AUSTRALASIAN CONFERENCE ASSOCIATION LTD V MERE SELA AND ORS [2007] FLR 12 A CASE ANALYSIS

Unaisi Narawa*

Indigenous Fijians today live under two parallel systems of law: Their traditional customs and observances which have been preserved over time, and State law.[1] *Sources of State law in Fiji are the Constitution, legislation, and common law. Prior to 1997, customary law was constitutionally recognised as a general source of law.*[2] *Although constitutional recognition is important, it is not what indigenous people rely on to continue practising their customs and implementing their laws. For many indigenous people, customary laws are the only laws that they know and that they encounter.*[3]*This article considers the operation of the two systems of law through an analysis of* Australasian Conference Association Ltd v Mere Sela and Ors.

Les Fidjiens de souche vivent aujourd'hui sous deux systèmes de droit indépendants: Leurs coutumes et leurs pratiques traditionnelles qui ont été conservées au fil de leur histoire, et le droit national. Les sources du droit positif aux Fidji sont la Constitution, la législation et la Common Law. Avant 1997, le droit coutumier était une source générale de droit reconnue par la Constitution. Cependant bien que la légitimité constitutionnelle soit une condition essentielle à la validité du droit coutumier, les populations autochtones ne s'en prévalent pas pour justifier la perpétuation du recours au droit coutumier qui pour de nombreux autochtones, sont de principe les seules lois qu'ils reconnaissent. Cette dualité de systèmes de droit applicables n'est pas sans poser de difficulté dans sa mise en œuvre pratique comme

* PhD Candidate with the School of Law, University of Queensland. Previously held positions: Legislative Counsel and Drafter in Nauru and academic with the University of the South Pacific.

1 R Knox-Mawer "Native Courts and Customs in Fiji" (1961) 10 The International and Comparative Law Quarterly 642, 645.

2 Section 100(3) was excluded from the 1997 Constitution (Fiji).

3 See Jennifer Corrin "Customary Land and the Language of the Common Law" (Pt SAGE Publications) (2008) 37 Common Law World Review 305-333, 309.

le démontre l'auteur qui illustre ses développements par une analyse des attendus de la décision 'Australasian Conference Association Ltd v Mere Sela et Ors'.

I INTRODUCTION

Australasian Conference Association Ltd v Mere Sela and Ors deals with an interesting encounter between the systems of law. Customary land had been given in custom by custom landowners. The recipients were the descendants of Solomon Islanders who had first arrived in Fiji during the 'blackbirding' period. Subsequently, the land was converted into "wasteland"[4] and sold by the State, leaving two parties with competing interests in the same piece of land.

Blackbirding is a term that not many are familiar with. It refers to the practice of "recruitment" of Pacific island people to work on plantations in Australia, Fiji and other countries. In 1863, a Sydney parliamentarian and merchant, Captain Robert Towns, first arranged for a sandalwood trader operating from Tanna, Henry Ross Lewin, to recruit islanders from the Loyalty and New Hebrides Groups.[5] The majority of the labourers were men, but women and children were also taken. Most were originally from Vanuatu and Solomon Islands. However workers were also "recruited" from the Loyalty Islands (part of New Caledonia), Papua New Guinea, Tokelau, Tuvalu, Kiribati and Fiji.[6] The phrase itself has often been said to be akin to kidnapping or slavery and it remains a controversial issue between scholars and descendants of people blackbirded.[7]

As stated by Coventry J, the decision in *Australasian Conference Association Ltd v Mere Sela and Ors* —

4 This is land that was not utilised by indigenous Fijians, held by private individuals (Europeans) or held by the Crown. The Legislative Council enacted the Native Lands Amendment Ordinance (No. IV) in 1905 which allowed the sale of indigenous Fijian land only with the approval of the Governor in Council. See commentary below for other land tenure laws passed during this period.

5 Reid Mortensen "Slaving in Australian Courts: Blackbirding Cases, 1869-1871" (2009) 13(1) Journal of South Pacific Law.

6 Will Higginbotham "Blackbirding: Australia's History of Luring, Tricking and Kidnapping Pacific Islanders" *ABC* (online, 16 September 2017) <https://www.abc.net.au/news/2017-09-17/blackbirding-australias-history-of-kidnapping-pacific-islanders/8860754>. See also H E Maude *Slavers in Paradise: The Peruvian Labour Trade in Polynesia, 1862-1864* (ANU Press, Canberra, 1981).

