Crown ownership of foreshores and seabed in Solomon Islands

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Introduction

Crown ownership of the foreshores and the seabed is a common law principle. It is the law of England. Introduced in 1893 by virtue of the Pacific Order in Council 1893,[1] it has become part of the law of Solomon Islands. This article discusses the application of this principle in Solomon Islands and its relationship with customary usage regarding ownership questions of the foreshores and the seabed.[2]

The starting point for legitimate British Colonial Administration in Solomon Islands as a Protectorate was the Pacific Order in Council 1893, which provided the legal framework for the functioning of the Administration. Apart from specific Acts of the English Parliament to the Protectorate (not relevant to this article), Article 20[3] of the Order provided for the general law to be applied in the Protectorate. Article 141 as read with Article 4 of the Order was supplementary to Article 20 in terms of the relevant law applicable to the Protectorate.

Solomon Islands as a British Protectorate was formally declared in March 1893 by British Naval Captains in various locations on the main islands.[4] The British Colonial Administration's pacification process throughout the Protectorate had not been completed until the mid-1920s. The first Resident Commissioner of the Protectorate was Mr C M Woodford, CMG, who remained Resident Commissioner for eighteen years. One of his early concerns was the control of acquisition of customary land for both public and private use.

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Ownership of land under custom was in fact readily recognised by the British Colonial Administration through legislation[5] and policy[6]. For example, Land Commissioner F B Philips was commissioned by the Colonial Government in 1920 to inquire into Native claims against Lever's Pacific Plantations Limited, arising from possession of over 200,000 acres of land under the provisions of waste and vacant land legislation passed in the Protectorate. Customary land owners in the western part of the Protectorate had alleged that the lands acquired by Lever's Pacific Plantations Limited under Certificates of Occupation were not waste and vacant lands; they were in fact occupied land under native custom. About 40,000 acres of land under dispute were found to be occupied under native custom. These lands were returned to the customary owners.

In spite of the eighty-five years of British rule under the status of a Protectorate, about ninety per cent[7] of the land in Solomon Islands is still held under the customary land tenure system. This may be surprising to others but generally, ordinary Solomon Islanders like it this way. The feeling of owning land under custom maintains security of livelihood on the land. This makes them feel good and satisfied.

Solomon Islanders obviously do not value land in the same way as Europeans do. That is to say, they do not value land in terms of its market price or its unimproved value or its rental value. The value of land is measured in terms of its social, economic and political significance in society.[8]

The Court challenge

The general attitude of Solomon Islanders is that land includes the foreshores and reefs.[9] In the 1920s and onwards, trochus shell as a marine product was being exported from the Protectorate in fairly large quantities. Trochus shell was being harvested from reefs by diving and collecting them from the reef-beds. It was also possible to collect them from reef-beds at low tide. This method of harvesting was used by Solomon Islanders, who then sold their catch to the trader on the beach at a convenient time. The export trade was carried on by non-Solomon Islanders. Reefs rich in this marine product were greatly sought after in that every reef was a possible harvesting ground and must be tried.

The possibility that some reefs might be claimed by Solomon Islanders under custom did not seem to arise in the minds of the traders. This assumption that Solomon Islanders would never have ownership rights to fringing reefs was to be short-lived. It was challenged in 1951 in the High Commissioner's Court by one Hanasiki on behalf of his line.

Hanasiki v O J Symes (the Hanasiki Case)

The facts

An European, one O J Symes, by his servants had in January 1951 gone and dived for trochus shell on a fringing reef off Tavaru Island[10] without the permission of Hanasiki and his line, who allegedly owned the island under custom. Hanasiki and members of his line lived in the salt-water area in the Marau Sound off the coast of South Guadalcanal. They were coastal dwellers living on some of the islands in the Marau Sound. Hanasiki (the Plaintiff) alleged in court that one O J Symes (the Defendant), by his servants, had trespassed on his reef and collected trochus shell for use without his permission. He therefore claimed damages. He also sought a declaration of his rights of ownership to the reef and an injunction against the defendant to prevent future acts of trespass. The case was heard by Judicial Commissioner W T Charles in Honiara in August 1951. [11]

The judgment

The Plaintiff's application for a declaration of his rights over the reefs was granted on the ground that he had successfully proved by evidence the existence of customary rights of ownership of the reef in question. The claim for damages was dismissed on the ground that the Defendant failed to collect trochus shell due to rough swells around the reef.

