LAND TENURE IN SOLOMON ISLANDS: PAST, PRESENT AND FUTURE

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Abstract

Since the arrival of foreigners in Solomon Islands the most perplexing question has been how to balance land as a spiritual and social ideal with land as an economic base. Law reformers have struggled with the competing aims of retaining land under customary tenure, whilst offering sufficient certainty for it to be used for purposes other than subsistence gardening and small locally owned projects. The other, related, question has been whether suitable arrangements can be made for customary land to be used as security for investment. This article traces the attempts that have been made to convert customary land into a form of tenure that facilitates economic development. It examines government policies and legislation that have attempted to convert land from a social framework to a form of property that can be owned and discusses the impact of these arrangements on village communities. Whilst the focus is on Solomon Islands, reference is also made to initiatives in neighbouring Pacific Island countries where similar issues have arisen. The article concludes that, to date, Solomon Islands has failed to find an appropriate system that responds to the needs of its population.

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 spirits was a cardinal point of

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> traditional faith and such reverence dictated the preservation of land which the living shared with the dead.[1]

These words from the late Sir Gideon Zoleveke capture the vital significance of land to Solomon Islanders. Land has long been a source of tension, not just between settlers and the indigenous population,[2] but also amongst Solomon Islanders themselves.[3] Since the arrival of foreigners, the most perplexing question has been how to balance land as a spiritual and social ideal with land as an economic base. Land reform advocates and law reformers have struggled with the competing aims of retaining land under customary tenure, whilst offering sufficient certainty for it to be used for purposes other than subsistence gardening and small locally owned projects, should the community wish to do so. The other, related, question has been whether suitable arrangements can be made for customary land to be used as security for investment.

This article traces the attempts that have been made to convert customary land into a form of tenure that facilitates economic development in Solomon Islands. It examines government policies and legislation that have been employed in an attempt to convert land from a social framework to a form of property that can be owned. It also discusses the impact of these arrangements on village communities. The thorny question of how best to resolve land disputes is outside the ambit of this article but gains some mention in areas where it is inextricably entwined with the main issues under discussion. Whilst the focus is on Solomon Islands, reference is also made to initiatives in neighbouring Pacific Island countries where similar issues have arisen. The article concludes that, to date, Solomon Islands has failed to find an appropriate system that responds to the needs of its population.

II. Background

A. Island Diversity

Solomon Islands is made up of 26 main islands and hundreds of small islands and islets, almost 350 of which are inhabited. It has a land area of about 28,000 km^2, around one third of the size of Tasmania, spread out in a 1,360 km long, double chain

1 Gideon Zoleveke "Traditional Ownership and Land Policy" in Peter Larmour (ed) *Land in Solomon Islands* (Institute of Pacific Studies, University of South Pacific, Suva) at 4.

2 For examples of disputes between Solomon Islanders and settlers see Judith Bennett *Wealth of the Solomons* (University of Hawaii Press, Honolulu, 1987) at 71.

3 See, for example, Toata Molea and Veikila Vuki "Subsistence fishing and fish consumption patterns of the saltwater people of Lau Lagoon, Malaita, Solomon Islands: A case study of Funa'afou and Niuleni Islanders" (2008) 18 SPC Women in Fisheries Bulletin 30. See also text at fns 9 and 10 below.

within a total sea area of 1,340,000 km^2. The significance of the issue addressed in this article is illustrated by the fact that some 86 per cent of the land is under customary tenure. The remaining 14 per cent has been alienated, that is, removed from customary tenure and formally registered.

The country's population is just over 667,000,[4] speaking about 80 vernacular languages, which is indicative of the number of different cultural groups. About 80 per cent of people live in rural areas. Though Solomon Islands is increasingly urbanised, the bulk of Solomon Islanders still live in villages, working their customary land. Those who live in urban areas maintain close links with their villages of origin and with the lands of their ancestors and are resistant to any scheme aimed at "reforming" customary land tenure by imposing individual titles.

B. Customary land

Despite the encroachment of Christianity on traditional religious beliefs, and the pressures of cash-oriented economic development, the fundamental features of customary land remain intact. It is still viewed as a social, political and economic base, irrevocably associated with a "land group" of individuals who have inherited rights to use the land. This land group is constituted by men and women tied to it by genealogy, together with the descendants of invitees given rights to use this land. Invitation may stem, for example, from marriage, adoption or the need to satisfy a customary debt or obligation. Though most Solomon Islanders do not consciously differentiate between these categories, some scholars[5] and common law courts[6] often refer to primary land rights (encompassing a perpetual interest in the land) and secondary rights (encompassing a limited right to use or take produce from the land). These terms have been defined in the Customary Land Records Act 1994, in the following way:[7]

> "[P]rimary rights" means the right to carry out any act on the land concerned without reference to any other person … "secondary rights" means any other right to carry out any act on the land concerned without reference to primary right holders.

4 Solomon Islands National Statistics Office "Population: Projected population by province 2010–2025" <www.statistics.gov.sb>

5 Don Paterson "Some Thoughts about Customary Lands" (2001) 5 JSPL <ww.paclii.org>.

6 See, for example, *Maena v Saeni* [2015] SBHC 83; and *Palmer v Vunagi* [2018] SBHC 40.

7 Cap 132 (SI), s 2.

Whilst the authors consider these categories to be a Western construct, which oversimplify customary land arrangements, the terms are used in this article for the sake of simplicity.

Even today, Solomon Islanders are sympathetic to individuals who do not have access to land, and may be prepared to grant them secondary rights. Importantly for the topic addressed in this article, land is still not regarded as property. Customary land tenure systems are flexible and are not considered in terms of "title". As stated by Solomon Islander, Waeta Ben, a former politician and, for a time, Minister of Lands:[8]

> The beauty of customary land is that it keeps everyone together, it allows their survival. When you start talking about land alienation, you own the title, you will start having land disputes. Customary land is the reason we survive ... Customary land means you don't need money, you can always go home, you always have a place to go to live.

