A STUDY OF CUSTOMARY METHODS DEALING WITH CUSTOMARY LAND DISPUTES IN MALAIMA, SOLOMON ISLANDS

by

Derek Lauta G Futaiasi

A supervised research project submitted in partial fulfilment of the requirements for the degree of Master of Law

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School of Law
Faculty of Arts and Law
The University of the South Pacific

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I dedicate this supervised research project to my late aunties; Rose Bufafi, Lisa Gwaena and Filustus Abuiri because they believed that education reveal pathways and bridges to self-fulfilment and advancement.
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ABSTRACT

In Malaita one of the provinces in Solomon Islands, during traditional times, the most important traditional decision making mechanisms that dealt with disputes were traditional priest, big-man, a warrior, and chiefs. In contemporary Malaita their roles in dispute settlement had been affected due to foreign influences such as Christianity and the protectorate government. However, chiefs and traditional leaders which are often referred to as chiefs’ settlement or houses of chiefs, are given recognition in 1985 by Parliament to deal with customary land disputes before such is referred to the formal courts. The legal recognition of chiefs or traditional leaders is timely against the increasing customary land disputes due to factors such as lack of clear records, migration, confusion over inheritance and ownership, lack of consultation about land transaction, population pressure and economic activities on customary land.

The conduct of proceedings by chiefs and traditional leaders are not regulated by an Act of Parliament. The ways in which the houses of chiefs deal with customary land disputes are by way of negotiation and mediation or by way of using court like procedures to determine an outcome of a customary land dispute. The latter is the main method when houses of chiefs deal with customary land cases. However, in some instances, before customary land disputes go to the houses of chiefs, if that dispute is between people of the same clan their leaders assisted by religious leaders, usually settled the matter between the clan members.

In Malaita, though there are advantages of custom dispute settlement such as chiefs are knowledgeable in custom, people feel that they own the system, the system is cheap, the system entails a common understanding between parties which reflect the interest of parties and traditional leaders are independent, there are also challenges facing custom dispute settlement. Some of these challenges include chiefs adopt court like procedures, participation of chiefs from other areas, questions as to validity of chief's position, conflicting decisions of chiefs, lack of government support, lack of independence of chiefs, lack of fair hearing and decisions are dominated by men. Therefore, much needs to be done to invigorate the work of the houses of chiefs or chiefs’ settlement as recognised by the 1985 amendment of the Local Court Act. Some
of the most important proposals are the need for government support in terms of remuneration for those who settle customary land disputes at the house of chiefs and the need to introduce and devise a program to train chiefs on legal concepts such as natural justice and relevant human rights issues. The need for a clear constitutional recognition of chiefs and traditional leaders as an important body to deal with customary land disputes is very important to ensure proper legitimacy. Apart from these proposed reforms; the inclusion of the chiefs, traditional leaders and the use of custom to deal with disputes as envisaged by the Tribal Land Dispute Resolution Panel Bill 2008 is a step in the direction in the resolution of customary land dispute. However, there is a need to address the challenges and problems inherent in Tribal Land Dispute Resolution Panels Bill 2008 in order to ensure it is developed into a proper Act of Parliament.
LIST OF ABBREVIATION

SRP – Supervised Research Project
TLDRPB – Tribal Land Dispute Resolution Panels Bills 2008
TLDRPF - Tribal Lands Dispute Resolution Panels Fund
TLDR Panel – Tribal Land Dispute Resolution Panel
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CHAPTER 1   INTRODUCTION

1.1 Overview

Chiefs and traditional leaders have been and still are an important factor in relation to the resolution of customary land disputes in Solomon Islands. In Malaita – a province in Solomon Islands and the jurisdiction selected for this supervised research project (SRP) chiefs and traditional leaders continue to play an important role to determine and ensure that customary land disputes are dealt with according to custom. This role is becoming more important due to the increase of customary land disputes and they are facing increasing challenges in this regard. With these in mind, the basic aim of this SRP is to assess customary forums in particular the chiefs and traditional leaders as the first tier to deal with customary land disputes before such disputes go to the formal/state courts for further determination.

This introduction is made up of five parts. First, it will define custom/customary law, customary land and customary land disputes. Second, the reasons for choosing the topic will be highlighted and explained. Third, a brief outline of the courts dealing with customary land disputes will be provided in order to see the position of the chiefs and traditional leaders dealing with customary land disputes, in the legal system in Solomon Islands. The fourth part provides a brief background of the chiefs and traditional leaders. The fifth part will give a summary of the scope of this SRP.

1.2 Definitions

1.2.1 Definition of Custom

The *Oxford Learner’s Dictionary* defines custom as an ‘accepted way of behaving or doing things in society or a community.’\(^1\) Basically, customs are established norms or patterns of behaviour. Though unwritten, they are generally well-known and respected. The Solomon Islands Constitution recognised that customs or customary

law is one of the sources of laws. In relation to customary land disputes, the use of custom to ascertain ownership, boundaries and related rights is very important because customary land is regulated by custom.

1.2.2 Customary Land

Customary land is held by indigenous people in accordance with established principles of custom. In the Solomon Islands, 85 percent of land is managed under customary tenure, meaning that local clans and members of clan groups have control over it. In Malaita the clan or tribe owns the land. To the Malaita people, as with most if not all Solomon Islanders, customary land is important because it has physical and spiritual significances.

Customary land is important because of its physical dimension in that it provides food, water, building materials and medication. Customary land is the life-blood of the people. Given that most of the people in Malaita live in rural areas, customary land will continue to be important in its physical dimension – the foundation of the livelihood of the Malaita people.

It is also significant because of its spiritual dimension. It contains burial grounds, ancestral tabu sites, custom artifacts and other places of historical significance. John Ipo added:

\[
\text{everywhere land ha[s] spiritual meanings. It was an enduring link between the past and the future. For it had once belonged to the ancestors, whose spirits were believed to inhabit parts of it, and it would be needed by later generations.}
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Customary land is therefore a living memory of the past and useful for the present as well as for future generations. This is so because it is the link between the past, the present and the future.7

1.2.3 Customary Land Disputes

A customary land dispute is a disagreement between two or more parties on issues of ownership, and/or boundaries or rights and interests over customary land. In Malaita customary land disputes are endemic.8 Customary land disputes are one of the contributing factors to the lack of more visible socio-economic development in Malaita. The factors which give rise to customary land disputes are covered in chapter five of this SRP.

1.3 Reasons For Topic

1.3.1 Lack of Comprehensive Research

One of the important reasons for selecting this topic is that very little has been written about the role of chiefs and traditional leaders in the resolution of customary land disputes in Solomon Islands. Though there are several studies about chiefs and traditional leaders in Solomon Islands most of them are from anthropological perspectives and other studies which concentrate basically on formal courts, rather than on how chiefs and traditional leaders deal with customary land disputes, i.e. the challenges affecting these chiefs and traditional leaders and in a context of a specific jurisdiction in Solomon Islands. Therefore, this study will focus on the mechanisms used by chiefs and traditional leaders in dealing with rights, interests, boundaries and ownership of customary land in Malaita and the challenges facing the chiefs and traditional leaders’ determination in relation to issues relating to customary land disputes. Thus, this SRP will contribute to the existing literature on customary land disputes mechanisms in Solomon Islands.

7 See Philip Iro Tagini, above n 5, 235 – 237 for further comments on the spiritual dimension of land.
1.3.2 Increase of Customary Land Disputes

Another reason for selecting this topic for research is that in Solomon Islands the prevalence of customary land disputes hinders socio-economic development in many rural areas such as Malaita. Although the government has been willing to develop customary land, it has been difficult to proceed with socio-economic development of certain areas chosen by the government, because national projects are affected by customary land disputes. Examples in Malaita are the Bina Harbour International Port Project in West Kwaio and Suava Fishing Industry in North Malaita. In addition, in the northern part of Malaita at Kwailabesi the only airstrip for the people of North Malaita is closed because of customary land disputes. Therefore, one of the aims of this SRP is to highlight the factors which cause customary land disputes in Malaita.

1.4 Courts Dealing with Customary Land Disputes

In Solomon Islands the state courts dealing with customary land disputes are the local court, customary land appeal court and the high court. Issues of custom in relation to boundaries, ownership and related interests are dealt with and determined in the local courts and customary land appeal courts. The High Court of Solomon Islands only deals with legal issues in relation to customary land disputes. This is basically on points of law, written procedure and natural justice issues. However, before any customary land disputes are dealt with by the state courts, they must be dealt with by chiefs and traditional leaders. This means that customary methods of solving customary land disputes need to be entertained and encouraged.

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12 Lands and Titles Act [Cap 133] (Solomon Islands), section 256(3) http://www.paclii.org/sb/legis/consol_act/lata143 (Accessed 20 August 2010).
Apart from the formal state courts, currently a draft of a new bill called the Tribal Land Dispute Resolution Panels Bill 2008 (TLDRPB) is being circulated for comments. Its aim is to establish a Tribal Land Dispute Resolution Panel (TLDR Panel) which would merge the function of the local court and the customary land appeal court, thus eliminating them both. Chapter eight briefly provides an overview discussion of some of the advantages and problems of the TLDRPB.

1.5 Chiefs and Traditional Leaders

In Solomon Islands the chiefs and traditional leaders are generally regarded as custodians of custom and problem solvers when disputes arise. Among other factors, the minimal or absence of state apparatus in the rural areas could be a factor for their continuous importance in Malaita. They are very important people to consult when problems in relation to customary land disputes emerge. Therefore, in Malaita, as in other parts of Solomon Islands, people continue to have respect for these chiefs and traditional leaders. Thus, when Andrew Nori – a lawyer by profession, who was a Member of West 'Are'are Constituency in 1985 – explained the intention of the private member’s bill to amend the Local Court Act to the Members of the Solomon Islands Parliament, he said:

The Bill...deals with one important aspect of land dispute settlement in our country [Solomon Islands] which at the moment appears to be the missing link between formal duties of process and the realities of our Solomon Islands societies. That missing link...is that in our attempt to resolve disputes of a customary land ownership we have been excluding the very people who are most confident to perform their function...It is my strong believe....that there is no competent persons to resolve customary land disputes than our own traditional leaders.15

Among other reasons, it is on this premise that Andrew Nori very persuasively moved in Parliament that the Local Court Act was in dire need for amendment to provide in statutory terms the respect that Solomon Islanders have to towards chiefs and traditional leaders in relation to the determination of customary land disputes. Therefore, the aim of the bill was ‘to amend the Local Court Act to provide for

customary land disputes to be heard and determined by chiefs [and traditional leaders] before such disputes are referred to the Local Courts and for other matters incidental thereto and connected therewith.\textsuperscript{16}

The 1985 amendment of the Local Court Act thus acknowledged that chiefs and traditional leaders need to hear and determine questions of ownership and rights including related custom issues concerning customary land before these customary land disputes go to the Local Court for further hearing. If the chiefs and traditional leaders do not deal with the customary land dispute that dispute cannot go to the formal courts for further determination.

This SRP, therefore, will study the chiefs and traditional leaders as a body that determines customary land disputes including its composition, jurisdiction, the ways chiefs and traditional leaders deal with customary land disputes, its advantages, and challenges.

1.6 Scope of the SRP

Including the introduction, this SRP has eight chapters. The second chapter discussed the research methodology. The third chapter briefly describes some of the common cultural features of Malaita Province and the way some of these common cultural features relate to customary land disputes and resolution. This is important to provide some background information on Malaita, the province in Solomon Islands which is the focus of this study. The fourth chapter describes and explains the common traditional decision making mechanisms in Malaita. The importance of this is to provide a brief snapshot on traditional decision making institutions and the way disputes were dealt with in the past in traditional Malaita. The fifth chapter outlines and explains some of the factors which are responsible for causing customary land disputes in Malaita. This is crucial in order to have an insight on how different socio-economic factors contribute to customary land disputes. The sixth chapter provides a description and explanation of the process whereby the chiefs and traditional leaders to deal with customary land disputes. The seventh chapter explains the advantages

\textsuperscript{16} See Solomon Islands National Parliament Hanzard, above n 15, 586.
and challenges facing custom dispute settlement in relation to customary land. The eighth chapter is a brief analysis and commentary on the TLDRPB. The ninth chapter provides a conclusion and explains several important recommendations which are important to improve the work of the chiefs and traditional leaders as an important body that deals with customary land disputes at first instance.
CHAPTER 2  METHODOLOGY

The methodology used to put this SRP together can be divided into four stages. These are: (A) The formulation of a framework or structure of the topics to be considered (B) Collection of information (C) Analysis of materials and review of information that were needed (D) Writing-up stage.

2.1 Stage 1: Formulation of Framework and Structure of Topics to be Considered

The first stage was the formulation of the framework or structure of topics to be considered. This stage entailed the formulation of the important issues or research questions that needed to be addressed. Initially, these were the issues/research questions that were formulated:

1. What is the nature of customary land in Malaita?
2. Why is customary land very important in Malaita?
3. Why are customary land disputes endemic in Malaita after the Protectorate period?
4. What are the adjudicative elements of customary and state legal systems that deal with customary land disputes in Malaita during and after Protectorate?
5. What are the advantages and challenges facing the adjudicative elements of the customary legal system in Malaita during and after the period of the colonial Protectorate?
6. What are the advantages and challenges facing adjudicative elements of the state legal system in Solomon Islands during and after Protectorate?
7. What are some of the needed reforms to ensure there is improvement in the function of the adjudicative elements of customary and state legal systems dealing with customary land disputes in Solomon Islands after the Protectorate?

As the above questions depicted, one of the issues was the need to explain the nature and importance of customary land in Malaita. This would then be followed by the need to explain the factors responsible for the prevalence of customary land disputes in Malaita. Third, in the preliminary stage, the need to highlight the adjudicative
elements of customary and state legal systems that deal with customary land disputes in Malaita during and after Protectorate were also noted. In this context, the advantages and challenges of these adjudicative elements during these two periods constituted an important issue that needed to be addressed. Further, an important issue that was noted was the need for reforms to ensure there is improvement in the function of the adjudicative elements of customary and state legal systems dealing with customary land disputes in Malaita after the Protectorate.

It was from the aforementioned issues that a set of questionnaire were formulated in preparation for the interviews which were conducted in Manasu’u, Fourau, Ngaliwawao and Auki in Malaita Province.

Consequently, at this preliminary stage, the scope of the issues that needed to be addressed included both the customary and the formal institutions dealing with customary land disputes during and after the Protectorate period in Malaita. However, the research questions/issues were trimmed and specific later during the third stage (Analysis of Materials and Review of Information Needed) and the fourth stage (writing up). The sole reason for such was the need to comply with the word limit of the SRP and that there was ample information to deal with issues relating to chiefs and traditional leaders in Malaita.

2.2 Stage 2: Collection of Information

There were various ways that were identified to get information for this SRP. An important method was library research. Four separate libraries were used namely, the University of the South Pacific (USP) Emalus Law Library, libraries in Solomon Islands (USP Honiara Library and the Solomon Islands National Library) and the USP Laucala Library. The USP Laucala library was used by way of inter-loan when certain books which I need were not found at the USP Emalus Law Library.

Secondly, the internet was used to get information. Many of the case laws, legislation, journal articles, reports and new paper articles were taken from the internet. The internet facilities available at the University of the South Pacific Emalus Law Library
helped to save a good deal of time, effort and funds in research and travelling. I also used email exchange with various important scholars to get information from them and related materials.

Third, I obtained information through interviews conducted with certain chiefs and other people who have knowledge about chiefs and traditional leaders, customary land, customary land disputes and related issues in Malaita. The main villages which I visited and interviewed their big-men from July 2010 to the first week of August 2010 were Manasu’u, Fourau, and Adou villages in North-east Fataleka. Interviews were also conducted at Auki – the Headquarter of Malaita Province, with members of the Malaita Local Court and Malaita Customary Land Appeal Court who are themselves chiefs and leaders within their own locality particularly Duddley Fugui, Rinaldo Talo, Jackson Lea’afuna and Jeffery Ini (a former member and secretary of the Fataleka House of Chiefs). In December 2010 I went back to North Malaita to do further interviews with two traditional leaders from Baefua area – Robert Kofuria and Vincent Misitana. The latter is the one who started the Tai House of Chiefs and a former member of the Lilisiana House of Chiefs. Mr. Vincent Misitana is a member of the Tai House of Chiefs as well and a member of Olemaoma House of Chief and joint panels who deal with customary land cases in Baefua and neighbouring localities. Given that there was limited funds and the duration of time spend in Malaita Province, the scope of the areas that were visited in Malaita were minimal.

Discussions were also held with two Solomon Islands academics who are lecturers at the USP Law School at Emalus Campus Port Vila, Vanuatu namely Joseph Foukona and Paul Mae who are by origin from Malaita Province hence both have insights on issues affecting chiefs and traditional leaders in Malaita. Generally, discussions were centred on issues and challenges affecting chiefs and traditional leaders in Malaita. Moreover, extensive discussions were held with Emeritus Professor Donald Edgar Paterson of the USP Law School, regarding issues that were discussed and explained in this SRP.
2.3 Stage 3: Analysis of Materials and Review of Information Needed

The third stage entailed the analysis and review of the various materials and information that was collected and gathered in stage two. Stage 3 was crucial as it put into perspective the information/materials that were collected. That is the various information collected were divided into their respective research issues and questions. At this stage the SRP started to take shape and the analysis concentrated on the role of chiefs and traditional leaders. The duration of this stage was the first and second weeks of August 2010.

As a consequence of stages 2 (collection of Information) and 3 (Analysis of Materials and Review of Information Needed), the scope of the SRP took a more specific direction. Thus, the first set of important issues that were framed as guidelines for this SRP were the ascertainment of important concepts such as customary law, customary land and customary disputes. The second set of fundamental issues entails the need to provide a background on certain important cultural aspects of Malaita – the province in Solomon Islands under study. Hence, research questions were formulated to include important cultural aspects and how these relate to customary land disputes and settlement in Malaita. Similarly, an important issue was the need to provide a clear description of the important traditional decision making mechanisms in various regions in Malaita in order to see the importance of why these institutions are crucial in the context of customary land disputes.

The third set of issues dealt with research questions relating to factors responsible for customary land disputes in Malaita. Further, research questions were formulated in order to differentiate intra-tribal and inter-tribal types of customary land disputes, and the explanation of issues relating to jurisdiction, procedural conduct, \textit{res judicata}, the ways chiefs and traditional leaders are chosen, and how these chiefs and traditional leaders solve customary land disputes. The fifth set of research questions mandated the explanation and assessment of the advantages and challenges facing customary land dispute settlement/determination and chiefs and traditional leaders in Malaita and the possible reforms to invigorate the work of chiefs and traditional leaders dealing with customary land disputes.
2.4 Stage 4: Writing Stage

The write-up stage for this SRP was in two stages. The first stage of the write-up was from middle of August 2010 to December 2010 in which I did most of the write up. This was done chapter by chapter. After each chapter was fully drafted, I gave it to my supervisor for comments. Feedback on each chapter was provided by the supervisor during meetings which was held as soon as each chapter was read by the supervisor.

A notable aspect of this stage is that given the ample amount of information that was collected and the word limit for the SRP, there was a shift in terms of the research questions. Thus, it was limited to a study of the chiefs and traditional leaders in Malaita and the associated issues affecting them. This means that the research questions or issues relating to the formal courts were left out.

The second stage of the write-up was from early September 2011 to October 2011. This was after the submission of this SRP to the relevant markers. The comments from the two markers were received in late August 2011. Both markers suggested important changes and the inclusion of several issues that are seen as crucial for the SRP. Consequently, in early September 2011, I started to include the relevant materials and the comments suggested by the two markers. I also write a new chapter entitled “An analysis of the Tribal Land Dispute Resolution Bill 2008”. This chapter was not an issue that was considered during the interviews that were carried out in Malaita. Therefore, the comments in relation to this chapter were personal and not that of the chiefs and traditional leaders in Malaita that were interviewed.
CHAPTER 3  
BRIEF OVERVIEW OF MALAITA

3.1 Overview

This chapter provides a general overview of Malaita Province. This is important to understand the location in which this SRP took place. Below are six sections. The first section highlights the name of Malaita, land size and population. The second section puts into context the classification of the people of Malaita and the dialects spoken within Malaita. The third section provides a brief overview of its religious and socio-political organisation. The fourth section provides a general overview of subsistence living in Malaita. Fifth, a brief explanation on marriage and how it relates to land disputes is provided. The sixth section briefly explains land ownership and its relationship to land disputes.

3.2 Malaita: Name, Land Size and Population

Solomon Islands is made up of nine provinces, and Malaita is one of them. According to Clive Moore there are different variations of the name Malaita. These are Mala, Nguala or Mara. These, according to Clive Moore mean “island as land”. He further stated that the “ita” ending could be a mistake due to lack of understanding by early agents of change such as explorers, as to the way Mala/Nguala/Mara was pronounced. Another explanation might be

the whole word “Malaita” may be a corruption of “Marahiria” meaning “the big island”, a word used by a dialect group from the west coast where the Spanish landed. In the nineteen century Malaita was commonly known as Maratta by both the Europeans and the Melanesia labourers who left there for colonies.

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18 See Clive Moore, above n 17.
19 See Clive Moore, above n 17.
20 See Clive Moore, above n 17.
21 See Clive Moore, above n 17.
The total land area of Malaita is 4,225 sq km. Malaita is about 115 miles (185 km) long and 22 miles (35 km) across at its widest point. It is densely forested and mountainous, rising to an elevation of 4,718 feet (1,438 metres) at Mount Ire (Kolourat, or Mount Kolovrat; Tolobusi in Kwaio where it is located) in the centre. The main island of Malaita is separated from the island of Maramasike [Small Malaita] at its southeastern end by a channel only 1,300 feet (400 metres) wide.23

According to recent statistics, Malaita is one of the most populous provinces in Solomon Islands.24 In 1999 during the national census, Malaita’s population was estimated to be about 121,299.25 Its current estimated population is about 159,923.26 Such rapid population growth will certainly have a severe impact on such things as goods and services provided by the national government, the use of resources such as customary land and related use of natural resources. Clearly, the fast growing population can be said to be a cause of customary land disputes when measured against the availability of limited land, the demand for the use of customary land and the cash economy.

3.3 Classification and Dialects

The people of Malaita are Melanesians.27 Most of them are brown skinned people.28 Clive Moore, stated that ‘the brown skins vary from quite dark to a light honey shade; hair types vary from dark red to dark brown and even blond, and from fizzy to curly and almost straight.’29 However, today, Malaita also includes the Polynesian outlying islands of Sikaiana and Ontong Java. Hence, contemporary Malaita is a province made up of Melanesians with a small minority of Polynesians.

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24 See Encyclopædia Britannica Online, above n 23.
26 Ibid.
27 See Clive Moore, above n 17.
28 See Clive Moore, above n 17.
29 See Clive Moore, above n 17.
In Malaita, there are at its least 12 languages or, more appropriately, dialects which represent different cultural areas. The language and dialect groups in Malaita are To'abaita, Baelelea, Lau, Baegu, Fataleka, Kwara’ae, Langalanga, Gula’ala, Kwaio, Dorio, 'Are'are and Sa'a. (See Fig 3). Therefore, these language groups/areas help to explain the division of Malaita into dialect and geographical location. These ‘different dialects are spoken in several areas on the island and by people living in and around each major lagoon. Generally, these dialects are very important in the context of demarcating Malaita into different custom areas for the purpose of dealing with customary land dispute resolution.

33 See Ben Burt, above n 32. Also see Fig 3 – Map of Malaita language areas.
34 Clive Moore, above n 17, 4.
35 Clive Moore, above n 17, 4.
Figure 3: Map of Malaita - Malaitan language areas as taken from Clive Moore, 'Malaita' Kanaka: A History of Melanesia Mackey (1985) 1, 5.
3.4 Religious and Socio-political Organisation

In Malaita during traditional times, according to Roger Keesing there was a shared single broad cultural pattern. In a broader context, this means that religious systems and social organisations were similar. However, there were ‘major variants of this common pattern [which] are found in areas with a maritime orientation and adaption: the shallow lagoons of northeast and west central coasts, and the island of Maramasike.’ Generally, Keesing made this clear when he said:

Political organization and ritual relations between local descent groups varied considerably. In the northern zone (comprising a set of closely related languages and dialects) local descent groups were grouped together into regional clusters, united in ritual hierarchies, conceptualized in terms of descent from ancient ancestors. Politically, local descent groups seems to have been largely autonomous...In the central zone that includes Kwaio...small-scale local descent groups are fully autonomous...The southern end of Malaita ... among the west coast ... 'Are’are speakers developed a distinctive adaptation: a more hierarchical political organization, and more maritime and outward orientation, than the bush peoples of most of the island... On Small Malaita...the political organization were more pronounced; hereditary chiefs, elaborate male initiations and (bush centering on bonito....

Furthermore, ‘there is a broad dichotomy between the *wane tolo* (bush people) who live inland and the *wane asi* (coastal people) who lead a maritime existence based on the lagoons’

According to Moore *wane asi* (people of the sea) are located in Lau, Langa langa, ‘Are’are lagoons, Sa’a, Fanalei and Walande on Small Malaita, Kwai and Ngongosila in east Kwara’ae. The Lau people mainly live on artificial islands so as the people of Walande in South Malaita and the Langa langa people adjacent to mainland Kwara’ae.

In Malaita, ‘[l]ocal descent groups, throughout the main island, have blocs of territory centred around ancient shrines where ancestors were propitiated.’ People were organised in localised clans which trace descent through the male.

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37 Roger M. Keesing, above n 36.
38 Roger M. Keesing, above n 36, 10 – 11.
39 See Clive Moore, above n 17, 4.
40 See Clive Moore, above n 17, 6.
41 Roger M. Keesing, above n 36, 8.
'clans [were] known by the location of their peculiar burial-grounds'. Nowadays, Malaita people continue to organise them as such. Further, in Malaita, Roger Keesing mentioned that ‘during pre-European times, settlements were tiny, scattered and shifting – two or three houses clustered on a ridge, relocated every few years. Stability in this shifting scene was provided by the shrines that were the foci of religious congregations.' Today, the practice of shifting and relocation is minimised compared to those pre-European times and early protectorate era, and settlements are bigger compared to the protectorate period due to population growth and the influence of Christianity.

Nowadays, though people continue to settle in their tribal lands according to their clans, there are changes to residence. One is that some villages are a mixture of people from different tribes or clans in Malaita, coming together due to the influence of Christianity and associated factors. Lawrence Foanaota stated that previously during traditional times before the arrival of Christianity, settlements consisted of members of single dialect, group or clan. However, due to the influence of Christianity, and protectorate government, the mixture of different people from different dialects, groups and clans from various parts of Malaita were encouraged. Consequently, the style and arrangement of village housing were influenced by the impact of mission and the protectorate government. An example of such a village is Dala in Kwara’ae which is divided into Roman Catholic and Anglican villagers from different parts of Kwara’ae and other parts of Malaita. Thus, this led to the formation of big villages which have a population of 300 to 500 people. Also, in Fataleka, an effect of the factors was that various small settlements were amalgamated which in turned led to the formation of big villages which have a population of around 300 people. The consequence of this residential grouping is that the clan pattern was obscured. However, the individuals know which clans they belong too.

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43 T Russell, above n 42.
44 Roger M. Keesing, above n 36, 10.
46 See Lawrence Foanaota, above n 45.
47 See Lawrence Foanaota, above n 45.
48 T Russell, above n 42, 4.
49 T Russell, above n 42.
current generation, this might not be the case, given their absence from their original home for decades.

3.5 Subsistence Living

In Malaita, apart from those living in urban areas, subsistence gardening, pig rearing and hunting are central to daily existence. For instance in Kwara’ae like other people in rural Malaita, people cleared the forest to make gardens and produced their own food like taro, sweet potato and cabbage. These rural Malaita people meet their other needs such as bush materials for their houses basically from the forest. Additionally, though everyone helps to work the land, men concentrate on heavy chores such as clearing the forest while women do tending and harvesting. These heavy chores include cutting trees, clearing the ground, burning of vegetation and marking plots with holes and planting with digging sticks. In the past, the main foods were taro, yam and fish. Nowadays, introduced foods such as sweet potato, which is now a common stable crop, tapioca and certain vegetables such as Chinese cabbage and fruits have in recent years become popular foods. Despite this, Malaita people living in rural areas get most of their food from their own customary land and sea. Therefore, ‘most foods come from the people’s own lands and seas, and so does an increasing part of the cash income which brings the benefits of Western style development.’

Subsistence farming and planting of other commercial trees relate to customary land disputes because it can sometimes spark customary land disputes. This was evident, for instance, in East Fataleka, Malaita Province. In the late 1990s there was a customary land disputes between the people of three groups/tribes namely the Kulakwai, Ro’ole and Manakwai. This was because the people of Kulakwai make gardens and the Ro’ole tribe planted coconuts on a customary land in which the

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51 See Ben Burt, above n 50.
52 See Ben Burt, above n 50.
53 See Ben Burt, above n 50.
54 See Ben Burt, above n 50.
Manakwai tribe claimed to be theirs. Consequently, this matter went before the Fataleka House of Chiefs, which shows that competition for access to customary land for subsistence farming by different tribes can lead to customary land disputes.

### 3.6 Marriage

In Kwara’ae as in other parts of Malaita ‘marriage is the foundation of moral relationships and the concern of all the relatives who have an interest in the new relationships which the union will create in present and future generations.’ According to Burt, ‘traditional marriage is an exchange between families, in which the husband’s side ‘buy the girl’ (folia kini) by exchanging a bridewealth of shell money for her sexual and economic services and for the children she will bear for his clan.’ Apart from that, the exchange of bridewealth shows the willingness of the couple’s tribes/clans to form a tribal/clan connection for purposes of working together when troubles arise.

