Chapter 6
Cultural Relativism vs. Universalism: The South Pacific Reality

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6.1 Introduction

In many countries of the world, international human rights texts explicitly or implicitly purport to be universal and to have binding effect. However, whilst many South Pacific countries are signatories to human rights conventions, in reality this has not resulted in tangible change. Issues remain, particularly in relation to poverty, governmental institutions and the rights of women, children and minorities. In some parts of the Pacific, culture and customary law have been relied on to justify the undermining of key human rights protections, particularly anti-discrimination norms.

This chapter looks at the question of whether human rights are universal and binding in the context of the South Pacific, and more particularly with reference to Solomon Islands.

6.2 International Law in Solomon Islands

The major international human rights texts are the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on Torture, and the Convention on the Rights of the Child.

Internationally, the Pacific has the lowest rate of any region in terms of ratification of human rights instruments. From 1892 to 1978, Solomon Islands was a

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British Protectorate. During that time, the United Kingdom government acceded to a number of international human rights instruments on its behalf. After independence, Solomon Islands succeeded independently to the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination in 1982. The country acceded independently to the Convention on the Elimination of All Forms of Discrimination Against Women in 2002 and the Convention on the Rights of the Child in 1995.

Solomon Islands is not a signatory to the Convention on Torture. Nor, somewhat surprisingly, has it succeeded to the obligations contained in the International Covenant on Civil and Political Rights. Some commentators have expressed concern about the lack of commitment to ratifying and implementing international human rights treaties within the region.

6.2.1 Binding Effect

The texts are of explicit binding effect on those countries that have ratified them. In respect of negative rights to provide certain freedoms, the obligations are strict. Positive obligations on States to provide the resources for certain rights to be recognised are treated less strictly, the obligation being only to take steps towards progressively realising these goals. Additionally, the international human rights texts allow for derogation from the rights set forth in those instruments in certain circumstances. In particular, provision is made for derogation in times of public emergency (ICCPR, art 4). Further, the degree to which States undertake to pursue the fulfilment of the rights varies. A number of States have also expressed reservations to various articles in these instruments. For example, in respect of the International Covenant on Economic, Social and Cultural Rights, Solomon Islands has maintained the reservations entered by the United Kingdom on original signature insofar as they are applicable. The result is that Solomon Islands retains reservations under the Covenant in respect of the provision of equal pay to men and women, the application of the Covenant to customary marriages and the obligation to provide compulsory primary education.

6.2.2 Universality

Universalism has been described as “the idea that human rights transcend national, historical and cultural boundaries and to which all players in an international arena should subscribe” (Farran 2009, 103). The international human rights texts purport to be binding on signatories with respect to all persons within the geographic territory of the signatory State. They are universal in the sense that the same rights are guaranteed to all within and between the State signatories.

The basic international instruments do not recognise any variation in the degree of protection offered based on cultural variances. Indeed, the idea that human rights

are universal was affirmed in the Vienna Declaration on Human Rights which noted that, while the differing history and backgrounds of countries needed to be taken into account, human rights were to be protected irrespective of differing political, economic and cultural systems.

6.3 Interpretation by International Institutions

International human rights obligations are regarded as universal and binding by international institutions such as the General Assembly, the International Court of Justice and the Human Rights Council. However, there are few interpretations of human rights obligations by the international human rights bodies that explicitly relate to Solomon Islands. The interpretations that do exist tend to come from bodies noting particular concerns in relation to treaties to which Solomon Islands is a party.

In 2007, a report from the Special Rapporteur on torture, containing summaries of credible allegations of torture, cruel, degrading or inhuman treatment, listed one allegation in Solomon Islands and noted the government response (Nowak 2007). An 18 year old male was sentenced to life in prison for a murder he committed when he was 14 years old. The government reported that the defendant's appeal against the sentence had been allowed, and the case remitted for resentencing.

In 2002, a report from the High Commissioner for Human Rights noted the concerns of the Committee on the Elimination of Racial Discrimination in respect of reports of displacement, hostage-taking, torture, rape, looting and the burning of homes in Solomon Islands in the context of political and ethnic unrest (Sub-Commission on the Promotion and Protection of Human Rights 2002).

In 2001, the Committee on the Rights of the Child considered the report of Solomon Islands in relation to its implementation of the Convention (Committee on the Rights of the Child 2002a). A list of issues for consideration was developed (Committee on the Rights of the Child 2002b). Similarly, a report was submitted to the Committee on Economic, Social and Cultural Rights in 2001 and a list of issues for consideration developed. The initial report of Solomon Islands was considered by the Committee on the Elimination of Racial Discrimination in 1983.

Apart from these instances, Solomon Islands does not appear to have come under consideration by the international human rights bodies. It has, for example, yet to come before the Universal Periodic Review Mechanism of the Human Rights Council; it is due to be considered in the eleventh session in 2011.

6.4 Enforcement of Human Rights Obligations

The mechanisms provided in the international texts for the enforcement of the rights they contain are limited. Most human rights treaty systems have a reporting procedure (Olowu 2006, 155, 176). However, Solomon Islands, like most South Pacific

countries, is well overdue to report (Olowu 2006, 155, 178). This may be explained, in part at least, by the burden that international reporting imposes on a State which is still developing, has other basic priorities (Corrin 2008, 8–9) and has suffered from civil unrest (Fraenkel 2004).

