

LEGAL ASPECTS OF CUSTOMARY LAND ADMINISTRATION IN SOLOMON ISLANDS

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INTRODUCTION

Prior to colonisation the usage and ownership of customary land was regulated by custom. Custom was the source of law that determined how customary land was administered. However, since 1893, when Solomon Islands became a British Protectorate, there was gradual change to customary land administration. Formal laws were introduced to regulate the alienation of customary land. State institutions were established to deal with customary land.

This paper focuses on the legal aspects of customary land administration in Solomon Islands. Its purpose is to show how the administration of customary land has developed during the protectorate period and after independence. There are three parts to the paper. The first part looks at the legal aspects of customary land during the protectorate era. The second part looks at the independence period, and the third part looks at possible reforms.

PROTECTORATE (1893 — 1978)

Solomon Islands first experienced formal administration when it became a British protectorate in 1893. This was established under the *Pacific Order in Council 1893*. As a result, no other foreign power had the legal capacity to interfere in the affairs of Solomon Islands during the protectorate era.¹ Despite being a protectorate Solomon Islands was administered in a similar way to crown colonies. There was never any planned settlement of European colonists. The Crown had complete control of public officers serving the government.²

The *Pacific Order in Council 1893* provided legislative power to the Western Pacific High Commission for administering the British Solomon Islands Protectorate. The Western Pacific High Commissioner based in Suva, Fiji Islands, had the authority to enact and enforce laws.³ It was not until 1896 that Britain sent the first Resident Commissioner, Charles Woodford, to set up office in Tulagi, north of Guadalcanal.⁴

With such formal administrative and governing arrangements by Britain there were some changes to customary land administration. First, the High Court of the Western Pacific had jurisdiction to deal with civil and criminal matters. The Court had jurisdiction over

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¹ Butterworths, *Halsbury's Laws of England 1st Edition*, Vol 10, Protectorates, [885, 521].

² *Ibid*, [504].

³ *Pacific Order in Council 1893*, s 108.

⁴ J Nonggorr, 'Solomon Islands' in Michael A. Ntummy (ed), *South Pacific Legal Systems* (1993) 268, 269.

all matters⁵ and its criminal and civil jurisdiction was exercised in accordance with the principles and laws for and in force in England. Interestingly, the *Pacific Order in Council 1893* did not provide a clear provision to indicate whether the Court had jurisdiction to hear any matters related to customary land. However, based on section 25 of the Order, which provided that the Court had jurisdiction to hear all matters, it can be inferred that the court had jurisdiction to hear land matters as well. Nonetheless, this seemed only to cover land grievances between British subjects.

In land cases which involved a British subject and a native the *Pacific Order in Council 1893* was silent. There was no clear provision on whether the Court had jurisdiction to hear any land cases that involved a European and a native or a native and a native. Presumably, any dispute between two natives was usually settled by custom during the early period of Protectorate. This was because Britain's main focus was to protect the people rather than regulate the ownership of land.⁶ Customary land administration therefore received very little attention from the British in terms of enacting laws to regulate it.

The setting up of the protectorate government was considered to be expensive; therefore when the Resident Commissioner, Charles Woodford arrived in 1896 he considered the development of plantations. This was an option to raise capital for the administration of the Protectorate because the grant money allocated by Britain was insufficient. Mr Woodford opted for the encouragement of foreign investment. In order to do this, Mr Woodford realised that the administration must devise an avenue whereby land and labour could be provided.

Land Alienation

Woodford's economic aim to generate more revenue for the Protectorate made him favourably disposed to alienation of customary land. The idea of alienating customary land ignored the existing complexities in customary land tenure in Solomon Islands. Woodford did not carry out any proper investigation or survey to determine the status of customary land ownership in areas where he observed. These areas included places such as Vonavona, north Coast of New Georgia, islands in the Manning Strait, and the south coasts of Santa Isabel and Choiseul.

The first law enacted for the alienation of customary land was the *Queen's Regulation No.4 of 1896*. That Regulation controlled land by preventing non natives from acquiring vacant land⁷ unless approval was sought from a colonial administration.⁸ The Regulation provided that land owned by natives for trading and agriculture could be purchased directly from native owners by British subjects. The native owners could transfer their customary land either as freehold or leasehold. British subjects who wished to purchase vacant land would have to seek approval from the administration.

⁵ See section 25 *Pacific Order in Council 1893*.

⁶ D Paterson, *LA 100: Legal Systems 1 Course Book 1* (1994) 76.

⁷ Vacant land is 'land being vacant by reason of the extinction of the original native owners and their descendants'; section 10 *Queen's Regulation No.4 of 1896*.