7 The collective memory of South Sea Islanders for example has often been contradicted by academic historians. For further reading see Clive Moore "Australian South Sea Islanders' Narratives of Belonging" in Farzana Gounder (ed) *Narrative and Identity Construction in the Pacific Islands* (John Benjamins Publishing Company, 2015) 155-176.

> throws into sharp focus the problems that arise when there is in existence one system of land rights and ownership to which people adhere and have adhered for centuries and another is superimposed upon it. There are many and complex considerations.

In this article, these problems and considerations are examined in detail, highlighting the conflict between customary law and formal laws governing land tenure in Fiji.

II THE FACTS

In 1935, Solomon Islanders[8] who had been brought to Fiji during the blackbirding era approached the traditional owners of land in Tamavua and presented a traditional request to allow them and their families to settle on the land. At that time, the land was alienated, having been registered in the late 19th century. After registration, it was gradually converted into freehold lots, and then sold to a Polynesian company.[9] Despite this, the traditional owners accepted the request and the Solomons people were permitted to set up their homes. The part of the land given to the Solomon Islanders was called Tamavua-i-wai. The plaintiff association purchased land in 1949[10] and part of that land included Tamavua-i-wai upon which the defendants and their ancestors had been permitted to settle in the 1930s.[11] From the time that they had been granted permission to settle on the land until this case was brought against them they carried out the customary obligations expected of them by the indigenous landowners. The exact details of the ownership of land appeared to be of concern to the Court which spent some time dealing with these details.[12]

In 2005, the plaintiff sought an order from the High Court of Fiji to remove the defendants from the land. The plaintiff claimed that the defendants did not have title and therefore had no legal right to live there. The defendants did not dispute the particulars of the land sale and the plaintiff's interest but asserted that they had an equitable right to remain on the property. According to the defendants, the land had

---

8 Eg the defendants.

9 In the discussion on land tenure below, there is included commentary on land being sold off by Cakobau and the colonial government without consent from the chiefs. This happened all over Fiji and may be the reason why the traditional owners in this case continued to treat such land as customary land.

10 The facts state that the Polynesian company had first purchased the land, but it is not clear who sold the land to the plaintiff in this case. See below n 12.

11 *Australasian Conference Association Ltd v Mere Sela and Ors* [2007] FLR 12.

12 It appears that during Governor in Thurn's time, some parts of the property had been categorised as waste or inaccessible and unsuitable for settlement, and therefore sold as "wasteland". This land was bought by the Polynesian company as sold to them "legitimately" by Cakobau. See also Timothy J Macnaught *The Fijian Colonial Experience : A Study of the Neotraditional Order Under British Colonial Rule Prior to World War II* (ANU eView, 2016).

been passed to them by the iTaukei Fijian customary manner. They also highlighted the fact that despite the plaintiff's purchase of the land almost sixty years ago, the plaintiff had not made any attempt to remove them from the land.

Coventry J[13] had to consider whether the plaintiff was entitled to vacant possession of the land or whether there was merit in the defendants' claim that they were given the right to remain on the land in perpetuity according to the laws and norms of the traditional system of tenure and ownership.[14] In its deliberations the following laws were relied on by the Court:

- Constitution of Fiji 1997 - s 49(2)(b)(i)-(v)
- High Court Rules, 1988 - Order 113
- Land Transfer Act [Cap 131] - ss 39(2), 42, 169, 178
- Common Law.

Section 49(2)(b)(i)-(v) of the Constitution deals with the protection of persons from compulsory acquisition of their property unless done under a law. Any law allowing for such acquisition must take into consideration any compensation and issues including the use of property, the history of its acquisition, market value, the interests of those affected and hardship to the owner.

The High Court Rules (Order 113) and s 169 of the Land Transfer Act were relied on by the plaintiff to claim that the defendants were in fact squatters and this could therefore legally justify their summary removal from the land. The Court determined that there was no legal definition of the word 'squatter', so devised its own, referring to a squatter as a person who enters onto another's land without any right to do so and remains there or who was lawfully on that land but later loses any legal right to be there.

The Land Transfer Act was relied on by both the plaintiff and the defendants. The defendants relied on the provisions of the Act[15] relating to adverse possession which is a Common Law principle encapsulated in legislation. It allows persons to remain on property if they can satisfy certain conditions.[16] Other provisions of the Land Transfer Act relied on by the plaintiff and referred to by the Court dealt with the register of titles and the registration of land in Fiji, the inapplicability of laws that are inconsistent to the Act, and the protection of proprietors against ejectment.

