

“Pacific land tenures – new ideas for reform” – Jim Fingleton

Biography: Jim Fingleton is a lawyer-anthropologist, who has worked on land matters in Asia and the Pacific Islands in various capacities over nearly four decades. He has been legal counsel in land cases and official inquiries, an academic researcher into changes in customary land tenures, a senior adviser to governments on land policy reform and a drafter of new land legislation.

He has worked for the United Nations and other aid agencies since 1980 on many projects, including legislative reforms in land, forestry, fisheries, agriculture, plant and animal health and conservation. He has working experience in two dozen countries in Asia, Africa, the Pacific and the Caribbean. At present, he practices as a freelance Development Law Consultant and a part-time farmer.

A. BACKGROUND

i) Since independence

- independence Constitutions in PICs placed strong emphasis on custom, trad. authorities and customary tenures
- since independence, major changes in formal political, econ. and admin. systems (eg, rep’ve govts. and decentralisation; plantations less important/mining and logging more; major weakening of admin. capacity)
- but, countries are still largely operating on pre-independence land legislation, with their policies and admin. underpinnings, which are increasingly outdated and dysfunctional
- there were some attempts to adapt the inherited land systems to the new realities and requirements – eg, PNG’s CILM in 1973
- but the reforms were not sustained, as a result of lack of ongoing political commitment, and financial and admin. support
- recently, however, there are signs of a mood for change (PIF, plus PNG, Vanuatu, Samoa, Sols., Fiji, ...)

ii) Pacific Land Program

- the PLP is a response to this mood for change
- also a recognition that there would be no sustainable changes without significant financial support
- \$54m from Oz Govt. over next 4 years to support land reforms in PICs – esp’y PNG, Van., Sols and East Timor
- first product – “Making Land Work”; based on 17 case studies

iii) My talk

- based on my own review of the case studies, recently published by FAO – **“Pacific Land Tenures: New ideas for reform” by Jim Fingleton, FAO Legal Papers Online #72, available at www.fao.org/legal/prs-ol**
- will identify the 15 main lessons I draw from the case studies
- will present my views on how to apply those lessons to land reform in the PICs

B. LESSONS FROM THE CASE STUDIES

- the 17 case studies covered the major land reform themes – strengthening of land rights, facilitation of land dealings, settlement of land disputes, access to land for public purposes, the process of land reform, land administration, training and education
- insufficient time to do justice to the richness of the case studies - see Vol. 2 of the report

- here, present what I regard as the 15 main lessons for land tenure reform
- will use Customary Land Registration to illustrate these lessons – CLR, aimed at confirming rights in customary lands and facilitating land dealings, covers most of the major themes; it is, in many ways, the “ultimate” land reform
- I have identified the lessons under 4 main headings –

i) THE BASIC APPROACH TO REFORM

ii) PRE-CONDITIONS FOR REFORM

iii) METHODS OF REFORM

iv) SUSTAINING REFORM

i) THE BASIC APPROACH TO REFORM

Lesson 1: Measures which build on and adapt existing customary tenures are more likely to succeed than those which try to replace them

Lesson 2: Only reform to the extent necessary to meet the need

Lesson 3: Reforms must be consensual

Lesson 4: The reform must balance the traditional and the modern

ii) PRE-CONDITIONS FOR REFORM

Lesson 5: Political leadership and commitment to the reform are indispensable

Lesson 6: Administrative capacity and adequate funding are major limiting factors on reform

iii) METHODS OF REFORM

Lesson 7: Provide legal recognition to customary institutions

Lesson 8: In giving such legal recognition, it is essential to allow customary institutions to adapt

Lesson 9: There are both suitable and unsuitable ways of adapting custom

Lesson 10: Customary institutions, even when adapted, are not always sufficient, and it may be necessary to “import” legal elements from elsewhere

Lesson 11: Where legal elements are imported, they too must be adapted

Lesson 12: Special institutional inputs may also be necessary

Lesson 13: Carry out trials first

iv) SUSTAINING REFORM

Lesson 14: *The political, financial and administrative commitment to reform must be sustained*

Lesson 15: *Reforms must be monitored and reviewed, and adjustments made where necessary*

C. HOW TO APPLY THOSE LESSONS

i) What would a land reform based on those lessons look like?

- I will take CLR as an example; the “ultimate” land reform; similar lessons re land dispute settlement, acquiring land for public purposes, ...
- so far, CLR has been largely a failure in the Pacific, with the singular exception of Fiji, where all the customary land has been registered and virtually all suitable land has been brought into production
- the main features of land registration –
 - a parcel of land is identified;
 - the main interests in the land are investigated and recorded;
 - the record of interests is kept up-to-date, with subsequent changes of ownership also recorded;
 - a statutory protection is given to the interest-holders
- there are 2 main types of CLR – *systematic* (everyone’s land rights within an area are investigated and registered together) and *sporadic* (a person can have his/her land rights investigated and registered separately from everyone else); it is generally accepted that systematic registration is fairer and more cost-efficient than sporadic
- the benefit of registration is security of tenure, for the owner of the land as well as anyone dealing with that owner; this facilitates dealings in land, and promotes better land use

ii) Applying the lessons from the case studies -

A “model” CLR system, based on the lessons from the case studies, would have the following main features –