Therefore, in Malaita, ‘blood connection’ through marriages between two disputing parties is very important in terms of dispute resolution, because the notion of marriage is crucial in the sense that it links different people from different tribes together. Most of the times, in dispute resolution in custom, it is a norm to ascertain whether the parties in a conflict are related by blood in the distant past through marriages or not. This is an important premise on which to launch negotiation and discussion when parties to a conflict want to settle outstanding disputes between them. Thus, connections through marriage between different tribes/clans are usually a fundamental point to consider when Malaita people deal with customary land disputes or related disputes. Ignoring such important blood connection/ties can make customary land disputes worse.

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55 Interview with Lawrence Nare, Member of Rakwane Tribe of East Fataleka in Malaita, Solicitor, Global Lawyers, (Global Lawyers Office, Honiara, 11 August 2011).
57 See Ben Burt, above n 56.
3.7 Land Ownership

In Malaita, the clan or tribe owns the land which means there is no individual ownership. Communal ownership of customary land is the norm. In Fugui & Another v Solmac Construction Co Ltd it was stated that ‘[i]t is well established that in custom, land is owned not only by a person, but a line or family or tribe.’ This means there need to be an agreement between all the members of a tribe or clan to ensure land-use rights or related rights are transferred to any other family or individual. The lack of agreement between members of a clan or tribe in relation to development activities within the customary land or the sale of customary land is a major cause of customary land disputes in Malaita.

The ownership of customary land can be claimed by way of first settlement – original occupation which is the main basis of rights in custom to ownership of customary land. This is because ‘the person[s] who first cleared and worked the land should receive some return for their initiative and their labour’. In Malaita, customary law recognises other voluntary ways in which there can be valid transfer of ownership of customary land. Customary land ownership can be based on the land having been received as a result of compensation for a murder or other atrocity, or as a reward or gifts for bravery, or some other notable treasured service. Such transfer of ownership is an affirmation of respect for a profound service the people rendered. Customary law

60 See Don Patterson ‘Land Law’ in Jennifer Corrin Care, Tess Newton and Don Patterson, Introduction to South Pacific Law (2000) 231, 239. In Solomon Islands Allen mentioned that ‘the individual or group who first cleared the virgin forest established a hereditary interest in the land, in return for the labour expended.’ (See Allen, ‘Chapter VIII’ Report of the Special Commission on Customary Land Tenure in the British Solomon Islands Protectorate (1957), [1]).
61 See Don Patterson, above n 60. Also see Ben Burt ‘Chapter Two: Land and People, Relationships and Rules’ Tradition and Christianity: The Colonial Transformation of a Solomon Islands Society (1994) 21, 26. Further, see Buga v Ganifiri [1982] SILR 119, 120 it affirmed that original occupation is one of the five ways in which ownership of land is based.
62 See Buga v Ganifiri, above n 61, 120.
also recognized gifts of customary land to a woman’s line from a male’s line. This exchange can demonstrate the respect which a tribe has for a female of their tribe who has married to a man from another place. Similarly, nowadays customary land can be sold as a commodity, though this was never a part of the traditional culture of the Malaita people.

In Malaita, most of the cases which come before the chiefs and traditional leaders for determination and settlement basically deal with customary land ownership and boundaries. This is because of the complexities of customary land tenure or other socio-economic factors and is one of the main reasons for customary land disputes in Malaita. Among other issues, this will be highlighted in Chapter five of this SRP which examines some of the causes of customary land disputes in Malaita.

3.8 Conclusion

Malaita – a province in Solomon Islands is seen as a densely populated area as compared to other provinces. They are mainly Melanesian people by culture with a minority of Polynesian people. There are various dialects spoken in Malaita. People still continue to live on tribal land and organised them according to their tribes/clans because in custom the land is owned by the tribe/clan. In the rural areas, substance agriculture is central to daily existence and can be subsidised with European food. Connections through marriage, compensation and reconciliation are important cultural factors which still play an important part in the life of the Malaita people. In the context of customary land ownership and transfer it is mainly regulated by custom. Apart from the aforementioned, Malaita people are also affected by the socio-economic, political and other changes that are taking place in the society, some of which have negative and positive impacts on the livelihood of the people in Malaita.

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63 Buga v Ganifiri, above n 61, 119.
64 Interview with Felix Laumae, Coordinator, Department of Peace and Reconciliation, Malaita Province (Auki, Malaita Province, 31 July 2010).
CHAPTER 4 TRADITIONAL DECISION-MAKING MECHANISMS

4.1 Overview

In the past in custom, there were certain important players who facilitated the resolution of customary disputes. These important decision-making mechanisms include the fata’abu (traditional priest), aofia (big man) and ramo or lamo (warrior). In Malaita, according to custom, these were the three main leaders within a clan or tribe. Each had different roles in the society, though in some places and situations their roles could overlap.

4.2 Traditional Priest

Basically, the fata’abu was the priest. He was the link between the people and the ancestral spirits in the traditional society. In Kwar’a, Fataleka and Lau, priests were called fata’abu which means holy-speakers or tabu-speakers. In Kwaio, a traditional priest was referred to as fata’abu or wan naa ba’e [man of the shrine]. The latter was more commonly used.

In Malaita, the fata’abu took the role of leadership by way of an appointment by the spirits or gods of his ancestors. In some parts of Malaita like Fataleka, the normal practice was that the eldest son succeeded the father to get the office of the fata’abu. There it was hereditary. However, succession was not possible if the eldest son was seen to be worthless. In other places in Malaita, it depended on circumstances as the fact that a member of the clan who was always willing and assisted the fata’abu during important sacrificial ceremonies succeeded to the office of the fata’abu, given an existing fata’abu and aofia taught him the important genealogies, histories and

66 See Roger Keessing, above n 65, 242.
68 See T. Russell, above n 42, 6.
 prayers associated with sacrifices. Thus, Moore is correct when he said ‘communication with the akalo is the province of the fata aabu, an achieved position depending on knowledge of ritual and genealogies as well as descent.’

In Kwara’ae,

Priests held authority through the clan system which dominated people’s relationships with one another and with the ghosts of their ancestors. A priest was normally the senior descendant of the ancestral ghosts he dealt with, ideally from the line of the firstborn sons, trained by his father to assist him while he was alive and succeed him after he died. But he would be actually be chosen by a ghost, through dreams or signs such as sickness, which meant that the first born might be passed over or that the ancestors of a clan with no available men might choose a priest descended from them through a woman.

Generally, succession occurred at the death of a fata’abu. In terms of his main role, the fata’abu was the medium between the spirits and people. In Kwara’ae, as in other parts of Malaita, according to Burt:

The priest’s essential duty and the source of his authority was to mediate with the ghosts, invoking their support and protection...This could be a very heavy and arduous responsibility, not merely for his people’s livelihood but for their very lives, and it was supported by power over life and death, for he could also hold back blessing of the ghosts or even invoke them to kill by cursing. A priest’s authority and his acceptability to the ghosts depended upon his being made tabu; too tabu to live a normal domestic life with his wife and family or even to share food and water with men who were not strict in separating themselves from women.

Hence, in the performance of fata’abu’s role as the mediator between the people and ancestral spirits, he was a very important man who was knowledgeable in genealogy, history, and traditional cosmology of his clan. Therefore, when land disputes arose, he had to be consulted to preside over the meetings to settle land disputes, particularly when genealogy, history or boundaries were contested issues between clans or tribes.

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69 Interview with Duddley Fugui, Leader – Suraina Tribe (Mana’su’u, Ata’a, North East Malata, 27 July 2010).
70 Clive Moore, above n 17, 15.
72 T. Russell, above n 42, 6.
73 See Sam Alasia, above n 67, 138.
74 Ben Burt, above n 71, 68.
In most parts of Malaita such offices as the *fata’abu*, have been abandoned. This is because most Malaita people abandoned the fabric of traditional society – traditional religion. Hence, they become Christians and adhered to it. Consequently, nowadays, some of the roles of the *fata’abu* have been taken over by the Christian priest or pastor. In the past the priest was always from within the tribe or clan, but now the Christian priest or pastor can be someone from another place or province. The Christian priest’s role is that of a mediator between his congregation and the divine world. Additionally, he can also be a mediator between different people when troubles arise.

In most cases, the fact that the modern priest/pastor is from a different place or province explains, why unlike the traditional priests of the past, he is ignorant of the histories and genealogies of the people he serves. However, rarely in some of the areas in Malaita, particularly among the bush people of Kwaio and Baegu in the interior and which still anchored to traditional religion, the *fata’abu* can be consulted about traditional histories and genealogies, depending on which party to a customary land dispute has blood connection to that *fata’abu*. In this way, the *fata’abu* can help in the process of customary land disputes by revealing his knowledge about the histories, boundaries and genealogies of the parties.

4.3 The Big-man

In Malaita, another type of leader exhibited the ‘big-man type’ of leadership. Among the Kwara’ae and Lau speaking people of Malaita, he was called the *aofia*. In Fataleka, he was called the *nwane inoto* (man of wealth).76 Different parts of Malaita had different ways to show whether a man had the status of a big-man. In Fataleka, at the age of 12 or 13, the *nwane inoto* would be specially decorated, ceremonially initiated and during such times more than 20 pigs would be killed.77 Further, during the initiation ceremony a *fata’abu* would place shell-money on the *nwane inoto*’s

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76 See T. Russell, above n 42, 6.
77 See T. Russell, above n 42, 6. In Fataleka this ceremony is not practiced nowadays.
shoulder.78 Thereafter, the nwane inoto would be dedicated to his service.79 Also during the ceremony, the nwane inoto was given 100,000 porpoise teeth, as a symbolic display of his wealth.80 Thereafter, a dance would be performed around the platform where nwane inoto sat.81

However, in other places in Malaita, the most common method was that the aofia was selected by consensus.82 In this regard, he might not be someone from a chiefly lineage.83 He would be an ordinary person who related well with ordinary people.84 His major characteristics were courage, aggressiveness, strength, love, service, knowledge, hard work, health and fitness and a good personality.85 Unlike Fataleka, in most parts of Malaita, the position of aofia was an achieved one, not an inherited status.

Among other roles, politically the aofia headed his society86 a role similar to a Prime Minister. The aofia would exerted influence over the socio-economic welfare of his clan and would have followers up to 200 people.87 Similarly, he had the power to ease quarrels and misconducts within his community or between his followers. This was clearly affirmed by Keesing who said ‘[e]ntrepreneurial leaders…not only mobilized wealth in Melanesia big-man fashion, but keep peace within their group and, as best possible, between groups.’88 He usually used his status to gain support hence keep his people in harmonious relationship with each other. Pierre Lemonnier affirmed this when he said: ‘[P]eace depends largely on the activity of big-men. Their talents as orators enable them to force the decision to stop the fighting and they dominated

78 See T. Russell, above n 42, 6.
79 See T. Russell, above n 42, 6.
80 See T. Russell, above n 42, 6.
81 See T. Russell, above n 42, 6.
82 See Alice Aruhe’eta Pollard ‘Literature Review’ A Melanesian Approach’ Gender and Leadership in’ Are’Are Society, the South Sea Evangelical Church and Parliamentary Leadership - Solomon Islands: Embracing the Past, engaging the present and hopeful for the future! (PhD, Victoria University of Wellington University, 2006) 9, 14.
83 See Alice Aruhe’eta Pollard, above n 82.
84 See Alice Aruhe’eta Pollard, above n 82.
85 See Alice Aruhe’eta Pollard, above n 82.
86 See Sam Alasia, above n 67, 138.
events by the scope of their network of acquaintances and their relative wealth...’. 89 The big-man surely was a peacemaker.

Although he had other roles, most of them were geared towards the maintenance of good government and order within the society in which he exerted influence. For instance, the big-man who was knowledgeable in genealogy and local history 90 would certainly use this as a powerful tool to maintain peace and mend broken relationships. In this way, among other factors, his status would be maintained as a big-man. Thus, like the traditional priest, he had the competence to solve customary land disputes as well when such arose between different clans or within his clan or area of influence. In Kwara’ae society, he was the right hand man of the fata’abu.91 Therefore, it would be correct to say that the fata’abu and the aofia would work together to ensure that problems in relation to land were settled by them in an amicable way.

Nowadays, the big-man system is still practiced but at a minimal level compared to the past. The office is being taken over by senior educated elites or active clan men in the village who usually provide help to their clan.92 Thus, a man can have the status of a big-man because he is well educated, a member of Provincial Assembly or Parliament or a village man who has traditional wealth and can help his people meet some of their socio-economic needs when these arise. Additionally, a big-man can be one who has in-depth knowledge about histories or genealogies of his clan or tribe. In terms of big-man status, there are certain criteria to measure against a person’s fitness to be a big-man. First, his status in the village is important. Sometimes, this is measured by whether his father was a former big-man. Similarly, a contemporary big-man in the village is someone who always helps in the village to settle hardships among his clan’s men, or gives small financial contributions towards families who experience hardships during funerals, marriage, feasts and other custom activities. If

90 Judith A. Bennett, above n 87, 15.
problems arise within the community he is there to give compensation on behalf of his clans. More importantly, an important factor is the knowledge of his and surrounding clan’s history of customary land, sea (*alata*) and deep with broad understanding of his clan’s genealogy and *futa’a* (link) and its implications for other neighbouring clans.

### 4.4 The Warrior

The warrior was the third important leader in traditional Malaita. Among the Kwara’ae and Lau people he was called *ramo*, in Kwaio *lamo* and in ’Are’Are *namo*. In Kwara’ae warriors were trained from childhood. In order to protect this young warrior, the traditional priest would make a sacrifice to a warrior ghost. The powers of *ramo* came from the warrior ghosts as well. According to Sam Alasia the *Akalonimae* did not appoint the *ramo* directly. However, when the boy was young he showed signs of being a *ramo* when he killed animals and caused troubles and proved by his deeds and actions that he was a future *ramo*. His bravery as a *ramo* cannot be questioned when he finally killed people due to the plea of other tribes for help or proved through his courageous deeds.

In Malaita as in other parts of the Solomon Islands, the *ramo* was the chief warrior. In some parts of Malaita this office was hereditary. He dealt with the affairs of defence and warfare. In Fataleka, for instance, the *ramo* was responsible to take measures necessary to maintain peace within the clan and with outside people. Sometimes, their community mandated that they ‘enforce[d] tabu, led organised raids and assassinate[d] appropriate victims to uphold the ‘law’, obtain restitution or collect rewards.’ In Malaita, among the Kwaio in Central Malaita, according to Keesing and Corris ‘[a] true *ramo* unlike other ramos [held] tightly to the moral codes of the society

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94 See Ben Burt, above n 93.
95 See Ben Burt, above n 93, 73.
96 Sam L. Alasia, n 91, 73.
97 Sam L. Alasia, above n 91.
98 See Ben Burt, above n 93, 74.
99 See Sam Alasia, above n 93, 73.
100 See T Russell, above 42, 7.
101 Ben Burt, above n 93.
he lived in. For instance, [Basiana – the Kwaio warrior who killed District Officer – Mr. Bell] killed many men for blood money [this practice was an important part of the social order in customary societies], however, he never stole any pigs and he only [had] one woman.'

Therefore, in essence, a warrior was ideally an enforcement officer and a law abiding resident of his community or clan/tribe. He upheld the customs of his society to the highest degree to ensure the stability within his society. Consequently, ‘in meting out punishments for wrongs he was impartial, a servant of justice as the gaoler or the hangman. He never killed without a reason, and respect for his methods had undoubtedly a stabilizing influence on the community.'

The above is a description of an ideal ramo. However, it must be understood that not all ramos were like Basiana. This was because a lot of innocent Malaitans, including sometimes women and children were killed by ramo, especially for blood bounties.

In contemporary Malaita, the position has disappeared. This is because of the influence of missionaries, European education and other related influences. In Malaita, one of the most influential factors responsible to demise this office was the protectorate government. The District Officer – William Bell was prominent to ensure the elimination of the office of ramo. First, he did this by direct confrontation with the ramo through armed raids on their strongholds in North Malaita. Moreover, Mr. Bell

was able to do this by exploiting traditional enmities and feuds on the island and by taking advantage of the work that had already been done by the missions in persuading some people to accept British protection. In identifying men prepared to work with him, Bell laid the foundations for a system of indirect rule.

More specifically, Mr. Bell gained support from certain Malaita people who were also ramos in their areas of influence and were prepared to help him. This was his profound and strong-held strategy. Without such a support his work to eliminate the office of the ramo in Malaita would certainly have been futile and doomed to fail.

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104 See T Russel, above n 42, 7.
106 John Houainamo Naitoro, above n 105.
107 John Houainamo Naitoro, above n 105.
Apart from the work of Mr. Bell who basically laid a solid foundation to eliminate the office of the *ramo* in Malaita, the ruthless strategy used by the protectorate government due to Mr. Bell’s death – he was murdered by the Kwaio warrior Basia and other followers in Kwaio in 1927 – gave a strong message to the Malaita people that they needed to rethink such a position as the *ramo*. The protectorate government made it clear that it would not tolerate such an office, and asserted the government’s superiority to maintain law and order.\textsuperscript{108} From then on, the number of such offenses declined dramatically in most parts of Malaita. The government’s retaliation was an important point in the history of Malaita and had a very substantial impact on the island’s religious and political frameworks. The actions of the colonial government contributed substantially to the demise of previous leadership roles, particularly that of *ramo*.

Generally, the demise of the office of *namo* entailed the collaboration of the protectorate government, churches and Solomon Islanders.\textsuperscript{109} Another important player due to the introduction of the administrative system, was the headmen. Prior to the formal introduction of the headmen ‘the official line of communication and command had been from the district officer to the people.’\textsuperscript{110} Additionally, though the formal system of village and district headman was created in 1922 because of the enactment of the Native Administration Regulation,\textsuperscript{111} it must be noted that in some parts of Malaita already unofficial headmen had already been established which helped the protectorate government.\textsuperscript{112}

The Native Administration Regulation therefore established a native administration for the appointment of village and district headmen and their duties.\textsuperscript{113} The basic


\textsuperscript{109} See John Houainamo Naitoro, above n 105, 74.


\textsuperscript{113} See King’s Regulation No.17 of 1922 (Solomon Islands British Protectorate).
administrative structure was that Solomons was divided into four main administrative units namely, Central, Malaita, Western and Eastern headed by the Resident Commissioner who was subject to the High Commissioner in Fiji. In each district a District Commissioner was assisted by a District Officer or two. During the year the District Officers would tour their districts on several occasions in order to give and receive information from village and sub-district headmen, and to collect tax and hold court hearings. Basically, with the supervision of the District Officer, the ‘[h]eadmen...were responsible [to maintain] law and order, healthy conditions, and population records; [to assist] in the collection of head-taxes; and [to enforce] other rules in the absence of the district officers.’ Thus, headmen were to ‘enforce government imposed rules [and] their duty was to act as the major communication link between district officers and the populations they administered.’

Therefore, among other roles, the headman’s role was ‘to keep a close watch on everyone in the sub-districts and arrest or at least report those who broke the new laws. Headmen become informers against the old leaders.’ Consequently, due to the introduction of the administrative system, in 'Are'are as in other parts of Malaita, famous *namo* such as Harisimae, stopped their activity. In 'Are'are the reign of the last *namo* – Ririoa Sutanihona ended in 1930s after he was arrested at Wairaha.

Nowadays, enforcement of leader's decisions is taken on by village young men who are willing to follow the advice of village elders and big-men in their communities. Moreover, in a broad context the role of the warrior to maintain law and order has been taken over by state institutions such as the police force and courts to maintain law and order. Most of the times, when crimes or civil upheavals are committed the state through its law enforcement institutions such as the courts and police has an important say regarding such matters.

114 See Sam Alasia, above n 67, 140.
115 See Sam Alasia, above n 67, 140.
116 See Sam Alasia, above n 67, 140.
117 See Ted Wolfers, ‘Centralisation and Decentralisation until independence’ in Peter Larmour and Sue Tarua (eds) *Solomon Islands Politics* (1983) 146, 148. Also see King’s Regulation No.17 of 1922.
118 Akin David Wallace, above n 112, 180.
119 See John Houainamo Naitoro, above n 105, 73.
120 See John Houainamo Naitoro, above n 105, 75.
121 See John Houainamo Naitoro, above n 105, 75.
4.5 **Hereditary Chiefs: Maramasike and 'Are'are**

People in the Southern part of Malaita in the Are’are and Sa’a linguistic group, had chiefly systems which were hereditary. Among the Are’Are the chiefly system was called *araha* system. The Maramasike people called it *alaha* system. In these chiefly systems, chiefs acquired their status by birth. In the event that chief did not have the competence to lead they were assisted by advisors to help the chief carry out his work and other functions to ensure a well organised society. In these chiefly systems, the first born was given the position, status and role of a chief. It was when the first born was grossly incompetent that the second born or capable male in the tribe/caln would be given the position of a chief. In terms of traditional political organisation, then, these areas differ from other parts of Malaita.

Today, these chiefly systems are still practised in the Southern part of Malaita. Though affected by modernisation the major features of these traditional chiefly systems are still intact. Therefore, in Are’are, the late John Naitoro – a Solomon Islands anthropologist originally from ‘Are’are, Malaita Province, is correct when he said:

> One of the most distinctive features of ‘Are’are social organization is the continuing importance of chiefs or *araha*. Despite many new positions of authority created by government and non-government organizations under colonialism and in the years since independence, chiefs have continued to retain their own special powers. While there are other leaders at the local level, such as politicians, church leaders, and businessmen, chiefs have not been replaced or sidelined, but continue to exercise substantial influence on own account.

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125 John Houainamo Naitoro, above n 123, 11.
Despite the fast infiltration of political and socio-economic changes in 'Are'are and Small Malaita, traditional chiefs still continue to have their right position basically as guardians of customary land, disputes over customary land, genealogies and history of their people. Therefore, writing in 1993 Naitoro said that this is a main factor which reduce or lessen customary land disputes in 'Are'are as compared to other areas in Malaita such as the Kwara'ae, Lau, Kwaio and Fataleka.\textsuperscript{126}

### 4.6 Concluding Remarks

The above offices have been affected by modern socio-economic and political influences. Among the various agents of change, the ones which had the most substantial impact on the traditional decision-making mechanisms were Christianity and the Protectorate’s government. Both greatly affected the traditional religious and political system of Malaita especially in places such as Kwara’ae and Lau lagoon. From the context of Kwara’ae, as in other regions in Malaita, Burt writes:

> The history which helped shaped the Kwara’ae society of today from their ‘tradition of the past’ is above all the history of Christian conversion. When the missions persuaded people to abandon their ghosts they struck at the root of the whole system of spiritual and political authority which supported the traditional establishment of priests, ‘important men’ and warriors. These leaders were well aware of the threat and many did all they could to oppose it, but when their influence was simultaneously undermined by the colonial government the ghosts who supported them began to lose credibility. As the new ‘school’ communities grew and established themselves they began to develop their own political establishment of ‘teachers’ whose authority also derived from spiritual support, but through the new ritual system of the mission churches.\textsuperscript{127}

Christianity and the protectorate government thus changed the dynamics of traditional decision-making mechanisms. In terms of leadership, contemporary Malaita is therefore a society which blends the effects of globalisation and custom to meet the socio-economic and political changes that are taking place in society. Consequently, state institutions such as the police and judiciary have taken on an important role to maintain law and order. Other positions such as traditional priests still exist in some other parts of Malaita, in areas which still practice traditional

\textsuperscript{126} See John Houainamo Naitoro, above n 123.

religion. These traditional priests are valuable depositories of customary law and custom relating to customary land, genealogies and boundaries in the locality of their influence. In the 'Are'are region, the position of traditional chiefs is still maintained. In other parts of Malaita, which do not have the chiefly system, some aspects of the big-men system continues to be practiced but it has taken on a modern context. In most parts of Malaita, despite the infiltration of westernisation, most of the people who are labelled as chiefs and traditional leaders within their respective societies are custodians of custom, hence play an important role when customary land disputes arise within their respective societies.
CHAPTER 5       CAUSES OF CUSTOMARY LAND DISPUTES IN MALAITA

5.1 General Overview

The main part of this chapter deals with some of the causes of disputes over customary land in Solomon Islands. Examples are drawn from Malaita. This is important to set the stage for what follows, particularly chapter six which deals with the settlement of customary land dispute in custom, because these factors cause disputes, then the chiefs and traditional leaders will have to deal with the dispute before further appeal is made to the formal courts. Among other factors, in Malaita, the factors which can cause customary land disputes are lack of clear records, migration, confusion over inheritance and ownership rights to customary land, lack of consultation about customary land transaction, population pressure and changes in customary land use to include commercial activities. Before moving on to the causes of customary land disputes, a brief overview of the several categories of customary land disputes in Malaita is necessary.

5.2 Categories of Customary Land Disputes

Writing in 1979, just before Solomon Islands gained its political independence, after a close study of customary land disputes cases, Ian Heath said:

Customary land disputes generally fell into (or more) into the following categories: disputes between adjacent “lines” (especially where members of “one” line were using land normally associated with the other); disputes within “lines” over past sales or other customary transfers of land (often amounting to disputes over how is the land controller by custom; disputes between two “lines” who had both used the same land at different times; disputes between the descendants of in-coming migrants and their host “line” (often associated with either mission activity or coastal relocation) and boundary disputes over a named parcel of land encompassed or whether one named area was part of or separate from another named area.128

In Malaita, as in other parts of the Solomon Islands, this basic categorisation still holds. At the most general level of analysis, there are four main types of disagreements

128 Ian Heath, ‘Post-war Administration’ Land Policies in Solomon Islands (PhD, La Trobe University, 1979) 326, 388 – 389. Also see Colin H. Alan, above n 111, 235 – 237.
between parties over customary land. The first one is in relation to the ownership of customary land. An example is *Kofana v Aute’e*\(^{129}\) where the dispute is basically ‘over rights of ownership between the parties’. Another is in relation to boundaries of customary land. For example, in *Alemaesia v Agola*\(^{130}\) Faukona J said ‘[t]hough both parties claimed Su’ubira customary land, and that both claimed to represent Su’ubira tribe, their versions as to the boundaries of the same land are quite not the same.’ Writing 10 years ago which is true nowadays, Philip Tagini, said that customary land boundaries were the most litigated.\(^{131}\) The third broad category encompasses the ownership of the seabed, foreshores,\(^{132}\) reefs and the sea between the foreshores and reefs. A fourth category includes certain rights to customary land particularly usage rights and control rights. The fourth category is different from the first category because of the notion of “ownership” of customary land and “usage” rights within the customary land. The fact is that disputes usually arise between those who own the land and those who have rights to use the properties within that customary land.

5.3 Causes of Customary Land Disputes: Brief Overview

5.3.1 Lack of Clear Records

A major factor which has caused land disputes is the lack of proper records in relation to occupation, births, deaths and marriages. There is lack of proper records by which clans or tribes pass on genealogies on to the succeeding generation because Malaitan genealogies and histories are passed on by word of mouth. David Gegeo confirmed that ‘…[l]ike other societies that did not have a writing system, in Solomon Islands the


reliance on human memory to support claims tends to compound land disputes...” 133 The problem with such transmission is that some facts might be easily distorted to suit a clan’s or tribe’s own interest in relation to a particular piece of land or genealogies or histories might be outright fabricated. 134 As a result there is a high chance for different versions of genealogies or histories to be presented for a particular piece of land. For instance, in one place in North-east Malaita, customary land disputes emerged because there were different versions of genealogies and histories about an area called Asinawane. 135 This led to several different tribes arguing over who had rightful ownership of the said piece of land. In that context, the lack of proper records is a cause of customary land dispute because it allowed assertion of different versions of genealogies or histories about a particular piece of customary land.

5.3.2 Migration

Second, a cause of customary land disputes is migration. In the past, Malaitans often moved from one place to another. Some of the reasons for such a movement include traditional warfare, fears of sorcery, cases of adultery, or a group of people causing so much trouble in a village that the land owners of the place told them to leave their land. 136 Another, reason might be ‘voluntary emigration for kinship reasons’ 137 which might be a consequence of cultural activities or marriage. For instance, in North Malaita, land disputes appeared because of a situation over who should be the head of the land associated with migration. James Apaniai stated:

In this situation, the real issue does not involve land ownership. It is undisputed that the land is owned by a certain clan, but when clan members get married, sometimes they would go and live with their in-laws while still retaining their ownership rights in their clan’s land. But as generations go by, the people’s knowledge about land rights back in the land where they originated, and who their real clan heads are, seems to deteriorate, so that in the end, the members who have always been living on that clan’s land would claim themselves as the heads of the land although according to customary rules the real heads might be

134 Interview with Anthony Oto (Fourau Village, Ata’a, Northeast Malaita, 29, July 2010).
135 Interview observation and conversation with Dudley Fugui (Manasu’u, Ata’a, Northeast Malaita, 27 July 2010).
136 See Clive Moore above n 17, 7.
137 See Clive Moore above n 17, 7.
some who has got married and who is now living somewhere else with his wife’s
land.  

Thus, ‘occasionally, migrant groups from one language area can be found living in
other areas’.  An example of this is the Lau speaking people living among the South
Malaita people. Another example is the Olufera people or Agia living at Ata’a,
Northeast Malaita, who were believed to have their origins from Kwaio. Such
migrations have the potential to cause land disputes generations later because the
descendants of the original land owners may not have been there due to other cultural
reasons which forced them to live in other places in Malaita. This is likely to have been
a factor that was responsible for the dispute over the Asinawane land in the mid
1980s in which migrant groups claimed that the land was given to them by the
original land owners who were not there and dispersed to other parts of Malaita.