---

13 An expatriate judge of the High Court of Fiji.

14 *Australasian Conference Association Ltd v Mere Sela and Ors* [2007] FLR 12.

15 Land Transfer Act [Cap 131] 1978 (Fiji) s 77.

16 The judgment acknowledged that all ingredients of adverse possession were present in the defendant's case but other than that, did nothing further.

In addition to the legislation, Coventry J considered the common law and equity relating to indefeasibility of title, and equitable and promissory estoppel. His Honour referred to cases on point from Fiji, New Zealand, England and Australia, including *Hardeo Prasad v Abdul Hamid* ABU0059/2004; [2004] FJCA 10; *Waimiha Sawmilling Co Ltd (in liq) v Waione Timber Co Ltd* [1923] NZLR 1137; [1923] GLR 353; *Plimmer v Wellington City Corporation* (1884) 9 App Cas 699; *Inwards and Ors v* Baker [1965] 2 QB 29; [1965] 1 All ER 446; [1965] 2 WLR 212; *Waltons Stores (Interstate) Ltd v Maher and Anor* (1988) 164 CLR 387; 76 ALR 513; 62 ALJR 110.

III THE DECISION

The Court found that:

(1) A promissory estoppel arose, and the plaintiff was estopped from evicting the defendants.
(2) The original permission was in perpetuity and only extended to the original grantees and their descendants, and was subject to two conditions:
    - Continuity of occupation; and
    - the continued performance of customary obligations.

The defendants remained on the land based on the initial agreement and promise to them by the custom landowners. The Court also made it clear that they were not squatters because their arrival and subsequent occupation had been, as far as they were concerned, based on and in accordance with the norms of customary land tenure which they knew and had known for centuries.[17] Despite s 169 of the Land Transfer Act and Order 113[18] of the High Court Rules, the plaintiff was prevented from gaining possession of the land from the original traditional grantees and their descendants.

The Court also took into consideration the actions taken by the plaintiff in allowing the defendants to continue to occupy the land. Inferences were drawn that the plaintiff would have made enquiries as to who the people on the land were, how they came to be there and how long they had been there or, as the Court stated, they would have ignored these issues altogether. The fact remained that no action was taken to remove the defendants or their forebears from the land until 2004. The

17 *Australasian Conference Association Ltd v Mere Sela and Ors* [2007] FLR 12.

18 The plaintiff had by an earlier originating summons brought proceedings under O 113 for summary removal of the defendants claiming that they were squatters, but the Court had in a judgment dated 3 April 2007 refused to grant any order.

plaintiff therefore failed in its application for vacant possession and could not remove the defendants or their descendants currently living on the land.

The Court also noted, obiter, that whilst promissory estoppel applied here, the requirements of equitable estoppel were not fulfilled. This was because the expectation to remain on the land did not come from the exchange of money (sporadic payment of what was said to be rent) but rather from the original assumption of traditional land rights.

IV LAND TENURE

To appreciate the issues arising out of this decision, it is vital to understand the context. Land holding for indigenous peoples of the Pacific does not hold the same meaning as ownership in the Western sense of the word. A Pacific Islands Forum Secretariat report highlighted the very simplistic nature of the word "ownership" as meaning that if someone owns something it is the individual's right to do with it as they please, as opposed to the spiritual connotations and enduring notion of intergenerational guardianship in indigenous land ownership.[19] For indigenous people, this approach to land is problematic when considering their relationship to the land and all that it encompasses including the sea, vegetation and crops, buildings and the overall rights that one has to the land.[20] The value of land can be said to be spiritual, linking one to his or her ancestors. This significance extends far beyond the economic value, to a symbolic and cultural value bound up with personal and group identity.[21]

In Fiji for example, the communalism within contemporary Fijian tradition can be interpreted as a form of land stewardship, or guardianship associated with an enduring sense of place or relationship to a village and that spiritual relationship remains grounded in tradition and custom.[22] The English perspective of fee simple absolute in possession or freehold ownership, albeit constrained by planning, taxation and other statutory requirements and obligations is an individualistic

19 Spike Boydell "South Pacific Land: An Alternative Perspective on Tenure Traditions, Business, and Conflict" (Pt Edmund A Walsh School of Foreign Service, Georgetown University) (2010) 11 Georgetown Journal of International Affairs 17-25, 18.

