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Customary law and women's rights in Solomon Islands

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Background

Solomon Islands is made up of several hundred islands, spread out over a sea area of approximately 1,340,000 square kilometres.[1] The social structure of the country is extremely complex. Culture and social organisation vary from island to island, and even from village to village. The official languages are English and Pidgin, but there are also about 65 vernacular languages and dialects.[2]

Solomon Islands became independent in 1978 (having been a British Protectorate since 1893), with a constitution brought into force by the British Privy Council.[3] This constitution incorporates international human rights (Chapter II), and also promotes local values by giving formal recognition to customary law. This law had continued to operate in traditional parts of society throughout the 'colonial' period.[4] Little attention appears to have been paid to the fact that human rights (particularly women's rights) and customary law embrace very different ideals. Customary law is based on male domination (see Brown and Corrin Care 1998), and even in those parts of the Solomon Islands where title to land descends through matrilineal lines, land disputes are generally litigated by men.[5] Human rights, on the other hand, are founded on principles of equality. The constitution is thus a vehicle for two competing notions. Like many other small Pacific Island countries, Solomon Islands faces the challenge of reconciling the two.

There is some guidance in the constitution as to the relative weight to be given to its provisions and to customary law generally. Section 2 declares the constitution to be the supreme law. More particularly, schedule 3 states that customary law will not apply if it is inconsistent with the constitution. On the other hand, the anti-discrimination section in Chapter II provides a number of exceptions to the right of protection, including those relating directly and indirectly to customary law. Further, inconsistency is often a matter of opinion. As in other countries, doubtful cases must be decided by the courts, taking into account the context not only of the constitution but also of Solomon Islands generally.

Constitutional provisions

Anti-discrimination

The Constitution of Solomon Islands incorporates a bill of rights, based on the United Nations' Universal Declaration of Human Rights 1948 and the European Communities' European Convention for the Protection of Human Rights and Fundamental Freedoms made in 1953. The preamble pledges to 'uphold the principles of equality'. This is given substantive force in s.15, which provides:

> (1) Subject to the provisions of subsections (5), (6), and (9) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
> (2) Subject to the provisions of subsections (7), (8), and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority...
> (4) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another description.

The width of protection in s.15 is also restricted by s.15(5), which contains seven paragraphs exempting certain categories of laws from the discrimination provisions. Section 15(5)(f) permits positive discrimination by stating that s.15(1) shall not apply to laws for the advancement of the more disadvantaged members of society. Paragraph (g) follows on from this by allowing special laws to be made for disadvantaged groups, whether advantageous or not, provided they are justifiable in a democratic society. Paragraph (a) exempts tax and revenue laws; paragraph (b) exempts laws relating to non-citizens; paragraph (c) exempts personal laws, such as laws relating to marriage, divorce, custody and inheritance; and paragraph (e) exempts land laws. Paragraph (d) provides that nothing in any law shall be held to be discriminatory to the extent that it makes provision for the 'application of customary law'. This restriction is open to different interpretations, which are discussed further below.

Customary law

The recognition of customary law as a source of law within the formal system shows respect for customary law at national level. This aim is reflected in the preamble, which commences by stressing pride in the 'worthy customs' of Solomon Islands people. Recognition is also an attempt to integrate customary law into the formal system. Section 75 states:

> (1) Parliament shall make provision for the application of laws, including customary laws.
> (2) In making provision under this section, Parliament shall have particular regard to the

customs, values and aspirations of the people of Solomon Islands.

Schedule 3 gives more detail regarding the effect of customary law in para. 3, which provides:

(1) Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands.

(2) The preceding subparagraph shall not apply in respect of any customary law that is, and to the extent that it is, inconsistent with this Constitution or an Act of Parliament.

Paragraph 3(2) of schedule 3 makes it clear that customary law is not to be applied if it is inconsistent with the constitution or a statute. This is also the implication from s.2, which provides: 'This Constitution is the supreme law of Solomon Islands and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.' Accordingly, a customary law that is inconsistent with constitutionally protected human rights will be void, unless within one of the stated exceptions, for example those in s.15(5).

Paragraph 3 goes on to empower parliament to take the matter further:

(3) An Act of Parliament may: –

(a) provide for the proof and pleading of customary law for any purpose;

(b) regulate the manner in which or the purposes for which customary law may be recognised; and

(c) provide for the resolution of conflicts of customary law.