5.3.3 Confusion over Inheritance and Ownership

A third factor that is a cause of customary land disputes is confusion over land
inheritance and ownership. This could be a result of several factors. One is that
customary land tenure entails *inter alia* ‘a complex, overlapping set of rights of
ownership and use’. This means customary land tenure encompasses sets of rights
for different people within a clan or tribe, or someone might live at one place but have
certain rights to other land. Ron Crocombe rightly recognized this when he said:

In many land disputes most people are going to continue to feel that a wrong
decision was made, because most people disputing the land do have a claim that
is reasonable to them, by one criterion or another. Very often there are not only
two, but three or four or five or more claimants, each claiming on the basis of
conquest, another may claim the same land by inheritance in the maternal line,
another by inheritance in the paternal line, another may claim it on the basis of
adoption, or gift, or purchase, or by the fact that they’ve use it for a long time, or
by various other criteria. 

139 Clive Moore, above n 17, 7.
140 See Cambell Alan Melachlan, ‘Disputes: Custom As Process’ *State Recognition of Customary law in the South
The various claims based on custom can create disputes as to who owns the land or other rights related to that land. An example is *Kofana v Aute’e*\(^{142}\) where the dispute is over rights of ownership between the parties, over Kwaruiasi and Biranakwao lands among the Kwara‘ae people in Malaita province. According to Albert Palmer J (now CJ):

> In the present case...the Appellants now wish to identify in custom what exactly are their rights of ownership as amongst themselves (as the recognised landowners). It seems the Appellants are alleging that primary rights of ownership are vested in them whilst merely secondary rights vested in the Respondents.\(^{143}\)

The above affirms that the parties were confused about what rights each of them had with regard to the land at issue, which led to the dispute over ownership and other rights which both parties had to the customary land.

Similarly, another factor which causes confusion of ownership and inheritance is the lack of proper transfer of genealogies and histories of clans or tribes to the current generation. There is a missing link between elders and young people. The missing link is typified by the younger generation who are at sometimes unwilling to learn from elders or live faraway from elders because of education or employment opportunities or related factors. Christianity also plays a part. This is recognised by Leonard Maenu‘u who said:

> The effect of Christianity on things like genealogies was a major factor of disruption in our society. This can be more readily appreciated when we keep in mind that all our dealings in the past were by word of mouth. The fact that there were no written records, and the fact that in Christian communities anything tending to remind people of their traditional beliefs and practices was blotted out, meant that children born in Christian communities had no means of appreciating their traditions, let alone their genealogies. Being able to keep fresh in our minds all the time, mainly through the performance of customary ceremonies, was important. The gap thus created in our culture by Christianity still exists.\(^{144}\)

As a result, elders or knowledgeable people to some extent are less able to transfer such important genealogies and histories to their clan’s or tribe’s people. This missing

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\(^{142}\) See *Kofana v Aute’e*, above n 129.

\(^{143}\) See *Kofana v Aute’e*, above n 129.

link therefore can breed confusion over ownership and inheritance. Land disputes can be sparked due to lack of clear or confusion over histories or genealogies between clansmen. For instance, at one village in North-east Malaita, there was confusion about the customary rights to a piece of land given by another tribe: Clan A argued that it was their great-grandfather who was given the land because he was the who defended some men from being killed by another tribe, and took them to his village to save their lives. They therefore, contend that they have overall rights over that given land which means Clan B is subject to Clan A. However, Clan B also claims the land because their great-grandfather also accompanied the great grand-father of Clan A to defend the lives’ of those who gave the land. Clan B contends that both of them have the same rights to land particularly in terms of gardening and hunting. This confusion about rights to that land therefore leads to land disputes over that concerned land between the clans. Though the matter is yet to be taken before the Fataleka House of Chiefs, there is a clear stand-off between the clans as to their custom rights to that concerned land.

5.3.4 Lack of Consultation about Land Transaction

A fourth factor which causes customary land disputes is the lack of proper consultation with tribe or clan members in relation to any development or happening within the customary land. As has already been stated, customary land is not owned by an individual. Thus, any decisions regarding development or activities in relation to customary land needs to be made by the clan or tribe. However, there are some individuals or clan/tribe leaders who make customary land transactions without the consent of or collective decision by their clan or tribal members. For instance, from personal observation in North Malaita among the Kao Tribe, a dispute emerged as to the ownership of the Kao land because a prominent leader of the clan sold certain lands belonging to the clan without the consent of the clan members. The fact is that in custom selling land without the consent of other clan members is wrong. The concerned leader is an educated man and because he saw himself as superior than his other clan members, he thought he did not need to consider their views to make

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145 Interview with Jeffery Ini, Former President and Secretary of the Fataleka Council of Chiefs (Auki, Malaita, 30 July 2010).
decisions about land sales, ownership or rights attached to that land. This made other clan members unhappy and this was what led them into the dispute over the Kao customary land. A member of the Kao clan said that they planned to take the matter to the Tai House of Chiefs in Baefua area in North Malaita or a joint committee of other members of surrounding houses of chiefs such as the Olemaoma House of Chiefs, Lilisiana House of Chiefs or Marada House of Chiefs. However, this is still in the process given that the Kao clan members need legal advice on res judicata in order for them to be certain on whether they can reopen the case.146

5.3.5 Population Pressure

Fifth, population pressure could be a factor which can spark land disputes.147 According to Tarcisius Tara and Ponipate Rokolekutu ‘in societies like those in the Pacific Islands there will always be potential for conflicts over land because there is limited land available while the population and demand for land increases rapidly.’148 In Solomon Islands, the population is growing at an alarming rate. Malaita, in particular, is densely populated.149 This becomes a special problem when people started to move or expand into a new territory or land which was previously unoccupied. They move to build new houses, make gardens, hunt or start economic activities such as stores or related commercial activities on customary land the rightful owners of which are undetermined. This may spark disputes as to land ownership or boundaries. This was confirmed by Campbell McLachlan who said, population pressure

[p]uts strain on the ability of the customary land tenure system to cope and encourages individuals and groups to test boundaries and rights to uninhabited lands which might not otherwise have become the subject of contention.150

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146 Interview with Mariano Firimolea, Member of land owning group of Kao land in North Malaita (Honiara, 4 August 2010).
147 See Campbell Alan McLachlan, above n 140.
149 See Nicholas K. Gagahe above n 22.
150 See Campbell Alan McLachlan, above n 140, 298.
This may be compounded by the fact that if the boundaries are not clear because of the changes of the natural features of the customary land this would certainly lead the parties to dispute where the boundaries are. For instance, a tree, shrine or physical geographical features such as stones which were used to mark a boundary may have been removed by natural disasters such as floods or cyclones. In sum, population pressure associated with the lack of clear boundaries could spark customary land disputes.

5.3.6 Economic Activities on Customary Land

Sixth, a factor responsible for customary land dispute is the change in customary land use to include commercial activities.151 According to David Gegeo,

> [n]umerous factors can be cited to explain the escalation in the number of land-related disputes on Mala’ita. The primary factor, however, is capitalist transformation of Solomon Islands society through the process of development. In West Kwara’ae alone this escalating tension has not only intensified hostility between disputing clans but also has led to rifts among clan members, and, in several instances, within families.152

People in the villages are starting to use customary land for commercial purposes in order to survive and compete in the modern economic system. This is important because the modern economic system influences people’s life styles. Consequently, Malaitans like people from other provinces in their quest to earn money invite commercial activities to take place on their customary land. Or this may occur as part of the government’s plans to develop the rural areas. Some of the major commercial activities which the Solomon Islands Government has supported that have increased customary land disputes include Bina Harbour Tuna Project and Suava Bay Fisheries Project. Logging too is a classic cause of disputes.153 It is interrelated to land disputes.154

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152 See David Gegeo, above n 133.
disputes.\textsuperscript{154} The problem among others, which sparked land disputes, is rightly recognised by Tarcisius Tara:

Many logging companies come to Solomon Islands from ... Indonesia and Malaysia where the state owns the land. Hence, they find it much easier to deal with the state or individuals rather than the tribe or clan. Consequently, they create individual landowners... In such a situation, the tribe is usually marginalised and denied access to the wealth accumulated through logging.\textsuperscript{155}

Since land is communally owned, when the tribe or clan members are left out regarding access to the wealth generated, land disputes can arise. This is because everyone who has rights to the land should benefit from the commercial operation relating to financial returns and related issues. Financial benefits should not only be enjoyed by an individual alone. This was a basic principle regarding the marketing of resources generated on land even before Europeans arrived in the Solomons. This often leads to disputes over land ownership, land use or related rights attached to customary land. Thus, Ian Heath was correct when he said ‘...it was clearly the modern pressures of development that were bringing the majority of land disputes to the surface.’\textsuperscript{156} Solomon Islands High Court Judge Faukona also recognized this when he said: ‘Dealings with customary land for the purposes of development under the (current Act) does not bring about social harmony among the people, community, or even among members of the same tribe, instead spark of litigation, threat and at times physical confrontation.’\textsuperscript{157}

5.4 Concluding Remarks

There may be other causes of customary land disputes in Malaita and in other parts of Solomon Islands, but the key ones are lack of clear records, migration both traditional and new, confusion over land inheritance and ownership, the lack of consultation with clan members regarding development activities or related issues, population pressure and the introduction of commercial activities to customary land, are believed to be

\textsuperscript{155} See Tarcisius Tara Kabutaulaka, above n 154.
\textsuperscript{156} Ian Heath, above n 128, 326, 390.
some factors. These factors are found in other provinces in Solomon Islands as well. Nowadays, it could be said that the spread of economic activities to customary land such as logging and the lack of clear records are the principal cause of customary land disputes. This could be followed by the lack of consultation with other tribe’s men/women in relation to sales of parts of customary land. The least of these factors responsible of customary land disputes are population pressure, confusion over inheritance and migration.
CHAPTER 6  CUSTOMARY LAND DISPUTE DETERMINATION AND SETTLEMENT IN CUSTOM: AN OVERVIEW OF THE PROCESS

6.1 Overview

In custom there were two main ways to settle disputes. One which is not practiced nowadays is by warfare, however, even today customary land disputes occur involving violence before they can be settled by village elders, chiefs, big-men or courts. Sometimes tribal and individual violence occurs because of an unfavourable outcome to a party to customary land case or sometimes tribal or individual violence in relation to issues regarding customary land genealogies, histories take place before the matter is taken before the chiefs and traditional leaders.

The other method is by way of negotiation, discussion and mediation which are associated with compensation and reconciliation. In traditional Malaita, the important leaders who played a role in dispute resolution were the fata’abu, aofia and ramo. Their roles have however declined due to the modern influences such as the Protectorate Government and Christianity. Despite that, negotiation, discussion and mediation as a custom way of settling land disputes still survives though there are changes in relation to the people who officiate in these processes. These processes are used by some of the tribal chiefs and traditional leaders and village elders in parts of Malaita assisted by Christian leaders when the customary land dispute is between people of the same clan or tribe.158 These processes are often associated with compensation and reconciliation. It is only when intra-tribal attempts fail that people will resort to the chiefs and traditional leaders’ involvement as recognised by law as the first tier to deal with customary land disputes159 which is referred to as inter-tribal in this SRP and is the commonly used forum.

This chapter consists of six sections. The first section gives a brief summary of disputes in Malaita during traditional times. The second section describes custom negotiation and mediation in traditional times in order to provide a background for the

159 See John Muria, above n 158.
continuous use of mediation by some of the chiefs and traditional leaders in Malaita. The third section deals with compensation and reconciliation as important customary methods to solve disputes. The fourth section looks at intra-tribal disputes in order to distinguish it from inter-tribal disputes. Section five entails the jurisdiction, conduct of proceedings, composition, overview, the way chiefs/traditional leaders are chosen to deal with customary land disputes and the ways in which houses of chiefs deal with customary land disputes. The sixth section explains tribal violence in traditional and modern times.

6.2 Background of Process in Custom

Customary land disputes were uncommon in traditional times. Arguably, ‘...land disputes in the olden days were practically nil’ or minimal as compared to contemporary Malaita. According to one commentator, this was because rights to land were clearly defined and at that time clan or tribe members knew what land belongs to each tribe or clan - during those times, people were certain as to what tribes or clans owned which land, and boundaries were clearly ascertained. Another factor might be ‘no one interfered with another’s interests for fear of sorcerers, or the vengeance of dead ancestors to whom it was believed, the land ultimately belonged.’ What was common were social disputes such as tribal warfare due to fights over women, blood money or revenge from earlier killings. However, disputes over customary land seen to have started to increase during the Protectorate period.

6.3 Negotiation and Mediation

One of the basic traditional methods for solving social disputes was discussion and negotiation. This custom method was later extended to solve customary land disputes

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161 See F. M. Talasasa, above n 160. Also see Colin. H. Alan above n 111, 234.
162 See Colin. H. Alan, above n 111.
when they started to become more common during the Protectorate period.\textsuperscript{164} During the Protectorate period this was the first step to solve disputes over customary land throughout most of the islands in Solomon Islands.\textsuperscript{165} Arguably, discussion and negotiation was a simple method. Generally, the process was informal. It had no rigid rules of adjudication and hearing of evidence. It was flexible and fluid. The process depended on the nature of the dispute. According to a commentator:

The method of open discussion is commonly used in Melanesia societies as part of their social way of life. The method is really a “carry forward” from the olden days in which all types of social conflicts were discussed by means of compromised solutions. The form it took in the olden days as compared to its present form may be slightly different due to change of circumstances and other social factors, but it is still used ... as a first resort to deal with all type of disputes relating to social misunderstandings.\textsuperscript{166}

Basically a compromise decision would be reached through the work of the leaders of the concerned society. The \textit{fata’abu}, \textit{aofia} and \textit{ramo} all worked together to the settle disputes. Though in the past land disputes were uncommon, when they arose it was the \textit{fa’atabu} who was the main solver of customary land dispute.\textsuperscript{167} In Kwara’ae according to Burt:

Historical accounts and present opinion ... both confirms that priests acted as land leaders and representatives of their local clans. In the 1960s a [traditional priest] Ramo'oitololo of Latea gave a memorable demonstration of this role in several land disputes with neighbours of other clans.\textsuperscript{168}

This was because in his area or locality of influence, in custom it was the \textit{fata’abu} who was the person who was very knowledgeable in custom law, genealogies, histories and boundaries of the people who disputed a customary land. In custom, usually the \textit{fata’abu} who presided over the disputed case would call the parties together. Discussions were simple. The main issue would be highlighted whether it was genealogy-based or boundaries-based, and the parties would listen to the \textit{fata’abu}. Thereafter, decisions would be made. Sometimes, the \textit{aofia} – a recognised big-man

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\textsuperscript{164} Ian Heath, above n 128, 391 – 392.  
\textsuperscript{165} See F. M Talasasa, above n 160, 12.  
\textsuperscript{166} See F. M Talasasa, above n 160, 12.  
\textsuperscript{167} Interview with Leonard Maenu'u, Former Commissioner of Lands at the Ministry of Lands, Solomon Islands (Honiara, 4 August 2010).  
\textsuperscript{168} Ben Burt, above n 56, 67.
\end{flushleft}
who gained power and support from his followers through his own hard work and personal integrity, assisted the *fata’abu*. This was because usually the *aofia* also had in-depth knowledge of customs, custom boundaries and traditional histories of the people of his area or those under his sphere of influence. As such, during land disputes he would be there to assist in settling the problems of boundaries or genealogies as the case might be to ensure a peaceful outcome.

Basically, the decisions were a reflection of a win-win situation. In order to reach a decision the *fata’abu* and *aofia* including other senior relatives assisted by way of mediatory efforts.\(^{169}\) They would engage in an open discussion.\(^{170}\) Thereafter, a compromised decision would be made.\(^{171}\) Hence, decisions were reached by consensus.\(^{172}\) Custom was the basis in which decisions to determine claims were based.\(^{173}\) The end results were made to ensure justice between rival parties. Therefore, the customary notion of justice was about re-establishing and fixing the broken relationship between the two parities. A result reached by the involvement of the *fata’abu* and *aofia* (big-men) usually meant that both parties would be happy at the end of the dispute settlement.

### 6.4 Compensation and Reconciliation

Compensation and reconciliation continues to be very important components of the customary legal system. They are associated with discussion, negotiation and mediation. Usually, compensation and reconciliation are outcomes of a successful discussion, negotiation and mediation between parties in dispute. In Malaita compensation and reconciliation usually end customary land disputes. This is when both parties to the customary land disputes have agreed to settle the dispute in a way that will help them to live in a harmonious relationship. This can be an outcome of both parties settling their differences in relation to history, genealogies and boundaries

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\(^{169}\) Sam Alasia above n 67, 138 – 139.


\(^{171}\) See Joseph D Foukona, above n 170.

\(^{172}\) Joseph D Foukona, above n 170.

\(^{173}\) Joseph D Foukona, above n 170, 10 and 26.
between themselves or it can happen after both parties have exhausted the legal processes in relation to customary land disputes.

In contemporary Malaita this still has its rightful place within the fabric of certain societies. As such it is still practiced and maintained in most societies in Malaita. Compensation is asked mainly when a norm recognised in custom is being breached by a person from Malaita or another province. In some instances, the state is asked to compensate for customary breaches against the Malaita people in which it was alleged that other provinces were responsible. Some of the examples of offences which mandate compensation include breach of sexual codes, murder, stealing, adultery and fighting. Compensation is an important way to bridge the broken relationship between the parties and ensure the wrong doings are forgiven. The effect of compensation completely settles the stand-off between the disputing parties.

Among the Kwara’ae people of Malaita, in order for resolution of disputes to take place the restoration of respect by making the mind of the offended party good is crucial. This could be by way of demanding shell money as compensation. In order to arrive at a compromised decision in relation to the amount of shell money (tafuli’ae) the parties would negotiate a suitable payment. Such a negotiation is on the premise that peace is what they want. The purpose is the restoration of goodwill and removal of bitterness.

175 David Akin, above n 174. Also see J D. Foukona, ‘State powers and institutions in Solomon Islands’ developing democracy’ http://www.vanuatu.usp.ac.fj/sol_adobe_documents/usp%20only/pacific%20law/foukona.pdf (Accessed 12 August 2011) in which the author highlights two case studies in 1989 and 1988 respectively. The former entails compensation due to swearing by a man from Rennell/Bellona Province and the later entails compensation asked by several Malaita people because two Malaita girls who were educated at a Secondary School in Guadalcanal were alleged to have to have been raped by certain people from Guadalcanal.
178 Ben Burt, above n 177.
179 Ben Burt, above n 177.
180 Ben Burt, above n 177.
One factor which determines the amount and nature of compensation or restitution is the seriousness of the offence. In relation to customary land disputes, the two parties would exchange one to two *tafuli‘ae*. When they have agreed on a certain amount as compensation a time will be usually set for reconciliation.

Reconciliation involves the parties in dispute, their family members and usually some moderators or mediators. The basic process is that there is usually apologies from each of the parties, and in a modern context due to the important role Christianity plays in the society prayers are often said and the most important part is the exchange of shell money and modern money given the importance of modern money in a contemporary society. Moreover,

[r]econciliation works through the acquiescence and support of the community in which it exists, and where it is undermined from within that community the relevance and force it has is similarly reduced. Reconciliation works as a bridge to repair damaged relationships between individuals, families and communities. It is a very powerful tool for maintaining harmonious relationships when it is used in a genuine spirit of cooperation and friendly relations.

In relation to criminal cases, though the courts in Solomon Islands recognize compensation as important, it is used only as a mitigating factor in sentencing of a criminal offence. In *Regina v Asuana* a former Chief Justice of the Solomon Islands High Court - Ward stated:

[I]t should always be remembered that compensation is an important means of restoring peace and harmony in the communities. 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.

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181 Ben Burt, above n 177.
183 See Nick Goodenough, above n 182.
184 See Nick Goodenough, above n 182.
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.\textsuperscript{185}

The aforementioned is the view of the state courts. It is therefore different from the way Malaita custom see the value and purpose of compensation. This is because compensation apart from the fact that it restores peace and harmony, also settles the dispute between the disputing parties whether the dispute is civil or criminal. In the context of customary land disputes, reconciliation and compensation are important custom practices associated with negotiation, discussion and mediation to bring disputing parties together in order to settle their differences and end the disputes between the disputing parties.

\textbf{6.5 Intra-Tribal: Tribal/Clan Elders, Big-men and Church Leaders}

In contemporary Malaita, warfare is no longer practiced as a mechanism for dispute resolution in relation to issues relating to customary land ownership. This is because the Protectorate government stopped the work of the \textit{ramo} and related offices. Similarly, Christianity sabotaged traditional religion which brought the demise of the traditional priest and other associated big-man in almost all of Malaita. Nonetheless, some of the elements of previous dispute resolution mechanisms in custom remain in practice. Within each area or region in Malaita, there are certain people knowledgeable on custom, boundaries, genealogies and histories of different tribes/clans. Others though they do not know the histories, genealogies and boundaries of the parties in customary land disputes, are competent to solve customary land disputes, at the village level. Such people mainly include church leaders such as priests and pastors of Christian churches. These priests and pastors have such status because of the respect people have towards Christianity within their communities.

Though, the process of modernisation has had some impact on the process of customary dispute settlement, there are certain features of custom dispute resolution which are still intact. The basic method or process of negotiation and discussion is still maintained. In some parts of Malaita, before a matter about customary land goes

to the chiefs for settlement, the two parties who are in dispute over boundaries and ownership of customary land first meet to settle any customary land issues. If the discussions do not succeed, the dispute is referred to chiefs’ panels or houses of chiefs which will be discussed later.

Consequently, when customary land disputes sometimes arise within a clan or tribes within the same village, concerned leaders of the two opposing tribes/clans can sometimes handle the situation as mediators and at meetings convened to settle the land problems and other problems like village violence associated with customary land disputes. The village elders or clan heads who engaged in such meetings are those who are knowledgeable about their clan’s boundaries, histories, genealogies or related facts and issues in relation to the problem. In most instances these leaders are supported by committee elders as well, to decide land disputes or problems relating to customary land or other social problems.\textsuperscript{186} For instance, in Kwara’ae, David Gegeo documented that,

\begin{quote}
   in one instance which he observed...an elder and a daughter of a big-man of a clan pulled up all the young coconut trees that other clan members had planted as a base for a large coconut plantation business venture. The resultant dispute almost led to bloodshed between the elder's daughter and her sons on one side and her clan members on the other; fortunately, the village chief and his committee of elders intervened.\textsuperscript{187}
\end{quote}

In order to conduct a meeting, they usually come together at one of their villages or on a neutral ground. In some instances, the neutral ground is the house of a church leader, the place of a neutral elder or respected leader within their community or at the village meeting house. This leads to a ‘talk-story’ that highlights the facts giving rise to the customary land disputes. When the nature of the customary land dispute is ascertained, they will discuss the boundaries, genealogies or disputed facts in question. Each party is given the chance to elaborate on how the dispute arose and their histories or genealogies before the village elders and clan heads.\textsuperscript{188} Meetings of this nature can take place over several months rather than being dealt with during one particular meeting. In very rare instances, some cases of disputes can be dealt

\textsuperscript{186} See David Gegeo, above n 134, [8].
\textsuperscript{187} See David Gegeo, above n 134, [8].
\textsuperscript{188} See David Gegeo, above n 134, [8].
with in a single meeting but sometimes there would be a number of meetings. At times, they will conduct a survey of the boundaries to ascertain the facts of the case.

Sometimes, though rarely, in that process or during such settlement the clan heads or village elders are assisted by the church leaders, a priest or pastor depending on the denomination of the villages involved in the dispute. Here, church leaders play a very important role in mediation. Thus, Burt is correct to say:

The greatest responsibilities of all belong to the ‘pastor’, who is elected by the members of the local church to be the religious leader for the group of neighbouring villages. The pastor is the ‘teacher’ of former times who acts as religious instructor, advisor and confessor, helping to settle problems in people’s relationships with one another and with God by mediating disputes and encouraging people to live clean and pure lives.

Usually, the church leader is neutral and acts as the mediator between the two parties. Sometimes he helps to clarify certain misunderstandings between the two tribes/clans as to the facts in dispute, or tries to help both parties to come to a common understanding. Sometimes, provincial members or members of parliament may also intervene to settle or mediate disputes. This is possible because of the high respect people of their tribe or people within their constituency hold for such people.

The settlement method just described is basically helpful if the problem is one of customary land within a clan or if leaders of each clan of the disputing parties are related by way of marriage to each other in the distant past which then creates some kind of respect to such blood connection. Such a settlement occasionally ends with reconciliation and exchange of shell money between the parties. An example is the reconciliation by villagers from Bita’ama in North Malaita, who held a reconciliation ceremony to sort out differences and end long-running land disputes.

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189 Personal conversation with Paul Mae, Assistant Lecturer (USP Law School, Emalus, Vanuatu, 21 September 2010).
190 Ben Burt, above n 127, 231.
191 Ben Burt, above n 127, 236.
192 Personal conversation with Joseph Foukona, Lecturer, (USP Law School, Emalus, Vanuatu, 21 September 2010).
However, the basic limitation of the aforementioned method is that it is only common within a village setting and within the same clan. When a land dispute is between different clans or tribes of different villages the people prefer to take customary land disputes to the chiefs who are often referred to chiefs’ panel or house of chiefs that will be explained and discussed later. A commentator rightly recognised the problems associated with intra-tribal/clan settlement when he said:

The fact that knowledge of land histories and genealogies is both oral and guarded poses significant problems for resolving land disputes. The more embedded a person is in the conflict under discussion (through relationships with the disputants) the less eligible he or she is to act as a mediator, as someone not already aligned. These problems have led to the creation of...panels...made up of respected local leaders who have the personal reputation and generalized local knowledge that lend their decision local legitimacy.194

Thus, most of the times when the elders, chiefs or traditional leaders (clan/tribal leaders) of two different parties within a clan or tribe cannot come to a common understanding on genealogies, histories or boundaries relating to customary land, they usually go to the panel of chiefs.

An example is a dispute between the land owning members of the Kao land in the Baefua area in North Malaita who disputed the ownership of that customary land between them. According to Alick Sulu, there were several attempts to solve the matter by their big-men in the village. 195 However, the tribal elders and educated elites of one of the parties never turned up, though he had promised a time for negotiation and discussion. As a result, there was continuous stand-off between the clan members, who claimed the ownership of that customary land in dispute. One of the members of the Kao customary land mentioned in an interview that if there was continuous reluctance by one of the two parties to negotiate and discuss a favourable outcome in relation to the ownership of Kao customary land, the matter will be taken to the Toi Houses of chiefs from the Baefua area in Ward 10 (Takwa Ward) – one of the 33 wards in Malaita Provinces – or to other surrounding houses of chiefs such as the Olemaoma or nearby joint-panels of other houses of chiefs close to ward 10.

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195 Interview with Alick Sulu, Member of Kao land owning group (Nngaliwawao, Baefua, North Malaita, Malaita Province, 26 December 2010).
Basically, when the customary land dispute over ownership or boundaries is between two different tribes or clans claiming the same piece of land, such will be referred to the houses of chiefs whose composition can be joint-panels from other houses of chiefs from the nearby surrounding houses of chiefs from different wards. This is because the customary land dispute involves two different clans or tribes, most of the times though within the same locality. Therefore, such will involve a panel of chiefs within that locality or members of panel of chiefs (which are usually referred to as joint panels) from different nearby wards which are close to the locality where the dispute arises. This therefore, leads to the next section which deals with the houses/panel of chiefs.

6.6 Panel of Chiefs/Traditional Leaders: Inter-Tribal

6.6.1 Overview

This section is made of six parts. The first section will introduce the Local Court Act in relation to how it came about because it is the Act which provides for the statutory recognition of chiefs/traditional leaders using custom methods to deal with customary land disputes. The second section, will discuss the jurisdiction of the chiefs and traditional leaders which will be followed by a description of the composition of panels. Fourth, a brief overview of panels of chiefs will be provided. Fifth, an attempt will be made to describe how chiefs are chosen to deal with customary land disputes in several parts of Malaita. The sixth section with explain how customary land disputes are resolved by the panel of chiefs.

6.6.2 Local Court Act: A Brief Description of its Evolution

The Local Court Act [Cap 12] was formally the Native Court Ordinance of 1942. The aim of the latter was to regulate the native courts which ‘were’ a postcolonial modification of a pre-existing system of native courts which evolved from native tribunals and native arbitration courts permitted on an ad hoc and informal basis by the British administration in the 1920s and 1930s to deal with local customary
disputes.'196 In clear terms, during the 1920s and 1930s District Officers adjudicated over criminal and civil cases in Malaita. Due to a heavy work load on the part of the District Officers this role was later transferred to the District Headmen197 who proved to be more successful than District Officers because they knew the customs of the people they dealt with when disputes happened.198

The Native Court Ordinance was a result of several factors. An important factor during the protectorate period was that District Officers who dealt with criminal and civil offences lacked proper understanding or had very limited knowledge about customs of Solomon Islanders.199 As such their decisions were based on the laws of England which were different from the custom of Solomon Islanders. This was foreign and not in the best interest of Solomon Islanders. Therefore, clearly there was a need for the involvement of Solomon Islanders in institutions such as the court system if indigenous aspirations and customs were to be taken into account as a basis for decisions made in courts, particularly when the parties were indigenous Solomon Islanders.

