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Second Integration Report: What are the Interactions between Indigenous and State Legal Systems and how are Such Interactions Managed?

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

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THE RESEARCH PARTNERSHIP

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 models of interaction between western state law and indigenous law that are potentially more legitimate and effective. 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, (2) insure 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 second report shall contain the data that will answer the following question: *What are the interactions between the indigenous and state legal systems and how are such interactions managed in the regions studied?*

After receiving the reports from regional groups, the Integrator Group will conduct a comparative synthesis and propose a mapping of legal pluralism management in an overall integration report. A draft report will be shared and discussed with researchers and partners whose input will be key for the completion of the final overall integration report.

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PART I: OVERVIEW OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS

I. General description and characterisation of relationship between Legal Systems

Describe in general the current state of interactions between the legal systems.

How would you describe the current relational dynamic that characterises the relationship between the legal orders? (Example: hierarchical, egalitarian, vertical, horizontal, etc.) Illustrate your analysis with several examples.

In theory, the relationship between the Indigenous legal system and the State legal system is hierarchical. The relationship is also often portrayed as dual, with the State system competing with the customary system. However, in reality, the relationship is far more complex. At one end of the spectrum, disputes may be dealt with in the three-tier hierarchy of common law, State courts. In Solomon Islands. At the other end of the spectrum, disputes may be dealt with in a traditional forum at the village or community level. In between these two extremes, a third possibility exists where 'customary' courts have been set up by the State specifically to deal with customary disputes, purportedly in accordance with custom. There is also a fourth alternative, where statutory recognition has been given to traditional dispute resolution mechanisms, either with a view to integrate them into the State system.

There is a lack of coordination between the State courts, the 'customary' courts and the traditional forums. The patchwork of legislation and rules governing the State system and its interaction with the customary fora makes the systems difficult to negotiate. As discussed below, the lack of clarity and the resulting uncertainties have given rise to conflicting decisions. It has also encouraged re-litigation of disputes and prevented finality, particularly in relation to land. Although efforts have been made to accommodate customary decision makers in dispute resolution, this has not been a success. This has been due in part to lack of resources noted as long ago as 1988,[1] but the situation appears to have deteriorated further since then.

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

PART II: DETAILED PRESENTATION OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS IN TERMS OF VARIABLES

I. Actors/Stakeholders

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negotiation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processes observed with respect to specific actors.**

First, the High Court may sit with assessors, chosen from amongst people who live within ten miles of the court and who are able to speak English.[2] This results in interaction between the courts and indigenous leaders. However, the use of assessors is rare.

Second, interaction also occurs when Chiefs are used as decision makers by the State legal system. This happens in the Local Court. There is provision for Local Courts to take account of chiefs' decisions, or even to refer a dispute to the chiefs to decide. Local Court justices are also chosen from the local community. Further, in criminal proceedings the High Court may sit with assessors chosen from the local community.[3]

Third, interaction also occurs when cases are appealed from Local Courts to the common law courts and when litigants who are unsatisfied with a decision made in a traditional forum take their case to the state courts.

2. **Identify areas or situations in which no interaction takes place between principles. Provide as many examples as possible of such areas or situations with respect to specific actors.**

In cases instituted in the State legal system, where the court sits without assessors and where there is no indigenous parties or law involved, the case will be decided without the involvement of indigenous actors. Similarly, where a dispute is dealt with in the indigenous system there is no involvement of non-indigenous actors.

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific actors (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

First, where the interaction results from an appeal from the indigenous system to the State system, this may result in magistrates or judges having to grapple with unfamiliar concepts. An

[2] *Criminal Procedure Code* Cap 7, ss 242 and 260.
[3] *Criminal Procedure Code* Cap 7, ss 242 and 260.

example occurred in the High Court case of *To'ofilu v Oimae,*[4] where Palmer J acknowledged that Local Courts were better placed than the common law courts to deal with customary matters, observing that:

> *[T]he Local Court is far better placed than the Magistrates' Court or this Court to deal with such claims [as the repayment of bride price] in custom in that it is comprised of Court Justices who come from the same province and sometimes from the same areas, and are therefore familiar with the customary practices of the parties.*

As mentioned in 1., another example of interaction is where Chiefs sit to deal with a customary land dispute under the auspices of the Local Courts Act. That Act defines 'Chiefs' as meaning, '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'.[5] This is out of step with the local practice. There is doubt as to whether 'chiefs' still exist as a customary institution in some regions of Solomon Islands. Where they do, changes in customary society and practices have given rise to uncertainties as to the 'true' Chiefs.[6] In fact, 'Chief' is a generic term used commonly to refer to a range of traditional leaders. In some places, the word 'elder' is used instead of Chief.[7] Each local language has its own word for Chief and, in some areas, things are complicated by the fact that there are different types of Chiefs. If chiefly institutions no longer, or have never existed in an area, the default provision gives jurisdiction to traditional leaders, who may or may not have had power to adjudicate under customary laws.

An example of controversy over the identification of appropriate chiefs to determine a dispute is provided by *Lauringi v Lagwaeano Sawmilling and Logging Limited*.[8] In that case, the plaintiffs had been determined to be the customary 'landowners' by the Marodo Council of Chiefs and this decision had been confirmed by the Malaita Local Court. However, the defendants refused to accept the decision of the Local Court and challenged the jurisdiction of the Marodo Council of Chiefs on the basis that the members did not meet the definition of Chiefs in the area where the land was situated. The High Court, on the plaintiff's application for trespass, granted an interim injunction to restrain the defendants from continuing a logging operation on the land while the plaintiffs either took the 'issue of customary land right to a local tribunal or local court not objectionable to the defendants or to simply proceed with pleadings and ask for listing for trial'.[9]

Lauringi also illustrates how the question of the appropriate Chiefs can be used to divert a case from the 'customary' courts back into the common law hierarchy. In fact, the authority of the chiefs in the Marodo Council of Chiefs was no longer a live issue, as the defendants had refused to accept that decision and had exercised their right to take the matter to the Local Court, which had made its own decision. In a later interlocutory decision in the same case,[10] the same court reaffirmed the state's power to adjudicate in customary land disputes framed in trespass, stating that it was, 'now settled that the High Court has original jurisdiction to decide the question of

[4] [1997] SBHC 33.
[5] Local Courts Act Cap 19 s 11.
[6] On a visit to Marovo Lagoon in 2009 the author was asked what the definition of Chiefs was in the Act, as the Chiefs wanted to make sure they were doing things 'legally'.
[7] The *Provincial Government Act 1986* (SI) s 30, referred to both 'Chiefs and elders'.
[8] (Unreported, High Court, Solomon Islands, Lungolo-Awich J, 28 August 1997). See also *Muna v Holland and Attorney-General* (Unreported, High Court, Solomon Islands, Kabui J, 28 March 2002), available via www.paclii.org at [2002] SBHC 109.
[9] (Unreported, High Court, Solomon Islands, Lungolo-Awich J, 22 February 2000).
[10] *Lauringi v Lagwaeano Sawmilling and Logging Ltd* [1999] SBHC 93

interlocutory injunction order restraining trespass, conversion and other wrongs on or affecting customary land'.[11]

[11] *Lauringi v Lagwaeano Sawmilling and Logging Ltd* [1999] SBHC 93.