Systems of customary land tenure differ throughout Solomon Islands. In some areas, such as Guadalcanal, Makira, Isabel and Central Provinces, inheritance is primarily matrilineal. In Malaita, as well as in most of western Solomon Islands, land inheritance is usually patrilineal. In some other parts of Solomon Islands, land claims may follow either or both the father's and/or mother's line (ambilineal). Genealogy, however, is not the only factor determining customary land rights. New arrangements may be the result of confusion over rights granted to invitees or the outcome of a dispute. Early disputes centred on the traditional right to use customary land and harvest its resources for subsistence and trade. In the Marovo Lagoon, for example, clamshells were a valued item of exchange. Warriors, led by a *Varane* (leading warrior) would embark on missions to defend their home territory.[9] A more dramatic example, perhaps, is the shift of villagers from part of mainland Malaita between 300 to 400 years ago to a new home on man-made islands in Lau Lagoon, to escape, amongst other things, tribal fighting over land.[10] Disputes still arise within customary groups, sometimes stemming from the ancient practice whereby members of a particular land group allowed fugitives from a different group to settle temporarily on their land. Although this only conferred temporary

8 Waeta Ben, as cited in Siobhan McDonnel *Building a Pathway for Successful Land Reform in Solomon Islands* (Coral Bell School of Asia Pacific Affairs, Australian National University, 2015) at 13.

9 Edvard Hviding *Guardians of the Marovo Lagoon* (University of Hawaii Press, Honolulu, 1996) at 86–87, 95.

10 Molea and Vuki, above n 3.

land rights, typically, after a few generations, descendants of later arrivals might assert "belonger" land rights.

Since the arrival of foreigners, with a very different attitude to land, disputes have been exacerbated by two factors. First, the lure of riches to come from resource extraction; mainly trees and minerals; and, second, misunderstandings of customary land principles by legislators, administrators and the courts, more familiar with common law categories of land.

C. The Constitutional Mandate

At independence, the decision was made to retain land in customary tenure. This was emphasised in the Constitution, which stated that "the natural resources of our country are vested in the people and the government of Solomon Islands".[11] Whilst the relationship between "the people" and "the government" is not made clear, this is generally understood to mean that all land is vested in Solomon Islanders, and the Government holds it on their behalf. In *K'Clay and Moka v Attorney General*,[12] Solomon Islands' Court of Appeal held the words to mean that the natural resources were owned by the people and government of Solomon Islands corporately and not individually. However, individuals and their communities, being part of the people of Solomon Islands, are entitled to use those resources as long as it is lawful for them to do so. Following up on this, the Constitution restricted the holding of a perpetual interest in land to Solomon Islanders.[13] However, the Constitution did not provide any detail about how this arrangement was to work. Instead, the task of providing for different interests in and transfer of land was left to parliament.

III. Early Encounters with Foreign Concepts of Land

The first traders initiated contact with Solomon Islanders some 200 years ago. Since that time, change has been a feature of Solomon Islands' society, largely in response to ideas introduced from outside. Whilst customary land tenure has not escaped change, its fundamental features remain intact, including inalienability of customary land. However, from the time when European settlers first made arrangements for transfers of land in Solomon Islands, their view was that land was "owned". This became the basis of subsequent British colonial policy in Solomon Islands and continues to underline thinking and policy today. Westerners interpreted

11 Constitution of Solomon Islands 1978, Preamble.
12 *K'Clay and Moka v Attorney General* [2014] SBCA 2.
13 Section 110.

land transactions as "buys", while Solomon Islanders, unaware that land could be considered as saleable property, probably considered such transactions as being in the nature of temporary, non-exclusive rights to use the land. It also seems from evidence given to subsequent land commissions (discussed further below) and in subsequent land cases, that individual islanders who negotiated land transfers were often not members of the land group associated with that land, but were trading on the fact that they were able to communicate with foreigners in Solomons Pijin or in broken English.

In 1893, a British Protectorate was declared in Solomon Islands.[14] This was closely followed by a regulation preventing foreigners from acquiring vacant land without the approval of the colonial administration.[15] This regulation also introduced freehold and leasehold title and allowed the purchase of customary land by British subjects, subject to approval from the colonial administration.[16] However, in 1914, sales of freehold land to foreigners were banned, although the leasing of land by customary "landowners" to foreigners was still permitted.[17] Neither did the prohibition extend to land regarded by the Crown as wasteland, on the basis of being unowned or unoccupied, over which the Crown continued to grant leases.[18] In particular, a large amount of land (nearly four per cent of the land area of the Protectorate)[19] was granted to Levers Pacific Plantations Limited.[20] This practice conflicted with Solomon Islanders' approach to land, which viewed all land in the islands as under customary "ownership", whether or not it was being currently occupied or cultivated.