However, there was a slow response to legally establish native courts. This was due to several factors. The main factor was a lack of trust by the Protectorate Government because they believed that Solomon Islanders were incompetent hence could not be entrusted with such institutions.200 This was the case in 1921 when R. R. Kane proposed the establishment of the Native Court but the High Commissioner declined to ensure such an establishment.201 Similarly, a factor was that there were divergent views between the Resident Commissioners and the High Commissioners as to whether there was a need for the establishment of a native court coupled with whether the customs of Solomon Islanders needed to be written, which consequently slowed

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197 See David Akin, above n 113, 197.
198 See David Akin, above n 113, 203.
199 See David Akin, above n 113,
200 See David Akin, above n 113, 176.
down the establishment of a native courts to operate.\textsuperscript{202} For instance, such a proposal was declined when F.N Ashley put the proposal forward to the High Commissioner who believed that there was no need to establish a Native Court because that might be used for improper purpose, injustice and oppression.\textsuperscript{203}

The Native Court Ordinance came into effect in 1942.\textsuperscript{204} It established the constitution of the native courts, prescribed its jurisdiction and powers. The High Commissioner established the Native Courts by way of a warrant.\textsuperscript{205} The High Commissioner could suspend, cancel or vary any warrant which established a native court or further defined the jurisdiction of the courts.\textsuperscript{206} Furthermore, a Native Court was constituted according 'with the native law or customs of the area in which the court' had jurisdiction.\textsuperscript{207}

In the early 1970s the native court was renamed as the local court.\textsuperscript{208} The Local Court Act did not have any provisions relating to whether chiefs and traditional leaders can deal with customary land disputes. Consequently, up to 1984, it would be proper to say that there was lack of a statute to regulate the jurisdiction and other legal issues relating to the chiefs or traditional leaders in the context of customary land disputes. However, in 1985 the Local Court Act merely recognised that chiefs and traditional leaders must deal with customary land disputes and in the event that there is unaccepted settlement by the parties to the customary land disputes, one of the parties is at liberty to go the Local Court for further determination.

6.6.3 Jurisdiction of Chiefs/Traditional Leaders

The jurisdiction of the houses of chiefs is implied from the Local Court Act. In 1985 the Local Court Act was amended to refer customary land dispute to the chiefs and

\begin{footnotesize}
\begin{enumerate}
\item See David Akin, above n 113, 173 – 181.
\item See Walter W Tiffany, above n 201.
\item See \textit{Native Courts Ordinance} [Cap 46] (Solomon Islands British Protectorate). Also see Ralph R. Prendas and Jeffery S. Stevens, \textit{The Early Evolution of Local Initiative’ \textit{The Solomon Islands: An Experiment in Decentralization}} (1985) 32, 35 – 36.
\item See \textit{Native Courts Ordinance}, above n 205, section 2(1).
\item See \textit{Native Courts Ordinance}, above n 205, section 2(2).
\item See \textit{Native Courts Ordinance}, above n 205, section 3.
\item See Walter W Tiffany, above n 201.
\end{enumerate}
\end{footnotesize}
traditional leaders before that dispute is taken to the local court for further determination. Section 12 (1) of the Local Court Act states:

Notwithstanding anything contained in this Act or in any other law, no local court shall have jurisdiction to hear and determine any customary land dispute unless it is satisfied that—

(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.

(2) It shall be sufficient evidence that the requirements of paragraphs (a) and (c) of subsection (1) have been fulfilled if the party referring the dispute to the local court produces to the local court a certificate, as prescribed in 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.

(3) In addition to producing a certificate pursuant to subsection (2), the party referring the dispute to the local court shall lodge with the local court a written statement setting out—

(a) the extent to which the decision made by the chiefs is not acceptable; and

(b) the reasons for not accepting the decision.209

Due to the above section a former Chief Justice of Solomon Islands – Sir John Muria, who is a Solomon Islander said in *Tavea v Paripao House of Chief*:

Chiefs are a recognised authority for the purpose of determining the rights of the disputing parties to a customary land dispute. The Chiefs have, by the nature of their authority, exercised at least some judicial-type duty....

The performance of their functions forms an integral part of the system of dispute adjudication applicable to customary land disputes in Solomon Islands. This gives them a public law character with sanctions thereof enforced publicly. They, therefore, also exercise important public law functions.210

However, despite such a legal recognition by virtue of the Local Court Act and the aforementioned case law, an issue is whether such recognition is constitutional given that as implied from the constitution only superior courts and subordinate courts

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209 See *Local Court Act*, above n 14, section 12(1).
have the power to make binding decisions. This issue is still to be challenged in the High Court of Solomon Islands. However, the legal recognition of the chiefs and traditional leaders may be unconstitutional. This is on the premise that the constitution may only provides that Parliament will consider the role of chiefs in the context of the system of government and not as a court like body. This may be the interpretation of section 114(2)(b) of the constitution which states ‘Parliament shall by law...make provision for the government of Honiara city and the provinces and consider the role of traditional chiefs in the provinces.’ As such it may be inferred that the fact that Parliament gives recognition for the chiefs to deal with customary land disputes is not within the intention of section 114(2)(b) of the constitution. Similarly, it could be said that the section 12 (1) (a) (b) of the Local Court Act is unconstitutional as well because it might be argued that it is contrary to the constitution given that the constitution does not recognise chiefs and traditional as a court to deal with customary land disputes.

The term chiefs as referred to under section 12 of the Local Court Act is defined by section 11 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’.211 The words of section 11 according to a former High Court Judge – Frank Kabui, mean that ‘[j]urisdiction of Chiefs or traditional leaders in customary land disputes is therefore based upon the locality of the land in dispute and the acceptance of the parties to the dispute of the Chiefs or traditional leaders residing in that locality to deal with the dispute.’212 The rationale for this according to Faukona J in *Vaekesa v Varisi House of Chiefs*213 is that the ‘Local Court Act expressly states that Chiefs within the locality should hear land disputes within their area, because they understand the customs and traditions of their locality. And they know quite well who owns which land in their area.’

211 See *Local Court Act*, above n 14, section 11
212 See *Felix v Korutalaumeimei* above n 153.
Thus, in a strict context, chiefs or traditional leaders from one locality have no jurisdiction to hear customary land cases of another locality. According to Frank Kabui J:

The practice that one Chiefs Panel of another locality is invited to determine a dispute in another locality is not based upon sections 11 and 12 of the Local Courts Act but upon the general principles of natural justice in the common law as applied in this jurisdiction under section 76 of the Constitution and Schedule 3 thereto.214

The above comment by this former High Court judge – Frank Kabui has two implications. The first one relates to the impracticality of section 11 when there is customary land dispute between two different tribes or clans in which both parties continuously disagree to the composition of any house of chiefs to deal with customary land disputes. In such event, the parties cannot use the house of chief as a medium to solve the customary land disputes which in turn can take years and can affect development outcomes. A case which highlighted this is *Bobby Ngalingwa’a v Anthony Maealasia* – Land Case No.3 of 2005. In an interview with David Lidimani, he mentioned that both parties cannot agree on a house of chiefs or any other traditional methods to solve their customary land dispute because when various councils of chiefs were ready to hear the dispute there was continuous absence of each party.215

The standoff between the parties took several years. This therefore affirms the impracticality of section 11 of the Local Court Act in that in the event there is continuous disagreement as to which houses of chiefs is to deal with a dispute, a dispute cannot be heard by the respective houses of chiefs within the locality of the dispute.

Consequently, in *Bobby Ngalingwa’a v Anthony Maealasia*, Bobby Ngalingwa’a was desperate to ensure the Malaita Local Court dealt with the land dispute was personally forced to make false claims or forged documents to affirm an accepted settlement by the two parties in dispute endorsed by a house of chiefs within that locality as to the fact that there was a determination by the house of chiefs, when in reality there was lack of such a settlement. This, therefore, is a direct effect of the impracticality of

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214 Felix v Korutalaumeimei above n 153.

215 Interview with David Lidimani, Associate, Rano and Company, Barristers and Solicitors (Honiara, Solomon Islands, 23rd August 2011).
section 11 of the Local Court Act when both parties to the customary land dispute cannot agree on which house of chief within the locality of the dispute to deal with the disputed customary land.

Second, if ‘the practice that one Chiefs Panel of another locality is invited to determine a dispute in another locality is...[based] upon the general principles of natural justice’ then this means that that locality is a ‘fluid concept’. In 1985 this was highlighted by Andrew Nori, when he answered a question by Honourable John Maetia – Member of Parliament from East Kwara’ae Constituency, regarding the fact that what would happen if the chiefs/traditional leaders who reside over the dispute are blood related to the parties in the dispute, who said:

[Assuming that one...chief or two chiefs within that area are party to the dispute then of course [it’s] up to the parties involve in the dispute to look at other people who are also leaders with their traditional context but who may not be related to the part[ies] in dispute [or] who may not be even living on the land. The word locality here...does not mean living on the land under dispute. Interpreted in a wider context could mean the linguistic locality of the area in which the land disputed is situated. [An example...is that if the dispute occurs if I could mention the name here in Nafunu u it is (sic) not mean (sic) that people from that area along (sic) will be entitle to sit as chief any person within the East Kwara’ae Constituency with the linguistic association with that area maybe entitle to entertain disputes between the parties.]^216

Therefore, according to Andrew Nori, whose views about locality is more practical, the extent of the scope of locality does not only include the actual area in which the disputed land is located but includes its surrounding and nearby areas or it extends to include a particular constituency given that area and the location in which the disputed land arises share the same dialect throughout that particular constituency. Generally, this is practical because a constituency in Malaita encompasses people of the same dialect and customs on land are usually the same.

Third, the fact that chiefs’ panel from another locality is invited to determine a dispute in another locality explains why the chiefs’ panel or houses of chiefs use the way the formal courts deal with customary land disputes. In practice there were some disputes in which a chiefs’ panel from a different locality came to determine a customary land dispute because the neutrality of the body dealing with the customary land dispute is

^216 Solomon Islands National Parliament Hanzard, above n 15, 618.
very important. That is people who are parties to the customary land disputes are more comfortable with a body which is truly independent and impartial to deal with their customary land cases. Therefore, one could say that the jurisdiction of the chiefs/traditional leaders or houses of chiefs to deal with customary land disputes is just to ensure that the people meet the requirement that chiefs/traditional leaders or houses of chiefs need to deal with the customary land dispute as required by section 12 of the Local Court Act.

6.6.4 Composition of houses of chiefs/ Panels

Usually, the composition of chiefs in a particular hearing is always an odd number. According to a second class magistrate – Jeremy Fasi, throughout the Solomon Islands, the general rule is that the number of chiefs can either be three (3) at its minimum and five (5) at its maximum. This is the general composition. However, in Malaita, there are some houses of chiefs which have a composition of even numbers. For instance, during a customary land case in which the Olemaoma House of Chiefs settled, the composition was six members.  

Nevertheless, it is usually encouraged that at a particular settlement the number of chiefs should not be an even number, so as to avoid deadlocks. The houses of chiefs also have a secretary whose role is to write down the minutes of the panel who settle any customary land case. The secretary also replies to queries of parties to a customary land dispute. The secretary does not have any say in the decision making or determination of the dispute.

6.6.5 Houses of Chiefs in Malaita: An Overview

In Malaita there are 33 wards (See Fig 5 - Provincial Wards’ boundaries in Malaita) which means that there should be a minimum of 33 houses of chiefs as well. The houses of chiefs are also referred to in short as chiefs or chiefs’ settlement, chiefs’ panel or chiefs’ hearing. These names are often used interchangeably to refer to the chiefs and traditional leaders as recognised under the 1985 amendment of the Local

217 Interview with Vincent Misitana, Member Olemaoma House of Chief and Tai House of Chief (Ngaliwao, Baefua, North Malaita, 27 December 2010).
218 See Figure 5: Provincial Wards in Malaita Province as taken from Secretariat of the Pacific Community, Provincial Population Profile – Malaita Province (2008) 5.
Court Act to include custom settlement as an important step in the process to solve customary land disputes. Arguably, prior to 1985, it could be said that there was no formal organisation of houses of chiefs in Malaita to deal with customary land disputes, though in their respective societies and communities there were traditional leaders or chiefs who were in existence and dealt with disputes such as those relating to customary land ownership, disagreements and boundaries. It could be said that it is a result of the 1985 amendment of the Local Court Act to recognise and include chiefs as one of the mechanisms, among other issues, to deal with customary land disputes. Andrew Nori the Member of Parliament for West 'Are'are in 1985 was the mover of the bill to amend the Local Court Act to recognise chiefs and traditional leaders to use custom methods to deal with customary land disputes.

Figure 4: Andrew Nori – a lawyer by profession and a former Member of Parliament for West 'Are'are was the mover of the Private Member's Bill to amend the Local Court Act in 1985 as taken from Solomon Star 19 August 1988 (Honiara, Solomon Islands) 3.
Figure 5: Provincial Wards’ boundaries in Malaita Province as taken from Secretariat of the Pacific Community, *Provincial Population Profile – Malaita Province* (2008) 5.
Generally, in Malaita, as in other provinces, the houses of chiefs are based on the Provincial Wards. These wards were developed during Protectorate period, particularly in the 1920s.\textsuperscript{219} As a result, Malaita was divided into sub-districts and based on territorial differences.\textsuperscript{220} Additionally, ‘administrative boundaries were chosen to correspond with traditional dialectical differences or sub-divisions.’\textsuperscript{221} For instance, in 'Are'are, as in other parts of Malaita,

The five administrative subdivisions correspond with cultural and social differences based on dialect, feasting method and marriage ceremony. Further each subdivision corresponds to a particular mode of social organisation. These subdivisions are weakened by intermarriage and interaction between villages so they are much less conspicuous than they were. However, they are still recognised and are still one of the common ways in which people are differentiated. The boundaries which were originally created for administrative and census purposes also came to be used as the electoral boundaries for languages.\textsuperscript{222}

In other parts of Malaita, although factors such as the feasting and marriage ceremony might be used to demarcate boundaries, the most important factor is dialect. It might be one or more of the factors that are used to demarcate wards.

Generally, in Malaita, it is recognised that there should be one house of chiefs for each ward. However, it may vary for each provincial ward to ward. A house of chiefs can cover several wards. This is the case in some wards in 'Are'are in that Namo’araha houses of chiefs covers three wards particularly the Are, Mareho and Raroisu wards.\textsuperscript{223} The Ha’arahana House of Chiefs covers two wards, the Kware Kwareo and Tai wards.\textsuperscript{224} In North Malaita in ward 10 (Takwa ward) it has three different houses of chiefs namely the Olemaomao House of Chiefs, Toi House of Chiefs and Morodo House of Chiefs. This is mainly based on dialect and the location of the area which the dialect covers.

\textsuperscript{220} John Houainamo Naitoro above n 219.  
\textsuperscript{221} John Houainamo Naitoro above n 219, 6.  
\textsuperscript{222} John Houainamo Naitoro above n 219.  
\textsuperscript{223} See Figure 6: 'Are’are Wards and Traditional Chiefly systems as taken from John Houainamo Naitoro, \textit{Politics of Development in 'Are’are, Malaita} (MA Thesis, University of Otago, 1993) 7.  
\textsuperscript{224} See Figure 6, above n 223.
The name of the houses of chiefs is often known according to the Provincial Wards which is in turn based upon traditional customary divisions. For instance, one of the wards in Malaita is East Beagu, hence its house of chiefs is called the East Baegu House of Chiefs. However, there are other houses of chiefs that do not have the name of the ward they are in. For instance, one the houses of chiefs within the Takwa ward in North Malaita, is named ‘Olemaoma House of Chiefs’. The others within the same ward are Toi House of Chiefs and Morodo House of Chiefs. Thus, within the Takwa ward (Ward 10) there are three houses of chiefs. The main factor which differentiates these houses of chiefs is the dialectal difference. So it can be seen that, the naming of the houses of chiefs varies in that it does not strictly follow the name of the ward in which it has jurisdiction to deal with land disputes.

Figure 6: Toi House of Chiefs where customary land disputes settlements usually are held, Baefua area, North Malaita. Courtesy of Derek Futaiasi, 27 December 2010.
In 'Are’are for instance, John Naitoro and Alice Pollard documented that there are three houses of chiefs. These are Namoaraha House of Chiefs, Hahuaraharea House of Chiefs and Arahanimane House of Chiefs. They are divided according to language and behaviour variation. These divisions are at the societal level rather than the family and community level. The late John Naitoro further stated that 'a large part of the power of chiefs comes from the importance which is given to land and the role played by chiefs in securing and controlling the land.'

Chiefs and traditional leaders in Malaita are, therefore, important players in attempts to determine customary land disputes over issues of ownership and boundaries because in most instances, according to Brown J genuine chiefs/traditional leaders are a ‘repository of customary truths or law’. According to Alice Pollard:

> It is the responsibility of the chief to ensure that land issues are dealt with appropriately. Chiefs and men generally are responsible for protecting the land from any development that would damage land as it is the life of the people. They are responsible for recording family and arata land, allocation of land to family members for gardening activities and ensuring that each member is well versed with which land they are connected to [because] knowing one’s genealogy also connects that person to land.

Given such well defined responsibility, chiefs have the ability to continuously retain powers over their people when customary land disputes arise. In certain ways, they still have the power to control the socio-economic fabric of their communities.

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225 See John Houainamo Naitoro, above n 123 and Alice Aruhe’eta Pollard, ‘‘Are’Are Paihana (Leadership): Complimentary But Separate’ Paina: 'Are’Are Painaha (Are’Are leadership)’ Gender and Leadership in Are’are Society, the South Seas Evangelical Church and Parliamentary Leadership Embracing the Past, engaging the present and hopeful for the future (PhD Thesis, Victoria University of Wellington, 2006) 64, 81 – 86.
226 See Alice Aruhe’eta Pollard, above n 225, 81.
227 See Alice Aruhe’eta Pollard, above n 225.
228 John Houainamo Naitoro, above n 123, 12.
230 See Alice Aruhe’eta Pollard, above n 225, 84.
6.6.6 How are Chiefs or Traditional Leaders Chosen?

A Overview

With the formal recognition of the chiefs and traditional leaders by law, as in direct statutory recognition in 1985 to deal with customary land disputes, chiefs and traditional leaders in Malaita continue to apply their traditional knowledge and ways to settle customary land disputes. In other words, talking in 1985 during the debate, both Andrew Nori and Sir Peter Kenilorea, who was the Prime Minister of Solomon Islands at that time, confirmed that the 1985 amendment of the Local Court Act to refer customary land disputes to chiefs/traditional leaders is simply to formalise and legalise what has already been in practice.\textsuperscript{231} The lack of formal recognition of chiefs was identified by Andrew Nori in a customary land case which he dealt with as a legal practitioner in which he said in Parliament in 1985:

I was involved in a court case in Gizo [in which an issue was a] dispute over the validity of decision made by chiefs in a certain community on Choiseul. I was very sad...when the court throughout the decision [held that the decision by chiefs] is not legal it has not legal authority; and as a result parties [have] to go back to local court to recommence proceedings but if this bill was applicable at that time...the court would have taken the decision and then matters would have been resolved in a friendly manner.\textsuperscript{232}

The above comment affirmed that prior to 1985 chiefs had no legal authority to deal with customary land disputes. In other words, prior to 1985 there was lack of legal recognition by way of legislation in order for chiefs and traditional leaders to make decisions which have legal authority, though in most societies, people have chiefs and traditional leaders who are competent and knowledgeable in custom, histories, genealogies and related aspects of customary land to deal with customary land disputes. Thus, before 1985 the local court is the recognised court to deal with any disputes regarding customary land before it is referred to the customary land appeal court. Therefore, with the recognition of the chiefs and traditional leaders in 1985 by law by way of statutory recognition to deal with customary land disputes, it is now mandatory for the chiefs and traditional leaders to deal with the customary land

\textsuperscript{231} See Solomon Islands National Parliament Hanzard, above n 15, 614.
\textsuperscript{232} See Solomon Islands National Parliament Hanzard, above n 15, 614
disputes before the customary land disputes are referred or heard by the Malaita Local Court and, if an aggrieved party is not satisfied with the local court judgment, that aggrieved individual can make an appeal to the Malaita Customary Land Appeal Court.

The people who act as chiefs in the chiefs' settlement or houses of chiefs are mainly men who are knowledgeable in custom, traditional histories, boundaries and related issues in their wards, locality and constituencies. It is the norm, common sense and established practise that they are usually those who live in the village most of their times or are basically permanent villagers who revolve around basic village life.

Another important factor is whether the concerned appointed chief's father is a *fata’abu* or someone whose father is knowledgeable in custom, who other people in the tribe or clan vest their faith in. The fact is that usually one of the *fata’abu*’s sons might take or learn comprehensively most of the genealogies and histories from his father. For instance, among the Baefua area, in North Malaita, the current paramount chief who also sits in the Toi House of Chiefs is the son of the last pagan priest of Kwairesi tribe in Baefua, North Malaita.

Generally, chiefs and traditional leaders in this context are chosen by tribes or clans based on whether they are knowledgeable in history, genealogy or custom relating to customary land. During an interview with Robert Kofuria - the oldest member of the Toi Council of Chiefs and former member of Lilisiana House of Chiefs - it was revealed that the current paramount chief of Baefua, apart from the fact that he is knowledgeable in custom history, genealogy and boundaries, was given that title of paramount chief because he is an active man and is seen as willing to carry out the work of the Toi House of Chiefs. Similarly, the paramount chief was given the title from Toi house of chief because he was seen to be a very cooperative man who is competent to work together with the members of the Toi House of Chiefs.
The most important factors that need to be taken into account when appointing or choosing a chief or leader to sit in the houses of chiefs’ is whether that individual is knowledgeable in the custom, cultural settings and values of that particular ward. An example was late Kinsley Waiala’a who was a member of the Falaleka Council of Chiefs in the early 1990s.233 With such a background, that chief or traditional leader must be one whom his clan continues to render him respect. Generally,

traditional leaders are recognized on the basis of their position and activity in the contexts of family, lineage, and clan. As the head of an extended family or lineage, traditional leaders possess valuable group knowledge, represent group interests in exchanges and interactions with others, and frequently act as mediator and peacemaker in dealing with local conflicts. Given the shared interests of members of the same family or descent group, fewer questions arise at this level about the accountability of a leader among his or her constituents.234

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233 Interview with Duddley Fугui, Leader, Suraina Tribe, (Mana’su’u, Ata’a, North East Malaita, 27 July 2010).
234 Geoffrey White, above n 194, 11.
In Malaita, given the nature of customary land and issues associated with customary land each clan or tribe has a person who knows about the history, genealogy and boundaries of their tribe/clan and other surrounding tribes within that locality. In Malaita, in those places which do not have a chiefly system, a leader in custom who can then be a candidate to sit in the chiefs’ settlement or houses of chiefs, apart from traditional leaders such as traditional priest, is chosen by consensus within the clan during clan gatherings or tribal meetings. Such meetings are usually organised by the clan elders and other respected leaders within their society.

Below is a brief description of how certain areas within Malaita choose their chiefs who consequently sit in houses of chiefs in their respective localities or wards to determine customary land disputes.

B Small Malaita – Maramasikey

In small Malaita, among the Maramasikey (See K, Fig 1 – Map of a Malaita), chiefly status is inherited. The Sa’a-speaking people of South Malaita (Maramasikey) has a chiefly system. According to John Susupuri, ‘when someone is born from the chief’s tribe, he is born a future chief’. He further states that, ‘in their village, a chief is chosen only by inheritance whether or not he is well educated.’ He continues that ‘even if the chosen one has no understanding on how to address the people or how to do things for the people, as long as he inherits the chief blood, he is the chief.’ In order to address such a deficiency, according to Susupuri, chiefs also have advisors. One of the main purposes is ‘to direct the chief with what to do or to say to the community if he is not capable of applying his chiefly role.’ These advisors are ‘called suala or tatahoala which means advisors for the chief.’ In small Malaita, according to John Susupuri,

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236 See Joanna Sireheti, above n 124.
237 See Joanna Sireheti, above n 124.
238 See Joanna Sireheti, above n 124.
239 See Joanna Sireheti, above n 124.
240 See Joanna Sireheti, above n 124.
241 See Joanna Sireheti, above n 124.
...they have two parts in Small Malaita and is divided...according to boundaries which [are] refer[ed] to as canoes...Small Malaita is divided into eight canoes and they have 24 chiefs...

He went on to state that that the whole of Small Malaita has been structured and each canoe has three chiefs.242 Additionally, Susupuri explained

Boundaries structured as canoes have chiefs for each point, the front part, one for the centre and the other for the rear part. Out of the three chiefs, the one in the middle part of the village is the most hard working, because he is the one to arrange everything in the village and to make everything according to the rules of the village to make things right...out of all the chiefs, there is an overall chief for the whole of South Malaita [who is the] head chief, known as the Ouou Inemauhi, gives out orders to the ones second to him...The head chief is also inherited “from his descendants” and respected by all throughout South Malaita.243

Given that in South Malaita the chiefly system is hereditary, chiefs can be easily ascertained to deal with customary land disputes, though in some instances these chiefs are affected by some of the challenges such as a lack of impartiality and related challenges mentioned in chapter seven. Additionally, in South Malaita the chiefly system is well structured given that it is customarily divided into eight canoes. This therefore provides a well established demarcation as to which chiefs are to determine customary land disputes whenever it arises.

C 'Are'are Chiefs

In 'Are'are, according to Alice Pollard, the ‘Arahana leadership is un-structured at the family and community level while semi-structured with a draft simple constitution at the societal level.’244 She stated that ‘Arahana leadership is both ascribed and achieved leadership.’245 In 'Are'are, ascribed leadership, is found in the Southern part of the 'Are'are246 (See Figure 8: 'Are'are Wards and Traditional Chiefly systems). This encompasses Mareho and Raroisa’a sub-divisions, governed by the leadership of the

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242 See Joanna Sireheti, above n 124.
243 See Joanna Sireheti, above n 124.
244 See Alice Aruhe’eta Pollard, above n 225, 83.
245 See Alice Aruhe’eta Pollard, above n 225, 83.
246 See Alice Aruhe’eta Pollard, above n 225, 83.
Hahuaraharea House of Chiefs\textsuperscript{247} (See Figure 8: 'Are'are Wards and Traditional Chiefly systems). According to Alice Pollard:

The Hahuarahana leadership is hereditary and based on inheritance and often leadership is given to the first born son of the chiefly tribe. A leader is determined by birth and not by personal achievements and demonstrated leadership skills. A leader is born to the position of leadership and recognised as a leader through accumulation of wealth in the form of feasting which involve amassing a large amount of shell money, pigs, food such as taros and yams and other valuables.\textsuperscript{248}

Further, achieved leadership in 'Are’are is covered by both the Namoaraha House of Chiefs and Arahanimane Houses of Chiefs.\textsuperscript{249} The former covers the East 'Are’Are area which encompasses the Aiaisi and 'Are wards\textsuperscript{250} (See Figure 8: 'Are’are Wards and Traditional Chiefly systems). The latter governs the southern part of ‘Are’Are covering Mareho and Raroisa’a sub-divisions\textsuperscript{251} (See Figure 8: 'Are’are Wards and Traditional Chiefly systems).

In relation to the Namoaraha House of Chiefs and Arahanimane House of Chiefs, succession is not hereditary. The former is based on the big-man and warrior type of leadership while the latter is based only on the big-man type of leadership. The former ‘depends on personal attributes and achievements such as of a warrior and feast-giving.’\textsuperscript{252} Therefore, in relation to the former ‘leadership...demonstrate “power to control” as well as “a process of influence”.’\textsuperscript{253} Such control and influence is bestowed on followers because custom is its basis. Leadership in the latter, 'is founded on personal achievement and demonstrated organising skills, wisdom and good personality.’\textsuperscript{254} Moreover, in the latter, the 'leader is known for his peaceful coexistence with his neighbours and is non violent.’\textsuperscript{255} The Arahanimae House of Chiefs demonstrates leadership as a “process of influence” as well as “power to

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\item \textsuperscript{247} See Alice Aruhe’eta Pollard, above n 225, 83.
\item \textsuperscript{248} See Alice Aruhe’eta Pollard, above n 225, 83, 80 – 81.
\item \textsuperscript{249} See Alice Aruhe’eta Pollard, above n 225, 83.
\item \textsuperscript{250} See Alice Aruhe’eta Pollard, above n 225, 83.
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\item \textsuperscript{255} See Alice Aruhe’eta Pollard, above n 225, 83.
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empower” followers and ordinary 'Are'Are people.” Therefore, apart from qualities such as personal achievement, demonstrated organising skills in peacemaking, wisdom and good personality, knowledge of custom is of paramount importance in both houses of chiefs to determine a chief who has the competence to sit in houses of chiefs to deal with customary land disputes.

Figure 8: ‘Are’are Wards and Traditional Chiefly systems as taken from John Houainamo Naitoro, Politics of Development in ‘Are’are Malaita (MA Thesis, University of Otago, 1993) 7.

D Paramount Chiefs – Kwara’ae and Kwaio

In some parts of Malaita, paramount chiefs also sit in the chiefs’ hearings or panels to determine and deal with customary land disputes. In Malaita there is no overall paramount chief for the whole island unlike Isabel Province, where the paramount chief is designated for the whole island.