II. Processes (rituals, ceremonies, etc.)

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negotiation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processes observed with respect to specific processes.**

Generally, the two legal systems interact when a dispute is transferred from the Indigenous legal system to the State legal system, or vice versa. This occurs, for example:

(a) When a party takes a customary law dispute to the common law courts;
(b) When a party who are dissatisfied with the Chief's decision, relating to customary laws, take their case to the local court; and
(c) where cases come before State Courts which involve questions of customary land tenure, the court will remit the case to the local court. Whilst the local court is not an indigenous court, its processes are less stringent.

The systems also interact when actors in the Indigenous legal system contravene human rights. The process will then be for the victim to commence proceedings in the High Court for breach of the Bill of Rights in the Constitution.

Once disputes are taken into the common law system, the process is governed by adjectival laws, which serve to regulate both procedure and evidence. Until 2007, civil procedure in the High Court of Solomon Islands was governed by the Western Pacific High Court (Civil Procedure) Rules 1964, which at one time applied throughout the Western Pacific. Inferior court procedure was governed by the Magistrates' Courts (Civil Procedure) Rules 1969. Procedure in both courts is now governed by the Solomon Islands (Civil Procedure) Rules 2007. Criminal procedure is governed by the Criminal Procedure Code,[12] and evidence in both civil and criminal cases by the Evidence Act.[13]

2. **Identify areas or situations in which no interaction takes place between principles. Provide as many examples as possible of such areas or situations with respect to specific processes.**

[12] Cap 7.
[13] 2009.

In cases proceeding solely in the State Courts, disputes are decided in accordance with common law processes. The process is adversarial. In cases instituted solely in the indigenous system, the dispute will be determined in accordance with customary processes.

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific principles (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

The current arrangements do not attempt to vest dispute resolution jurisdiction exclusively in the State. To the contrary, jurisdiction regarding customary land is vested exclusively in traditional fora and the 'customary' courts. In the context of customary land disputes, the State Courts have more recently indicated that they intend to take a more receptive approach to traditional fora. In *Muna v Billey*,[14] Brown J held that the Chiefs' procedural powers were, 'unfettered by any consideration of concepts more suited to curial proceedings.'

A prime example of a negative effect of interaction can be seen in the confusing process that applies to customary land 'ownership' disputes. These disputes go first to the Chiefs, then to the Local Court, except in the case of disputes over timber rights under the *Forest Resources and Timber Utilisation Act,* which are decided by the Provincial Executive decision, where appeals go directly to the CLAC.[15] This means that there are two different avenues for dealing with customary land disputes, one determining customary land 'ownership', and the other the right to grant timber rights. The uncertain relationship between the two regimes was exposed by the recent case of *Majoria v Jino.*[16] In that case, it was pointed out that whilst it was clear that referral to the Chiefs was a prerequisite to lodging a claim with the Local Court, the status of any decision made by the Chiefs which had not been endorsed by a court was not specified by the legislation. After a decision regarding 'ownership' had been made by the Marovo Council of Chiefs, the unsuccessful party applied to the Customary Land Appeal Court, acting under the regime created by the Forest Resources and Timber Utilisation Act for a determination of timber rights. It was held by the High Court that as the Chiefs' decision was made under a different regime (i.e. the *Land and Titles Act* and the *Local Courts Act*) it was not binding on the Customary Land Appeal Court acting under the forestry legislation. The Court of Appeal reversed this decision on the basis that a party who disagreed with a decision of the Chiefs, but who declined to take advantage of the right to appeal to the local court must be considered to be bound by the decision.[17]

The decision in *Majoria v Jino* highlights the lack of coordination between the legislative regimes for determining disputes as to interests in customary land. The Court of Appeal, left to

[14] (Unreported, [2003] SBHC 9; cited with approval in *Choe Integrated Development Company Ltd v Maekera* [2012] SBCA 12 [9].
[15] *Cap 40* (SI) s 10(1).
[16] (Unreported, Court of Appeal, Solomon Islands, Lord Slynn of Hadley P, Adams JA, Salmon JA, 1 November 2007), available via www.paclii.org at [2007] SBCA 20.
[17] *Marjoria v Jino* (Unreported, Court of Appeal, Solomon Islands, Lord Slynn of Hadley P, Adams JA and Salmon JA, 1 November 2007), available via www.paclii.org at [2007] SBCA 20.

deal with the resulting conflict, accepted the need to accommodate the demands of legal pluralism. It stated that 'the key to understanding the scheme and applying it in a practical way is to recognise the important role assigned by the Parliament to the Chiefs and their decisions for the purpose of determining disputes of customary land'. However, it is arguable that the court did not grasp the subtleties of the customary land tenure system, assuming that the rights being determined under the *Local Courts Act* were identical to those being determined under the *Forest Resources and Timber Utilisation Act*. According to earlier case law, this assumption is clearly incorrect.[18] This now means that a party who has established 'ownership' through the local court process may challenge a subsequent determination of timber rights made in favour of another party under the forestry legislation, which is precisely what the forestry legislation was intended to prevent.

It is also relevant to note that the litigation between the parties to *Majoria v Jino*,[19] over the same area of customary land continued on in the High Court[20] and then the Court of Appeal.[21] Although the dispute was primarily about customary land, which the *Land and Titles Act* clearly states is to be governed by customary law,[22] the dispute was redirected into the common law arena.