In response to a series of complaints by Solomon Islanders, the Phillips Land Commission was appointed to investigate claims of wrongful alienation. *The Phillips Report*, as it became known, is actually a series of documents recording the results of investigations in those parts of the country to which the complaints pertained. These elusive documents, which have disappeared from Solomon Islands' archives, are among the earliest written records of customary land in the country. As a result of this enquiry, Levers lost half of its land, but remained the largest private landowner in the country.[21]

A second land commission was appointed in about 1953, with a much broader mission than Phillips. The Allan Commission was, "to study, record and, as far as

14 Pacific Order in Council 1893 (UK).
15 Queen's Regulation No 4 1896.
16 Queen's Regulation No 4 1896.
17 King's Regulation No 3 1914.
18 Queen's Regulation No 3 1900; Solomons (Waste Lands) Regulation 1904.
19 Harold Scheffler and Peter Larmour "Solomon Islands: Evolving a New Custom" in Ron Crocombe (ed) *Land Tenure in the Pacific* (University of the South Pacific, Suva, 1987) at 312.
20 Ian Heath "Land Policy in Solomon Islands" (PhD thesis, LaTrobe University, 1979) at 125.
21 Scheffler and Larmour, above n 19, at 312.

possible, correlate native custom relating to land".[22] Colonial officer, Colin Allan, spent months travelling around the islands seeking and recording information on customary land rights. Allan's approach was to integrate customary and alienated land through the Western medium of land registration. Allan's final report, was completed in 1957 and led to the changes which still dominate land tenure law in Solomon Islands today, although not to the wide-scale registration that was originally envisaged.

IV. Attempts to Instil Certainty into a Flexible System

Over the years, a number of attempts have been made to establish a formal, legally secure, land regime. In addition to recommending the systematic registration of customary land, the Allan Commission proposed establishment of a land trust board to hold the title to lands declared vacant. Establishment of a statutory body to manage land that appeared to be vacant was an early strategy, used in Fiji and Vanuatu, and the Solomon Islands Land Trust Board was established in 1959.[23] However, all the land was claimed by Solomon Islanders, and the Board was disbanded in 1964.[24]

The Allan Commission's Report also led to the drafting of the Land and Titles Ordinance 1959. This Ordinance formed the origins of the Land and Titles Act,[25] discussed further below.

A. The Land and Titles Act

The Land and Titles Act[26] prescribes a "Torrens" type registration system, where interests in alienated land are required to be registered with the State. In return, the registered owner gets an indefeasible title to the registered interests. Registration is required for all interests in land, including leases in excess of two years,[27] but excluding customary land. This reflects the colonial preference for legal certainty over land-linked social ties and stability, which had underpinned the Allan Report.[28]

Two years before Independence, in 1976, a Select Committee on Lands and Mining laid the foundation for radical amendments of the Land and Titles Act,

22 Colin Allan *Customary Land Tenure in British Solomon Islands Protectorate* (Western Pacific High Commission, Honiara, 1957) at i.
23 Land and Titles Ordinance 1959 (SI), s 9.
24 Land and Titles (Amendment) Ordinance 1964 (SI), s 4.
25 Cap 133 (SI), first enacted in 1968.
26 Land and Titles Act Cap 133 (SI).
27 Section 146.
28 Allan, above n 22.

designed to give effect to the imminent constitutional limitation on foreigners holding perpetual interests in land. The changes were largely incorporated in the 1978 amendment of the Act.[29] As amended, the Act provides for freehold titles of over 75 years held by non-Solomon Islanders immediately prior to independence to be converted to interests of 75 years.[30] Whilst the Committee's report courageously tackled the sale of land to non-Solomon Islanders, the opportunity to shift from the "land as property" theme to something more attuned to customary land tenure was missed.

The Land and Titles Act makes separate provision for customary land, which is to be dealt with in accordance with "current customary usage". Every "transaction or disposition of or affecting interests in customary land [must] be made or effected according to the current customary usage applicable to the land concerned".[31] Only Solomon Islanders are permitted to own an interest in customary land,[32] and transfer or lease of customary land to a non-Solomon Islander is only permitted in very limited circumstances.[33] Apart from transactions permitted by customary usage between Solomon Islanders, the only dealings with customary land authorised are compulsory acquisition for public purposes[34] or a lease to the Commissioner of Lands or a Provincial Assembly.[35]

Since independence, the Land and Titles Act has been amended several times. The most significant changes are contained in the Land and Titles (Amendment) Act 2014, which is discussed below. Whilst this Act recognises the importance of customary land tenure and a need for special arrangements to deal with such land, it still embraces the Western paradigm of absolute rights that are readily identifiable *and* registerable. Further, the failure to recognise multi-level rights has led to continued misunderstandings between indigenous people and the State, with Solomon Islanders still struggling to negotiate between the two legal systems.

Local dissatisfaction with the Act is frequently aired in the media. For example, the local press often carries statements of concern. For instance, a frustrated Malaita Premier, Peter Chanel Ramohia, was prompted to say:[36]

29 Act 14 and LN 88 1978.
30 Sections 100 and 101.
31 Section 240.
32 Section 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": section 2.
33 Section 241. Transfer is permitted only to a person who is married to a Solomon Islander or who inherits the land and is entitled to an interest in custom.
34 Section 71.
35 Section 60.
36 Biriau Wilson Saeni "Land Act blamed for dispute" Solomon Star, (online ed, Honiara, 18 August 2016).

> We have observed particularly that the current Land and Titles Act is the main cause of land disputes as the Land and Titles Act [does] not recognise our customary land Tenure System.

Certainly, the Act does nothing to solve the most pressing issue of how to balance the desire to retain the "ancestral trust" with the ability to use the land for commercial purposes and exploit its resources in a way that would benefit local communities.

B. Forest Resources and Timber Utilisation Act

Another key piece of legislation impacting on land tenure is the Forest Resources and Timber Utilisation Act,[37] introduced in 1970. This builds on a long-held policy of Solomon Islands governments to facilitate logging by separating timber rights from the land on which the timber grows. The Act, which has been extensively revised over the years, provides that a person wishing to acquire timber rights on customary land must obtain the Commissioner of Land's consent to negotiate with, amongst others, "the owners of such customary land".[38] Use of the term "owners" highlights the foreign, colonial approach to land use.[39] The Act goes on to provide the following process:

- A meeting is held with stakeholders including the "customary landowners" to discuss and determine the application.[40]
- The application must be rejected if "no agreement is reached between the applicant and the customary landowners".[41]
- If agreement is reached, the Provincial Government issues a certificate,[42] which is forwarded to the Commissioner.