The application for an injunction was refused on the ground that the Defendant would no longer be entitled to go to the reef in view of the declaration granted to the Plaintiff by the Court. The Plaintiff was, however, allowed to reapply to the court for an injunction if the Defendant should again attempt to commit an act of trespass upon the reef.[12]

Reasoning of the Court

In paragraph 4 of his judgment, Judicial Commissioner W T Charles said:

> The action itself raises a question of considerable importance to both the natives and non-natives of the Protectorate, namely whether the law will recognise and protect the ownership of trochus shell reefs by natives under their own custom. So far as available records show, that question has not been the subject of decision by either the Court of Appeal or this Court before. It is desirable first to consider the plaintiff's case on the assumption that his line owns Tavaru Island reef by native custom and that the law recognises that ownership, leaving the correctness of those assumptions to be determined only if it becomes necessary. (at 1)

This statement was clearly a recognition of the important implication of the court action brought by one Hanasiki and his line. It was the first case of its kind in the Protectorate. It was a landmark case. Clearly, the parties to the dispute were a Solomon Islander and an European whose respective systems of law, beliefs and perceptions were miles apart. The reef in dispute was located at sea and exposed only at low tide. The trochus shell found on the reef would be on the reef-bed permanently under water.

If, indeed, there was a Marau custom about the ownership of reefs and marine life thereon, would the whiteman law recognise it, and if so, to what extent would recognition be granted? Throughout the hearing, the Defendant had argued that he, as a member of the public, had the right to fish for trochus shell on the Marau reefs including the reef under dispute. The Defendant's argument was that the law could not possibly be so ridiculous as to easily recognise the right of any Solomon Islander either to refuse or allow him to fish for trochus shell on any reef. The Defendant's line of argument was based upon a misinterpretation of two legal opinions in 1941 and 1946 respectively. In rejecting this argument, Judicial Commissioner W T Charles said:

> . . . In support of his denial of that right, the defendant has referred me to two advisory opinions upon the subject of fishing rights in the Protectorate. One is by the then Judicial Commissioner given in 1941 in his capacity as Legal Adviser to the Resident Commissioner and the other is by the Chief

> Judicial Commissioner, Sir Claud Seton, given in 1946. As these opinions were advisory, they are not binding upon me and do not absolve me from having to form my own opinion upon the question of law involved, though naturally I have read them in order to gain from them whatever assistance they may offer me. In my opinion they do not cover this case at all. The Judicial Commissioner's opinion was merely that as a general proposition no-one has an exclusive right to fish on any particular reef but he admitted the possibility of exceptions to that proposition. As will appear later, I agree with that opinion, but it leaves open the question whether any, and if so what, exceptions are possible; the question which this case raises. (at 3)

In deciding what law was to be applied to resolve the dispute, Judicial Commissioner W T Charles said:

> The law applicable to this case must be ascertained by reference to the Pacific Order-in-Council 1893, which is the basis of the law of the Protectorate, since there is no other Order-in-Council or Regulation specifically covering it. The only Regulations relating to fishing are the Fisheries (Explosives) Regulation 1922 and the Trochus Shell Fishery Regulation 1920–1940, but these do not help in any way . . .
>
> The Pacific Order-in-Council 1893 prescribes the law which is to be administered by this Court and, by necessary implication from Articles 5 and 23, makes the natives of the Protectorate as well as non-natives, subject to that law. It deals specifically with a certain number of matters which are not relevant here, and leaves all other matters to be covered by King's Regulation made under Article 108 or by English law as introduced into the Protectorate by Articles 20 and 141. The relevant portions of the two latter Articles are:-
>
> > 20 Subject to the other provision of this Order, the civil and criminal jurisdiction exerciseable under this Order shall, so far as circumstances admit, be exercised upon the principles of and in conformity with the substance of the law for the time being in force in and for England . . .

> 141 Where by virtue of any Imperial Act or of this Order or otherwise, any provisions of any Imperial Acts, or of any law, or of any Order-in-Council, other than this Order, are applicable within the limits of this Order . . . the same shall be deemed applicable so far only as the constitution and jurisdiction of the Courts acting under this Order and the local circumstances permit and for the purpose of facilitating application may be construed or used with such alterations and adaptions as necessary . . . (at 3–4)

The Court then went on to liken Articles 20 and 141 above to similar provisions of other Orders in Council of other British dependencies elsewhere in the British Empire which introduced the English law into these dependencies. The Court then identified the general formula for the application of the English law in the Protectorate.[13] The formula consisted basically of three questions to be asked and answered. The first question was whether the relevant English law was not inconsistent with any legislation that had been applied to the Protectorate. If the answer was that there was legislation inconsistent with the relevant English law, then that English law would not be part of the law of the Protectorate to the extent of that inconsistency. The second question was whether the relevant English law, in so far as not being inconsistent with legislation, can be applied in the Protectorate as it would be applied in England without causing difficulties in view of the local circumstances prevailing in the Protectorate. If the answer was that there would be no difficulties experienced in the application of that law, then that law was part of the law in the Protectorate in its original form. If, on the other hand, the answer was that there would be difficulties encountered in its literal application, the next question was whether by removing such difficulties by adaptation and alteration, that English law in principle and substance would be the same law as it was in England. If the answer was in the affirmative, that English law would be part of the law of the Protectorate with necessary adaptations and alterations but otherwise it would not apply.