International institutions do encourage countries to comply with their periodic reporting obligations, in order to monitor compliance and by making substantive recommendations for reform. For example, in 2002, the Committee on the Elimination of Racial Discrimination noted that Solomon Islands had not submitted a report to the Committee since its initial report in 1983. While accepting the challenges facing Solomon Islands, the Committee said:

> In line with its previous recommendations, the Committee strongly urges the Government of Solomon Islands to avail itself of the technical assistance offered under the advisory services and technical assistance programme of the Office of the United Nations High Commissioner for Human Rights, with the aim of drawing up and submitting as soon as possible a report drafted in accordance with the reporting guidelines.

There had been previous communications to the same effect from the Committee on the Elimination of Racial Discrimination.

The Committee on Economic, Social and Cultural Rights considered the initial report from Solomon Islands when it was submitted in 2002. It made a number of recommendations for the improvement of compliance with the Covenant and encouraged Solomon Islands to send State representatives to undertake dialogue with the Committee. Likewise, as noted above, in 2001, the Committee on the Rights of the Child developed a list of issues for consideration in response to the report of Solomon Islands (Committee on the Rights of the Child 2002b).

6.5 Margins of Appreciation in International Texts

The international texts give States room to manoeuvre in relation to particular human rights, whether through provision for derogation in particular circumstances or through an obligation of progressive realisation. More generally, the language of rights is couched in terms which permit a culturally relative interpretation and takes into account regional and national cultural and political specificities.

The idea of a “margin of appreciation” has been used by the European Court of Human Rights to give States some discretion in the implementation of their human rights obligations. The term does not appear in the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘European Convention’) but stems from limitations on the exercise of Convention rights, which indicate that interference by the State may be justified in certain circumstances (Butler 2008, 687, 695–696). This idea has particular relevance in the South Pacific, where the margin of appreciation could be used to justify taking into account the culture, traditions and history of a Pacific State when determining whether a limitation on a certain right is justified (Butler 2008, 687, 706).

6.6 Normative and Empirical Universality

In Solomon Islands, as in many other small South Pacific Island States, there is a significant gap between the normative and empirical positions on universality. Whilst Solomon Islands is signatory to a number of international conventions, there is no express political commitment to human rights. Nor is there any serious debate amongst the country's political leaders about this. Caution has been expressed about the value of international instruments. For example, the usefulness of the Convention on the Elimination of All Forms of Discrimination Against Women and the Beijing Platform of Action have been questioned. It has been said that women have been "flooded with international instruments" and that they required modification to fit the circumstances of Solomon Islands. Scholars have also endorsed this view. Additionally, there is strong support for a relative approach to human rights in the South Pacific, which would accommodate the different cultural contexts in which rights operate. Cultural relativism can act as a challenge to the universality of human rights (Corrin 2009, 31, 54).

Generally, Solomon Islands' courts have acknowledged the country's commitment to human rights as expressed in international conventions. They have also confirmed the binding nature of the rights chapter in the Constitution. However, this is another area where the empirical position departs from the normative. In a number of judgments, the courts have failed to promote or even to enforce human rights. These cases are discussed below. Writing extra-judicially, Muria CJ has observed that modern regimes in the domestic sphere are categorised as "foreign" by ordinary islanders (Muria 1996, 7).

Human rights protections do not play a significant role in the lives of the majority of the population in Solomon Islands. Also, there is a "disconnect" between the formal dispute settlement system and local realities (Corrin and Brown 1998, 1334, 1351; Corrin 2009, 55–56). Protection is limited, both by restricted access to remedies and evidential problems (Corrin Care and Zorn 2005, 144, 159–160), particularly for women. Further, even where a formal judgment upholding human rights may be a Pyrrhic victory if the applicant is ostracised by the local community for seeking relief outside the traditional system (Corrin Care 2006 51, 79).

6.7 The National Legal Order

6.7.1 Introduction

Solomon Islands, like other common law States in the Pacific, has a "dualist system" in which international treaty law does not become part of domestic law unless specifically incorporated by legislation. To date, there is no legislation in Solomon Islands which specifically introduces the international texts into the internal order. There is no other legislation dealing specifically with human rights.

There are some individual statutes which protect certain rights but these are outside the scope of this chapter.

Whilst international law has not been encapsulated in domestic legislation, Solomon Islands' Constitution contains a Bill of Rights (Constitution Chap II) and provides a mechanism for the enforcement of those rights (Constitution s 18). It should also be noted that in common law countries, like Solomon Islands, protection is also provided by the common law. Solomon Islands also has an Ombudsman who plays an indirect role in human rights protection through review of government action. These three modes of protection require further elaboration.

6.7.2 Constitutional Provision

Whilst Solomon Islands has not incorporated international conventions into domestic law, Chapter II of the Constitution, entitled 'Protection of Fundamental Rights and Freedoms of the Individual', contains an extensive list of human rights protections. The Constitution provides that each person is entitled to these rights and freedoms, subject only to respect for the rights and freedoms of others and for the public interest (Constitution, s 3).