The purpose of the process is to identify the named representatives of the "customary landowners". Once these people have been identified, that process sets in stone a list of those entitled to grant timber rights. However, in practice, those identified as "landowners" may not be the true customary landholders but may be those who have the right to grant timber rights only. Because of the multiple levels

37 Cap 40 (SI).
38 Forest Resources and Timber Utilisation Act Cap 40 (SI), s 7(1).
39 See further in relation to the use of common law terms to describe customary concepts, Jennifer Corrin "Customary law and the Language of the Common Law" (2008) 37 Common Law World Review 305.
40 Forest Resources and Timber Utilisation Act Cap 40 (SI), s 8(1) and (3).
41 Forest Resources and Timber Utilisation Act Cap 40 (SI), s 9(1).
42 Under the original scheme the initial determination was made by the area council: Forest Resources and Timber Utilisation (Amendment) Act 2000 (SI).

of customary interests that may exist in customary land, they may not be the same people as those with more pervasive interests in the land. Consequently, the Forest Resources and Timber Utilisation Act may permit those with a restricted interest in land to dispose of the most valuable fruit of the land. In *Tovua v Meki* Ward CJ said:[43]

> The procedure identifies persons to represent the group as a whole. Once the procedure has been followed, the people named by the Area Council [now Provincial Executive] 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.

It is not surprising that this convoluted scheme, contained in an Act that the High Court complained had been subjected to "a series of apparently haphazard and sometimes ill-conceived amendments",[44] is baffling to most Solomon Islands' villagers. The Act has created tensions between customary landowners and those who assert the customary right to control the forest resource. When a logging operation has been approved under the Act to go ahead despite opposition from some landholders it is a recipe for conflict. With State law on the side of the loggers, police, who are tasked with enforcement of state law rather than customary law (presented verbally and differing according to the area and history), may become involved to prevent frustrated landholders from acting violently to prevent logging. In these circumstances, customary landholders may have cause to doubt whether the State is dealing with "the natural resources of [their] country" on behalf of "the people … of Solomon Islands" as required by the Constitutional provision set out above.[45] Neither does this legislation reflect the mandate to deal with customary land in accordance with "current customary usage", as required by the Land and Titles Act.[46]

43 *Tovua v Meki* [1988/89] SILR 74, 76.
44 *Allardyce Lumber Company Ltd v Attorney-General* [1988–1989] SILR 78, 89.
45 Preamble.
46 Section 240.

C. North New Georgia Timber Corporation Act 1979

In the late 1970s, funds from logging were an important contribution to the national and provincial economies in the newly independent Solomons. In the North New Georgia region of Western Province, logging negotiations by Levers Pacific Timbers Limited had been stalled by disagreements as to ownership and representation. Protracted litigation concerning land ownership was bogged down in the High Court. This common law forum was bound by Western rules of civil procedure[47] and evidence,[48] which were unsuitable for dealing with a dispute between nearly 2,000 claimants, whose representatives could not be agreed upon, and where the rights and issues were customary.

In an effort to bypass this difficulty, Levers and representatives of the *butubutu* (the traditional kinship groups) devised an alternative approach. The North New Georgia Timber Corporation Act 1979 established a corporation and transferred to it customary timber rights in the northern part of New Georgia, identified in accordance with customary boundaries, but not the land on which timber grew. Thus, like the Forest Resources and Timber Utilisation Act, the timber rights were separated from other interests in the land. The North New Georgia Corporation's Board of Directors, consisting of representatives chosen by tribal leaders, was empowered to grant logging concessions and to receive and distribute the resulting royalties.

Whilst the Act allowed Levers to proceed with logging, it compounded, rather than solved, the underlying problems arising from a lack of recognition or understanding of traditional systems of landholding and land use and of their strong social basis. Divisions remained (and still exist),[49] as to who were the appropriate tribal leaders to choose directors and how the timber royalties should be divided up. In 1982, this culminated in a raid by about 2,000 Jericho villagers on Levers' logging camp at Enoghae.[50] Workers' houses and logging equipment were burned and vandalised, causing damage estimated at SBD one million (a sum worth considerably more in today's currency). The conflict was never satisfactorily resolved from Levers' point of view, and it abandoned logging in Western Province in 1986. The following year, a new logging contract was negotiated by the Corporation, which in the interim had changed its Board to include representatives of the disgruntled parties, with a Malaysian logging company. So began the Asian phase of logging in the Solomons.

47 Western Pacific High Court (Civil Procedure) Rules 1964 (SI).

48 Until the enactment of the Evidence Act 2009 (SI), evidence was governed by the Evidence Act 1938 (UK) and various 19th-century United Kingdom statutes.

49 See, for example, *Talasasa v Attorney General* [2017] SBHC 150.

50 See further, Judith Bennett *Pacific Forest: A History of Resource Control and Contest in the Solomon Islands, c. 1800–1997* (Brill, Leiden, 2000) at 220–224.

Disputes between the logging company and the landowners ensued,[51] and disputes with other Asian logging companies continue to occur.[52]

V. Further Attempts to Accommodate Custom in the State System

More recently, attempts have been made to build bridges between the State and customary systems. The principal attempts to deal with land tenure are to be found in the Customary Land Records Act 1994 (Cap 132) and the Tribes and Customary Land Titles' Bill 2006. Although not dealing directly with land tenure, two other documents also deserve mention. The Customs Recognition Act 2000 provides for application of customary laws, including land laws. More recently, the Traditional Governance and Customs Facilitations Bill 2018 was designed to formalise councils of chiefs at a local and national level and to give them a role in regulation and application of "customary rights".