The Court then stated that the relevant English law in this case was the rule that the public was entitled to fish anywhere within the territorial waters except where the Crown had granted or a particular subject had gained an exclusive right of fishing or the exercise of a public right had been restricted

by legislation. The Court also stated that in England the English law would recognise local customs provided certain conditions where fulfilled. The Court then stated these conditions. The custom must:

1 be different or contrary to the common law on its subject matter;
2 be certain as to the locality in which it applied, to whom it applied and its principle and mode of application;
3 have existed from time immemorial, that is before 1189. However, if the custom was proved to have existed for a long time, it would be presumed to have existed from time immemorial until the contrary was proved;
4 have been observed without interruption from the time of its inception;
5 have been reasonable at the time of its inception; and
6 not be inconsistent with any enacted law.

Judicial Commissioner W T Charles was no doubt of the view that this English law recognising custom was applicable to the Protectorate. He stated:

> This English law was also, in my opinion, introduced into the Protectorate by Articles 20 and 141 of the Pacific Order-in-Council 1893, except that the year 1893 is substituted for the year 1189 as the time from before which the custom must have existed. The year 1189 is, in English law, the year from which legal memory is deemed to have commenced and the analogous year for the Protectorate is 1893, the year in which the Protectorate was established. No doubt the law would not have recognised in 1894, for example, any custom proved to have been in existence in 1892 unless it was also proved to have existed for so long that the time of its origin was unknown. But it seems to me that now, after this lapse of time, the law will follow the principle adopted by English law by saying on the one hand that, provided that a custom is proved presumptively or otherwise, to have existed before 1893, it will be regarded conclusively as having been a custom of immemorial origin and, on the other hand, as the introduction of English law into the Protectorate precluded

> the creation of new customs after that event, the law will not recognise any custom which is proved not to have existed before 1893. (at 6–7)

He concluded:

> As a result of the above enquiry the law which, in my opinion, is applicable to this case may be stated thus:- Every person has the right to fish anywhere within the territorial waters of the Protectorate except where the right to fish has been restricted by any enacted law or where the natives have an exclusive right of fishing under a native custom which has existed from before 1893 which has been continuously observed since its origin, and which is certain in its principle and application and which was reasonable at the time of its inception . . . (at 8)

The Colin H Allan recommendations

In November 1951, the Colonial Office, in London, issued a Memorandum in which the terms of reference of a Special Lands Commission for the Protectorate were stated. The terms of reference were: (1) to study, record and correlate, where possible, native custom on land and (2) to recommend, in the light of its findings, in what ways the use and ownership of native land would be best controlled and to draft the necessary legislation accordingly. Mr Colin H Allan, an Administrative Officer in the Protectorate at that time, was appointed the Special Commissioner to undertake the study into the customary land tenure system of the Protectorate. Work began in 1953 and the Commission complete its work in 1957. The major recommendation of the Special Lands Commission was the need to control and utilise land that was lying idle without apparent ownership. This recommendation became the major provision of the Land and Titles Regulation 1959.[15] Under this legislation, a Land Trust Board was to be set up to identify and acquire vacant land and register it as public land under its control.

Vacant land would be land that was not customary land nor public land nor land that was not registered and used or occupied by anyone for 25 years before 1958. The following part of the speech delivered at the first meeting

of the Land Trust Board by the High Commissioner as the Chairman of the Board explained the objective of the legislation:

> The purpose of the Solomon Islands Land Trust Board is to provide for the development of land that is owned by no-one. This land is called vacant land under the new law and it is very important to understand what vacant land is. Vacant land is not Native Customary land. It is any land which is neither Native Customary land, nor public land nor land in which someone has been granted an estate. It is land without any kind of owner.
>
> The new law says that if land which is not registered and which has not been used by anyone for occupation or cultivation during the 25 years before 1958 then it is not Native Customary land unless a court or a Commission of Inquiry has at some time decided that it belongs to someone or unless the owner or owners have at some time or times during the 25 year period mentioned earlier, received payment such as rent, for allowing some other person or persons or the Government to use the land or exercise any rights over it. It is this kind of land that has not been used for a long time that is vacant land and section 13 in Part I of the Ordinance says, as you will have seen, that the duty of the Solomon Islands Land Trust Board is to further the use of land in the Protectorate for the benefit of the people by bringing vacant land under public control.[16]

