CUSTOMARY LAW AND HUMAN RIGHTS IN SOLOMON ISLANDS
A COMMENTARY ON *REMISIO PUSI v JAMES LENI AND OTHERS*

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Introduction

In the post-Independence era, many countries of the South Pacific region have encountered conflicts between human rights provisions on the one hand and customary law on the other. Solomon Islands is no exception. The Constitution of Solomon Islands contains a Bill of Rights Chapter, based on the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. It makes detailed provision for rights and freedoms and the exceptions to which they are subject. Customary law is also recognised by the Constitution as a formal source of law, and is given emphasis in a number of sections.

There is some guidance in the Constitution as to the relative weight to be given to provisions of the Constitution and customary law, in the form of section 2. This declares the Constitution to be the supreme law. More particularly, it is laid down in Schedule 3 that, to the extent that it is inconsistent with the Constitution, customary law shall not apply. However, inconsistency is often a question of degree. In the case of doubt, it is ultimately a question for the courts. In such cases, the courts must perform a delicate balancing exercise, taking into account all the circumstances of Solomon Islands, including the emphasis on communal rights and other aspects of its cultural heritage.

One area in which conflict between customary law and the constitutional protection

has been revealed is freedom of movement.[1] In the 1997 case of *Remisio Pusi v James Leni and Others*[2] the High Court was called upon to consider such a conflict. This article examines this decision and the legal framework in which it was decided and considers its implications for the future of the law in Solomon Islands.

Constitutional Provisions

Human rights provisions relating to freedom of movement

The fundamental rights and freedoms provisions are contained in Chapter II of the Constitution of Solomon Islands. Section 14(1) provides:

> No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means 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.

This protection is then qualified by section 14(2), which states:

> Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.

Section 14(3) goes on to provide further exceptions for any provision in or action under the authority of any law made in respect of seven specified cases, that can be summarised as follows:

> restrictions on an individual's movement or residence, in the interests of defence, public safety or public order;

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[1] For examples arising in other jurisdictions see *Teitinnong v Ariong* [1987] LRC (Const) 517; *Tagaloa v Inspector of Police and Fuataga v the Inspector of Police* [1927] NZLR 883; *Italia Taamale and Taamale v the Attorney General of Western Samoa*, unreported, Court of Appeal, Samoa, 2/95B, 18 August 1985; *Tuivaita v Sila* [1980-93] WSLR 17.

[2] Unreported, High Court, Solomon Islands, cc 218/1995, 14 February 1997.

> restrictions on movement or residence generally or on that of a class of persons, in the interests of defence, public safety or public order;
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> restrictions on movement or residence of a non-citizen;
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> restrictions on the acquisition or use of land or other property in Solomon Islands;
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> restrictions on movement or residence of public officers;
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> extradition to a foreign country or transfer to that country to serve a sentence of imprisonment imposed under Solomon Islands law;
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> restrictions on movement or residence by order of court following conviction or to ensure appearance at trial or at certain other proceedings.

In the case of a restriction imposed in either of the first two cases a safeguard is imposed by section 14(4), which gives a right to apply for a review of such restriction by an independent and impartial tribunal, presided over by a person qualified for admission as a legal practitioner, and appointed by the Chief Justice.

Additionally, in all cases, the law or the action done under its authority must be reasonably justifiable in a democratic society.

Customary law provisions

The recognition of customary law as a source of law within the formal system serves two main purposes. First, it shows respect for customary law and confirms its importance at national level. This aim is demonstrated in the preamble,[3] which

[3] Whilst the term 'preamble' is commonly used by the courts, and was used in the case on which this article focuses, this terminology is not found in the Constitution itself. As the paragraphs in question contain underlying principles and philosophies and use the words 'declare' and 'agree and pledge' in capital letters, they might perhaps be more correctly referred to as the 'Declaration, Agreement and Pledge'. Notwithstanding this, the term 'preamble' is used to identify the opening passages of the Solomon Islands Constitution in this article, in accordance with the prevailing practice.

commences by stressing pride in the 'worthy customs' of Solomon Islands' people. The second purpose is to integrate customary law into the formal system. Section 75 of the Constitution of Solomon Islands states:

> Parliament shall make provision for the application of laws, including customary laws.
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> 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 paragraph 3, which provides:

> Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands.
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> 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 section 2 of the Constitution, 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, generally a customary law that is inconsistent with constitutionally protected human rights will be void. An exception to this can be found in section 15(5)(d), which potentially exempts customary law from the anti-discrimination provisions in section 15.

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

> (3) An Act of Parliament may: -
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> (a) provide for the proof and pleading of customary law for any purpose;
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> (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.

Parliament has not exercised its powers under paragraph (3)(c).[4] 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 the Bill until 1995 when a second draft of the Bill was issued. The 1995 Bill has still not been enacted.