⁸ J Ipo, 'Land and Economy' in Hugh Laracy (ed) *Ples Blong lumi: Solomon Islands in the past four thousand years* (1989) 125.

Generally, the government encouraged freehold title more than it did leasehold because freehold conferred a lesser burden on the government. Freehold provided the best form of security for credit and the sense of absolute ownership.⁹ It was considered the best incentive for both domestic and foreign investment because it had three forms: life estate; estate tail; and fee simple.¹⁰

These three forms of freehold title provided different lengths of time in which a person's interest in land may endure. The idea of freehold was introduced under the *Queen's Regulation No. 4 of 1896*. The Protectorate government encouraged freehold land dealings between natives and British subjects.

By 1900 the control of waste land by the Crown extended to include land that was not owned, cultivated or occupied by any native.¹¹ Under the *Queen's Regulation No.3 of 1900* occupation of waste land was permitted where a Certificate of Occupation was issued. Before a Certificate of Occupation was issued an applicant was required to explain in the prescribed schedule form that the land he/she was interested in was vacant land. However, there was no provision in the legislation to determine what waste/vacant land was. In relation to land that was purchased the 1900 Regulation provided that those who held freehold title were required to develop at least one tenth of it within the first five years of purchase. Later, they were required to pay a fee at a rate of up to six shillings per annum after ten years.¹² The introduced land law provided an inducement for more land alienation to proceed, particularly, in relation to waste/vacant land.

Land Conservation

There was increasing misunderstanding about land dealings and not much development took place under freehold or certificates of occupation. As a result, grants of perpetual estate made by natives to foreigners were prohibited.¹³ However, the rights and obligations acquired under the 1896 and 1904 Regulations remained. A leasehold system was introduced by the *King's Regulation No. 3 of 1914*. That Regulation enabled the government to buy land from natives and then lease it. Native land could be acquired for public purposes¹⁴ and this could be done compulsorily.¹⁵ Compensation was paid only for an improved land that was compulsorily¹⁶ acquired while no compensation was paid for unimproved land.¹⁷

A lease agreement differed from freehold because it only provided exclusive possession

⁹ CK Meet, *Land Law and Custom in the Colonies* (1946) 243.

¹⁰ Concepts such as life estate, estate tail and fee simple were duplicates of the *Law of Property Act 1925*. See section 2 of the *Law of Property Act 1925* for example.

¹¹ *Queen's Regulation No. 3 of 1900* as amended by *Queen's Regulation No.1 of 1901* repealed and consolidated by *Queen's Regulation No.2 of 1904*.

¹² I MacNeill, *Sweet Horizon: A history of the Solomon Islands* (2000).

¹³ Section 3 *Solomon Islands Land Regulation 1914 (King's Regulation No.3)*.

¹⁴ *Ibid*, section 29.

¹⁵ Section 4 *King's Regulation No. 14 of 1918*.

¹⁶ *Ibid*, section 9.

¹⁷ *Ibid*, section 8.

for a limited period of time, for example between ten to ninety nine years.¹⁸ In addition, the right of exclusive possession was subject to conditions and terms of the lease agreement.¹⁹ If there was a breach the lease could be cancelled.²⁰ A lease agreement also required the payment of rent. A rent based on the fee simple value of the land could be applied on an incremental scale, for 21 years in the case of grazing lease, and for the first 33 years of cultivation if the land was not cleared. Reassessment would usually take place on the 33rd or 66th years. The administration of the system of leasehold was vested in the Resident Commission.²¹

The land law of 1914 prescribed the following types of leases: a) cultivation leases for up to 99 years subject to improvement conditions;²² b) grazing leases for periods of up to 21 years;²³ and c) building leases for periods of up to 20 years. Native land²⁴ or public land²⁵ could be leased but this was subject to the absolute discretion of the Commissioner.²⁶ In relation to leasing of native land, the owner's consent needed to be sought.²⁷ The term of such lease ranged from 5 to 99 years and the rent fees were collected by the Resident Commissioner on behalf of the natives. The Commissioner would retain 10 percent of the amount collected for administrative purposes.²⁸

Leasehold was favoured by both the government and land owners because it accrued pecuniary benefit. Under a leasehold arrangement the government also had greater control over lands.²⁹ These changes gradually increased land disputes. As a result, the government introduced the concept of survey under the *Lands Survey Regulation No. 19 of 1915*. The Regulation was enacted mainly for the surveying of registered lands or land that was yet to be registered. In support of this concept the protectorate administration introduced a system of registration of deeds and documentary title to land.³⁰ A land registry was established at Tulagi in 1918. It administered the registration of deeds in order to ascertain certainty of title.