In a different vein, the rules of procedure present particular difficulties if issues of customary law are involved.[23] These types of disputes do not always fit with adjectival laws, which have developed hand-in-hand with the common law. Even in cases involving indigenous customary laws, in the absence of legislative guidance, State courts apply technical rules of evidence and procedure. Customs and customary law are treated as matters of fact and are thus required to be proved. They therefore may be viewed as somewhat suppressed In *Allardyce Lumber Company Limited v Laore*[24] Ward CJ went as far as to say that, in the absence of guidance, the courts should perhaps not be applying customary laws at all.

The latest rules do not clarify the position regarding proof of customary laws. With regard to pleading, Rule 5.3(d) of *Solomon Islands (Civil Procedure) Rules 2007* states that if a party is relying on custom law, he or she must 'state the custom law.' This requirement ensures that the other party is informed of the indigenous customary law relied on, which is important given that

[18] See *Allardyce Lumber Company Ltd v Attorney General* (Unreported, High Court, Solomon Islands, Ward CJ, 18 August 1989), available via www.paclii.org at [1989] SBHC 1.
[19] (Unreported, Court of Appeal, Solomon Islands, Lord Slynn of Hadley P, Adams JA, Salmon JA, 1 November 2007), available via www.paclii.org at [2007] SBCA 20.
[20] See *Majoria v Jino* (Unreported, High Court, Solomon Islands, Faukona J, 16 May 2008), available via www.paclii.org at [2008] SBHC 54.
[21] See *Majoria v Jino* (Unreported, Court of Appeal, Solomon Islands, Goldsborough P, Williams JA, Hansen JA, 26 March 2009), available via www.paclii.org at [2009] SBCA 4.
[22] *Land and Titles Act Cap 133* (SI) s 239(1): 'The manner of holding, occupying, using, enjoying and disposing of customary land shall be in accordance with the current customary usage applicable thereto, and all questions relating thereto shall be determined accordingly'.
[23] See, eg, Warrant Establishing the Bauro Local Court LN61/1986 cls 3 and 5. See also Local Courts (Criminal Jurisdiction) Order.
[24] See, eg, Warrant Establishing the Bauro Local Court LN61/1986 cls 3 and 5. See also Local Courts (Criminal Jurisdiction) Order.

it is unwritten and that indigenous customary law is not one homogenous body of law, but differs from island to island and sometimes from village to village. The rules do not specify what happens to parties who fail to state 'custom law' and there is currently no case law on the operation of either rule. However, failure to comply with the rules is an irregularity and does not make a proceeding, document, step taken or order made, a nullity.[25] The court is then empowered to take appropriate steps in relation to the irregularity.[26]

Another example of the consequences of interaction is the emergence of hybrid dispute resolution processes have emerged as a consequence of the coexistence of the two legal systems. Two examples are:

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

As mentioned above, Local Courts may take into consideration the decisions of Chiefs[27] relating a case before them and may even refer a case to the chiefs for determination. The Local Courts Act states that, in determining disputes, the Local Courts may:[28]

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

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.[29] Such a decision then carries all the weight and legal enforceability of a decision made by the Local Court itself.[30]

Since 1985, further, more specific recognition, has been given to the role that chiefs play in resolving customary land disputes and it is now required that parties attempt to resolve customary disputes in this manner before attempting other forms of dispute resolution. This is one of the few regional forays into deep legal pluralism. Local Courts may only deal with a customary land disputes if:[31]

(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

[25] See, eg, Warrant Establishing the Bauro Local Court LN61/1986 cls 3 and 5. See also Local Courts (Criminal Jurisdiction) Order.
[26] See, eg, Warrant Establishing the Bauro Local Court LN61/1986 cls 3 and 5. See also Local Courts (Criminal Jurisdiction) Order.
[27] '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.
[28] *Local Courts Act* s 13.
[29] *Local Courts Act* s 14.
[30] *Local Courts Act* s 14(3).
[31] *Local Courts Act* Cap 19, s 12.

(c) no decision wholly acceptable to both parties has been made by the chiefs in connection with the dispute.

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, signed by two or more of the Chiefs to whom the dispute had been referred.

2. *Resolution of Disputes by the Moli Wards Chiefs Council*

The second hybrid process of dispute resolution is set up by the Moli Wards Chiefs Council Ordinance 2010. This Ordinance was passed by the provincial government,[32] rather than the national parliament. Rather than attempting to incorporate traditional dispute resolution into the State system, the Ordinance seeks to give recognition to the Moli Ward Chiefs, in respect of both its law making and dispute resolution power. The Ordinance set outs specific prohibitions and offences, including provisions designed to encourage sustainable harvesting of land resources,[33] and regulates the use of 'traditional practices or heritage'.[34]

The Chiefs Council is not a traditional institution. Its members are elected by secret ballot at a meeting presided over by the Provincial Member for Moli Ward,[35] who is a State official.[36] The executive consists of elected members and two Paramount Chiefs (one for each House of Chiefs).[37] It is unclear whether all Council members must be hereditary chiefs, but although this is not stated in the Ordinance, it would seem to be the intention. The Ordinance certainly recognises the authority of hereditary chiefly titles.[38] It endorsed two Houses of Chiefs; Bota Moli and Veuru Moli.[39] Each tribe in the Ward must have a paramount chief and two assisting chiefs with hereditary titles. Each village must also have a village chief and assistant village chief with a hereditary title.[40]

Whilst the Ordinance applies only to activities or persons within Moli Ward, as a matter of principle the Council is empowered to order a 'stranger' living within Moli Ward to pay compensation. However, a 'stranger' is not permitted to apply for compensation. 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.[41] 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.[42]

[32] Regulated by the *Provincial Government Act* 1996.
[33] *Moli Wards Chiefs Council Ordinance 2010* cl 15.
[34] *Moli Wards Chiefs Council Ordinance 2010,* cl 60.
[35] *Moli Wards Chiefs Council Ordinance 2010,* cl 3(2).
[36] *Provincial Government Act* 1996.
[37] *Moli Wards Chiefs Council Ordinance 2010, c*l 3(1).
[38] *Moli Wards Chiefs Council Ordinance 2010, c*l 8.
[39] *Moli Wards Chiefs Council Ordinance 2010, c*l 9.
[40] *Moli Wards Chiefs Council Ordinance 2010, c*l 74.
[41] *Moli Wards Chiefs Council Ordinance 2010*, cl 79(1).
[42] *Moli Wards Chiefs Council Ordinance 2010*, cl 79(2).

