



**CANADA RESEARCH CHAIR
ON LEGAL DIVERSITY AND ABORIGINAL PEOPLE**

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***First Integration Report:
How does legal
pluralism manifest
itself?***

**Title of Sub-project: *Resolution
of customary disputes in Solomon
Islands***

SSHRC -AUF Partnership 2012-2018

01/05/2015

BRIEF DESCRIPTION OF THE PROJECT

The objective of the research partnership « *The State and Indigenous legal cultures: law in search of legitimacy* » is to compare and assess, through case studies conducted in Canada, Africa and the Pacific, practices and experiences regarding the management of legal pluralism in order to identify potentially more legitimate and effective models of interaction between western state and indigenous legal systems. The study of these practices unfolds in three phases (observation, classification and evaluation) in order to answer the following research questions:

- How does legal pluralism manifest itself in the case studies?
- How are the interactions and relationships between indigenous law and state law managed?
- What practices or models are likely to create a more legitimate and effective management of legal pluralism?

The team is composed of four research groups, including three regional groups conducting field research (Africa Group, Canada Group and Pacific Group) and the Integration Group. The role of the latter is to foster a coordinated research approach in order (1) to achieve the team's comparative objectives as approved by SSHRC-AUF, (2) ensure that the data collected will lend itself to a rigorous comparative analysis in accordance with our legal pluralism theoretical framework, (3) produce a comparative study of practices and experiences with respect to managing legal pluralism and (4) identify possible avenues for innovation in the management of legal pluralism in the regions being studied.

This first report provides the data regarding the manifestations of legal pluralism in the regions studied.

The working definitions of two key concepts in the development of the report are as follows:

Law: values, principles, rules and processes for the regulation of a group and the settlement of conflicts.

Legal pluralism: the existence within the same space, with respect to the same subject-matter and the same actors, of more than one law.

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PART I: SUBPROJECT DESCRIPTION AND METHODOLOGY

I. Subproject description

1. Background and objectives of the subproject

Background

Like Canada and Africa, South Pacific States are struggling with an inheritance of legal pluralism that gives recognition to both Indigenous Laws and 'State Law'. This sub-project examines the intersection between Indigenous Laws, State Law and the uncertainties and tensions that arise from pluralism in practice. More particularly it looks at the resolution of customary disputes within the Solomon Islands. The research seeks to identify transferable solutions to the problems arising from pluralism in this context.

Research Parameters

The research is conducted within the theme of justice and examines resolution of the following types of dispute in both the State and Indigenous forums:

- Minor customary disputes;
- Disputes relating to land, including land below high water mark;
- Disputes relating to other resources, including mining and forestry.

Within these fields, the law to be explored includes:

- Domestic laws, including indigenous customary laws and State laws.
- Relevant international laws, in the form of treaties and customary international laws. It should be noted that Solomon Islands has a dualist system, and this creates tensions between treaty obligations and domestic law.

Taking account of the fact that indigenous customary laws and State laws are not exclusive categories, it will also include:

- Hybrid laws.

The research looks at both adjectival and substantive laws and the legal systems in which they operate. Adjectival laws considered include evidence and procedure, and laws governing the constitution and jurisdiction of dispute resolution systems. Research on substantive laws include consideration of areas of law pertinent to the dispute resolution forums under examination, including aspects of environmental, property, mining, and forestry law.

The geographical context is Solomon Islands, where indigenous communities struggle continuously with issues arising at the interface between Indigenous and State Law. The research also draws on examples of problems and possible solutions from other small island States of the South Pacific, in particular Vanuatu. It is also transnational in the sense that legal transplants from countries including England and France, and international law are now a part of the South Pacific legal landscape.

Objectives

The objectives of the sub-project are to explore legal pluralism and justice in Solomon Islands, concentrating on dispute resolution. By examining existing practices surrounding legal pluralism and the relationship between dispute resolution by indigenous communities and the State, it seeks to identify the uncertainties and tensions that arise from pluralism in practice. It also considers the influence of the Church in dispute resolution. The sub-project aims to expose areas in need of reform in the light of the mandate to accommodate local culture and indigenous customary laws, the demands of international law and the increasingly global environment. The research seeks to find transferable solutions to the problems arising from pluralism. Recommendations will be aimed at decolonising indigenous laws by providing more local resonance and hence a more effective and legitimate legal system.

2. Research questions

The following research questions are being addressed in the overarching project:

- i. How does legal pluralism manifest itself and which legal traditions are involved?
- ii. How do State authorities address legal pluralism?
- iii. How do Indigenous legal institutions and indigenous community members interpret their relationship with State law?
- iv. What formal and informal inter-normative processes or systems are implemented by State and indigenous community members to reduce conflicts caused by legal and societal pluralism?
- v. What are the obstacles to the implementation or effectiveness of these processes or systems?
- vi. What is the role of fundamental human rights with regards to the inter-normative processes or systems observed?
- vii. How can observations be categorised based on existing theoretical models of legal pluralism (separation, subordination, coordination)?
- viii. Is there a need to propose new theoretical models?

Within the parameters of these questions, this sub-project addresses the following, more specific questions:

1. Where are customary disputes resolved?
2. How are customary disputes resolved?
 - Who presides;
 - What is the procedure;
 - How is evidence adduced?
3. How do the traditional and State forums compare?
4. What other influences are at play?
5. Have hybrids emerged?
6. What problems arise from these processes?
7. Does the practice coincide with the theoretical position?
 - Are the forums provided for operating effectively?
 - Does the level of recognition of indigenous customary processes by the State translate into practice?

3. Theoretical framework

The theoretical framework of legal pluralism, both in the sense of social fact legal pluralism and normative legal pluralism, is employed. More specifically, the research employs the framework provided by Morse and Woodman to analyse the level of legal pluralism operating in the context of dispute resolution by indigenous communities. The approach within this theoretical framework is legal as opposed to anthropological.

4. Glossary and abbreviations

Glossary

‘Chiefs’ a generic term used in this Report to describe traditional leaders including elders.¹

‘Custom’ includes practices, habits and usage of Indigenous Peoples.

‘Indigenous Laws’ includes customary laws and norms whether written or unwritten.

‘State Law’ includes formal, written laws, made by or under the authority of the State.

Abbreviations

Allan Report: Colin Allan, Special Lands Commission on Customary Land Tenure, 1957, Western Pacific High Commission: Honiara

LALSU: Landowners Advocacy and Legal Support Unit

Rules: Solomon Islands Courts (Civil Procedure) Rules 2007

SILRC: Solomon Islands Law Reform Commission

¹ It is acknowledged that this is an imprecise and contentious term: see below in Methodology and Actors/Stakeholders Sections.

II. Methodology:

1. Description of data collected and analysed (source, forms, etc.)

Primary Sources

With regard to State Law, a survey of primary sources, that is legislation and case law was conducted. As the research relates to dispute resolution, court decisions are of particular significance. To a lesser extent, primary sources are also relevant to indigenous customary laws and forums. Some of this material is available electronically, but largely the bulk of material is only available in hard copy in Solomon islands.

Secondary Sources

The research builds on the Investigator's existing work in the field and identifies other scholarly work and contributions to the debate. The literature review identifies the existing scholarship, both legal and anthropological. This review reveals extensive literature on the theoretical issues, but little data on the content and application of Indigenous law operating outside the State system. A further review explores data and initiatives relating to the research questions posed by the project and, more particularly, the sub-project. The Land Advocacy and Landowners' Support Unit ('LALSU') in Honiara is another source of empirical data.

Empirical Data

The review of secondary sources reveals useful country wide data, in particular, the data collated in a literature review by Goddard.² The Report of the Special Lands Commission in 1957 ('the 'Allan Report')³ is also of assistance. Data compiled by Solomon Islands Law and Justice Sector Institutional Strengthening Program, which is a bilateral program of the governments of Australia and Solomon Islands, and by Solomon Islands Law Reform Commission ('SILRC') as part of their enquiries and reports is also useful. This data forms the platform for this research. This material is supplemented by pre-existing data from informal interviews carried out by the Investigator in 2008. It is also supplemented by anthropological data from the Western region of Solomon Islands. Some of this material is available electronically, but a great deal is only available in hard copy.

2. Description of connection between data and research objectives/questions

Primary Sources

The research draws on the primary materials, that is, legislation and case law, mainly to ascertain the sources of State law. It also assists in ascertaining the types of law within the Indigenous Law and State Law spheres. These sources are also used to ascertain the theoretical extent Indigenous Law was operating, both outside and within the State system. They are also helpful in ascertaining the values, principles and norms of State Law. Primary sources also assisted in understanding indigenous customary laws and forums, in particular where cases describe such processes, as well as the level of input indigenous communities have had an input into State

² Michael Goddard, *Justice Delivered Locally: Solomon Islands*, 2010, World Bank: Washington DC.

³ Colin Allan, *Special Lands Commission on Customary Land Tenure*, 1957, Western Pacific High Commission: Honiara (the "Allan Report").

sources of law.

Secondary Sources

The research draws on the literature to identify the different sources and types of law within the Indigenous Law and State Law spheres. These sources are also used to ascertain the theoretical extent of the operation of Indigenous Law, both outside and within the State system. They are helpful in ascertaining the values, principles and norms of State Law.

Empirical data

This data is used to provide a richer analysis of the resonance of the current forums for dispute resolution. It sheds light on the values, principles and norms of Indigenous Laws and their practical, rather than theoretical, application. Only reliable sources are used, including World Bank Reports, The Allan Report, Solomon Islands Law and Justice Sector Institutional Strengthening Program data, SILRC data, and the anthropological data. This data is used as the basis for addressing the research questions and meeting the objectives of the sub-project.

The framework of analysis provided by Morse and Woodman is used as an analytical tool to discover the extent, force and application of State Law and Indigenous Law. More specifically, it is applied to the primary materials, literature and data to answer the first research question, namely how legal pluralism manifests itself in the context of this sub-project.

3. Data selection criteria

The different nature of State and Indigenous Laws demands different criteria for examination of dispute resolution in each context. The written nature of State Law allows its theoretical existence to be determined by reference to primary source material, that is, legislation. Its application, both theoretical and practical, can also be assessed from primary source material in the form of case law. The primary material also shows how legislators and the courts have had to grapple with legal pluralism on numerous occasions.

Different criteria apply to Indigenous Laws which, due to their unwritten, non-homogenous nature, especially within the geographical area of the sub-project, cannot be ascertained from primary legal sources. Solomon Islands Law and Justice Sector Institutional Strengthening Program (SILRC) enquiries and reports combined with World Bank initiatives have assembled some countrywide data which, given the geographical hurdles, would not otherwise have been available. This was supplemented and triangulated by reference to data from informal interviews carried out by the Investigator in 2008 and other anthropological data from a particular geographical area in the Western region of Solomon Islands.

Given the profound effect of colonisation on indigenous laws, the discussion in most sections of this report has been divided into different eras. Originally it had been planned to divide data into three groups: pre-contact; the colonial era; and post-independence. However, due to the paucity of material from the pre-contact era, the first two eras were merged, resulting in 'pre-contact to independence' and 'post-independence' as the focus of this sub-project.

Geographically, the use of data from Solomon Islands, where struggles between indigenous communities and State government exist, provides some graphic examples of the unresolved

tensions between the two systems. This choice is also driven by expertise and opportunity. The Investigator has ten years' experience of living and working in Solomon Islands. She has also undertaken consultancy work for the MacArthur foundation which provided empirical data from a particular part of Solomon Islands. She also took part in a World Bank workshop on customary land dispute resolution, which provides some additional material.

The Investigator has an existing body of work on the legal system of these countries, providing a ready foundation. Solomon Islands has given constitutional recognition to customary law and thus provide a fertile field from which the project intends to draw useful lessons. The research also draws on examples from other small island States of the South Pacific, and in particular Vanuatu for the purpose of comparison and development of possible solutions.

4. Data collection tools

This research is primarily library based, so the main data collection tools were internet searches and perusal of hard copies of materials in libraries, archives and the Investigator's own collection. The Paclii database was relied on heavily for primary materials. Other University web sites have some Solomon Islands material and the Solomon Islands Government's web site also provides some materials.

The Investigator is also involved in a pro bono project to assist LALSU, which forms an indirect source of information.

The Investigator also relies on her network of connections with legal practitioners and on her indigenous PhD student to collect data and check information.

5. Limitations or reservations regarding the reliability or interpretation of data

A problem exists in trying to identify 'indigenous law' falling under the headings prescribed by the reporting document for two reasons. Firstly, pre-contact, there was no national identity (and arguably, there still isn't!). As noted by Goddard, *'inhabitants saw themselves as culturally diverse, and many of the groups were unaware of each other's existence for much of their history'*. What research exists reinforces the view that the diversity of social organisation makes it difficult to generalise. Secondly, there is very little information about dispute resolution forums or practices prior to the 1930's. Research post-contact must obviously be viewed with some caution – the passing of time results in practices more influenced by introduced ideas being recorded.

A further problem arises in trying to place observations under the headings prescribed in the report, in that the process of colonisation and the influence of the church have had a profound effect on customary law. Interaction has produced hybrids. For this reason it is imperative to include the church and the hybrids in the study. As will be seen, this has been done by including them in the 'other' legal systems. While there may be some objection to describing the church as a 'legal system' there is no doubt that it does resolve disputes directly and has a profound influence on other legal systems in this instance.

A more specific problem lies in the term ‘chief’. The types and levels of traditional leaders differ considerably from place to place. It has been argued that chiefs are indeed a colonial invention.⁴ However, the term ‘chief’ is in common use in Solomon Islands and is used as a generic term in this report. It should be born in mind that in some areas there is a hierarchy of status. Generally the hierarchy starts with chiefs who have authority at a local level, over an extended family group, who administer family affairs including land. The hierarchy ascends to chiefs, or a meeting of a group of chiefs, whose authority might extend island wide. Apart from kinship, authority may be based on achievements or relationship to land, among other criteria. Hierarchies may extend from local landholding groups to broader tribal chiefs and then on to an alliance of linked tribes over a broader land area.

