

PERSONAL/COMMON LAW CONFLICTS AND WOMEN'S HUMAN RIGHTS IN THE SOUTH PACIFIC: THE SOLOMON ISLANDS EXPERIENCE



*The Hon Sir John Muria,
Chief Justice of Solomon Islands*

Introduction

Human rights principles have been incorporated in most of the Pacific Islands countries' constitutions, something which was done as a pre-requisite to independence. These countries have a common feature of a plural legal system. There are the customary law, statute laws and legal processes imported during the colonial rule before independence, and laws passed by the national legislatures. All these co-exist and are assuredly changing to meet the circumstances of each of these countries.¹

The countries in the South Pacific region are of varying background. The three main ones are Melanesian, Polynesian and Micronesian. Despite the different cultural and ethnic background, the common feature of a plural legal system runs through most, if not all, of the countries in the region. The space limitations of this paper do not allow exposition of the effect of the legal systems of all the countries in the region on the rights and freedoms of the individuals in those countries. I shall therefore limit this contribution to my own country, Solomon Islands.

Historical and cultural background

Solomon Islands lies about 2,000 kilometres northeast of Australia and had been settled as far back as 1300-1000 BC. The first European sighting of the islands was by a Spanish explorer, Alvaro de Mendaña in 1568.²

Solomon Islands consists of many islands, with six of them being the large ones and having large populations. The total population of Solomon Islands was 285,000 in 1986 and it is now well over 300,000, with the country's population growth rate as 3.5%.

The indigenous population is mainly Melanesian. There are however other races who make up the population, for example, Micronesian, Polynesian, European and Chinese.

¹ See generally M A Ntuny (ed), *South Pacific Islands Legal Systems* (Honolulu, University of Hawaii Press, 1993).

² *Id* at 268.

The country was declared a British Protectorate in 1893. It was in 1967 that steps were first taken to have Solomon Islands become self-governing and then independent. Self-government was actually given in 1976 and independence was achieved two years later on 7 July 1978.

Sources of law in Solomon Islands

The Constitution adopted at independence specifies the laws applicable in Solomon Islands. These are:

- the Constitution
- Acts of the National Parliament of Solomon Islands
- Acts of the United Kingdom Parliament of general application in force on 1 January 1961
- customary law
- the common law

The Constitution is the supreme law of the country and any law that is inconsistent with the Constitution shall be void to the extent of the inconsistency.

Human rights

The Constitution provides for the protection of individual rights and freedoms. These rights are respected by the authorities and have consistently been defended by an independent judiciary. The fundamental rights and freedoms of the individual are protected under the provisions of Part II of the Constitution. Section 3, Part II of the Constitution, provides as follows:

“3. Whereas every person in Solomon Islands is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedom subject to such

limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedom of others or the public interest.”

Protection against discrimination on the ground of “race, place of origin, political opinions, colour, creed or sex” is guaranteed under section 15 of the Constitution.³ Any person whose rights or freedoms under the Constitution has been contravened is entitled to compensation. This is provided for under section 17 of the Constitution.⁴

Women and tradition

In order to express any views on the conflicts which may possibly arise on the rights of women in the modern Solomon Islands society, it is important to appreciate first the conflicts presented between traditional and introduced norms on the status of women in countries such as Solomon Islands, where traditional values play a considerable role in maintaining what the country now enjoys — peaceful co-existence between the various different groups of people in one happy peaceful country. Thus the name by which Solomon Islands is often referred to today is “the Happy Isles”.

In Melanesian societies, such as Solomon Islands, women play important roles. These roles include maintaining continuity of the clans or the tribes through the bearing of children, maintaining and preserving the status of their husbands as well as the status of their leaders in their communities, maintaining continuity in land rights (in matrilineal society), and maintaining family stability in the homes. Simply because women perform these roles would not mean that women in Melanesian society are regarded as second-class or lower to men. It is very much a matter of perception, and in most cases that perception depends on those who are giving their perceptions and the basis on which their perceptions are made.

Rights over customary land are extremely vital in Solomon Islands society, especially where customary land comprises more than 85% of the land. In matrilineal communities, the women carry with them the rights over that land. They cannot simply be ignored in such situations.

³ Section 15 states that “no law shall make any provision that is discriminatory either of itself or in its effect” and “no person shall be treated in a discriminatory manner...” and provides in paragraph (4) that “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 such description.”

⁴ Section 17 states:
“Any person any of whose rights or freedoms under this Chapter has been contravened shall be entitled to compensation for the contravention thereof from the person or authority which contravened it.”

