defined.[46] For example, the Constitution of Vanuatu does not define custom or customary law. Section 2 of the Schedule to the *Interpretation Act 1982* Cap 132 (Vanuatu) states that 'custom' is 'the customs and traditional values of the indigenous peoples of Vanuatu.'[47] As Kenneth Brown observed, this definition presents three points: (a) the only clear aspect of this definition is that customs of people who are not indigenous to Vanuatu is not covered by it (b) further clarification is required of the position regarding values that do not fall within 'traditional' or modern developments in customs and (c) it defines custom by referring to 'traditional values', which is centred around values that create confusion between 'positive values with past practices' and 'traditional values.'[48]

These observations lead to a key issue relevant in a development context. For example, because of its lack of clarity, Section 2 of the Schedule to the *Interpretation Act 1982* Cap 132 (Vanuatu) could be used 'to suit the purpose of those with vested interests to protect',[49] which means whether from a customary landholder's perspective or from an overseas investor's perspective, they could be used or rather misused. Leaving aside the question of whether customs should be defined with precision, the implication for development initiatives is the uncertainty of ascertaining customary rights over land. This is further complicated by diversity of customs that exist in PICs.[50]

In the case of Solomon Islands, Schedule 3 paragraph 3 (1) to the Constitution of Solomon Islands 1978 states that 'customary law shall have effect as part of the law of the Solomon Islands' as stated in 3(2) except 'in respect of any customary law that is, and to the extent that is, inconsistent with this Constitution or an Act of Parliament.' This provision read together

[45] *Ibid*.
[46] For a comprehensive analysis of customary law in the context of the Pacific Island countries, see Jennifer Corrin and Don Paterson, above n 31, 51-76.
[47] See Kenneth Brown, *Reconciling Customary Law and Received Law in Melanesia: the Post-Independence Experience in Solomon Islands and Vanuatu* (2005) 22-23. See also Jennifer Corrin and Don Paterson, above n 31, 61-65.
[48] *Ibid,* Kenneth Brown, 23.
[49] *Ibid*.
[50] R. Gerard Ward and Elizabeth Kingdon, above n 14, 69. This will be examined later in this paper.

with paragraph 2(1)(c) of Schedule 3, which explicitly states that common law and equity do not apply if these are inconsistent with customary law, means that on the one hand, customary law is secondary to the Constitution or an Act of Parliament, and on the other hand prevails over common law and equity.[51] What this means to development initiatives is that when land tenure issues require ascertaining the law applicable to such matters, customary law could be considered as the applicable law. To this end, Corrin observes that in most PICs 'the choice between customary law and common law is determined on an *ad hoc* basis'.[52] Although, it appears that common law may be preferred,[53] the availability of a choice means it is subject to judicial interpretation and courts can decide on the nature of the application of customary law.

Section 239 of the *Land and Titles Act Cap 33* (Solomon Islands) is a provision states that customary land is to be dealt with according to the current customary usage applicable to such land. This is a provision with broad application. This section protects customary land from alienation because it requires that the 'manner of holding, occupying, using, enjoying and disposing of customary land shall be in accordance with the current customary usage applicable.' The practical implication of this section is that it is relevant from the perspective of development projects when accessing customary land for development purposes.

The constitutional and legislative provisions of the constitution and other legislation in Vanuatu, Solomon Islands and a few other PICs do not comprehensively define customary law. However, despite customary law not being clearly and specifically defined, constitutional provisions form the foundation for ascertaining customary land rights in PICs although integrating customary tenure within a formal system is an ongoing issue for PICs.[54]

At present, both introduced concepts of land tenure such as "freehold ownership" which is individual ownership of land that can be held for an indefinite period and customary land tenure exist in PICs.[55] The socio-economic and political changes after the colonial period have transformed some aspects, particularly in the way communal land is viewed at present.

[51] Jennifer Corrin and Don Paterson, above n 31, 60.
[52] Jennifer Corrin 'Complexities of State Law Pluralism in the South Pacific' (2010) 61 *Journal of Legal Pluralism* 149.
[53] *Ibid*,.
[54] In a recent paper, Farran and Corrin examine this issue comprehensively with its relevance to Vanuatu. See Sue Farran and Jennifer Corrin, above n 15, 1-27.
[55] AusAID, above n 56, 3-8.