A. Customary Land Records Act 1994

The Customary Land Records Act provides a mechanism for recording customary land boundaries and the names of the relevant land-holding groups and their representatives. The Act is administered by a National Recorder in a Central Land Record Office, with sub-offices intended to be established by Provincial Executives in the Provinces. The first office, set up in Honiara in the late 1990s, was a victim of "the tensions".[53] It was not re-established until 2016 and is now incorporated within the Land Reform Unit, which is discussed below.

Seeking to avoid naming individuals, a common source of dispute, the "record" does not confer any formal title on any individual or group, but rather identifies the leaders with authority to deal with the land, based on the genealogy of the group, which is also recorded. The Act provides a process for delineating and recording the boundaries of the land.[54] Further, what is recorded is not only primary rights, but also secondary rights, such as traditional rights to grow food crops on that land, to hunt, or to harvest the fruits of certain trees, and the extent of those rights.[55] Regulations, finally passed in 2007,[56] follow up on this, specifying what is to be

51 See, for example, *Sakiri v Golden Springs International (SI) Ltd* [2012] SBHC 3.
52 See, for example, *Dekurana Development Company Ltd v Kuku* [2013] SBHC 72.
53 This is the term commonly used to refer to the civil unrest and fighting between the Isatabu Freedom Movement (also known as the Guadalcanal Revolutionary Army) and the Malaita Eagle Force between 1998 and 2003.
54 Sections 12 and 13.
55 Section 11.
56 Customary Land Records Regulations 2007.

recorded, including the name of the land holding group or groups interested in the land; the name of the authorised representatives and their manner of appointment, the name of the customary land, and the rights held.[57]

The process provided under the Act has the advantage of keeping the land as customary, rather than alienating it. However, it does not assist in answering either of the two core questions raised at the beginning of this article, as the land is still subject to the prohibition on granting any interest in customary land imposed by the Land and Titles Act.[58] Neither does it appear to allow customary land to be used as security. To date, it appears that no lender has agreed to accept the land "record" for this purpose. This is hardly surprising, as the land is not transferable except to Solomon Islanders in accordance with custom.[59] The Act does invite the recorded representatives to apply for recorded primary interests in the land to be registered in the names of the relevant land-holding groups and their representatives.[60] No provision is made for secondary interests to be registered. Further, it is unclear whether the effect of registration is to alienate the land. The Act states that:[61]

> ... any customary land registered and recorded ... shall grant ... [the registered] land holding group all rights to use, occupy, enjoy and dispose of such land in accordance with custom usage.

This would suggest that the land remains under customary tenure, even though it is registered. However, this provision is subject to the provisions of the Land and Titles Act.[62] Given the nature and consequences of the registration process set up by that Act, including the provision that "[no] registered interest in land shall be capable of being created or disposed of except in accordance with this Act", it is arguable that registration removes it from the customary system and converts the land to a "registered interest". No land has yet been recorded, but a pilot project is proceeding and planned to be completed by the end of 2020.[63]

B. Tribes and Customary Land Titles Bill

The most radical attempt at reform of land tenure is to be found in the Tribes and Customary Land Titles Bill, a notable departure from the Western paradigm,

57 Reg 5(1).
58 Section 241(3).
59 Section 241(1).
60 Section 19.
61 Section 20.
62 Section 20.
63 Email correspondence between author and land officer (20 November 2018).

which seeks to empower traditional leaders. The Bill appears to have begun life in December 2005, when it was entitled the Lands and Titles (Amendment) Bill 2005. The Bill, drafted in the Ministry of Lands, was endorsed by Cabinet, but then stalled. Though the Bill is not publicly available, it appears to have re-emerged in 2006 as the Tribes and Customary Land Titles Bill. The Bill provides for the repeal of the Customary Land Records Act,[64] discussed above, and replaces it with a far more radical scheme.

This Bill has much to recommend it. It provides for the drawing up of schedules of tribes, lines and sub-tribes and "small lines", organised by Province, and for the schedules of tribes to be certified as correct by the Provincial Executive.[65] The listed tribes are declared to have legal identity.[66] It also provides for the preparation of maps and plans showing the external boundaries of tribal customary lands. Those plans are sent to the Minister concerned, who then makes a declaration assigning the "Customary Land Title" to the appropriate tribe from the list in the schedule.[67] The elders of the tribe are to have authority over "all matters relating to usage of customary land"[68] and may transfer a portion of the land to a third party for a fixed term.[69] The proceeds of any land transaction belong to the tribe and must be dealt with by consensus.[70] It also provides that tribal representatives may not use any income from land for their personal benefit without approval of the tribe.[71]

Unfortunately, from a legal perspective, the Bill is of questionable validity, particularly as its provisions conflict with the Land and Titles Act. Whilst it could be said to repeal the relevant provisions of the earlier Act by implication, the failure to specify whether the "other parties" to whom land may be assigned include non-Solomon Islanders would be likely to restrict the operation of the Bill. There is a myriad of other uncertainties raised by the Bill, which would need careful consideration and drafting to obviate.

To date, the Bill has not been before Parliament. Instead, a different amending Act has been passed, the Land and Titles (Amendment) Act 2014. This is directed at combatting the possibility of corrupt decisions arising where a single individual (in this case the Commissioner of Lands) has power to deal with applications for registered land allocation. The Act transfers the Commissioner's power to deal with applications for land allocation and related issues to a newly established Land

64 Tribes and Customary Land Titles Bill, cl 17.
65 Clauses 4 and 12.
66 Clause 3.
67 Clause 6.
68 Clause 7(1).
69 Clause 8.
70 Clause 8(2).
71 Clause 8(2)(b).

Board and restricts the Commissioner of Lands to dealing only with regulatory and administrative matters.[72] Whilst this Act obviates the risk of corruption arising from concentrating decision making power in a Commissioner, it does not address the major concerns relating to land discussed in this article.