Access to South Pacific materials is a perennial problem. There is no subscription service for legislation and no comprehensive, up to date, library holding. The last edition of the Solomon Islands Law Reports was published in 1991 (edited by the Investigator!). Whilst the Paclii database has made a dramatic improvement, the uploaded materials are not complete and are not always up to date. Visits to the Supreme Court in Honiara have not assisted as the Registrar was unable or unwilling to assist with copies of judgments.

⁴ Geoffrey White and Lamont Lindstrom, *Chiefs Today: Traditional Pacific Leadership and the Postcolonial State*, 1997, Stanford: Stanford University Press, 232-233.

III. Values/Beliefs

1. Indigenous Law

Pre-Contact to Independence

The earliest literature on Solomon islands societies comes from records relating to Spanish exploration in 1568, and later from the early 1800's, when European whalers and traders began to arrive. This literature casts no light on values or beliefs relevant to dispute resolution within indigenous communities. However, the literature does make it clear that there was great diversity in social organisation, which makes it necessary to exercise caution in generalising about values and beliefs. From the middle of the nineteenth century more detailed literature is available from the accounts of Christian missionaries.⁵ Again, this emphasises a great diversity of social organisation and leadership, accentuated by the lack of a common language.⁶ There is no indication in that literature of any common values or beliefs underpinning distinct mechanisms for dispute resolution. However, there is evidence that direct action was believed to be the legitimate response to disputes.⁷ From the middle of the nineteenth century, the influence of missionaries had a profound effect on the beliefs of Solomon Islanders. Later, colonial pacification undermined the local dispute resolution systems.

Post 1930's, the research indicates that values and beliefs were influenced by both missionaries and government administration within the Protectorate.⁸ Blood feuds were common and personal violence was regarded as an appropriated means of dealing with disputes, even to the point of using assassins.⁹

Whilst customary laws are still largely unwritten, there are some examples of Solomon Islands communities reducing principles of customary laws into writing. One is '*Are-Are Customary Law*' written by Chief Haiware and Chief Waitotora over more than three decades and published in 1981.¹⁰ This work, whilst stated in the preface to be a 'code of ethics', is in fact a statement of offences and penalties. Whilst this does not assist directly in distilling the values and beliefs underpinning dispute resolution, it does constitute evidence that there was a systematic way of dealing with those who had offended against customary law. Individual rules also provide evidence of the belief that customary laws extended to foreigners who were within the customary area. For example, Rule 69 prohibits a foreigner from using any house in Are-Are without paying rent. It is also evidence of the fact that men and women were treated very differently in respect of the type of offences of which they might be found guilty. For example, a woman was prohibited

⁵ See for example: Charles E. Fox, *The Threshold of the Pacific: An Account of the Social Organization, Magic and Religion of the People of San Christoval in the Solomon Islands*, 1924, London: Kegan Paul; Arthur Hopkins, *In the Isles of King Solomon: Twenty-five Years Among the Primitive Solomon Islanders*, 1928, London: Seeley, Service and Co; Walter G. Ivens, *Melanesians of the Southeast Solomon Islands*, 1927, London: Kegan Paul; Alfred Penny, *Ten Years in Melanesia*, 1887, London: Wells Gardner.

⁶ Michael Goddard, *Justice Delivered Locally: Solomon Islands*, 2010, World Bank: Washington DC, 6.

⁷ Michael Goddard, *Justice Delivered Locally: Solomon Islands*, 2010, World Bank: Washington DC, 5.

⁸ Michael Goddard, *Justice Delivered Locally: Solomon Islands*, 2010, World Bank: Washington DC, 6.

⁹ Michael Goddard, *Justice Delivered Locally: Solomon Islands*, 2010, World Bank: Washington DC, 6.

¹⁰ George Waitotora, *Are-Are Customary Law*, 1981, Kenilorea: Honiara.

from walking over a sacred stone and from going near a site or altar dedicated to traditional worship or sacrifice, offences not applicable to men.¹¹

Post-Independence

Dispute resolution in indigenous communities in Solomon Islands has roots in traditional beliefs, but has been shaped by outside influences. However, the strength of the belief in the legitimacy of customary dispute resolution systems is evidenced by the fact it is by far the most commonly used.¹² Customary norms confer legitimacy on local chiefs to determine disputes. However, the extent of dispute resolution power and whether it is exercisable individually or communally is influenced by local customary values, which differ widely from place to place. In some places there is disagreement as to who is a legitimate chief and their role and power is often contested. This is discussed in more detail below.

Where land disputes are concerned, the belief in land as part of ancestral trust must be taken into account. As mentioned above, whilst customary laws are still largely unwritten, there are some instances of Solomon Islands communities recording statements about customary laws in writing. One example, which is restricted to the land context, is *'The Tradition of Land in Kwara'ae'* edited by Ben Burt and Michael Kwa'ioloa in 1992, but approved by the Kwara'ae chiefs. While the contents of the book are more in the nature of principles, certain parts do throw light on the values and beliefs underlying land management. In particular, the work contains an important section on the meaning of leadership of land, which states:¹³

The meaning of leadership of land is this: the person who is leader and his clan must look after and manage their land so that the land and all the things on the land will be good, enabling tier families and their descendants to live well and to obtain their food and raw materials, on and on into the distant future. Because land is the father and mother of the kwara'ae people and leadership for land means looking after the clan and all the people of the land.

2. State Law

The supreme law is in the Constitution,¹⁴ which sets out some of the guiding principles on which the country is built. The aspirational principles are contained in the Preamble to the Constitution, which declares pride in 'the wisdom and the worthy customs' of Solomon Islanders ancestors and pledges to 'cherish and promote the different cultural traditions within Solomon Islands'. The Solomon Islands is currently undergoing a constitutional review process, with a view to introducing a federal constitution. The preamble in the latest draft retains the commitment to custom, pledging to:

Honour the noble heritage, Customs and wisdom of our ancestors and the freedom they enjoyed since time immemorial; Affirm the indigenous political units of our original

¹¹ George Waitotora, *Are-Are Customary Law*, 1981, Kenilorea: Honiara, Rules 9 and 10.

¹² Matthew Allen et al, *Justice Delivered Locally: Systems Challenges, and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 34.

¹³ George Waitotora, *Are-Are Customary Law*, 1981, Kenilorea: Honiara, Rule 27.

¹⁴ *Constitution of Solomon Islands* 1978.

society, whose cultures, traditions, customs, practices and social relationships have always existed, based on tribes, clans and lineages.

The Constitution contains a rights chapter, modelled on the Universal Declaration of Human Rights¹⁵ and the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁶ Accordingly, it describes the rights and freedoms, and the exceptions to them, in very detailed terms. The human rights protections conferred by that chapter have binding effect throughout the country and are superior to other national laws. Most relevant is section 10, which provides that any person charged with a criminal offence must ‘be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.’ The section also contains more detailed guarantees for those charged with a criminal offence (see Annex B).¹⁷

Section 5 is also relevant. It provides that a person arrested or detained must be informed as soon as reasonably practicable, and in a language that he understands, of the reasons for his arrest or detention.¹⁸ Further, such person must be brought before a court without undue delay. If any person who is arrested or detained on reasonable suspicion of having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he or she must be released, although release may be conditional on, for example, complying with conditions which are reasonable necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.¹⁹

The Constitution also provides the foundation for the recognition of customary land rights. The Preamble provides that, ‘the natural resources of our country are vested in the people and the government of Solomon Islands.’

The draft federal constitution also contains a rights chapter which retains the right to a fair hearing²⁰ and rights of arrested and detained persons, and prisoners.²¹ It also adds a right to access courts or tribunals.²² These draft sections are set out in Annex B.

3. Other systems

The Church

The Church is a powerful institution in Solomon Islands. It offers another avenue for resolution of disputes. According to the 2009 census 98% of the population purport to be Christians.²³ Just over .1% of the population purport to have no religious affiliation and .8% hold customary beliefs.²⁴ Denominational affiliation is largely dependent on geographical area linked historically

¹⁵ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 24 October 2014].

¹⁶ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 24 October 2014].

¹⁷ *Constitution of Solomon Islands* 1978, s 10(2).

¹⁸ *Constitution of Solomon Islands* 1978, s 5(2).

¹⁹ *Constitution of Solomon Islands* 1978, s 5(3).

²⁰ 2nd Draft Constitution of Solomon Islands 2014, s 40.

²¹ 2nd Draft Constitution of Solomon Islands 2014, s 39.

²² 2nd Draft Constitution of Solomon Islands 2014, s 38.

²³ Solomon Islands National Statistics Office, *Report on 2009 Population and Housing Census: Analyses*, 2009, Volume II [4.2].

²⁴ Solomon Islands National Statistics Office, *Report on 2009 Population and Housing Census: Analyses*, 2009, Volume II [4.2].

to missionaries' strongholds. Isabel, Temotu and Central Provinces are dominated by the Church of Melanesia, which is the dominant religious denomination, having 32% of the population within its congregation. The second biggest affiliation is to the Roman Catholic Church which is followed by 20% of the population, mainly in Guadalcanal Province and in parts of Malaita. The South Sea Evangelical Church has a 17% share and has followers in the provinces of Rennell-Bellona, Malaita, Makira - Ulawa, Honiara, and Guadalcanal.²⁵ Half of the populations in Rennell and Bellona are members of the Seventh Day Adventist church which has a 12% share. The United Church has 10% share and is strongly represented in Choiseul and the Western province.

The Church is an important part of village life and church and religious values and beliefs have a strong influence on local dispute resolution. Beliefs of forgiveness and reconciliation play a large role, with a focus on resolving disputes outside court. Indeed, some churches even forbid the use of civil litigation.²⁶

Hybrids

The interaction between the three pillars of dispute resolution, State, custom, and the Church, has produced hybrid dispute resolution processes in Solomon Islands. This sub-project focuses on two such hybrids, chiefs' dispute resolution as endorsed by the Local Courts Act,²⁷ and resolution by the Moli Ward Chiefs Council under the *Moli Wards Chiefs Council Ordinance 2010*.

- **Resolution of Land Disputes by Chiefs under the Local Courts Act**

Since 1985, the vital role that chiefs play in resolving customary land disputes has been recognised by the *Local Courts Act*. It is now required that parties attempt to resolve customary disputes in this manner before attempting other forms of dispute resolution.²⁸ The values and beliefs prevailing in the process of chiefs dealing with land disputes under the auspices of the legislation are theoretically those which underpin customary law. As with other dispute resolution processes, there is evidence to suggest that values and beliefs are sometimes influenced by the State and the Church. The State's influence is particular acute - as the Chiefs are acting pursuant to a statutory scheme.

Further, where land disputes are concerned, there are more specific values and beliefs to be taken into account, when considering their resolution. As stated by Zoloveke,

[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

²⁵ Solomon Islands National Statistics Office, *Report on 2009 Population and Housing Census: Analyses*, 2009, Volume II [4.2].

²⁶ See eg. South Seas Evangelical Church, *Administration Manual*, 2011, cited in Allen, 61.

²⁷ Cap 19.

¹⁶⁴ See, eg, *Local Courts Act* Cap 19, s 12.

*of traditional faith and such reverence dictated the preservation of land which the living shared with the dead.*²⁹

This encapsulates the spiritual significance of land for indigenous peoples in Solomon Islands, where 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.

- **Resolution of Land Disputes by the Moli Ward Chiefs Council**

The *Moli Wards Chiefs Council Ordinance 2010*, enacted by Guadalcanal Provincial Assembly, establishes the Moli Ward Chiefs Council, including with powers and jurisdiction to deal with breaches of the rules contained in the Ordinance and to hear land disputes. The values and beliefs underpinning the Councils are contained in the ‘Cultural Norms and Values’ part of the Ordinance, which states that;³⁰

Each person in Moli Ward shall, where it is not inconsistent to the Constitution, be bound by and respect cultural norms, values, beliefs, and tradition as passed on or inherited from our forefathers.

Further, the Ordinance recognises the authority of hereditary chiefs ‘as a feature of the traditions of the people of Moli Ward’.³¹

²⁹ Gideon Zoloveke, in Peter Larmour (ed) *Land in Solomons*, 1979, Institute of Pacific Studies, University of the South Pacific: Suva, 4.

³⁰ *Moli Wards Chiefs Council Ordinance 2010*, cl 59(1).

³¹ *Moli Wards Chiefs Council Ordinance 2010*, cl 8.

IV. Principles

1. Indigenous Law

Pre-Contact to Independence

The early literature on Solomon islands societies emerge from records relating to Spanish exploration and from European whalers and traders in the early 1800's, which give no evidence suggesting the existence of any organised mechanisms for dispute resolution.³²

Literature from post 1930's reinforces the view that there was a diversity in social organisation making it difficult to generalise about principles of indigenous laws or to identify a body of principles in any particular part of the country. Further, the fact that indigenous laws were, and still largely are, unwritten, adds another layer of difficulty to a search for underlying principles. Notwithstanding, there are certain relevant principles which appear common throughout the country. For example, there was no division made between civil and criminal 'offences',³³ and the use of a system of *tambu*, whereby certain behaviour such as adultery was prohibited³⁴ and punished by traditional authorities.

Post-Independence

The principles on which customary dispute resolution is based are still largely unwritten. Further, there is no uniform set of principles applying throughout the country. However, there are four important principles which appear to prevail. First, there is no division made between civil and criminal law. Rights, liabilities or offences are dealt with holistically rather than reduced to individual actions. Second, the process is rarely limited to individual parties. Rather, the extended family or even a whole village may be involved. Third, the processes are not aimed at determining individual liability, innocence or guilt. Rather, they are aimed at reconciling parties and families to restore and maintain community harmony. This is similar to the position in Fiji, a neighbouring Melanesian country, where it has been said that:

*[C]ustomary practices of conflict resolution have continued at the community level. Many of these have been successful in maintaining communal coherence and good relations. They are practiced mainly at a communal level involving entire kinship groups although the dispute may have originated between two individuals. The cultural logic is that individuals are part of a larger socio-communal setting and that the whole group needs to be involved in repairing social fractures and rehabilitating those individuals concerned. The group becomes the guarantor for community peace and ensures that fractious individuals conform to collective expectations.*³⁵

³² Michael Goddard, *Justice Delivered Locally: Solomon Islands, 2010*, World Bank: Washington DC, 5.

