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Dans Le Pacifique: Land Law and Governance in the South Pacific.**

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CUSTOMARY LAND IN SOLOMON ISLANDS: A VICTIM OF LEGAL PLURALISM

*Jennifer Corrin**

In Solomon Islands, as well as throughout the South Pacific, land is a fundamental facet of traditional culture. Customary land in most South Pacific constitutions is acknowledged and protected, with ownership rights often being restricted to indigenous citizens, as in Solomon Islands. This article explores the effects the plural nature of society has on the protection of customary land in practice in Solomon Islands and discusses relevant case law and legislation as well as their interactions with customary law.

Aux Solomon, comme dans l'ensemble du Pacifique Sud, la terre revêt un aspect fondamental de la culture traditionnelle. Les constitutions ou les lois fondamentales de la plupart des Etats du Pacifique Sud reconnaissent l'existence des terres coutumières et organisent leur protection. Dans cet article, à la lumière du droit positif et des principales décisions de jurisprudence, l'auteur porte sa réflexion sur les conséquences du pluralisme juridique en matière foncière aux Solomon.

I INTRODUCTION

[L]and was an ancestral trust committed to the living for the benefit of themselves and generations yet unborn. 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 departed ancestors superintended the earthly affairs of their living descendants, protecting them from disasters and ensuring their welfare, but demanding in return strict compliance with time-honoured ethical prescriptions. Reverence for ancestral

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spirits was a cardinal point of traditional faith and such reverence dictated the preservation of land which the living shared with the dead.¹

This statement by Zoloveke encapsulates the spiritual significance of land for indigenous peoples in the South Pacific. Throughout the region, land is a fundamental part of traditional culture. It is subject to a sacred trust that requires it to be preserved for future generations and its value cannot be encapsulated in monetary terms alone.

Independence constitutions in most South Pacific countries acknowledge the significance of customary land by making special provision for its protection. In many cases, 'ownership' of customary land is restricted to indigenous citizens and alienation is forbidden, or at least restricted.² This is the position, for example, in Solomon Islands, where it is also specified that customary land is to be governed by customary law.³

In practice, however, the spirit and letter of these constitutional protections have been eroded and customary land has been subjected to sweeping changes. These have come about in a number of ways but, broadly speaking, may be said to stem from the plural nature of society, which is a relic of the country's colonial history. These two very different societies, rural, village based communities on the one hand and urban societies on the other, sometimes operate independently, but often, and increasingly, overlap. This interaction gives rise to tensions and is a source of transformation for both traditional and urban⁴ society. Each places different demands on customary land. There have been increasing pressures on the national government to make land available for commercial and development purposes⁵ and to provide housing and facilities for migrants who move to urban centres from the

1 Gideon Zoloveke, in Peter Larmour (ed) *Land in Solomons* (Institute of Pacific Studies, University of the South Pacific, Suva, 1979) 4.

2 See, eg, Constitution of Samoa 1960 Art 102.

3 For the complexities of the distinction between customary law and custom see Jennifer Corrin Care and Jean Zorn, 'Statutory "Developments" in Melanesian Customary Law' (2001) *Journal of Legal Pluralism*, 49, 52, n 5. Given the lack of a clear dividing line between the two concepts, in this chapter the terms are used loosely and interchangeably.

4 The distinction could be made between modern and traditional, but this seems to suggest that the introduced system is progressive and to be preferred. Accordingly, the traditional versus urban distinction has been used, although it is recognised that in many urban and semi-urban areas custom may still be strong. See further, Chris Barker *Cultural Studies: Theory and Practice* (Sage, London, 2008).

5 See, eg, Forest Resources and Timber Utilisation Act Cap 40 (SI).

village for work, education and marriage.⁶ In the customary sphere, the desire of more urbanised members of society to individualise land holding, together with competing claims to valuable resources, have threatened traditional authority.

The complex legal pluralism in place in the Pacific has also had an impact on customary land. There is considerable debate about the meaning of 'legal pluralism'. Used in a descriptive sense, it is used to refer to 'a situation in which two or more legal systems co-exist in the same social field'⁷ within the same country. Used as an analytical tool, the term may be used in the 'weak' sense,⁸ to discuss co-existing legal systems from the perspective of the State and using State law concepts to define the parameters of each. Whilst this chapter does conduct its analysis by reference to the written law, to the extent that weak legal pluralism endorses a hierarchical approach, with state law at the apex and customary law nested below,⁹ it is rejected in favour of 'strong' or 'deep' legal pluralism. Deep legal pluralism is an approach which resists giving supremacy to any one legal system,¹⁰ and involves an ideological commitment to promotion of plurality of laws.¹¹ This chapter seeks to point out the danger of assuming the supremacy of State law.¹² The use of State law as the starting point for consideration of customary law has led to some profound changes to customary land. Some have been made overtly by legislation, but more insidious changes have crept in, sometimes inadvertently, through the misinterpretation of customary law as

6 See further Daniel Storey, 'The Politics of Managing Urban Development in Pacific Island States: The Case of Samoa and Tonga' (1998) 22 *The Journal of Pacific Studies* 61; 'The Peri-urban Pacific: From Exclusive to Inclusive Cities' (2003) 44(3) *Asia Pacific Viewpoint* 259.

7 Sally Engle Merry "Legal Pluralism" (1988) 22 *Law & Society Review* 869, 870.

8 John Griffiths "What is Legal Pluralism" (1986) 24 *Journal of Legal Pluralism* 1, 38.

9 Lauren Benton *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge University Press, Cambridge, 2002) 8.

10 Gordon Woodman "Ideological combat and social observation: recent debate about legal pluralism" (1998) 40 *Journal of Legal Pluralism* 21.

11 Peter Sack "Legal Pluralism: Introductory Comments" in Peter Sack and Elizabeth Minchin (eds) *Legal Pluralism* (ANU, Canberra, 1986) 1.

12 As Benton points out, such an approach to legal pluralism brings with it 'a sense of inevitability about the dominance of state law': *Ibid* 9.

equivalent to the closest common law concept.¹³ This has happened both in the legislative drafting process¹⁴ and in the course of judicial interpretation.¹⁵

This chapter examines the existing system of land tenure in Solomon Islands and the complex web of legislation surrounding it. It also discusses some of the most significant case law and highlights the principal problems arising from the legislation and from its interaction with customary law. Those arrangements have resulted in uncertainty and continuous disputes in some parts of the country. The question has arisen as to how these disputes should be resolved. This chapter examines the present system for dispute resolution as well as evaluating the current proposal for reform, which is to establish Tribal Land Dispute Resolution Panels in Solomon Islands.

II BACKGROUND

A Context, Culture and Land

Solomon Islands is part of the sub-region of Melanesia, in the South West Pacific. It lies 1,600 kilometres North East of Australia and has a population of about 400,000. The land area of 30,000 sq km is divided between twenty-six islands and hundreds of small islets spread out in a 1360 km long, double chain, within a sea area of 1,340,000 sq km.

In Melanesian countries, traditions vary from island to island and even from village to village. This diversity can be illustrated by reference to the sixty-five vernacular languages and dialects in existence in Solomon Islands alone.¹⁶ Social and economic changes have had a profound impact on Solomon Island's society. Increased mobility and communications between the rural sector, the urban centres and the rest of the world have influenced perceptions. In many cases this has weakened the strength of traditional authority and posed challenges to customary rules and decision-making.¹⁷ The extent of family or individual ownership of customary land seems to be increasing in some areas of the country. However, this

13 For an explanation of the difference between concepts and terms see Tom Bennett "Terminology and Land Tenure in Customary law: An Exercise in Linguistic Theory" [1985] *Acta Juridica* 173, 173.

14 See, eg, the use of the term 'owners' in the Forest Resources and Timber Utilisation Act Cap 40 (SI) s 7(1).

15 *Allardyce Lumber Company Limited and Others v Attorney General and Others* [1988/9] SILR 78, 97.