The process for resolution of disputes is set out in the Ordinance. The President may call a sitting at any time. The President or in his absence, the Vice-President, presides, and at least two other members must be present. The power to make the final decision lies with the President. 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.[43] Members of the Council are entitled to allowances.[44] 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. Any person may apply to the Council for a complaint to be heard. The President presides with a panel of three members appointed by him. Legal representation is not allowed. The procedure specified is similar to the common law, adversarial process.[45] 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. Basic 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.[46] The Council may also visit the land to 'verify the evidence'[47]. There is a right of appeal to the Local Court within 20 days of the date of the decision.

With regard to penalties, these are a mixture of State constructed penalty units,[48] and custom goods, including pigs and shell money ('chauvati'). The form and amount of compensation to be imposed are at the discretion of the Council, but taking into account any penalties set out in the Ordinance.[49] Reconciliation is not a bar to consideration of a dispute by the Council, but is to be taken into account in determination of penalties.[50]

[43] *Moli Wards Chiefs Council Ordinance 2010,* cl 6
[44] *Moli Wards Chiefs Council Ordinance 2010,* cl 7
[45] See above, n 18 as to the suitability of this process.
[46] *Moli Wards Chiefs Council Ordinance 2010,* cl 21
[47] *Moli Wards Chiefs Council Ordinance 2010,* cl 21(2)
[48] As defined by the *Interpretations and general Provisions Act* cap 85, s 50A (1).
[49] *Moli Wards Chiefs Council Ordinance 2010* cl 61(2).
[50] *Moli Wards Chiefs Council Ordinance 2010,* cl 71

III. Rules

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negotiation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processes observed with respect to specific rules.**

As mentioned above, interaction of specific rules takes place whenever a State court considers a question of customary law, which it is bound by the Constitution to do if such law is relevant to the case before it.[51] Interaction also takes place where human rights become an issue in the indigenous system.

2. **Identify areas or situations in which no interaction takes place between principles. Provide as many examples as possible of such area or situations with respect to specific rules.**

In civil disputes dealt with entirely in the State legal system or entirely in the Indigenous legal system, there is rarely any interaction between rules. This is particularly true in commercial cases.

3. **Describe and illustrate with as many examples as possible the effects of the *interactions on the indigenous AND state legal system with respect to specific rules (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

The interaction between the State and Indigenous legal systems has resulted in the State attempting to mould customary concepts to fit into a common law mould. The following examples can be given:

1. *Customary Ownership*

The terms 'customary ownership' and 'landowners' are often employed in written law. The term 'ownership' has a very specific meaning under the common law, and does not allow for the very different approach to interests in land existing under customary law. It usually refers to a fee simple, involving absolute rights relative to all other rights.

2. *Trusts*

A related example is the use of the trust to describe the legal relationship between customary leaders and the rest of their community. For example, in *Allardyce Lumber Company Limited v*

[51] Sch 3.3.

Attorney General,[52] Ward CJ used the trust concept to deal with the rights of customary 'landowners'. Similarly, in *Muna v Holland*,[53] the court was called upon to determine the rightful representatives of the customary landowners. Again, the court accepted that the trust was a suitable vehicle for dealing with rights to determine shares and distribute money. In neither of these cases was consideration given to the investigation of the relationship of representatives under customary law.

However, more recently there has been an opposing phenomenon of State courts altering the common law to recognise and accommodate customary rules. An example is the rules that have been applied to determine ownership of land below the high-water mark. State legislation does not expressly state whether 'customary land' includes reefs or foreshore, and the case law on this point is conflicting. At one time, the High Court regarded the issue as governed by the common law, and these areas were regarded as belonging to the Crown. However, according to the latest High Court decision, reefs and foreshore may be under customary management if it can be proved that this was the case prior to 1 January 1969. This means that if customary 'owners' have undisputed evidence that they 'owned' the mangrove area before that date they should be able to establish a legal right to 'ownership'. Because of the uncertainties in this area the issue was referred to Solomon Islands Law Reform Commission. The Commission's report, published in December 2012, acknowledges that indigenous land 'owners' consider that they are the 'owners' of the areas of reef and seabed adjacent to their land. The Commission recommends amending the definition of customary land in the Land and Titles Act to include land below the low watermark up to the limit of Provincial boundaries. It also recommends abolishing the need to prove ownership prior to 1 January 1969 and relying on proof of current customary usage. However, these recommendations have yet to be implemented.

Indigenous customary laws have also been recognised interstitially by the courts in the exercise of discretion. For example, in *Thugea v Paeni,*[54] the High Court accepted that gifts of money and a clock were payments made in accordance with customary laws and not for the purpose of influencing voters in an election, which was outlawed by legislation.

[52] [1988/9] SILR 78, 97.
[53] (Unreported, High Court, Solomon Islands, Kabui J, 28 March 2002) available via www.paclii.org at [2002] SBHC 109.
[54] [1985-86] SILR 22. See also *Alisae v Salaka* 1985-86 SILR 31; *Haomae v Barlett* 1988-89 SILR 35.

IV. Principles

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negotiation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions of processes observed with respect to specific principles.**

In dispute resolution, the principles are set out in the supreme law of the State in Solomon Islands, which is the Constitution. This sets out a hierarchy of laws and gives recognition to customary laws within the State system.[55] The Constitution's Rights Chapter makes specific provision regarding access to justice in the State system.[56] The sections are focused mainly on criminal proceedings, but in both a civil and criminal context, they set out the right to a fair hearing within a reasonable time by an independent and impartial court, established by law.[57] These principles may come into play in Indigenous dispute resolution proceedings.

2. **Identify areas or situations in which no interaction takes place between principles. Provide as many examples as possible of such areas or situations with respect to specific principles.**

As stated previously, in cases instituted in the State legal system, where there is no indigenous law involved, the case will be decided in accordance with State law. In commercial cases there is unlikely to be any interaction between principles.