For instance, the setting up of incorporated land groups in Papua New Guinea is an example.[56]

DEVELOPMENT AND CUSTOMARY TENURE

The interaction between customary land tenure and development

The purpose of considering the interaction between customary land tenure and development is to understand their reconciliation. From this perspective, for the present discussion rather than the concept of legal pluralism, what is useful is how to consider ways to approach legal pluralism. This is mainly due to the reason that customary land tenure in PICs presents several ongoing issues, which can impact the opportunities for development. The following exposition considers only a few persisting issues relevant to land reform in PICs, which are examined under the following heads:

- *Formalising customary land management and related issues*
- *The difficulty in generalising customs, traditions and cultural practices*
- *The application of customary land laws within a formal legal system*

Formalising customary land management and related issues

In the pluralistic setting as is in PICs, formalising customary land law invariably leads to the question as to its place within the formal system. Resolving this issue requires considering customary law and its place. Should customary law apply alongside the formal system or is one superior to the other? To this end, Corrin notes the hierarchical system that exists and that it inevitably gives state law superiority, but leaves one question unresolved, that is, despite the recognition of customary law, its exact place in the state system.[57] It appears that this relates to the issue of co-existence. As Benda-Beckmann observed '[b]eyond the threshold of the yes or no to legal pluralism, there is little uniformity in the conceptualisation of law, or legal pluralism.'[58] This ambiguity identified by Benda-Beckmann points to the underlying issue of the scope of law within the co-existence of a formal and informal system.

[56] AusAID, 'Making Land Work: Reconciling customary land and development in the pacific' (Report, Vol 1, Commonwealth of Australia, 2008) 22-23, 37-39.
[57] Jennifer Corrin, 'Moving Beyond Hierarchical Approach to Legal Pluralism in the South Pacific' (2009) 41(59) *The Journal of Legal Pluralism and Unofficial Law* 32.
[58] Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 34(47) *Journal of Legal Pluralism* 72.

First, the main issue posed by this co-existence is, where does or where should customary law be placed in the pecking order? This question is usually addressed in the context of the concept of legal pluralism. However, Jayasuriya approaches it from a different perspective. According to him, rather than viewing customary law as an alternative or substitute to state rules, 'that implicitly assume the autonomy of private and civil ordering', state and non-state institutions should be considered as legal hybrids.[59] The main advantage of considering such an approach is that, it takes the focus from theoretical to a practical manner of application, which allows customary law and thereby customary land law the opportunity to co-exist while retaining its cultural context.

To this end, Farran and Corrin suggest that legal hybrids, which refer to mixed systems of law where several different types of laws are seen in the same system, may be a useful tool to reconciling the past and the future, and fostering development that is relevant to local conditions.[60] For example, in the context of Vanuatu, legal hybrids refer to the common law, civil law and customary law which applies in different manner to diverse communities within Vanuatu.[61] Farran and Corrin observe that sometimes development may seem to nurture legal pluralism but in reality this may be 'a conduit to hybridity, so that the distinctive characteristics of a formerly plural system, whether identified as weak legal pluralism or deep legal pluralism, are blurred through a process of merger or blending.'[62] This may not necessarily be a negative aspect if legal hybrids can adapt to their current environment. From the context of development which considers local factors, legal hybrids that allow mixed and plural systems to co-exist within a formal system, as Farran and Corrin observe[63] might be a link for transition between the past and the present. What it means for the present discussion is that customary tenure practices based on custom and tradition can adapt to the present and participates in the development process yet retain the cultural identity.

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[59] Above n 18, 148. Jayasuriya notes that the term 'legal hybrids' was borrowed from Teubner (1986). See also Doug J. Porter, above n 23, 162-174. Porter considers in depth, a number of challenges of the application of legal pluralism to development practice.
[60] Sue Farran and Jennifer Corrin, above n 15. See generally Seán Patrick Donlan, 'To Hybridity and Beyond: Reflections on Legal and Normative Complexity' in Vernon Palmer, Mohamed Y. Mattar and Anna Koppel (eds) *Mixed Legal Systems, East and West: Newest Trends and Developments* (2015) and Seán Patrick Donlan, 'Comparative Law and Hybrid Legal Traditions: An Introduction' in Eleanor Cashin-Ritaine, Seán Patrick Donlan and Martin Sychold (eds), *Comparative Law and Hybrid Legal Traditions* (2010).
[61] Sue Farran and Jennifer Corrin, above n 15, 8.
[62] *Ibid*, 8.
[63] *Ibid*, 9.