At the same time, provision was also made to declare as public land the subsoil of every road and the bed of every river, the seashore between high water mark and low water mark, and all land adjoining the sea coast within sixty-six feet on each side of every road and every river. The following was the relevant section:

> 47. (1) There shall vest in the Board as public land, by virtue of this subsection—
>
> (a) the subsoil of every road and the bed of every river;
>
> (b) the seashore between the points of mean high water and mean low water;

(c) all land adjoining the sea coast within sixty-six feet of mean high water mark;

(d) all land within sixty-six feet of mean high water mark;

(2) The Board may grant to any person, in accordance with the provisions of section 33, a licence to occupy any such land as is mentioned in paragraphs (b) (c) and (d) of subsection (1).

(3) It should not be necessary for the Board to cause any entry to be made on the Register in respect of any land vested in it by virtue of subsection (1).

(4) This section shall not apply to any land comprised in an interest of which any person becomes or is entitled to become registered as owner pursuant to the provisions of the Second Schedule, or to any native customary land.[17]

The 1964 Amendment

Part I (Administration), Part VII (Survey) and Part VIII (Offences) of the Land and Titles Ordinance came into operation on 1 May 1961.[18] The remaining Parts II (Land Tenure), III (Public Land), IV (Transactions in Land), V (Compulsory Acquisition of Land), Part VI (Registration of Title) and Part IX (Miscellaneous) came into operation on 1 February 1963. Part III (Public Land) except section 37 was subsequently repealed and replaced by the Land and Titles (Amendment) Ordinance 1964. The procedure for the acquisition of vacant land by the Land Trust Board had been completely removed and replaced. Vacant land was to be established only after land settlement procedure was commenced and completed. Section 37 above was amended to say that any land found to be vacant under the land settlement procedure was to be vested in the Commissioner of Lands for and on behalf of the Government of the Protectorate.[19]

Mr J B Twomey, Member of the Legislative Assembly, explained these changes to the Legislative Assembly during the debate of the Land and Titles (Amendment) Bill, 1964: [20]

The vacant land provisions of the Ordinance have always been controversial. Section 13 of the principal Ordinance provides that it is the duty of the Solomon Islands Land Trust Board to further the use of land in the Protectorate for the benefit of the people by bringing vacant land under public control . . .

Under the present definitions, vacant land is land which is neither native customary land nor public land nor registered land but, by virtue of the present definition of native customary land, it does in fact include much land which Solomon Islanders consider to be owned by them. This is because the definition of native customary land excludes native land which has not been used for occupation or cultivation during the 25 years before 1958 unless a court or a Commission of Inquiry has at some time settled its ownership, or unless the owner has at some time during this 25 year period received payment for permitting the Government or some other person to use the land or to exercise any rights over it. This definition clearly conflicts with the view generally held by Solomon Islanders that almost all, if not all, unalienated land is subject to native customary interests.

The concept that vacant land should include all native land which has not been regularly and continuously used in recent years springs from the report of the Special Lands Commission which was set up before the Land and Titles Ordinance was drafted. Although this concept has much to commend it from an economic point of view in the long term interests of the country, there is little doubt that the public feels too strongly on the subject that it has been recognised that it would be extremely difficult to implement the vacant land provisions of the Ordinance and that this will become increasingly difficult as time goes on, whether vacant land is administered by a Trust Board or not. Under clause 2 of the Bill, therefore, the definition of vacant land has been repealed and native customary land has been re-defined as any land lawfully owned, used or occupied by a person or community in accordance with current native usage . . . (at 236–37)

Apart from the repeal of Part III (Public Land) of the said Ordinance, section 47 was further repealed and replaced. The custodian of all land under the new section 47 became the Commissioner of Lands. Also, all land below the low water mark within the territorial limits of the Protectorate became public land. The following was the new provision in legislation:

> 47. (1) There shall vest in the Commissioner of Lands as public land by virtue of this subsection—
>
> (a) all land below mean low water within the territorial limits of the Protectorate;
>
> (b) the seashore between the points of mean high water and mean low water;
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> (c) all land adjoining the sea coast within sixty-six feet of the mean high water mark;
>
> (d) the subsoil of every road and the bed of every river;
>
> (e) all land within sixty-six feet on each side of every road and every river.
>
> (2) The Commissioner of Lands may grant to any person, in accordance with the provisions of section 33, a licence to occupy any such land as is mentioned in paragraphs (b), (c) and (e) of subsection (1).
>
> (3) It shall not be necessary for the Commissioner of Lands to cause any entry to be made on the land register in respect of any land vested in him by virtue of subsection (1).
>
> (4) If the Commissioner of Lands desires to procure the registration of any public land vested in him by this section, he shall cause the Crown Surveyor to prepare the necessary registry maps, and shall serve upon the Registrar a certificate signed by him certifying that the necessary registry maps have been prepared by the Crown Surveyor and that the land in question is vested in him by this section; and the Registrar shall thereupon register the land as public land.[21]