In particular, the Constitution protects:

- The right to life (s 4);
- The right to personal liberty (s 5);
- The right to be free from slavery and forced labour (s 6);
- The right to be free from inhuman and degrading treatment (s 7);
- The right to property (s 8);
- The right to privacy (s 9);
- The right to due process of law (s 10);
- The right to freedom of conscience (s 11);
- The right to freedom of expression (s 12);
- The right to freedom of association and assembly (s 13);
- The right to freedom of movement (s 14);
- The right to freedom from discrimination (s 15).

These provisions are modelled on the Universal Declaration of Human Rights Fundamental Freedoms (1950), containing specific rights and freedoms and detailed exceptions.

The High Court of Solomon Islands has original jurisdiction to hear an application by any person who alleges infringement, whether actual or potential, of their constitutional rights (Constitution, s 18(1) and (2)). A subordinate court may also refer any question arising before it as to the contravention of the rights provisions (Constitution, s 18(3)).

As the Constitution, which contains the human rights provisions, is the supreme law, it is clear that the State as a whole is bound by those provisions. However, the Constitution may be amended by legislation. Changes to Chapter II, protecting

fundamental rights and freedoms, require a majority of three-quarters of the legislature.

The draft of a new federal constitution is currently being discussed in Solomon Islands. This constitution differs in a number of key respects from the existing one. The human rights protections are far more extensive, encompassing both civil and political and economic, social and cultural rights and specific protections for women and other persons; it is made clear that the human rights provisions bind not only government acts but also those of individuals in certain circumstances; and, while custom continues to be recognised as a source of law to the extent that it is not inconsistent with the Constitution or other statutes, the exemptions customary law previously enjoyed in respect of human rights have been removed. A Constitutional Court and Human Rights Commission are to be created.

6.7.3 Courts and Common Law Rights

The hierarchy of the courts in Solomon Islands follows the typical three tier model of inferior court, superior court, and appeal court. The superior court is called the High Court. It has original jurisdiction to determine any question as to the interpretation or application of this Constitution (Constitution, ss 83 and 84(2)). More specifically, it has jurisdiction to determine applications for breach of the rights protected by chapter II (Constitution, s 18(2)). The appeal court is called the Court of Appeal and it has jurisdiction to hear appeals as of right from the High Court (Court of Appeal Act, Cap 6, s 11).

Courts in Solomon Islands have been slow to develop their own jurisprudence. Their approach to constitutionally enshrined human rights has been inconsistent.

With regard to common law rights, given the breadth of constitutional protection, there is very little need to resort to these. Solomon Islands follows the English common law and, in this manner, where necessary, the courts may protect rights. In some cases, this protection has been indirect, through an approach to statutory interpretation to the effect that Parliament is presumed not to intend to invade fundamental rights, freedoms and immunities. The courts have also accepted that various common law rights qualify for protection as rights, freedoms or immunities. These include:

- The right of access to the courts;
- Legal professional privilege;
- Privilege against self-incrimination;
- Immunity from the extension of the scope of a penal statute by a court;
- The right to procedural fairness when affected by the exercise of public power;
- Freedom from extension of governmental immunity by a court;
- Immunity from interference with vested property rights;
- Immunity from interference with equality of religion;
- The right to access legal counsel when accused of a serious crime;
- Protection from false imprisonment (habeas corpus).

6.7.4 The Ombudsman

Solomon Islands has an Ombudsman who plays an indirect role in human rights protection through review of government action. The public and independent office of the Ombudsman is established by the Constitution (Constitution s 96). Further provisions relating to the office and its powers are made by legislation (Ombudsman (Further Provisions) Act Cap 88). The role of the Ombudsman is to enquire into the conduct of the public service and other public bodies, assist in the improvement of practice and procedure and ensure the elimination of arbitrary and unfair decisions (Constitution s 97). Any person who has suffered injustice as a result of government action may make a complaint to the Ombudsman, who may investigate (Ombudsman (Further Provisions) Act Cap 88, ss 5–6). Where, after investigation, the Ombudsman is of the view that the action under consideration was contrary to law, based wholly or partly on a mistake of fact or law, unreasonably delayed or otherwise unjust or manifestly unreasonable, recommendations may be made to the department or authority concerned.

6.8 Enforcement of Rights at the National Level

A threshold question which arises in relation to enforcement of human rights in Solomon Islands is whether the constitutional provisions are enforceable against individuals. The Constitution as it presently stands makes no express reference to the parties bound by the rights chapter. Theory provides a spectrum between two opposing approaches to the potential applicability of human rights norms: the "vertical approach", in which rights protections apply only to violations by the State or State authorities, and the "horizontal approach", in which human rights protections extend to violations by individuals (Corrin 2009, 31). The Constitution is silent as to which of these approaches is to prevail. With human rights having their foundation in a desire to protect the individual from the might of the State, it might be assumed that the vertical approach would be prevalent. However, throughout the South Pacific region, it seems that the opposite is the case, with Solomon Islands jurisprudence demonstrating the only real discussion of the issue (Corrin 2009, 53). Some members of the judiciary have favoured the "horizontal approach". Others have been of the view that the rights contained in the Constitution are "principally" concerned with the relationship between citizen and State. This tendency to support the vertical approach has gained further support and was favoured in *Ulufa'alu v Attorney-General* [2005] 1 LRC 698 the latest Court of Appeal decision to consider this matter. However, the comments in that case are strictly obiter, as the case was decided on other grounds. Further, the Court of Appeal was anxious not be taken as laying down a general inflexible rule that fundamental rights were only applicable vertically. They noted that this was a developing area and considered that the nature

of the particular right relied on and the surrounding context would have to be examined in each case, stating:

> It is necessary to consider the precise rights sought to be relied on and the context in which they are relied on. This Court does not think that it can be said as an absolute principle 'always horizontal' or 'never horizontal' ([2005] 1 LRC 698 [32]).