Unfortunately, parliament has not exercised its powers under paragraph (3)(c). Progress with regard to sub-paragraphs (a) and (b) has not fared much better. Although the Solomon Islands Minister for Justice circulated the first draft of the Customs Recognition Bill for comment in 1993, no further action was taken on it until 1995 when a second draft was issued. The 1995 bill has still not been enacted.

Case law

In the case of *The Minister for Provincial Government v Guadalcanal Provincial Assembly*,[6] the Court of Appeal of Solomon Islands was called on to consider whether the Provincial Government Act 1996 was unconstitutional. This Act repealed the Provincial Government Act 1981, under which Provincial Assembly members were elected democratically. Under the 1996 Act, members were indirectly elected by Area Assemblies which consisted of 50 per cent elected members and 50 per cent non-elected chiefs and elders. As only males could be 'traditional chiefs', half of the members of an Area Assembly had to be male. This effectively denied females equal opportunity. While the point does not appear to have been pleaded or argued, the court considered its implications. It concluded that, as s.114(2)(b) mandated parliament to 'consider the role of traditional chiefs in the provinces', it had been recognised that 'traditional chiefs' should play a role in government at provincial level. The discrimination that would remain until the role of 'traditional chiefs' under the constitution was re-evaluated had, according to the court, been accepted in the constitution itself. Goldsborough JA stated:

> Parliament has made provision for provincial government. It was required to do so [under s.114]. It has considered, as required, the role of traditional chiefs. Indeed it has decided to enhance their role, as compared to the repealed legislation. In this regard it is clear that women at present may be disadvantaged, given that traditional chiefs are male. This I conclude cannot be said to offend against the constitution. It is a required consideration by the same constitution.

Unfortunately, their Lordships failed to consider the power conferred by s.114 in the context of the right to protection from discrimination contained in s.15. Of course, even if they had done so, there is still the stumbling block of s.15(5)(d). As stated above, this exempts laws providing 'for the application of customary law' from the protection given by s.15(1). However, the potential width of this exemption is limited when it is read in the context of s.75(1), which directs parliament to 'make provision for the application of laws, including customary laws'. The question then arises: is subsection (5)(d) designed to exempt all customary laws from the protection of s.15(1), or only those laws that govern the application of customary law, such as the Customs Recognition Bill 1995? The second interpretation appears more likely, particularly in light of the pledge in the preamble to support equality. If this is correct, the exemption is aimed at protecting laws specifying how, when and to whom customary law should apply, which might otherwise be unconstitutional because they only apply to certain parts of the community. On this interpretation, the Provincial Government Act 1996 should not have been upheld, as it is not such a law.

A similar question arose for consideration in *Tanavulu & Tanavulu v Tanavulu and SINPF*.[7] There, the court had to consider customary inheritance for the purpose of the Solomon Islands National Provident Fund Act. That Act provides that, if a member of the fund dies without nominating a beneficiary for their accumulated funds, distribution is to be in accordance with the custom of the member, 'to the children, spouse and other persons' entitled in custom (s.33(c)). No provision is made as to how this custom is established. In this particular case, the deceased had nominated his brother and nephew as beneficiaries when he joined the fund. As provided by s.32 of the Act, that nomination became void when he married the following year. After he died, his father applied for and was paid the amount held in the fund on the basis of custom in Babatana, South Choiseul. Of the $11,079 paid to him, the father deposited $4,000 in an interest-bearing deposit account in the name of the deceased's son. He used $3,000 to meet funeral expenses and paid $2,000 each to the deceased's brother and nephew. Seventy-nine dollars was used for his own purposes. The deceased's widow challenged this distribution, seeking a declaration in the High Court that she and her infant child were each entitled to a third share of the money. The evidence in the case showed that inheritance in the deceased's tribe was patrilineal and that the deceased's father was entitled to distribute the estate to relatives. According to customary law, the deceased's father had the discretion to pay some amount of the inheritance to the widow, but in some circumstances, for example as where she had left the father's house, he was entitled to leave her out of the distribution altogether.

Most of the argument concentrated on the proper interpretation of s.33(c). However, it was also argued for the widow that customary law that was discriminatory was unconstitutional. At first instance, the judge found that the word 'law' in s.15(1) did not include customary law. His basis for this finding was that the section was referring to a law to be made in the future and customary law was not such a law. Rather, it was 'evolving or was already pertaining at the time of the adoption of the Constitution'. This interpretation puts customary law outside the protection of s.15 for all purposes. However, it is open to question. While the word 'shall' may generally be used to denote indefinite future time, it is used by legislative drafters to denote an obligation (see Thornton 1987:90). In a negative phrase such as 'no law shall', it means 'a law must not ...'. His Lordship went on to say that discriminatory customary law would not be protected by the section in any event, because he considered that ss.15(5)(c) and 15(5)(d) excused discriminatory law in a case such as this.