16 This information was supplied by John Lynch and Robert Early, University of the South Pacific.

17 See further Ron Crocombe and Malama Meleisea (eds), *Land Issues in the Pacific* (Institute for Pacific Studies, University of the South Pacific, Suva, 1994) Ch 1.

impression may be partly due to Chiefs and leaders representing rights of control as rights of individual ownership.

In Solomon Islands, changes in society have given rise to particularly serious issues relating to land. The relationship of indigenous people to their land is part of a complex social system, bound up with culture and tradition. As stated by Bonnemaïson in relation to Vanuatu:¹⁸

[C]ustom 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.

The relationship between the land and the needs and practices of those who rely on it for their livelihood is a two way process of change. As stated by Crocombe, '[I]and tenure is shaped by the society it serves, and by external forces. The tenure system, in turn, is also one of the forces which shapes the society, in a continuing process of interaction'.¹⁹ Accordingly, changes to land tenure introduced through legislation and case law can have serious and often unforeseen impact on society. Resource exploitation can also have dramatic consequences. The effect of these changes is only recently being acknowledged in the Pacific, where it is at last becoming the norm for social and environmental impact studies to be carried out as part of development proposals and reviews.²⁰ However, these studies cannot wind back the clock or, it would seem, stem the tide of commercialisation of large areas of land.

B The Legal System

Former colonies and protectorates of the United Kingdom have inherited the common law system.²¹ However, in the Pacific, most countries gave constitutional recognition to customary law, which was added to the formal, common law sources of law at independence.²² The *Constitution* declares itself to be supreme law²³ with

18 Joel Bonnemaïson "Social and Cultural Aspects of Land Tenure" in Larmour (ed), *Land Tenure in Vanuatu*, above n 1, 1-2.

19 See further, Crocombe and Meleisea, above n 11, Ch 1.

20 The draft of a new constitution for Solomon Islands provides for impact studies to be carried out before any development proceeds: Federal Constitution of Solomon Islands Bill cl 15.

21 Non-common law jurisdictions include the Overseas Territories of France, eg, New Caledonia and Easter Island. Vanuatu inherited both common law and civil law. See further Jennifer Corrin "Bedrock and Steel Blues: A Study of Legal Pluralism in Vanuatu" (1998) 24 (1 & 2) *Commonwealth Law Bulletin* 594.

22 See for example, *Constitution of Solomon Islands 1978* Sch 3, para 3(1); *Constitution of Samoa 1960*, Art 111(1); *Constitution of Vanuatu 1980*, Art 47(1). See further, Jennifer Corrin Care "Conflict between Customary Law and Human Rights in the South Pacific" Vol 1 *Commonwealth*

legislation ranked next highest in order of priority. Beneath this level, the hierarchical structure starts to unwind. This can be illustrated more specifically by reference to the legal system of Solomon Islands. Where there is no Act of Solomon Islands' parliament covering a situation, United Kingdom Acts of general application may apply.²⁴ In theory, UK Acts and customary law are on par, but in practice, the legislation is likely to prevail. There is also provincial law in the mix, which comes in the form of Ordinances²⁵ and operates within Provincial boundaries.²⁶ Matters within the legislative competence of provincial governments include both land and land use.²⁷

The other source of law is common law and equity. The *Constitution* states that customary law is to prevail over English common law and equity.²⁸ Whilst this provision is often ignored in some areas of law, in land matters it is bolstered by legislative provision stating that customary land is to be dealt with in accordance with customary usage.²⁹

In any event, an hierarchical approach ignores the fact that for many people customary law is far more relevant, and the contents of the *Constitution* and statutes are a mystery.³⁰ This is particularly the case in the rural sector and especially in relation to personal laws and land matters where, even during the colonial era, customary law has continuously been allowed to govern.³¹ Deep legal

Law Conference Papers, Kuala Lumpur: Commonwealth Lawyers Association, September 1999, 251-272.

23 Constitution of Solomon Islands 1978 s 2.

24 Constitution of Solomon Islands 1978 Sch 3, para 1.

25 Provincial Government Act 1997 (SI) s 30(1).

26 Provincial Government Act 1997 (SI) s 31(2).

27 Provincial Government Act 1997 (SI) s 26 and Sch 3.

28 *Constitution of Solomon Islands 1978* Sch 3, para 2(1)(c): 'the principles and rules of the common law and equity shall have effect as part of the law of Solomon Islands, save in so far as ... in their application to any particular matter, they are inconsistent with customary law applying in respect to the matter'. See also, *Kasa v Biku* (Unreported, High Court, Solomon Islands, Muria CJ, 14 January 2000), available via www.paclii.org at [2000] SBHC 62.

29 Land and Titles Act Cap 133 (SI) s 239(1).

30 See Jennifer Corrin Care "Wisdom and Worthy Customs: The Role and Operation of Customary Law in the South Pacific" (2002) 80 Reform 31, 34. Compare *K v T and KU* [1985-1986] SILR 49.

31 See for example, in relation to Solomon Islands and Vanuatu, Kenneth Brown *Reconciling Customary Law and Received Law in Melanesia* (Charles Darwin University Press, Darwin, 2005) 38-40.

pluralism,³² in the sense of an ideological commitment to and equal acknowledgment of customary and State law may assist in the development of a more appropriate approach to the demands of plurality.³³

III CUSTOMARY LAND TENURE

About 83% of the land in Solomon Islands is still customary. The *Land and Titles Act*,³⁴ originally enacted in 1968, acknowledges that customary land is governed by customary law.³⁵ The main problem today in the Solomon Islands is that customary usage is not a universally accepted body of rules or practice. Customary law is, by its very nature, flexible and there are particular variations in customary land tenure. The difficulties are exacerbated by the lack of homogeneity of custom. The differences in practices between Melanesian and Polynesian communities are particularly acute, but even amongst the Melanesians there is great diversity. In some parts of the country, such as Guadalcanal and Makira, the land system is matrilineal, whereas in others, such as Malaita and Choiseul, it is patrilineal.³⁶ Accordingly, it is difficult to be precise about exactly what is demanded by the rules of customary usage.³⁷

However, there are similarities in the way that land is regarded, including the religious importance of land and the use of geographical features to identify boundaries. Land is normally held by a group or community who are linked by a combination of blood relationships,³⁸ by residence and by contribution to village enterprise. This land-holding group differs in size from a family, to a village, to a larger line, clan or tribe. Each group is usually represented by a male member or members, who make decisions relating to land by virtue of their political status in the local community.³⁹ Inheritance is the main method of land transfer. The

32 For a discussion of the meaning of deep legal pluralism see John Griffiths "What is Legal Pluralism?" (1986) 24 *Journal of Legal Pluralism*, 15; Gordon Woodman "Legal Pluralism and the Search for Justice" (1996) 40 *Journal of African Law*, 152.

33 Peter Sack "Legal Pluralism: Introductory Comments" in Peter Sack and Elizabeth Minchin (eds) *Legal Pluralism* (ANU, Canberra, 1986) 1.

34 *Cap 133* (SI).

35 *Land and Titles Act Cap 133* (SI) s 239(1).

36 John Ipo "Land and Economy" in Hugh Laracy (ed) *Ples Blong Iumi: Solomon Islands, the Past Four Thousand Years* (Institute of Pacific Studies, University of the South Pacific, 1989) 121, 123.

37 *Ibid* at 122.

38 *Ibid* at 123. See, eg, *Fugui v Solmac Construction Company Limited* [1982] SILR 100 at 108.

39 See further Ron Crocombe "Overview" in Ron Crocombe (ed) *Land Tenure in the Pacific* (3rd ed, University of the South Pacific, Suva, 1987) 7, 14.

methods of allocating houses and garden sites, the sort of tools and techniques used to cultivate land, and the means of settling land disputes often share commonalities.⁴⁰

Whether or not transfer of land to outsiders was allowed under customary law is a matter of debate.⁴¹ However, the *Land and Titles Act*⁴² now provides that, subject to limited exceptions discussed below, only Solomon Islanders are permitted to own an interest in customary land.⁴³

IV LEGISLATION RELATING TO LAND

Legislation governing land in Solomon Islands is spread across a wide range of disparate Acts. This section outlines the principal legislation, with the emphasis on provisions relating to customary land. It looks at key problems arising from the legislation and from its interaction with customary law and discusses the case law in which this has been highlighted. The legislation governing resolution of customary land disputes is discussed separately in the next main section of this chapter.