Again, Mr J B Twomey, Member of the Legislative Council, explained:

> . . . In the new section 47 (clause 13 of the Bill), provision has been included for all land (other than native customary land or land already alienated to private persons) below mean low water mark within the territorial limits of the Protectorate to vest in the Commissioner of Lands as public land. This has been included to cover land reclamation and the grant of title to land covered by wharves. (at 236–37)

The 1968 Amendment

Section 47 was finally repealed in 1968. However, paragraphs (a) and (b) of section 47(1) of the repealed Ordinance[22] were saved by section 10(4) of the Land and Titles Act (Cap.93). The current provision is as follows:

> 10. (4) The Commissioner may apply to be registered as the owner on behalf of the Government of the perpetual estate in such land—
>
> (a) below mean low water; and
>
> (b) between the points of mean high water and mean low water, as vested in him under paragraphs (a) and (b) of section 47(1) of the repealed Ordinance.[23]

In moving the Second Reading of the Land and Titles Bill 1968, Mr J B Twomey, Member of the Legislative Council, said:

> Part III deals with first registration by persons holding title deeds and includes a provision whereby the Commissioner of Lands may register the Government's interest in land below high water mark. As studied to the Select Committee, this does not mean that reefs lawfully owned by Solomon Islanders are affected by these provisions[24]

Again the legal position of land below the high and low water marks was saved to ensure easy access for public interest activities such as building of wharves and reclamation of land under the sea. Also it would appear that the intention was not to alienate reefs lawfully owned by custom.

Allardyce Lumber Company Limited v Laore (Laore Case)

A dispute over customary ownership of land below the high water mark came up for decision in the High Court of Solomon Islands in 1989. This was thirty-eight years since the *Hanasiki case* and twenty-five years since statutory incorporation of Crown ownership of the foreshore and the seabed in 1964.[25] The dispute was between a Solomon Islander on behalf of his line and a foreign-owned logging company in Solomon Islands.[26]

The facts

Allardyce Lumber Company Limited (the Plaintiff) owns land in the Shortlands in the Western Province. The land was originally bought from native owners in 1914 and subsequently owned by the Plaintiff. The seller of the land in 1914 was the great-grandfather of Laore (the Defendant). It was sold for five pounds. The boundaries of the land were well marked on the map at the time of purchase from the native owners. However, the seaward boundary had changed over the years due to sea erosion and the acts of the Plaintiff. All in all, there had been a net loss of land to the sea. The Plaintiff was operating a logging business on the land under a timber licence obtained from the Government.

The company had earlier built a camp, a log yard and temporary wharves to facilitate its operation. It had also reclaimed some land at the eastern and southern parts of the seaward boundary for the construction of these facilities.

In 1987, the Defendant, on behalf of his line, claimed $250,000 compensation for damage done to the coastline by the log yard and the wharves. The Defendant later notified the Plaintiff that he and his line intended to dispute the ownership of the reefs fringing the coastline. In 1989, the Defendant claimed $6,000 compensation for encroachment of the log yard and the wharves at the southern part of the land over what he claimed to be his customary land. The other reasons for this claim for compensation were the sinking of four vessels over the reefs, discharge of oil onto the reefs and the use of the seas around the area of the reefs.

The Plaintiff then filed an action in the High Court seeking a declaration that it was entitled to carry on its business without interference from the Defendant and his line. The Defendant did not oppose the Plaintiff's case but counterclaimed on the ownership of the reclaimed land and the reefs. He sought declarations accordingly.

The judgment

The declarations sought by the Defendant were refused on the ground that the Defendant had failed to prove the existence of customary rights of ownership of the area of land under dispute. Had he done so, the Court was prepared to recognise his customary rights of ownership. The Court also ruled that the seabed was not land and therefore the reefs would not obviously be customary land.