Case Law

The case of *Remisio Pusi v James Leni and Others* followed an argument between the plaintiff and the respondents, who were members of the local chiefs committee. The plaintiff shouted offensive words at them and told them to leave his property. The next day the plaintiff sent an apology coupled with an offer to pay $20 compensation through one of the respondents, but the respondents refused to accept this, as it was not done in the proper customary manner. The plaintiff sent a further apology through the area constable, who wrote to the respondents asking them to accept the plaintiff's offer of compensation. The third attempt to apologise was made through the plaintiff's solicitor. Neither of these attempts was successful. The plaintiff then applied to the High Court for an order that the decision of the village chiefs banning him from the village was 'null and void' and for compensation for breach of his constitutional rights. In particular, the Plaintiff alleged breaches of the right to personal liberty (s 5); the right to protection from deprivation of property (s 8); the right to freedom of assembly and association (s 13); and the right to freedom of movement (s 14). Section 14, which is discussed above, is the most relevant section. Section 5 is more concerned with incarceration than with restriction of movement; section 8 relates more to compulsory acquisition; and section 13 is mainly directed to hindrance of formation or membership of political parties, trade unions or other associations.

Muria CJ dismissed the application with costs, on the basis that the plaintiff's individual rights had not been contravened, as he had not established that he was

[4] In *Allardyce Lumber Company Limited v Laore*, unreported, High Court, Solomon Islands, cc64/89, 10 August 1990, Ward CJ went so far as to suggest that paragraph 3(3) of Schedule 3 of the Constitution required parliament to provide for proof and pleading of customary law before it could be considered by the courts.

subject to a banning order. Rather, His Lordship considered that the plaintiff's reluctance to go to the village was due to the fact that he had not yet atoned for his serious breach of custom.

Whilst this finding was strictly sufficient to dispose of the matter, His Lordship proceeded to give guidance on the position where customary law and human rights provisions conflict in the following significant statement:

> Lest it may be forgotten by anyone else and those who intend to apply [sic] the proper and lawful authority of community leaders with constitutional challenges would be advised not to lose sight of the Preamble of the Constitution as well as section 76 and Schedule 3 of the Constitution. Those provisions clearly embrace the worthiness, the value and effect of customary law in this country. 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. It is the circumstances in which the principles are applied that vary and one cannot be readily substituted for the other.

His Lordship went on to say:

> I have made these observations because it appears to the court that this case is a classic example of an attempt to use the Constitution to circumvent the lawful application of custom, a course of action that may well engender disharmony in society. Such a course must not be allowed to flourish in this country.

This case is an important milestone in the evolution of Solomon Islands jurisprudence and indicates an intention on the part of the High Court to nurture customary law and practices. Further, his Lordship placed emphasis on the preamble, in spite of section 2 of the Constitution, which declares the Constitution to be the supreme law, and made it clear that constitutional provisions would not necessarily be applied in preference to customary law. Rather, it would depend on the circumstances of the case.

The emphasis given to the words of the preamble in *Remisio Pusi v James Leni and Others* follows the approach which Muria CJ had earlier foreshadowed in *John Wesley Talasasa v Attorney-General and the Commissioner of Lands*.[5] There his Lordship stated that, if called upon to consider the right of ownership of water flowing through customary land in a future case, he would bear in mind the guiding principles in the preamble to the Constitution.

This can be contrasted with the approach of the Court of Appeal in *The Minister for Provincial Government v Guadalcanal Provincial Assembly*.[6] That case arose after the passing of the Provincial Government Act 1996, which repealed the Provincial Government Act 1981 and replaced the system of Provincial Assemblies, made up of elected members, with a system of Provincial Councils with members consisting of the Chairpersons of all the Area Assemblies in the province. Area Assemblies were to consist of elected members and an equal number of members appointed from chiefs and elders. It was therefore possible for the Provincial Assembly to consist exclusively or predominantly of non-elected members. At first instance[7] Palmer J, relying heavily on the wording of the preamble, held that the 1996 Act was inconsistent with the underlying Constitutional principles of representative and responsible government, and therefore void. This decision was unanimously reversed by the Court of Appeal. Kapi P reviewed the case law from other jurisdictions relating to the use of the preamble in interpretation. His Lordship concluded as follows:

> I consider that the Preamble of the Constitution of Solomon Islands is no different to the nature of preambles in other constitutions. The preamble is a general statement of jurisprudential philosophy or underlying principles or beliefs by the people as the basis of the new nation. To this extent it is permissible as has been illustrated by decisions from other jurisdiction for courts to have regard to preambles in construing provisions of constitutions. However, in my opinion, these general statements must not be read as constituting legal principles on their own.

[5] Unreported, High Court, Solomon Islands, cc43/95, 15 May 1995.

[6] Unreported, Court of Appeal, Solomon Islands, CAC 3/1997, 11 July 1997.

[7] Unreported, High Court, Solomon Islands, cc309/96, 26 February 1997. For a more detailed discussion of this case see Corrin Care 1997.