A The Constitution

The *Constitution* states that 'the natural resources of our country are vested in the people and the government of Solomon Islands'.⁴⁴ By implication, therefore, all land is vested in Solomon Islanders or the Government, holding it on their behalf. The *Constitution* restricts the holding of a perpetual estate, which is the nearest equivalent to freehold, to Solomon Islanders.⁴⁵ It also guarantees the right to freedom from deprivation of property.⁴⁶ While it does allow for compulsory acquisition of land, this may only be done in the public interest and is subject to certain conditions.⁴⁷ The *Constitution* envisages that statutory provision will be made to ensure that there are prior negotiations with the 'owner' prior to

40 Above n 28, at 122-123.

41 See, eg, Kenneth Brown "The Language of Land: Look Before You Leap" (2000) 4 *Journal of South Pacific Law*.

42 *Cap 133* (SI) s 239(1).

43 *Land and Titles Act Cap 133* (SI) s 241(1). A Solomon Islander is defined as 'a person born in Solomon Islands who has two grand-parents who were members of a group, tribe or line indigenous to Solomon Islands': *Land and Titles Act Cap 133* (SI) s 2.

44 Constitution of Solomon Islands 1978 Preamble.

45 Constitution of Solomon Islands 1978 s 110.

46 Constitution of Solomon Islands 1978 s 8.

47 Constitution of Solomon Islands 1978 s 8.

acquisition; that the 'owner' has access to independent legal advice; and that, if possible, the interest acquired is limited to a fixed-term interest.⁴⁸ No such legislation appears to have been passed, although the Land and Titles Act does provide for notice to be given⁴⁹ and for the Provincial Secretary to assist any person requesting assistance to draw up any documents required in relation to acquisition proceedings.⁵⁰

The *Constitution* also states that, in making provision for the application of laws (including customary laws), Parliament has a duty to 'have particular regard to the customs, values and aspirations of the people of Solomon Islands'.⁵¹ A similar phrase, 'provision for the application of customary laws', appearing in an earlier part of the Constitution,⁵² has been interpreted widely as encompassing any legislation,⁵³ rather than laws designed specifically to govern *application* of laws.⁵⁴ Consequently, legislation, including legislation governing customary land, passed without reference to 'customs, values and aspirations of the people' might be open to challenge on the basis that it is unconstitutional. To date this argument does not appear to have been raised before the courts.

B Land and Titles Act

The *Land and Titles Act*⁵⁵ consolidates the law on land tenure, acquisition and registration. It deals with both customary and alienated land. The Act was drafted to deal with the changes that were made to land tenure at independence. Accordingly, some of the provisions, are spent or outdated. For example, the Act provided for interests of over 75 years held by non-Solomon Islanders immediately prior to independence to be converted to interests of 75 years.⁵⁶ The Act is silent on the legal position when these fixed-term estates and leases expire. It is unclear

48 Constitution of Solomon Islands 1978 s 112.

49 Land and Titles Act Cap 133 (SI) s 73.

50 Land and Titles Act Cap 133 (SI) s 74.

51 Constitution of Solomon Islands 1978 s 75(2).

52 Constitution of Solomon Islands 1978 s 15(5)(d).

53 *Tanavalu v Tanavalu* (Unreported, High Court, Solomon Islands, Awich LJ, 12 January 1998), available via www.pacii.org at [1998] SBHC 4. See further Jennifer Corrin "Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Post Colonial South Pacific Societies" (2006) *The Indigenous Law Journal*, 51.

54 See eg the *Custom Recognition Act 2000*, which makes provision for proving customary law before a court. It has not yet become law.

55 *Cap 133* (SI).

56 Land and Titles Act Cap 133 (SI) s 100 and 101.

whether these interests will roll over or whether compensation for improvements must be paid if they do not.

As opposed to alienated land which is required to be registered under a Torrens type system,⁵⁷ the Act provides for customary land to be dealt with in accordance with customary law. The relevant provision states that:⁵⁸

The manner of holding, occupying, using, enjoying and disposing of customary land shall be in accordance with the current customary usage applicable thereto, and all questions relating thereto shall be determined accordingly.

As highlighted by this section, the Act avoids the use of the term 'ownership' and this is in accordance with the view of customary land as being held communally, rather than individually. The Act goes on to provide that 'every transaction or disposition of or affecting interests in customary land shall be made or effected according to the current customary usage applicable to the land concerned'.⁵⁹

As mentioned above, the Act provides that only Solomon Islanders are permitted to own an interest in customary land.⁶⁰ Customary land may not be transferred or leased to a non-Solomon Islander unless that person is married to a Solomon Islander or inherits the land and is entitled to an interest under customary law.⁶¹ Apart from transactions permitted by customary usage between Solomon Islanders, the only dealings with customary land that are authorised are compulsory acquisitions for public purposes⁶² or leases to the Commissioner of Lands or a Provincial Assembly.⁶³ It is not clear whether licences allowing non-islanders to use the land are permitted, but as 'no person other than a Solomon Islander may hold or enjoy any interest of whatsoever nature in, over or affecting customary land',⁶⁴ it would appear not. However, a licence may be regarded as falling short of an 'interest' and, in practice, licences are often granted.

57 Land and Titles Act Cap 133 (SI) s 109 and 110.

58 Land and Titles Act Cap 133 (SI), s 239(1).

59 Land and Titles Act Cap 133 (SI) s 240.

60 *Land and Titles Act Cap 133* (SI) s 241(1). A Solomon Islander is defined as 'a person born in Solomon Islands who has two grand-parents who were members of a group, tribe or line indigenous to Solomon Islands': *Land and Titles Act Cap 133* (SI) s 2.

61 Land and Titles Act Cap 133 (SI) s 241.

62 Land and Titles Act Cap 133 (SI) s71.

63 Land and Titles Act Cap 133 (SI) s 60.

64 Land and Titles Act Cap 133 (SI), s 241(1).

The Land and Titles Act does not expressly state who owns the land below high water mark. This has given rise to problems as members of the customary community almost invariably regard the foreshore, reefs and seabed as part of customary land,⁶⁵ whereas the common law presumes that the area below high water mark belongs to the Crown.⁶⁶ The position is complicated by the fact that, as with other types of 'ownership' of customary land, 'ownership' of foreshore and reefs may be multi-layered, with a number of interests co-existing at the same time.

Unfortunately, the two most recent High Court cases to consider this issue are in conflict. In *Allardyce v Laore*,⁶⁷ Ward CJ held that the issue was governed by the common law, and that this meant that 'land covered by water' did not include the seabed and that therefore the seabed could not be part of native customary land. However, he did recognize that 'some customary rights can exist over the sea and such customary rights can supplant the common law position'.⁶⁸

In the more recent case of *Combined Fera Group v The Attorney General*,⁶⁹ Palmer J took a more liberal approach. His Lordship traced the evolution of the definition of land through the Lands and Titles legislation. In an early version of the Act 'land' was defined as including areas covered by water but not the sea at mean low water. In 1964, this definition was amended and the reference to the land covered by sea at mean low water was omitted. On this basis, Palmer J reasoned that land covered by water was now capable of including the seabed, and could vest in the Commissioner of Lands as public land. His Lordship considered that this raised a strong presumption in favour of the view that the seabed could also become part of customary land. The court held that the 'cut off' date for establishing a claim of current customary usage was 1st January 1969, when the current Land and Titles Act came into effect. If land which formed part of the seabed was customary land as at that date, then it could not have vested in the Commissioner of Lands.