Having said all that, it is observed that in developing countries such as Solomon Islands where very often traditional norms and structure are expected to function alongside the introduced non-Melanesian system, instances of incompatibilities between the two systems are bound to surface. Under the introduced system, the social structure, particularly in the secular sphere of the society in Solomon Islands, has been greatly affected.

The effects of these changes are more apparent in some areas than others, as illustrated in the following examples:

Family matters

Traditionally, a woman in some societies in Solomon Islands is expected to bear children for the husband, and his relatives who have paid the bride price for the woman before the marriage. The effect of the bride price is that the children will belong to the husband and his relatives should the wife die or leave the husband.

The traditional support system in the family will ensure that the children are cared for together by the husband's side of the family in the event that the husband and wife separate. Separating the children is not encouraged in custom since it is regarded as a disturbing factor for the children.

Those of us who have practised in the English common law system know that such a notion is not readily accepted, although we strive to find what is "in the best interest of the children" in cases of divorce or legal separations. In our attempts to do justice, we grant a decree *nisi* or decree of judicial separation and award the younger child to the mother and the older one to the father with the added justifying phrase, "in the best interest of the children", or award all the children to the mother who has limited means of support and order the husband to pay alimony.

The Constitution of Solomon Islands does not allow discrimination on the ground of sex, hence the interest of both the husband and the wife must not be sacrificed one for the other, whether by reason of custom or statute law. Yet, the Constitution clearly declares that custom is part of the law of Solomon Islands, with the qualification that it must not conflict with the Constitution or Acts passed by Parliament.

In this context I shall refer to a case decided by the High Court of Solomon Islands on appeal from the Magistrate's Court.⁵ The Magistrate's Court decided that in accordance with custom the father should have custody of the two children of the marriage. On appeal, the High Court ordered retrial and ordered the custody of the younger child to the mother and the elder one to the respondent father. The court not only took into account what was in the best interest of the children, but obviously recognised that the woman had rights to her children as well,

⁵ *Sukutaona v Houanihou* [1982] SILR 12.

a right which in some societies in Solomon Islands is curtailed by customary law.

Land matters

In Melanesian society, customary land is owned not by one person but by a tribe or a sub-clan and is passed on either patrilineally or matrilineally. Although in the matrilineal society, the rights of a woman over the land are recognised, she is very seldom consulted by men in land matters. Most of the land dealings are conducted by the men and in most cases the women are simply expected to accept the decisions made by men on such matters.

In the modern land tenure system, women are entering into the land registration system as joint-owners in registered land. However, not all women are able to do this. Those who do so have some measure of security to cling to, particularly when marriages break down. Where there are no joint registered interests in land, the courts have been able to accord women their entitlement in such cases.⁶ In a male-dominated society like Solomon Islands, it has to be appreciated that the courts have been left free to administer equal protection of the law, so that the rights of women and their interests are not unduly sacrificed to their detriment.

Decision-making

One of the keys to balanced and harmonious society is shared decision-making, especially in a multi-cultural society like Solomon Islands, where many of the women's rights and duties are centred around child care, family health, nutrition or subsistence agriculture. The men have always been the key players in politics, economics and other national matters of importance.

It is not until recently that women in Solomon Islands have become involved in politics. Today a woman sits in the National Parliament as an elected representative of her people. Other women have also been elected into Provincial Assemblies. Thus, in the decision-making bodies, women have been able to exercise their rights to compete for membership in those bodies, an exercise which in traditional Solomon Islands would be very rare, if not unlikely.

The government has recognised and encouraged women to participate in decision-making. It has appointed women to be members of a number of important statutory bodies, for examples, the Leadership Code Commission, the Law Reform Commission, the Citizenship Commission, the National Education Board, the Town and Country Planning Board, the Solomon Islands Broadcasting Corporation and the Teaching Service Commission. These are some of the key areas where important decisions are made and the women are fully participating.

⁶ *Kuper v Kuper* [1987] HC Civil Case No 12 of 1987 (unreported).

Currently the tribunal responsible for dealing with industrial disputes, the Trade Disputes Panel, is chaired by a qualified female lawyer. The other members of the Panel are men. As chairperson, she is responsible for determining the extent of the rights of thousands of employees and employers. Traditionally, such role would be an impossible assignment for a woman to undertake.

Domestic violence

There is very little documented evidence on violence against women in Solomon Islands. However, there are instances where women have been subjected to threats of violence both physically and emotionally. Though the magnitude of domestic violence has not been ascertained, it has been a cause for concern, not only for the women and women's organisations, but also for the interested groups outside the women's circle, such as non-governmental organisations and churches.