Legal hybridity is not an easy approach in certain settings. Some difficulties in Vanuatu regarding the introduction and implementation of the *Custom Land Management Act,* identified by Farran and Corrin demonstrate that assessing the existing realities unique to each PIC regardless of whether such realities are state or non-state normative orders is important. From a development perspective, this is essential, which is exactly the reason why customary tenure should be considered in identifying development opportunities and formulating development agenda in the Pacific region. In countries such as Solomon Islands and Vanuatu, developing legislation to formalise customary land management is an ongoing challenge. In particular, some difficulties and setbacks in respect in Vanuatu include the impact of natural disasters, more specifically cyclone Pam in March 2015 delaying the pilot testing and the implementation of the newly introduced *Custom Land Management Act,* political climate, change of government, funding ceasing and introduction of additional processes between Custom Land Management office and the State Law Office.[64] These conditions and setbacks are not limited Solomon Islands and Vanuatu, but also relevant to other PICs.

Second, the question is whether formalising customary tenure means converting to formal title. This paper advocates the position that formalising customary land tenure does not mean wholesale conversion to individual title. To convert or not to convert to individual title is a long-standing debate supported by some and opposed by others. There is strong advocacy by some to convert customary land tenure to individual rights within a formal property law system on the basis that legal pluralism is an impediment to development. A proponent of this argument, Helen Hughes, in a highly criticised paper written in 2003, paints a bleak overview of the Pacific region and expresses the view that communal rights are a barrier to development, which also holds back the progress of the communities in the Pacific Islands.[65] Moreover, arguing that communal property rights should be converted to individual private property rights, Hughes refers to the emergence of individual property rights based development in the 1990s.[66] She draws attention to what she observes as the success of World Bank land-titling projects in Taiwan and Thailand and in contrast, the Scandinavian aid agency's failure with co-operative farming in Tanzania.[67]

[64] *Ibid*, 1-27, 16-17.
[65] Helen Hughes, 'Aid has failed the Pacific' (*Issues Analysis*, 33, The Centre for Independent Studies, 7 May 2003) 11-12.
[66] *Ibid*.
[67] *Ibid*, 11.

Although, Hughes uses land-titling projects to favour individual property rights, scholars such as Durand-Lasserve and others who examined seventeen past and current titling programmes in other parts of the world: Africa, Asia and the Latin America, concluded that while titling increased tenure security, its impact on poverty alleviation and access to credit was minimal.[68] Jim Fingleton denounces Hughes' assertions based on several grounds including their narrow view of what 'land reform' means and the lack of comprehension of the term 'communal land ownership.'[69] Fingleton's main argument is that countries do not have to abandon their customary land tenure and convert to individual titles to achieve economic development.[70] This approach of converting customary rights to individual title is an approach that has been tested over time as Fingleton aptly observes.

Hughes' observations appear to conform with the former approach of international organisations in the 1980s and 1990s based on strategies led by the 'Washington Consensus'[71] to generate wealth for developing countries by granting formal title. This approach has been considered at global forums[72] for eradicating poverty.[73] Those in favour of formal issuing title and simplified property transaction processes argue that formal title leads to marketability of property, which improves the opportunity of owners to engage in

[68] Alain Durand-Lasserve, Edesio Fernandes, Geoffrey Payne and Carole Rakodi, 'Social and Economic Impacts of Land Titling Programmes in Urban and Peri-urban areas: A Review of the Literature', (Independent Assessment Report, 2006), 4-5, 17, 32–56, 58. The authors advocate a cautious approach to introducing large-scale titling programmes in places where the concept is new or local communities are vulnerable. See also Alain Durand-Lasserve and Geoffrey Payne, 'Evaluating Impacts of Urban Land titling: Results and Implications: preliminary findings' (Preliminary paper, 2006) 2.

[69] Jim Fingleton (ed), 'Privatising Land in the Pacific: A defense of customary tenures' (The Australia Institute, Discussion Paper No 80, June 2005) 1-5.

[70] *Ibid*.