20 For a more detailed analysis of this see Sue Farran "South Pacific Land Law: Some Regional Challenges, Cases and Developments" (2001) 32 Victoria University of Wellington Law Review.

21 Corrin, above n 3, 308.

22 Spike Boydell and Krishn Shah "An Inquiry into the Nature of Land Ownership in Fiji" International Association for the Study of Common Property Meeting, 2.

paradigm.[23] With the arrival of Europeans and the beginning of colonial rule much of what was known to the Pacific islanders began to change.

Apart from the introduction of a different religion and western goods and materials, the need for land was a big part of that change. The colonialists needed land for production, residential and administrative purposes, so ways had to be found to access customary land.[24] The alienation of land in Pacific island countries differed according to the type of colonial administration and differed also among Melanesian, Polynesian and Micronesian countries. Sometimes land was accessed using force or coercion and at other times by adapting the western systems to the traditional practices and, where people practised shifting cultivation, tracts of fallow land were commonly regarded by colonists as unoccupied, not owned or 'waste' land, and were simply appropriated by them.[25]

Melanesian countries such as Fiji and Solomon Islands went through a similar system of colonial land acquisition. In Solomon Islands, which was a British protectorate, there was no acquisition of land by the Crown, and Solomon Islanders owned all the land except that which was considered to be unoccupied.[26] The first Solomon Islands law enacted for the alienation of customary land was the Queen's Regulation No 4 of 1896; it controlled land by preventing non-natives from acquiring vacant land unless approval was sought from a colonial administration.[27] Vacant land as defined in the Regulation was 'land being vacant by reason of the extinction of the original native owners and their descendants.[28] Only in very restricted cases can non-Solomon Islanders own customary land.[29]

Vanuatu on the other hand was a country under an Anglo-French Condominium and saw a different type of land alienation. Despite customary claims of ownership,

---

23 Ibid.

24 Australian Agency for International Development "Making Land Work: Reconciling Customary Land and Development in the Pacific" (2008) 1, 115.

25 Ibid.

26 Ibid 117.

27 Joseph Foukona "Legal Aspects of Customary Land Administration in Solomon Islands" (2007) 11 Journal of South Pacific Law 65.

28 Queen's Regulation No 4 (1896), s 10.

29 Customary land may not be transferred or leased to a non-Solomon Islander unless that person is married to a Solomon Islander or inherits the land and is entitled to an interest under customary law. See Jennifer Corrin "Customary Land in Solomon Islands: A Victim of Legal Pluralism" (2011) Revue Juridique Polynesienne (Special Issue 12) 277.

the joint administration permitted the sale of customary land.[30] In the Vanuatu case of *Noel v Toto*,[31] which dealt with a dispute on the customary rights that may be derived from native land, the court considered the category of "waste and vacant land".[32] The court made reference to custom owners and how those who were the first occupants of the land are rightfully the designated customary owners and stated that customary ownership is permanent. This perpetual ownership in custom means that leaving the land does not divest the owners of their ownership.[33]

Prior to colonisation, all land in Fiji was held in customary tenure and "owned" communally. Upon becoming a British colony, all land not occupied by the iTaukei was acquired by the Crown.[34] Until the creation of the Native Lands Commission in 1880, indigenous ownership of land was unclassified. Property rights in Fiji are inherently a colonial construct. The Torrens system in Fiji now co-exists with the customary system with the 1874 Deed of Cession creating a threefold system of property rights to land, replacing the traditional system:

- Customary Land: held under communal ownership (83.82%).
- Freehold Land: land appropriated or purchased by Europeans prior to the Cession. Fee-simple estate (8.06%).
- State Land: under the custodianship of government. Land not claimed by iTaukei landowning units or whose owners have died. This is separated into two categories: deemed necessary for public purposes or vacant at the time of Cession (8.10%).[35]

The Native Lands Commission introduced the Vola Ni Kawa Bula[36] and created a system that assigned exclusive possession of contiguous blocks of land to social

30 Australian Agency for International Development. At independence all freehold land reverted to customary ownership except land that was owned by the government which comprises only 2% of the land mass.

31 *Noel v Toto* (Unreported, VUSC, Civil Case 18 of 1994, 19 April 1995, Kent J).

32 This is discussed in more detail in Sue Farran "South Pacific Land Law: Some Regional Challenges, Cases and Developments" (2001) 32 Victoria University of Wellington Law Review.

33 Ibid.

34 Clause 1 of the Deed of Cession was interpreted by the British to mean that at the point of cession, the Crown held any and all rights to land in Fiji.