Entries in the Register of Land Claims in the Office of the Western Pacific High Commission were transferred to the Land Registry Office. The *King's Regulation No. 6 of 1918*³¹ stated that any land dealing was legal only if registered in the Land Registry Office.³² The establishment of the Land Registry Office for the registration of deeds gave

¹⁸ Section 15 (1) *King's Regulation No.3 of 1914*.

¹⁹ *Ibid*, section 14.

²⁰ *Ibid*, section 25.

²¹ C Allan, Western Pacific High Commission, *Report of the Special Lands Commission on Customary Land Tenure in the British Solomon Islands Protectorate* (1957) 41.

²² Section 17 (1) *King's Regulation No. 3 of 1914*.

²³ *Ibid*, section 18(1).

²⁴ Land owned by natives or subject to the exercise by natives of customary rights of occupation, cultivation or other user (see section 2 *ibid*).

²⁵ All land not being native land or private land (see section 2 *ibid*).

²⁶ *Ibid*, section 13.

²⁷ *Ibid*, section 5.

²⁸ *Ibid*, section 22.

²⁹ J Bennett, *A Wealth of the Solomon: A History of a Pacific Archipelago, 1800 - 1978* (1987) 148.

³⁰ D Ruthven, 'Land Legislation from the Protectorate to Independence' in Peter Lamour (ed), *Land in Solomon Islands* (1979) 246.

³¹ Later amended by *Regulation No. 2 of 1919*; *No. 6 of 1921* and *No. 4 of 1932*.

³² See section 8 *King's Regulation No. 2 of 1919*.

the government more control over alienated land. People who wished to purchase or sell land also had the advantage of accessing information about the land they were interested in. However, any defect in the registered instrument would not be cured or made valid by the registration system.³³

Land Reclamation

People continued to claim that alienation by either the government or Europeans in respect of coastal land was improper. Complaints increased and many natives decided to impose their own solutions. This prompted the administration to immediately appoint the first Land Commissioner, Captain Alexander.³⁴ A Land Commissioner was favoured by the Protectorate administration because he could travel easily and quickly around the islands. The Land Commission was deemed appropriate to deal with complaints and grievances of the natives because its method and procedure was informal. For instance, assessors or advisors with ample knowledge of the custom were required to assist the Land Commission, and evidence could be accepted from any source.

The method of investigation used by the Land Commissioner for hearing any disputes was mainly spasmodic due to the lack of transportation around the Protectorate.³⁵ Hence, all land complaints or grievances raised by the natives regarding the process of alienation could not be heard by the Land Commissioner. In addition, not all the land complaints or grievances were dealt with satisfactorily. The Land Commissioner personally lacked knowledge of customary rules applicable to disputes which required resolutions. Instead, emphasis was placed on evidence and testimony supplied by opposing parties in disputes.³⁶

Therefore, when Sir. F Baumont Philips took over as Land Commissioner he had to rehear most of the claims.³⁷ Not all claims made by natives were successful. Most of the lands returned to local claimants were under developed. The Commission did not investigate most of the complaints made against European companies. However, it tried its best to reduce land acquisition by European companies (such as Levers Pacific Limited) in areas where it investigated; it also clarified boundaries of land claimed.

Land Adjudication

From the 1920s up until 1941 questions relating to customary land created problems for district officers who were mainly European settlers or traders.³⁸ Particularly, judicial decisions on customary land varied from district to district and there was no native codified law.³⁹ Therefore, the establishment of native courts was considered a solution.

³³ Ibid, section 10.

³⁴ *Commission of Inquiry Regulation 1914*.

³⁵ C Allan, above n 21, Ch X.

³⁶ D Paterson, 'Current Issues Relating to Customary Land — National or Personal Heritage or Heredity as Damnosa?' (2000) (Unpublished paper).

³⁷ C Allan, above n 21, Ch X.

³⁸ J Bennett, above, n 29, 397 - 404; section 2 of the *King's Regulation No. 2 of 1947* explained district officers as 'persons who were administrative officers in charge of a district'.

³⁹ Ibid.