256 See Alice Aruheta Pollard, above n 225, 83.
chief is appointed by certain kind of nomination process and his status as paramount chief is acknowledged by way of a ceremony to confirm his status as a paramount chief.257 Generally,

> [t]he title “paramount chief”—a term that in many cases has modern (colonial) origins—is generally used to designate claims to wider regional or island-wide leadership. Regional influence is established through activities that bring people together across descent groups or residential areas—traditional activities such as large feasts and exchanges, as well as more contemporary engagements in business, church, and state.258

As other parts of Malaita, in West Kwara’ae, Malaita Province, for instance, paramount chiefs are symbolic guardians of and researchers into *falafala* (custom).259 On this premise they can sit on panels or houses of chiefs that determine and deal with customary land disputes. In Kwara’ae (See F, Figure 3 – Map of Malaita) an important development in the process of the whole idea of paramount chiefs went back to the period between 1962 and 1963.260 During that time Adriel Rofate’e and Ganifiri organised meetings for senior East Kwara’ae leaders.261 According to Burt:

> The purpose of these meetings was to discuss and codify ‘traditional law’ (*falafala ana taki*), deciding how far it was compatible with Christianity, and to record genealogies for all the clans of the district. The men who took part were regarded as the fata’abu (priests) of their clans, although of course most were Christian. It was felt that the government Local Courts, even under local court Justices, were not settling disputes according to correct interpretations of traditional rules.262

Such activities were continued in the 1970s by Arnon Ngwadili in West Kwara’ae. He took a leading role ‘in traditional activities...joining others to compile ‘laws’ and genealogies and establish position of traditional authority.”263 Consequently,

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258 Geoffrey White, above n 194, 11.
261 See Ben Burt, above n 260.
With government approval they began to set up a system of ‘chiefs’ based on the Kwara’ae clan system and Ngwadili contacted the East Kwara’ae leader to take part. In 1975…the East Kwara’ae appointed several of their leaders as ‘Paramount Chiefs’ to present some of the major clans and factions within their movement…in February 1976 West and East [Kwara’ae] joined at a meeting at Aimela… [and] fifteen Paramount Chiefs in all were formally appointed, including those from the East and others…and 180 Tribal Chiefs of minor clans were also recognised.264

Burt stated ‘[w]hile a local clan may agree who is their senior ‘leader’ or Tribal Chief, the Paramount chiefs of East Kwara’ae are appointed by meetings of activities, and they are leaders for the purposes of tradition rather than general leaders of the major clan groups they represent.’265

Among the Kwaio (See H, Fig 3 – Map of Malaita) in Malaita, as Solomon Islands advanced towards political independence in 1978, according to Roger Keesing, the emergence of paramount chief was a product of the reactions of people because of Christianity and an alien legal system.266 The purpose was basically to preserve ancestral ways.267 Among the Kwaio people, as Solomon Islands was ready to gain its political independence, one of the issues was whether Solomon Islands should retain the Queen as sovereign.268 Similarly,

discussions about what “independence” meant invited extremist interpretation among diehard pagans in the mountains [in Kwaio] who had for decades fought against the colonial imposition of alien law and rule. Independence, they argued, should mean freedom from alien laws—the right to follow ancestral customs on ancestral lands. Foremost among the extremists was Folofo’u, who increasingly arrogated a role as spokesman for kastomu vis-à-vis the administration…269

Further, in 1978 and 1979, pagans and Christians grouped together to boycott payment of taxes.270 Additionally, Folofo’u did not allow the police to take two Kwaio

264 Ben Burt, above n 263.
265 Ben Burt, above n 263.
267 Roger M. Keesing, above n 266.
268 See Roger M. Keesing, above n 266, 256.
269 See Roger M. Keesing, above n 266, 256.
270 See Roger M. Keesing, above n 266, 256.
who allegedly committed attempted murder. Consequently, because of the above and several related issues,

Folofou‘u was elevated, with the support of the Christian scribes and schemers, to the government-created position of paramount chief and was dealt with by the government as the legitimate customary leader of the Kwaio people. He and his scribes, leading sometimes reluctant sifi [chief] from the interior...assumed a collective identity as Kwaio Fadanga (or Council) in defying the provincial and central government.271

Today, in Kwaio the position of the paramount chief is hereditary. Folofo‘u’s eldest son – Kwai’lamo is now the paramount chief of Kwaio.272

Although the evolution of the paramount chief in East Kwaio and Kwara’ae were basically affected by the intervention of Christianity and colonial government, an important and dynamic characteristic of the paramount chief like other genuine chiefs in other parts of Kwaio and Malaita is their competence to clearly ascertain the customs regulating customary land.

The aforementioned chiefs and traditional leaders throughout Malaita as described above who are knowledgeable in traditional knowledge about custom in relation to genealogies, custom relationships, custom ceremonies and activities, histories and boundaries in Malaita, also employ certain types of methods when dealing with and determining an outcome to a customary land dispute.

6.6.7 How Are Customary Land Disputes Resolved By Chiefs and Traditional Leaders?

A Conduct of Proceedings

In terms of the conduct of proceedings by the chiefs’ panel/houses of chiefs who deal with customary land disputes, Brown J said:

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271 See Roger M. Keesing, above n 266, 257.
272 See Roger M. Keesing, above n 266, 258.
The chiefs conduct their proceedings in accordance with procedure adopted by them and that any question of law affecting their deliberations are questions going to customary law. The High Court has no role to pay in the functioning of chiefs deliberations.273

This affirms that the chiefs have the discretion to adopt whatever procedure they want to apply when determining an outcome to a dispute. Additionally, in Muna v Billey274 Brown J stated that he is sure that ‘custom reflects the old maxim omnia praesumuntur rite it sollenniter esse acta (it is presumed that all the usual formalities have been complied with).’ He further stated that

...the “proof and pleading, regulation of manner and resolution of conflict”, remains a matter of custom and usage in the discretion of the Chiefs, in accordance with the Constitution (Schedule 3(3)). Their procedural powers are unfettered by any consideration of concepts more suited to jurial proceedings. My allusion to the maxim is strengthened, for there is no Customs Recognition Act for instance, to be read with any established practice of the Chiefs to bring into conflict “procedure” and the need or otherwise for appearances of persons before them, or the need for attendance of particular persons before their decisions in personem or in rem are efficacious.275

In simple terms ‘any [procedural] matters of custom required by the Chiefs leading up to the hearing are within their absolute discretion, in the absence of any legislation dealing with customs recognition.’276 In Solomon Islands, though, there is a Custom Recognition Act 2000, which is yet to be passed by the Parliament, which may be due to certain shortcomings in its formulation.277 Jean Zorn and Jennifer Care summarised the shortcomings of the Customs Recognition Act 2000 as:

...it is more difficult for courts that treat custom as fact to recognize and apply a rule from customary law than it is for courts that treat custom as law. And the Act would further limit the extent to which the courts are able to use custom by allowing its use only in certain situations. Thus, the Act stipulates that custom may not be used where such use would result in injustice or would not be in the public interest. Whilst these limits are seemingly innocuous, the legislators need to reiterate them suggest that they do not trust custom. Further, the Act limits the use of custom in criminal cases primarily to decisions about sentencing, and, in civil cases, to family

274 See Muna v Billey, above n 229, [7].
275 See Muna v Billey, above n 229, [19 – 20].
276 See Muna v Billey, above n 229, [28].
In addition, a literal understanding of the words of Brown J in that ‘any [procedural] matters of custom required by the Chiefs leading up to the hearing are within their absolute discretion’ reflects that issues of natural justice particularly the right to be heard is not of value despite objections on the part of any of the party who does not agree to the composition or jurisdiction of the houses of chiefs to deal with that concerned customary land disputes because it could be argued that issue of natural justice is an introduced concept which is not part of Malaitan custom. Such a position as enumerated by the learned judge even if done according to custom has certain negative implications in that clearly such a determination by any concerned houses of chiefs reflect a decision that will be in favour of the party that is present. This, therefore, can be seen as a one sided decision. The need for both parties to be present is essential in order for a comprehensive decision in relation to the customary land dispute to be ascertained, hence an outcome which takes into account considerations from both parties.

Contrary to the views of Brown J, in an earlier case dealing with a house of chief in South Malaita, Kabui J mentioned that section 12 implies the need for both parties to agree to the composition of the houses of chiefs before any determination or settlement can take place. Faukona J also affirmed this in Vaekesa v Varisi Houses of Chiefs. The fundamental core of this argument is the need for both parties to be heard as to their claims in relation to the ownership or boundary dispute. A more substantive position is stated in Majori v Jino in which the Solomon Islands High Court ruled that:

> [i]f only one party attends, then there is no issue before the chiefs and no claims over customary land presented to the Chiefs to resolve...An arbitrator in custom

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must hear two sides of the stories before he applies traditional means to solve the land dispute. On sided story or evidence is not enough, it does not give any litigation issues for the chiefs to determine.

Further, section 14(1) of the Local Court Act further stated that: ‘Where, in any dispute referred to the chiefs, a decision wholly acceptable to both parties has been made by the chiefs, the chiefs or any of the parties to the dispute may, within three months from the date of the decision, cause a copy of the decision to be recorded by the local court.’ In practice this provision has very little effect on the parties because in Malaita, most of the cases in which the houses of chiefs or chiefs’ panel dealt with in relation to customary land ownership or boundaries have been appealed to the Malaita Local Court and, thereafter, to the Malaita Customary Land Appeal Court. Therefore, from the late 1980s to the present, it is very rare for both of the parties to a customary land dispute relating to ownership and boundaries to wholly accept the settlement of the houses of chiefs. Parties to customary land disputes usually want to exhaust the full legal process that starts from the Chiefs’ settlement to the Malaita Customary Land Appeal Court282 and to the High Court and Court of Appeal if certain legal issues arise during the proceedings before the chiefs, local court and customary land appeal court.

Another important legal principle that has an impact on the proceedings of houses of chiefs in Malaita is *res judicata*. In *Ramo v Olemaoma House of Chiefs*283 the issue is whether the Olemaoma House of Chiefs in North Malaita is bound by the legal principle of *res judicata*. Chetwynd J said that the Olemaoma House of Chiefs are bound by *res judicata*. He said ‘[c]hiefs cannot go behind previous decisions of a competent court whether it is the Local Court, Customary Land Appeal Court or the High Court.’ This means ‘if there has been a previous decision where the same issues, the same parties and the same cause of action, have been litigated and decided then the Chiefs cannot re-open the case.’284

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284 See *Ramo v Olemaoma House of Chiefs*, above n 283, [4].
One of the implications of *res judicata* on the chiefs panel or houses of chiefs is that as far as their knowledge on such important legal concepts are concerned it seems that they sometimes sidelined this concept and hence continue to hear customary land cases that fall within the ambit of *res judicata*. In context, before the chiefs panel or houses of chiefs deal with the customary land disputes, most of the times these chiefs panel or houses of chiefs depend on the letters of those parties concerned which allege that there is *res judicata* without referring such confusion to the relevant authority such as the Local Court Officer in Auki or other relevant legal institution in Honiara for proper legal advice on such legal issue before they declined or continue to hear a customary land dispute case. However, sometimes when the houses of chiefs refer such matters to the relevant legal officer, such as the Local Court officer, these houses of chiefs receive ambiguous advice in relation to such matters, thus the only course is to hear that case.285

Further, the legal principle of *res judicata* is important because it gives a stop to customary land cases which have already been settled, given that in any legal system cases do come to an end to stop cases going on for ever and which might have negative implications for community stability and development. Arguably, given that the disputes will not be litigated in the houses of chiefs and the formal courts between the same parties over the same issues and the same cause of action, it is likely to be a stepping stone for the parties to settle their differences and work together towards community rebuilding, if they are willing to do so. Similarly, it gives a stop to the losing party from manipulating the case in the context that it could find other evidence to ensure a new case against their opposing party. The fact is that sometimes there is a tendency for those who supported the winning party to have problems in later years leading to them trying to open the case again. However, given that chiefs are bound by *res judicata*, that case will not be litigated.

Moreover, *res judicata* could have a negative impact on the losing party in the sense that if the losing party is the rightful land owner of a particular customary land but there is some kind of corrupt dealings between the winning party and those who gave evidence for the winning party, i.e. they did not tell the truth in relation to ownership

285 See *Ramo v Olemaoma House of Chiefs*, above n 283, [12].
of that customary land, by the time the losing party knows the truth in later years, they would not have the chance to take the matter back to the chiefs’ panel because the legal process to determine the ownership of customary land had already been exhausted. That is to say, that the chiefs, local court and customary land appeal court had all ready determined the right owners of that piece of customary land. In this context, chiefs and traditional leaders should not be bound by res judicata. Therefore, the reasoning of Brown J in Lagobe v Lezutuni286 who said res judicata which is a common law principle should not be bound by custom chiefs and leaders because the orders or decisions of chiefs in relation to custom are not legal issues; in other words ‘custom is not a constitutive legal act’. In this context, Jennifer Jean Zorn and Jennifer Corrin might be correct when they said ‘Pacific Islanders are of the view that no dispute is ever entirely settled. Any disagreement can–and will–be reopened whenever either party sees an opportunity to gain an edge, or whenever disagreements over other issues have re-instituted ill feeling between the parties.’287

B  Mediation

There are two ways in which chiefs usually settle disputes. One is by way of mediation. The Oxford Advanced Learner’s Dictionary defines ‘mediation’ as an informal process of finding a solution to a disagreement between persons or groups of people. It is a ‘peacemaking function with a vision of justice.’288 Mediation in this context is flexible and is not bound by legal rules of evidence and procedure. In Malaita as in other Melanesian countries

mediation deals with civil conflicts. It aims at preserving the quality of life in line with the customary values of the community. Melanesians are uncomfortable with a win-lose process and strive to produce a solution which all can agree to.289

In Malaita, disputing parties and the chiefs would come together on a date appointed by the chiefs. Usually, both parties agree to which chiefs’ panel will hear the case before it proceeds. If disputed parties do not agree on the chiefs’ composition—perhaps because of issues relating to the chiefs’ impartiality or related issues of natural justice or the fact that the chiefs are seen as closely related to one of the parties—the hearing sometimes would not proceed. This is on the premise that one of the parties object for the hearing not to continue, usually by way of letter to that concerned house of chief/panel. However, in *Daveta v Kotomae* Chetwynd J said he is ‘not convinced by the argument that the Local Courts Act requires both parties to actually choose who sits to hear the dispute.’ He further states ‘the Act requires that the parties to the dispute to recognise the Chiefs who are to hear the dispute as being from the locality and accept them as being Chiefs or traditional leaders from the locality.’ First, while this is the legal position, clearly there are cases which determine otherwise in that there is a need for both parties to agree on which chiefs are going to sit to deal with a land dispute. Second, the statement by Chetwyn J is impractical because in most of the land disputes cases in which chiefs and traditional leaders were given the role to determine the case, the lack of agreement between the two parties as to who will sit in the panel usually results in the panel being unable to deal with that dispute. Therefore, there is a need for both parties to agree as to who sits in the panel in order for the parties to give legitimacy to the decisions of the panel.

The process of mediation involves both parties telling their stories about their histories, genealogies and other stories related to the issue of ownership in dispute. The parties to the dispute do the most of the talking. The role of the mediator – chiefs or traditional leaders – is to ensure common understanding between the parties. Similarly, the chiefs assist both sides in clearing away doubts as to the facts of their stories or the chiefs or leaders might ask questions to the parties to clarify certain points that the parties made. In some ways they usually leave the floor open for the parties to discuss between themselves what is best for them in terms of the disputed issues. Therefore, in a nutshell, the decisions of the two parties are usually a reflection of their discussion rather than that of the chiefs. The chiefs’ panel or houses of chiefs.

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291 See *Daveta v Kotomae*, above n 290.
are there to ensure a peaceful co-existence during the settlement as well as clarifying matters that are discussed during the settlement. At the end of the discussion and negotiation between the parties a decision would be made based on custom and which reflects the interests of both parties.

Such a method is helpful when the chiefs or traditional leaders sitting as houses of chiefs/panel to hear and determine an outcome to customary land disputes are well versed with the histories and genealogies of the parties to the dispute. That is, all the chiefs who sit to hear the customary land disputes have a common understanding on the genealogy, histories or boundaries of the disputing parties because of certain customary connections to both of the parties either by marriage or some kind of custom happenings such as feast, tribal warfare and related activities in the past. Similarly, this is helpful when the dispute is between the members of the same clan who have a common or same history and similar genealogies which affirms shared blood and ancestry. In this context, mediation is the method used to settle the customary land dispute. The lack of the above associated factors will certainly lead the chief's panel/houses of chiefs or traditional leaders to adopt court like procedures which is described in section C (Decision Making/Determination).

C Decision Making/Determination

Generally, the chiefs or traditional leaders who are in the houses of chiefs adopt the way the formal legal system operates to deal with customary land disputes, i.e. the way that Local Court and Customary Land Appeal Court deal with customary land disputes. The usual procedure is that when the parties are before the house of chief, the chairman of the house of chief will inform and remind the parties of the need for calmness while the case is before them. The chairman will also allow time for the parties to make objection to the composition of the panel/house of the chief. If there is no objection as to the composition, the panel will continue to hear the case. Thereafter, the panel or house of chief will hear the sides of the stories of both parties. The plaintiff side will present their case followed by their witnesses to affirm their case.

292 Interview with Jackson Lea’afuna, Vice president of the Malaita – Customary Land Appeal Court, (Auki, Malaita, 30 July 2010).
After the presentation of the plaintiff’s case, the defendants will then present their case followed by their witnesses to affirm boundaries, genealogies or histories. The parties and their witnesses are usually asked certain questions by the panel as well. According to a panellist at the Olemaoma House of Chiefs, the parties to the customary land case before the houses of chiefs could not be cross-examined by both parties. In order to ascertain the party’s boundaries or other evidence in relation to sacrificial and other *tabu* sites, a survey is usually made after the presentation of each party’s case. This is important because in custom if one alleges that a certain place belongs to his tribe or clan that concerned person or spokesman certainly knows the places where *tabu* sites like grave yards, sacrificial places, traditional artefacts and remnants of old village sites are situated or positioned. As such the surveys though could be seen as influenced by the western legal system, can be said to be a custom procedure in its nature. This is because of the interconnection between the spokesperson custom knowledge of those *tabu* sites and their actual positions and locations to affirm his history of that concerned customary land or boundary enumerated during the hearing thus his claim to those disputed customary land or boundary in issue before the concerned houses of chiefs/panel. Such a practice (the survey) by the chiefs to ascertain custom sites is practiced by houses of chiefs throughout Solomon Islands.

Thereafter, chiefs or traditional elders will determine who owns the customary land or where the proper boundaries are according to custom. Here, the chiefs’ panel acts as a fact finding body using custom as the basis to make decision or determine the outcome of the case. The outcome of the case depends predominantly on the way each party presents its case and whether their presentation of the facts, histories, genealogies and *tabu* sites supported by the survey after both parties’ submissions are persuasive to those who sit as panellists of the customary land case. After taking these factors into account, a decision is made by way of consensus. In Malaita, this method of settlement therefore resembles that of the formal courts, particularly, the local court and customary land appeal court which deal with customary land disputes.

Basically, the aforementioned process in relation to decision making/determination could be said to be influenced by rules of formal courts. This means that it is the
process in which the local court and customary land appeal court used that are adopted by the chiefs, traditional leaders or houses of chiefs or chiefs panel to ascertain boundaries, ownership of customary land and related issues. Among other factors, one of those which might influence the use of such a method by the houses of chiefs is that sometimes the chiefs sit as judges at the local courts or customary land appeal courts as well. More importantly, the use of such a method is to ensure the parties to the customary land disputes provide substantial customary evidences as to their ownership or boundary claims.

6.7 Tribal and Individual Violence

6.7.1 Overview

Apart from the methods described above, sometimes customary land disputes started or ended in violence. In custom, physical aggression or remonstration was a traditional means of settlement. In traditional times tribal violence was a way in which ownership of customary land could be transferred when another party was satisfied with acts of bravery exhibited by a ramo. Nowadays, this is not practised. However, in contemporary Malaita, violence between parties to a customary land dispute is usually an outcome of the disagreement between the parties. Therefore, one could say that tribal and individual violence could be an outcome or a prelude to settlement of customary land dispute by chiefs/traditional leaders and the formal courts.

6.7.2 Tribal Violence in Traditional Times

In traditional times, among other ways, when parties could not settle their disputes particularly in terms of boundary, they would actually resort to warfare. This was usually the last resort in some parts of Malaita. For instance, at Suava in the North

294 See Buga v Ganifiri, above n 61.
Malaita, Rinaldo Talo confirmed this was the case.Usually, each party was led by their warriors. This would usually depend on whose force was strongest. Thus, boundaries would be established depending on that factor. Such an establishment of the boundary would therefore be the conclusion of the disputes. However, at any time the loosing party might make a revenge attack. Thus, settlement by tribal violence would be subjected to continuous warfare until a proper settlement and reconciliation took place in which both parties would come together to talk about their differences in relation to the boundaries, genealogy and related issues. During those times, it would be the fata’abu and the aofia of both parties who would come together to settle their differences.

6.7.3 Tribal Violence in Contemporary Times

Nowadays, tribal violence usually happens as well between parties to a customary land dispute. The current Chief Magistrate of the Magistrate Court in Solomon Islands – Leonard Maina confirmed this when he said: ‘...customary land problem[s] [have] continuously taken out the lives or caused death to the people [and] create[s] disharmony in the community...’ Sometimes, this happens when the customary land dispute is before the chiefs, elders or the formal courts dealing with customary land. Violence usually takes place at village markets when one of the parties makes a declaration or swears that it was forbidden to hunt, garden or cut trees on the disputed land. An example of such was in the late 1990s when the Kao land was in dispute between two tribes in Baefua, North Malaita. Here, rumours at a market was clear that tribe A planned to beat a custom drum (a custom way to call another tribe to fight) for tribe B – a way to affirm bravery and challenge another tribe due to hatred towards each other. Consequently, that came to pass. The drum was beaten. As a result tribe B gathered several of their clansmen who were armed with knives and traditional clubs and went to the village where the drum was beaten. When the group of men from Clan B arrived at Clan A’s village, most of the men including all the woman and children escaped. Only a few specific houses sustained damage as well as

295 Interview with Rinaldo Talo (Malaita Local Court President, Magistrate Court, Auki, Malaita, 30 July 2010).

nearby gardens and animals such as pigs. Clan B made an open challenge to affirm their strength. Luckily, there was no bloodshed. This problem continues to cause uneasy feelings between the parties and sparks minor tribal tensions between them. Such a stand-off was and continues to be a direct consequence of dispute over customary land ownership between parties to customary land disputes.

Similarly, violence can be a result of a decision of a court. This was the case in the 1980s when the Malaita Local Court judgement was given in relation to the Asinawane land at Ata’a in Malaita Province to the defendants. When the local court decision was announced that the defendants won the case, the defendants went around shouting. This provoked the claimants, thus fighting broke out between the parties. This resulted in some people being injured and later hospitalised. A similar incident occurred in Fataleka, Malaita Province in the late 1970s. The incident occurred over an attempt to solve a disputed land known as Bina Gwelebu. The land was claimed by two different tribes known as Rakwane and Toto tribes. Both of the tribes claimed the Bina Gwelebu land. When the Native Court decision was made, it was in favour of the Toto Tribe. Consequently, this led to a fight between both tribes. Instead of accepting the decision, the Rakwane tribesmen confronted the Toto tribe (now known as Bina Gwelebu following the winning of the land). The aftermath of the fight was that three people of Toto tribe were hospitalized.

6.8 Concluding Remarks

In traditional Malaita, customary land disputes seldom occurred. However, when disputes about customary land were evident apart from tribal warfare, custom negotiation and mediation were the main methods to solve such disputes. This continued during the protectorate period as the first stage to solve disputes before these disputes went to the Native Courts. Nowadays, negotiation, discussion and mediation associated with compensation and reconciliation are practical if the customary land dispute is between members of the same clan. It is only when both parties of the same clan cannot agree on an outcome that the disputes are taken to the houses of chiefs for determination. Apart from that, the houses of chiefs mainly
deal with customary land disputes between members of different tribes or different clans as well.

Generally, in Malaita, there are 33 wards which indicate there should be a minimum of 33 houses of chiefs. These wards were developed by the protectorate government and were based on territorial differences, feasting, marriage ceremony and more importantly on dialect. The house of chief’s jurisdiction to deal with customary land disputes is briefly stated in the Local Courts Act. This was an outcome of a 1985 amendment of the Local Court Act, though the fact that chiefs and traditional leaders dealt with customary disputes is not a new process.

The jurisdiction of chiefs and traditional leaders to deal with customary land disputes poses a constitutional issue in that whether or not the recognition of the chiefs and traditional leaders by the Local Court Act is constitutional given that strictly only courts of law are given the role to deal with such disputes. Similarly, the impracticality of section 11 as read with section 12 of the Local Court Act needs to be addressed to clearly ascertain what locality is. In relation to the conduct of proceedings the chiefs and traditional leaders have the discretion to adopt whatever procedures they deem fit and proper. This is sometimes affected by legal principles of res judicata and natural justice principles. Generally, the composition of the house of chief varies depending on the availability of chiefs within the locality of the disputed area. However, there are instances in which chiefs/traditional leaders from other nearby localities deal with customary land disputes that are not within their locality. It is in such instances that the houses of chiefs are forced to use court-like procedures to deal with customary land disputes. Apart from using court-like procedures the houses of chiefs also use mediation as an important method to deal with customary land disputes. This is relevant when the two parties are connected by marriages or belong to the same clan.

The main criteria used to select panellists to deal with customary land disputes is that they must be knowledgeable in the custom relating to land in that particular locality. In ‘Are’are and Maramasike, chiefs are chosen by birth because of their hereditary system. In other parts of Malaita which put more emphasis on the big-man system, panellists are basically chosen because of their knowledge on custom of that
particular land in that particular locality. This is influenced by the consensus of their particular tribe or clan. Other factors also affect the way chiefs/traditional leaders are chosen. One such factor is whether the father of the person who is chosen to deal with the customary land disputes is or was a traditional priest or not.

The factors, *inter alii*, which cause customary land disputes as enumerated in chapter five explains why houses of chiefs/panels deal with customary land disputes. Given this role, a general observation will only be appropriate if advantages and challenges facing chiefs and traditional leaders are discussed. Chapter seven will therefore, examine some of the advantages and challenges facing chiefs and traditional leaders who deal with customary land disputes in Malaita.
CHAPTER 7 ADVANTAGES AND CHALLENGES FACING CUSTOM DISPUTE DETERMINATION AND SETTLEMENT: AN ASSESSMENT

7.1 Overview

This chapter has two main parts. The first briefly explains some of the advantages of customary determination and settlement, while the second part explains some of the challenges facing the custom mechanism dealing with customary land disputes in Malaita.

7.2 Advantages of Contemporary Custom Settlement

7.2.1 Chiefs and Traditional Leaders are Knowledgeable in Custom

An advantage of the customary settlement particularly the handling of disputes by the chiefs’ panel or house of chief is that within the village or community some chiefs or big-men have a comprehensive knowledge of the customs, histories and genealogies of the parties in dispute. They may be those who know customary law regulating customary land within their specific areas. Sam Lungole-Awich J suggested this when he said ‘I think [the council of chiefs] is the forum with the most knowledge of the customs and customary laws of the locality.’ Vincent Misitana and Robert Kofuria confirmed that the main criteria used to select members of the panel of the chiefs to listen to and determine customary land disputes is whether those members are knowledgeable in custom, histories and genealogies of the parties. As a result of this, when disharmony arises whether over family problems, criminal activities or land disputes, the chief or big-men can easily call the parties together to an appropriate location selected to discuss the problem. Thus, when disputes are settled, custom is the basis for such settlement. Consequently, one could infer that such a decision is legitimate, acceptable and proved to be one which favours and affirms the rightful

298 Interview with Vincent Misitana, Member – Tai and Olemaoma Houses of Chiefs (Ngaliwawao, Baefua, North Malaita, Malaita Province, 27 December 2010). Also Interview with Robert Kofuria Chairman, Tai house of chief (Baefua, North Malaita, 27 December 2010).
claims of the party concerned. This thus, helps to explain their important role in society. In recognition of this Chetwynd J said:

I believe the Chiefs all around Solomon Islands carry out an important function resolving disputes involving custom and in particular, resolving disputes about customary land. Their work is extremely important and they go about it largely unappreciated but with good grace. They bring an enormous amount of knowledge and experience to their task...

The important role of the chiefs and traditional leaders as recognised is mainly grounded in the fact that while they are custodians of custom they also apply customs to make decisions which helps to solve disputes.

7.2.2 People Feel that They Own the System

Another advantage of customary settlement is that people in the rural areas or where the house of chiefs is established see such settlements as belonging to them. Arguably, the customary settlement process is not foreign oriented, but rather has been part of the customary settlement system from time immemorial. People know that it is a system that has been practiced as part of their custom for generations. In this way, chiefs or big-men can handle and solve disputes with ease and effectiveness by taking into account the rights of the people of their society as a whole, not only a portion of the society. Therefore, as in Vanuatu in which a similar conclusion can be drawn, for the Solomon Islands ‘the kastom system is able to define its own norms and procedural framework, allowing it to remain a dynamic and legitimate grassroots justice system.’

However, given that in Malaita most of the customary land disputes are determined by the houses of chiefs were appealed to the Malaita Local Court because of unaccepted settlement by one of the parties to the customary land dispute, one can conclude that such an assertion that people feel that they own the system is questionable. Such a position could be rebutted, however, in that in any justice

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299 See Ramo v Olemaoma House of Chiefs above n 283, [5].
301 Interview with Rinaldo Talo, President, Malaita Local Court (Auki, Malaita, 30 July 2010).
system there is a need for appeal from lower tribunals or courts to higher courts in order for all the parties to exhaust their reasons, beliefs and customs at to their claims.