Both Kapi P and Goldsborough LJ concluded that, as the nature and power of provincial government were left entirely to the National Parliament by section 114, there was no provision for the preamble to work upon. There was then only the question of whether democratic principles could be implied as a requirement for provincial government. Kapi P was in no doubt that they could not. Goldsborough LJ considered that, having rejected the notion of ambiguity in section 114, the question of 'necessary implication' should not have been considered by the court. Williams LJ agreed that specific provisions must prevail over general intention derived from words of wide import but, in any event, concluded that the method of election provided by the 1996 Act was not undemocratic. Accordingly he felt that this was not "an appropriate case in which to finally determine the Court's power with regard to implying terms into the Constitution or drawing implications therefrom".

The Minister for Provincial Government v Guadalcanal Provincial Assembly is of relevance here, not only as an illustration of a different approach to the use of the preamble, but also because the practical effect of upholding the Provincial Government Act 1996 was to perpetuate discrimination founded on customary law and practice. As only males could be 'traditional chiefs' the result of the provision in the Act for the membership of Area Assemblies was that one half of the members of every Area Assembly would be male. This effectively denied females equal opportunity.

Section 15 of the Constitution provides that no law shall make any provision that is discriminatory, either of itself or in its effect. Whilst noting the discriminatory effect of the 1996 Act, the Court of Appeal upheld its effect on the basis that s 114 of the Constitution mandated Parliament to 'consider the role of traditional chiefs in the provinces' and thereby recognised the imbalance or discrimination that would remain until the role of 'traditional chiefs' under the Constitution was re-evaluated.[8] However, the argument that discriminatory provisions are validated by Parliament's mandate in section 114 without reference to the fundamental rights provisions takes that section out of the context of the Constitution as a whole. Apart from the exceptions listed internally, Chapter II requires legislative powers to be exercised within its boundaries. A relevant exception is ssection 15(5)(d), which insulates laws making provision for the application of customary law from the anti-discrimination provisions. Their Lordships did not refer to section 15 directly. Accordingly, they

[8] Ironically, following this decision Parliament enacted the Provincial Government Act 1997, which repealed the Provincial Government Act 1996 and re-enacted the Provincial Government Act 1981 with all amendments made prior to its repeal. It also contained modifications and transitional provisions necessary in consequence of the repeal of the 1996 Act and other incidental provisions.

did not discuss whether they regarded section 15(5)(d) as protecting the offending provisions of the 1996 Act from the fundamental rights protection in section 15(1) to (3). In fact section 15(5)(d) appears to be referring to the exercise of Parliament's power under section 75(1) to "make provision for the application of laws, including customary laws" rather than to the enactment of substantive provisions. Even on the broadest interpretation of s 15(5)(d), it could not be said that making provision for the role of traditional chiefs in provincial government is making provision for the application of customary law.

Thus, as in *Remisio Pusi v James Leni and Others*, the court refused to uphold the human rights provisions in the face of conflicting customary law, in spite of section 2 of the Constitution.

Conclusion

The number of decisions involving resolution of conflict between customary law and human rights provisions is still too small to make any accurate predictions for the future.[9] However, the attitude displayed seems to confirm the tendency of judges trained in the common law tradition to interpret human rights provisions narrowly. In the context of conflicts between such provisions and customary law, however, this conservatism may be viewed by some as radicalism. Proponents of customary law may applaud the restrictive interpretation of human rights provisions if the result is the enhancement of the role of customary law within the legal system. Whilst this approach may attract criticism from human rights activists, it is arguable that it also has the effect of preserving human rights charters in Pacific Constitutions, and indeed the fact that there have been no post-independence amendments restricting their operation could be viewed as evidence of this. The latest South Pacific constitution, the Constitution of the Republic of the Fiji Islands 1997[10] contains a prominent Bill of Rights.

There is of course the wider question of whether international human rights concepts are suitable for the South Pacific in the first place, or whether they require adaptation to suit the circumstances of the region. From the point of view of their interaction with customary law, it seems clear that such law must be viewed in

[9] For an example of conflict between customary law and the right to life enshrined in section 4, Constitution of Solomon Islands, see *Loumia v DPP* [1985/6] SILR 158.

[10] Enacted by the Constitution Amendment Act 1997.

context before foreign standards are applied. Particular customs that are, prima facie, objectionable to outsiders, may be justifiable when considered in the light of the operative infrastructure. For example, customs involving deterrents may be easier to comprehend in the context of village life, where no rehabilitative programmes exist. An approach such as that of Muria CJ in *Remisio Pusi v James Leni and Others* may be viewed as a practical means of adaptation through judicial interpretation.

Reference

CORRIN CARE, Jennifer
1997 'Democratic Fundamentals in the Solomon Islands: Guadalcanal Provincial Assembly v The Speaker of National Parliament.' *Victoria University of Wellington Law Review* 27: 501-515.