In any event, it should be noted that the Constitution provides that a Court may decline to grant constitutional relief if other means of redress are available (Constitution 1978, s 18(2)).

As has been noted above, a significant proportion of the Solomon Islands population has little interaction with State institutions, with the majority of dispute settlement occurring outside of the formal context through customary processes. It has therefore been proposed that, rather than adopting either a horizontal or vertical approach to human rights enforcement, a "lateral approach" should be used in the Pacific region (Corrin 2009, 67–68). This approach would recognise the pluralistic nature of Solomon Islands by making human rights protections enforceable against not only the State but also traditional leaders (Corrin 2009, 67).

The draft of the new constitution for Solomon Islands, referred to above, provides for the rights provisions it contains to apply not only to the government but also to 'all other persons and bodies'. However, this is limited "to the extent that it is applicable taking into account the nature of the right and the nature of the duty imposed by the right". The extent of this limitation is unclear.

Legislation in Solomon Islands may be reviewed for compatibility with the human rights provisions of the Constitution. This power depends on an interested party seeking judgment on whether the legislation is constitutional. The Court may decline to exercise jurisdiction if satisfied that there are alternative means of redress available (Constitution, s 18(2)).

The High Court of Solomon Islands may "make such orders, issue such writs and give such directions" as it considers appropriate "for the purpose of enforcing or securing the enforcement of any of the provisions" (Constitution, s 18(1)). These powers have been interpreted broadly and used as a basis for declaring an Act void and severing words from a statute to make it conform to the Constitution. Interestingly, any person aggrieved by the violation of their fundamental rights may apply to the High Court for an award of compensation to be made against the person or authority violating the relevant constitutional protection (Constitution, s 17; Nonggorr 1993, 278).

Although certain human rights are constitutionally entrenched in Solomon Islands and are therefore superior to other laws, this does not mean that they will always prevail (Corrin 2007, 143, 151). There are several reasons for this. Firstly, these rights are subject to exemptions. In particular, the right to freedom from discrimination is specifically made subject to the application of customary law. The section exempts laws which provide "for the application of customary law" from the protection of non-discrimination. There is case law to the effect that this provision exempts all customary law from the requirement of non-discrimination. However, it

has been argued that this is reading the provision too broadly and that the constitutional exemption should really only protect laws "designed specifically to govern the application of customary law", rather than all customary rules which might have discriminatory effect (Corrin Care 2006, 51, 74). The existence of this exemption has often resulted in customary practices adversely affecting women in particular. This is because the customary system is largely patriarchal and status-based, and capable of operating to the detriment of women.

Secondly, human rights are subject to more general provisos. The Constitution provides for laws to contravene certain human rights protections set out in the Constitution in a time of public emergency (Constitution, s 16(7)). A period of public emergency is defined to mean either a time of war or a time during which a declaration of public emergency has been made (Constitution, s 16(1)). Laws passed during that time will be valid even if inconsistent with the fundamental freedoms contained in the Constitution, provided they are reasonably justified in the circumstances for the purpose of addressing the situation arising or existing.

In addition, the Constitution provides that custom is a source of law and its importance is emphasised by the Preamble. Although the Constitution is the superior source of law, the fact that custom is explicitly recognised can influence the courts in determining the existence of an inconsistency between custom and human rights (Corrin 2007, 143, 151). For example, in *Pusi v Leni*, a case concerning an alleged violation of the constitutional freedom of movement resulting from the application of customary law, doubt was cast on the superior force of the human rights provisions in the Constitution. Muria CJ considered that the Constitution clearly embraced "the worthiness, the value and effect of customary law" and noted:

> The Constitution itself recognises customary law as part of the law of Solomon Islands and its authority therefore cannot be disregarded. It has evolved from time immemorial and its wisdom has stood the test of time. It is a fallacy to view a constitutional principle or a statutory principle as better than those principles contained in customary law. In my view, one is no better than the other is. It is the circumstances in which the principles are applied that vary and one cannot be readily substituted for the other.

6.9 National Interpretation of Rights

6.9.1 Domestic Interpretation of Constitutionally Enshrined Rights

Constitutionally enshrined rights have been interpreted by Solomon Islands courts in a number of cases.. These decisions are in accord with the Privy Council's broad approach to the interpretation of constitutionally enshrined rights. Others are not.

Particular problems have arisen where human rights conflict with customary law. In these cases, the courts appear to take a narrow view of the application of human rights. Where the texts are referred to, they appear to be interpreted narrowly.

The most striking example of this is that the human rights provisions are not always taken as universally binding. This is demonstrated by cases where customary law has prevailed.

One example of this is *Pusi v Leni*, which has already been referred to above. In this case, the applicant claimed that he had been banned from entering a particular village due to insulting behaviour towards the village elders. He claimed that this was a violation of his constitutional rights, inter alia, to freedom of movement. Muria CJ found on the facts that there was no such ban and that the applicant was reluctant to go into the village not because of a ban but because he had not atoned for his breach of custom. As noted above, Muria CJ made some important obiter dicta comments regarding the place of custom in the constitutional hierarchy.