7.2.3 The System Is Cheap and Accessible

Third, it is argued that the customary determination/settlement is not expensive because most of the time the chiefs, big-men or traditional leaders are paid very little money by the parties to the dispute. When hearing customary land disputes, the payment of the leaders or chiefs is usually 300 to 500 SBD for them to deal with village problems, criminal activities and land disputes. That they do not demand much in terms of payment makes this very cheap compared to the legal fees imposed by the courts established by law to deal with customary land disputes. In that context, the system fits the pockets of rural people in that most of the times they can afford to pay the fees.

Sometimes, elders and church leaders who may be involved in settling disputes do not demand payment either. They settle disputes and maintain social order, among other factors, because custom or their roles as church leaders or elders mandate that they work for the benefit and prosperity of their society. As such they see maintaining social order and its associated values to be part of their role in their respective societies. Thus, in this context, it could be argued that the use of chiefs and big-men in customary settlement is less expensive and suits the economic context of the people in a Solomon Islands village.

Taking into account the geographically scattered islands in Solomon Islands and the lack of effective transportation systems, the inexpensiveness of the chiefs helps people to solve problems that the state should deal with. In this way, the customary justice system has two implications: it is inexpensive for the people in the rural areas concerned and it is inexpensive for the state. Therefore, it could be inferred that ‘the

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302 Interview with Jeffery Ini, Former President and Secretary of Fataleka House of Chiefs (Auki, Malaita, 30 July 2010).
custom system provides access to justice in areas not serviced by the State and keeps a high percentage of cases out of the state system with no cost to the State.\textsuperscript{303}

However, the idea that the system is cheap is a contested one. This is because that is true for some locality in Malaita, but it is believed that in other parts of Malaita when certain houses of chiefs were asked to determine a customary land disputes their fees are expensive. As a consequence, this hinders some parties to take their customary land disputes to those concerned houses of chiefs. In other provinces in Solomon Islands this might be expensive as well given that there is not a standard remuneration or allowances as established by law as fees for the chiefs and traditional leaders who determine customary land disputes.

7.2.4 Common Understanding

Fourth, according to a Kwaio big-man who has been involved in the resolution of customary land disputes for the last 20 years, an advantage of customary settlement is that several times, though rarely settlement by chiefs and traditional leaders helps disputing parties to come to a common understanding on a best and proper solution for the parties concerned, and for other tribal or clan members of the disputing parties.\textsuperscript{304} Jackson Lea’afuna who is a vice president of the Malaita Customary Land Appeal Court and who also sits at their houses of chiefs in their locality in Kwaio confirmed that this is what he usually emphasised when dealing with customary land disputes at their house of chiefs.\textsuperscript{305} Sometimes, though rare, the overall result is that both parties are happy about the decision on the disputed matter. This is because all of the parties including the chiefs and traditional leaders were involved in making the decision. Additionally, in reaching the decision ‘...there was no loser or winner. A compromise or clarification is what they arrive on.’\textsuperscript{306} The chief and big-men were present to ensure genealogies and custom stories were complied with. For this reason, at the end of the meeting, the decision made, reflected the position of both parties and

\textsuperscript{303} Miranda Forsyth, above n 300. 175.
\textsuperscript{304} Interview with Jackson Lea’afuna, Vice President, Malaita Customary Land Appeal Court (Auki, Malaita Province, 30 July 2010).
\textsuperscript{305} See interview with Jackson Lea’afuna, above n 304.
includes the position which custom mandates regarding how the problem should be solved. This helped all parties to correct their misunderstandings and be happy with the outcome. As such they would confirm and comply with the decisions of the chiefs because they feel that the decisions are in their best interests.

The issue of whether the determination by the houses of chiefs enhances common understanding is arguable as well. This might be because some chiefs and traditional leaders encourage parties of the need of common understanding while other chiefs and traditional leaders seem unlikely to encourage such. In Malaita, there were many instances in which the effects of lack of common understanding between parties to the customary land disputes were clearly seen. This is clear from the fact that in the last 15 years most of the customary land cases in which the houses of chiefs dealt with were appealed to the Malaita Local Court. Therefore, it could be inferred that common understanding is applicable in very limited customary land cases – particularly, those which the parties are from the same clan or tribe living within the same locality and related through the same denomination or having a common commercial interest to advance.

7.2.5 Chiefs and Big-men are Independent

Fifth, the independence of chiefs and traditional leaders is usually put forth as an advantage, though sometimes it is subject to criticisms. That is, some chiefs or elders during a customary land settlement may remain independent of outside influences and try their best to avoid taking sides. Generally, they try as much as possible to remain neutral when determining the outcome of customary land disputes within their respective locality. In terms of land disputes, the neutrality of the chief or big-men is seen in that more often they apply custom and logic in the right contexts to make sure both parties are happy with the decisions they make. Consequently, they continue to maintain broad support and integrity among their people. The result is that social order is maintained because there is a neutral authority that is competent to oversee and deal with land disputes. Similarly, their independence has positive

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307 Interview with Jeffery Ini (Former President and Secretary, Fataleka Council of Chiefs, Auki, Malaita, 30 July 2010).
implications in relation to their competence to deal with village disputes. In this way, at times, village people respect the decisions of the chiefs and traditional leaders. Therefore, what Miranda Forsyth said about Vanuatu Chiefs ‘as it is based entirely on respect, there is considerable incentive for the chiefs to maintain their integrity and to work hard to gain community support’\textsuperscript{308} is also true for the chiefs and traditional leaders in Malaita.

However, as will be highlighted in the part dealing with challenges facing custom determination, there are some chiefs and traditional leaders who are not independent when dealing with customary land disputes, which consequently leads to their status as chiefs and traditional leaders being questioned or sometimes they lack the support of the people in their locality to determine a customary land dispute.

### 7.3 Challenges Facing Custom Dispute Settlement

#### 7.3.1 Chiefs Adopt Court Like Procedures

One of the major problems of the houses of chiefs is that nowadays they conduct settlements like a local court. This means that when they conduct their hearings these are partly based on the notions of a Western formal legal system. As such, these court-like procedures rely on witness and evidence. According to Dudley Fugui, this means that when the chiefs conduct their hearings they ask a lot of questions and depend entirely on the submissions of the parties in order to determine the outcome of the case rather than making decisions based on their original knowledge about the customary land, its boundaries and associated issues in which they know from their fathers or has been the history from time immemorial. Similarly, court-like procedures are adopted during such settlements because the composition of the houses of chiefs are most of the times those who also sit as local court justices in the Malaita Local Courts or the Malaita Customary Land Appeal Court. Thus, it could be rightly inferred that they may apply court-like procedures when dealing with customary land disputes. This has several negative implications. First, there is doubt in distinguishing

\[\text{\textsuperscript{308} Miranda Forsyth, above n 300, 175.}\]
between local court procedures and custom process.\textsuperscript{309} Similarly, sometimes instead of striking a clear balance in relation to rights or associated issues in relation to customary land, such decisions sometimes create a win and lose situation. Such a situation can be used by primary right holders to subjugate secondary right holders or at its worst remove secondary right holders from the concerned customary land after an outcome of the dispute is announced.

Moreover, the adoption of court-like procedures ‘depend heavily on witness and evidence, both of which can be misleading as they are irrelevant to [Malaita] land tenure system.’\textsuperscript{310} This means that ‘in practice their rulings only declare the party with the most convincing arguments the winner of the case.’\textsuperscript{311} Sometimes, as a consequence of houses of chiefs using court-like procedures, it could be argued that the houses of chiefs ‘[do not], by necessity, decide questions of ownership of land’.\textsuperscript{312}

\subsection*{7.3.2 Participation by Chiefs from other Areas}

It is clear that participation by chiefs to deal with customary land disputes which are not within their locality has been evident in some parts of Malaita by certain chiefs’ panel. This problem is clearly seen in \textit{Felix v Korutalaumeimei}.
\textsuperscript{313} After the Hoasitaemane Panel in South Malaita was unable to hear a land dispute case because there was an objection by the Plaintiff, another panel heard the case. There again, there was another objection because one of the chiefs in the panel had an interest with the concerned logging company in that he was one of those who was a party in signing the logging agreement with the logging company – Omex Limited. The consequence, in this context, was that the chiefs or traditional leaders hearing the case may come from another region, a different locality. This usually arises when parties to the settlement do not agree with the chiefs or traditional leaders within their own locale because of issues relating to their lack of impartiality. The problem with this, according to Dudley Fugui, is that there is a high chance that one or both of the parties to the customary land dispute may fabricate facts, histories or genealogies to suit their circumstances.

\begin{footnotesize}
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\item \textsuperscript{309} See Michael Goodard, above n 163, 26.
\item \textsuperscript{311} See Leonard P. Maenu’u, above n 310.
\item \textsuperscript{312} See Leonard P. Maenu’u, above n 310, 27.
\item \textsuperscript{313} See \textit{Felix v Korutalaumeimei} above n 153.
\end{itemize}
\end{footnotesize}
and if one of them tell lies, the decision will be based on lies or false stories from both parties. In other words, the customary way of negotiation and discussion to reach a win-win solution is usually not used to strike a balance in terms of the customary issues raised. This is contrary to the basic idea of settlement, and thus contrary to the normal custom way of dealing with customary land disputes.

### 7.3.3 Questions as to Validity of Chiefs Position

Another problem with the chiefs is that the ways chiefs are chosen today is problematic.\(^{314}\) This is because there is the tendency for them to be self appointed.\(^{315}\) This is clearly the case when some customary land cases are heard, some chiefs remain silent throughout the settlement process.\(^{316}\) They make no attempt at discussion or to give constructive comments on custom or related issues which are in dispute. This is a reflection and manifestation of the fact that the concerned chief or elder/big-man does not know the histories, genealogy or boundaries of the concerned parties.\(^ {317}\) Arguably, their competence in custom, histories and genealogies is questionable. Another explanation for the problem of identification of chiefs or big-men is identified by Mr. Philip Smiley who mentioned that '[i]n some other islands a number of ‘Paramount’ Chiefs have arisen, usually with a certain degree of acrimony and disagreement within the community. With the divisions it is becoming harder for obvious and accepted traditional leaders to be identified.'\(^ {318}\) Thus, ‘in some areas there may be difficulties in ascertaining the “chiefs”’\(^ {319}\) An example is *Lauringi v Laguaeno Sawmilling and Logging Ltd*\(^{320}\) in which there was determination by the Marodo Council of Chiefs that the plaintiff was the customary land owner which was then confirmed by the Malaita Local Court. In the High Court of Solomon Islands, the defendants challenged the jurisdiction of Marodo Council of Chiefs in Malaita. The grounds for the challenge were that that Marodo Council of Chiefs failed to fall within

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\(^{315}\) Interview with Duddley Fugui (Leader, Suraina Tribe, Manasu’u, Ata’a, North East Malata, 27 July 2010).

\(^{316}\) Interview with Duddley Fugui, above n 315.

\(^{317}\) Interview with Duddley Fugui, above n 315.


\(^ {319}\) See Jennifer Corrin Care, above n 11, 110.

the definition of chiefs in the area where the land is situated. This, therefore, is an illustration that sometimes there is difficulty in ascertaining the chiefs and their position to deal with customary land disputes in Malaita.

7.3.4 Conflicting Decision of Chiefs

An associated problem is that sometimes the chiefs or traditional leaders make contrary decisions. This is because in some customary land cases chiefs or traditional leaders have contradictory knowledge on genealogies, boundaries and histories of the two parties. The Deputy Vice President of the Malaita Customary Land Appeal Court observed that there is only one genealogy that is correct. He further stated that when there were different versions of genealogies or histories it created a situation which was irreconcilable, and the dispute was not settled which resulted in an unaccepted settlement by the losing party. Consequently, the matter went to the Local Court.

In some cases, decision made by the chiefs or traditional leaders contain contradictions in that instead of a clear unified decision, each chief makes his own decision, which results in different decisions signed by different chiefs. An example can be seen in a joint panel which constituted the Toi and Olemaoma Houses of Chiefs. Vincent Misitana who was a panellist during that settlement confirmed that during a hearing it was clear that the customary land dispute concerned a land within the Baefua area. During the joint panel which heard the case four chiefs were selected from the Olemaoma house of chiefs and two were from the Toi house of chiefs. According to Vincent Misitana and another chief who are from the Toi House of Chiefs, which is the proper house of chiefs to deal with the concerned land, both concluded that the land belonged to the defendant. However, all the chiefs from the Olemaoma Houses of Chiefs concluded that the land belonged to the appellant. The chiefs from the Olemaoma House of Chiefs even dominated the discussion. Due to the standoff between them, the four chiefs from the Olemaoma House of Chiefs forcefully suggested

321 Interview with Jackson Lea’afuna, Vice President, Malaita Customary Land Appeal Court (Auki, Malaita Province, 30 July 2010).
322 Interview with Vincent Misitana, Member Toi and Olemaoma houses of chiefs (Ngaliwawao, North Malaita, 27 December 2010).
that they vote among them – a process which, according to Vincent Misitana and Robert Kofuria, should not be entertained by the Chiefs when making determinations about customary land. There was therefore a standoff between the chiefs as to who the land rightfully belongs to.

This undermines their credibility, and that of the status of the land about which they made the decision, because such a decision did not clearly affirm custom as the basis for the decision. It is because of such conflicting decisions that parties apply to the local court for further determination of questions on custom regarding customary land and associated rights attached to it. Therefore, the words of the current Chief Magistrate – Leonard Maina, might be true when he said:

> It is now a concern that the traditional chiefs who are vested the roles of settling disputes on customary land have drastically failed to do so and their decision is hardly accepted by disputing parties.323

7.3.5 Lack of Government Support and Enforcement

Chiefs or traditional leaders though recognised by law, receive no substantial help from the Solomon Islands Government. This situation is affirmed for 'Are'are by Alice Pollard who reported

> 'Are'Are chiefs strongly argue that their existence is recognised by the government merely by words but without any concrete assistance.324

Thus, although, chiefly or traditional settlement is a ground-level mechanism to deal with customary land disputes, the Solomon Islands Government has turned a blind eye to such an important process.

Recognition of chiefs is provided for under section 114(2)(b) of the Solomon Islands Constitution 1978, which states that ‘Parliament shall by law ... consider the role of

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324 Alice Aruhe'eta Pollard ‘Literature Review – A Melanesian Approach’ Gender and Leadership in 'Are'Are Society, the South Sea Evangelical Church and Parliamentary Leadership - Solomon Islands: Embracing the Past, engaging the present and hopeful for the future! (PhD, Victoria University of Wellington University, 2006) 9, 20.
traditional chiefs in provinces.’ This provision has been mostly ignored by the Solomon Parliament. It has been by-passed since political independence in 1978 and has been given minimal effect. Apart from that, an additional recognition is that which is stated in Local Court Act in 1985, in that chiefs or traditional leaders are recognised as an important process to settle customary land disputes before customary land cases go to the local courts. The chiefs’ or traditional leaders’ role are given no effective legislative recognition that would mandate financial return or, from a broader perspective, there is lack of proper regulation. Hence, their role as solvers of customary land disputes in the village or within their areas of influence is severely affected and not viable as a cohesive institution.

The lack of government support is shown by the lack of government funding which hinders the work of the houses of chiefs in some ways. For instance, chiefs or leaders do not have any office or proper administrative centre. Additionally, the lack of funding or proper remuneration by the government of the day helps to explain why some leaders who are knowledgeable in custom or genealogies relating to customary land dispute cases have declined to sit in chiefs’ settlements because they do not want to waste their time and energy on a mechanism that lacks proper regulation and support by the government. Therefore, the lack of funding by the National Government helps to explain the lack of willingness by certain knowledgeable islanders to hear customary land disputes, preparatory before they go to the Local Court.

In addition, the lack of government support is shown by the lack of enforcement of the decisions of the chiefs and the power of the chiefs or elders is, therefore, sometimes undermined. In this context, Ian Heath highlighted some of the problems with negotiations and discussions when he said:

but the range of issues that could be handled in this way (without being formalized from outside) was limited. Intra-“line” disputes almost certainly went through discussion and negotiation, but if what was in dispute was the authority of the land controller over young men keen on “development” the dispute would not easily be resolved by discussion. It is interesting to note that a number of disputes were brought before the Native Courts by the land controllers to enforce their authority. Discussion and negotiation could only
reach binding decisions if the authority of the older men continued to carry weight.  

Therefore, the scope of discussion and negotiation is very limited. Similarly, decisions are respected subject to the authority of the older men and sometimes these decisions are not respected. One could infer that the enforcement of these decisions is sometimes questionable because there might be a lack of proper enforcement to enforce the decision or to ensure it would be binding. Another explanation for the lack of enforcement is that ‘[i]n recent times, the emergence and introduction of the cash economy, increasing population, greater international business pressures, and commercial developments have required greater reach and authority than the traditional land management system can provide.’ This helps to explain the ineffectiveness of chiefs’ powers when making decisions in relation to customary land. Similarly, in Malaita Province like Western Province, young men who were once active enforcers of chiefs’ decision are now reluctant to do so. Against this background, the decisions of the chiefs or big-men are not binding or backed by proper enforcement.

7.3.6 Lack of Independence of houses of chiefs/Panel

Another problem is that, as noted earlier, sometimes chiefs lack independence. In some places, in Malaita, this is, particularly so when the chiefs and traditional leaders have interests in commercial activities which take place on the customary land that is in dispute. A notable commercial activity is logging. For instance, in *Felix v Korutalaumeimei* it was alleged after the date of the announcement of the chief’s panel (Hoasitaemane Panel) in South Malaita to hear and settle a customary land dispute, two members (Messrs Lie and Horoimarau) of the Hoasitaemane Panel who were to sit and hear the customary land dispute case were picked by an outboard motor owned by a logging company (Omex Limited), which had an interest in the land that was being disputed, with the supporters of the defendant in that concerned case.

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325 Ian Heath, above n 128, 391 – 392.
328 See *Felix v Korutalaumeimei*, above n 153.
Contextually, Messrs Lie and Horoimarau – the two chiefs of the Hoasitaemane Panel linked them with the supporters of the second defendant. Supporters in this context were the tribal members and blood relatives of the second defendant. Taking that into account Kabui J said:

In this case, the Chiefs constituting the Hoasitaemane Panel would have been the Chiefs or traditional leaders residing in the locality of the Tangiliu dispute, Tangiliu land being situated within the locality of the Chiefs. The problem however was that two members of the Hoasitaemane Panel, Messrs Lie and Horoimarau had associated themselves with Omex Limited being the supporter of the 2nd Defendant. The conduct of the two members of the Hoasitaemane Panel had created in the mind of the Plaintiff doubt about the impartiality of the Hoasitaemane Panel should they hear and determine the Tangiliu dispute.329

Thus, the chiefs’ action in this context created suspicion that there would not be impartial in dealing with the concerned customary land in dispute. In this context, the words of Lord Denning in Metropolitan Properties Co. Ltd v Lannoon and Others330 is very true in that ‘[j]ustice must be rooted in confidence; and confidence is destroyed when right minded people go away thinking: “the judge was biased”.’

Similarly, there are instances in which chiefs who have an interest in commercial activities in a disputed customary land continue to sit at the hearing to deal with the customary land dispute case. For instances in Siwa’ahu v Korutalaumeimei331 the plaintiff objected to the Korutalaumeimei Panel hearing the customary land dispute case because the paramount chief of Korutalaumeimei, whose name is Laenalaha, was one of the signatories to the logging agreement with Omex Logging Company who wanted to engage in logging activities within the said disputed customary land. Hence, this showed that there may be instances where some chiefs in certain houses of chiefs are biased and lack impartiality when they dealt with disputes over ownership or related issues in terms of customary land in some parts of Malaita. The fact is that that concerned paramount chief should have withdrawn, given that he was a party to that concerned logging agreement that the plaintiff opposed.

329 See Felix v Korutalaumeimei, above n 153, [7].
330 Metropolitan Properties Ltd v Lannoon [1968] 3 AER 304, 310.
Additionally, the independence and impartiality of chiefs or traditional leaders in the houses of chiefs are affected by remuneration. The chiefs depend on the two disputed parties to pay them to deal with a customary land dispute. There are some instances, in which a party to the dispute will give more than the other party to the panel or house of chief that deal with the customary land dispute. Further, there are instances in which a party instead of the two parties to the customary land dispute pay the house of chief in order for it to hear the customary land dispute. The later could be deduced from instances where there was objection by one party to the customary land dispute for the chiefs not to hear the dispute. Such objection might result in that party which made the objection refused to pay the chiefs though the chiefs continued to hear the customary land dispute in the absence of the party that objected. In such instances, it can be inferred that there is high likelihood that the outcome of the customary dispute would favour the party that was present and paid the fees to the chiefs to hear the dispute. More likely, the decision would be in favour of the party that gave a higher amount or the party which met the remuneration and other related expenses such as living allowance and food for the chiefs during the course of that concerned hearing.

7.3.7 Lack of Fair Hearing

The houses of chiefs are sometimes not fair in terms of their processes. A factor responsible for this is their lack of understanding on legal concepts such as natural justice principles particularly the fact that natural justice requires that the other party must be heard. In other words, the requirement of natural justice and fairness ‘that a person must be allowed an adequate opportunity to respond, and give his or her side of story’ is sometimes not observed by chiefs or houses of chiefs. In terms of land disputes, in some instances, the chiefs’ panel move ahead to hear or settle a customary land dispute even though the other party may not be present or it has not had sufficient notice and time to prepare its case. An example in South Malaita is

Siwa’aha v Korutalaumeimei Panel\textsuperscript{334} in which the Korutalaumeimei Panel went ahead to hear the customary land dispute despite the objection from one of the parties and the absence of the appellants presence to present his case at that time. Therefore, the decision was seen to be one-sided and to the disadvantage of the other party that had not turned up and objected because his side of story was not heard. However, Brown J said:

\begin{quote}
in any procedure (sic) matters of custom required by the Chiefs leading up to the hearing are within their absolute discretion, in the absence of any legislation dealing with customs recognition.\textsuperscript{335}
\end{quote}

While the statement by Brown J might be appreciated, it is essential to understand it in the context that the application of customary law or procedure should be fair to both of the parties as well. This is important to ensure, a comprehensive decision is made in relation to the dispute. However, there are conflicting decisions of the High Court in relation to proceedings before the houses of chiefs and whether it should comply with natural justice issues.

7.3.8 Dishonesty by Some Chiefs

In Malaita there are some cases in which chiefs and traditional leaders in houses of chiefs have been dishonest in dealing with customary land disputes. Dishonesty in this context is basically attributed to cases in which parties to the customary land dispute cannot be settled by any particular house of chief because the parties to the customary land dispute cannot agree on a date of settlement or cannot agree on the composition of a concerned house of chief which in turn drag the customary land dispute to take so long without any settlement. According to David Lidimani a classical example is the \textit{Bobby Ngalingwa’a v Anthony Maelasia} – Land Case No.3 of 2005. The consequence of such a long stand-off between the two parties to this customary land dispute forced Bobby Ngalingwa’a to lure some chiefs within the locality of the disputed customary land to sign certain documents providing a settlement in favour of Bobby Ngalingwa’a, though such a settlement never took place.

\textsuperscript{334} Siwa’ahu v Korutalaumeimei Panel, above n 332.
\textsuperscript{335} See \textit{Muna v Billey}, above n 229.
Furthermore, chiefs in the houses of chiefs are sometimes bribed by concerned parties which lead them to be dishonest when they deal with customary land disputes. A classical example could be deduced from the Toi Houses of Chiefs in North Malaita in which the chiefs were asked to settle a matter between the land owning group of Kao Land in Baefua area. When the matter went before them for settlement, the panel was unable to deal with it on points of custom. In an interview with one of the appellants regarding this matter, he mentioned that all the members of the panel stated that they could not deal or make a decision regarding this case because they were afraid of possible retaliation by the defendant by way of a court case against the panel. This, therefore, forced the panel not to make any decision relating to the dispute between the appellants and defendants regarding whether it was correct in custom for the defendant to cut a tree on customary land which destroyed the tabu (sacred) sites and shrines of the appellants. It was alleged that the panel was unable to determine the case because the defendant influenced the panel by using money.

7.3.9 Lack of Proper Advice

Another of those challenges facing houses of chiefs is that they lack any proper advice on legal issues relating to legal concepts such as res judicata and natural justices issues which they are bound to follow during their proceedings. Legal issues such as res judicata and natural justices are sometimes not well understood by the chiefs’ panel or houses of chiefs. An example can be drawn from a dispute over the ownership of Kao customary land in Baefua area, North Malaita. Prior to this dispute, party A and party B were one party in that they were against party C. Party A and B managed to win the case against party C. However, in 2009 there was dispute between Party A and B because party A sold certain lands within the Kao customary land without the consent of party B. This, therefore, stirred up continuous disputes as to the ownership of Kao customary land between party A and B. Party B then referred the matter to the Olemaoma House of Chiefs. Party B objected by writing a letter to the Olemaoma House of Chiefs on the grounds of res judicata. Given that letter the Olemaoma House of Chiefs wrote a letter to Party A stating that they could not hear this case because the issue of ownership had already been determined, without any proper advice from the Local Court Officer or relevant legal institutions such as the Public Solicitor’s
Office at Auki, Malaita. However, sometimes these chiefs were ill advised on legal issues by the Local Court Officer as well. However, given what might be termed as a shortfall on the part of this house of chief it is up to party B to take the matter to the formal courts for determination on whether there is an existence of res judicata, thus forbidding this house of chief to deal with the determination.

Another similar case is depicted in *Pita v Samo* in which it was alleged by the Secretary of the Olemaoma House of Chiefs that it had already dealt with the question of ownership of a piece of disputed customary land, which is called Feralalo land. However, according to the Francis Manesalua J, the determination by the Olemaoma House of Chiefs did not deal with Feralalo. That determination only dealt with Dai Island and Feralalo is part of Dai. He further stated that the determination by the Olemaoma House of Chiefs did not identify who gave away certain parcels of land, their names, boundaries and locations of those parcels and the names of those tribes which received such parcels of land.

Given the above, it is clear that houses of chiefs sometimes lack a minimal understanding of this concept, thus leading them to make a decision which may be incorrect or a determination that should not be made. Thus, among other factors, the problem which this shows is that in relation to such matters, the houses of chiefs lack proper legal advice on that matter. This in turn helps to explain why they made the decision in that way.

**7.3.10 Decisions of Custom Settlement Dominated by Men**

A feature of custom dispute resolution which is arguably a disadvantage, is that only men preside over customary land disputes. The decisions were and are continually based on men’s thinking. Men dictate and dominate the negotiations and discussions and still do today. Women are given very little to say in dispute resolution although in some parts of Malaita there have been women who are knowledgeable in genealogy and history of their tribes or clans. For instance, in East Are’are according to

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336 See *Ramo v Olemaoma Houses of chiefs*, above n 283.
Alphonsus Nori in his statements to the Commission of Enquiry into the April 2006 Honiara riots he said ‘in ’Are’are [they] have women as chiefs and these women they call them Ouabu or Virgins.’ However, Rebecca Monson writing about Guadalcanal women, which is also true for women in Malaita said, ‘[w]omen are unlikely to talk in these arenas because they lack the confidence, education, and customary authority to do so.’ Moreover, strictly speaking, the basic role of women does not encompass issues relating to dispute resolution. According to Alice Pollard ‘[i]n the traditional political arena women lack formal positions of authority’. Therefore, in Malaita like other parts in the Solomon Islands, dispute resolution in custom is basically men’s domain. It is the men’s role to talk and settle disputes that arise between members of the same clan or different tribes. The implication of the lack of women in these forums is that it ‘may mean that the important role woman play in using and managing land, including resolving disputes, is not always fully recognised.’

### 7.4 Concluding Remarks

In Malaita, as other provinces in Solomon Islands, the houses of chiefs have certain advantages and challenges. As depicted in this chapter the challenges outweigh the advantages. Generally, the houses of chiefs are not an effective body to deal with customary land disputes basically because of the challenges it continues to face at the moment. This means that the challenges are serious issues and need to be addressed. There is a need to ensure proper attention to the challenges facing the function of the houses of chiefs in Malaita and in other provinces as well. If the challenges facing the houses of chiefs are not properly addressed, the houses of chiefs, though an important body to deal with customary land disputes will continue to be ineffective body in dealing with customary land disputes.

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8.1 Introduction

Initially, this chapter was not part of this SRP because the scope of this paper was limited to the role of chiefs and traditional leaders dealing with customary land disputes using custom forums. However, this chapter has been added because of the recommendation of an external examiner. The Tribal Land Dispute Resolution Panels Bill 2008 (TLDRPB) provides for the use of chiefs and traditional leaders in customary land disputes as part of the Tribal Lands Dispute Resolution Panels (TLDR Panel). The aim of this chapter is to briefly highlight the contents of TLDRPB and discuss some of the provisions therein. This chapter is divided into three major parts. The first part of this chapter will provide an overview of the TLDRPB with some commentaries. The second part of this chapter will discuss some advantages of the TLDRPB. The third part of this chapter will examine some of the problems inherent in the TLDRPB.

The TLDRPB has been in circulation for around four years and it is still to be passed by the Solomon Islands National Parliament. It has also provoked different comments from various commentators. In December 2008 after late Toswell Kaua – the Minister for Justice and Legal Affairs, announced the circulation of the TLDRPB for further comments to the general public, the Malaita Traditional Governing Council of Chiefs welcomed the new approach which the TLDRPB encompasses. According to the Vice Chairman of the Malaita Traditional Governing Council of Chiefs he said they were ‘encouraged with the new move and would like to congratulate the government for realizing that overdue problem.’ He further stated that the ‘Malaita Chiefs believed that if the bill becomes law, Solomon Islands will see an end to land disputes.’