35 Chethna Ben and Neelesh Gounder "Property Rights: Principles of Customary Land and Urban Development in Fiji" (Pt Elsevier Ltd) (2019) 87 Land Use Policy 104089, 3.

36 This is an official record or register of indigenous Fijian land-owning units.

groupings or land-owning units.[37] The alienation of customary land was legalised by s 19 of the iTaukei Lands Act (1905).[38] This gave the iTaukei Lands Commission the power to mark out the boundaries of any land found to have been unoccupied at the date of cession.[39] This land had remained unoccupied up to the time of the sittings of the Commission and no title had been created by the operation of any indigenous Fijian custom in force before cession.[40] There was disagreement as to whether land should be sold at all. In a statement in the House of Lords in 1908, the Earl of Crewe Secretary of State of the Colonies stated his opinion that all land was owned by the indigenous people and that only rarely should such land be sold and if it were sold, all proceeds should be held in trust for the existing community and successors.[41] This did not stop the sale of such land during Governor im Thurn's leadership in Fiji. It was in May 1905 that the Legislative Council (without consulting any chiefs) passed land reforms that allowed Fijian lands to be alienable with the consent of the Governor-in-Council.[42] From 1905 to 1909, Governor im Thurn managed to secure the approval of the Legislative Council in passing several Ordinances that allowed indigenous Fijian land to move from their hands to the ownership of Europeans or under the colonial government.[43] During the course of those years, 104,142 acres of indigenous Fijian land were sold and became freehold.[44]

The present case involves three groups: the defendants (Solomon Islands descendants), the plaintiff (holder of the title of the land), and the original indigenous landowners (the people who granted the defendants the right to live on the land). The right of the indigenous people to give the land was acknowledged by the Court and all evidence provided to the Court indicated that the defendants sought permission

---

37 Mathew Dodd, "Reform of Leasing Regimes For Customary Land in Fiji" (Bachelor of Laws (Hons) Thesis, University of Otago, 2012) p 5 <https://www.otago.ac.nz/law/research/journals/otago041735.pdf>.

38 Following the consolidation of laws, the word "native" was removed from all laws and replaced with the word "iTaukei".

39 iTaukei Lands Act 1905 (Fiji) ('iTaukei Lands Act').

40 Ibid.

41 "Waste Land of Fiji, A Communal Tenure: Statement by the Earl of Crewe" *The Sydney Morning Herald*.

42 Macnaught, above n 12, 31.

43 The Native Lands Acquisition Ordinance (V) allowed the colonial government to take land for public purposes. The Acquisition of Land Ordinance (XVI) defined 'public purpose' under that legislation to include any enterprises that would advance the interests of the government. Ordinance IX of 1907 removed restrictions relating to the ownership of land or lease by individual indigenous Fijians.

44 Macnaught, above n 12, 31.

from the landowners whenever they wished to make any changes on the land, including for example the laying of electricity and water.

The portion of land under dispute was sold by Ratu Cakobau to the Polynesian Company. The Court accepted that there are significant discrepancies between the acreage marked out and sold in 1869-1871 and that surveyed in 1905 and 1926.[45] The discussion also of there being a Tamavua reserve despite Cakobau's outright sale of Suva adds to the intrigue.[46] Governor im Thurn introduced a third Ordinance (IX of 1907) in June 1907; it provided for the sale or lease of native land to Fijians and its conversion thereby to freehold title.[47] The sale of that land would have ultimately converted it from native land to freehold land which is supported by the fact that the plaintiff has a Certificate of Title 7168. It is interesting to note the Court's view on this as it stated that the existence of the original freehold title as Crown grant predates the event upon which the defendants rely and therefore whether the Tui Tamavua or Tui Suva granted descendants of Solomon Island labourers some interest in land at some point in the past is irrelevant.[48]

V CUSTOMARY LAW

In this analysis it is important to examine the application of customary law and the interaction between this type of law and the State system introduced during the colonial era. Customary law and its recognition not only vary between jurisdictions but may also vary within areas of a single jurisdiction. In the South-West Pacific and in pre-colonial times, laws were originally pronounced orally by the chiefs, related only to individual communities, and purported to be restatements of the established practices and customs of that group.[49] This meant that the law changed according to the different circumstances and as people changed. There has not been any definitive definition of customary law and this may be because customary law does not lend itself to easy identification or codification.[50]

Fiji has seen a shift in the way customary law has been recognised and applied by the iTaukei and by the State. When colonial governments were faced with the challenge of these laws, their approaches differed. An aspect of difference which

---

45 *Australasian Conference Association Ltd v Mere Sela and Ors* [2007] FLR 12.