³³ Ian Hogbin, *Native Councils and Native Courts in the Solomon Islands*, 1944, 14(4) *Oceania* 257, 267-71

³⁴ Darryl Whiteman, *Melanesians and Missionaries: An Ethnological Study of Social and Religious Change in the Southwest Pacific*, 1983, Wipf and Stock: USA, 226.

³⁵ Stephen Ratuva, *Reinventing the cultural wheel: re-conceptualising restorative justice and peace building in ethnically divided Fiji* in Sinclair Dinnen, Anita Jowitt, Tess Newton (eds), *A Kind of Mending: Restorative Justice in the Pacific Islands*, 2003, ANU, Pandanus Books : Canberra, 149, 156.

Finally, a fourth principle is that punishment in custom normally falls into one of three categories, death, compensation, or banishment.³⁶

As mentioned above, an example of customary laws reduced to writing, restricted to the context of land, is *'The Tradition of Land in Kwara'ae'* edited by Ben Burt and Michael Kwa'ioloa in 1992 and approved by the Kwara'ae chiefs. This explanation contains a few principles that are relevant to dispute resolution. Most importantly in the present context the book makes it clear that leadership for land or anything planted on the land included the right to make decisions about use of the land and the power to stop people from carrying out activities on, or in relation to, the land.³⁷ This confers legitimacy on leaders to determine land and property based disputes. Rules of seniority are said to prevail in determining decision making power, depending on the relationship of a person to the leader by birth or marriage and the contribution of a person to the lives of their relatives and neighbours.³⁸ Whilst leadership will normally pass to the senior son, suitability for leadership is also a factor.³⁹ However, it is also clear that decisions were not made unilaterally, but rather the leader would speak with his 'leading clan' about the land including its maintenance and use.⁴⁰ As stated in Rule 2:

They established the tradition that the person who discovered something or made it or received it from anyone else, that person was leader for that thing and he was senior for it and head for it. It must this leader who spoke about and managed that thing ... But if the thing was important to other people in the family, the leader must ask them, because a person is just a member of his family and he cannot do anything by himself. The leader for a thing must share it with his family and his relatives and any person who asked to do something with it. This tradition of sharing and cooperation was basic to the tradition for managing land and the things originating in the land, in the past.

2. State Law

The principles guiding state dispute resolution can be found in the overriding objectives of the Rules governing the civil process in State courts.⁴¹ The overall objective of the procedure is 'to enable the courts to deal with cases justly with minimum delay and expense.'⁴² The Rules go on to say that:⁴³

Dealing with cases justly includes, so far as is practicable:

- (a) ensuring that all parties address the real issues of the proceedings; and*
- (b) saving expense; and*
- (c) dealing with the case in ways that are proportionate:*
 - (i) to the importance of the case; and*
 - (ii) to the complexity of the issues; and*
 - (iii) to the amount of money involved; and*

³⁶ *Regina v Tutala* (unreported, High Court of Solomon Islands, Kabui, J, 5 May, 2004) available at www.pacii.org at [2004] SBHC 37.

³⁷ Ben Burt and Michael Kwaiioloa, *The Tradition of Land in Kwara'ae*, 1992 Institute of Pacific Studies: USP, r 15.

³⁸ Ben Burt and Michael Kwaiioloa, *The Tradition of Land in Kwara'ae*, 1992 Institute of Pacific Studies: USP, r 6.

³⁹ Ben Burt and Michael Kwaiioloa, *The Tradition of Land in Kwara'ae*, 1992 Institute of Pacific Studies: USP, r 11.

⁴⁰ Ben Burt and Michael Kwaiioloa, *The Tradition of Land in Kwara'ae*, 1992 Institute of Pacific Studies: USP, r 2 and 24.

⁴¹ *Solomon Islands Courts (Civil Procedure) Rules 2007* (the 'Rules').

⁴² *Rules*, r1.3.

⁴³ *Rules*, r1.4.

- (iv) to the financial position of each party; and
(d) ensuring that the case is dealt with speedily and fairly; and
(e) Allocating to each case an appropriate share of the court's resources, while taking into account the need to allocate resources to other cases.

Courts must give effect to the overriding objective when applying or interpreting the Rules, which are discussed in the Rules section below.⁴⁴

As a matter of principle, State courts are required to recognise and apply customary laws provided that they are not contrary to legislation of Solomon Islands' parliament.⁴⁵ In theory, they are superior to common law and equity and at least on a par with English Acts. However, the courts are reluctant to give them full recognition and, in practice, have tended to prefer United Kingdom Acts to customary law. This will be further explored in Stage 2 of the sub-project.

3. Other legal systems

The Church

The principles on which the church deals with disputes differ between denominations, but are largely influenced by the principles of forgiveness and reconciliation.

Hybrids

As discussed above, two hybrid system operating in Solomon Islands are considered in this sub-project.

- **Resolution of Land Disputes by Chiefs under the Local Courts Act**

As with other customary dispute resolution procedures, diversity in social organisation makes it difficult to generalise about principles of indigenous laws or to identify a body of principles. The system of *tambu*⁴⁶ is of relevance. The fact that a place or land belongs to particular *tambu* areas is often used as evidence of ownership. Whilst continuity of occupation is not essential in land claims, knowledge of genealogy of tribes and their connection with the land is important.

- **Resolution of Land Disputes by the Moli Wards Chiefs Council**

The principles governing the Guadalcanal Provincial Assembly are contained both in customary law and in the *Moli Wards Chiefs Council Ordinance 2010*. Whilst this Ordinance was State generated, it purports to incorporate customary principles. The main principle of relevance to dispute resolution is that all persons within Moli Ward must maintain the traditional practices and heritage of Moli Ward.⁴⁷ A second principle is that, whilst the Ordinance applies only to activities or persons within Moli Ward,⁴⁸ as a matter of principle the Council is empowered to

⁴⁴ Rules, r1.5.

⁴⁵ *Constitution of Solomon Islands 1978* sch 3, para 3(1)

⁴⁶ Darryll Whiteman, *Melanesians and Missionaries: An Ethnological Study of Social and Religious Change in the Southwest Pacific*, 1983, Wipf and Stock: USA, 226.

⁴⁷ *Moli Wards Chiefs Council Ordinance 2010*, cl 60(4).

⁴⁸ *Moli Wards Chiefs Council Ordinance 2010*, cl 2(2).

order a 'stranger' living within Moli Ward to pay compensation. However, a 'stranger' is not permitted to apply for compensation.⁴⁹

The other important principle is that, if a matter brought before the Council is an offence under any other law, the Council must consult the Police as to whether the matter should be dealt with by the Council or the State courts.⁵⁰ Matters to be taken into account when deciding this are the nature of the offence, the aggravating factors, the amount involved, the circumstances surrounding the offence, the nature of any physical injuries, elements of the offences and any relevant constitutional rights.⁵¹ Penalties for breach of the Ordinance are generally in the form of fines expressed in penalty units and custom goods.

In relation to land, the Ordinance sets out the following specific principles which will guide the resolution of disputes:

- (a) No individual shall have sole ownership of land;*
- (b) A tribe may claim ownership of an land;*
- (c) Land is inherited through the female child according to the matrilineal tradition of the society;*
- (d) A male person in a tribe has equal primary land right as a female person to inherit land for his life time only;*
- (e) A child affiliated to a tribe through his father has secondary rights to any land by that tribe;*
- (f) A male person may become a custodian of the tribal land to which he is affiliated, and has the authority to look after the affairs of the land, including the right to talk about the tribal land in any proceeding pertaining to the ownership of the land;*
- (g) A female person affiliated to a tribe shall be involved in any decision making pertaining to any land affiliated to that tribe;*
- (h) Any person who wishes to gain access to his 'moru' which is owned by any given tribe must, prior to any further action, obtain permission from the chief of the tribe;*
- (i) from the date of commencement of this Ordinance, no customary land shall be sold to any natural or corporate person;*
- (j) Land can only be leased to another for a period not more than twenty years. Lease agreements may be renewed after each term has expired; and*
- (k) Any negotiation or agreement relating to any land owned by a tribe shall be made through the head of the members of the tribe concerned.*

⁴⁹ Moli Wards Chiefs Council Ordinance 2010, cl 61(4).

⁵⁰ Moli Wards Chiefs Council Ordinance 2010, cl 79(1).

⁵¹ Moli Wards Chiefs Council Ordinance 2010, cl 79(2).

V. Rules

1. Indigenous Law

Pre-Contact to Independence

As discussed above, traditions in Solomon Islands are not homogenous, but vary from place to place. Just as it is difficult to identify a body of principles, it is also difficult to identify rules. Moreover, indigenous laws in Solomon Islands do not operate in the same way as common law. They are not inflexible rules. Rather they differ according to all the circumstances of the case. Further rules governing disputes and dispute resolution tend not to constitute a distinct body of rules; rather, they operate as part of the overall system of social order.⁵²

Having said this, there is some evidence of the emergence of ‘codes’ of customary penalties in some parts of the country. One example is ‘*Are-Are Customary Law*’. This code contains a list of individual wrongs and offences, rather than rules of dispute resolution. However it also sets out the rules regarding penalties. These consist of compensation varying from \$12 (casting a spell with malicious intent)⁵³ to \$600 (for fishing without permission in a traditionally owned fishing ground).⁵⁴ In some cases penalties include custom goods, For example, \$6 and a pig (for an item from the women’s menstruation hut being placed in the family home).⁵⁵

Post-Independence

As discussed above, traditions in Solomon Islands are not homogenous, but vary from place to place. Whilst customary rules are still largely unwritten, ‘*The Tradition of Land in Kwara’ae*’ sets out certain rules of relevance to resolution of customary land disputes. These include:

- The rules of seniority which will determine decision making power depend partly on the relationship of a person to the leader by birth or marriage. The rules on ranking include:
 - (a) the leaders brothers and children rank first;⁵⁶
 - (b) the leaders children rank in order of date of birth;⁵⁷
 - (c) male relatives are senior to female relatives;⁵⁸
 - (d) the closer the generation of a person to a leader the more senior the ranking;⁵⁹
 - (e) blood relatives rank higher than relatives by marriage;⁶⁰
 - (f) all relatives rank higher than strangers.⁶¹
- Suitability for leadership will also be governed by knowledge of land, including:
 - (a) genealogy;
 - (b) village sites of ancestors and *tambu* places;
 - (c) land boundaries and sub-divisions.⁶²

⁵² Matthew Allen et al, *Justice Delivered Locally: Systems Challenges, and Innovations in Solomon Islands*, 2013, World Bank : Washington DC, 7.

⁵³ George Waitotora, *Are-Are Customary Law*, 1981, Kenilorea: Honiara, Rule 31.

⁵⁴ George Waitotora, *Are-Are Customary Law*, 1981, Kenilorea: Honiara , Rule 83.

⁵⁵ George Waitotora, *Are-Are Customary Law*, 1981, Kenilorea: Honiara , Rule 8.

⁵⁶ Ben Burt and Michael Kwaiioloa, *The Tradition of Land in Kwara’ae*, 1992 Institute of Pacific Studies: USP, Rule 7(a).

⁵⁷ Ben Burt and Michael Kwaiioloa, *The Tradition of Land in Kwara’ae*, 1992 Institute of Pacific Studies: USP, Rule 7(b).

⁵⁸ Ben Burt and Michael Kwaiioloa, *The Tradition of Land in Kwara’ae*, 1992 Institute of Pacific Studies: USP, Rule 7(c).

⁵⁹ Ben Burt and Michael Kwaiioloa, *The Tradition of Land in Kwara’ae*, 1992 Institute of Pacific Studies: USP, Rule 7(d).

⁶⁰ Ben Burt and Michael Kwaiioloa, *The Tradition of Land in Kwara’ae*, 1992 Institute of Pacific Studies: USP, Rule 7(e).

⁶¹ Ben Burt and Michael Kwaiioloa, *The Tradition of Land in Kwara’ae*, 1992 Institute of Pacific Studies: USP, Rule 7(f).

⁶² Ben Burt and Michael Kwaiioloa, *The Tradition of Land in Kwara’ae*, 1992 Institute of Pacific Studies: USP, Rule 12.

- If a leader lets another person plant or build on land then that person is entitled to make the decisions about the thing planted or built.⁶³

Indigenous communities in Solomon Islands apply their own penalties for misconduct in accordance with customary laws. Just like the laws themselves, penalties are flexible and will depend on all the circumstances surrounding the conduct being punished. However, as stated above, penalties normally fall within one of three categories: death, compensation, or banishment.⁶⁴ Death often takes the form of payback;⁶⁵ the concept of banishment discussed in *Pusi v Leni*.⁶⁶ These cases will be analysed in *Stage 2*.

Customary penalties have the force of customary law and are binding on members of the community subject to that law. As customary laws are recognised as a source of law by the Constitution, customary penalties also have the force of State law, but are not usually enforceable by the State.⁶⁷

2. State Law

Rules governing the constitution of the State courts can be found in the *Constitution*;⁶⁸ *Magistrates Courts Act*;⁶⁹ and the *Local Courts Act*.⁷⁰ Rules governing jurisdiction of the State courts can be found in the *Constitution*;⁷¹ *Court of Appeal Act*;⁷² *Magistrates Courts Act*;⁷³ *Local Courts Act*;⁷⁴ and the *Land and Titles Act*.⁷⁵

The rules governing civil dispute resolution in State Courts are contained in the Rules mentioned above. In criminal cases, they are governed by the *Criminal Procedure Code*.⁷⁶ Rules relating to appeals can be found in *Solomon Islands Court of Appeal Rules 1983*. The common law is also relevant to procedure.

Rules regarding evidence can be found in the Evidence Act 2009 and in the common law.

3. Other legal systems

The Church

⁶³ Ben Burt and Michael Kwaiolola, *The Tradition of Land in Kwara'ae*, 1992 Institute of Pacific Studies: USP, Rule 5.

⁶⁴ *Regina v Tutala* (unreported, High Court of Solomon Islands, Kabui, J, 5 May, 2004) available at www.pacii.org at [2004] SBHC 37.

⁶⁵ See, for example, *R v Loumia* [1984] SILR 51.