These encouraging comments by the Vice Chairman of the Malaita Traditional Governing Council of Chiefs were made only a few days after the announcement of the

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344 See Solomon Islands Government Communications Unit, above n 343, [8].
345 See Solomon Islands Government Communications Unit, above n 343, [7].
circulation of TLDRPB for comments and without much opportunity for very lengthy or adequate discussion and scrutiny of the TLDRPB.

On the other hand, in response to the announcement of the circulation of the TLDRPB by Honourable Kaua, Dr. Tarcisius Tara – a Solomon Islands academic, originally from the Guadalcanal Province, who is currently an Associate Professor at the University of Hawaii, was more cautious. He said that the ‘current laws to settle land disputes in court are inadequate and lack in-depth knowledge of the country’s diverse cultures and customs.’ More importantly, he said ‘people [Solomon Islanders] need to have their say on having a panel, made up of local chiefs and leaders, decide on tribal land disputes and applying customary law.’ This chapter is therefore part of this discussion.

8.2 Overview of the TLDRPB with Commentaries

8.2.1 Object of TLDRPB

The object of the TLDRPB is stated in clause 3:

...to provide for the establishment and operation of Tribal Land Dispute Resolution Panels for the purpose of –
(a) providing dispute resolution services, including mediation and encouraging and facilitating agreements between parties, and
(b) determining the rights of parties according to custom pertaining to the area at the time the dispute arises and
(c) recording the determined and agreed rights.

The purpose of the TLDRPB is three fold. First, it provides dispute resolution services which include mediation and facilitation of agreements between parties to a customary land dispute. Another purpose is the determination of rights of the parties to the land disputes by using custom of the area in which the dispute emerged. The third

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348 Tribal Land Dispute Resolution Panels Bill 2008 (Solomon Islands), clause 3. Herein after referred to as TLDRPB.
349 TLDRPB, above n 348, clause 3(a).
purpose is the recording of the rights of the parties which have been determined or which have been agreed to.

8.2.2 Establishment of Registers

The TLDRPB provides for the establishment of a Membership Register which includes a national register and a provincial register. The National Director will be responsible to maintain the national register while the Chief Clerk will maintain the provincial register. A suitable person will become a member of the Membership Register if he/she lodged an application to the relevant officer. Section 10 of the TLDRPB is silent as to the person with whom the application will be lodged; it is unclear whether it will be lodged with the National Director or secretaries or with other relevant officers. The lodgement of the application is followed by the appointment of that suitable person to the Membership Register by the National Director.

There are important criteria in order for a person to be listed in the Membership Register which consists of provincial and national registers. These include that the person must be knowledgeable in the custom of that area or are ‘custodians of land’, he or she must live in that area as a principal place of residence for more than three years and he or she must not have any criminal conviction. A person is ineligible to be listed in the Member Register if he or she is a member of the National Parliament, Provincial Government or Local Government. A disadvantage due to such exclusion is that if such a person is knowledgeable in the customs of that area/locality he or she will be unable to sit as a panel member to determine such disputes. However, that exclusion is essential because there is very high likelihood that people with political position might not be impartial or might be likely to control other panel members from making an independent decision given their status as influential members in a society.

The criteria that those members must be ‘custodians’ of the land is vague because the word custodian is not defined in the TLDRPB and so its meaning is unascertained.

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350 TLDRPB, above n 348, clause 16.
351 TLDRPB, above n 348, clause 19(a).
352 TLDRPB, above n 348, clause 13.
353 TLDRPB, above n 348, clause 10.
354 TLDRPB, above n 348, clause 11.
However, generally, all the criteria to select members to the Membership Register are very important because such have positive implications. The criteria are fundamental to protect the status of the Membership Register as well as the TLDR Panel in order to ensure the members of the TLDR Panel have the support of their communities in the enforcement of the TLDR Panel’s decisions. These criteria provide guidelines as to the way chiefs/traditional leaders are chosen to hear and determine customary land disputes. This is important because there are some chiefs or traditional leaders in Malaita who have some questionable status due to their dealings with their communities and some even commit criminal activities. In Malaita there is one traditional leader known by his community to have committed a criminal activity some 15 years ago, yet he continues to be part of some of houses of chiefs which determine customary land disputes. Solely, his inclusion in these houses of chiefs is because of his in-depth knowledge in custom. In this context, his knowledge in custom overrides his past criminal activity thus his inclusion in some of the houses of chiefs in this concerned area in Malaita province.

8.2.3 Establishment of TLDR Panels

The National Director has the power to establish the TLDR Panel by warrant which needs to consist of three members. Clause 30 of the TLDRPB gives power to the Clerk to select seven suitable persons from the Provincial Membership Register to constitute a Panel. Clause 35 of the TLDRPB further states:

Panel members shall be selected from the locality where the land dispute is situated. However, if there are insufficient members for a particular area, members from the next nearest localities may be selected.

First, clause 30 does not state who the clerk is because there are several clerks who are authorised officers; whether it is the Chief Clerk, Clerk of the Secretariat to the Panels or other Clerks remains vague. Second, clauses 30 and 35 can be seen as conflicting as to the scope of the area in which Panel Members are to be chosen. These clauses are confusing because two places are given as to where Panel Members are to

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355 TLDRPB, above n 348, clause 5.
356 TLDRPB, above n 348, clause 9.
357 TLDRPB, above n 348, clause 35.
be selected; one is the *province* which can be deduced impliedly because the Provincial Membership Register is used to select the members and the other is the *locality*. The problem with the former is that it might entail that members are to be selected from any parts of the province which definitely defeats the purpose of clause 35 that TLDR Panel members are to be selected from the locality of the land where the dispute takes place. Additionally, the latter is confusing because locality is not defined. The fact is whether locality refers to custom area or geographical location or both remains unclear.

8.2.4 Procedures For Calling Meetings

In order to ensure a resolution of a customary land dispute, TLDRPB describes certain procedures to be followed. First, a request with a fee needs to be made to the Clerk of the Secretariat by a person who has an interest in the customary land.358 Second, the Clerk who is not clearly stated in the TLDRPB will select from the Provincial Membership Register, contact and determine at some suitable persons from the locality of the land in dispute.359 The Clerk is also required to provide to the National Director the interested parties to the customary land dispute and the seven proposed Panel members.360 Thereafter, a notice of meeting will be published and displayed.361 Any other interested parties to the dispute will have to make an application within three months after the display of the notice of the meeting.362 Objections as to the composition of the TLDR Panel are allowed within the six weeks after the publication of the notice.363 If objections are made which resulted in less than three panel members remaining in the TLDR Panel, the Chief Clerk and the Chief Justice will determine the composition of the TLDR Panel.364

Generally, the procedures to call meetings are likely to be cumbersome, time consuming and likely to be very expensive for the parties and the government. Factors

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358 TLDRPB, above n 348, clause 27 and 28.
359 TLDRPB, above n 348, clause 29 – 35.
360 TLDRPB, above n 348, clause 37.
361 TLDRPB, above n 348, clause 38.
362 TLDRPB, above n 348, clause 39.
363 TLDRPB, above n 348, clause 40.
364 TLDRPB, above n 348, clause 42.
such as the geographical location of the provinces, the related expenses needed to execute such procedures from Honiara to the provinces where the disputes are located, and the lack of effective communication and transportation links between Honiara and other provinces in Solomon Islands will make these procedures very expensive and cumbersome.

Additionally, clause 40 which gives power to the Clerk to remove any panel member is drafted in a mandatory language. Thus, it could be inferred that there might be lack of consideration of proper grounds for the ousting of a panel member. This is because the removal of a panel member due to any objection by an interested party in a customary land dispute is done upon the receipt of the objection. Thus, it could be deduced that the concerned panel member will be unable to give his/her views as to the objection before any termination is made by the Clerk. Arguably, this procedure is therefore subject to abuse because there might be lack of consideration of proper grounds to oust any panel member.

Further, among the above procedures one which is worthy of a comment is in relation to the fees that need to be paid to the Clerk of the Secretariat. It is envisaged that the fee might be very expensive for the parties which might result in legitimate claims unable to be referred to the TLDR Panel for determination. However, the advantage of the fees given to a coordinating body is that it will not have an impact on the impartiality of the body determining the customary land dispute.

Furthermore, the approval by the Chief Justice after the appointment of suitable person by the National Director, to be listed on the Membership Register is questionable given that the Chief Justice might not know these proposed members.

The power of the Chief Clerk and the Chief Justice to appoint panel members in the event that objections by the concerned parties to the customary land disputes resulted in less than three members remain in the TLDR Panel is important because it may put a stop to unnecessary objections by parties who just feel that they want to drag the customary land dispute from being solved.
8.2.5 Procedures At Meetings

The TLDRPB provides for procedures to be followed during TLDR Panel meetings. During such meetings the presence of the Clerk to the TLDR Panel is important to ensure he records the proceedings of TLDR Panel meetings.\textsuperscript{365} The absence of the Clerk to the Panel will render the TLDR Panel meetings void.\textsuperscript{366} Prior to any meetings of the TLDR Panel, a Chairman must be chosen.\textsuperscript{367} The TLDR Panel must take oaths or affirmation.\textsuperscript{368} The failure to take an oath does not invalidate his or her function but that concerned panellist will be removed from the membership register.\textsuperscript{369} However, clause 50 is silent on the consequence of the lack of affirmation by any panel members.

The Chairman has the power to ensure the order of witness to be heard and consider the materials presented by the witness.\textsuperscript{370} During the meeting, witness can be questioned by the TLDR Panel. The parties are not allowed to ask a witness directly but through the TLDR Panel as to the evidence produced by the witness. Parties are not allowed to be represented by a legal person\textsuperscript{371} which is the same as the current practice before the chiefs, local courts and customary land appeal courts. This is an advantage given that the expenses in relation to legal representation are very expensive. The TLDR Panel is empowered to inspect the customary land and the boundaries that are in dispute.\textsuperscript{372} Meetings of the TLDR Panel can be open to the public but this is subjected to the discretion of the TLDR Panel.\textsuperscript{373}

Further, the TLDRPB provides that ‘the procedure for the conduct of proceedings is to be determined by the Panel.’\textsuperscript{374} This is the same as that of the houses of chiefs.\textsuperscript{375} This is essential given that currently, there is lack of a legislation to regulate the proof of
custom. The Customs Recognition Act 2000 is yet to be enforced. Though the Custom Recognition Act 2000 recognised that custom may be taken into account rights relating to customary land and things in, on or produce of customary land, one of the flaws of the Customs Recognition Act 2000 is its restriction on the application of custom in relation to criminal and civil cases. Furthermore, a problem with the Custom Recognition Act 2000 is that it entails that custom is to be proved as a matter of fact. This is problematic because it derogates from the constitutional status of custom as a recognised source of law as stated in Schedule 3 of the Solomon Islands Constitution. Further, if custom is to be proved as a fact, it will entail adding evidence on point. Furthermore, ‘[a]part from being a costly exercise, it may also involve complicated rules of evidence, inapplicable to customary matters.’ It might be because of these factors that the Solomon Islands National Parliament is yet to pass the Custom Recognition Act 2000.

8.2.6 Decision of Panels

Clause 60 of the TLDRPB states that the basis for a determination of the decision of TLDR Panel is custom which must not be inconsistent with the Constitution or any other Act. First, this section does not state whose custom the determination is going to be based on. Second, the crux of section 60 is that if the TLDR Panel’s determination is inconsistent with the Constitution or any Act the decision of the TLDR Panel will be void and of no effect. As such the decision of the TLDR Panel is subject to the Constitution and any other Act of Parliament.

Further, clause 61 states that the TLDR Panel is empowered to encourage and facilitate an agreement between the two parties before or during the meeting. The problem with this section is that it is silent on how to go about encouraging and

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376 See Jennifer Corrin Care, above n 2, 169.
377 See Jennifer Corrin Care, above n 2, 175.
378 See Jennifer Corrin Care, above n 2, 175.
379 See Jennifer Corrin Care, above n 2, 176.
380 TLDRPB, above n 348, clause 60.
381 TLDRPB, above n 348, clause 60.
382 TLDRPB, above n 348, clause 61
facilitating an agreement. The 10 days given to allow for a settlement to take place is arguably impractical measured against how long custom processes take in relation to the settlement of land disputes. The TLDRPB further states in the event that there is an agreement, the Clerk must record that agreement and the parties must sign it. This will be treated as a final determination and such determinations are enforceable in the Magistrate’s Courts.

First, given that the determination by the TLDR Panel is final, it could be seen as contrary to custom because the nature of custom in relation to such determination is that it is not final. In custom, decisions in relation to the land disputes might be changed sometimes later when the parties agree to settle in a different way their differences between themselves as to the customary land dispute. Second, the fact that the determination of the TLDR Panel is given the force of law, mean that is highly likely that the nature of custom will change from a flexible and changing norm to one which is inflexible and unchanging. According to Jennifer Care, the flexibility of custom in dispute settlement is that customary norms act as counters and benchmarks in the negotiation process. As a result, there can be in custom many norms, all seemingly applicable to the same circumstances. The plethora of norms helps to resolve disputes by allowing participants to call upon those that best fit the moment, thereby enabling there to be a settlement between the parties that serves both principle and the needs of the parties, as well as a reassertion of harmony within the group.

Such flexibility will likely change if given the force of law because ‘[a]t law...there can be only one rule applicable to each situation, and it will apply regardless of the relations between the parties, their relative status and power, or the needs of the group, because the essence of the adjudicatory process is the application of a known rule similar to all similar situations.’ The fact that the nature of law puts emphasis on precedent means that the changing nature of custom to deal with different situations using the same custom is particularised. Therefore, the changing nature of

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383 TLDRPB, above n 348, clause 61
384 TLDRPB, above n 348, clause 62
385 TLDRPB, above n 348, clause 62.
386 TLDRPB, above n 348, clause 68.
387 Jean G. Zorn and Jennifer Corrin Care, above n 287, 615.
388 Jean G. Zorn and Jennifer Corrin Care, above n 287, 615.
custom and its flexibility to deal with different situations at different times is undermined.

8.2.7 Appeals

TLDRPB provides for an appeal from the decision of the TLDR Panel to the High Court of Solomon Islands on two grounds: denial of natural justice and lack of jurisdiction. If the applicant is successful, the High Court will remit the case back to a different panel within that locality or nearby locality to rehear and determine the case. The decision of the High Court in relation to an appeal on points of law from the TLDR Panel is final. It cannot be appealed in any other court of law.

Given that only the TLDR Panel and High Court of Solomon Islands are the bodies to deal with customary land disputes as opposed to the current land dispute settlement process, it could be argued that the process will be shorter when compared to the current legal framework which entails the houses of chiefs, local court and customary land appeal courts in relation to questions of custom and the high court in relation to questions of law. Consequently, it is arguably foreseeable that it will be less expensive for the parties and the state as well to ensure the function of these two bodies. Furthermore, given that the determination of the High Court in relation to legal issues will be final, this could help to avoid protracted litigation in relation to customary land disputes and avoid other expenses.

8.2.8 Administration

A National Director who is a person with a legal background will be appointed by the Judicial and Legal Services Commission to administer both the TLDR Panels and its secretariat. Among the duties of the National Director the most important ones are to oversee the national and provincial registers by maintaining, updating, reviewing

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389 TLDRPB, above n 348, clause 71.
390 TLDRPB, above n 348, clause 72.
391 TLDRPB, above n 348, clause 73.
392 TLDRPB, above n 348, clause 15.
and distributing them.\textsuperscript{393} The National Director is also responsible to introduce a case management system that needs to be effective so that disputes are dealt with in a timely manner.\textsuperscript{394} Further, the National Director has to ensure that all staff and TLDR Panel members applied statutory procedures in a consistent and uniform manner. Moreover, he is to provide appropriate training for TLDR Panel members and staff as well.\textsuperscript{395}

The role that is bestowed on the National Director to ensure training for TLDR Panel members is important because there might be panel members who are knowledgeable in custom but lack legal capacity in relation to legal issues that are going to be affected by the TLDR Panel such as natural justice and human rights including the important procedures that the TLDR Panel is obliged to abide by such as the taking of oaths and related issues. Moreover, the creation of the position of the National Director in which he or she will oversee, administer and supervise TLDR Panel and its secretariat, is likely to ensure the TLDR Panel is characterised by a quality and suitable status which might consequently foster local ownership.

\subsection*{8.3 Some Advantages of TLDRP Bill 2008}

\subsubsection*{8.3.1 TLDR Panel to Use Custom to Settle Customary Land Disputes}

One of the hallmarks of TLDRPB is that it encourages the use of mediation as an important way to settle customary land disputes. In Melanesian custom, mediation is one of the important ways to settle disputes.\textsuperscript{396} The TLDRPB provides that during the meeting, the TLDR Panel can encourage and facilitate an agreement between the two disputing parties in order to come to a settlement.\textsuperscript{397} If the parties agreed, that will amount to a final determination which has the same effect as that of a TLDR Panel.\textsuperscript{398} The advantage is that such will reduce the amount of time spend to settle the dispute. Moreover, mediation entails that such a dispute will be dealt with in a just way in that

\begin{itemize}
  \item \textsuperscript{393} \textit{TLDRPB}, above n 348, clause 16(b) – (c).
  \item \textsuperscript{394} \textit{TLDRPB}, above n 348, clause 16(e).
  \item \textsuperscript{395} \textit{TLDRPB}, above n 348, clause 16(e).
  \item \textsuperscript{396} See Patrick F Howley, above n 289, 92.
  \item \textsuperscript{397} \textit{TLDRPB}, above n 348, clause 61.
  \item \textsuperscript{398} \textit{TLDRPB}, above n 348, clause 62.
\end{itemize}
it cements the broken relationship between the disputing parties. This is because mediation in custom usually leads to reconciliation between the disputing parties. Therefore, the likely outcome will be a continuous preservation of mutual understanding and respect between the parties.

Further, rules of evidence are not applicable during meetings held by the TLDR Panel. The TLDRPB states the need for little formality and technicality in relation to the proceedings before the TLDR Panel. Such flexibility affirms the notion of customary dispute settlement. It is therefore culturally relevant in the context that it may be better understood by the parties because the parties to the customary land disputes are local people who might have low legal literacy, thus are familiar with customary procedures which lack technicality. Therefore, the inapplicability of rules of evidence and the lack of technicality is an advantage basically for the chiefs, traditional leaders and the parties to the dispute.

8.3.2 Decisions to be reached by Consensus

In custom, decisions in relation to any disputes are reached by way of consensus. This is provided for by the TLDRPB in clause 65(c). In the event that there is lack of consensus by the TLDR Panel, determination will be by majority vote. Moreover, the TLDRPB provides a wide basis to resolve customary land dispute in that ‘nothing in this Act shall prevent any person from resolving a tribal land dispute in accordance with rules of custom or in any other lawful manner.’ Such a wide provision entails the use of other customary methods such as compensation and reconciliation in order to settle customary land disputes. However, the TLDRPB is silent on whether such will be registered with the Magistrate Court in order for it to have the force of law.

399 TLDRPB, above n 348, clause 56
400 TLDRPB, above n 348, clause 57.
402 TLDRPB, above n 348, clause 65(c)
403 TLDRPB, above n 348, clause 76.
The fact that custom is used to settle customary land disputes coupled with some kind of state procedures as reflected in the clauses dealing with procedures for calling meetings and procedures during meeting will to some extent foster local ownership.\(^{404}\)

Moreover, generally it is hopeful that the fact that the TLDRPB will ‘provide for customary jurisdiction and customary procedures, including the application of humane customary remedies’ will further cement and foster local ownership\(^{405}\) by local people.

8.3.3 Remuneration

The TLDRPB states that the government will provide allowances for the TLDR Panel. These include sitting, sustenance and travel allowances\(^{406}\) which are not provided for under the current legal framework in particular for chiefs and traditional leaders who determined customary land disputes at the houses of chiefs. Also, the TLDRPB will establish a fund called the Tribal Lands Dispute Resolution Panels Fund (TLDRPF).\(^{407}\)

This will be a special fund established under section 100(2) of the Solomon Islands Constitution.\(^{408}\) The funds for the TLDR Panel will be money from the government as determined by the parliament or in accordance with section 21(1) of the Public Finance and Audit Act, and money collected as fees or contributions.\(^{409}\)

While it could be argued that the establishment of the TLDRPF will likely to have positive implications in relation to the independency of the operation of the TLDR Panel, the likely disadvantage, with remuneration from the government is that the operation of the TLDR Panel is subjected to the availability of cash flows from the government coffer. The lack of government funds is likely to affect the work of the TLDR Panel. In Solomon Islands, this is not a new problem given that the lack of proper cash flow is a problem that affected the work of the current land courts. For instance, due to the lack of funding for local courts, a private lawyer – John Smith


\(^{405}\) TLDRPB, above n 348, clause, 34.

\(^{406}\) TLDRPB, above n 348 clause 36

\(^{407}\) TLDRPB, above n 348 clause 22.

\(^{408}\) TLDRPB, above n 348 clause 22.

\(^{409}\) TLDRPB, above n 348, clause 23.
Pitabelama called on the government to ensure funding for these courts.\textsuperscript{410} A similar call was made by the Premier of Choiseul Province – Mr. Jackson Kiloe – who affirmed that the local courts lack of sittings is due to lack of funds.\textsuperscript{411} The problem of government cash-flow is likely to affect the operation of the TLDR Panels.

8.3.4 Inclusion of Women in TLDR Panel

TLDRPB provides for the inclusion of women in the TLDR Panel which is subject to the availability of women in that locality where the dispute is located. This is not clearly provided for under the current framework of customary land dispute resolution. TLDRPB provides that at least one woman must be included. This is important because in some societies or communities it is clear that women are also knowledgeable in custom relating to boundaries, genealogies and related issues. Writing about the role women in land and dispute resolution in Guadalcanal, Isabel and Makira in the Solomon Islands which is the same for Malaitan women, Ruth Maetala said:

\begin{quote}
The extent and intensity of a conflict generally determine what role a woman plays in conflict resolution. For example, a conflict which has resulted in injury is managed differently from one which, though intense, is only about a boundary issue and involves participants swearing at each other. In approaching an intense conflict a woman may be asked to stay home…while the men attend mediations and negotiations to find a peaceful solution. On the other hand, because women are considered traditional mediators, they could also take on the role as mediators. It is against tradition to take the life of a woman who is mediating (in recognition of her importance to the survival of the tribe). Women can be instrumental in calming a spill-over by using their taboo parts (thighs, clothing) to cease the conflict...  
\end{quote}

In that context, women must not be denied from participating in a forum where they can express their knowledge to advance truth and justice for the betterment of their societies. The TLDRPB thus provides for such an opportunity to be recognised. Among


other reasons, such an inclusion is timely given that one of the millennium developments goals is to ensure gender equality and the need to empower women. However, Jennifer Corrin stated that ‘[a]s selection is made subject to availability, where there are no females on the Provincial Membership Register then there will be no female Member.’\textsuperscript{413} She went on to say ‘[i]f gender equality is regarded as important then this provision could be bolstered by requiring the Clerk to select a female Member from a neighbouring Province if no one is available.’\textsuperscript{414}

It is argued that in a very strict sense, the inclusion of women is culturally irrelevant because in most provinces in Solomon Islands women’s role does not encompass customary dispute resolution. It could be said that in some cultures women are included in dispute resolution just to give evidence and does not encompass a position to determine the outcome of a customary land dispute. Therefore, though the inclusion of women is timely and seen as an advantage, it could be seen as culturally irrelevant as well.

8.3.5 Issues Relating to Natural Justice

The TLDRPB provides that the clerk is duty-bound to make contacts with the proposed members of panel in order to ascertain whether the members have any interest or conflict of interest in the said customary land in dispute.\textsuperscript{415} Therefore, the TLDRPB provides that the selected members of the TLDR Panel must disclose any interest in the land in dispute. This must be done before the hearing takes place. If a selected member knowingly fails to disclose such interest he or she will be guilty of a misdemeanour.\textsuperscript{416} These provisions are therefore important to ensure the TLDR Panel that is given the task to deal with the customary land disputes is seen as neutral to the common people. In this way people will feel that they owned this institution which will consequently lead to the people respecting its decisions.

\textsuperscript{414} See Jennifer Corrin, above n 413.
\textsuperscript{415} \textit{TLDRPB}, above n 348, clause 31
\textsuperscript{416} \textit{TLDRPB}, above n 348, clause 33.
8.3.6 Legal Education of TLDR Panel Members

An advantage of TLDRPB is that the National Director is obliged to ensure that those in the TLDR Panels undergo some kind of training,\textsuperscript{417} possibly to ensure that these TLDR Panel members are well versed with the legal principles and procedures which are important to be taken into account when dealing with customary land disputes by way of conducting legal workshops. This is important because some TLDR Panel members might be knowledgeable in custom law and processes but lack understanding of legal concepts such as human rights and natural justice or other legal procedures which are important for the TLDR Panel to adhere to. Therefore, it is an advantage that the National Director is provided with the role to ensure trainings for the TLDR Panel members.

8.4 Problems Inherent in TLDRPB

8.4.1 Overview

Though the TLDRPB has some advantages, there are also certain problems which are inherent in the TLDRPB. This section will deal with some of these problems. Some of these are, inadequate definition of customary land, lack of jurisdiction for the TLDR Panel to deal outer edge of any reef, potential unconstitutionality in that the decisions of the TLDR Panel will be binding in \textit{rem}, lack of clear definition of locality, the creation of a win-lose situation when dealing with disputes, and ambiguous definition of clause 9 of TLDRPB.

8.4.2 Inadequate definition of customary land

One of the problems inherent in the TLDRPB is that its definition of customary land is inadequate.\textsuperscript{418} It adopts the definition of custom as stated in the Land and Titles Act [Cap 133] and the Customary Land Records Act [Cap 132]. Both defines customary land as

\textsuperscript{417} \textit{TLDRPB}, above n 348, clause 16(h).

\textsuperscript{418} Email from Jennifer Corin <j.corrin@law.uq.edu.au> to Derek Futaiasi <dfutaiasi@gmail.com> 9 September 2011.
...any land...lawfully owned, used or occupied by a person or community in accordance with current customary usage, and shall include any land deemed to be customary land by paragraph 23 of the Second Schedule to the repealed Act.

The above definition is problematic because of the use of ‘current usage’ which is defined as:

the usage of Solomon Islanders obtaining in relation to the matter in question at the time when that question arises, regardless of whether that usage has obtained from time immemorial or any lesser period.

According to Kenneth Brown the problematic issue with the above definition of customary usage is whether usage ‘is contextually synonymous with law or has a singular distinct meaning endowing it with a wider and more flexible ambit than might be accorded to customary law?’ However, due to the lack of any judicial interpretation of this term by the courts in Solomon Islands, Kenneth Brown suggested that usage is contextually synonymous with law.

8.4.3 Lack of jurisdiction by the TLDR Panel to deal with outer edge of any reef

The jurisdiction of the TLDR Panel to deal with outer edge of any reef is also complicated by the definition of customary land as read with the definition of ‘land’ in the Lands and Titles Act [Cap 133]. The definition of land as defined by section 2 of the Lands and Titles Act [Cap 133] is it ‘includes land covered by water, all things growing on land and buildings and other things permanently fixed to land but does not include any minerals (including oils and gases) or any substances in or under land which are of a kind ordinarily worked for removal by underground or surface working.’

It can be interpreted that Section 3(b) of TLDRPB as read with the definition of tribal land adopted by the TLDRPB does not give jurisdiction to the TLDR Panel to deal with

419 See Lands and Titles Act, above 12, section 2.
420 Lands and Titles Act, above 12, section 2(1).
422 See Kenneth Brown, above n 421.
‘the outer edge of any reef which lies adjacent to any such tribal land.’\(^{423}\) This is further supported in that land as defined by the Lands and Titles Act [Cap 133] ‘includes land covered by water, all things growing on land and buildings and other things permanently fixed to land but does not include any minerals (including oils and gases) or any substances in or under land which are of a kind ordinarily worked for removal by underground or surface working.’\(^{424}\) The definition of land in the Lands and Titles Act [Cap 133] adopted by the TLDRPB seems not to include the outer edge of any reef. The latter is supported by Allardyce Timber Co Ltd v Laore\(^{425}\) in which Ward CJ said that ‘land covered by water’ does not include seabed which means it could not be part of customary land. This therefore contradicts the custom of the people of Malaita especially those living along the coast that seabed up to the reefs are seen as customary land which is customarily owned. The decision by Ward CJ in Allardyce Timber Co Ltd v Laore was later overruled by Palmer J (now the Chief Justice) in Combined Fera Group v Attorney-General\(^{426}\) in it was held that ‘land covered by water’ could be part of customary land. However, it must be noted that the fact that land includes ‘land covered by water’ does not necessarily mean that it includes land below low water mark or reefs and seabed.\(^{427}\) The various interpretation of land therefore have serious implications for section 7 of TLDRPB which gives jurisdiction to the TLDR Panel to deal with outer edge of reefs and section 3(b) of the TLDRPB as read with the definition of the tribal land in the TLDRPB. It is therefore ambiguous as to whether the TLDR Panel have jurisdiction to deal with boundaries and ownership relating to the outer edge of any reef which lies adjacent to the tribal land. In contrast to Papua New Guinea, the definition of customary land is certain in that for the purposes of its Land Disputes Settlement Act, ‘land’ means customary land and includes reef or a bank...\(^{428}\) Therefore, the definition of tribal land in clause 2 of the TLDRPB as read with clause 7 of the TLDRPB which confers jurisdiction on the TLDR Panel to hear

\(^{423}\) Lands and Titles Act, above 12, section 7.

\(^{424}\) Lands and Titles Act, above 12, section 2.


cases dealing with the outer edge of any reef which lies adjacent to any such tribal land is questionable.