Reasoning of the Court

The Court made it clear from the outset that the burden of proof was upon the Defendant. His Lordship Ward C J said:

> . . .The defendant, on the other hand, does assert customary rights of ownership over these areas and the burden of proving that lies on him . . .
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> . . . It has been stated many times by this Court that, if custom is to be relied on, it must be proved before the Court by evidence and must be proved each time . . .
>
> . . . Thus, in order to prove his case, the defendant must prove the existence of customary law in relation to the areas in question and then his rights to ownership under that customary law. . . (at 3–4)

The Plaintiff's first argument was that the ownership of the foreshore and the seabed vested in the State and therefore the Defendant's claim would have no legal basis. The Court, however, quickly pointed out that there were exceptions to this general rule stated by the Plaintiff. Other interests could arise out of royal grants or immemorial use, under the rules of common law. His Lordship Ward C J said:

> . . . Under English common law it is clear that the foreshore and rights over the sea bed in some areas could be owned by the owners of the land adjacent. Many of the authorities deal with grants by the early English monarchs and others refer to the rights arising out of immemorial use. Generally, however, under common law, in the absence of such rights the foreshore does vest in the State giving rights of use to the public and that is the position here. . . (at 4–5)

The Court then pointed out the legal relationship between common law and customary law in terms of paragraph 2 of Schedule 3 to the Constitution and concluded that in this case, the common law concept of immemorial use was consistent with customary law, there being no conflict. The Court then took the view that this being the case, the foreshore could well be customary land. The Plaintiff's second argument was that sovereignty was vested in the state and not in individuals. This argument was based upon the common law and section 9 of the Delimitation of Marine Waters Act 1978 and paragraph (a) of the Preamble to the Constitution. Section 9 of the Delimitation of Marine Waters Act 1978 provides that the sovereignty of Solomon Islands extends beyond its land territory and internal waters over its archipelagic waters and territorial seas and to the airspace over it as well as to the seabed and subsoil thereunder. The exercise of its sovereignty is, however, subject to the customary rules of international law. Paragraph (a) of the Preamble to the Constitution declares that all power in Solomon Islands comes from the people and is exercised on their behalf by Parliament, the Executive and the Judiciary established by the Constitution. In rejecting this argument, His Lordship Ward, C J said:

> I am afraid I cannot accept that argument. The concept of sovereignty referred to in section 9 and under international law is far wider. It is a term that embraces the independence of a state in relation to all others and to the paramount power it exercises over its internal affairs. To suggest any individual claim to ownership of the sea conflicts with that sovereignty is to take it out of context.
>
> My study of the authorities suggests that, under the common law, ownership of the sea bed vests in the State but that may be modified by a grant of certain rights to individuals. International law and the common law demand rights of free passage and of fishing in areas of sea and this generally applies to areas of sea and tidal waters whether owned by the State or granted to an individual. That also applies to Solomon Islands. However, I feel that the court may still be satisfied by evidence that some customary rights can exist over the sea and such customary rights can supplant the common law position. (at 7)

Francis Waleilia & Others v David Totorea (the Totorea Case)

The facts

The Auki waterfront had previously been shallow sea. It is now reclaimed land. It is now being used as the Auki market and the base of the Auki wharf. There had been an acquisition procedure on the assumption that the area of reclaimed land was customary land. The Acquisition Officer, Mr David Totorea, had made a certain determination. Six local groups appealed against the determination of the Acquisition Officer. The appeals were heard by the Auki Magistrate Court on 28 and 29 May 1992.

The judgment

The issue before the Court was whether or not the reclaimed land was customary land. The Court applied the *Laore case* and set aside the determination by the Acquisition Officer. In other words, the reclaimed land was not customary land as it had previously been an area permanently under water. In terms of section 10(4) of the Land and Titles Act (Cap.93), ownership does vest in the Government through the Commissioner of Lands.

Although the Court did appreciate the fact that it was possible for the appellants to establish customary rights over the area in dispute, it doubted this as the wording of section 10(4) of the Act did not seem to permit it. This decision is being appealed in the High Court of Solomon Islands.

Observations

The *Hanasiki case* established in 1951 that whilst the Crown became the owner of the foreshores and the seabed under the common law of England, customary ownership rights could still be established under custom. This would be an exception to the general rule of Crown ownership of the foreshores and the seabed. Then came the Land and Titles (Amendment) Ordinance 1964.[27] The effect of this Amendment was that the foreshores and all land below the low water mark within the territorial limits[28] of the Protectorate be public land vested in the Commissioner of Lands. However, this Amendment was not to apply to any customary land. In 1968, section

47 was again repealed by the Land and Titles Act (Cap.93) but as we have seen section 10(4) of this repealing Act saved only paragraphs (a) and (b) of the previous section 47 of the repealed Ordinance.

In other words, land below the high water mark and below the low water mark continues to be vested in the Crown. There is, however, no qualification to the rule that the Crown owns all land under this provision of the Act. The customary ownership rights recognised by the decision in the *Hanasiki case* appear to have been nullified as there is no saving provision under either the repealed Land and Titles Ordinance 1959 or under the present Land and Titles Act (Cap.93). The customary rights of Hanasiki and his line seem therefore to have been swept under the carpet by section 47 of the Land and Titles Ordinance 1959 and its subsequent amendments. However, it is arguable that these legislative provisions were simply statutory restatement of the common law and therefore no vested customary rights had been taken away.