⁶⁶ (Unreported, High Court, Solomon Islands, Muria CJ, 14 February 1997), accessible via www.pacii.org at [1997] SBHC 100. This case is discussed in Jennifer Corrin, *Breaking the Mould: Constitutional Review in Solomon Islands*, 2007, 13 *Revue Juridique Polynesienne* 143, 151. See also Jennifer Corrin Care, *Customary Law and Human Rights in Solomon Islands*, 1999, 43 *Journal of Legal Pluralism and Unofficial Law* 135; *Public Prosecutor v Kota* [1989-94] VanLR 661.

⁶⁷ But see *Moli Wards Chiefs Council Ordinance 2010* discussed below.

⁶⁸ 1978, ss 77 and 78.

⁶⁹ Cap 20.

⁷⁰ Cap 19.

⁷¹ 1978 ss 78,79, 85 and 86.

⁷² Cap 6.

⁷³ Cap 20.

⁷⁴ Cap 19.

⁷⁵ Cap 133, s 256

⁷⁶ Cap 7.

The rules which govern dispute resolution by the church are not explored in detail in this sub-project.

Hybrids

- **Resolution of Land Disputes by Chiefs under the Local Courts Act**

As with other customary dispute resolution procedures, diversity in social organisation makes it difficult to generalise about rules of indigenous laws or to identify a body of rules.

- **Resolution of Land Disputes by the Moli Wards Chiefs Council**

The *Moli Wards Chiefs Council Ordinance 2010* encapsulates some applicable rules of customary law. It set outs specific prohibitions and offences, including provisions designed to encourage sustainable harvesting of land resources.⁷⁷ It also obliges the Council to encourage a reforestation campaign.⁷⁸ The Ordinance requires non-citizens to obtain development approval from the Council⁷⁹ and regulates the use of ‘traditional practices or heritage’, defined to include ‘traditional knowledge and any other authentic activity or object attributed to the customs and traditions of Moli Ward.’⁸⁰

A number of rules governing dispute resolution are also set out, including:

- (a) The form and amount of compensation to be imposed is at the discretion of the Council, taking into account the penalties set out in the Ordinance.⁸¹ Penalties are a mixture of State constructed penalty units,⁸² and custom goods, including pigs and shell money (‘chavati’).
- (b) Reconciliation is not a bar to consideration of a dispute by the Council, but is to be taken into account in determination of penalty.

Some examples of the other things it deals with are provisions for sustainable harvesting of land resources. It also regulates the use of ‘traditional practices or heritage’. This is defined to include, ‘song, chant, dance costume or clothing, ritual, ceremonial object or practice, folklore, painting, carving, art, weapon, architecture, traditional knowledge and any other authentic activity or object attributed to the customs and traditions of Moli Ward.

⁷⁷ *Moli Wards Chiefs Council Ordinance 2010* cl 15.

⁷⁸ *Moli Wards Chiefs Council Ordinance 2010* cl 18.

⁷⁹ *Moli Wards Chiefs Council Ordinance 2010* cl 17.

⁸⁰ *Moli Wards Chiefs Council Ordinance 2010* cl 17.

⁸¹ *Moli Wards Chiefs Council Ordinance 2010* cl 61(2).

⁸² As defined by the *Interpretations and general Provisions Act* cap 85, s 50A(1).

1. Indigenous Law

Pre-Contact to Independence

Before colonisation, customary dispute resolution systems were diverse. Decision making power was largely in the hands of ‘chiefs’ or big men. Whereas chiefs claimed authority through their blood line, big men were recognised as having achieved their status on account of their wisdom, skills and contribution to the community. In some parts of the country, communities were governed by both ‘chiefs’ and big men.⁸⁴

As stated in the Allan Report:⁸⁵

In the process of settlement, chiefs, whether men rich in money or pigs, leaders of head hunting expeditions, or just plain organisers, hereditary or otherwise, singly and collectively, played a considerable part.

Unlike other Pacific countries such as Fiji, where there was a defined chiefly and tribal structure with large areas of the country ruled by paramount chiefs, Solomon Islands society was organised into small, village communities.⁸⁶

Post-Contact Era

The term ‘chief’ is commonly used, as a generic term, to refer to traditional leaders. However, each local language has its own word for chiefs and, sometimes, different words for different types of chiefs. Further, some areas have clearly identifiable chiefs, while others do not. In some places, for instance in some parts of Malaita, there are people with special responsibility for land (called ‘fata’abu’).⁸⁷ Further, in some places, the word ‘elder’ has been used instead of chief.⁸⁸

In Marovo, in the Western Province of Solomon Islands, there is one word (‘bangara’) for paramount chiefs and another (‘palambatu’) for traditional leaders.⁸⁹ There are different types of palambatu with different names, depending on their area of responsibility. For example, in some areas palambatu with responsibility for land are known as ‘vuluvulu’.⁹⁰ There is another word for chief, which is ‘inavave’. Literally, this means ‘rubbish bin’, as the chief is seen as the person who has to deal with everyone’s rubbish (problems).⁹¹

⁸³ The section ‘actors’ may include institutions and stakeholders

⁸⁴ Rodger Keesing, *Killers, Big Men, and Priests on Malaita: Reflections on a Melanesian Troika System*, *Ethnology* 24(4), 237.

⁸⁵ *Allan Report*, 234.

⁸⁶ *Allan Report*, 14, 52.

⁸⁷ 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*, 2003, 22.

⁸⁸ *The Provincial Government Act 1986* (SI), s 30, referred to ‘chiefs and elders’.

⁸⁹ Interview with Marovo Chiefs, 18 June 2008, Marovo Lagoon: Solomon Islands. See also E. Hviding, *Guardians of Marovo Lagoon: Practice, Place, and Politics in Maritime Melanesia*, 1996, University of Hawaii Press: Honolulu, 72.

⁹⁰ Interview with Marovo Chiefs, 18 June 2008, Marovo Lagoon: Solomon Islands.

⁹¹ Interview with Marovo Chiefs, 18 June 2008, Marovo Lagoon: Solomon Islands.

Chiefly institutions exist at ward, district, provincial and village levels throughout the Solomon Islands.⁹² They are perceived by most villagers as being ‘above’ and more important than the distant, invisible State.⁹³ The organisation of chiefly institutions differs considerably from area to area. In some areas, more rigid structures have been established. The chiefly structures may be governed by a written constitution.⁹⁴ For example, on the island of Santa Isabel, there are eight District Houses of Chiefs, corresponding to the six different language groups on the island.⁹⁵ The District Houses are overseen by the Isabel Council of Chiefs which also acts as an advisory body to the Isabel Provincial Assembly.⁹⁶ In some provinces, notably Malaita and Isobel, a distinction is drawn between ‘tribal chiefs’ (members of the landowning group) and ‘village chiefs’ (not necessarily of the landowning group, but who have been appointed to a community governance role); only the former are permitted to sit in the chiefly structures.⁹⁷ This also seems to be the case in some parts of Guadalcanal, as reflected in the provisions of the *Moli Wards Chiefs Council Ordinance 2010*.⁹⁸

In the Kwara’ae region, the principle of leadership, and the relationship between the leader and other stakeholders has been expressed as follows:⁹⁹

The man who was leader for something important, because he had discovered land or planted trees or set up anything else, his family and his relatives by birth must share in those things. Then all their line and other descendants born of them must share in these things after them, from generation to generation, as long as these things remained. ... But the leader was senior amongst them and after the leader some people were senior to others. When the leader went away or he had died, then the people who were senior among the group who remained then replaced that leader and it was they who then took leadership for the land or trees or anything else.

While this statement was put forward in relation to land, it would appear, on its face, to have a broader application to dispute resolution.

Resolution by the chiefs or traditional leaders is the most commonly recognised forum for the resolution of family and social disputes and of land disputes.¹⁰⁰

⁹² Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 35.

⁹³ Graham Baines, *Beneath the State: Chiefs of Santa Isabel, Solomon Islands, coping and adapting*, 2014, Working Paper 2014/2, State, Society & Governance in Melanesia Program: ANU College of Asia and the Pacific, 3.

⁹⁴ For example, the Isabel Council of Chiefs has a written constitution which sets out procedures for the selection of members of the Council. However, the idea of codifying the customary practice of appointing a chief is controversial. The paramount chief of Santa Isabel, Dudley Tuti, rejected a draft constitution in 2004 because it made provision for chiefs to be appointed by election, which he argued was contrary to customary practice: Geoffrey White, *Chiefs, Church and State in Santa Isabel* in Matt Tomlinson and Debra McDougall (eds) *Christian Politics in Oceania*, 2012, Berghahn Books: Michigan, 171, 184.

⁹⁵ Graham Baines, *Beneath the State: Chiefs of Santa Isabel, Solomon Islands, coping and adapting*, 2014, Working Paper 2014/2, State, Society & Governance in Melanesia Program: ANU College of Asia and the Pacific, 3.

⁹⁶ Graham Baines, *Beneath the State: Chiefs of Santa Isabel, Solomon Islands, coping and adapting*, 2014, Working Paper 2014/2, State, Society & Governance in Melanesia Program: ANU College of Asia and the Pacific, 3.

⁹⁷ Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 35.

⁹⁸ *Moli Wards Chiefs Council Ordinance 2010*, cl 74.

⁹⁹ Ben Burt and Michael Kwaiioloa, *The Tradition of Land in Kwara’ae*, 1992 Institute of Pacific Studies: USP, 11.

¹⁰⁰ Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 39.

2. State Law

In the State system, the main actors in dispute resolution forums are the judiciary and the magistracy. However, local courts are constituted by justices, chosen from a list compiled from nominations. There is also an established legal profession in Solomon Islands which plays an important role representing clients before state courts. The fused profession is regulated by legislation.¹⁰¹

3. Other legal systems

The Church

As discussed above, the church is a powerful influence in Solomon Islands and often plays a part in resolving disputes. Leadership structures differ according to the denomination, but most churches have religious leaders, committees, and elected or chosen officials who play a significant role in dispute resolution within the village in which they are situated.¹⁰²

The traditional role of chiefs has been altered by the spread of Christianity throughout the islands; for example, in Santa Isabel, the Isabel Council of Chiefs (represented by the paramount chief) governs 'in dialogue' with the Anglican Church of Melanesia (represented by the bishop of the Diocese of Ysabel) and the Isabel Provincial Government (represented by the premier for Santa Isabel Province).¹⁰³

Hybrids

- **Resolution of Land Disputes by Chiefs under the Local Courts Act**

As discussed above, chiefs are called on by the Local Courts Act to make a decision in land disputes, as a prerequisite to invoking the Local Court's jurisdiction. The actors in this forum are the parties to the dispute and the chiefs who are called on to resolve the dispute. The Act defines 'chiefs' broadly as 'chiefs or other traditional leaders residing within the locality of the land in dispute and who are recognised as such by both parties to the dispute'.¹⁰⁴ However, this is unhelpful when the identity of 'chiefs' or 'traditional leaders' is disputed.

- **Resolution of Land Disputes by the Moli Wards Chiefs Council**

As discussed above, a hybrid chiefly institution has been established in the Moli Ward on Guadalcanal by the *Moli Wards Chiefs Council Ordinance 2010*. The Ordinance recognises the authority of hereditary chiefly titles.¹⁰⁵ It establishes two Houses of Chiefs; Bota Moli and Veuru Moli.¹⁰⁶ Each tribe in the ward must have a paramount chief and two assisting chiefs with

¹⁰¹ *Legal Practitioners Act* Cap 16; *Legal Practitioners (Professional Conduct) Rules 1995*. The Act and Rules are currently under review.

¹⁰² Matthew Allen et al, *Justice Delivered Locally: Systems Challenges, and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 60.

¹⁰³ Graham Baines, *Beneath the State: Chiefs of Santa Isabel, Solomon Islands, coping and adapting*, 2014, Working Paper 2014/2, State, Society & Governance in Melanesia Program: ANU College of Asia and the Pacific, 3; Geoffrey White, *Chiefs, Church and State in Santa Isabel* in Matt Tomlinson and Debra McDougall (eds) *Christian Politics in Oceania*, 2012, Berghahn Books: Michigan, 171, 186.

¹⁰⁴ *Local Courts Act* s 11.

¹⁰⁵ *Moli Wards Chiefs Council Ordinance 2010*, cl 8.

¹⁰⁶ *Moli Wards Chiefs Council Ordinance 2010*, cl 9.

hereditary titles. Each village must also have a village chief and assistant village chief with a hereditary title.¹⁰⁷

The main actors are the Moli Ward Chiefs Council and members of the community living within Moli Ward. Council. Members of which are elected by secret ballot at a meeting presided over by the Provincial Member for Moli Ward,¹⁰⁸ who is a state official. Members are elected to the positions of President, Vice President, Secretary of the Council, and two members as Paramount Chiefs (one for each House of Chiefs).¹⁰⁹ It would appear that Council members must all be chiefs with a hereditary title, but this is not stated in the Ordinance, This question will be explored in stage 2.

¹⁰⁷ *Moli Wards Chiefs Council Ordinance 2010*, cl 74.

¹⁰⁸ *Moli Wards Chiefs Council Ordinance 2010*, cl 3(2).

¹⁰⁹ *Moli Wards Chiefs Council Ordinance 2010*, cl 3(1).

VII. Process

1. Indigenous Law

Pre-Contact to Independence

Generally speaking, the process of customary dispute resolution was governed by the customs and indigenous laws of the area in which they operate, making it hard to generalise. However, there is no evidence of processes resembling courts or moots.¹¹⁰ Instead the process used to deal with disputes involved settlement between groups by payment of compensation or war between contesting groups.¹¹¹ These wars, or bloods feuds, were of varying intensity and length and were sometimes settled by payment of compensation.¹¹²

From the anthropological literature of the 1930's onwards, it appears that until Solomon islands became a Protectorate, there were still no organised forums for dispute resolution. Rather, responses were on an ad hoc basis. Sanctions were imposed by individuals or by groups in the form of retributive violence, and in some cases, death. Third parties could also be called on to inflict a penalty. This might be in the form of sorcery, using the skills of a person renowned to possess such skills. It might also be through employment of a paid assassin. This was a prevalent practice in some parts of Solomon Islands, such as Malaita, where they were known as 'Ramo'.¹¹³

Since the establishment of the Protectorate, the process has gradually changed. Indigenous men were often appointed as headmen, assistant headmen or village constables.¹¹⁴ Headmen had some authority to settle disputes, stemming not from custom, but from the ability to withhold resources.¹¹⁵ In 1942, native courts were set up to deal with customary and minor civil and criminal cases.¹¹⁶ These courts were to apply customary laws to minor civil and criminal matters involving Solomon Islanders.¹¹⁷ They were 'constituted in accordance with the native law or customs of the area in which the court is to have jurisdiction' and were to administer 'the native law and custom prevailing in the area'. Application of customary laws in native courts was limited by the proviso that such laws were to apply only in so far as they had not been modified by any Act. Imposition of customary punishments 'repugnant to natural justice and humanity' were also prohibited. Whilst community elders were appointed to sit on these courts, they were not customary and may have contributed to the failure of customary forums to develop outside the State.