Under **Lesson 1** (build on and adapt, not replace):

- a) the CLR system would adapt customary tenures, and not try to replace them
- b) it would, therefore, reflect the customary position, where the *ownership* of land is vested in groups, while the *use rights* in land are vested in individuals
- c) therefore, both the rights of the owners and the rights of the users could be registered

Under **Lesson 2** (change only to the extent necessary to meet the need):

- a) CLR would be applied selectively – only where there is a clear need to modify customary tenures, and where the costs are justified
- b) in those selected areas, CLR should be applied systematically (for reasons of fairness and cost effectiveness); outside those areas, a lower-level order of recording of existing land rights would be available, but without the same level of legal protection (because there has not been the same systematic investigation of interests)
- c) custom would continue to apply to the land after registration, except to the extent that it conflicts with the registered title

Under **Lesson 3** (reforms must be consensual):

- a) CLR should only be introduced to an area where there is a real demand for it
- b) at the same time, people who do *not* want CLR in their area should not be able to stop those who do

Under **Lesson 4** (reforms must balance trad./modern):

- a) rights would be registered/recorded at 2 levels –
 - ownership would be recorded at group level;
 - use rights would be recorded at individual level
- b) provision would be made for dealings in land – sales, leases, mortgages
- c) dealings would be controlled by a combination of traditional and modern authorities

Under **Lesson 6** (adequate capacity and funding are major limiting factors):

- a) CLR could only be introduced to an area where the financial and administrative resources are adequate
- b) try to meet the wider need for tenure security with a system for recording land rights, relying mainly on local knowledge, skills and manpower

Under **Lessons 7, 8 and 9** (provide for the suitable legal recognition to customary institutions, and allow them to adapt):

As part of the CLR processes –

- a) give legal recognition to customary tenures and customary law, and provide for their development
- b) give legal recognition to customary groups and their decision-making processes
- c) give legal recognition to traditional leadership and dispute settlement mechanisms
- d) enable conversion of group titles to individual ownership, if demanded by the group
(This last involves very sensitive policy decisions, but in principle I have no objection to the elimination of group ownership of customary land – if custom is no longer coping, and conversion to individual ownership is the considered decision of the group members)

Under **Lessons 10 and 11** (“imports” may be necessary, but they should be adapted too)

- a) the formal recording/registration of land rights is, itself, an import
- b) other imports adopted in the Pacific are trusts, companies and leases
- c) re trusts, it is very important to place limits on the trustee’s powers to bind the group (eg, for informed and free consent)
- d) re companies, keep the commercial sphere separate from the customary sphere, and spell out how they interact
- e) re leases, provide for ongoing consultation and periodic review; tailor-make special arrangements for benefit-sharing (eg, joint ventures)

Under **Lesson 12** (special institutional inputs may be necessary)

- a) eg, for control of dealings – a body to advise customary owners on proposed major developments of their land, to make sure they understand the nature and purpose of the proposals, and have given their free and informed consent in accordance with traditional decision-making processes (eg, NLTB, Land Councils)

Others: (also important)

- trialling the new CLR system (**Lesson 13**)
- monitor and review its operation, and be ready to adjust it as indicated (**Lesson 15**)

Two lessons not mentioned so far - **Lesson 5** (the necessity for pol. leadership of the reform) and **Lesson 14** (for sustaining the pol., fin. and admin. commitment to reform); I will conclude by addressing the critical matter of local “ownership”

iii) Where to from here?

There is no doubt that local “ownership” of land reforms is absolutely indispensable, but it is extremely important to address two things –

- the need for local “ownership” of any reforms, and
- ensuring that those reforms are based on good research, and will in fact promote sustainable development.

This is where the case studies, and the lessons which can be learnt from them, become so important. Unless the reforms which are “owned” by the political leadership are designed on the basis of –

- a good knowledge of the issues, and
- a good grasp of their likely solutions,

the reforms will not achieve their policy objectives, and the cause of land reform will be set back.

TA, provided by AusAID and other donors, can make a critical contribution to achieving the dual goals – ownership of the reform outcomes and their good quality

Finish with 2 quotes -

i) from Peter McCawley’s abstract for an SSGM seminar being held today (Peter is a former DDG of AusAID):

“Aid donors have not yet given enough attention to one of the central features of working in fragile states – the extreme weakness of the institutions of government.”

ii) Prof. Jeffrey Sachs (adviser to the UN Secretary-General on poverty reduction and a recent visitor to Canberra):

“The biggest obstacle to action is simply the lack of awareness of the things that can be done.” There *are* solutions, “The rest is up to the people and their political masters.”

These quotes are relevant for 2 reasons – they show that there *are* solutions, but they need to be carefully identified. Land tenure reform is extremely complex and sensitive, and it makes sense to accept outside assistance