The issue in the *Laore case* was the alleged customary ownership of the foreshore as well as the reefs. The reefs are submerged coral heads. This contrasts with the reefs under dispute in the *Hanasiki case* where the reefs are exposed at low tide etc. In the *Laore case*, a submerged reef is not customary land and therefore is beyond the jurisdiction of the Local Court. However, rights of use under custom could be established short of customary ownership of a submerged reef. The Courts seem to have made a difference between submerged reefs and reefs exposed at low tide. In the *Hanasiki case*, right of exclusive ownership and use of the reef under dispute were found to exist in custom whereas in the *Laore case*, right of ownership was excluded but rights of use could be established should they exist in custom.

The approach taken by the Court in determining the matter in dispute in both cases was the same. That is to say, the common law of England about Crown ownership of the foreshore and the seabed was applied. Section 10(4) of the Land and Titles Act (Cap.93), however, was never raised and argued in the *Laore case*. It would appear that both Counsels and the Court were unaware of the existence of section 10(4) of the Act. The legal implications of section 10(4) were brought to light three years later in *Francis Waleilia & Others v David Totorea* in 1992, where the Magistrate Court in Auki, Malaita Province, said that the wording of section 10(4) would seem to suggest that Crown ownership of foreshores and the seabed

was absolute. This interpretation would certainly leave no room for making claims of customary rights of ownership or use of foreshores and reefs. Such an interpretation would be consistent with paragraph 3(2) of Schedule 3 to the Constitution in that customary law would not apply if it is inconsistent with an Act of Parliament. Section 10(4) being part of the Land and Titles Act (Cap.93) would prevail over the High Court rulings in both the *Hanasiki case* and the *Laore case*. Government policy from 1964 onwards would, however, appear to be different. It was clear during Legislative Council Debates that Crown ownership of the foreshores and the seabed was basically aimed at facilitating reclamation of land and building of wharves. Also, reefs lawfully owned by Solomon Islanders were not to be affected by the law being debated. In fact, the *Hanasiki case* was cited by the then Attorney-General at pages 80–83 of Legislative Debates, official Report, Ninth Session, Second Meeting of the Legislative Council, Honiara, 19 November 1968. The Debate was on a Motion moved by the then Honourable Baddley Devesi, Member for North Guadalcanal, to the effect that Government consider introducing legislation to safeguard the rights, privileges and interests of landowners regarding customary ownership of reefs, beaches and river mouths. The Motion was passed but has not been implemented to date. No record exists as to why this Motion was not implemented but it would appear that the then Attorney-General, Mr R D Davis, was of the view that customary interests were adequately safeguarded through the action of trespass or applying for an injunction in the High Court. This Motion was moved following the passage of the Land and Titles Act (Cap.93).[29]

Conclusion

The introduction of the common law of England in 1893 does not take away customary rights of ownership of the foreshores and reefs, depending on the facts of each case and proof of the existence of customary rights of ownership. The concept of immemorial use, amongst other things, at common law is consistent with proving the existence of customary rights and usages. In fact, there is no conflict. However, the suggestion that section 10(4) of the Land and Titles Act confers absolute ownership of foreshores and the seabed on the Crown is probably overstating the

common law position. If, however, absolute ownership by the Crown is the position, an amendment to section 10(4) should correct the position so that account could be taken of customary claims. The decision of the High Court in the appeal from the Auki Magistrate Court in 1992 may make the position clearer one way or the other. This appeal has been adjourned twice already for various reasons, first in October 1994 and secondly in September 1996. The next hearing date is likely to be some time in 1997. In the meantime, two similar cases have arisen, both on Malaita. The first was *Renaldo & Others v David Totorea* 1995 over the acquisition of the Bina Harbour. The Auki Magistrate Court had ruled that land below high water and low water mark was not customary land. This ruling was again based upon the *Laore case*. The second was the *Combined Fera Group & Others v David Totorea* 1996, yet to be heard before the Auki Magistrate Court. It is again an appeal against the determination of the acquisition officer, David Totorea, over the acquisition of the Auki Rubbish Dump at Auki. The area of land under dispute is a mangrove swamp always covered with sea at high tide. This area of land is basically reclaimed land, being used as a rubbish dump for the Auki township. The decision of the High Court in the appeal from the *Totorea case* in 1992 would obviously have important implications for the parties involved in the appeal and those in the two above cases. In deciding the appeal, the High Court will obviously and critically analyse the common law, customary law and statute law and then reconcile them on the basis of the evidence produced before it. The *Hanasiki case* and the *Laore case* would certainly serve as important precedents for the discussion of the common law and customary law. The *Laore case* would further serve as a useful precedent for the discussion of constitutional aspects of the common law and customary law under the Constitution. However, neither the *Hanasiki case* nor the *Laore case* would assist the Court in the discussion of section 10(4) of the Land and Titles Act (Cap.93) as there has been no conclusive precedent on the interpretation of the above section, apart from some obiter dicta in the *Totorea case* in 1992. It is also possible that any of the parties may further appeal to the Court of Appeal if there are grounds to do so. If such should be the case, the grounds of appeal will obviously be further scrutinised by the Court of Appeal, whose decision is final, this being the final Court of Appeal in Solomon Islands.