Post-Independence

¹¹⁰ Michael Goddard, *Justice Delivered Locally: Solomon Islands*, 2010, World Bank: Washington DC, 6.

¹¹¹ *Allan Report*, 234.

¹¹² Michael Goddard, *Justice Delivered Locally: Solomon Islands*, 2010, World Bank: Washington DC, 6.

¹¹³ Roger Keesing and Peter Corris, *Lightning Meets the West Wind: The Malaita Massacre*, 1980, Oxford University Press: Melbourne, 30.

¹¹⁴ Michael Goddard, *Justice Delivered Locally: Solomon Islands*, 2010, World Bank: Washington DC, 6-7.

¹¹⁵ Michael Goddard, *Justice Delivered Locally: Solomon Islands*, 2010, World Bank: Washington DC, 6.

¹¹⁶ *Native Courts Act* Cap 33 (SI), s 10.

¹¹⁷ *Native Courts Act* Cap 33 (SI) s 3.

Customary institutions still play an essential role in resolving customary disputes. They are of vital importance in rural areas where State courts are often absent. Whether the authority or the process employed is traditional is open to doubt, but the authenticity of proceedings is often stressed by Solomon Islanders themselves. This will be further explored further in Stage 2.

There is no written procedure and the process still differs from place to place. Disputes which do not involve land are usually dealt with initially at the family level. If they are not resolved, then assistance from individual 'chiefs' or community leaders may be sought.¹¹⁸ This will usually be the case where social or family problems are concerned. In areas of the country where bride price is paid, issues often arise.¹¹⁹ Adultery and compensation claims are frequent. In these cases the process is usually one of mediation. As stated by the former Chief Justice of Fiji:¹²⁰

There are a number of traditional dispute settlement mechanisms that have existed in Pacific societies for a very long time. Some follow simple forms of apology where minor disputes are settled informally between families, whilst others take on a more structured court like process with some kind of formal assembly of disputants and community members presided over by a designated person or group of persons who act on behalf of the community to settle the dispute....Social and family pressures of any and every kind are brought to bear on the disputing parties to shift ground, to accept, to compromise and to settle the dispute... The common element of these various models of traditional dispute settlement in Pacific societies is characterized by one of a peaceful settlement, compromise and agreement where communal interests outweigh individual rights and interests.

The skills of religious leaders in the community may also be drawn on as part of the process.¹²¹

Customary land disputes will usually be dealt with in the customary system in the first instance.¹²² Land disputes are, in many cases, dealt with by a chiefly institution. These institutions take various forms across the country. For example, in some areas there is a distinction between tribal chiefs and village chiefs. In these areas, only tribal chiefs deal with customary disputes. They resolve internal disputes within the village. Where there is an inter-village dispute, it will often be dealt with by the paramount chief, either alone or, more often with a group of tribal chiefs from the neighbouring villages.

Proceedings are usually held in public and in the local language. In most cases, procedure is informal. Prayers often form part of the proceedings. However, in some cases, particularly those

¹¹⁸ Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 39.

¹¹⁹ See further, Jennifer Corrin, *Customary law and Human Rights in Solomon Islands - A commentary on Remisio Pusi v James Leni and Others*, 1999, *Journal of Legal Pluralism* 135 – 144.

¹²⁰ Chief Justice of Fiji, His Honour Justice Daniel V Fatiaki, *Opening address to Alternative Dispute Resolution (ADR) workshop*, March 2005, Suva:Fiji Islands, cited in Ratu Filimone Ralogaivau, *Blending Traditional Approaches To Dispute Resolution In Fiji With Rule of Law - The Best of Both Worlds*, June 26-30 2006, paper presented to the 3rd Asia Pacific Mediation Forum Conference: University of the South Pacific, <<http://www.governance.usp.ac.fj>>.

¹²¹ Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 39.

¹²² Michael Goddard, *Justice Delivered Locally: Solomon Islands, 2010*, World Bank: Washington DC, 39; ANU Enterprise, *People's Survey*, 2012, 142.

involving land, chiefs' forums have developed into 'customary' courts, mirroring a version of state forums.¹²³ The process is described in general terms by Allen as follows:

Parties to a dispute will appear and answer questions, either from the other party and/or the panel of chiefs. Oftentimes, written records of deliberations and decisions will be kept by an individual nominated to do so. Site inspections may take place in cases involving customary land disputes. Chiefs will deliberate and frequently a written record of the decision will be produced. These judgments are often typed and sometimes evoke a mixture of Christian and quasi-legal discourse.

Tracing genealogies is often involved. For this reason, chiefs are commonly considered to be best equipped to deal with land disputes, as they have the relevant knowledge of relationships to land and custom stories, which often involve *totems*.¹²⁴ The chiefly land dispute resolution process has been, to some extent, incorporated into the state system and this is discussed in more detail below.

There is generally a fee for invoking the dispute resolution mechanisms. Traditionally, this was in the form of custom goods. Today cash payments are common and will usually include payment of the costs of transport. Accommodation and meals will often be provided in-kind. In some cases there may also be a sitting fee, a process copied from the local court. Fees generally range from SBD\$50 to SBD\$500.¹²⁵ The 2011 annual *People's Survey* (ANU Enterprise 2012, 145) found that 62.5 percent of all respondents expect to pay for assistance in resolving a land-related dispute. However these results do not differentiate between the common law courts and customary institutions.

In Malaita and Isabel, the customary system allows an appeal from the first level forum to a higher level, for example from a village forum to a forum with representatives drawn from a broader area.¹²⁶

With regard to responses or penalties, there is no set list or range of penalties. They are open ended and flexible. Whether forming part of a customary institution's process or family or village level dispute resolution, responses are usually driven by the objective of reconciliation. Custom ceremonies are commonly held at which apologies will be expressed and parties to the dispute will shake hands.¹²⁷

Common penalties are fines or compensation, sometimes in the form of custom goods such as pigs or chickens or shell money,¹²⁸ but increasingly in the form of cash. Corporal punishment is

¹²³ *Allan Report*, 242; Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 39.

¹²⁴ This observation is based on the author's own observations in land cases dealt with in practice in Solomon Islands over a period of ten years.

¹²⁵ Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 39.

¹²⁶ Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 40.

¹²⁷ See further Debra McDougall and Joy Kere, *Christianity, Custom, and Law: Conflict and Peacemaking in the Post-Conflict Solomon Islands*, in Morgan Brigg and Roland Bleiker (eds), *Mediating Across Difference: Indigenous, Oceanic and Asian Approaches to Conflict Resolution*, 2011, Honolulu: University of Hawaii Press, 151-153.

¹²⁸ See below regarding the conversion of shell money penalties to cash in the Are-Are area.

another form of punishment utilised. In some places, this consists of a public whipping, especially for juveniles. Whipping is frequently imposed by indigenous leaders in Gilbertese communities as a punishment for acts such as public drunkenness or sexual misconduct.¹²⁹ Death was a common form of punishment for more serious offences but is not so frequently imposed today. Banishment is another form of penalty which is commonly employed.¹³⁰

Where penalties are imposed by individuals or groups outside a customary institution, responses or penalties include sorcery against the offender. Payback, which may include inflicting physical punishment or killing the offender, is still prevalent in some parts of the country. An example can be found in the recent prosecution of a seventeen year old youth for arson, after he burnt down a man's house in revenge for his alleged use of sorcery on the accused uncle.¹³¹ Another example of payback can be found in *Loumia v DPP*.¹³²

Claims of bias on the part of one or more chiefs dealing with a dispute are frequent. Such claims are usually on the basis of a conflict of interest arising either from a blood relationship with a party or a personal interest in the property. Claims of bribery also occur. In the event of such claims, the chief in question is normally asked to step aside.

2. State Law

Common Law Courts

The jurisdiction of the courts is governed by the Constitution and other legislation. The Constitution establishes a three tier structure consisting of inferior courts, a superior court, and an appeal court. Due to lack of resources, the appeal court is not constituted on a permanent basis, but sits between one and four times annually to deal with accumulated appeals.¹³³ The Court of Appeal is established under the Constitution,¹³⁴ and is constituted by a President and Justices of Appeal, together with the Chief Justice and the puisne judges of the High Court.¹³⁵ The High Court is also established under the Constitution,¹³⁶ and consists of the Chief Justice and puisne judges.¹³⁷ The High Court may also sit with assessors, chosen from amongst people who live within ten miles of the court and are able to speak English.¹³⁸ The magistrates' courts are

¹²⁹ A World Bank Survey reports that this is common practice in Gilbertese communities in Wagina, in Choiseul province; Titiana, in Western province; and Honiara: Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands, 2013*, World Bank: Washington DC, 40.

¹³⁰ See, eg, *Pusi v Leni* (unreported, High Court, Solomon Islands, Muria CJ, 14 February 1997), accessible via www.paclii.org at 1997 SBHC 100. This case is discussed in Jennifer Corrin, *Breaking the Mould: Constitutional Review in Solomon Islands, 2007*, 13 *Revue Juridique Polynésienne* 143, 151.

¹³¹ Assumpta Buchanan, 'Juvenile Jailed for 6 Months over arson', *Solomon Star*, 18 April 2015, <www.solomonstarnews.com/news/national/6692-juvenile-jailed-for-6-months-over-arson> accessed 22 April 2015.

¹³² [1985/6] SILR 158, 169.

¹³³ See M. Pulea, *A Regional Court of Appeal for the Pacific*, 1980, 9(2) *Pacific Perspective* 1 for a discussion of the historical perspective and I. Mataitoga, *South Pacific Court of Appeal*, 1982, 11(1) *Pacific Perspective* 70 for a discussion of some of the problems which favour the present system in preference to a regional appeal court. See also S. Boyd, *Australian Judges at Work Internationally*, 2003, 77 ALJ 303.

¹³⁴ *Constitution of Solomon Islands 1978*, s 85.

¹³⁵ *Constitution of Solomon Islands 1978*, s 85(2).

¹³⁶ *Constitution of Solomon Islands 1978*, s 77.

¹³⁷ *Constitution of Solomon Islands 1978*, s 77(2).

¹³⁸ Criminal Procedure Code Cap 7, ss242 and 260.

established by the *Magistrates' Courts Act*¹³⁹ to sit in districts, as directed by the Chief Justice.¹⁴⁰ Magistrates' courts are constituted by a magistrate sitting alone.

The process of dispute resolution is governed by adjectival laws, that is, laws governing procedure and evidence. Until 2007, civil procedure in Solomon Islands was governed by the Western Pacific High Court (Civil Procedure) Rules 1964, which at one time applied throughout the Western Pacific. Civil Procedure is now governed by the Civil Procedure Rules 2007; criminal procedure by the *Criminal Procedure Code*¹⁴¹ and evidence in both civil and criminal cases by the *Evidence Act*.¹⁴²

As will be explored in Stage 2 of this research, these adjectival laws are very rigid and present barriers for the resolution of customary disputes in common law courts. These types of disputes do not always fit with adjectival laws which have developed hand in hand with the common law. In late 2000, the *Customs Recognition Act*, based on the *Customs (Recognition) Act 1963* of Papua New Guinea,¹⁴³ was passed. The Act has numerous deficiencies,¹⁴⁴ and has never been brought into force. State courts are still operating within a system of procedural norms which are alien to customary laws. As stated above, this issue will be further analysed in Stage 2 of this sub-project.

Local Courts

Introduction

In addition to the common law courts, the Constitution empowers Parliament to provide for the resolution of customary disputes.¹⁴⁵ However, it has chosen to do this through Local Courts, which are so called 'customary' courts, established by legislation, rather than through recognition of traditional dispute resolution forums. The Local Courts are constituted 'in accordance with the law or customs of Islanders of the area in which the court is to have jurisdiction', with the proviso that the Chief Justice may prescribe the constitution.¹⁴⁶

Customary disputes other than land

The Local Courts have jurisdiction over minor matters in which all parties are islanders, resident or within the area of jurisdiction of the court.¹⁴⁷ The extent of the jurisdiction is set out in the Warrant establishing the Local Court.

The vital role that chiefs¹⁴⁸ play in resolving disputes of customary laws are recognised by the *Local Courts Act*. In determining disputes, the Local Courts may:-

(a) *have regard to the decision made by the chiefs in connection with the dispute;*

¹³⁹ Cap 20.

¹⁴⁰ *Magistrates' Courts Act* Cap 20, s 3(2) and s 50.

¹⁴¹ Cap 7.

¹⁴² 2009.

¹⁴³ The PNG Act ironically was repealed in the same year.

¹⁴⁴ Jennifer Corrin and Jean Zorn, *Legislating for the application of customary law in Solomon Islands*, 2005, 34 *Common Law World Review* 144.

¹⁴⁵ *Constitution of Solomon Islands 1978*, s75

¹⁴⁶ *Local Courts Act*, s 3.

¹⁴⁷ *Local Courts Act*, s 6.

¹⁴⁸ 'Chiefs' are broadly defined as 'chiefs or other traditional leaders residing within the locality of the land in dispute and who are recognised as such by both parties to the dispute': *Local Courts Act* s 11.

...

(c) call one or more of the chiefs who took part in making the decision to give evidence on the applicable customary law ...