65 Interview with Marovo Chiefs (Marovo Lagoon, Solomon Islands, 18 June 2008).

66 See, eg. *Attorney-General v Chambers* [1843-1860] All ER Rep 941; *Attorney-General v Chambers* [1843-1860] All ER Rep 559; *Southern Centre of Theosophy Inc v South Australia* [1982] AC 706; *Allardyce v Laore* [1990] SILR 174; *Waleilia v Totorea* (Unreported, Magistrates Court (Auki), Solomon Islands, 28-29 May 1992); *Combined Fera Group v Attorney General* (Unreported, High Court, Solomon Islands, Palmer J, 19 November 1997), available via <www.paclii.org> [1997] SBHC 55.

67 [1990] SILR 174.

68 See also *Waleilia v Totorea* (Unreported, Magistrates Court (Auki), Solomon Islands, 28-29 May 1992).

69 (Unreported, High Court, Solomon Islands, Palmer J, 19 November 1997), available via <www.paclii.org> [1997] SBHC 55.

The latest High Court decision in *Combined Fera Group v The Attorney General*,⁷⁰ was followed recently by the Magistrates Court in a land acquisition appeal.⁷¹ It was held that 'the evidence of customary practices and continuous use or occupation established the right to permanent communal [right of use] and right of ownership on the land below high water mark'.⁷²

These cases also highlight the importance of proving customary law. The Act contains specific provision on point, providing that a court may take judicial notice of current customary usage after enquiry by reference to 'books, treatises, reports (whether published or not), or other works of reference'.⁷³ This is one of the few provisions in Solomon Islands that deals with the manner of proof of custom. The Customs Recognition Act 2000, which has not been brought into force, also allows the court to take judicial notice after inquiry, but extends the sources of reference to 'statements by Provincial Governments or Chiefs (whether published or not)'.⁷⁴ It also relaxes the rules of evidence and allows both hearsay and opinion evidence as to the existence and nature of customary law.⁷⁵

Over the past eight years there have been several attempts to amend the Land and Titles Act. The Land and Titles (Amendment) Bill 2003 updated the Act and provided for a Land Board to take over the responsibilities of Commissioner of Lands. That Bill was redrafted as the Land and Titles (Amendment) Bill 2006, and is now the Land and Titles (Amendment) Bill 2010, but is unlikely to be passed in the current sitting. Meanwhile, a more radical revision was encompassed in the Land and Titles (Amendment) Bill 2005, which was endorsed by Cabinet but not passed. As discussed in the next main section of this chapter, this provides for customary land disputes to be resolved through traditional systems.

C Customary Land Records Act

The Customary Land Records Act⁷⁶ was enacted in 1994 to provide a mechanism for recording customary land boundaries and the names of land-holding

70 (Unreported, High Court, Solomon Islands, Palmer J, 19 November 1997), available via <www.pacii.org> [1997] SBHC 55.

71 *Tafisi v Attorney-General* (Unreported Magistrates Court, Solomon Islands, Maina J, 2 July 2009).

72 (Unreported Magistrates Court, Solomon Islands, Maina J, 2 July 2009) 14.

73 Land and Titles Act Cap 133 (SI) s 239(2).

74 Customs Recognition Act 2000 (SI) s 5(2)(a).

75 Customs Recognition Act 2000 (SI) s 5(1).

76 Cap 132.

groups and their representatives for the purposes of any dealing with recorded land. The Act provided for the establishment of an office of National Recorder, a Central Land Record Office and provincial Land Record Offices. In the late 1990s an office was established, some appointments made and some initial awareness-raising carried out. Unfortunately, the office was burnt down shortly afterwards during the tensions,⁷⁷ and it has not been re-established. One recording project was carried out, but this was not entirely in compliance with the legislation.⁷⁸

There seems to be a general misunderstanding about the processes under the Act. It does not result in registration, but only in 'recording'. This 'record' does not confer any formal title on any individual or group, but rather identifies the leaders with authority to deal with the land and delineates agreed boundaries and tribal links. A 'record' seems unlikely to be accepted by a lender as security and is certainly not transferable to non-Solomon Islanders, as it is still customary land and therefore subject to the bars on dealings referred to above. The Act does give an option for the representatives identified under the recording process to apply for the recorded land to be registered, but this then leads back to the *Land and Titles Act* under which the only way to register land is by a process of alienation. The result of this registration is that the land is no longer classified as customary land, but rather that the landowners are given a perpetual estate.⁷⁹ The lack of an avenue for customary communities to formalise their land tenure in a way that is accepted under the formal law is a significant problem. It often prevents them from enforcing their rights against other communities and outsiders. There is anecdotal evidence that some communities are considering using the timber rights process (discussed in the next section) to identify rights in relation to land.⁸⁰ This is a very dangerous course of action as a logging company which invested time and money in the process will expect a timber rights agreement to come out of it, and will be unlikely to back away after reaching that stage.

77 The 'tensions' is the name commonly used to describe the civil unrest in Solomon Islands which began in 1998. See further Jonathen Fraenkel *The Manipulation of Custom: from Uprising to Intervention in the Solomon Islands* (2004, Pandanus Books, Sydney).

78 *Inadequate Land Laws Slow Work on Aluta*, Solomon Times Online, 6 July 2007, <www.solomontimes.com/news.aspx?nwID=371>, accessed 12 May 2010.

79 Land and Titles Act Cap 133 (SI) s 109.

80 This anecdotal evidence comes from the Marovo area of Solomon Islands where the author has been conducting research as a member of an interdisciplinary team funded by the Macarthur Foundation.

D Forest Resources and Timber Utilisation Act

Forestry is governed by the Forest Resources and Timber Utilisation Act.⁸¹ This statute provides a complex process leading to the grant of a timber licence. It sets up a process for determination of the persons entitled to grant timber rights to third parties and for the negotiation and finalisation of a timber rights agreement. The statute was enacted to by-pass the problems that had arisen in getting permission to log customary land. It provides a process for identifying those entitled to grant 'timber rights' in respect of customary land. In effect, it divorces land 'ownership' from the right to negotiate and dispose of timber. Under the original scheme the initial determination was made by the area council.⁸² That power is now exercised by the Provincial Executive.

Unlike the Land and Titles Act, the Forest Resources and Timber Utilisation Act uses the term 'ownership' together with the associated term, 'landowners' in places.⁸³ This is a careless mistake,⁸⁴ particularly as the relationship between timber rights 'owners' and customary 'landowners' is not specified in either Act. One thing that is clear is that those entitled to grant timber rights are not necessarily the same as those entitled to broader rights. This was recognised by Ward CJ in *Tovua v Meki*⁸⁵ when he said:

[T]he Forest Resources and Timber Utilisation Act as amended, sets up a procedure whereby anybody wishing to acquire timber rights over customary land can identify the people with whom to deal. The procedure identifies persons to represent the group as a whole. Once the procedure has been followed, the people named by the area council are the only people entitled to sign an agreement to transfer those rights and that are clearly, as the parties to the agreement, the people to whom the royalties should be paid. ... I have no way of knowing, on the evidence before me, whether the persons identified by the Area Council as entitled to grant timber rights have that entitlement because they are landowners or because they have some secondary rights and neither can I question their decision on that.

81 *Cap 40 (SI)*.

82 Forest Resources and Timber Utilisation Act Cap 40 (SI) s 8, prior to amendment by the Forest Resources and Timber Utilisation (Amendment) Act 2000 (SI).

83 See, eg, s 9 (1).

84 See further Jennifer Corrin "Customary Land and the Language of the Common Law" (2008) *Common Law World Review* 305.

85 [1988/89] *SILR* 74, 76.

The Forest Resources and Timber Utilisation Act also sets up a mechanism to deal with disputes arising in connection with timber rights agreements. Resolution of disputes is discussed in the next main section of this chapter.