[71] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (2009) 337. The terminology 'Washington Consensus' was first introduced in 1989 by John Williamson, a renowned economist and a scholar. He used this term to refer to ten policies that focused on Latin America. See, John Williamson, 'A Short History of the Washington Consensus' (Paper commissioned by Fundación CIDOB for the 'From the Washington Consensus towards a new Global Governance' Conference, Barcelona, 24 September 2004) 1-2. See also, Stanley Fisher, 'The Washington Consensus' in C. Fred Bergsten and C Randall Henning (eds), *Global Economics in Extraordinary Times: Essays in Honour of John Williamson* (2012) 11-16; John Williamson, 'Overview: An Agenda for Restarting Growth and Reform' in Pedro-Pablo Kuczynski and John Williamson (eds), *After the Washington Consensus: Restarting Growth and Reform in Latin America* (2003); John Williamson, 'What Should the World Bank Think About the Washington Consensus?' (2000) 15(2) *World Bank Research Observer* 251.

[72] See Pietro Garau and Elliott D. Sclar, 'Interim Report of the Task Force 8 on Improving the Lives of Slum Dwellers' (Interim Report, UN Development Group, 1 February 2004), 61-62. The Global Acton Plan proposed by United Nations Centre for Human Settlement in 1996 (Istanbul Declaration 1996) stipulated four strategies of which exploring 'innovative arrangements to enhance security of tenure.'

[73] Keith Clifford Bell, 'World Bank Support for Land Administration and Management: Responding to the Challenges of the Millennium Development Goals' (Paper presented at XXIII FIG Congress, Germany, 10 October 2006).

economic activities leading to enhanced economic potential for countries.[74] A well-known economist de Soto is a strong advocate of this approach.[75] His ideas further cemented the idea that existed at the time that formalising property systems by land titling leads to secure title and generates credit for landowners with secure title.[76]

However, there is wider acceptance now that the outcome of formalising rights to private property by issuing formal title is not similar in all countries. Bromley uses studies from Sub-Sharan Africa to question the need to formalise title to achieve economic development and to conclude that formalising is not the prescription for some countries.[77] A World Bank report (2006) notes that 'most policy analysts now no longer simply assume that formalization in a given context necessarily increases tenure security…'[78]

Fingleton states that his research among Tolai people of the Gazelle Peninsula in Papua New Guinea showed the Tolai people were able to use their customary tenure system to continually redistribute their village land to use these in the most beneficial and useful manner.[79] Another scholar, Fisher presents a strong argument of the usefulness of group arrangements such as 'informal common property arrangements' and the fact that these have been effective in forest and pasture management in some developing countries.[80] Thus, such arrangements actually allow communities to access economic benefits.[81] He observes that 'it is not the group arrangements that are a barrier to development but the fact that the group rights are constrained by the state.'[82]

The Australian aid agency, AusAID (which was integrated into Department of Foreign Affairs and Trade in Australia in 2013), which had a long history of supporting development projects in the Pacific, also recognised that land policy reform as 'a complex and sensitive

[74] For example, Thai land titling project. See Anthony Burns, 'Thailand's 20-year program to title rural land' (Background Paper, 13 February 2004).
[75] Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000), 206.
[76] *Ibid*, 32-35.
[77] D.W. Bromley, 'Formalizing Property Relations in the Developing World: The Wrong Prescription for the Wrong Malady' (2009) 26(1) *Land Use Policy* 20. Bromley quotes Frank Place and Peter Hezell, 'Productivity Effects of Indigenous Land Tenure Systems in Sub-Saharan Africa' (1993) 75 *American Journal of Agricultural Economics* 10 in examining Ghana, Kenya and Rwanda.
[78] Rogier van den Brink, Glen Thomas, Hans Binswanger, John Bruce and Frank Byamugisha 'Consensus, Confusion, and Controversy – Selected Land Reform Issues in Sub-Saharan Africa' (Working Paper No 17, The World Bank, 2006) 12.
[79] Jim Fingleton, above n 69, 34.
[80] *Ibid*, 33.
[81] *Ibid*, 35.
[82] *Ibid*, 33.