Instances of domestic violence usually occur in homes and reporting of instances to police is very rare. However, even if cases are reported, almost in all those cases, either they are dropped by the women before getting to court or are settled out of court. There is also a further aspect to this: police are often reluctant to interfere or prosecute in such cases, perceiving such cases as domestic disputes.

In today's Solomon Islands, the laws which give benefit to the women are derived from British practice.⁷ To a Solomon Islander, these are "foreign laws" which are regarded as not reflecting the custom and traditions of the people. These laws empower the courts to grant custody of children to the wives and to order restraint, maintenance and other protective measures in favour of women. Despite the perception that such laws are foreign, the courts have always considered and dealt with cases that are brought before them arising out of instances of domestic violence. In many of these cases, restraining orders are issued against the husbands, these orders have very often resolved the conflicts. Experience has shown that court orders are always respected and abided by, even by the most irritated husband who sees such order as a product of "foreign law".

Women and modern Solomon Islands

Solomon Islands had been under colonial rule for more than a three-quarters of a century (85 years) before gaining independence on 7 July 1978. The impact of the colonial administration and outside influence have had a considerable effect on the people generally, in the way they think as well as in their social behaviour.

⁷ For example, Islanders Divorce Act (Cap 48) and the Affiliation, Separation and Maintenance Act 1971.

One of the manifestations of this influence can be seen in the areas involving women and their related activities, such as programmes to raise women's awareness of their rights and interests.⁸ Twenty years ago, such "women's activism" was a rare phenomenon or at least an activity that had not been encouraged in Solomon Islands. Perhaps one of the reasons for such rarity was that the notion of "gender equality" and "gender difference" were non-issues in those days, since women were perceived to be created to be different from men and each of them was ordained to order himself or herself according to the purpose for which he or she was created. This reasoning also perpetuates the notion that because of the gender distinction, there must also follow different treatment. It is no surprise that in present-day thinking, women have turned their attention to this seemingly discriminatory distinction, with a view to eradicating or at least minimising any recognition of gender difference, so that women and men should be considered to be essentially the same and treated the same.⁹

Women's "activism" and other women awareness programmes in Solomon Islands have not started until very recently, particularly after the government's assistance in establishing the Solomon Islands National Council of Women, which is a body responsible for addressing issues of concern to women, as well as providing a link with the relevant government ministries and other organisations for support in women's activities and development. Up to now the Council has been active and has had the support of the Government. As a result of some of the awareness programmes organised by the National Council of Women, some consciousness has emerged among the women groups and individuals of their rights and of the need to be given equal opportunities to exercise their rights. It is no longer uncommon to hear women asserting their rights publicly and demanding to be given equal opportunities to participate in the country's development.

In Solomon Islands, the law accords women equal legal rights both under the supreme law, the Constitution, and statutes. It must, however, be appreciated and has to be said that Solomon Islands is a tradition-based society, where custom and other traditional practices will still remain the order of the day while interacting with the introduced concepts in the same society. Based on the co-existence of the two systems, it is not surprising that a report on human rights in Solomon Islands remarked that despite constitutional and legal protection against discrimination, women remain victims of discrimination in this tradition-based society.¹⁰

⁸ See, eg, *The Solomon Islands National Plan of Action for Women, Strategies and Programmes of Action 1995-1998*.

⁹ Asia-Pacific Forum on Women Law and Development, *Workshop on Feminist Legal Theory and Practice*, Chiangmai, 20-22 July 1995.

¹⁰ United States Department of State, *Country Reports on Human Rights Practices for 1995*, Solomon Islands, Section 5.

In strict observance of the Constitution, custom or tradition law and practices which are discriminatory in nature and effect must be regarded as contravention of the Constitution and must be null and void. The courts in Solomon Islands have continued to maintain their duties of upholding the provisions of the Constitution safeguarding the rights of the individuals against violation. The courts have also unhesitatingly declared customs which are contrary to the Constitution null and void. In *Loumia v DPP*,¹¹ both the High Court and the Court of Appeal rejected the argument that the appellant had a legal duty to kill the deceased because the deceased killed the appellant's brother. This argument is premised on the notion that custom is part of the law of Solomon Islands. Both courts held that such a custom is in conflict with section 4 of the Constitution, ie, protection of right to life, and so cannot be part of the law of Solomon Islands.¹²

The approach of the national courts to human rights guarantees

It is pertinent that the approach taken by the national courts in Solomon Islands on constitutional rights is seen not only as giving meaning and effect to the constitutional guarantees of fundamental rights and freedoms, but also as compatible with international and comparative human rights law. This has to be so, since the framers of the Constitution who incorporated these human rights provisions surely must have had in contemplation those international principles. This necessarily entails an exercise of observing the proper approach to interpreting those constitutional rights, the approach taken by courts of other countries with similar constitutional provisions and the principles as contained in the international legal instruments on human rights such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights),¹³ the Universal Declaration of Human Rights,¹⁴ and other international declarations on human rights.