8.4.4 Potential unconstitutionality

There is also potential for clause 67 of TLDRPB to be unconstitutional. Clause 67 states:

The determinations and orders of the Panels are final and binding on all parties who are affected by them, whether they were parties to the dispute or not. Orders of the Panel cannot be appealed against, set aside, reviewed or altered by any court or other body except as otherwise provided for in this Act.

The aforementioned can be deduced to mean that the decision of the TLDR Panel is a decision in rem which means that it covers those who are not parties to that concerned customary land dispute but which have an interest on that particular piece of land. From this premise one could argue that clause 67 breached the rights of those who are not parties to the dispute in relation to an opportunity to be heard and property rights.\(^{429}\) However, clause 39 provides that within three months of the notice of a concerned land case any party who wants to be part of that proceeding in relation to that concerned land in dispute may apply to join the meeting.\(^{430}\) Furthermore, the TLDR Panel is given wide powers to include any party who have an interest in that concerned customary land dispute at any stage of the proceeding.\(^{431}\)

A possible problem inherent in the TLDRPB relates to whether the decision of the TLDR Panel will be binding given that only decisions of courts of law are binding. In Vanuatu, unlike in the Solomon Islands, its Constitution provides in Article 52 that:

Parliament shall provide for the establishment of village or island courts with jurisdiction over customary and other matters and shall provide for the role of chiefs in such courts.\(^{432}\)

\(^{429}\) See Jennifer Corrin, above n 413, 248.

\(^{430}\) TLDRPB, above n 348, clause 39.

\(^{431}\) TLDRPB, above n 348, clause 39.

\(^{432}\) Constitution of the Republic of Vanuatu (Vanuatu), article 52

In Solomon Islands, its constitution does not have such provision as article 52 of the Constitution of Vanuatu. The Solomon Islands constitution only establishes the Court of Appeal and the High Court. In terms of other courts, it only makes reference to lower courts by the use of the word subordinate courts. Thus, other subordinate courts are established by different legislation. The Customary Land Appeal Court is established by the Lands and Titles Act and the Local Courts are established by the Local Court Act. In Solomon Islands, the Interpretation and General Provisions Act [Cap 85] defines court as ‘any Court of Solomon Islands of competent jurisdiction.’ Therefore, all of the local courts and customary land appeal courts are courts established by law and are regarded as within the formal court system, thus their decisions are binding. It could be implied from the Solomon Islands constitution that the court of appeal, high court and subordinate courts – Magistrate courts, customary land appeal courts and local courts are those with competent jurisdiction thus are deemed as courts which can make binding decisions.

The TLDR Panel on the other hand is a panel which means it is not a court though it is going to be established by law. In Vanuatu the case of Valele Family v Touru is important in this regard given that the structure of the Customary Land Tribunal system in Vanuatu as it now operates is unconstitutional. In this case, an issue was whether Utulamba Land Committee and similar committees established to determine the ownership of customary land ownership were established by the Vanuatu constitution. The Court of Appeal in Vanuatu held that since the said bodies were not established by the Constitution they were not authorised to determine the ownership of the customary land. Similarly, by implication from the Solomon Islands Constitution, there is lack of any mention of any panel; there is only mention of subordinate courts. This seems to mean that only courts can make binding decisions. Therefore, it is likely that the decisions of the TLDR Panel as envisaged by the TLDRPB might be unconstitutional as well, thus not binding, if challenged in the higher courts.

433 See Constitution 1978, above n 2, sections 77 and 85.
434 See Constitution 1978 above n 2, section 84.
8.4.5 Definition of Locality/Area

TLDRB also takes into account the issue of locality which has been a contested issue in many of the cases before the chiefs or traditional leaders. TLDRPB states:

Panel members shall be selected from the locality where the land in dispute is situated. However, if there are insufficient members for a particular area, members from the next nearest localities may be selected.437

The crux of the above clause is that panel members must be selected from the locality of the customary land dispute which is an advantage. The premise for this is that those members of the panel within the locality know the customs of area in which the customary land dispute is situated. The only hurdle is that the locality is not defined, therefore the scope and extent of locality is unascertained. Though the extent of the locality to choose members of the TLDR Panel is expanded, the TLDRPB does not define the exact extent of locality in that whether it refers to the wards, constituency or language groups/areas or more specifically whether locality is by way of custom or physical location is unsettled.

Further, clause 3(b) of the TLDRP Bill states ‘custom pertaining to that area’ is to be used to determine the rights of the parties. The word ‘area’ is not defined and whether it has the same meaning as locality is also not clearly stated. Therefore its meaning is unclear. There is lack of clarity as to the extent of the area in that whether it is the geographical area/location or whether the area is denoted by way of custom.

8.4.6 TLDR Panel Might Create Win-Lose Situation

A possible problem which the TLDRPB might create is that while it provides that resolution of customary land disputes is to be resolved using custom principles which might be the intention of those who frame this TLDRPB, there is likelihood that this might not reflect a customary outcome. This is because the decisions of TLDR Panel in relation to custom issues are final. Such finality has certain negative implications. Among others, one is that it is likely that the decisions of the TLDR Panel might end in

437 TLDRPB, above n 348, clause 35.
a win and lose situation. In such case, clearly that is contrary to custom dispute resolution, because it diverts from the essence of custom dispute settlement which entails an outcome that supports and favours the needs and rights of both parties to the dispute. In that context, the TLDRPB will create a situation in which there is a contrast in relation to the intention of the TLDRPB to use custom and the practical outcome of the decision of the TLDR Panel.

8.4.7 Ambiguity of Clause 9

The reading of clause 9 of the TLDRPB seems to be ambiguous. It states

Panels shall consist of 3 Members who have been nominated in the prescribed manner, appointed to the Membership Register by the National Director and approved by the Chief Justice.\(^\text{438}\)

The above interpretation is complicated by the summary notes of clause 9 which states ‘composition of panels’. Hence, one interpretation of clause 9 as read with the summary notes means that the approval of the Chief Justice relates to the membership of the TLDR Panel. On the other hand, if clause 9 is read without the summary notes then approval of the Chief Justice relates to the Membership Register. Therefore, the reading of clause 9 can mean that the approval of the Chief Justice relates to both the membership of the TLDR Panel and Membership Register.\(^\text{439}\) These various interpretations therefore lead one to conclude that the interpretation of clause 9 is ambiguous.

8.5 General Comments

The TLDRPB is an attempt to juxtapose custom and state systems of dispute resolution, particularly in relation to customary land disputes. The inclusion of chiefs and traditional leaders, custom ways of solving disputes and the flexibility of procedures within TLDR Panel are clear evidences of the former. The latter is seen in that there is the inclusion of the chiefs into the framework of the state in relation to

\(^{438}\text{TLDRPB, above n 348, clause 9.}\)
\(^{439}\text{See Jennifer Corrin, above n 413, 245 at footnote 142.}\)
dispute resolution. While the juxtaposition of these two systems might yield some positive outcomes, it is not without some foreseeable problems.

One issue is whether such a system will be accessible to Solomon Islanders, given the geographical location of the islands and the main provincial headquarters and infrastructure problems. Another issue is whether such a system will be accepted by Solomon Islanders or will continue to be seen as a foreign system. Third, the issue of delay which has characterised the local courts and customary land appeal courts in Solomon Islands might be a problem for the TLDR Panel. More importantly, bringing custom into the state system will certainly change the nature of custom. The fact is that the nature of custom law is flexible and adapts to different kinds of circumstances. Such a nature will certainly change when the TLDR Panel for instance makes decisions that are written and finally thereby characterising it into a format which is inflexible.

8.6 Concluding Remarks

TLDRPB is a move to regulate customary land disputes in Solomon Islands. It has some good features, but there are some problems inherent in the TLDRPB. These problems need to be addressed to ensure the TLDRPB is developed into a proper and effective Act of Parliament. There is a need for wider consultation throughout the provinces in Solomon Islands by the responsible body to properly ascertain the relevancy of the TLDRPB.
CHAPTER 9 CONCLUSIONS AND RECOMMENDATIONS

91. Introduction

This conclusion is divided into three parts. The first part briefly affirms the need for the continuation of the involvement of chiefs and traditional leaders in customary land disputes settlement amidst the increase of customary land disputes in Malaita. The second part deals with some important recommendations which deal with the need to strengthen chiefs and traditional leaders in the way they deal with customary land disputes. The third part recommends certain important changes as to TLDRPB.

9.2 Continuation of the Involvement of Chiefs and Traditional Leaders

Customary land disputes in Malaita are endemic because of the factors which have been explained in chapter five. Though this SRP does not encompasses management structures to reduce customary land disputes, it is clear that chiefs and traditional leaders as a mechanism is an important body to deal with customary land disputes because of their knowledge and the use of custom methods to solve these disputes. Thus, it is important that the chiefs and traditional leaders are maintained. It is therefore, important that the work of the chiefs and traditional leaders be strengthened.

9.3 The Need to Strengthen Chiefs and Traditional Leaders

Also, in Malaita as in other parts of Solomon Islands, chiefs and traditional leaders continue to be an important body to deal with customary land disputes. Custom dispute settlement in relation to customary land has both advantages and challenges. Some of the most common advantages are: traditional leaders are knowledgeable in custom, the settlement is cheap and accessible to village people, such settlement enhances common understanding between parties to the dispute, and sometimes to a lesser extent chiefs and traditional leaders are sometimes independent when dealing

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with disputes. It is suggested that chiefs and traditional leaders continue to be used as an important body to deal with customary land disputes. These therefore call for the need to continue to strengthen such institution or custom process in order to ensure it reflects the cultural realities of the Malaita people.

Custom dispute settlement in relation to customary land is not without its problems and challenges. In Malaita there are challenges facing the institutions dealing with customary land disputes, particularly the chiefs and traditional leaders. These have caused problems for this institution in terms of their functions. Some of these are: chiefs usually use the formal means of deciding their cases in that they usually adapt the western-based form of dispute resolution, their appointment are sometimes questionable, there can be contrary decisions by different chiefs, chiefs lack government support in when dealing with disputes, sometimes chiefs lack independence, there is lack of natural justice displayed by chiefs and house of chiefs settlement is dominated by men.

The above challenges are serious. They have serious negative impact on the way custom settlement in relation to customary land disputes is concerned. This therefore calls for immediate attention by the concerned authorities to ensure important changes are made to the way custom dispute resolution in relation to customary land disputes is being handled by the tribal leaders, elders, chiefs and house of chiefs. Basically, there is a need for institutional strengthening on the way chiefs handle or deal with customary land disputes.

The following recommendations are therefore important and need to be considered:

(1) There is a need for the government to support the houses of chiefs in order to ensure and invigorate the way the house of chief deal with customary land disputes. Similarly, government support is important to ensure the integrity and independence of the houses of chiefs is continuously upheld. White rightly recognised this when he said: ‘Providing public service support for bodies of indigenous leaders offers one means for empowering traditional leaders and adding greater transparency to their
transactions.441 Therefore, there is a need for a proper administrative office and proper remuneration in that those who sit in the houses of chiefs to deal with customary land disputes, need to be included in the government payrolls. In this way, the house of chiefs will be more independent and their decisions respected as a result of the inclusion in the government payroll. This will also encourage other chiefs or traditional leaders to willingly come forward to settle customary land disputes when asked to do so.

However, the danger about this proposal is that the chiefs or traditional leaders might be affected by the delay of payments from the government as experienced by the subordinate courts – the local court and customary land appeal court. As such sittings of the chiefs and traditional leaders to hear customary land disputes will be at the mercy of whether the government has sufficient funds to ensure the chiefs and traditional leaders hear the disputes. This means the financial problems of the local court and customary land appeal court in which there is lack of sufficient fund to ensure they proceed with their hearing will be experienced by the chiefs as well. This will consequently lead to back-log of cases.

It is also suggested that allowances for the chiefs should be taken from the Rural Constituency Funds which is subject to the discretion of the Members of Parliament. This means whenever a customary land disputes arises, the Member of Parliament of that constituency needs to be consulted and contacted through his Chief Executive Officer in order to finance such settlements. However, the problem with this is that it might be subjected to abuse in the event that there is lack of proper coordination between the chiefs/traditional leaders and the office of the Member of Parliament. In order to avoid this, there needs to be a proper coordination between the Member of Parliament and the chiefs and traditional leaders.

(2) Whether the payment of chiefs/house of chiefs to the customary land disputes is to be continued by the parties or the Member of Parliament through the Constituency Development Fund it is crucial that payment is made through the Magistrate court and not directly to the chiefs/house of chiefs. Such procedure is essential in order to

441 Geoffrey White, above n 194, 14.
ensure chiefs and traditional leaders are independent. However, while such an arrangement is preferable, the issue of whether such payment should be made after or before the determination is debateable. It is recommended that travelling and accommodation allowances for the chiefs and traditional leaders should be given prior to the hearing and other allowances should be given to the chiefs after the determination of the dispute.

(3) There is a need for continuous education of elders, traditional leaders, chiefs and those at the houses of chiefs on certain legal principles such as res judicata, natural justice principles and relevant human rights issues regarding dispute resolution. These are important concepts which are essential in any justice system. As such, elders, traditional leaders, chiefs and houses of chiefs need to be bound by these principles. They need to know them well in order to conduct a fair process when dealing with customary land disputes. As such it is crucial for chiefs to be educated on these issues and principles.

Therefore, a program needs to be devised to train elders, traditional leaders and chiefs. Such a program needs to be ongoing. Thus, in order to effect this, the government needs to establish an office within the judiciary that deals with such capacity issues. The role of this office should be to educate elders, traditional leaders, chiefs and houses of chiefs about such legal concepts and their importance in decision making. This can be done by way of workshops. In this way, chiefs, traditional leaders and those in the houses of chiefs/panel will acquire knowledge about these legal concepts to help them when they deal with customary land disputes.

While such a proposal is timely and important for the function of the chiefs and traditional leaders, it will be also be expensive and subjected to the cash flow from the government. This means the success of such programme depends on the funding from the government. In light of that, other stakeholders such as nongovernmental organisations, Regional Assistance Mission to Solomon Islands and related intergovernmental organisations need to open up funding to ensure the institutional strengthening of the chiefs and traditional leaders in relation to the work of the chiefs and traditional leaders.
(4) Chiefs also need proper legal advice on legal issues from credible legal institutions such as the Public Solicitor’s Office in Honiara and headquarters in the provinces in a timely manner. There is a need for a close relationship between the Public Solicitor’s Office and the chiefs in the event the chiefs and traditional leaders are caught up with any legal issue such as natural justice or *res judicata* or other relevant legal issues. This is because in some instances, the lack of proper legal advice, lead chiefs and traditional leaders to deal with customary land disputes in which they should not deal with. However, the fact that proper legal advisory institution such as the Public Solicitors Office is far from the rural areas makes it difficult for chiefs and traditional leaders to ensure they get proper legal advice in a timely manner.

(5) Houses of chiefs should be on the same bar as the local court if the local court is still maintained. This means the house of chief and the local court should be used as a first tier in terms of dealing with customary land disputes. It would then be up to the parties to the customary land dispute to choose which body to deal with the customary land dispute. The current structure of dealing with customary land cases is that chiefs or houses of chiefs is the first tier, then the local court if parties are not happy with the decision of the chiefs. The case would be appealed to the customary land appeal court from the local court, and on grounds of law to the High Court of Solomon Islands. This process is lengthy and expensive. In order to ensure a shorter process and reduce the cost of the parties the houses of chiefs and the local court should be on the same bar. This means that it would be up to the parties to choose which body the customary land disputes should be taken to at first instance. In this way it will be less expensive in that instead of an appeal to the local court, it would go straight to the Customary Land Appeal Court. However, this could be a novel proposal if the government of the day is willing to ensure the house of chief/panel is institutionally strengthened.

(6) In terms of composition of the house of chief, it is important that women who are knowledgeable in custom should be given the chance to sit in the houses of chiefs or chief's panels when dealing with customary land disputes. Apart from being a panellist, roles such as secretary to the houses of chiefs should be given to women.
While such might be a good move in the right direction, it could be argued that the inclusion of woman does not reflect the cultural realities in relation to custom dispute resolution in that women are said to be incapable to deal with customary land disputes in Malaita. This is clearly seen in that in most societies in Malaita, it is men who are seen as leaders to deal with customary land disputes when they arise. This could be seen as an establish tradition.

(7) There is a need for proper supervision and monitoring of the chiefs and traditional leaders because currently, this is lacking. Therefore, it is important to ensure a High Court judge is mandated the role to supervise and monitor the chiefs and traditional leaders. This is essential to provide quality and suitable status.442

(8) The word ‘locality’ in the Local Court Act needs to be defined in order to avoid unnecessary challenge or litigation in the High Court of Solomon Islands as to issues relating to participation of chiefs from other locality/areas and questions relating to the validity of chiefs.

(9) The Solomon Islands Constitution needs to be amended in order to clearly state the chiefs and traditional leaders are by virtue of their operation are bodies that have jurisdiction to deal with customary land disputes in Solomon Islands. Though the Local Court Act recognises that chiefs and traditional leaders to deal with customary land disputes and the fact that case law has established that chiefs and traditional leaders dealing with customary land disputes are part of the formal court system, it is suggested that such recognition should be clearly stated in the constitution in order to ensure certainty as to this important role of solving customary land disputes. Without such an amendment of the constitution, there is likelihood that decisions of chiefs and traditional leaders dealing with customary land disputes might be unconstitutional if challenged in a court of law on the grounds that the establishment of such a body is inconsistent with the constitution given that as implied from the constitution the chiefs’ and traditional leaders’ panel is not a court in order to make binding decisions. There is therefore, a need to amend the constitution in order to ascertain that the chiefs have power and jurisdiction to hear customary land disputes apart from a vague

442 See See Patrick F Howley, above n 289, 93.
recognition that Parliament has the duty to legislate for the role of chiefs and traditional leaders.

(10) Further, it is crucial that the houses of chiefs should continue to use custom method to solve customary disputes. There is a need to continue customary methods such as negotiation, discussion, mediation and reconciliation between the parties. This means that in an attempt to resolve customary land disputes, mediation must be encouraged as a starting point before the chiefs adopt court-like procedures to deal with customary land disputes.

Like other provinces in Solomon Islands and other Melanesian countries these are part of the tradition in Malaita. Moreover, they are effective means to settle customary land disputes because it helps bring parties together to sort out their differences and it is based on respect. However, custom methods alone are insufficient due to the socio-economic changes in Malaita. Arguably, there is a need for the juxtaposition of customary and state legal system in order to achieve a positive outcome in relation to resolution of customary land disputes. Perhaps, such a position is not simple as it sounds because there might be potential tensions between customary mechanisms and western mechanisms. Geoffrey White recognised this when he said ‘[i]ncorporating traditional leaders in the framework of government may have the effect of creating a new kind of leader who is more like a government official based on appointment rather than personal reputation’ which consequently lead to people questioning their authenticity or legitimacy.\textsuperscript{443} In such a situation their decisions might not be respected because Malaitans or Solomon Islanders in general, see such a system as foreign.

However, in Solomon Islands ‘to date there has not been a serious attempt to create a framework for a comparative study of relationships between state and non-state justice systems.’\textsuperscript{444} Moreover, ‘although in much of the relevant literature there are references to the need to ‘recognise’, ‘empower’ and ‘harmonise’ relations between state and non-state systems, as yet there has been limited inquiry into what exactly is

\textsuperscript{443} Geoffrey White, above n 194, 13.
\textsuperscript{444} See Miranda Forsyth, ‘A typology of relationships between state and non-state justice systems’ \textit{A Bird that Flies with Two Wings: Kastom and state justice systems in Vanuatu} (2009) 201.
meant by these terms.\textsuperscript{445} Therefore, there is a need for further comprehensive research into this area. The current work by the World Bank through the Justice for Poor project is timely. However, it is important that such a project is nation-wide and not restricted to certain provinces.

It is important that the customary and state legal systems are juxtaposed in order to reflect the socio-economic realities and the changes that are taking place in Solomon Islands. In order to ensure a comprehensive reform it is essential that both systems undergo institutional changes. This means before any changes are made to the adjudicative features of both systems, a comprehensive study needs to be conducted on how well both systems can be juxtaposed. In context, it will be best if the seven different types of relationship between state and non-state justice systems proposed by Miranda Forsyth are studied and measured against the current relationship of the custom and state legal systems in Solomon Islands.\textsuperscript{446}

These steps are:

1. Analyse the operation of the state and non-state systems
2. Consider the aims of the overall justice system
3. Examine the current positive and problematic features in the relationship between the systems
4. Consider the applicability of the different models of relationship to this context
5. Develop the chosen model so that it becomes one of mutual adaptation, mutual recognition and mutual regulation
6. Develop a method of progressive implementation and evaluation of changes
7. Revise the model pluralist method.\textsuperscript{447}

In this way, it is believed a comprehensive system will be devised to juxtapose the two systems to reflect the social-economic and cultural realities in Solomon Islands. This is because by doing so, there is possibility that the strengths of one system might help where there is a weakness in the other system and vice versa.

\textsuperscript{445} See Miranda Forsyth, above n 444.
\textsuperscript{446} See Miranda Forsyth, above n 444, 201 – 247.
9.4 Some Recommendation to Improve TLDRPB

The TLDRPB is a move in the direction to solve customary land disputes in Solomon Islands. However, the problems inherent in the TLDRPB need to be addressed. Some of the important recommendations for improvement are:

(1) There is a need for the TLDRPB to clearly state the officer in which the application for membership to the TLDR Panel will be lodged to.
(2) The word custodian as used in the TLDRPB needs to be defined.
(3) The Clerk responsible to select the TLDR Panel members needs to be stated clearly because there are several clerks stated in the TLDRPB.
(4) Clauses 30 and 35 of the TLDRPB need to be redrafted in order to ensure clarity as to the area in which the TLDR Panel members are to be selected from.
(5) Procedures to call meetings are likely to be cumbersome and time confusing therefore the procedures need to be reconsidered.
(6) Clause 40 should not be drafted in a mandatory language in order to avoid an abuse of that procedure.
(7) Clause 50 is silent on the consequence of lack affirmation, thus it needs to state the effect of lack of affirmation.
(8) Clause 60 needs to be clear on whose custom the TLDR Panel’s determination is going to be based on.
(9) Clause 61 needs to be clear on how to go about encouraging and facilitating an agreement between the parties to the customary land disputes.
(10) The finality rule which is vested in TLDR Panel to make binding decisions should be reconsidered in order to take into account custom process of dispute resolution.
(11) Clause 67 needs to be reconsidered on whether the decisions of the TLDR Panel should be binding in rem, because such decisions might be unconstitutional given that those who are not parties to the proceedings might argue that their constitutional right to property is being deprived.
(12) The definition of customary land in the Lands and Titles Act needs to be amended to clearly include and ascertain whether land for the purposes of customary land dispute settlement includes reefs, banks, seabed and land below low and high water mark in order to ensure certainty as to whether these lands are customary land.
(13) The Solomon Islands Constitution needs to be amended in order to take into account whether the TLDR Panel is a body to deal with customary land disputes to avoid the likelihood of its decisions being unconstitutional, because it can be deduced from the Constitution that only courts of law can make binding decisions.  
(14) The word ‘locality’ needs to be defined to ensure it has a clear meaning as to its extent – whether it is by way of custom or geography that needs to be clearly stated in the TLDRPB.  
(15) Clause 9 of TLDRPB is ambiguous thus, it needs to be redrafted in order to ensure there is clear meaning in relation to the approval by the Chiefs Justice as to the membership of the TLDR Panel as well as the approval to the Membership Register or both.

9.5 Concluding Remarks

First, in contemporary Malaita, chiefs and traditional leaders continue to play an important role in relation to the resolution of customary land disputes, amidst the prevalence of customary land disputes. The advantages highlighted in chapter seven of this SRP affirmed such a role. Among the advantages, the most important is their knowledge about custom to deal with customary land disputes. However, the chiefs and traditional leaders in Malaita also continue to face challenges when dealing with customary land disputes. It is therefore important that the recommendations which are suggested should be taken into account in order to improve the function of chiefs to deal with customary land disputes.

Furthermore, the TLDRPB is an important step in the right direction in the attempt to deal with customary land disputes in Malaita, given that it encompasses the role of chiefs and traditional leaders – people who are knowledgeable in custom – to deal with customary land dispute resolution. This is further strengthened by the use of customary methods and principles to solve customary land disputes, particularly mediation. However, given that the TLDRPB has some problems and deficiencies, the recommendations suggest the need for improvement of the TLDRPB in order to ensure the TLDRPB is developed into a proper Act of Parliament that reflects the proper place of custom in dispute resolution.
1. Cases

- *Alemaesia v Agola* [2009] SBHC 2

- *Allardyce Timber Co Ltd v Laore* [1990] SBHC 96; [1990] SILR 174


- *Combined Fera Group v Attorney-General* [1997] SBHC 55

- *Daveta v Kotomae* [2010] SBHC 13

- *Felix v Korutalaumeimei* [2001] SBHC 108

- *Fugui & Another v Solmac Construction Co Ltd* [1982] SILR 100; [1982] SBHC 8

- *Hikinao v Hou* [2007] SBHC 23


- *Kofana v Aute’e* [1999] SBHC 92

- *Lauringi v Lagwaeano Sawmilling and Logging Ltd* [1997] SBHC 61
• *Lagobe v Lezutuni* [2005] SBHC 59  

• *Liou’ou v Saruho’ola* [1999] SBHC 83  

• *Majoria v Jino* [2008] SBHC 54 [42 and 45]  

• *Metropolitan Properties Ltd v Lannoon* [1968] 3 AER 304 – 314.

• *Pita v Samo* SBHC 68  

• *Muna v Biley* [2003] SBHC 9  

• *Ramo v Olemaoma Houses of chiefs* [2010] SBHC 19  

• *Regina v Asuana* [1990] SBHC 52  

• *Siwa’ahu v Korutalaumeimei Panel* [2001] SBHC 26  

• *Tafisisi v Attorney General* [2009] SBMC 1  

• *Tavea v Paripao House of Chief* [1999] SBHC 145  

• *Vaekesa v Varisi Houses of chiefs* [2008] SBHC 70  

• *Valele Family v Touru* [2002] VUCA 3  
2. Constitution

- *Constitution of the Republic of Vanuatu* (Vanuatu),
- *Solomon Islands Constitution 1978* (Solomon Islands)

3. Legislation

- *Customs Recognition Act 2000* (Solomon Islands)
- *Interpretation and General Provisions Act* [Cap 85] (Solomon Islands)
- *King’s Regulation No.17 1922* (Solomon Islands British Protectorate)
- *Land and Titles Act* [Cap 133] (Solomon Islands)
- *Land and Titles (Amendment) Act 1972* (Solomon Islands).
- *Local Court Act* [Cap 19] (Solomon Islands)
- *Native Courts Ordinance* [Cap 46] (Solomon Islands British Protectorate).
- *Tribal Land Dispute Resolution Panels Bill 2008* (Solomon Islands).
4. Books/Book Chapters


5. Journals

• H. Ian Hogbin, ‘Native Councils and Native Courts in the Solomon Islands’ (1944) XIV (4) Oceania 257 - 283.


6. Thesis


• Alice Aruhe’eta Pollard, Gender and Leadership in ’Are’Are Society, the South Sea Evangelical Church and Parliamentary Leadership - Solomon Islands: Embracing the Past, engaging the present and hopeful for the future! (PhD, Victoria University of Wellington University, 2006).


• Ian Heath, Land Policies in Solomon Islands (PhD, La Trobe University, 1979)


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9. Reports/Papers

• Colin H. Allan, Special Lands Commission on Customary Land Tenure in the British Solomon Islands Protectorate (1957).


• J D. Foukona, ‘State powers and institutions in Solomon Islands’ developing democracy’
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10. Interviews

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• Interview with David Lidimani, Associate, Rano and Company, Barristers and Solicitors (Honiara, Solomon Islands, 23rd August 2011).
• Interview with Don Paterson, Emeritus Professor, USP Law School, (Emalus Campus, September 2011).
• Interview with Duddley Fugui, Leader, Suraina Tribe, (Mana’su’u, Ata’a, North East Malaita, 27 July 2010).
• Interview with Jackson Lea’afuna, Vice president, Malaita Customary Land Appeal Court (Auki, Malaita, 30 July 2010).
• Interview with Jeffery Ini, Former President and Secretary of the Fataleka Council of Chiefs (Auki, Malaita, 30 July 2010).
• Interview with Lawrence Nare, Member of Rakwane Tribe of East Fataleka in Malaita, Solicitor, Global Lawyers, (Global Lawyers Office, Honiara, 11 August 2011).

• Interview with Leonard Maenu’u, Former Commissioner of Lands (Honiara, 10 August 2010).

• Interview with Mariano Firimolea, Land owner of Kao land in North Malaita (Honiara, 4 August 2010).

• Interview with Rinaldo Talo (Malaita Local Court President, Magistrate Court, Auki, Malaita, 30 July 2010).

• Interview with Robert Kofuria, Chairman, Toi house of chief, (Ngaliwawao, Baefua, North Malaita, 27 December 2010).

• Interview with Vincent Misitana, Member Toi and Olemaoma houses of chiefs (Ngaliwawao, North Malaita, 27 December 2010).

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12. Email Contacts

• Email from Jennifer Corrin <j.corrin@law.uq.edu.au> to Derek Futaiasi <dfutaiasi@gmail.com> 18 October 2011.

• Email from Jennifer Corin <j.corrin@law.uq.edu.au> to Derek Futaiasi <dfutaiasi@gmail.com> 9 September 2011.