Failure to distinguish 'ownership' from rights existing in customary law in the Forest Resources and Timber Utilisation Act has led to injustice, which is unlikely to be solved unless a totally new scheme of legislation is introduced.⁸⁶ The Forests Act 1999 was passed by Parliament, but has not yet been brought into force. In the meantime, a more comprehensive Bill has been drafted, which aims to introduce a methodical approach to forestry management. Whilst retaining the reference to 'ownership', the Forests Bill 2010 would be an important advance, as it requires the preparation of a 'Statement of Customary Ownership' as a prerequisite to a 'Forest Access Agreement'. It also requires a 'Determination of Potential Forest Uses' and includes National and Provincial Forest Policies and a Code of Practice. However, this Bill has not yet been tabled in Parliament.⁸⁷

E Mines and Minerals Act

The Mines and Minerals Act⁸⁸ vests all minerals 'in or under all lands' in 'the people and the Government of Solomon Islands'.⁸⁹ The use of phrase 'all lands' makes it clear that mineral deposits 'in or under' customary land are included. However, this is not accepted by customary communities, which regard such deposits as part of the customary land. The Act establishes a Minerals Board⁹⁰ and regulates mining licences, permits and leases.⁹¹ The only agreement that the customary Chiefs may enter into is the grant of surface access rights, which give permission to third parties to enter onto customary land to access minerals from the surface.⁹²

86 See further, Jennifer Corrin "Abrogation of the Rights of Customary Land Owners by the Forest Resources and Timber Utilisation Act" (1992) 8 Queensland University of Technology Law Journal 131, 139.

87 There are political reasons for this as there are vested interests at stake. Many MPs have interests in the logging industry or associated with those who have such interests. See further Judith Bennett *Wealth of the Solomons* (University of Hawaii Press: Honolulu, 1987).

88 *Cap 42 (SI)*, in force 1 March 1996.

89 Section 2.

90 Section 10.

91 Part III (permits), Part IV (licences), Part V (leases).

92 Section 21.

F River Waters Act

The River Waters Act⁹³ prohibits diversion of rivers and provides for inspectors to gain access to inspect rivers. However, the Act only applies to rivers declared by ministerial order to be under its protections. To date, only six rivers have been made the subject of the Act.⁹⁴

Many rivers run through or form the boundaries of customary land and the legal position regarding their use is often ambiguous.⁹⁵ As with other customary laws, the rules vary from area to area and different rights attach to different parts of the river. However, generally speaking it would appear that communities on opposite sides of rivers that form boundaries have equal rights of access from their own side, and upstream communities are not permitted to cut off the water supply of those downstream.

In recent times, problems have arisen from customary communities demanding money for the use of water resources. These situations do not appear to be covered by customary rules or the rules are sufficiently unclear. A new Water Act was proposed in the early 2000s to deal with demands on the increasing water supply due to development, but this does not appear to have progressed further.

V OTHER RELEVANT LEGISLATION

A Town and Country Planning Act

The Town and Country Planning Act⁹⁶ came into force in 1980. It provides for control and development of land and local planning schemes. The object of the Act is to ensure that land developed and used in accordance with properly considered and informed policies that are directed at promoting the welfare of Solomon Islanders and other residents.⁹⁷ A number of areas, including Honiara, Gizo Town, Tulagi, Munda and Noro,⁹⁸ have been declared as local planning areas, with the consequence that they may be the subject of a local planning scheme. However, to date no customary land has been made the subject of any local planning scheme.

93 *Cap 135 (SI)*.

94 LN 146/1967; LN 95/1969; LN 65/1974; LN110/1976; LN 8/1979.

95 *Talasasa v Paia* [1980-1981] SILR 93.

96 *Cap 154 (SI)*.

97 Section 3.

98 LN63/1980; 41/1981; 48/1981; 11/1982.

B The Protected Area Bill 2010

The Protected Area Bill 2010 provides for the establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity and similar matters. Like the proposed amendments to the Land and Titles Act, the Bill does not appear to be a government priority.

VI RESOLUTION OF CUSTOMARY LAND DISPUTES

Uncertainties arising from the unsatisfactory legislative regime and conflicting case law have contributed to the large number of customary land disputes. From the time of first settlement, when cash was brought into the equation, land disputes have been increasingly common. Things have now reached a stage where these disputes have soured many intra and inter-tribal relationships and the courts' attempts at resolution dominate the law reports.

A vexed issue is how these disputes should be dealt with. At the village level, disputes are still sometimes resolved through traditional processes, which differ from place to place and depending on the nature of the dispute. In the case of disputes between different communities or in areas where there is no strong, recognised customary authority, parties are resorting to the formal courts. Originally, customary land disputes went straight to the Local Court. However, in 1985 the process was changed and disputes must now be referred initially to the traditional Chiefs.⁹⁹ A party who is dissatisfied with the Chiefs' decision may then lodge a claim with the Local Court. From there, appeal lies to the Customary Land Appeal Court. Parties may then appeal to the Magistrates Court and from there to the High Court. There is then a final appeal, to the Court of Appeal. This section examines the existing process and then considers the proposal to introduce a new forum, the Tribal Land Dispute Resolution Panel.

A The Chiefs and Local Courts

Provision was made in 1942 for Native Courts, 'constituted in accordance with the native law or customs of the area in which the court is to have jurisdiction'.¹⁰⁰ These courts were established by warrant, on a piecemeal basis, starting in 1943.¹⁰¹ They were designed to provide a forum to deal with minor disputes arising within the geographical area in which they were established on the basis of the customary law which applied in that locality.¹⁰² The name of the courts was changed to Local

99 Local Courts Act Cap 19 (SI) s 12.

100 Native Courts Act 1942 (SI), now Local Courts Act Cap 19 (SI), s 3.

101 Local Courts Act, Native Court Warrant 1943 (SI).

102 Native Courts Act Cap 46 (SI) ss 6 and 10.

Courts in the lead up to independence due to the negative connotations of the word 'native'.¹⁰³ In 1977 there were 42 Local Courts operating throughout the country in all areas apart from Honiara, and the Eastern islands of Tikopia and Anuta.¹⁰⁴ By 1999 this number had declined to thirty-three, and although a Local Court had been set up the Honiara it was not operating.¹⁰⁵ At the height of the tensions the Local Courts ceased to function at all and they are still largely inactive.

The Act provides for each court to be constituted in accordance with the law or custom of the area in which it has jurisdiction, with the proviso that the Chief Justice may prescribe the constitution.¹⁰⁶ In practice, the constitution of each court has been specified by the Chief Justice in the warrant establishing it.¹⁰⁷ It usually consists of a President, one or more Vice-Presidents, and two or more Justices. The court may sit to hear a case provided that at least three Justices are present.¹⁰⁸ Each court must also have a clerk appointed to it by the Chief Justice,¹⁰⁹ although absence of the Clerk does not render the court improperly constituted.¹¹⁰

Local Courts have exclusive jurisdiction to deal with all proceedings of a civil nature affecting or arising in connection with customary land other than:

- matters expressly excluded by the Land and Titles Act; and
- questions as to whether land is or not customary land.¹¹¹

The Local Courts are sometimes described as 'customary'. However, this is only true in the sense that it is intended that they administer customary law,¹¹² as they are not traditional forums. Despite this fact, Local Courts are in a better position to

103 Constitution (Adaption and Modification of Existing Laws) Order 1978 (SI), Sch.

104 Tabunwati Takoa and John Freeman 'Provincial Courts in Solomon Islands' in Guy Powles (ed) *Pacific Courts and Legal Systems* (USP, Suva, 1988) 73, 73-74.

105 Jennifer Corrin "Courts in Solomon Islands" [1999] LAWASIA Journal 98.

106 Local Courts Act Cap 19 (SI), s 3.

107 The proviso to s 3 of the *Local Courts Act Cap 19* (SI) empowers the Chief Justice to prescribe the constitution of any local court. The only Local Court to have a female justice appointed is the Honiara Local Court.

108 See Warrants establishing the local courts, eg Warrant establishing the Honiara Local Court, LN 48/86 and LN54/89.

109 Local Courts Act Cap 19 (SI) s 5.

110 *Kela v Aioro* (Unreported, High Court, Solomon Islands, Palmer J, 26 September 1997).