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific actors (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

Theoretically, decisions of traditional authorities are not normally binding on State Courts. There are some exceptions to this, most importantly, in relation to land.[58] Accordingly, decisions of Indigenous forums are of limited effect on State courts, except in relation to land. However, even in relation to land, there has been a failure to acknowledge customary institutions as the exclusive, or even concurrent holder of the power of adjudication on customary land matters. As a result, an unsuccessful party may take the case back into the state system by lodging a claim in the local court. From this perspective, it is arguable that the state is incorporating the chiefs as a

[55] *Constitution of Solomon Islands* 1978 (the 'Constitution'), s 76 and sch 3.3.
[56] *Constitution of Solomon Islands* 1978 (the 'Constitution'), s 10.
[57] *Constitution,* s 10(1) and (8).
[58] See, eg Local Courts Act Cap 19, s 12.

bottom rung of the state system. In practice, unsuccessful parties have been unwilling to abide by the chiefs' decisions and almost 100% of cases end up in the Local Court. From there an appeal lies to the Customary Land Appeal Court ('CLAC'),[59] a state court, established pursuant to legislation.[60] 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 include a point of customary law) or failure to comply with any procedural requirement.[61] There is a final appeal to the Court of Appeal on a point of law only, and leave is required.[62] Objections to the presiding chiefs and spurious procedural objections have been used to divert questions of customary land ownership away from traditional institutions.

An example is provided by *Lauringi v Lagwaeano Sawmilling and Logging Limited,* [63] discussed above, where an allegation of trespass under the common law was used to divert what was essentially a customary land case into the state system. In this case, an interlocutory injunction was granted by the High Court, Lungole-Awich stating that:

> *From the above facts there is no doubt that both parties have taken lawful steps to assert their rights over the land. The plaintiffs' case cannot be dismissed as baseless at this stage because the Marodo Council of Chiefs are [sic] said to lack jurisdiction. They certainly believed that the council had jurisdiction and therefore have gone to the Local Court. Whether Marodo Council of Chiefs lack [sic] jurisdiction is one of the issues to be determined on proper evidence and full submissions on the law at trial*.[64]

The last sentence of this quotation illustrates the State's continued assertion of authority in this area. Determination of the authority of the customary institution in a common law trial, with 'proper evidence and full submissions on the law' converts the deep legal pluralism established by the 1985 legislation to State legal pluralism. In any event, the judgment ignores the fact that the jurisdiction of the Chiefs was no longer an issue, as the defendants had refused to accept that decision and had exercised their right to take the matter to the Local Court, which had made its own decision. The proper course for the defendants was to have appealed from that decision to the Customary Land Appeal Court, which although it is not a traditional body had at least the virtue of being constituted largely by local people knowledgeable in custom. In a later judgment in this case, the same court reaffirmed the state's power to adjudicate in customary land disputes framed in trespass, stating that it was, 'now settled that the High Court has original jurisdiction to decide the question of interlocutory injunction order restraining trespass, conversion and other wrongs on or affecting customary land'.[65] Interestingly, however, the court also expressed itself as anxious to comply with the provisions of the Land and Titles Act giving exclusive jurisdiction

[59] Land and Titles Act Cap 133 s 256.
[60] *Land and Titles Act* Cap 133 s 255(1) empowers the Chief Justice to establish CLACs by warrant.
[61] *Land and Titles Act* Cap 133 s 256(3).
[62] *Land and Titles Act* Cap 133 (SI), s 257(4).
[63] *Lauringi v Lagwaeano Sawmilling and Logging Ltd* [1999] SBHC 93
[64] *Lauringi v Lagwaeano Sawmilling and Logging Ltd* [1997] SBHC 61.
[65] *Lauringi v Lagwaeano Sawmilling and Logging Ltd* [1999] SBHC 93.

to the Local Courts and refused to rule on questions of primary ownership and the extent of the area of land in dispute.[66]

A further example of the State courts' principle unwillingness to apply customary law can be seen in cases involving custody of children. In at least four reported cases, that is, *Sukutaona v Houanihou,*[67] *Re B,*[68] *K v T*[69] and *Sasango v Beliga,*[70] it has been held that the customary rights of custody were subordinate to the welfare of the children, which was the paramount consideration. That the welfare of the children must be given paramount consideration in custody cases does not, however, appear in the Constitution of Solomon Islands or in any Act of Parliament of Solomon Islands. This principle derives from principles of common law and equity[71] which were given statutory form in England in s 1 of the Guardianship of Infants Act 1925.[72] This Act is a statute of general application which was in force in England on 1 January 1961 and so is in force in Solomon Islands by virtue of para 1 of Sch 3 of the Constitution. At first sight, therefore, it might be thought that the rejection of customary law could be justified on the basis that it was inconsistent with a British Act of Parliament in force in the country. However, as indicated in the preceding paragraph, the courts in Solomon Islands have held that the term 'Act of Parliament', as used in para 3(1), refers only to Acts of the Parliament of Solomon Islands, not of the Parliament of Great Britain. Although the desire of the courts to protect the welfare of children can be readily understood, at least by European observers, there is no obvious legal basis for denying the application of custom in custody disputes.

However, there are also some instance the courts have refused to interfere with the decisions of traditional authorities. A good example of this is *Pusi v Leni*,[73] a case concerning an alleged violation of the constitutional freedom of movement resulting from the application of customary laws. In this case Muria CJ pointed out that customary laws were constitutionally recognised as a source of law and this led him to the view that customary laws were on a par with constitutional law (and legislation) and that 'one is no better than the other'. Which would prevail depended on the circumstances of the case.

[66] *Lauringi v Lagwaeano Sawmilling and Logging Ltd* [1999] SBHC 93
[67] [1982] SILR 12.
[68] [1983] SILR 223.
[69] [1985-86] SILR 49.
[70] [1987] SILR 91..
[71] *R v Gyngall* [1893] 2 QB 232.
[72] Guardianship of Infants Act 1925, s 1: *Principle on which questions relating to custody, upbringing, etc of infants are to be decided*: 'Where in any proceeding before any court (whether or not a court within the meaning of the Guardianship of Infants Act 1866) the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether, from any other point of view, the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application, is superior to that of the mother, or the claim of the mother is superior to that of the father.' See, further, Chapter 7.
[73] (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 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.

V. Values/Beliefs

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (Example: imposition, negotiation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processes observed with respect to specific values.**

The values and beliefs underlying the two systems of dispute resolution interact when a case is taken from the Indigenous system into the State system or vice versa through one of the pathways set out in Part II.II. In particular, interaction occurs when indigenous customary laws intersect with constitutionally enshrined human rights. These concepts have occasionally been assumed to be complementary, for example, recognition of custom and the reintroduction of traditional courts in Pacific countries have been cited as evidence of the promotion of human rights, a stance which ignores the fundamentally different values involved. Customary laws are indigenous and, often, fragmentary (on a geographical basis). Generally, they are conservative, patriarchal and applicable only to members of the community who accept them as binding. Human rights, on the other hand, are introduced concepts, founded on liberal, egalitarian principles, and professed to be universal. Customary laws emphasise status, duties, and communal values, whereas human rights provisions emphasise individual rights, freedoms and equality.