issue' in the Pacific.[83] While refraining from advocating for specific policy options, AusAID's *Making Land Work* prepared in 2008 on the topic of reconciling customary land and development and the collection of 16 case studies contained in this report provide an overview of land tenure and administration in the Pacific region.[84] Some of these case studies highlight that in practice when development plans require access to customary land, there are numerous constraints to access.[85] The most important contribution of *Making Land Work* to the debate on customary tenure and development is the premise on which it is based, that is: 'reform efforts are much more likely to be successful if they acknowledge the continuing relevance of customary land tenure systems' and their suggestion to approach reform in a consultative way.[86] This is a compelling observation for *Pacific Possible* to consider customary land tenure. *Making Land Work* encourages a consultative approach by taking into account the diverse nature of PICs, individuals, communities, organisations and institutions that use and mange land with the intention of developing 'mechanisms to link customary land systems to the formal legal and economic systems.'[87]

The difficulty in generalising customs, traditions and cultural practices

Despite shared colonial histories and geographical location, there is difficulty in drawing conclusions or generalising customary land tenure within PICs and sometimes within Islands in the one country. For example, Vanuatu and Solomon Islands have their population fragmented across multiple islands. Solomon Islands is spread over a number of large, medium and small Islands covering an area of 28,896 square kilometres.[88] Similarly, Vanuatu is comprised of approximately 80 islands, both habited and inhabited, covering an area of about 12,189 square kilometres.[89] In Vanuatu, more than 100 languages are used while in Solomon Islands, approximately 80 languages are used.[90] This population spread over many islands has resulted in cultural fragmentation within Solomon Islands and Vanuatu. This is reflected in the diversity of native languages, the variety of customs and land tenure practices

[83] AusAID, above n 56, v.
[84] *Ibid*.
[85] *Ibid*.
[86] *Ibid*, 2.
[87] *Ibid*.
[88] 'Solomon Islands' Central Intelligence Agency, *The World FactBook* https://www.cia.gov/library/publications/the-world-factbook/geos/bp.html (Accessed 20 July 2017).
[89] 'Vanuatu' Central Intelligence Agency, *The World FactBook* <https://www.cia.gov/library/publications/the-world-factbook/geos/nh.html> (Accessed 20 July 2017).
[90] Kenneth Brown, above n 47, 69. See Angela Terrill, 'Why make books for people who don't read?: A perspective on documentation of an endangered language from Solomon Islands' (2002) *International Journal of the Sociology of Language* 205.

in those countries. Ward and Kingdon's observations on diversity of ideas on land tenure rules in the island of Ambae in Vanuatu, highlight the complexity presented as a result of this diversity. According to them:

> [p]atrilineal reckoning of descent and inheritance of land prevails in the western half of the Island … ; and in the eastern half, descent and land transmission follow matrilineal pattern. In north Pentecost and east Ambae matrilineal descent is combined with a principle of virilocal residence. South Pentecost practises patrilineal descent. Patrilineal clans characterised land holding in pre-contract southwest Malakula with well-demarcated territories associated with each landholding kin group, but not with each individual ….[91]

Ward and Kingdon further elaborated that in respect of the Santo interior in the hierarchy of importance, group rules were more important than individual rights although there was flexibility to gain access to land by using various ties with different groups.[92]

In Solomon Islands, customary land is held by communal or group ownership based on blood relationships, the place they inhabit and their contribution to the village unit.[93] Interests in land are multilayered with clans and individuals having various rights over the same land.[94]

Customary land law forms an important part of Solomon Islanders' lives and any act contrary to that can be declared void by the court. From the point of entering contracts, this means every contract or agreement entered into either orally or in writing is subject to customary law. If a contract is entered contrary to section 241 (1) of the *Land and Titles Act Cap 133* (Solomon Islands), the court can declare it void under section 241 (3). Since the courts in Solomon Islands have this power to declare void contracts or agreements that contravene customary land rights, any agreement between customary land owners and non-Solomon Islanders that do not comply with the relevant provisions are at risk of being declared void. This is also a reason why it is important to know, acknowledge and consider customary land tenure as an essential aspect of transformative opportunities in PICs especially those that require access to customary land.

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[91] Kenneth Brown, above n 47, 69.
[92] *Ibid*.
[93] Craig Forrest and Jennifer Corrin, 'Legal Pluralism in the Pacific: Solomon Islands' World War II Heritage' (2013) 20 *International Journal of Cultural Property* 11.
[94] *Ibid*.