The first petition was made in 1929. The High Commissioner did not support the idea because there was no codified customary law. Ian Hogbin suggested that a council of senior men should be established in each district. The High Commissioner in Suva objected to this, but by 1939 District Officers had succeeded in encouraging native arbitration courts to hear civil and criminal matters.⁴⁰

Subsequently, native courts were established in 1942 under the *Native Court Ordinance 1942*. This was an attempt by the protectorate administrators to involve Solomon Islanders in the settling of disputes by relying on local knowledge as far as possible in reaching a decision.⁴¹ The jurisdictional limits of the courts in relation to both criminal and civil matters (including land) were stipulated by the warrants that established them. In land disputes the native courts only had jurisdiction to hear the matter if it did not exceed £100. Significantly, the establishment of the native courts reflected an adoption of a more formal and court like procedure for determining disputes about rights to customary land.⁴²

The native courts were occasionally used in cases where it appeared to be advantageous since the decision made by the court would give the successful party individual title. The idea of individual family title was influenced by the introduction of cash cropping. The native court system encouraged individual ownership of land. It helped to individualise land by assigning it as belonging to a certain group or family while the unsuccessful parties were held to have no right to the land.⁴³ However, from 1972 with the establishment of the Custom Land Appeal Court (CLAC)⁴⁴ unsuccessful parties who were unhappy with the decision of native courts regarding customary land could appeal to the CLAC.

The CLAC had jurisdiction to deal specifically with appeals regarding customary land. The CLAC relied on customary law to determine interests in customary land that had been affected by a transaction or disposition.⁴⁵ The CLAC relied mainly on genealogy,⁴⁶ taboo places,⁴⁷ properties, occupation and specific customary transactions as evidence to support an appellant's claims. Hearsay evidence was also admissible in the CLAC. The CLAC was established specifically to deal with issues relating to timber rights, boundaries, ownership, use or interest in customary land.

INDEPENDENCE (1978 — 2005)

Acquisition

In Solomon Islands European ownership of customary land was abolished near the time

⁴⁰ Ibid, 382.

⁴¹ J Ipo, above n 8, 130.

⁴² D Paterson, 'Land Law' in J Corrin, T Newton and D Paterson, *Introduction to South Pacific Law* (1999) 249.

⁴³ J Ipo, above n 8, 131.

⁴⁴ See section 16 *Land (Amendment) Ordinance 1972*.

⁴⁵ Section 220 *Land and Titles Act* [Cap 133].

⁴⁶ C Allan, above n 21, 105.

⁴⁷ Ibid, 100.

of independence. The government introduced compulsory tenure conversion. This related to estates held by both Solomon Islanders and non Solomon Islanders. Section 6 of the *Land and Titles (Amendment) Ordinance 1977* stipulated that perpetual estates could only be held by Solomon Islanders. Any perpetual estates or freehold held by non Solomon Islanders for a period exceeding 75 years were to be converted into fixed term estates of 75 years.⁴⁸ Section 2 of the *Land and Titles (Amendment) Ordinance 1977* defined a Solomon Islander 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’.

The prohibition of sale of customary land to non natives was first provided for under section 6 of the *Land Regulation 1914*. This has now been carried forward under section 241 of the *Land and Titles Act* [Cap 133].⁴⁹ There is no legal provision expressly providing for the transfer of ownership of customary land to indigenous people. There is also no legal restriction against the transfer of ownership of customary land. Under the *Constitution* of Solomon Islands customary land is not alienable. Only indigenous citizens can acquire a perpetual estate in it. Non Solomon Islanders can only be granted a lease as prescribed by Parliament.⁵⁰ Therefore one can argue that the transfer of customary land between natives is permissible.

Registration

Registration of land was encouraged in the latter days of the Protectorate period by virtue of the *Land and Titles Ordinance 1959*. That legislation provided for land to be placed on the register as a unit of property. The system of registration encouraged by the legislation was the Torrens System. Under that system a person who first registered his/her interest gained priority over other interests. Hence, a title would be indefeasible and the interest of the registered owner protected.⁵¹ However, registration of titles was unsuccessful due to the shortage of shipping and surveyors to carry out the process. As a result, there was sporadic registration which was not favourable for economic growth.

Registration of land was later encouraged. As a result, legislation provided for the registration of land but on a selected basis.⁵² This process was found to be costly. The costs incurred came from salaries of personnel, transportation and survey fees. The government continued to encourage systematic registration after independence but did not come up with solutions to resolve the problem of cost and other difficulties encountered. Thus, despite the encouragement to register customary land in the name of five trustees, there remained inherent obstacles to systematic registration of customary land.

Land Recording

The most radical change to customary land administration was land recording. Following the recommendation of the Nazareth and Land and Mining Committees for

⁴⁸ Section 98A *Land and Titles (Amendment) Ordinance 1977*.

⁴⁹ See section 123 *Land and Titles Ordinance 1969*.