46 As stated by Coventry J.

47 Macnaught, above n 12, 33.

48 *Australasian Conference Association Ltd v Mere Sela and Ors* [2007] FLR 12.

49 Corrin "Customary Land and the Language of the Common Law", above n 3, 309.

50 Brendan Tobin *Indigenous Peoples, Customary Law and Human Rights Why Living Law Matters* (Routledge, 2014) p xvii.

distinguished Pacific region experiences from each other was the character of foreign administrations during colonial periods, and the steps taken to deal with a plurality of sub-systems of law.[51]

Prior to colonial times customary law applied with or without "permission", and then colonial administrators allowed most indigenous customs to continue to be applied by customary leaders to people of their communities as forms of social control.[52] Indigenous Fijians were governed in large part by an increasingly elaborate and codified system of 'customary law,' with its own courts, judges, and administrators.[53] Powles states that the significance of customary law in a country today depends on three enquiries. The first is the overall status of customary law as a source of law.[54] This enquiry relates to whether the Constitution of the country acknowledges custom as a source of law directly, indirectly or through legislation.[55] Sometimes recognition may be given by the preamble of the Constitution and in other circumstances, through a constitutional provision requiring the legislature to create legislation to put customary practices and values into law.[56] This of course only works if the legislature actually enacts such laws. In Fiji's case under the Constitution of 1997 no such laws were ever created that put the Constitutional section into effect.

The second enquiry looks at the structural organisation of the judicial system to see which courts actually incorporate and apply customary law.[57] The third enquiry according to Powles, steps back from the law and its sources to survey the national polity in its entirety and make some generalisations as to the circumstances or spheres of activity in which customary law operates with the objective of seeing customary law in perspective as part of the total legal system.[58] The application of customary law today is often dependent on whether it is understood and ultimately recognised by the formal legal system. One of the main challenges, for those

---

51 Guy Powles "The Status of Customary Law: Achievements and Prospects" (Tuhonohono: Custom and State) (Pt University of Waikato) (2010) 13-14 Yearbook of New Zealand Jurisprudence 238.

52 Jennifer Corrin and Donald Edgar Paterson *Introduction to South Pacific Law* (4th ed, Intersentia Ltd, 2017).

53 John D Kelly "Threats to Difference in Colonial Fiji" (Pt [Wiley, American Anthropological Association]) (1995) 10(1) Cultural Anthropology 64-84, p 65.

54 Powles, above n 51.

55 Ibid.

56 For example, the now abrogated Constitution of Fiji 1997 had such a provision.

57 Powles, above n 51.

58 Ibid.

unversed in customary law is to accept the notion that indigenous people are empowered by law to make law and have been making and enforcing these laws for centuries and passing them on through the generations by oral means.[59]

The degrees of recognition vary throughout the world and in different Pacific jurisdictions. In Fiji, there have been varied types and stages of recognition and it goes back to the enquiries suggested by Powles. Section 100 of the 1990 Constitution required that Parliament make provision for the application of laws including customary laws and in doing so, must have regard for the customs, traditions, usages, values, and aspirations of the Fijian people. The Constitution went on to ensure that customary law had effect as part of the laws of Fiji unless an Act of Parliament provided otherwise.[60] The 1997 constitutional provision carried on that same provision with slight modifications.[61] Despite the constitutional recognition, there were never any laws enacted that gave effect to these sections. 2013 saw a different approach in that the Constitution did not give that same recognition to customary law and instead dealt only with customary land.[62]

VI CUSTOMARY LAW AND ESTOPPEL

This is not the first time that courts in the Pacific have been faced with dealing with customary law and having to decide cases based on a mix of laws. It also will not be the last. In some courts, customary law can also be enhanced by modifying accepted principles of foreign law to fit with local norms.[63] In Papua New Guinea, the National Court modified the common law doctrine of proprietary estoppel to reflect two customary concepts: balancing the rights of the landowner and the occupiers; and granting a temporary, rather than permanent, right of occupation.[64] The influence of customary law on the common law is discussed by Jean Zorn[65] in the context of the case of *Ready Mix.*[66] In some ways similar to *Australasian*

---

59 Tobin, above n 50, p xx.

60 Constitution of Fiji 1990 (Fiji) s 100 (3).

61 Constitution Amendment Act 1997 (Fiji) s 186.

62 Constitution of Fiji 2013 (Fiji) s 28.

63 New Zealand Law Commission "Converging Currents: Custom and Human Rights in the Pacific" (Working Paper, p 168 <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20SP17.pdf>.