Two other examples where the court has managed to avoid declaring customary law unconstitutional occurred in relation to the right to freedom from discrimination. As noted above, this right is subject to a constitutional exemption in favour of laws providing for the application of customary law. The first case is *Tanavalu v Tanavalu*, where a widow was claiming rights over the property of her deceased husband. The Court accepted the evidence that, under customary law, the deceased's father was entitled to take over the deceased's estate, to the exclusion of the widow. The widow argued that, if that was the case, the rules of customary law were discriminatory. However, the court refused to treat this as unconstitutional on the grounds of sexual discrimination. Whilst it was accepted that discriminatory 'law' was unconstitutional, the court held that the word 'law' in this context did not include customary law. The judge's basis for this finding was that the words, "no law shall", in the relevant section, were referring to a law to be made in the future. As customary law already existed at the time of the adoption of the Constitution, it was not such a law. According to this decision, no customary law, no matter how discriminatory, would offend the anti-discrimination provision. The court went on to say that even if this had not been the case, the Constitution exempts from the anti-discrimination provision any laws making provision "for the application of customary law". This is a wide interpretation as it is arguable that the shield is only for a law designed specifically to govern the application of customary law. The decision was upheld by the Court of Appeal.

The second case involving discrimination where the court declined to declare customary law unconstitutional despite its discriminatory effect was *Minister for Provincial Government v Guadalcanal Provincial Assembly*. In that case, the Court of Appeal was called on to consider whether the Provincial Government Act 1996 was unconstitutional. This Act introduced a system whereby Provincial Assembly members were indirectly elected from Areas Assembly members. As Area Assemblies consisted of 50% elected members and 50% non-elected chiefs and elders, who were all male, females were effectively denied equal opportunity. The Court concluded that as the Constitution mandated parliament to "consider the role of traditional chiefs in the provinces" (s 114(2)(b)), 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 therefore been accepted in the Constitution itself.

Ironically, due to pressure from existing Provincial members, the Provincial Government Act 1996 was repealed and replaced by the Provincial Government Act 1997, which reintroduced direct elections of Provincial Assembly members.

This approach can be contrasted with the Court of Appeal's decision in *Loumia v DPP* [1985–6] SILR 158, where the right to life was in question rather than freedom from discrimination. In that case, the accused had been convicted of murder under the Penal Code (Cap 26). He argued that his actions were justified as he had acted in the belief that he had a legal obligation under customary law to retaliate against a person responsible for the death of his close relative (Penal Code Cap 26 s 204(c)). The Court of Appeal held, that even if the duty to kill was part of the customary law of Solomon Islands, such law was contrary to right to life (Constitution s 4), and therefore unconstitutional.

In other cases involving the application of the rights chapter in the Constitution, where customary law has not been used as a defence, the Courts have, generally, interpreted rights liberally. In some cases they have made reference to the analogous provision in the international text as an additional ground for upholding the right in question.

6.9.1.1 The Right to Life

The right to life was considered in *Regina v Su'u*, where the court was called on to consider whether the accused were entitled to a legislative amnesty under the Amnesty Act 2000 (SI) in respect of murder charges. Mwanesalua J held that killing was a violation of the right to life protected by the Constitution, which "adopted" Article 3 of the Universal Declaration of Human Rights. As the killing violated human rights, it was held that the amnesty provisions did not apply.

6.9.1.2 The Right to Be Free from Inhuman and Degrading Treatment

In *R v Rose* the court had to decide whether corporal punishment in a school environment amounted to inhuman and degrading punishment, which was prohibited by the Constitution (s 7). Ward CJ determined that, while such punishment could be inhumane, this was not always the case. It was a matter of degree and depended on the way in which the punishment was carried out. In this case the punishment was unreasonable and the right to protection was upheld.

6.9.1.3 The Right to Due Process of Law and Personal Liberty

In *Regina v Mae*, on a bail application, it was held that a delay of 15 months between charge and trial was inconsistent with the right to be tried within a reasonable time. Similarly, in *Kimisi v DPP* [1990] SILR 82 a delay of over 2 years was considered prejudicial to a fair trial.

Manedetea v Kulagoe [1984] SILR 20 considered the requirement that courts be independent and impartial, holding that it required that courts not be perceived by a reasonable bystander to be biased.

In *Kenilorea v AG* [1984] SILR 179 the Court held that retrospective legislation purporting to direct the Court as to the manner of dealing with litigation currently pending before it infringed judicial independence. Orders had been made under price control legislation that had never been passed, and an application was made to declare the Orders invalid. The parliament attempted to pass legislation that retrospectively validated the orders.

In *DPP v Sanau* [1987] SILR 1, a provision of the Criminal Code allowing for summary dismissal was held to be void as it contravened the requirement that trials be held in public.

In *K v Regina*, consideration was given to the Constitutional requirement that an accused be brought to trial within a reasonable time or consideration be given to bail (Constitution s 5(3)(b)). The Court referred to Amnesty International's Fair Trials Manual, and took account of the relevant considerations of the Human Rights Committee and regional human rights bodies referred to in the Manual. A similar approach was taken in *Seko v Regina*.