(d) substitute for the decision made by the chiefs such decision as may to it seem just; or

(e) refer the dispute to the chiefs with such directions as it may consider necessary.¹⁴⁹

If the Local Courts refer a dispute to the chiefs under s 13(e) and the chiefs make a decision which is 'wholly acceptable to both parties', the chiefs or the parties may apply for the decision to be recorded by the Local Court.¹⁵⁰ Such a decision then carries all the weight and legal enforceability of a decision made by the Local Court itself.¹⁵¹

Customary land disputes

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.¹⁵²

Since 1985, the vital role that chiefs¹⁵³ play in resolving customary land disputes has been recognised by the *Local Courts Act*. It is now required that parties attempt to resolve customary disputes in this manner before attempting other forms of dispute resolution.¹⁵⁴ This is discussed below under the heading of hybrids.

Appeals from the Local Courts in relation to customary land are heard by the Customary Land Appeals Court ('CLACs').¹⁵⁵ Appeals from the CLAC lie as of right to the High Court, but are only permitted on the grounds of error of law (which does not exclude a point of customary law) or failure to comply with any procedural requirement.¹⁵⁶ There is a final appeal to the Court of Appeal on a point of law only, and leave is required.¹⁵⁷

CLACs also hear appeals from decisions of the Provincial Executive under the Forest Resources and Timber Utilisation Act in relation to disputes over the ownership of timber rights.¹⁵⁸ 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 problems this causes will be analysed in the next stage of the sub-project.

The *Tribal Land Dispute Resolution Panels Bill 2012*, which has been under consideration since about 2004, is an attempt to address the issues facing the statutory customary courts, including lack of resources and overlapping responsibility. This Bill will be analysed in the second stage of

¹⁴⁹ *Local Courts Act* s 13.

¹⁵⁰ *Local Courts Act* s 14.

¹⁵¹ *Local Courts Act* s 14(3).

¹⁵² *Land and Titles Act* Cap 133 s 254(1).

¹⁵³ 'Chiefs' are broadly defined as 'chiefs or other traditional leaders residing within the locality of the land in dispute and who are recognised as such by both parties to the dispute': *Local Courts Act* s 11.

¹⁵⁴ See, eg *Local Courts Act* Cap 19, s 12.

¹⁵⁵ *Land and Titles Act* Cap 133 s 256.

¹⁵⁶ *Land and Titles Act* Cap 133 s 256(3).

¹⁵⁷ *Land and Titles Act* Cap 133 (SI), s 257(4).

¹⁵⁸ *Forest Resources and Timber Utilisation Act* s 10(1).

this sub-project.

3. Other legal systems

The Church

As discussed above, the church is a powerful influence in the Solomon Islands, and often plays a part in resolving disputes. Churches are often situated in villages or serve two or more small village.¹⁵⁹ Minor disputes, such as family disagreements over adultery or unplanned pregnancies will be dealt with by the church leaders or the committee.¹⁶⁰

In some cases, church guidelines or manuals set out a process for resolving certain types of dispute which must be followed by leaders and church members. For example, the Constitution of the United Church of Solomon Islands requires the pastor or minister to record the responses of the alleged wrongdoer to the allegation of acts listed as misconduct by the church, and to make recommendations to a higher church body. A disciplinary measure may then be imposed, such as counselling or a reprimand. The Constitution also sets out a detailed appeal process.¹⁶¹ Where no process is set down, church leaders may deal with disputes as they see fit.¹⁶² Church processes generally emphasise counselling and mediation. Praying together by all parties to the dispute is often part of the process.¹⁶³ Group bible readings may sometimes form part of the process.¹⁶⁴ Confessions and announcements of forgiveness are also common, reflecting the emphasis on restorative justice, forgiveness and reconciliation.¹⁶⁵

Hybrids

- **Resolution of Land Disputes by Chiefs under the Local Courts Act**

As discussed above, there are two hybrid systems established by state law, but purporting to incorporate traditional forums and processes. Since 1985, the vital role that chiefs¹⁶⁶ play in resolving customary land disputes has been recognised by the *Local Courts Act*.¹⁶⁷ It is now required that parties attempt to resolve customary disputes in this manner before attempting other forms of dispute resolution.¹⁶⁸ Local Courts may only deal with a customary land disputes if:

¹⁵⁹ Matthew Allen et al, *Justice Delivered Locally: Systems Challenges, and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 60.

¹⁶⁰ Matthew Allen et al, *Justice Delivered Locally: Systems Challenges, and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 60.

¹⁶¹ Matthew Allen et al, *Justice Delivered Locally: Systems Challenges, and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 62.

¹⁶² Matthew Allen et al, *Justice Delivered Locally: Systems Challenges, and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 61.

¹⁶³ Debra McDougall and Joy Kere, *Christianity, Custom, and Law: Conflict and Peacemaking in the Post-Conflict Solomon Islands*, in Morgan Brigg and Roland Bleiker (eds), *Mediating Across Difference: Indigenous, Oceanic and Asian Approaches to Conflict Resolution*, 2011, Honolulu: University of Hawaii Press, 150.

¹⁶⁴ Matthew Allen et al, *Justice Delivered Locally: Systems Challenges, and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 61.

¹⁶⁵ Matthew Allen et al, *Justice Delivered Locally: Systems Challenges, and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 61.

¹⁶⁶ 'Chiefs' are broadly defined as 'chiefs or other traditional leaders residing within the locality of the land in dispute and who are recognised as such by both parties to the dispute': *Local Courts Act* s 11.

¹⁶⁷ *Local Courts Act* Cap 19 s 12, as amended by the *Local Courts (Amendment) Act 1985*.

¹⁶⁸ See, eg *Local Courts Act* Cap 19, s 12 as amended by the *Local Courts (Amendment) Act 1985*.

- (a) *the parties to the dispute had referred the dispute to the chiefs;*
- (b) *all traditional means of solving the dispute have been exhausted; and*
- (c) *no decision wholly acceptable to both parties has been made by the chiefs in connection with the dispute.*¹⁶⁹

A party who is dissatisfied with the chiefs' decision who wishes to apply to the Local Court must produce to the court a certificate in the prescribed form.¹⁷⁰ Form 1 of the Schedule, containing the required particulars and signed by two or more of the chiefs to whom the dispute had been referred. The certificate must be accompanied by a written statement setting out the extent to which the decision made by the chiefs is not acceptable; and the reasons for not accepting the decision.¹⁷¹ After the lodgement the case follows the normal process, which is outlined above.

This innovation has not been successful and this will be explored further in Stage 2.

- **Resolution of Land Disputes by the Moli Wards Chiefs Council**

As discussed above, a hybrid process of dispute resolution is set up by the *Moli Wards Chiefs Council Ordinance 2010*. The process for resolution of disputes is set out in the Ordinance. The President may call a sitting at any time.¹⁷² The President or in his absence, the Vice-President, presides, and at least two other members must be present.¹⁷³ The power to make the final decision lies with the President.¹⁷⁴ Where no procedure is specific, the Council may make its own procedures. A fee is payable by any person bringing a matter before the council.¹⁷⁵ Members of the Council are entitled to allowances.¹⁷⁶ Fees and allowances are said to be set out in the schedule, but no sums are set out in the gazetted version.

The Ordinance provides more specific procedures for land disputes.¹⁷⁷ Any person may apply to the Council for a complaint to be heard.¹⁷⁸ The President presides with a panel of three members appointed by him.¹⁷⁹ Legal Representation is not allowed.¹⁸⁰ The procedure specified is similar to the common law process. The complainant presents his or her case together with evidence. The defendant may ask questions. The complainant may ask questions or make statements to clarify anything raised by the complainant. The defendant goes through the same process. Each party may then make closing remarks.¹⁸¹ Rules of evidence are set down, providing that hearsay is admissible; fabricated evidence is inadmissible; and no new evidence is admissible after a party has closed his or her case.¹⁸² The Council may also visit the land to 'verify the evidence'.¹⁸³

¹⁶⁹ *Local Courts Act* s 12(1).

¹⁷⁰ *Local Courts Act* s 12(2) and Schedule, Form 1.

¹⁷¹ *Local Courts Act* s 12(2).

¹⁷² *Moli Wards Chiefs Council Ordinance 2010* cl 4(1).

¹⁷³ *Moli Wards Chiefs Council Ordinance 2010* cl 4(2)(a) and (b).

¹⁷⁴ *Moli Wards Chiefs Council Ordinance 2010* cl 4(3).

¹⁷⁵ *Moli Wards Chiefs Council Ordinance 2010* cl 6(1).

¹⁷⁶ *Moli Wards Chiefs Council Ordinance 2010* cl 7.

¹⁷⁷ *Moli Wards Chiefs Council Ordinance 2010* cl 19 and 20.

¹⁷⁸ *Moli Wards Chiefs Council Ordinance 2010* cls 19.

¹⁷⁹ *Moli Wards Chiefs Council Ordinance 2010* cl 19(3) and (4).

¹⁸⁰ *Moli Wards Chiefs Council Ordinance 2010* cl 19(2).

¹⁸¹ *Moli Wards Chiefs Council Ordinance 2010* cl 20.

¹⁸² *Moli Wards Chiefs Council Ordinance 2010* cl 21.

¹⁸³ *Moli Wards Chiefs Council Ordinance 2010* cl 21(2).

There is a right of appeal to the Local Court within 20 days of the date of the decision.¹⁸⁴

¹⁸⁴ *Moli Wards Chiefs Council Ordinance 2010* cl 22..

III. Other variable (1)

1. Indigenous Law

In Solomon Islands, 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.¹⁸⁵ While local practices may differ from place to place, they are also part of an interwoven network which links different communities within Solomon Islands broader society.

Custom and customary law have undoubtedly been influenced by the state. The extent of this influence differs from place to place, depending on a number of factors. An example of this is the tendency of chiefs in some areas to form a chiefs' 'committee' or 'council', governed by a written constitution.¹⁸⁶

Social and economic changes have had a profound impact on Solomon Island's society. Just over 80% of the population live in rural areas.¹⁸⁷ However, 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.¹⁸⁸ The extent of family or individual ownership of customary land seems to be increasing in some areas of the country. However, this impression may be partly due to Chiefs and leaders representing rights of control as rights of individual ownership.

2. State Law

3. Other legal systems

¹⁸⁵ This information was supplied by John Lynch and Robert Early, University of the South Pacific.

¹⁸⁶ Personal knowledge.

¹⁸⁷ Solomon Islands National Statistics Office, *Key Social Indicators (Census 2009)*, <http://www.spc.int/prism/solomons/index.php/social>, accessed 27 April 2015.


¹⁸⁸ See further Ron Crocombe and Malama Meleisea (eds), *Land Issues in the Pacific*, 1994, Institute for Pacific Studies: Suva, Ch 1

IX. Comments

The structure of this report seems to assume that systems function independently. This is not the case in Solomon Islands, where the three systems, indigenous, state and church are inter-related. Further dispute resolution practices do not operate in a vacuum, but are part of a more homogenous approach to customary governance.

ANNEXES

I. Annex A: Diagram of the presentation

THEME: Justice					
SOUTH PACIFIC: SOLOMON ISLANDS					
		Step 1: How does legal pluralism manifest itself in the case study?			
VARIABLES	QUESTIONS	INDIGENOUS LAW	STATE LAW	OTHER LAW	COMMENTS
<p>Values/beliefs</p> <div style="text-align: center; margin: 10px 0;">  </div> <p>Principles</p>	<p>What values are at work? (ex. <i>solidarity, harmony, responsibility</i> etc.)</p>	<ul style="list-style-type: none"> • Diversity of values and beliefs • Status based • Communitarian • Direct action • Patriarchal • Ancestral trust over land 	<ul style="list-style-type: none"> • Individual rights eg to fair trial • Pride in heritage and custom • Natural resources vested in Solomon Islanders • Egalitarian • State control 	<p>Church Laws:</p> <ul style="list-style-type: none"> • Christian values • Forgiveness • Reconciliation • Autonomy <p>Hybrid Laws:</p> <p>Local Courts - a mixture of indigenous and State values</p> <p>Moli Ward Chiefs Council –</p>	

<p style="text-align: center;">↕</p> <p style="text-align: center;">Rules</p> <p style="text-align: center;">↕</p> <p style="text-align: center;">Process, rituals, ceremonies/ Actors</p> <p style="text-align: center;">↕</p>	<p>Which principles embody these values? (ex. <i>good faith, reconciliation, sharing, reparation</i> etc.)</p>	<ul style="list-style-type: none"> • Holistic approach • Not limited to parties • Reconciliation • Maintenance of village harmony • Seniority in decision making 	<ul style="list-style-type: none"> • Dealing justly • Timely resolution • Limitation of cost • Customary law to be applied if consistent with the Constitution and legislation 	<p>Church</p> <ul style="list-style-type: none"> • Forgiveness • Reconciliation <p>Hybrid Laws:</p> <p>Local Courts –</p> <ul style="list-style-type: none"> • Knowledge of <i>tambu</i> • Places and genealogy <p>Moli Ward Chiefs Council</p>	
	<p>What rules apply these principles? (ex. <i>duty to share the hunt, duty to honour a commitment, duty to compensate</i> etc.)</p>	<ul style="list-style-type: none"> • Seniority in decision making determined by birth and contribution to the community, with specific rules as to priority • Penalties depend on all circumstances of case, including payback and banishment 	<ul style="list-style-type: none"> • Fixed rules of procedure • Fixed rules of evidence • Fixed penalties 	<p>Church</p> <ul style="list-style-type: none"> • Rules not investigated <p>Hybrid Laws:</p> <p>Local Courts –</p> <ul style="list-style-type: none"> • Customary rules apply subject to State legislation <p>Moli Ward Chiefs Council –</p>	

	<p>- How is the law created? (ex. <i>custom, consensus, majoritarian decision-making, central authority, natural law, sacred law</i> etc.)</p>	<ul style="list-style-type: none"> • Customary Laws developed within each small community • Seniority of leadership but some consultation 	<ul style="list-style-type: none"> • Legislation • Court Rules • Common Law 	<p>Church</p> <ul style="list-style-type: none"> • Church authorities <p>No detailed investigation</p> <p>Hybrid Laws:</p> <p>Local Courts –</p> <ul style="list-style-type: none"> • Legislative framework but applying customary rules developed within community <p>Moli Ward Chiefs</p>	
	<p>- Who interprets the law? (<i>Elders, judges, ad hoc processes</i> etc.)</p>	<ul style="list-style-type: none"> • Chiefs and ‘traditional’ leaders 	<ul style="list-style-type: none"> • Judges • Assessors • Magistrates • Local Court Justices • Barristers & Solicitors 	<p>Church</p> <ul style="list-style-type: none"> • Church authorities • Local church committees <p>Hybrid Laws:</p> <p>Local Courts –</p> <ul style="list-style-type: none"> • Local Court Justices <p>Moli Ward Chiefs</p> <p>Council –</p> <ul style="list-style-type: none"> • Council 	