64 Ibid.

65 Jean G Zorn "Making Law in Papua New Guinea : The Influence of Customary Law on the Common Law" (Pt Brigham Young University, Hawaii Campus) (1991) 14(4) Pacific Studies 1-34.

66 *PNG Ready Mix Concrete Pty Ltd v The State, Utula Samana and Samson Kiamba* [1981] PNGLR 396.

Conference Association Ltd v Mere Sela and Ors, the case involved the residents of a squatter settlement in the town of Lae fighting against forced removal by a company that had won a tender to lease the land[67] part of which was occupied by the settlement. The case saw the residents being granted temporary occupancy rather than lifetime possession, but the court refused to grant the right to evict following the expiration of the stated period. Zorn highlights how the court, without realising it (or wanting to admit it), was influenced by the principles and processes of customary law and how the customary law changes when it becomes part of a formalistic common law system.[68]

In the Samoan case of *Lemalu v Jessop,*[69] the question was asked whether a claim settled in accordance with customary law created an estoppel, preventing a common law action in respect of the same claim from succeeding.[70] The plaintiff in the case had suffered injuries due to actions by the defendant but before the hearing the plaintiff accepted an *ifoga* in accordance with Samoan custom but did so with the reservation that the common law claim would not be withdrawn.[71] The defendant argued that acceptance of the *ifoga* estopped the plaintiff from succeeding in his claim for damages. One of the elements needed for an estoppel is the existence of a relationship and in this Samoan case, there was no such relationship.

In *Australasian Conference Association Ltd v Mere Sela and Ors*, Coventry J had this to say about estoppel:

> The estoppel arises from the Plaintiffs' actions and inactions since purchase precluding them from exercising those rights which but for those actions and inactions they could have exercised under the Land Transfer Act. Further, I do not find this is inconsistent with the Act so as to make it inapplicable in accordance with section 3. Accordingly, I find that despite the provisions of the Land Transfer Act, within the factual circumstances of this case, an estoppel, can and does arise which prevents the Plaintiff from gaining possession of the disputed land from the original grantees of the permission and their direct descendants.

---

67 At the time the original case was heard, the leasing authority had not yet granted the lease.

68 Zorn, above n 65.

69 *Lemalu v Jessop* [1969] WSLR 214.

70 As discussed in Jennifer Corrin *Contract Law in the South Pacific* (Routledge-Cavendish, 2015) 120.

71 Ibid.

As in the *Ready Mix Case*[72] the reality for the Court in *Australasian Conference Association Ltd v Mere Sela and Ors* was that no common law principle or rule seemed appropriate to the situation. It had to invent one.[73] In doing so it looked to custom and customary laws.[74] Estoppel is an equitable device but the courts of common law and equity do not always allow compromises in their judgments. As Zorn makes clear, even at Equity, which professes to be (and occasionally is) more attuned to justice and fairness than the Common Law, the winner-takes-all principles usually hold.[75] Customary law remedies are somewhat different in that there is always an attempt to strike a balance so that no one walks away from a dispute completely unsatisfied. There are compromises made.

The Court made such a compromise in *Australasian Conference Association Ltd v Mere Sela and Ors.* Instead of granting the eviction order sought by the plaintiff or giving every defendant title to the land, the Court compromised by estopping the defendant's removal and limiting the estoppel to only those defendants who were direct descendants of the original grantees. It also did not take away the plaintiff's right to the land. Instead it stated that despite the defendants' continued occupation of that portion of land, there were conditions that had to be fulfilled and in failing to fulfil them, the defendants could no longer occupy the land and the land would revert to the plaintiff.

There were no prior English or Fijian cases that had adopted such a remedy or made conditions to an existing remedy.[76] Common law courts play a fundamental role in cultivating an indigenous law, also called an autochthonous law or a local jurisprudence and they may follow the precedents of English judges in developing the common law from principles regarded as "common" to all England.[77] This statement may come from the need for uniformity in applying customary law in the Pacific. The concern here is, as was stated earlier in this article, customary law differs and applies differently in different jurisdictions and often within the same jurisdiction. Uniformity would therefore be restrictive and change the essence of the law itself.