6.9.1.4 The Right to Freedom of Conscience

In *Lobo v Limanilove*, Kabui J considered the proper balancing of interests between religious groups attempting to worship in the same area. Insofar as one religious group was attempting to halt another carrying out religious activities in a certain area, that conduct was held to be unconstitutional.

6.9.1.5 The Right to Freedom of Association and Assembly

Folotalu v Attorney-General considered the right to freedom of association in the context of the requirement of a deposit from a candidate wishing to stand for election. The applicant contended that the deposit hindered him in his right to freely associate in forming or joining a political party. It was held that the deposit was so high as to infringe this right and was not justifiable.

6.9.1.6 The Right to Freedom of Movement

Solomon Islands courts have upheld the right to freedom of movement where the government has acted without legal authority to prevent an individual from leaving the country. For example, in *Jamakana v AG* [1983] SILR 127, a resident of Solomon Islands was illegally banned from leaving the country by the Minister for Immigration. Although the constitutional protection defined freedom of movement as meaning 'the right to move freely throughout Solomon Islands, the right to reside in any part of Solomon Islands, the right to enter Solomon Islands and immunity

from expulsion from Solomon Islands' (s 14(1)), this was interpreted broadly to include the right to depart from Solomon Islands and the ban was held to be unconstitutional. Compensation, which was awarded on the same basis as damages for tort, was awarded against both the government and the Minister personally. Similarly, in *Tong v AG* [1985–6] SILR 112, where immigration authorities withheld a citizen's passport without legal authorisation, this was held to restrict his freedom of movement and compensation was awarded.

A less liberal approach can be observed in the following cases:

6.9.1.7 The Right to Property

In *Fugui v Solmac Construction Company Limited* [1982] SILR 100, the applicants claimed customary rights of ownership over certain land which had been subject to logging by a company. The Court held that, on the facts of the case, a right to crop coconuts amounted to "property" within the meaning of the Constitution. However, the constitutional right of protection from deprivation of property (s 8) was limited to acquisition by right of statute or statutory regulation. The appropriate remedy for unlawful acquisition by private individuals was a normal claim in damages.

6.9.1.8 The Right to Privacy

Solomons Mutual Insurance Ltd v Controller of Insurance concerned an application to quash certain search and seizure warrants on the basis, inter alia, that they were not compliant with the Criminal Procedure Code and alternatively, that there had been a breach of the applicant's right to privacy under the Constitution. Palmer J had difficulty determining the correct respondents to the Constitutional action and preferred to decide the case on the basis of breach of the Code. His Honour also noted that once a person has been charged and brought before the courts, it was inappropriate for the police to obtain further information relating to the matter by way of search warrant.

6.9.1.9 The Rights to Due Process of Law and Personal Liberty

Gerea v Director of Public Prosecutions [1984] SILR 161 considered the Constitutional protection of a fair hearing by an independent and impartial court as it related to a mandatory penalty of life imprisonment for murder. It was submitted that requiring a court to impose a mandatory life sentence intruded upon the independence of that judicial body. The Court concluded that while the nature of a "hearing" extended to the sentencing process, the independence of a court was not infringed by it being required to impose a certain sentence for a particular offence. The courts were sufficiently:

> independent within the meaning of s 10(1) if in the exercise of that function they are subject neither to control nor pressure by any outside body. The requirement of s.10(1) is in our

> opinion fully met if, as is the case in Solomon Islands, they are subject to no direction by the legislature or the executive government as to the disposition of a particular case and to no form of pressure from outside bodies in the performance of their judicial functions.

Taurii v Kerehote [1985] SILR 80 involved a justice with an alleged interest in the outcome of the case he was hearing. The applicant, by not objecting when invited, was considered to have waived his right to do so.

Qalo v Qaloboe concerned the question of whether the parties to an appeal could provide the funds necessary to allow a hearing to take place when those funds were otherwise not forthcoming. The Court concluded that such a step would interfere with the governmental role of appropriating funds established by the Constitution. The fact that the Constitution provided for the establishment of courts by law and for the fundamental right to be tried within a reasonable time did not mean that there was an enforceable duty on the government to continue to fund the courts.

6.9.1.10 The Right to Freedom of Expression

In *DPP v Solomon Islands Broadcasting Corporation* [1985–1986] SILR 101, the respondent was charged with criminal contempt for having broadcast a statement by a Member of Parliament criticising the judiciary. The respondent argued that a finding of contempt would limit the right to broadcast, and as such would infringe the freedom of expression guaranteed by the Constitution (s 12). The Court held that a finding of contempt would not infringe this freedom as it fell within the ambit of the proviso exempting anything "done under the authority of any law … for the purpose of … maintaining the authority and independence of the courts" (s 12 (2)).

In *Digicel (Solomon Islands) Ltd v Attorney-General* the applicant applied to quash the grant of a telecommunications licence to a third party on the grounds that it infringed the applicant's freedom of expression by creating a monopoly on telecommunications services. The Court considered that, given the circumstances surrounding the grant of the licence, and provision for review within the licence itself, it could not be said that the grant was unjustifiable.