	<p>- How is the law implemented? (ex. <i>group pressure, institutionalized constraint etc.</i>)</p>	<p>Community pressure or force</p>	<p>State enforcement mechanisms</p>	<p>Church</p> <ul style="list-style-type: none"> • Church authorities • Local church committees <p>Hybrid Laws:</p> <p>Local Courts –</p> <p>State enforcement mechanisms</p>	
		<ul style="list-style-type: none"> • Variation of beliefs, principles and rules from island to island and village to village. • Extent of influence of State and Church on indigenous communities • Social and economic changes 			<p>Structure of report seems to assume that systems function independently. This is not the case in Solomon Islands where three systems: Indigenous; State; and Church are inter-related and have produced hybrids (see ‘Other Legal Systems’)</p>

II. Annex B: Significant extracts from the collected data

Case Note

Loumia v DPP [1984] SILR 51

The defendant, from the remote Kwaio region, admitted killing members of a rival customary group, but argued that he was only guilty of manslaughter, on the basis of provocation. At the time of the killing, the defendant had just seen one brother killed and the other seriously wounded in the same fight. It was argued that the defendant had been provoked and that he came within s 204 of the Penal Code (Cap 26), which reduced the offence of murder to manslaughter if, inter alia, the offender ‘acted in the belief in good faith and on reasonable grounds, that he was under a legal duty to cause the death or do the act which he did’. Evidence was adduced from a local chief that Kwaio custom dictated the killing of a person who was responsible for the death of a close relative. As customary laws were constitutionally recognised as part of the formal law of Solomon Islands, it was argued that s 204 included a ‘legal duty’ in custom. More pertinently to the current discussion, counsel for the appellant argued that s 4 of the Constitution, which protects the right to life, and most of the other fundamental rights provisions did not apply to relationships between private persons but only between the State and private persons. The Court of Appeal upheld the defendant’s conviction for murder. Extracts from Constitution of Solomon Islands

Section 10(2):

Every person who is charged with a criminal offence -

(a) shall be presumed to be innocent until he is proved or has pleaded guilty;

(b) shall be informed as soon as reasonably practicable, in detail and in a language that he understands, of the nature of the offence charged;

(c) shall be given adequate time and facilities for the preparation of his defence;

(d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice;

(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and, except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

Extracts from 2nd Draft Federal Constitution of Solomon Islands 2014

Section 38:

Access to courts or tribunals

(1) Everyone has the right to have any dispute that can be resolved by application of law decided within a reasonable time in a fair public hearing before a court or, if appropriate, another independent and impartial tribunal.

- (2) *In any civil, criminal or other matter before a court, everyone has the right to justice that is timely and not excessively expensive or distant.*
- (3) *The Federal Government, through legislation and other measures, must provide for legal aid for those who cannot afford to pursue justice on the strength of their own resources, if injustice would otherwise result.*
- (4) *If any fee is required to access a court or tribunal, it must be reasonable and must not impede access to justice.*
- (5) *In any proceedings, evidence obtained in a manner that infringes any right in this Chapter, or any other law, must be excluded unless the interests of justice require it to be admitted.*

Section 39:

Rights of arrested and detained persons, and prisoners

- (1) *An arrested person has the right—*
- (a) *to be informed promptly, in language that the person understands, of—*
 - (i) *the reason for the arrest;*
 - (ii) *the right to remain silent, and the right to consult a legal practitioner; and*
 - (iii) *the consequences of not remaining silent;*
 - (b) *to remain silent;*
 - (c) *to communicate with a family member, legal practitioner, and with other persons whose assistance is necessary;*
 - (d) *not to be compelled to make any confession or admission that could be used in evidence against the person;*
 - (e) *to be held separately from persons who are serving a sentence;*
 - (f) *to be brought before a court as soon as reasonably practicable, but in any case—*
 - (i) *not later than 48 hours after being arrested; or*
 - (ii) *not later than the end of the next court day immediately following the arrest, if the 48 hours would end outside ordinary court hours, or on a day that is not an ordinary court day;*
 - (g) *at the first court appearance, to be charged or informed of the reasons for the detention to continue, or to be released; and*
 - (h) *to be released on reasonable terms and conditions, pending a charge or trial, unless there are compelling reasons for the person not to be released.*
- (2) *Whenever this section requires information to be given to a person, that information must be given simply and clearly in a language that the person understands.*
- (3) *A person who is deprived of liberty, by being detained, held in custody or imprisoned under any law, retains all the rights and freedoms set out in this Chapter except to the extent that any particular right or freedom is clearly incompatible with the fact of being so deprived of liberty.*

Extracts from Ben Burt and Michael Kwaiioloa, *The Tradition of Land in Kwara'ae* (Institute of Pacific Studies, USP, 1992)

6 – Seniority

The man who was leader for something important, because he had discovered land or planted trees or set up anything else, his family and his relatives by birth must share in those things. Then all their line and other descendants born of them must share in these things after them, from generation to generation, as long as these things remained. This was because they were all born of one blood. But the

leader was senior amongst them and after the leader some people were senior to others. When the leader went away or had died, then the people who were senior among the group who remained then replaced that leader and it was they who then took leadership for the land or trees or anything else.

The basis for some people being senior to others was this:

- a) Their relationship to the leader by birth or marriage
- b) Their lives and if they helped their relatives and neighbours.

7 – Seniority by Birth and Marriage

The rules about who had seniority for something after the leader, because of birth or marriage, came from several important ideas, like this:

- a) The brothers of the leader who were born with him from one father and mother, and the children of the leader who were born of him, these people were senior to any other relatives. For example: the children who were born of the leader were senior to the children who were born of the brothers of this leader.
- b) The children of the leader who were born first were senior to their younger brothers who were also born of this leader. For example: an elder brother was senior to his younger brothers and the children and grandchildren of the elder brother were senior to the children and grandchildren of the younger brother, from generation to generation. Even though the children of the younger brother were born first, the children of his elder brother who were born after them were senior to them.
- c) The male relatives of the leader were senior to his female relatives, and children born of his male relatives were senior to children born of his female relatives. For example: brothers of the leader were senior to his sisters; sons of the leader were senior to his daughters; relatives who were born with the leader through male ancestors were senior to his cousins who were born with him through women; line descendants of the leader were senior among all his descendants.
- d) If several people were born of the leader in the same way, the person who came from a generation after the others was senior to any people who came from a generation before him, because that man was born closer to the leader. For example, a person who was born of the line of the leader, and came from the same ancestor five generations before the present, was senior to a person who was born of the line ten generations before the present.
- e) Relatives of the leader who were related to him by blood were senior to people who were related to him just by marriage. For example, people who were born of a woman of the leader, or born of any of his relatives, whether through men or women, must be senior to the wife of the leader and his in-laws.
- f) People related to the leader, whether by birth or by marriage, or because they were his adopted or purchased children, were senior to any other people who were strangers to the land. For example in-laws of the leader were senior to a stranger who just arrived for no reason.

8 – Leadership of the Clan

The rules about who had seniority meant that the people who replaced the leader who first discovered land or planted trees or set up anything should be his descendants who were born from him, every one, whether they were descended on the male or female side. This was the group of people who were the clan of that leader and they were leaders for his land or trees or anything else after him. But the people who were senior among this clan should be his descendants who were born from him through the male line, from generation to generation. The person who was senior among these line descendants was called the leader of the clan or the head of the clan. It was this leader who spoke about things on behalf of his clan. But he could not decide by himself because he was just part of his clan.

11- Seniority by the way a person lived

When the leader for land or trees or anything else had died, usually it was the senior son born of him who replaced his father as leader for these things, as he was senior to all his relatives. Usually he stayed with his father, even though his brothers had gone away to live somewhere else. But even though a man was senior by birth, he must show that he was also suitable for leadership. So while the senior son was still a child, his father began to guide and teach him about their land and the important things on the land and he instructed him about leadership for land. If the man didn't listen to his father's teaching, or if he was self-willed about doing things in his own way, or he made trouble for his family, his relatives might not respect him as a leader. If the man listened to his father and was sure about the things his father taught him, then he was suitable to replace him for the leadership.

12 – Knowledge suitable for Leadership for Land

The things which a man suitable for leadership must know were these:

- a) How their ghost long ago came from another place and discovered in the land, and what was the genealogy beginning at that time and going on to his descendants at the present day.*
- b) Where were the village sites where the ghosts lived and the tabu places where they were buried and the shrines where their line and other descendants worshipped the ghosts.*
- c) Where was the boundary around the land and where were the pieces of land inside it.*

The wisdom of this knowledge showed that the man was senior for the land and he was suitable to take leadership for it, but if he was ignorant his fathers and elder brothers had to advise him.

Analysis of Chiefly Structures from fieldwork extracts from Allen (pp36-39)

Isabel province

The chiefly system in Isabel province is relatively formalized and institutionalized. In 1975, the people of Isabel began establishing a system of chiefs and houses of chiefs across the province. The Isabel Council of Chiefs (ICC) is led by a paramount chief. In 1984, the Isabel Provincial Assembly passed a resolution recognizing the ICC and its role and power to deal with matters of "tradition and custom." Under the resolution, the power of chiefs was extended to settling disputes in customary law; "taking an active involvement in the setting of land boundaries and the settlement of land disputes"; and improving "documentation of custom and decisions for preservation purposes and to avoid future disputes."

The ICC draws its membership from eight district houses of chiefs, whose geographic jurisdiction is defined by the eight language groups that were used by the colonial administration to divide Isabel province into administrative districts. Below this are ward-level chiefs. There are 16 wards in Isabel, and each has at least one ward-level house of chiefs, though some have two or three. The ICC and district houses of chiefs all have written constitutions ... and observe a high degree of formality in their meetings. While village chiefs are not necessarily inherited roles, ward- and district level chiefs attain their position in large part through their membership in a widely recognized chiefly line of descent. Such chiefs are generally the son of the eldest daughter from the chiefly line, and will generally choose one of their sisters' sons as their successor, although in some instances, they may choose their own son. The Isabel Provincial Administration provides funding to the ICC and the various houses of chiefs, the only province encountered during the research to do so. According to the Isabel province Provincial Secretary, in 2011, the ICC received SBD\$36,000, the eight district houses of chiefs received SBD\$3,000 each, while various ward-level houses of chiefs received a total of SBD\$16,000 (that is, SBD\$1,000 each). According to the Provincial Treasurer, the same amounts had been budgeted in 2012.

Malaita province

The colonial government's institutionalization of "chiefs" as "traditional leaders" was continued by Malaitans through the Maasina Rule movement... This movement dominated social and political life on Malaita from the mid-1940s until the early 1950s, and its activities included the establishment of a island-wide system of chiefs, customary courts, and councils. A hierarchy of councils from the district to village level was established, headed by a "Federal Council." The influence of the Maasina Rule period endures today.

While forms of chiefly organization vary across Malaita province, in most places it is comprised of male "clan chiefs" who hold genealogical seniority within the clan, and "tribal" or "paramount chiefs," who are usually the chiefs of the historically senior clans within Malaita's regional traditional ritual systems, which are variously referred to as "houses," "panels," or "councils" of chiefs. While many contemporary leaders claim genealogical seniority, many also advance their status by distributing and sharing wealth, contributing to bride price and compensation payments, and using their education to assist relatives in dealing with government bureaucracy. As on Isabel province, many communities also have "village chiefs" who are elected or appointed by their communities and have functions distinct from the clan or tribal chiefs, as described above.

Western province

Typically at the village level in Western province, there is a single chief (bangara in many of the local languages, but also lala'aha, palabatu, uiniame, and lekasa), who is from a chiefly line from the major tribe in the area. Such chiefs may have responsibility for one or several villages. Under the leadership of the bangara, there are tribal elders who head subtribes within the region. Chiefs' spokesmen and village organizers are principally appointed from among tribal elders to help the bangara manage village affairs. In some areas, the bangara and tribal elders form the governing body at the village level known as the "council of elders," "chiefs committee," or "village committee."

The position of village organizer has existed in Western province since the 1980s. Today, the role of the village organizer includes acting as a liaison between communities and the provincial government, a feature of which is assisting in the collection of business license fees. There are 53 village organizers on the Western province payroll. All three actors—chief, village spokesman, and village organizer—may play a role in relation to dispute management. Owing to the absence of chiefs in many villages in Western province, village spokesmen often end up acting in their stead. (During the research, chiefs were present in only two out of 13 communities visited in Western province, the remainder apparently residing in Honiara or elsewhere.) At the constituency level are councils of chiefs that generally take the form described above. For example, there are functioning councils of chiefs in Marovo and Kolombangara. Like the other council of chiefs discussed, they deal predominantly with customary land-related disputes.

Renbel province

In traditional Renbel society, there was no organizational structure bringing together a collective of chiefs. The Polynesian societies of Rennell and Bellona had individual hereditary tribal chiefs who were responsible for their own tribal groups.

As elsewhere, this changed with the colonial government's system of indirect rule, under which the government selected headmen with exclusive responsibility to administer justice, including the establishment of courts comprised of tribal chiefs. According to the present chairman of the west Rennell Council of Chiefs, in the lead-up to independence, the representative of Renbel in the

Legislative Assembly worked with Renbel chiefs to establish councils of chiefs. The councils, which had one representative from each tribe, were presided over by a paramount chief elected by consensus. The role of the councils was to make common rules that tribal chiefs enforced, and also to mediate conflicts, mainly over land.

The contemporary chiefly system of Renbel province is the least institutionalized of those documented and was observed to be extremely weak. Following the 1985 amendment to the Local Courts Act, the councils became preoccupied with customary land related disputes and were said to have abandoned their broader community governance and maintenance of order roles. Today, the only council of chiefs that is functioning across the province, albeit sporadically, is the West Rennell Council of Chiefs. According to the secretary of the council, its last sitting was in 2010 and involved the hearing of two customary land-related disputes. Parties paid a SBD\$250 “court fee.” At the time of the research, roughly one year after the 2010 hearing, decisions had not yet been handed down. A host of negative comments about the council were expressed during the research, the most common being accusations of bias. It was said that the breakdown of similar councils in Bellona and east Rennell was linked to community distrust and illegitimacy.