C. Customs Recognition Act 2000

In addition to the Acts that deal directly with land, the Customs Recognition Act 2000 has some relevance, as it is designed to govern the application of customary laws, including land laws. However, although it is on the statute books, it has never been brought into force. It deals with, perhaps, the thorniest issue stemming from the Constitution, and that is how to make the aspirations for the promotion of customary law, expressed in the Preamble, a reality. Instead of grappling with this problem, the "application" of customary law was left for parliament to deal with at some future time.[73] It took until 2000 for this Act to go through parliament, and since then it has never been brought into force.[74] The Act was modelled on that of a Melanesian neighbour, Papua New Guinea (PNG). That country's colonial legislation, the Customs Recognition Act 1963,[75] ironically, was the subject of implied repeal in the same year that Solomon Islands passed its Act.[76]

The Act provides for the recognition of custom by all State courts, except where it is inconsistent with the Constitution or a statute or where it would result in injustice or would not be in the public interest.[77] The Act limits the recognition to a list of specified purposes for which custom may be taken into account. These include determination of "rights relating to customary land and things in, on or produce of customary land"; "rights relating to water, the sea, sea-bed, reef, river or lake"; and "devolution of customary land on birth, death or the happening of a certain event".[78] Customary law may also be applied "to avoid injustice". Whilst this gives scope for a broader application of customary law by a court which is well disposed towards it, the Act's limitation of customary law to a list of specified cases, in effect, relegates it from a general source of law to a more limited field of application.

72 Alan McNeil, "Land Reform" <https://www.visitsolomons.com.sb/wp-content/uploads/2018/06/6.-ministry-of-lands.pdf>.

73 Constitution of Solomon Islands 1978, s 75(1).

74 Section 1 requires the Act to be gazetted before it comes into force and this has never occurred.

75 Originally called the Native Customs (Recognition) Act 1963.

76 Repealed by the Underlying Law Act 2000 (PNG), which came into force on 18 August 2000. Repeal was implied rather than express, and the extent of the repeal is uncertain.

77 Section 6.

78 Section 8.

D. Traditional Governance and Customs Facilitations Bill 2018

More recently, the Traditional Governance and Customs Facilitations Bill 2018 was circulated by the Ministry of National Unity, Reconciliation and Peace as a working document. This Bill was designed to formalise the role of tribal chiefs and traditional leaders and to establish a national House of Chiefs and Provincial Councils of Chiefs. The Bill fell short of interfering with the scheme established by the Land and Titles Act. However, it did confer on tribal chiefs and traditional leaders the power to:[79]

> a) assess any dispute relating to competing claims over customary property and rights within or between groups in his or her locality;
> b) hear and receive evidence pertaining to any internal or competing claims in or between groups; and;
> c) make a binding decision in custom.

If no consensus was reached through this process, the Bill provided for the dispute to be referred to the responsible House of Chiefs.[80]

The Bill also included in the responsibilities of tribal chiefs and traditional leaders, management of all customary property and rights of their groups.[81] This Bill reached the second reading stage but, due to objections regarding lack of broad consultation, it was subsequently withdrawn.[82] A more robust consideration of the Bill would offer the opportunity to deal with its relationship with the Land and Titles Act and the legislation governing the jurisdiction of Local Courts and Customary Land Appeal Tribunals. The Bill expressly stated that it would have no effect on any existing court decisions on customary land,[83] but was otherwise silent on how jurisdiction was to be shared.

79 Clause 25(1).
80 Clause 25(2).
81 Clause 24.
82 Gina Maka'a "Traditional Governance and Customs Facilitations Bill Withdrawn" (13 December 2018) SIBC online <www.sibconline.com.sb>.
83 Clause 51.

VI. Returning Alienated Land to Customary Tenure

The desire to retain customary land tenure is evidenced by the fact that almost a third of the individual submissions to a 1978 Constitutional Review Committee[84] called for its preservation and for the return of alienated land to customary tenure. Most also called for mineral resources within land also to be specified as belonging to the customary land group.[85] As explained above, the Independence Constitution reflects these desires by vesting natural resources in the people and the government of Solomon Islands.[86] However, this general provision has been restricted by legislation reflecting a Western approach to land. The second 2014 draft of the country's new Constitution goes much further to encompass the aspirations of Solomon Islanders' regarding land, providing that:[87]

> Customary land is all the land held under customary law by a tribe, clan, lineage or other customary group, entity or individuals, described as the "customary owners" in this Chapter, according to the customary law applicable to the land in question.
>
> Customary land includes the air-space above the land, and everything on or below the surface of the land down to the centre of the earth including, in particular, all minerals, petroleum and natural gas.

As noted above, 86 per cent of Solomon Islands land is under customary tenure. Of the 14 per cent of alienated land, the descendants of the original landholders continue to press claims for the return of that land to customary tenure. There are some isolated examples of successful claims. In the Allardyce Harbour region of the island of Isabel, where negotiations in the 1960s had led to a sizeable addition to a National Forest Estate, some small islands and mangrove-dominated coastal areas were subsequently deemed by foresters as not needed, and were returned to customary land groups.[88] Since these areas had already been registered, it was

84 Solomon Mamaloni, chair *Constitution Review Committee Report* (Government Printer, 1988) Vol 2.
85 Solomon Mamaloni, chair, above n 84.
86 Constitution of Solomon Islands 1978, Preamble.
87 2nd Draft Constitution of Solomon Islands, 2014, clause 53(2) and (3). A further draft was finalised by the Constitutional Reform Unit in May 2019, but does not appear to have been released to the public.
88 Author is related by marriage to the original land holders.

returned to "representatives" of the original landholding group as "Registered Customary Land"; an ironic labelling.