There is also interaction in criminal proceedings where tension between emphasis on the individual and the community can be seen in the approach to resolution of cases. Indigenous people may be subject to double jeopardy, being subject to two different systems of punishment. The westerners introduced jurisprudential concept upholds notions of justice grounded in individual responsibility, whereas custom puts an emphasis on restoring peace and order in the community. Reconciliation and settlement under customary laws are not barred by the State system. To the contrary, the Magistrates Court Act explicitly allows magistrates to promote reconciliation and settlement in minor criminal cases.[74] Further, there are a number of cases in which customary settlements, as opposed to customary punishment, have been accepted as mitigating factors by state courts dealing with punishment after a conviction under state law.

[74] Cap 20, s 35(1).

2. **Identify areas or situations in which no interaction takes place between values. Provide as many examples as possible of such areas or situations with respect to specific values.**

As previously stated, in cases instituted in the State legal system, where there is no indigenous law involved, the case will be decided in accordance with State law. In commercial cases there is rarely any interaction between values and beliefs.

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the indigenous AND state legal system with respect to specific values (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

Many examples of the effect of interaction between Indigenous and State values overlap with, and have been discussed above, under IV. Principles. A more particular example of conflict between different values occurs in relation to gender. The involvement of women in traditional dispute resolution has always been a difficult issue. Leaders are usually male elders or chiefs, so women rarely get to adjudicate in traditional forums. Further the patriarchal and status based culture means that women may not be heard and their views may not be taken into account. In responses to RAMSI's 2013 People's Survey, 65% of respondents said women in their community help to resolve community disputes. However, when asked 'what would make dispute resolution better for you?', only 0.1% of all respondents suggested the involvement of more women.

This issue of gender equality has loomed large in discussion of reform of the Local Courts. The Tribunal was conceived as 'being a custom body, dealing with custom issues in a custom way, yet underpinned by certain universally held principles.' The original proposal was for the Panels to include at least two women unless a waiver of this requirement was sought from the National Secretary for custom reasons. However, the latest version of the Bill, the Tribal Land Dispute Resolution Panels Bill 2008 provides that at least one member of the Panel must be female, unless there are no females 'available'. Qualifications for application to be placed on the Provincial Membership Register from which panel members are chosen are good knowledge and custodianship of customary rules, and nomination requires endorsement by two people from a list of officials who are more than likely to be male than female. In the current circumstances of Solomon Islands, it seems unlikely that many women will be nominated. It was found during the early consultation process on the proposal for Tribal Land Dispute Resolution Panels that 'generally custom excludes women [from decision-making processes] … even in those Provinces where a matrilineal landholding system prevails.' In seeking solutions for gender inequities, it should be borne in mind that discrimination is not caused by the dispute resolution processes, but by the prevailing culture. It was found during the early consultation process on the proposal for

Tribal Land Dispute Resolution Panels that 'generally custom excludes women … even in those Provinces where a matrilineal landholding system prevails.'

Another example, which has been touched on above, is the effect of interaction in criminal cases. In particular, the question has arisen whether customary compensation payments can be taken into account in mitigation of sentence. In fact, State courts have accepted this as a relevant matter to consider in mitigation. In *R v Asuana,*[75] for example, Ward CJ stated:

'It should always be remembered that compensation is an important means of restoring peace and harmony in the community. Thus the courts should always give some credit for such payment and encourage it in an appropriate case. Thus, any custom compensation must be considered by the court in assessing sentence as a mitigating factor but it is limited in its value. The court must avoid attaching such weight to it that it appears to be a means of subsequently buying yourself out of trouble. The true value of such payments in terms of mitigation is that it may show genuine contrition and the scale of payment may give some indication of the degree of contrition.'

In *Buruka v R*[76] Muria J held:

> *'Custom is part of the law of Solomon Islands and payment of compensation has always been part of the custom of the people in Solomon Islands. As such payment of compensation must be accepted in Solomon Islands as a relevant matter for consideration in mitigation of sentences in criminal cases.'*

In *Timo v R*[77] Palmer CJ said,

> *reconciliation ceremonies are entrenched in our culture but also within the context of our civil society whose laws are based on Christian principles. Reconciliation does have a place in our society. It looks to the future even after an accused had been punished by the courts under the law, it enables that accused to be able to re-settle back into a community after serving his/her time in prison*.

Customary '*compensation*' has even been taken into account in a murder case.[78] However, it has been made clear by Practice Direction[79] that reconciliation must be 'genuine' and 'freely accepted by the complainant'.

Further, while reconciliation and payment of compensation may be mitigating factors, that does not mean that they are a bar to state proceedings. In *R v Funifaka* [80] Palmer J noted the significance of compensation in custom, stating that:

> *It does have its part to play in the community where the parties reside, in particular it makes way or allows the accused to reenter society without fear of reprisals from the victims' relatives. Also it should curb any ill- feelings that any other members of their families might have against them or even between the two communities to which the parties come from.*

[75] [1990] SILR 201,202.
[76] (Unreported, High Court, Muria J, 1991) 1. See also, *Rojumana v R* [1990] SILR 132.
[77] [2004] SBHC 44.
[78] *R v Sanga* (Unreported, High Court, Wood CJ, 1885).
[79] High Court *Practice Direction* No 1 of 1989.
[80] (Unreported, High Court, Palmer J, 1996) 17-18.

However, His Lordship went on to say:

> *The significance of however should not be over-emphasised. The payment of compensation or settlements in custom do not extinguish or obliterate the offence. They only go to mitigation. The accused still must be punished and expiate their crime. I do give credit however for this.'*

PART III: FURTHER ANALYSIS OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS

I. Reactions of Indigenous and State Actors

How the actors perceive and experience the interactions between the legal systems? Illustrate your analysis with as many examples as possible.