Guadalcanal province

All tribes and clans on Guadalcanal are members of the two original clans on the island referred to locally as “big line” and “small line.” Under these two lines there are various sub lineages that are held together by claims to common land ownership. Sub lineages have chiefs (who can be equated with tribal chiefs in the present discussion) responsible for land-related matters and relationships with other sub lineages. At the village level, however, men who demonstrate leadership qualities are appointed chiefs and are referred to as taovia (leaders). Their role is to look after the day-to-day affairs of people, and their jurisdiction is limited to their village of residence. Today, chiefly authority has become closely associated with control over land, particularly as a “trustee” of registered land on behalf of a landholding group (Monson 2011). The most formalized and institutionalized chiefly structures that were encountered during the research on Guadalcanal province were on the plains in the Northeast, and were apparently associated with the development of the oil palm plantation.

III. Annex C: Selective bibliography

A. Books

- Brown, Kenneth, *Reconciling Customary Law and Received Law in Melanesia: the Post-Independence Experience in Solomon Islands and Vanuatu* (Charles Darwin University Press, 2005)
- Burt, Ben and Michael Kwaiioloa, *The Tradition of Land in Kwara’ae* (Institute of Pacific Studies, USP, 1992)
- Corrin, Jennifer and Don Paterson, *Introduction to South Pacific Law* (Palgrave Macmillan, 3rd ed, 2011)
- Dinnen, Sinclair, Anita Jowitt, and Tess Newton (eds), *A Kind of Mending: Restorative Justice in the Pacific Islands*, 2003, ANU, Pandanus Books : Canberra Forsyth, Miranda, *A Bird That Flies With Two Wings: Kastom and state justice systems in Vanuatu* (ANU E Press, 2009)
- Roberts-Wray, Kenneth, *Commonwealth and Colonial Law* (Stevens & Sons, 1966)
- Sage, Caroline, Brian Tamanaha, and Michael Woolcock (ed), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, 2012)
- Waitotora, Chief George, *Are-Are Customary Law* (Kenilorea, 1981)

B. Articles/Reports

- Corrin Care, 'Sources of Law in the Constitution of Vanuatu' (1985) 1 *Queensland Institute of Technology Law Journal* 225
- Corrin, Jennifer, 'Bedrock and Steel Blues: A Study of Legal Pluralism in Vanuatu' (1998) 24 *Commonwealth Law Bulletin* 594
- Corrin, Jennifer, 'Breaking the Mould: Constitutional Review in Solomon Islands' (2007) 13 *Revue Juridique Polynesienne* 143.
- Corrin, Jennifer, 'From Horizontal and Vertical to Lateral: Extending the Effect of Human Rights in Post Colonial Legal Systems of the South Pacific' (2009) 58 *International and Comparative Law Quarterly* 31-71
- Corrin, Jennifer, 'Moving Beyond the Hierarchical Approach to Legal Pluralism in the South Pacific' (2010) 3-4 *Journal of Legal Pluralism and Unofficial Law* 29
- Corrin, Jennifer, 'Wisdom and Worthy Customs: The Role and Operation of Customary Law in the South Pacific' (2002) 80 *Reform* 31
- Craig Forrest, J Jennifer Corrin, 'Legal Pluralism in the Pacific: Solomon Island's World War II Heritage' (2013) 20 (1) *International Journal of Cultural Property* 1-21
- Hogbin, H. Ian, 'Native Councils and Native Courts in the Solomon Islands' (1944) 14(4) *Oceania* 257
- Laracy, Hugh and Eugénie Laracy, 'Custom, Conjuality and Colonial Rule in the Solomon Islands' (1980) 51(2) *Oceania* 133
- New Zealand Law Commission, *Converging Currents: Custom and Human Rights in the Pacific*, Study Paper No 17 (2006).
- Porter, D, Deborah Isser, Phillippa veebning, *Towards More Effective and Legitimate Insitutions to Handle Problems of Justice in Solomo Islands*, Policy Note, March 2015, World Bank J4P
- Tiffany, Sharon, W, 'Customary Land Disputes, Courts, and African Models in the Solomon Islands' (1983) 53(3) *Oceania* 277
- Weisbrot, David, 'Custom, Pluralism, and Realism in Vanuatu: Legal Development and the Role of Customary Law' (1989) 13 *Pacific Studies* 65
- World Bank J4P, 'Legal Pluralism and Development Policy Workshop' April 2010: <http://Web.Worldbank.Org/Wbsite/External/Topics/Extlawjustice/0,,Contentmdk:22604241~MenuPk:445676~Pagepk:64020865~Pipk:51164185~Thesitepk:445634,00.html>.
- Zorn, J and J Corrin, 'Legislative Pluralism: Statutory Developments in Melanesian Customary Law' (2001) 46 *Journal of Legal Pluralism* 49

C. Chapters

- Corrin, Jennifer 'Protection Des Ressources Naturelles Aux Îles Salomon' in Carine David and Nadège Meyer (ed), *L'intégration De La Coutume Dans L'élaboration De La Norme Environnementale* (Bruylant, Paris 2012) 455-478
- J Corrin, 'Customary Land In Solomon Islands: A Victim of Legal Pluralism' in Anthony Angelo and Yves-Louis Sage (ed), *Droit Foncier et Gouvernance Judiciaire Dans Le Pacifique: Land Law and Governance in the South Pacific*. (Revue Juridique Polynesienne, Wellington, New Zealand 2011) 361-376

D. Treaties and Declarations

- *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly 13 September 2007

IV. Annex D: Data collection tools

Data Collection Tools employed were:

- Internet searches and in particular:
 - www.pacii.org
 - <http://www.pso.gov.sb/index.php/lalsu>
 - <http://www.parliament.gov.sb/>
- Perusal of hard copies of materials in libraries, archives and the Investigator's own collection.
- Notes from previous research in Solomon Islands.

V. Annex E: Additional data

ANSWERS FROM PROFESSOR JENNIFER CORRIN TO QUESTIONS FOR INTEGRATION REPORT

Question 1: Some of your sources are not clearly identified. For example, you refer to « Informal interviews conducted by the investigator in 2008...and other anthropological data from a particular geographical area in the Western region of the Solomon Islands. » (p. 9). Could specify the kind of data collected, the number of interviews and who was interviewed?

Response 1: I have not conducted any formal interviews for this research project, and I do not have ethical clearance for such work. The example you refer to consisted of INFORMAL interviews: while presenting a workshop in the Western region of Solomon Islands in 2008, I took the opportunity to discuss several matters with the traditional leaders assembled. I do not have permission to attribute this information to individuals, which is why I have referenced it in this way. Please let me know if you would like it referenced in a different way.

Question 2: How do you reconcile the objectives of reconciliation, harmony, rehabilitation and collective responsibility with sometimes harsh individual punitive measures? Would it be correct to state that customary justice has both a restorative and a punitive dimension? If so, which dimension, if any, generally prevails? And what data supports your conclusion?

Response 2: Yes, it would be correct to state that customary justice has both a restorative and a punitive dimension. However, it is difficult to say which prevails, as this depends on all the circumstances of the individual case. However, generally, the restorative dimension may be said to prevail as the extent of punishment will depend on what penalty will satisfy the aggrieved persons and the community's sense of what is just, and that is how the two objectives are reconciled. This is something that I am intending to explore in Stage 2. My conclusion is supported by the conclusions (based on empirical work) of Matthew Allen et al, in *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 40 and by Sinclair Dinnen, "'Traditional' Justice Systems in the Pacific, Indonesia and Timor-Leste' paper commissioned by UNICEF Papua New Guinea for the 2009 Justice for Children in the Pacific, Indonesia and Timor-Leste, EAPRO Sub-Regional Workshop, April 2009, 5.

Question 3: Specific examples of real cases would help us to understand how customary justice is delivered.

Response 3: Please see some examples in 'Attachment 1 – page 53'.

Question 4: What is Tambu?

Response 4: It means ‘forbidden’ or ‘tabu’; in French, ‘interdit’.

Question 5: How are heredity and leadership suitability balanced in practice in ascribing dispute settlement authority?

Response 5: There is no single answer to this, as it depends on the region of Solomon Islands in question. However, hereditary leaders will, generally, only be displaced if they are clearly unfit. In many areas there is a Paramount Chief, elected from and by the hereditary chiefs. In Malaita and Isabel Provinces, and some parts of Guadalcanal and Western Province, there is a distinction between village chiefs and tribal chiefs. The former are appointed; the latter are hereditary. Village chiefs may deal with non-customary disputes; whereas tribal chiefs deal with customary disputes.

Question 6: What is the exact role played by local religious bodies in dispute settlement? Could you give an example?

Response 6: Again, there is no single answer to this as it depends on the region of Solomon Islands in question. In many areas, the resident priest or minister will be asked for or offer advice in the event of a dispute. This happens most commonly in family disputes. I have further information on this from Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, which I was intending to use in Stage 2. I attach an example as ‘Attachment 2 – page 55’.

Question 7: You provide little detail about the values, principles and rules of state law. Will you be willing to send the integration group with more precise data if needed?

Response 7: Certainly! The values and principles can be found mainly in the Constitution, legislation and court decisions. Rules can be found in legislation, court decisions and Solomon Islands Courts (Civil Procedure) Rules 2007. NB I am hoping that the latest edition of my book on South Pacific Courts and Civil Procedure will be published by the time of the meeting in Montreal.

Attachment 1

Example 1: Successful Resolution of Fraternal Dispute

‘An individual was drinking alcohol late into the night, disturbing the community. His elder brother asked him to refrain from making noise. An argument ensued, leading to a physical altercation in which the elder brother was injured. He reported the case to the police officer located at Kia the next morning. The officer conducted an investigation and concluded that the problem was a family one and was best resolved through kastom. The complainant agreed and the officer referred the matter to a village chief. The village chief conducted a short hearing and ordered the offender to pay the appropriate compensation rate to the elder brother. The younger brother paid the compensation and the matter was considered settled.’

Source: Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 67

Example 2: Unsuccessful Attempt at Dispute

In September 1994 two women got into an argument about the killing of a dog and an area of land where potato vines were growing. The members of the village chiefs’ committee went to the home of a man who had an interest in the land, with a view to settling that dispute, after having asked the man’s permission to do so. Not long after the chiefs entered the man’s home the man became angry and aggressively shouted offensive language at the members of the chiefs committee, telling them to leave or he would make them “pee.” The man also told the members of the chiefs committee that if anyone removed the pegs on the land he would make him “pee” as well. One of the members of the chiefs committee rebuked the man and told him that what he did was a very serious matter in custom, particularly, where the insult was directed at the elders of the community. The village elders then left, returning to their village.

The next day the man sent an apology to the elders for what he did to them through a third party. The third party he tried to help settle the matter by passing the man’s apology to the elders. The elders were not happy with the manner in which the applicant apologised to them as it was not done in the proper customary manner in accordance with the custom of the Alum people. The man then tried to settle the dispute with the chiefs through the Area Constable, who wrote to the chief’s committee asking them to accept the applicant’s offer of compensation. The chief’s committee refused to accept the Area Constable’s letter on the basis that the applicant must properly settle the matter in accordance with custom directly with the chiefs and not through the Area Constable. The man then tried to settle the matter through his solicitor who wrote to the chiefs asking them to reconsider their decision banning the applicant from entering Koliae Village. The chiefs did not reply to the letter written by the solicitor and

maintained that they had not banned the applicant from entering Koliae Village. The man then made an application to the High Court for breach of his right to freedom of movement.

Source: *Pusi v Leni* (Unreported, High Court, Solomon Islands, Muria CJ, 14 February 1997)

Attachment 2

Example 1: Marital Counseling by the Mothers Union of the Church of Melanesian, Isabel Province

‘A married woman in Isabel province discovered that her husband had an “O2,” with whom he had had a baby. The woman’s uncle encouraged her not to make the problem “too big,” but subsequently, the man had another affair and the couple fought on a regular basis. Upon learning of the couple’s problems, the leader of the local Mother’s Union group requested that the woman visit her. The woman explained that she had caught her husband at the other woman’s house and had sworn at and hit the woman. She wanted to separate from her husband, as they continued to argue all the time.

The leader of the Mother’s Union told the woman that,...the only way to resolve this is to show love. Not just with your body. Call him with a soft voice, hug him, slowly he will realize he is wrong. But if you are cross, if you swear, the problem won’t be solved. So from now until next week, try this, and look at the outcome.

According to the leader of the Mother’s Union, the wife followed the instructions and found that she and her husband argued less. She also said that her husband admitted all that he had done, and apologized. The leader of the Mother’s Union advised the wife to take the man’s mobile phone from him so that he could not remain in contact with the other woman. According to the leader, the couple has reunited and is now happy together. The leader also met with the husband, and they discussed a number of issues, including his alcohol consumption. She counseled him in relation to trust, and explained that because of their history, his wife struggles to trust him. She advised him to stop drinking, and work hard to regain his wife’s trust.’

Source: Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 65

Example 2: Adultery Case, Church of Melanesia, Isabel Province

‘A recently married couple visited the Church of Melanesia priest in Buala village, Isabel province, concerning a marital problem: the husband had been having an affair. According to the priest, the couple chose to use the church as a means of resolving their problem because they wanted the matter to be dealt with in a private manner. Generally, kastom chiefs’ hearings are public events. Similarly, once a matter is reported to police it quickly becomes public knowledge. A complicating feature of the case was that the husband had had an affair with a married woman. The priest advised the young couple to pray together for forgiveness; he then referred the kastom settlement (involving compensation) to village chiefs with a specific request that the chiefs keep the matter private. On this basis, the husband paid

compensation to the spouse of the woman with whom he was having an affair. The woman involved also paid compensation to the man's wife. Accordingly, the matter was said to have been settled using complementary church and kastom procedures.'

Source: Matthew Allen et al, *Justice Delivered Locally: Systems, Challenges and Innovations in Solomon Islands*, 2013, World Bank: Washington DC, 66.