A broader scheme to return alienated land to original landholders was devised in 1990. The national Government decided to return large areas to the original landholders in two stages, the first of which was to transfer ownership from the Commissioner of Lands to the Premiers of Provinces where such land was located. The second step envisaged was for those Premiers to return the land to the original customary land groups, subject to suitable proposals from each group to develop that land. Though the first step was taken, none of the Isabel Province land, for instance, has been returned to the original holders of this land. It has proved to be too valuable as a source of logging revenue for the Province.

VII. "Grassroots" Efforts

Traditional leaders in some parts of the country have instigated initiatives designed to clarify landholdings and to minimise disputes over customary land. The Lauru Land Conference of Tribal Community (LLCTC), a non-government organisation founded in Choiseul Province in 1981 and, in a neighbouring Province, the Isabel Council of Chiefs (ICC), are currently active in this respect. However, traditional leaders, though highly respected by their village communities, are conscious of their limited formal authority. They find negotiation of barriers established by existing legislation frustrating and, so far, initiatives have not proceeded far. In 2017, chiefs in Isabel attempted to settle uncertainty over Barora Fa'a land. This land had been divided up between different land groups by a former land group leader, though current members of the original land holding group have more recently disputed this transfer. Through a series of meetings, the Paramount Chief of Isabel has been successful in getting the earlier decision accepted and recognised.[89] However, acceptance did not go so far as agreeing to registration. The Lands Department has recognised this local initiative.[90]

At meetings in early 2018, the community offered to undertake a formal customary land recording exercise under the guidance of the National Recorder and the Ministry of Lands, Housing and Survey. Using traditional knowledge to support the creation of official records will ensure that the community has ownership over the process, while still providing data essential for the official records. The Barora Fa'a Interim Committee and the Zabana House of Chiefs met in February

89 Personal communication between author and the Paramount Chief of Isabel, Rt Rev Thaba James Mason OBE (circa 2017).

90 Pacific Community "Traditional knowledge helping to create official land records in Solomon Islands" (22 February 2018) <www.spc.int>.

2018, at which time they confirmed their interest and support for this project. The South Pacific Commission, with Australian Government financial assistance, has agreed to fund a recording officer to record the genealogies, representatives and boundaries of the Barora Fa'a land, Santa Isabel, should those with customary rights to this land, collectively, decide to proceed.[91]

VIII. Current State Policy

Attempts to find a pathway to open up customary land for economic development have been made from time to time, all predicated on the idea of reform based on elimination of customary land tenure. The report from the latest land summit, held in 2015, identified steps that Solomon Islands might "wish to consider in designing its own unique pathway to land reform". Its recommendations included "genuine, broad-based consultation across the nation on the directions for land reform" and development of "models for identifying custom landowners".[92]

As mentioned above, the Land and Titles (Amendment) Act 2014 transfers power to deal with applications for land allocation and related issues to a newly established Land Board and restricts the Commissioner of Lands to dealing with regulatory and administrative matters.[93] Whilst this amendment addresses the corruption arising from concentrating decision-making power in the Commissioner, it does not address the other concerns relating to customary land discussed in this article.

Whilst current government policy is still based on "a colonial mindset", a few modifications have been made to address some aspects of customary land tenure. In particular, the Land Reform Unit in the Ministry of Lands has been charged with implementing Government customary land reform programs and with the recording of customary land in accordance with the Customary Land Records Act. Whilst the use of the word "reform" is questionable, this Unit is mandated to seek recommendations from Provincial Executives in relation to the declaration of Customary Land Record Areas in each respective province. The Unit is urged to "proactively seek interest from land holding groups across Solomon Islands to have their land recorded in accordance with the Act"[94]. Eventually, these applications are to be processed through Provincial Land Record Offices. However, the Act makes no specific provision for the input of representatives of traditional bodies except where disputes may arise.

91 Pacific Community, above n 90.
92 McDonnel, above n 8, at 11.
93 McNeil, above n 72.
94 Solomon Islands Government, Ministry of Lands, Housing and Survey "Land Reform" <www.lands.gov.sb>.

IX. Finding a Pathway Towards Economic Development

The Government and traditional leaders of Solomon Islands are still struggling to find a way of accommodating the competing aims of retaining the "ancestral trust" in land, which holds together the social fabric of Solomon Islands, whilst permitting this land to be used in a way that leads to economic prosperity. The formidable challenge is to find a pathway between customary land tenure and the introduced system of land holding. As stated by Tagini:[95]

> ... the requirement by native people [is] that certain valuable attributes of the customary land tenure be preserved. In today's world, economic development is an equally important aim to pursue. It is impossible to discard either goal. A compromise must therefore be devised.

Corrin has pointed out that, though customary "law" in general has not fulfilled the potential role opened for it by constitutional recognition, its importance outside the formal system remains.[96] Indeed, in 1996, the Law Reform Commissioner of Solomon Islands explained the lack of support for state law reform by the fact that the majority of the population "already had local customs to regulate their daily lives" and that "Whiteman law" was "not their business". Whilst there has been increased recognition amongst development practitioners and law reformers of the need to acknowledge legal and social pluralism,[97] they have been unable to shed the English common law approach to land law. It is clear from continued opposition to the alienation of customary land that such a "Western" form of tenure is not acceptable to those whose traditional land rights are destined to be affected, and in some cases extinguished.

The force of customary land principles rests, not in their recognition by the State, but in the fact that members of customary groups feel bound by them. However, increasing urbanisation as people move away from village life into towns for work, education, or family commitments, has led to a weakening of traditional customary authority. This trend towards an urbanised society lends urgency to the

95 Phillip Tagini "The Effect of Land Policy on Foreign Direct Investments in the Solomon Islands" (2001) 5 JSPL <www.paclii.org>.