Section 15(5)(c) exempts law, inter alia, 'with respect to devolution of property on death'. Arguably the distribution of funds under the National Provident Fund Act would not be covered by this, as the Act takes entitlements from the fund out of a deceased's estate for testamentary purposes. The contrary interpretation of s.15(5)(d) has already been discussed above.

The Court of Appeal upheld the first instance decision and limited their consideration of the conflict between customary law and protection from discrimination to the following words:

> The Constitution (s.15(5) and cl. 3 of Schedule 3) recognises the importance of customary law to citizens of the Solomon Islands. The former provision recognises that the application of customary law may have certain discriminatory consequences. The learned trial judge was correct in holding that the Act was not unconstitutional because s.36(c) discriminated against the widow.

The practical effect of both these decisions was to perpetuate discrimination founded on customary law and practice.

Conclusion

There are insufficient decisions involving resolution of conflict between customary law and anti-discrimination provisions to make any accurate predictions for the future.[8] However, it is apparent that the values encapsulated in s.15(1) to (4) are often diametrically opposed to the values underlying customary law in Solomon Islands. The failure of the Solomon Islands Constitution to address this conflict may be attributed an assumption by the British drafters that international human rights norms are universal. This approach fails to take into account the fact that traditional Solomon Islands societies are founded on community values and duties, rather than on individual rights.

The decisions discussed above support the view that judges trained in the common law tradition continue to interpret human rights provisions narrowly.[9] This approach appears to coincide with contemporary attitudes within the Pacific.[10] It may also assist in preserving the bill of rights in Solomon Islands, in the sense that insistence on immediate recognition of unconditional equality might be actively resisted on the basis that it threatens the very foundations of customary society. A gradual approach to the introduction of change from within the boundaries of that society may have a greater chance of long-term success.

There is no doubt that successful resolution of the conflict between customary law and human rights in Solomon Islands requires recognition and understanding of the different cultural perspectives in which they operate. The debate on human rights is finally being expanded outside its former geographical and philosophical boundaries (see, for example, Tomas and Haruru 1999). This may provide an opportunity for human rights to be redefined in a South Pacific context. At the same time, legal education within the region has expanded to include undergraduate and postgraduate study of customary law.[11] Armed with this knowledge and without preconceived notions of the superiority of Western law, the next generation of South Pacific lawyers may be better equipped to grapple with the conflict between customary law and human rights.

Notes

1. The present population is about 328,723 (1991 Government Census). Of these, about 93.4 per cent are Melanesian, 4 per cent Polynesian, 1.4 per cent Micronesian, 0.7 per cent European and 0.2 per cent Chinese.
2. Acknowledgement is due to Prof. J. Lynch and Dr R. Early of the Pacific Language Unit, University of the South Pacific (USP), who supplied this information.
3. Solomon Islands Independence Order 1978.
4. Customary law was encouraged during the Protectorate era as a means of social control; for example, Native Courts Ordinance 1942 (Solomon Islands).
5. See, for example, *Maerua v Kahanatarau* [1983] SILR 95. The same applies in other Melanesian countries; for example, 'Submission by the Fiji women's rights movement and the crisis centre', *Report of the Commission of Inquiry on the Courts*, Fiji Islands, which states that 'tradition, culture and custom in the main is defined by men, not women – therefore there is a conflict about whose custom is being applied' (1984:172).
6. Unreported, High Court, Solomon Islands, CAC 3/97, 23 April 1997, at p. 26.
7. Unreported, High Court, Solomon Islands, civ cas 185/1995, 12 January 1998.
8. For an example of conflict between customary law and the right to life enshrined in s.4 of the constitution, see *Loumia v DPP* [1985/6] SILR 158.
9. See also *Remisio Pusi v James Leni and Others*, unreported, High Court, Solomon Islands, cc 218/1995, 14 February 1997, where customary law was upheld in the face of a challenge on the basis of infringement of the right to freedom of movement and various other rights.
10. In a recent informal survey of final-year law students at USP, only 6 out of 33 students considered that women's human rights should override customary law. About 40 per cent of those students were women.
11. The School of Law at USP offers an LLB and postgraduate degrees, which include courses on customary law.

References

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