The hierarchical structure imposed by the Constitution places traditional forums at the bottom, with 'customary' courts seen as the next level, and further appeals back into the State system. The view of 'customary' courts as sitting below the common law courts is reflected in the World Bank's report, 'Institutional and Fiscal Analysis of Lower-Level Courts in Solomon Islands', which states that local courts and Customary Land Appeal Courts ('CLAC's) are 'the lowest in the judicial hierarchy',[81] and places them below magistrates' courts in the accompanying diagram.[82] This is in spite of the fact that appeals from CLACs are to the High Court, not the magistrates court. Courts of first instance are in some senses the most important courts, as they normally carry a heavier case load than superior courts. However, incorporating 'customary' courts into this hierarchy means that dissatisfied parties have an avenue of appeal to state courts. Whilst appeals from CLACs to the High Court are only allowed on a point of law,[83] this still means that the superior courts can impose further, non-customary rules on both CLACs and local courts.[84]

Linked closely to the issues surrounding the hierarchical position of 'customary' courts is the problem of lack of finality. Unsuccessful parties in land disputes have been unwilling to abide by the Chiefs' decisions and the majority of cases have been taken to the Local Court. This has led to an increase in litigation rather than a reduction. Chiefs feel that the ability of an unsuccessful

[81] World Bank's report, 'Institutional and Fiscal Analysis of Lower-Level Courts in Solomon Islands', February 2015, 7.
[82] World Bank, 'Institutional and Fiscal Analysis of Lower-Level Courts in Solomon Islands', February 2015, 11.
[83] *Land and Titles Act* Cap 133 s 256.
[84] See further, *Livingstone v Napata* (Unreported, High Court, Solomon Islands, Palmer J, 10 October 1997).

disputant to ignore their decision and go on to the Local Court often means that the effort expended is all for nothing.

Attempts to limit re-litigation can be seen in the legislative provisions limiting appeals to questions of law. However, there are numerous instances of parties dressing up questions of fact as questions of law. In *Teika v Maui,*[85] for example, the appellant's grounds of appeal were:

- Failure to exclude a court member;
- not allowing witnesses to be heard;
- that not all the members discussed the decision; and
- that the appellant was not allowed to present his case fully and fairly.

Chief Justice Wood held that the appellant's request to exclude a member had been properly dealt with and rejected, and that the second and third grounds had not been proved. However, the decision was quashed and the case remitted to the Customary Land Appeal Court for hearing *de novo* on the basis of the third ground.

The courts have attempted to deal with this be referring to the doctrine of *res judicata*. In *Koina v Clerk*[86] for example, the High Court, relying on *Majorio v Jina*,[87] emphasised that, in the absence of an appeal, decisions on customary land 'ownership' made by the Local Court were final and that parties were 'estopped from seeking a different decision in respect of that question under the regime instituted under the Forest Resources and Timber Utilisation Act, or vice versa.'[88]

In *Muna v Billey*[89] the High Court also bolstered the inviability of chiefs' decisions regarding land by making it clear that the doctrine of audi alterem partem does not apply to such decisions. This case was cited with approval by the Court of Appeal in *Choe Integrated Development Company Ltd v Maekera*[90] This case concerned the application of pleadings and proof evidence rules in cases before the chiefs, where the High Court stated that, 'the substantive rights of the parties have been determined by the particular Chiefs... There may be an increasing culture of vexatious litigation over the Chiefs decision, but the Constitution is clear. The findings of the Chiefs in custom shall be afforded the status of law.'

[85] [1985/6] SILR 91.
[86] (Unreported, High Court, Solomon Islands, Faukona J, 21 June 2013), available via www.paclii.org at [2013] SBHC 69.
[87] (Unreported, Court of Appeal, Solomon Islands, Lord Slynn of Hadley P, Adams JA, Salmon JA, 1 November 2007), available via www.paclii.org at [2007] SBCA 20.
[88] (Unreported, High Court, Solomon Islands, Faukona J, 21 June 2013) available via www.paclii.org at [2013] SBHC 69.
[89] [2003] SBHC 9.
[90] [2012] SBCA 12.

II. Other Aspects of the Interactions Between Legal Systems

What other aspects or issues of interaction between the legal systems do you judge relevant and why? Illustrate with examples the points raised.

The Church

In most SIDS there is another important avenue for dispute resolution and that is the Church. In Solomon Islands, the church is a powerful influence. It is an important part of village life and plays a large role, with a focus on forgiveness and reconciliation and on resolving disputes outside court. Indeed, some churches even forbid the use of civil litigation.

Churches are often situated in villages or serve two or more small villages. Minor disputes, for example family disagreements over adultery or unplanned pregnancies will be dealt with by the church leaders or the church committee. 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.[91] A disciplinary measure may then be imposed, such as counselling or a reprimand. The Constitution also sets out a detailed appeal process.[92] Where no process is set down, church leaders may deal with disputes as they see fit. Church processes generally emphasise counselling and mediation. Praying together by all parties to the dispute is often part of the process. Group bible readings may sometimes form part of the process. Confessions and announcements of forgiveness are also common, reflecting the emphasis on restorative justice, forgiveness and reconciliation.

The Strength of Traditional Authority

Outside of the state system, traditional authority is still strong, although there is little doubt that they have been affected by outside influences. The strength of the belief in the legitimacy of traditional dispute resolution systems is evidenced by the fact that they are by far the most commonly used. Customary laws are largely unwritten, and do not constitute a homogenous body system, applying throughout the country. However, there are some discernible commonalties. In particular, customary laws do not differentiate between civil and criminal law, but deals with wrongful conduct in a more holistic way.

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

APPENDICES

I. Appendix A: Diagram of the Presentation (mandatory, but template optional)

THEME				
REGION / CASE				
Step 2: What are the interactions between the indigenous and state legal systems and how are such interactions managed?				
VARIABLE	**EXAMPLES OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS**	**EFFECT OF INTERACTIONS ON LEGAL SYSTEMS**	**REACTIONS OF STATE-ACTORS AND ABORIGINALS TO THESE INTERACTIONS**	**COMMENTS**
Values / beliefs 	• The involvement of women in traditional dispute resolution has always been a difficult issue. • An example also lies in the role of customary reconciliation and settlement in mitigation in State criminal cases.	• Leaders are usually male elders or chiefs, so women rarely get to adjudicate in traditional forums. • Further the patriarchal and status-based culture means that women may not be heard and their views may not be taken into account. Customary '*compensation*' has been taken into account in a murder case.[93] However, it has been made clear by Practice Direction[94] that reconciliation must be 'genuine' and 'freely accepted by the complainant'.	• The issue of gender equality has been discussed in consideration of reform of the Local Courts. The Tribunal was conceived as 'being a custom body, dealing with custom issues in a custom way, yet underpinned by certain universally held principles.' • The latest version of the Tribal Land Dispute Resolution Panels Bill 2008 provides that at least one member of the Panel must be female, unless there are no females 'available'. • It has been made clear by Practice Direction that reconciliation must be	

[93] *R v Sanga* (Unreported, High Court, Wood CJ, 1885).
[94] High Court *Practice Direction* No 1 of 1989.