96 Jennifer Corrin "Wisdom & Worthy Customs: Customary Law in the South Pacific" (2002) 80 Australian Law Reform Commission Reform Journal 31.

97 See, for example, Brian Z Tamanaha, Caroline Sage and Michael Woolcock (eds) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, Cambridge, 2012).

need to address the role and operation of customary land tenure in Solomon Islands. To date, the State's attempts at legislating to accommodate an appropriate form of customary land tenure have been based on the Western paradigm of "ownership" and absolute rights. This is not only contrary to the constitutional declaration that "the natural resources of our country are vested in the people and the government of Solomon Islands" but also out of step with local community perceptions.

Successive Solomon Islands' governments have taken a top-down approach rather than working with village communities to try to find approaches that incorporate the social dimension. Communities that reside and depend on customary land and its resources for survival have been disempowered by the Land and Titles Act and this aspect of the asymmetry between the State and people continues to disrupt the quest for a shared vision of nationhood. Approaches to the urgently needed changes to legislation affecting customary land need to be developed in conjunction with those most directly involved: the communities living on customary land. This would also offer an opportunity to review the position of women in land tenure practices.[98] A national framework is desirable, but with due regard for different customary laws. Whilst a government might manage the process, allowing traditional leaders to take the primary role would be more likely to result in reforms that are accepted at community level.

Reforms need to be developed in conjunction with those most directly involved, that is the communities living on customary land. Consultation with rural, village communities and changes in long-accepted tradition will take time and resources. Government and its' officers are likely to find the demands of consultations with traditional communities cumbersome. Both sides may argue that this process "will take too long". There may also be resistance to the idea of traditional experts on customary land having a major role. However, the temptation to settle for "quick fixes" designed by foreign consultants must be countered by the reform history set out above, from which it is evident that piecemeal reforms will not solve the problem.

While the neighbouring Melanesian states of Vanuatu and Papua New Guinea, and the French-administered Melanesians of New Caledonia have struggled with the same issue, their endeavours have not led to a solution.[99] Even so, there are advantages for Solomon Islands in examining the attempts of other Melanesian states. For instance, in Papua New Guinea, a practical arrangement for migrant

98 Elise Huffer (ed) *Land and Women: the Matrilineal Factor: the cases of the Republic of the Marshall Islands, Solomon Islands and Vanuatu* (Pacific Islands Forum Secretariat, Suva, 2008).

99 In relation to Vanuatu, see Sue Farran and Jennifer Corrin "Developing Legislation to Formalise Customary Land Management: Deep Legal Pluralism or a Shallow Veneer?" (2016) 10 Law and Development Review 1.

Melanesians to cultivate oil palm on customary land to which they have no traditional rights has been introduced.[100]

The proposed new Constitution, dramatically different from the current version, and more strongly aligned with customary interests, could be a vehicle for enshrining such an idea. Unfortunately, the 2014 draft of this document[101] continues the colonial theme of recognising only "primary" land rights. Ignoring "secondary" rights, despite these being fundamental to harmonious relations in local communities, is a minefield for potential investors. Solomon Islanders are very conscious that it was a perceived misuse of land rights that led to the 1998–2002 years of civil strife.[102]

Solomon Islands faces a challenge: to marry the past with the present while anticipating the future. Both past and present are steeped in customary land tenure. Who knows whether individualism, which might make a Western form of land titling, could be acceptable in the future? Meanwhile, what emerges from 40 years spent wrestling with an inappropriate colonial model is that a fresh approach is required. For now, the way forward surely lies in moving away from the Western paradigm of land as property and developing a truly Melanesian base on which to develop a form of customary land tenure that makes available some of this land for economic development, while also fostering cohesive communities by preserving important social links with this land.

A prominent Solomon Islander has remarked that there "is a need for reform of land laws so that the administration of customary land can become more relevant to the socio-economic and political context of Solomon Islands".[103] A report on trade integration in Solomon Islands points out that:[104]

> Recognising the need to access customary land for economic development does not need to mean that all land should be alienated, or that traditional ways of life need to change radically, but that areas of land should be set aside for

100 G Koczberski, GN Curry and J Anjen "Changing land tenure and informed land markets in the Oil Palm Frontier Regions of Papua New Guinea: the challenge for land reform" (2012) 43 Australian Geographer 181.

101 2nd Draft Constitution of Solomon Islands, 2014.

102 Jon Fraenkel *The Manipulation of Custom, From Uprising to Intervention in the Solomon Islands* (Pandanus Books, Canberra, 2004). See also Matthew Allen "Land, Identity and Conflict on Guadalcanal, Solomon Islands" (2012) 43 Australian Geographer 163.

103 Joseph D Foukona "Legal Aspects of Customary Law in Solomon Islands" (2007) 7 JSPL 64. See also the recent UN Report on peace building, which, although not specifically addressed to land, supports the direction for reform of customary land tenure recommended in this article: United Nations Development Programme and UN Women *National Perceptions Survey on Peacebuilding for Solomon Islands: Summary Report* (UNDP, 2018) at 42.

104 Daniel Gay (ed) *Solomon Islands Diagnostic Trade Integration Study Report 2009* (Solomon Islands Department of Trade, Industry and Investment, 2009) at 73.

> modern economic development according to an appropriate, nationally-owned plan and process.

Those committed to good governance and economic opportunities urgently await such legislation. As stated by the Trade Integration Report:[105]

> ... the sooner that Government, donors and members of civil society can put in place a long-term process of reform, the sooner satisfactory solutions will be reached. Crucial issues include how to ensure that land is put to productive use; how to ensure security of tenure, and how to ensure that the benefits of wealth are distributed fairly to those with a proven association with that customary land - and, importantly, how to link traditional governance with formal government in a way that does not substantially change traditional ways.

105 At 73.