---

72 *PNG Ready Mix Concrete Pty Ltd v The State, Utula Samana and Samson Kiamba*, above n 66.

73 Zorn, above n 65.

74 Ibid.

75 Ibid.

76 As was the case in *PNG Ready Mix Concrete Pty Ltd v The State, Utula Samana and Samson Kiamba*, above n 66.

77 New Zealand Law Commission, above n 63, 167.

Coventry J (also presiding in this case) had, in a Vanuatu case, stated:[78]

> Custom and common law have many features in common. One of those features is their flexibility to meet change and development, yet still retain their inherent qualities and value. Neither works on the basis of saying, this is how it was always done in the past and must always be done in the future.

The Court has not applied either species of law in its entirety but foreshadows an approach that provides hope for others who may be caught in a similar situation. In anticipation of such cases, Coventry J stated:

> I do not consider, given the peculiar facts of this case, that this decision detracts from the system of land registration in Fiji or indefeasibility of title. There are many pieces of land that are occupied by "squatters". Each proceeding must be examined upon its own facts.

This decision recognised customary law and the powers of the traditional owners to give land to another group of people who have no connection to the land but through the performance of certain customary obligations. The defendants in no way sought to apply their own customary law and the Court did not attempt to distinguish their custom from that of the indigenous landowners. In fact, it was not an issue in the case. At the time that the land had been first granted to the Solomon islanders, they would still have been speaking their own native tongues and practising the customs and traditions of their forefathers. Yet they chose to assimilate themselves into the customary ways of the iTaukei and adhere to the rules set out by the traditional chiefs. The question remains as to whether the Court would have been swayed in the same way had it been the custom of the Solomon Islanders that had been an issue.[79]

In 2016, the defendants who did not qualify as being direct descendants appealed to the High Court from the judgment ordering them to vacate the land.[80] Amaratunga J dismissed that appeal stating that the criteria had already been clearly laid out by Coventry J. An application for leave to appeal, accompanied by an application for

---

78 *Tenene v Nmak* [2003] VUSC 2; Civil Case 203/2002.

79 For example, in Solomon Islands the High Court had ruled that the reference to the customary law in the Constitution was not to the exclusion of other indigenous people living in the country who practised their own customs. Kent J stated that it should not be read restrictively but should be remedial in its application and given a fair, wide and liberal interpretation. See *Edwards v Edwards* (Unreported, High Court, Solomon Islands, Palmer LJ, 12 January 1996), accessible via www.paclii.org at [1996] SBHC 75.

80 *Australasian Conference Association v Sela* [2016] FJHC 914.

an extension of time in which to appeal the 2016 judgment was made to the Court of Appeal in 2020.[81] Both applications were dismissed.

Sela has been relied on in other land cases in Fiji. For example, in *Mal v Sahib*[82] the appellant sought to apply the facts in *Sela* as being applicable as the defendants had met the requirements of an equitable estoppel. Brito-Mutunayagam J on the other hand made it clear that the facts in the two cases are not comparable as the plaintiffs had never, for over 70 years since purchasing the land and despite knowing that the defendants were on the land, made any attempt to remove them from the land. In *Mal v Sahib* ownership had changed twice from the original owner to whom the alleged promise had first been made.

VII SIGNIFICANCE FOR FUTURE LITIGANTS

Australasian Conference Association Ltd v Mere Sela and Ors[83] is significant in that it not only highlights the plight of the descendants of Melanesian descendants of non-indigenous Fijians in Fiji, but also throws into focus the problems that arise when there is in existence one system of land rights and ownership to which people adhere and have adhered to for centuries and another that is superimposed upon it.[84]

Sela sets a precedent for the recognition of customary law of indigenous Fijian people by the courts, even though such law is not expressly recognised by the Constitution. Further, it establishes that customary land may be alienated under customary laws, rather than state law, and that a new class of people, who are not indigenous Fijians, may be given permission to live on indigenous land in perpetuity.

81 *Sela v Australasian Conference Association Ltd* [2020] FJCA 141. As of 1 July 2021 it is unknown whether the defendants who did not qualify under the 2007 judgment have been removed from the land.

82 Unreported, High Court, Fiji, Brito-Mutunayagam J, 8 February 2017, accessible via www.paclii.org at [2017] FJHC 84.

83 *Australasian Conference Association Ltd v Mere Sela and Ors* [2007] FLR 12.

84 As stated obiter by Coventry J.