111 Land and Titles Act Cap 133 (SI), s 254(1).

112 For example, Vanuatu's Island Courts are subject to the following procedural rules: Island Courts (Civil Procedure) Rules 2005, Island Courts (Court Clerks) Rules 2005, Island Courts (Criminal Procedure) Rules 2005, and Island Courts (Supervising Magistrates) Rules 2005.

deal with customary matters than the formal courts. This was recognised by the High Court itself in *To'ofilu v Oimae*¹¹³ where Palmer J said:

the Local Court is far better placed than the Magistrates' Court or this Court to deal with such claims [as the repayment of bride price] in custom in that it is comprised of Court Justices who come from the same Province and sometimes from the same areas, and are therefore familiar with the customary practices of the parties.

In 1985, a landmark piece of legislation, the Local Courts (Amendment) Act 1985, attempted to shift decisions on customary land back into the traditional sector. The amending Act provided that before a land dispute could be lodged with the Local Courts it had to be shown that:

- the dispute has first been referred to the Chiefs;
- all traditional means of resolving the dispute have been exhausted; and
- the Chiefs have made no decision wholly acceptable to both parties.¹¹⁴

This attempt to address the lack of customary legitimacy in the dispute resolution process, by returning decision-making power on customary land matters to traditional leaders had much to recommend it. However, it has not been successful for a number of reasons. First, unsuccessful parties have been unwilling to abide by the Chiefs' decision and the majority of cases have been taken on appeal. This has led to an increase in litigation rather than a reduction. There have also been difficulties in ascertaining the identity of the 'Chiefs' in some areas of the country. Changes in customary society and practices have given rise to uncertainties as to the 'true' Chiefs. The Act does not define 'Chiefs', no doubt regarding this as a matter of customary law.¹¹⁵ In fact, 'Chief' is a generic term used commonly to, refer to traditional leaders. In some places, the word 'Elder' is used instead of Chief.¹¹⁶

Each local language has its own word for Chief and, in some areas, things are complicated by the fact that there are different types of Chiefs. Each is known by a different name, for example, in some parts of Malaita, there are people with special

113 (Unreported, High Court, Solomon Islands, Palmer J, 19 June 2007), available via <www.pacii.org> at [1997] SBHC 33.

114 Local Courts Act Cap 19 (SI) s 12.

115 On a visit to Marovo Lagoon in 2009 the author was asked what the definition of Chiefs was in the Act, as the Chiefs wanted to make sure they were doing things 'legally'.

116 The Provincial Government Act 1986 (SI) s 30, referred to both 'Chiefs and elders'.

responsibility for land (called 'fata'abu').¹¹⁷ The problem of identifying the appropriate 'Chiefs' is illustrated by the case of *Lauringi v Lagwaeano Sawmilling and Logging Limited*.¹¹⁸ In that case, the plaintiffs had been determined to be the customary 'landowners' by the Marodo Council of Chiefs and this decision had been confirmed by the Malaita Local Court. However, the defendants refused to accept the decision of the Local Court and challenged the jurisdiction of the Marodo Council of Chiefs on the basis that the members did not meet the definition of Chiefs in the area where the land was situated. An interim injunction was granted by the High Court to restrain the defendants from continuing a logging operation on the land while the matter went on appeal to the Customary Land Appeal Court.¹¹⁹ There is no published record of that appeal having been heard and it is unclear whether the matter has been resolved.

A serious problem lies in the fact that the Local Courts are mostly inoperative and there is a backlog of cases to be heard.¹²⁰ In 2006 there were said to be about 100 cases waiting to be heard in Nggella alone.¹²¹ This is mainly due to lack of resources, but also due to other reasons including the fact that the register of justices is out of date, due to old age, death or departure of existing members. Also, some Chiefs are reluctant to deal with land disputes as they regard the current sitting allowance as inadequate and feel that the ability of an unsuccessful disputant to ignore their decision and go on to the Local Court often means that the effort expended is all for nothing.

B The Appeal Process

An appeal lies from a Local Court to the Customary Land Appeal Court (CLAC). From the CLAC appeals lead to the common law courts. Appeal lies first as of right to the High Court, but only on the grounds of error of law (which does not include a point of customary law) or failure to comply with any procedural

117 Solomon Islands Law and Justice Sector Institutional Strengthening Program, Report on the Feasibility of Removing the Administration of Land Disputes from the Local Court and Establishing a Tribunal for that Purpose, July 2003, 22.

118 (Unreported, High Court, Solomon Islands, Lungolo-Awich J, 28 August 1997). See also *Muna v Holland and Attorney-General* (Unreported, High Court, Solomon Islands, Kabui J, 28 March 2002), available via <www.pacii.org> [2002] SBHC 109.

119 (Unreported, High Court, Solomon Islands, Lungolo-Awich J, 22 February 2000).

120 In 2003 there were estimated to be 239 cases waiting to be heard by the Local Court and 109 appeals waiting to be heard by the CLAC: Solomon Islands Institutional Strengthening of Land Administration Project, *Report on the Feasibility of Removing the Administration of Land Disputes from the Local Court and Establishing a Land Tribunal for that Purpose*, July 2003, Honiara, 101. Anecdotal sources suggest that the number is much higher.

121 Communication with Chiefs, Halavo Village, 16 June 2006.

requirement.¹²² There is then a final appeal to the Court of Appeal on a point of law only, and leave is required.¹²³

The CLACs were introduced in 1972,¹²⁴ but not established until 1975. The CLACs were set up by Chief Justice's warrant under of the Land and Titles Act.¹²⁵ Originally there were five courts, one for each District. After independence, the number was increased to seven, allowing one court for each of the seven Provinces. Appointments to the CLAC are made by the Chief Justice,¹²⁶ and each court consists of a President, Vice-President and not less than three other members of whom at least one must be a Magistrate.¹²⁷ Like Local Courts, CLACs are not customary in the sense of being traditional. In this respect, they have been described by the High Court as in a 'special position': whilst they deal with matters of custom, their procedure is that of a formal court.¹²⁸ As in Local Courts, representation by a Legal Practitioners is prohibited.¹²⁹ In *Livingstone v Napata*,¹³⁰ CLACs were held to be subordinate courts, subject to the supervisory powers of the High Court.

The court may exercise all the powers of the Local Court¹³¹ and may hear appeals as of right from a Local Court exercising jurisdiction in customary land disputes. CLACs also hear appeals from the Provincial Executive under the Forest Resources and Timber Utilisation Act.¹³² This means that there are now two separate bodies dealing with customary land appeals, one determining customary land 'ownership', and the other the right to grant timber rights. The uncertain relationship between the two regimes was exposed by the recent case of *Majoria v Jino*.¹³³ In that case it was pointed out that whilst it was clear that referral to the

122 Land and Titles Act Cap 133 (SI), s 256(3).

123 Land and Titles Act Cap 133 (SI), s 257(4).

124 Land and Titles (Amendment) Act 1972 (SI).

125 Cap 133 (SI), s 255(1).

126 Land and Titles Act Cap 133 (SI) s 255(2).

127 Ibid.

128 *Liufafao'oa v Malaita* Customary Land Appeal Court [1989] SILR 70 at 73 (Ward CJ).

129 Land and Titles Act Cap 133 (SI) s 255(6).

130 (Unreported, High Court, Solomon Islands, Palmer J, 10 October 1997).

131 Land and Titles Act Cap 133 (SI) s 255(4)

132 Cap 40 (SI) s 10(1).

133 (Unreported, Court of Appeal, Solomon Islands, Lord Slynn of Hadley P, Adams JA, Salmon JA, 1 November 2007), available via <www.pacii.org> [2007] SBCA 20.