6.9.1.11 The Right to Freedom of Association and Assembly

Tri-Ed Association v SICHE [1985–6] SILR 173 concerned a law restricting the ability of academics to associate with others in certain trade unions. The Constitution allowed for restrictions to be placed on public officers as long as they were reasonably justifiable in a democratic society. It was held that it had not been demonstrated that the restriction was not justifiable and the constitutional case was not made out.

Feratalia v Attorney-General concerned both freedom of expression and association in the context of refusal to permit a protest to be held. While accepting that the refusal was a restriction on those freedoms, the High Court held that it was one that was reasonably justifiable given the prevailing circumstances at the time. It was therefore a legitimate restriction.

6.9.1.12 The Right to Freedom from Discrimination

Folotalu v Attorney-General, discussed above, also considered the right to freedom from discrimination. The applicant contended that in being obliged to pay a deposit in order to stand as an electoral candidate, he was being discriminated against as an individual living in a rural area, compared to those living in urban centres. It was held that no discrimination had been established.

R v Bowie [1988–9] SILR 113 concerned a charge of gross indecency. The relevant provision of the Penal Code applied only to males. This was alleged to contravene the right to freedom from discrimination on the grounds of gender. The Court held that the law was inconsistent with the Constitution, but that the section could be saved by severing the word 'male'.

6.9.2 Domestic Use of International Texts as an Aid to Interpretation

As international human rights law is not incorporated into Solomon Islands law, there is little jurisprudence dealing directly with the international law. However, the courts of Solomon Islands do refer to the international texts and decisions reasonably frequently as an aid to interpretation of the fundamental rights provisions found in the Constitution. Case examples demonstrating this include the following:

Regina v Su'u
In this case, reference was made to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in determining the content of the right to life.

Loumia v DPP [1985–6] SILR 158
In this case, reference was made to the European Convention on Human Rights as the model for the rights and freedoms set out in the Constitution.

R v Rose
In this case, reference was made to the European Convention on Human Rights and associated case law as relevant to the interpretation of the protection against inhuman or degrading punishment.

Timo v Regina
This was a bail application. The Court referred to the Human Rights Committee's General Comment 8, which refers to principles of pre-trial detention and the presumption of innocence.

Seko v Regina
Reference was made to the jurisprudence of the Human Rights Committee and the regional human rights bodies.

K v Regina
In this bail application, the key international texts were cited. It was noted that these must be read subject to the Constitution and domestic legislation. Particular attention was given to the Convention on the Rights of the Child as the accused in question was a youth. The Court noted that much of the relevant requirements of the Convention, namely that a young person not be subjected to torture, or other cruel inhuman or degrading treatment, and that a young person not be deprived of their liberty arbitrarily, were reflected in the Constitution and other Acts.

Reference to these texts is not specifically required or referred to in the Constitution, but will depend on the approach of the court. This can be compared with other countries in the region., In Fiji, for example, the Constitution provides that the courts "must, if relevant, have regard to public international law applicable to the protection of [constitutionally enshrined] rights" (s 43). Fiji has thereby incorporated international norms into the domestic legal system. The Constitutions of both Papua New Guinea and Tuvalu allow reference to be made to the international conventions, declarations and recommendations, as well as to judicial decisions relating to human rights in determining whether an act is reasonably justifiable in a democratic society.

6.10 The Role of Regional Organizations

While there are a number of regional groups in the South Pacific of which Solomon Islands is a member, such as the Pacific Islands Forum and the Melanesian Spearhead group, there is no regional human rights organisation. Nor is there any regional protection system supporting the national system of human rights. It has been noted that the Asia-Pacific is the only region in the world without a regional human rights protection mechanism (Chiam 2009, 127, 128ff; Jalal 2009, 177, 187). In 1989, LAWASIA, the Law Association for Asia and the South Pacific, adopted a draft Pacific Charter of Human Rights. However, the draft did not receive support at a governmental level (Jalal 2009, 177, 181). LAWASIA is currently considering a revival of this initiative.

Although there is no regional human rights organisation or regional protection system, use is made of the universal instruments and decisions of international and regional bodies in interpreting protection provided on the national level. Also, there have been a number of United Nations-sponsored initiatives designed to examine the possibility of establishing a human rights mechanism for the Pacific (Chiam 2009, 127, 128ff; Jalal 2009, 177, 180). In 1996, the Commonwealth Secretariat organised a workshop on human rights education in the South Pacific. The attendees recommended that a Pacific Charter of Human Rights be adopted and that a South Pacific Centre for Human Rights be established. However, this was not taken further.

More recently, there has been some support for a Pacific regional human rights mechanism in the 'Pacific Plan', created under the auspices of the Pacific Islands

Forum, of which Solomon Islands is a member (Jalal 2009, 182, 185–186). Nonetheless, it remains the case at present that there is no Pacific human rights organisation for Solomon Islands to join.

6.11 The Relationship Between National and International Systems

As discussed above, international texts do not prevail over national laws as the former have not been incorporated into domestic law. Even if they had been incorporated into domestic legislation, they would be subject to the Constitution, which is the supreme source of law in Solomon Islands. The Constitution of Solomon Islands protects most of the key rights protected under the universal instruments. As noted above, the provisions are modelled on the Universal Declaration of Human Rights (1948) and the European Convention, containing specific rights and freedoms and detailed exceptions. The protections tend to emphasise civil and political rights rather than economic, social and cultural rights. In terms of modalities, the national system is arguably stronger than the international system, with provision made for the hearing of disputes and the granting of remedies in the event of contravention.