⁵⁰ Section 110 *Constitution* of Solomon Islands.

⁵¹ See section 93 *Land and Titles Ordinance 1969*.

⁵² See Part IV *Land and Titles Ordinance 1969*.

land recording in the 1970s Parliament enacted the *Customary Land Records Act* [Cap 132]. The Act was considered as an alternative for overcoming the uncertainties to land ownership and boundaries. The land registration scheme which was encouraged after independence was not successful. Therefore, the *Customary Land Records Act* was enacted in order to help promote development. This was because most of the policies affecting land administration such as land tenure conversion and systematic registration were slow in enhancing development for Solomon Islands.

The *Customary Land Records Act* [Cap 132] encourages voluntary registration of customary land.⁵³ Land owning groups of customary land can register their primary rights to customary land if they wish to do so. The Act empowers land holding groups to appoint representatives to deal with the recording of customary land holding. It places emphasis on different land holding units to assert their titles to the land by registering it in order to avoid potential disputes. On the receipt of an application for registration of customary land by a land holding group who claim interest over it, the Recording Officer would then publicise the claim.⁵⁴

The Act prescribes that the recording of customary land should include: a) the recognised name of the customary land holding group claiming the primary rights; b) the genealogy of the group; c) method by which membership of the customary land holding group may be granted to others; d) name of person(s) who will represent the land holding group and who is responsible for any dealings affecting such customary land; e) method by which such person(s) are appointed, dismissed and substituted; f) and names of groups of persons claiming secondary rights and the extent of such claims.⁵⁵ In cases where the determination of primary rights constitutes a dispute the Act provides for the dispute to be settled by negotiation.⁵⁶ Section 13 (2) further provides that in determining a dispute the leaders of the customary groups must consider relevant genealogy and secondary rights. If no agreement is reached the Recording Officer should refer the dispute to the traditional chiefs. Their decision will be final.⁵⁷

After primary rights of any land holding group have been entered in the record, the land holding group may apply to the Registrar of titles in the prescribed form to have their primary rights registered.⁵⁸ Once the customary land has been registered and recorded in the name of the customary land holding group they should by law be granted the right to use, occupy, enjoy and dispose of such land in accordance with current custom and usage.⁵⁹ In addition, the primary rights of the land holding groups in the record should not be liable to be defeated and will be free from all other interests and claims, but subject to leases, charges and other encumbrances, conditions and restrictions.⁶⁰ There is no express provision in the Act for the amendment of the record. Hence, the effect of recording the land would mean the rights of the landowning group cannot be challenged

⁵³ Section 9 *Customary Land Records Act* [Cap 132].

⁵⁴ *Ibid*, section 10.

⁵⁵ *Ibid*, ss 11 (1) (a)-(f).

⁵⁶ *Ibid*, section 13(1).

⁵⁷ *Ibid*, section 13 (4).

⁵⁸ *Ibid*, section 19 (1).

⁵⁹ *Ibid*, section 20.

⁶⁰ *Ibid*, section 15.

on any ground.

Under the *Land and Titles Act* [Cap 133] once there is registration the title of the registered person cannot be challenged. However, it is subject to overriding interests.⁶¹ Also, the Register of Titles has the legal capacity under s 228 of the *Land and Titles Act* to amend the register if he thinks that the register ‘does not truly declare the actual interest to which a person is entitled, or is in some other respect erroneous or imperfect’. The High Court also has the authority to amend the register if it is of the opinion that the registration was made or omitted by fraud or mistake.⁶² However, it is uncertain whether the provisions under the *Land and Titles Act* for the amendment of the register are intended to apply to customary land which has been recorded under the *Customary Land Records Act*.⁶³

REFORM AND CONCLUSION

Although the *Land and Titles Act* [Cap 133] and the *Customary Land Records Act* [Cap 132] make provisions for regulating customary land administration, such provisions are inadequate. There is a need for reformation of these laws so that the administration of customary land can become more relevant to the socio-economic and political context of Solomon Islands. It is necessary that all alienated lands be returned to their original owners so that such owners can use and develop their land to improve their socio-economic standing in society. Moreover, customary land recording and registration must be encouraged more to ensure certainty of title. Only then can there be significant reduction in the number of land disputes, and more positive promotion of development.

⁶¹ See ss 100, 104 *Land and Titles Act* [Cap 133].

⁶² *Ibid*, ss 228, 229.

⁶³ D Paterson, *LA 301, Property Law, Semester II 2005* <http://law.vanuatu.usp.ac.fj/easol/LA301> (Accessed 10 September 2005).