The application of customary land laws within a formal legal system

The application of customary land law within a formal legal system creates issues especially regarding the application of custom and law, which is relevant in a development context. In this regard, Corrin and Paterson identified several issues in relation to the application of customary land laws in the South Pacific, which provide a useful point of reference to understand the nature of some issues that may appear in plural legal systems.[95] These are:[96]

1. The necessity to plead custom and customary law and how should this be done;
2. Whether all matters involving indigenous people need to be considered by using customs and customary laws;
3. The application of customs or customary laws: whether these apply to indigenous people or to persons of other communities or both;
4. The relationship between custom and the common law and equity; and
5. Customary law and gender issues.

These issues identified and examined comprehensively by Corrin and Paterson demonstrate that the interaction between customary and formal system in PICs is not yet solved due to a lack of clarity regarding the application of customary law.[97] From a development perspective, when customary land has to be accessed for new use for development purposes, an issue likely to arise is whether registered title should replace customary tenure. Fingleton proposes that it is possible to do so where a system of registration of land titles would be useful in cases where customary land are located 'within the boundaries of towns and cities, or on their fringes where people are setting on land without formal recognition of their rights to occupy.'[98] On the other hand, another scholar Chris Lightfoot considered Fiji as an example to demonstrate that customary land ownership can exist while also providing individual, secure and transferrable property rights, which can be used to generate economic benefit.[99] He refers to how the Native Land Trust Board operates in Fiji to enable the leasing of registered customary property, which remains the property of traditional owners: an option that has worked for Fiji.[100] His point is that there is only a minimal difference in the

[95] Jennifer Corrin and Don Paterson, above n 31, 63-76.
[96] *Ibid*. This is a summary of the issues considered in detail by Jennifer Corrin and Don Paterson, above n 31.
[97] An example is Vanuatu considered by Farran and Corrin in their recent paper. See Farran and Corrin, above n 16, 1-27.
[98] Jim Fingleton, above n 69, 35.
[99] *Ibid*, 23.
[100] *Ibid*.

economic outcome between leasehold over a property and freehold property.[101] Lightfoot's observations provide another angle to the question regarding conversion of customary landholding to formal title. According to him, it is a matter of the value of the 'cost of having a land tenure system that permits individual leaseholds over customary land versus replacing customary land tenure with an individualised freehold land tenure system.'[102]

The options presented by Fingleton and Lightfoot provide ways to navigate customary tenure, retain the cultural context while achieving economic development that benefit the community. Although, these options have been considered in various contexts in response to customary tenure reform, the *Pacific Possible* draft report does not make any mention to customary tenure when considering development opportunities.

DEVELOPMENT OPPORTUNITIES: THE NEED TO CONSIDER CUSTOMARY LAND TENURE

In a development context, a main consideration for PICs should be how to retain their cultural context while ensuring that they can participate in economic activities using land and benefit from opportunities such as those identified by *Pacific Possible.* Despite most PICs being former colonial nations, customary land law reform[103] is ongoing as noted earlier. In this background, although land plays a crucial part in the lives and livelihood of Pacific Island communities and 80 per cent of the land in most countries in this region is under customary authority,[104] *Pacific possible* does not identify customary land tenure as an important area.

The *Pacific Possible* overview draft report published in March 2017 specifically states that *Pacific Possible* 'does not intend to provide a comprehensive review of development issues, a development vision or detailed action plans.'[105] But some of the opportunities identified in this report support the need to consider customary land law as an important aspect. This can be better explained by using two transformative economic opportunities specified in the *Pacific Possible* draft report. For example, two transformative economic opportunities for PICs identified in the report are:[106]

[101] *Ibid*, 24.
[102] *Ibid*.
[103] The example of Vanuatu considered by Farran and Corrin. Sue Farran and Jennifer Corrin, above n 15, 1-27.
[104] AusAID, above n 56, 3.
[105] The World Bank, above n 8, 2.
[106] *Ibid*, 25-26.