Chiefs was a prerequisite to lodging a claim with the Local Court, the status of any decision made by the Chiefs had not been specified. In that case, after a decision regarding 'ownership' had been made by the Marovo Council of Chiefs, the unsuccessful party applied to the Customary Land Appeal Court, acting under the regime created by the Forest Resources and Timber Utilisation Act for a determination of timber rights. It was held by the High Court that as the Chiefs' decision was made under a different regime (ie the Land and Titles Act and Local Courts Act) it was not binding on the Customary Land Appeal Court acting under the forestry legislation. The Court of Appeal reversed this decision, stressing 'the important role assigned by the Parliament to the Chiefs and their decisions for the purpose of determining disputes of customary land'.¹³⁴ The appeal court concluded that a party who disagreed with a decision of the Chiefs, but who declined to take advantage of the legislative scheme for reconsidering that determination by invoking the jurisdiction of the local court must be considered to be bound by the decision.¹³⁵

This decision highlights the lack of coordination between the legislative regimes for determining disputes as to interests in customary land. The Court of Appeal, left to deal with the resulting conflict, accepted the need to accommodate the demands of legal pluralism. It stated that 'the key to understanding the scheme and applying it in a practical way is to recognise the important role assigned by the Parliament to the Chiefs and their decisions for the purpose of determining disputes of customary land'. However, it is arguable that the court did not grasp the subtleties of the customary land tenure system, assuming that the rights being determined under the Local Courts Act were identical to those being determined under the Forest Resources and Timber Utilisation Act. According to earlier case law, this assumption is clearly incorrect.¹³⁶ This now means that a party who has established 'ownership' through the local court process may challenge a subsequent determination of timber rights made in favour of another party under the forestry legislation, which is precisely what the forestry legislation was intended to prevent.

It is also relevant to note that the litigation between the parties to *Majoria v Jino*,¹³⁷ over the same area of customary land is continuing in the High Court¹³⁸ and

134 *Marjoria v Jino* (Unreported, Court of Appeal, Solomon Islands, Lord Slynn of Hadley P, Adams JA and Salmon JA, 1 November 2007), available via <www.pacii.org> [2007] SBCA 20.

135 *Ibid.*

136 See *Allardyce Lumber Company Ltd v Attorney General* (Unreported, High Court, Solomon Islands, Ward CJ, 18 August 1989), available via <www.pacii.org> [1989] SBHC 1.

137 (Unreported, Court of Appeal, Solomon Islands, Lord Slynn of Hadley P, Adams JA, Salmon JA, 1 November 2007), available via <www.pacii.org> [2007] SBCA 20.

the Court of Appeal.¹³⁹ Although the dispute is primarily about customary land, which the Land and Titles Act clearly states is to be governed by customary law,¹⁴⁰ the dispute has been removed into the common law arena.

Like the Local Courts and for similar reasons, Customary Land Appeal Courts are mostly inoperative and there is a backlog of cases to be dealt with.

VII PROPOSALS FOR REFORM

The problems that have arisen with the present dispute resolution regime have led to calls for reform. This section examines two different responses to this.

A Increasing the Role of Traditional Leaders

Dissatisfaction with the current delays has resulted in calls for reform of the dispute resolution process. One suggestion has been to increase the involvement of traditional leaders. In December 2005, Cabinet endorsed the Lands and Titles (Amendment) Bill 2005, which had been drafted in the Ministry of Lands. The Bill permits traditional leaders to exclude the jurisdiction of the Local Court, by publishing the customary rules relating to land dispute resolution. There has been no further progress with this proposal.

Although there is much to be said for this proposal, caution must be exercised in bolstering traditional forums, due to the potential for conflict with human rights.¹⁴¹ Traditional leaders are usually male elders or Chiefs and may not take into account the views of women, young people, or those who have moved away from custom. Such forums do not always accord with the principles of natural justice – for example, the right to be heard may not be respected, particularly in the case of women.

B Tribal Land Dispute Resolution Panels

A rival proposal is for Tribal Land Dispute Resolution Panels (TLDRP) to be established. The idea dates back to 2004 and the current scheme is embodied in the

138 See *Majoria v Jino* (Unreported, High Court, Solomon Islands, Faukona J, 16 May 2008), available via www.paclii.org at [2008] SBHC 54.

139 See *Majoria v Jino* (Unreported, Court of Appeal, Solomon Islands, Goldsborough P, Williams JA, Hansen JA, 26 March 2009), available via www.paclii.org at [2009] SBCA 4.

140 *Land and Titles Act Cap 133* (SI) s 239(1): 'The manner of holding, occupying, using, enjoying and disposing of customary land shall be in accordance with the current customary usage applicable thereto, and all questions relating thereto shall be determined accordingly'.

141 For a detailed discussion of conflict between customary law and human rights in the Pacific see New Zealand Law Commission, *Converging Currents: Custom and Human Rights in the Pacific*, Study Paper No 17 (2006).

Tribal Land Dispute Resolution Panels Bill 2009. This Bill transfers jurisdiction from the Local Court to Tribal Land Dispute Resolution Panels, established under the legislation. Referral to the Chiefs will no longer be a prerequisite to the statutory body's jurisdiction.

The Bill provides for each Panel to have three Members appointed by a National Director and approved by the Chief Justice from a membership register.¹⁴² Applicants for membership of the register are self-nominated by filling out a form declaring that they have a good knowledge of customary rules applying to land in their area or are custodians of land there; and have lived mainly in that area for more than three consecutive years.¹⁴³ The form must be signed by two witnesses, being either: magistrates; former magistrate; Provincial government members; a minister of religion; or the Chief Clerk.¹⁴⁴ Applicants must possess legal capacity and may not hold an elected office in the National, Provincial or Local Government or have been convicted of any crime of dishonesty, or any crime carrying a penalty of more than 6 months in prison.

The Panel must decide the dispute according to custom, provided the custom is not inconsistent with a written law. The meeting of the Panel is conducted informally and the formal rules of evidence do not apply. Legal representation is not allowed. If witnesses are called they must be given an opportunity to present their story and materials and may be questioned by Panel Members but not the parties. The Panel must normally inspect the land and the boundary, if that is in dispute. The Clerk to the Panel must always be present and must take notes of everything that happens and the reasons for the decision. However, absence of a Clerk does not invalidate the proceedings.

The Panel must encourage the parties to come to an agreement themselves but, if they cannot agree, the Panel must make a decision within seven days of the hearing. If possible, the decision must be by consensus; otherwise it is by majority vote. The decision and reasons must be given in public and is normally final. However, an application may be made to the High Court if there has been a denial of natural justice or the Panel has exceeded its jurisdiction.¹⁴⁵

142 Clause 9. This clause is ambiguous and it is not entirely clear whether approval relates to appointment to the Register or membership of the Panel or both.

143 Clause 10.

144 Reg 6.

145 This is stated to be by way of appeal, but it appears that there has been a failure to distinguish between an appeal and a review.

The Panels serve the aim of providing a locally-based, participatory system, but the Bill is generally badly drafted and a number of technical objections arise from its current form. A threshold question is the suitability of the term 'tribal'. Deciding on a name for the tribunal is understood to have been a difficult matter and it is fair to say that any name was likely to cause controversy. However, there are a number of objections to the title chosen. Some scholars have been critical of the use of the word 'tribe' to describe a customary group.¹⁴⁶ Further, tribal land has been defined in the substance of the Bill by reference to the definitions of 'customary land' in the Land and Titles Act and the Customary Land Records Act. As the Customary Land Records Act states that "'customary land" has the meaning ascribed thereto in section 2 of the Land and Titles Act', it adds nothing helpful and this part of the definition should be deleted.

Section 2 of the Land and Titles Act uses the term 'customary land', rather than 'tribal land'. It defines 'customary land' as meaning:

any land (not being registered land, other than land registered as customary land, or land in respect of which any person becomes or is entitled to be registered as the owner of an estate pursuant to the provisions of Part III) lawfully owned, used or occupied by a person or community in accordance with current customary usage, and shall include any land deemed to be customary land by paragraph 23 of the Second Schedule to the repealed Act.

As the definition of 'customary land' is being imported into the Act, it is clear that this is intended to be a semantic change rather than one of substance. However, this results in a Bill which uses different terminology from the rest of the legislation relating to such land. This change in terminology is understood to have stemmed from feedback during the consultation process. However, more convincing evidence would be required in order to justify such a significant change. In any event, to avoid confusion, the change should be made through legislation. This could be done by amending each piece of relevant legislation individually in Part IX of the Bill. Alternatively, a further amendment could be made to the Interpretation and General Provisions Act in the Bill, changing the term 'customary land' to 'tribal land' in all legislation, except where the context demands otherwise. An even broader change could be made by amending the term 'customary' to 'tribal' but this would extend the use of the term tribal beyond the boundaries of land, a change which appears not to be generally supported.