Theoretically, the human rights protections conferred by the Constitution have binding effect throughout the country and are superior to other national laws. However, there is a significant gulf between the form of rights protection in the South Pacific and realities, with constitutional protections not bringing about real cultural change (Corrin Care 2006, 51, 78). For the majority of the population therefore, the Constitution, and the protections it contains, play little, if any, role in daily life (Corrin 2009, 55–56). For most people, enforcement of human rights law in the formal court system is not a practical option; they are far more likely to encounter local dispute settlement, in which custom plays a key role and human rights are unfamiliar (Butler 2008, 687, 688).

As has been noted above, international decisions are sometimes cited in the interpretation of the Constitution of Solomon Islands. Reference is also often made, for interpretive purposes, to the case law of various other jurisdictions where similar issues have arisen for consideration.

The references to international texts and decisions, referred to above, would seem to suggest some degree of convergence between the national and universal level. However, in general this does not appear to be the case. In fact, the national jurisprudence perhaps demonstrates a preference for customary law over human rights, where the two come into conflict. Apart from this, decisions are largely on a case by case basis. Neither is there any uniform regional jurisprudence on human rights.

As discussed above, in theory, national human rights protections contained within the Constitution prevail over any inconsistent laws. They therefore have binding effect nationally. However, this effect is diminished by the scope of exceptions and by the narrow interpretation that is often preferred by the courts.

As there are no regional human rights instruments in the Pacific, it might be expected that national rights would only converge with the international human rights instruments. However, there is some convergence with the instruments of other regions, such as Europe, demonstrated by the occasional use of such instruments as aids to interpretation at the domestic level.

6.12 Conclusion

In Solomon Islands, as in many other small island States in the South Pacific, human rights are not widely regarded as universal or indispensible. For many people, particularly those living in rural areas, human rights, whether contained in international law or the Constitution, are a foreign concept. For the majority of the population, traditional values have more relevance. There is no strong convergence of human rights protection at international and national level, although there is some limited convergence evidenced by the courts' reference to international instruments as an additional basis for some of their decisions.

Whilst there may be an increasing tendency in some parts of the world to recognise human dignity as the supreme value and to place the individuals in the centre of social, economic, legal and political activities of State and international institutions, this assertion does not hold true for Solomon Islands. Whilst human dignity is recognised as an important right, the prevailing ethos in Solomon Islands and much of the Pacific is not concerned with the individual. The emphasis is on collective rather than individual rights (Thaman 1999; Corrin 1999, 251; Corrin 2009, 57). There is also an emphasis on duties rather than rights. Further, these collective rights and duties are not centered around the State, but stem from and are specific to traditional communities. While some have argued that the notion of collective rights is not foreign to international instruments, those instruments do tend to focus on the rights of the individual in accordance with liberal theory (Tamata). Despite the existence of human rights protections, Solomon Islands remains predominantly patriarchal and status-based (Corrin 2009, 57).

As discussed above, there is no regional protection mechanism in Solomon Islands. The influence of the international regime is limited by the fact that it has not been incorporated into domestic law. At the national level, although human rights are constitutionally enshrined, those rights are often divorced from the realities of everyday life. There is strong resistance to some aspects of human rights from sectors of Solomon Islands society where traditional leadership and customary law are still strong. Constitutional guarantees have not brought about tangible cultural change and the values underpinning traditions and culture are still widely accepted (Corrin 2006, 78). Where traditional values conflict with human rights, the former are likely to prevail, at least in the rural sector. In addition to tensions between cultural norms and human rights, abuses occurring during the ethnic conflict in Solomon Islands between 1998 and 2003 have been a serious challenge to human rights (Farran 2009, 4–5).

Bearing in mind the importance of retaining the valuable fabric of the complex social network, a gradual approach to bridging the gap between universal values and traditional norms may be more productive. A more nuanced approach to resolving conflicts between human rights and customary law is required. As suggested by the Australian Law Reform Commission ('ALRC'), in the context of recognition of Australian indigenous law, "The approach to be adopted must be flexible … and must pay particular regard to the practicalities of the situation". Such an approach might focus "less on which rights trump other rights according to either the cultural relativist or universalist position, but instead on an outcome that minimizes the extent to which each conflicting right must be compromised" (Charters 2003, 21).

Above all, there is a need for further research and discussion. Comparative work is both important and useful, but this should not confine the debate to existing models as opposed to searching for fresh ideas. Further, the process of change must involve Solomon Islanders at every level. In the past, there has been a failure to consult, and consultation which has taken place has usually proceeded from a preordained, imported agenda. The language of rights is an important ingredient in the search for common values and the formulation of principles that are resonant in the context of Solomon Islands.

Human rights education is also an essential element of any initiative for change. Many people in Solomon Islands remain ignorant of their rights (Corrin 2008). Apart from preventing access to remedies, this leads to suspicion and fear of change. Education, therefore, plays an important role in ensuring human rights protections have practical force (Corrin 2008, 17). There is also the question of adequate resourcing. Without adequate and sustained support, human rights initiatives are likely to be driven by an 'outputs' approach that has no lasting effect on embedded structures and attitudes.

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