(i) Develop high-end luxury properties

The future economic potential of high-end development is identified in this report to be over US$450 million in tourism.[107] A number of actions are identified as requiring to be adopted to attract investments in high-end resorts in order to capture this opportunity. One action identified is '[s]upport by governments to assist the purchase or lease of land under conditions acceptable to investors but ensuring full protection and benefits to traditional land owners.'[108]

(ii) Retiree market

The report highlights that there is the potential for PICs to attract US$200 million dollars by 2040 through the retiree market.[109] In addition, the report also divides tourism market into three segments, of which two are home-owners and permanent-stay segments. These two segments are identified as considering certain factors as important when making decisions regarding retirement. But the report assumes that PICs have strong functioning states. These factors considered by the two segments based on the assumption that PICs have strong functioning states include long term certainty of residency, access to high quality medical care, affordability, safety, tax status and property ownership rights, including disposal on death or departure with repatriation of assets.[110] To this end, the report acknowledges the need to '[i]nvest in infrastructure and provide incentives to attract the private sector to develop accommodation options for foreign retirees' and the need to '[p]rovide policy incentives for foreign retirees to own and dispose of properties in PICs.'[111]

The actions identified in the draft report as requiring to be adopted by PICs in order to attract the retiree market or investors to build high-end development assumes that customary land is titled or exist within a formal system, and do not state (a) the need to consider the existence of customary landholding although formalising customary law management is a current ongoing issue for many PICs or (b) the importance of the role customary practices play in the lives of communities in PICs.

[107] *Ibid*, 26.
[108] *Ibid*, 29.
[109] *Ibid*, 27.
[110] *Ibid*.
[111] *Ibid*, 31.

The *Pacific Possible* draft report neither strongly dispels nor agrees the importance of property rights and tenure. This report makes no mention of the existing issues on customary tenure. Instead it states that '[i]ssues such as macroeconomic stability, property rights' are important considerations but 'Pacific Possible works on the assumption that countries maintain the standards currently achieved.'[112] Further, the report notes that *Pacific Possible* 'would only comment on these issues when a significant change from the current situation is essential to unlock an opportunity or to manage a threat.'[113] The report does not explain what this current standard is in regards to existing property rights or what a significant change entails. This mere mention of a change in the current situation to unlock an opportunity is very ambiguous. This is also not a sufficient explanation of the local conditions because some opportunities mentioned in the *Pacific Possible* are directly linked to having access to and using customary land.

Further, elsewhere in the report there is some acknowledgement that the actual benefit of opportunities identified will depend on PICs implementing appropriate 'policies and investments to attract more tourists.'[114] This seems to place the responsibility on PICs to make an environment conducive for investment. Again, merely placing the responsibility on PICs is not sufficient. It is not sufficient to assume that PICs are responsible without a comprehensive explanation and acknowledgement of the importance of customary land tenure in the proposed development opportunities.

The draft report also focuses on specific recommendations in relation to the opportunities identified in *Pacific Possible* and mentions five cross-cutting issues that are important for addressing opportunities and challenges. As examined in this exposition, some opportunities identified in the draft report clearly require access to customary land and land use. For example, building more luxury resorts or retirement villages would require access to customary land. As such, secure and transferrable title would be one incentive for investors to invest and for *Pacific Possible* transformative opportunities to become actual economically beneficial realities. Whether customary land can be accessed by long term leases or in the manner of registered title as Fingleton proposes, which has worked for Papua New Guinea and Fiji, is the next step. But many PICs such as Solomon Islands and Vanuatu are at the initial point of still navigating their way through to reconcile customary law and formal law.

[112] *Ibid*, 2.
[113] *Ibid*.
[114] *Ibid*, 97.

The 'cross-cutting'[115] issues identified in the report, such as policies and investments, and promoting regional cooperation are areas that this World Bank report should further explain in the context of accommodating existing customary tenure and formal laws in PICs. The purpose of identifying transformative opportunities is to transform the lives of the communities in a sustainable manner. If this is the case, then the current customary tenure which forms a crucial part of the lives of communities in PICs must be considered.

CONCLUSION

Despite their origination based on geographical, historical and political similarities and differences, customs and customary land tenure have survived colonial times. As demonstrated in the scholarly work in various contexts considered in this paper, customary tenure forms an important aspect of the lives of the communities in PICs. This paper examined several ongoing issues relevant to customary law, land law reform and its interaction with the formal systems in PICs. Given that the nature of the interaction between customary land law and formal law in PICs is a continuing issue, customary land tenure cannot be disregarded when identifying opportunities in PICs. As such, the transformative opportunities presented by the *Pacific Possible* require considering and acknowledging the importance of customary land tenure as well as finding ways to accommodate customary tenure. Transformative opportunities cannot be considered in isolation of customary land tenure.

[115] *Ibid*, 107.