¹⁴⁶ Sharon Tiffany "Customary land Disputes, Courts, and African Models in the Solomon Islands" (1982-83) 53 *Oceania* 277, 287.

In addition to these problems of definition, there are more substantive concerns raised by the Bill. A jurisdictional issue arises from the fact that the Panel is empowered to deal with 'tribal land situated in the Solomon Islands including the outer edge of any reef which lies adjacent to any such tribal land'.¹⁴⁷ Presumably, this means up to the outer edge. The inclusion of reef is significant, because this implies that reefs are part of tribal land. As discussed above, the common law position on this point in Solomon Islands is not entirely clear.

Perhaps the most fundamental problem with the Bill is its provision that decisions of the Panels are binding 'on all parties who are affected by them, whether they were parties to the dispute or not'.¹⁴⁸ In legal terms, decisions will be binding *in rem* as opposed to *in personam*.¹⁴⁹ Whilst the aim of this clause is clearly to achieve finality, doing so in this way is problematic. Firstly, the *Constitution* may be infringed by the power to make orders extending to persons who are not before the Panel, as it requires that persons deprived of property rights must have access to a court.¹⁵⁰ Further, the goal of finality must be balanced against the complexity of intersecting rights, and the flexibility of the customary tenure system.¹⁵¹ It will also necessitate a comprehensive and general enquiry, to try to ensure that rights and responsibilities at all levels are encompassed in the decision. This shifts the focus away from settlement of the dispute and restoration of harmony in the community to the question of land ownership, which is a much bigger question.

Another difficult issue arising from the Bill is the potential underrepresentation of women on the Panels. It is provided that the Clerk must select at least one at least one female to constitute a Panel.¹⁵² Qualifications for application are good knowledge of customary rules or being a custodian of land and a residential requirement of at least three years.¹⁵³ While many women will no doubt qualify, in

147 Clause 7.

148 Clause 67.

149 A decision *in rem* is binding on the land itself, whereas a decision *in personam* is only binding on the parties before the tribunal at the time.

150 Constitution of Solomon Islands 1978, s 8.

151 The High Court has recently held that the principle of *res judicata* has no relevance to the Local Court: *Lagobe v Lezutuni* (Unreported, High Court of Solomon Islands, Brown PJ, 14 April 2005). *Res judicata* is a legal rule whereby final judgment on the merits of a case by a court of competent jurisdiction is conclusive of the rights of the parties, and bars re-litigation between the same parties.

152 Clause 30.

153 Clause 10.

the patriarchal environment of Solomon Islands they may be reluctant to apply. As selection is made subject to availability, where there are no females on the Provincial Membership Register then there will be no female Panel Member. If gender equality is regarded as important then this provision could be bolstered by requiring the Clerk to select a female Member from a neighbouring Province if no one is available locally. However, this might have adverse consequences regarding knowledge of the applicable customary rules. In any event, inclusion on the Panels does not guarantee full participation by women.

The proposals for changing the method of dealing with customary land disputes seems to be based on the assumption that the present system is inappropriate. However, the main criticism of local courts is their failure to resolve disputes in a timely manner.¹⁵⁴ It should be borne in mind that this failure appears to have been mainly due to lack of resources. Some local courts have not operated for many years. If TLDRPs are introduced there will be two forums requiring administration and funding, as the local courts will presumably continue to deal with minor matters within their warrants. This is certainly the implication from clause 81 of the Bill, which amends the Local Courts Act by deleting the sections relating to customary land disputes. Local Courts have also been criticised for taking an 'adversarial' approach,¹⁵⁵ although this was not the intention when these courts were introduced, and there is little evidence to support the criticism. In any event, it would be a fairly straightforward matter to introduce procedures in the Local Courts similar to those proposed for the Tribal Land Dispute Resolution Panels. Coupled with proper resourcing the Local Courts could be improved and revived.

The arrangements for dispute resolution over customary lands require urgent attention, so that land disputes can be settled more efficiently. The Tribal Land Dispute Resolution Panels Bill 2009 is currently in the consultation process. If the scheme is to go ahead it is to be hoped that it will be in a revised form with the problems identified above having been addressed. In the meantime, the register of justices should be updated and the Local Courts should be properly resourced to deal with the backlog of land cases.

VIII CONCLUSION

As highlighted in the above discussion, the legal position of customary land in Solomon Islands is far from satisfactory. The *Constitution* emphasises the importance of custom in relation to land and this is given practical application by

¹⁵⁴ Above, n 120.

¹⁵⁵ Tabunwati Takoa and John Freeman 'Provincial Courts in Solomon Islands' in Guy Powles and Mere Pulea (eds) *Pacific Courts and Justice* (USP, Fiji, 1988) 73, 75.

the Land and Titles Act. However, whilst this statute has provided some protection against alienation of customary land, the legislative arrangements are far from satisfactory. The regime is unclear and the resulting uncertainties have given rise to a culture of disputing land 'ownership' and boundaries. In addition to the mismatched, disparate legislation, there is a lack of coordination between the different legal systems. For customary communities there is no bridge from the customary system into the formal system. This leaves them without any access to many commercial avenues, such as leasing or mortgaging. More particularly, as the Customary Land Records Act¹⁵⁶ is not in operation there is no means for a community to establish its title to land in a way that is recognised by the formal system, other than through registration under the Land and Titles Act or the more sinister option of being identified as timber rights owners. However, there are serious drawbacks to both options for the community involved. Making the choice to register their land means that it will lose its status as customary land and be converted into a perpetual estate¹⁵⁷. The other method for obtaining formal recognition, the timber rights process, is designed to allow the land to be logged, a process that only benefits a few members of the community. As there are increasing pressures on customary land due to development, the dearth of mechanisms enabling customary land to be dealt with in a way that allows it to interact with the formal legal system pose a serious threat that it will become a victim of legal pluralism.

The lack of an adequate bridge between the two systems is further highlighted by the unsatisfactory arrangements for resolving disputes. Although efforts have been made to accommodate customary decision makers in the process, this has not been a success. This has been due in part to lack of resources, which was noted as long ago as 1988,¹⁵⁸ and the situation since then has only deteriorated. The two suggestions for reform currently on the table take very different stances. Both highlight the lack of a shared vision for the plural system, one view advocating a return to the traditional system and the other introducing a statutory forum. Whilst the latter intends to use those knowledgeable in custom as adjudicators, the formalities and emphasis on the written medium tend to indicate a non-traditional approach. The draft of a new constitution is under consideration in Solomon Islands. This bolsters protection of customary land. For example, it provides for social, spiritual, cultural and environmental impact studies before any development

¹⁵⁶ *Cap 132 (SI)*.

¹⁵⁷ Land and Titles Act *Cap 133 (SI)*, s 109.

¹⁵⁸ Tabunwati Takoa and John Freeman "Provincial Courts in Solomon Islands" in Guy Powles and Mere Pulea (eds) *Pacific Courts and Justice* (USP, Fiji, 1988) 73, 76.

is carried out and that free and informed consent of customary owners is required, as well as a right to a 'just and fair return' for any use of their resources.¹⁵⁹ It also limits the government's right to acquire customary land other than by way of a leasehold or similar.¹⁶⁰ However, the Bill does not overcome the lack of a shared vision for customary land, which still appears to be a real stumbling block for Solomon Islands. Piecemeal reforms attempting to address problems individually are at best a compromise and at worst a misguided exacerbation of the problem.

As stated towards the beginning of this chapter, customary land 'is the mainstay of a vision of the world. [It]is at the heart of the operation of the cultural system'.¹⁶¹ Until the tensions between pluralism and the increasing demands of the changing Pacific are addressed, that vision will continue to be distorted by conflict and disillusionment.

159 Federal Constitution of Solomon Islands Bill cl 15.

160 Federal Constitution of Solomon Islands Bill cl 179.

161 Joel Bonnemaïson, above, n 12.