		• Further, while reconciliation and payment of compensation may be mitigating factors, that does not mean that they are a bar to state proceedings.	'genuine' and 'freely accepted by the complainant'.	
Principles 	• Allegations of trespass under the common law have been used to divert what is essentially a customary land case into the state system. • Customary rights of custody have been subordinated to the statutory welfare principle. • However, there are also some examples of the court having refused to interfere with the decisions of traditional authorities. A good example of this is *Pusi v Leni*.	• In dispute resolution the principles set out in the Constitution apply. This sets out a hierarchy of laws and gives recognition to customary laws within the State system. The Constitution's Rights Chapter makes specific provision regarding access to justice in the State system. They set out the right to a fair hearing within a reasonable time by an independent and impartial court, established by law. These principles may come into play in Indigenous dispute resolution proceedings.	• The customary dispute system is still strong and traditional leaders generally continue to apply customary principles.	
Rules 	• The interaction between the State and Indigenous legal systems has resulted in the State attempting to mould customary concepts to fit into a common law mould. Examples are 'customary ownership'; 'landowners'; and trusts.	• In disputes dealt with entirely in the State legal system or entirely in the Indigenous legal system, there is rarely any interaction between rules. This is particularly the case in commercial cases.	• The High Court has allowed Customary law on ownership of land below high-water mark to prevail in certain circumstances. • Solomon Islands Law Reform Commission's 2012 Report acknowledges that indigenous	

	• An example of State law accommodating indigenous customary laws lies in the different outcomes on ownership of land below the high-water mark. • Indigenous customary laws have also been recognised interstitially by the courts in the exercise of discretion. For example, the High Court accepted that gifts of money and a clock were payments made in accordance with customary laws and not for the purpose of influencing voters in an election.	• Interaction takes place whenever a State court considers a question of customary law, which it is bound by the Constitution to do if such law is relevant to the case before it. Interaction also takes place where human rights become an issue in the Indigenous system.	land 'owners' consider that they are the 'owners' of the areas of reef and seabed adjacent to their land. It recommends amending the definition of customary land in the Land and Titles Act to include land below the low watermark up to the limit of Provincial boundaries. • It also recommends abolishing the need to prove ownership prior to 1 January 1969 and relying on proof of current customary usage.	
Actors 	• There is provision for Local Courts to take account of chiefs' decisions, or even to refer a dispute to the chiefs to decide. Local Court justices are also chosen from the local community. • Local Courts Act defines 'Chiefs' as meaning, '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'.	• The identity of actors in the customary system has been confused by the imposition of terms in legislation which do not accord with local custom and practices.	• The High Court has acknowledged that Local Courts were better placed than the common law courts to deal with customary matters.	
Process, rituals, ceremonies	• An example of the effect of interaction can be seen in the confusing process that applies to customary land 'ownership'	• The two legal systems interact when a dispute is transferred from the Indigenous legal system to	• The Solomon Islands Courts (Civil Procedure) Rules,	

	disputes. These go first to the Chiefs, then to the Local Court, except in disputes over timber rights under the Forest Resources and Timber Utilisation Act, which are decided by the Provincial Executive decision, where appeals go directly to the CLAC. This means that there are two different avenues for dealing with customary land disputes, one determining customary land 'ownership', and the other the right to grant timber rights. • Where cases come before State Courts which involve questions of customary land tenure, the court will remit the case to the local court. Whilst the local court is not an indigenous court, its processes are less stringent.	the State legal system, or vice versa. This occurs, for example: • When a party takes a customary law dispute to the common law courts; • When a party who is dissatisfied with the Chief's decision, relating to customary laws, take their case to the local court; and • Where cases are remitted by State courts to the local court the processes are less stringent. • The adjectival laws applying in State courts are rigid and may present barriers for the resolution of customary disputes in common law courts.	introduced in 2007,[95] were intended to simplify procedure. However, although they do unify High Court and Magistrate's Courts' procedure and replace some of the archaic language with plain English, in some respects they are even more complicated than the former rules. • The decision in *Majoria v Jino* highlights the lack of coordination between the legislative regimes for determining disputes as to interests in customary land. The Court of Appeal accepted the need to accommodate the demands of legal pluralism. It stated that 'the key to understanding the scheme and applying it in a practical way is to recognise the important role assigned by the Parliament to the Chiefs and their decisions for the purpose of determining disputes of customary land'.	

[95] See, eg, Warrant Establishing the Bauro Local Court LN61/1986 cls 3 and 5. See also Local Courts (Criminal Jurisdiction) Order.

Others	• The Church is another important avenue for dispute resolution and that is the Church. It is an important part of village life and plays a large role, with a focus on forgiveness and reconciliation and on resolving disputes outside court.	• Minor disputes, for example family disagreements over adultery or unplanned pregnancies will be dealt with by the church leaders or the church committee. • 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. • Where no process is set down, church leaders may deal with disputes as they see fit.	• The customary dispute system is still strong.	

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D. Treaties and Declarations

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III. Appendix C: Significant Extracts from the Collected Data

Extract from Draft Federal Constitution of Solomon Islands 2014 No 2, cl 48 (addressing the issue of access to justice):

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.

Extract from Local Courts Act Cap 19, s 13:

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

Extract from Magistrates Court Act Cap 20, s 35(1):

In criminal cases a Magistrate's Court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any offence of a personal or private nature not amounting to felony and not aggravated in degree, on terms of payment of compensation or other terms approved by such Court, and may thereupon order the proceedings to be stayed or terminated.

Express recognition by Palmer J that local courts are better equipped to deal with customary matters; excerpt from To'ofilu v Oimae:

'[T]he Local Court is far better placed than the Magistrates' Court or this Court to deal with such claims [as the repayment of bride price] in custom in that it is comprised of Court Justices who come from the same Province and sometimes from the same areas, and are therefore familiar with the customary practices of the parties.'