Notes

1 See Statutory Instruments applicable to the British Solomon Islands Protectorate 1971.

2 This is one of the references being studied by the Law Reform Commission. Recommendations are yet to be made.

3 This was replaced by the Western Pacific (Courts) Order, 1961. See above nl at 19.

4 The Protectorate was extended to the Santa Cruz group between 1898 and 1899 and to Santa Ysabel, Choiseul and the Shortlands in 1900.

5 See Queen's Regulation No. 4 of 1896, Queen's Regulation No.3 of 1900, King's Regulation No. 3 of 1914.

6 See F Beaumont Philips's Report on Native claims 30–37, 55 (Lever's cases), British Solomon Islands Protectorate 1 April 1925.

7 This is a general statement to indicate the vast amount of land up to date that remains unregistered. The exact number of hectares registered under the Torrens system is not known but certainly is much smaller by comparison.

8 These statements all draw on Colin H Allan, 'Report of the Special Commission on Customary Land Tenure in the British Solomon Islands Protectorate', presented to the Chief Secretary, Western Pacific High Commission at Honiara on 17 June 1957.

9 This is a general perception of ownership of land under custom. Whilst ownership can be automatic in some cases, it is not so in all cases. Where disputes do arise, proof of ownership by evidence becomes necessary for one of the parties to win the dispute.

10 This island, correctly named Tawaro Island, is surrounded by long, fringing reefs. Commissioner W T Charles's recording of the name in 1951 as Tavaru was incorrect.

11 Under Article 8 of the Pacific Order in Council 1893, the Chief Justice and all other judges of the Supreme Court of Fiji were automatically Judicial Commissioners for the Western Pacific. In their absence, the High Commissioner for the Western Pacific could appoint a suitable lawyer to perform judicial functions as the case may be.

12 See *Hanasiki v O J Symes* (Unreported Judgment delivered at Honiara on 17 August 1951).

13 The Court must have meant the English common law by the use of the term 'English law'.

14 The 1893 bench mark has been modified by section 2 of the Land Titles Act (Cap.93) in that the term used is 'current customary usage', which means the usage of Solomon Islanders obtaining in relation to the matter in question at the time the matter in question arises, regardless of whether that usage has obtained from time immemorial or any lesser period.

15 See Western Pacific High Commission Gazette, 1959 1 at 364.

16 See Notes on the Implementation of the Land and Titles Ordinance 1959, 1–2.

17 Land and Titles Regulation 1959, WPHC Gazette, 1959 1 at 364.

18 The laws were styled Ordinances after the Order in Council 1960.

19 This is now section 58 of the present Land and Titles Act (Cap.93). Although there have been a number of land settlement schemes, no land has yet been found to be vacant land in order to be registered under section 58.

20 Mr J B Twomey was then the Commissioner of Lands and an Official Member of the then Legislative Council. The quotations that follow are taken from Legislative Council Debates, Official Report, Fifth Session. First Meeting of the Legislative Council, Rove. 3–16 December 1964.

21 Laws of the British Solomon Islands Protectorate 1964, 1 at 158.

22 Land and Titles Regulation 1959, WPHC Gazette 1959.

23 The Land and Titles Act (Cap. 93) p.23. This Act came into operation on 1 January 1969 (see L.N. No. 110/68).

24 Legislative Council Debates, Official Report, Ninth Session. First Meeting of Legislative Council, Honiara, 5–14 June 1968, 1 at 36.

25 As already seen, Crown statutory ownership of the foreshores came into force on 1 February 1963, under the Land and Titles Ordinance Part III (Public Land). Crown statutory ownership of the seabed came into force in 1964.

26 *Allardyce Lumber Company Limited v Laore* (Civil Case No. 64 of 1989) (Unreported decision of the High Court delivered on 10 August 1990.

27 See the section of this paper called ‘The 1964 Amendment’.

28 Solomon Islands is now an archipelagic state consisting of both archipelagic waters and territorial waters. See Delimitation of Marine Waters Act 1978.

29 However, it is a rule of statutory interpretation that Hansard records are not to be used to establish the intention of Parliament in a statute.