¹¹ [1985-1986] SILR 158, [1986] LRC (Crim) 62 (CA of Solomon Islands).

¹² Section 4 states:

"(1) No person shall be deprived of this life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law in force in Solomon Islands of which he has been convicted.

(2) A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable —

- (a) for the defence of any person from violence or for the defence of property;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) for the purpose of suppressing a riot, insurrection or mutiny; or
 - (d) in order to prevent the commission by that person of a criminal offence,
- or if he dies as the result of a lawful act of war."

¹³ 213 UNTS 221, with new text and protocols 1-11, 15 HRLJ 102.

¹⁴ GA Res 217A(III), adopted on 10 December 1948.

The principle articulated by the Judicial Committee of the Privy Council in *Minister of Home Affairs v Fisher*¹⁵ is that a “generous approach” must be taken when interpreting the words of the constitution regarding constitutional rights. This approach has been adopted without reservation in Solomon Islands in *The Speaker v Danny Philip*,¹⁶ which is a case dealing with the respondent’s right as a Member of Parliament to move a motion of no confidence in the Prime Minister. There are other cases which also consider the principle laid down in the *Fisher* case.¹⁷ These cases, although not directly concerned with women’s human rights as such, reflect the approach of national courts when considering the constitutional rights and freedoms of the individual.

In the above-mentioned case, *Sukutaona v Houanihou*,¹⁸ apart from the other grounds of appeal, there was a constitutional right element which had been ignored by the trial court. The respondent husband gave evidence in the Magistrate’s Court in English, a language the appellant wife did not understand. What was said by the husband in English was not interpreted to the wife. On this the High Court pointed out:

“If this were so it is a most serious matter as she would, of course, be unable to understand the case what was being made out against her.”

The wife’s right to know what was said against her stems from the right to a fair hearing guaranteed by the Constitution of Solomon Islands.

Application of international and human rights law

With the growing awareness and application of the international and human rights law, courts in many Commonwealth countries have been influenced in this area of the law. Beside the Judicial Committee of the Privy Council, the Supreme Court of India,¹⁹ the Supreme Court of Zimbabwe,²⁰ the Court of Appeal of Singapore,²¹ the Court of Appeal of Botswana,²² the High Court of Solomon Islands,²³ and many other courts in the Commonwealth have on occasions applied the highly

¹⁵ [1980] AC 319, [1979] 3 All ER 21.

¹⁶ (1991) Civil Appeal No 5 of 1990 (unreported).

¹⁷ For example, in *Kenilorea v AG* [1984] SILR 179, [1986] LRC (Const) 126 (CA of Solomon Islands), and *DPP v Rolland Kimisi* [1991] Civil Appeal No 67 of 1990, the Court of Appeal noted the four factors set out in *Barker v Wingo*, 407 US 514, 33 L Ed 2d 101 (1972), on the question of the right to speedy trial.

¹⁸ [1982] SILR 12.

¹⁹ *Rangarajan v Jagjivan Ram & Others* [1990] LRC(Const) 412 (SC of India).

²⁰ *Ncube and Others v State*, 1985 (2) SA 702, [1988] LRC (Const) 442 (SC of Zimbabwe).

²¹ *Teo Soh Ling and Others v the Minister of Home Affairs* [1990] LRC (Const) 490 (HC of Singapore).

²² *State v Petrus and Another* [1985] LRC (Const) 699 (CA of Botswana).

²³ *R v Rose* [1987] SILR 45, [1988] LRC (Crim) 369 (HC of Solomon Islands). It applied the cases *Tyrer v UK*, European Court of Human Rights, Judgment of 1978, Series A, No 26, (1980) 2 EHR 1, and *State v Petrus*. The High Court held that corporal punishment is not inherently inhuman but could become so by the manner of its execution.

persuasive value of the international principles on human rights as found in the European Convention on Human Rights and in a number of the decisions of the European Court of Human Rights.

Conclusion

There has been very little by way of cases coming before the courts in Solomon Islands dealing with issues directly on the women's human rights as such. Perhaps the time has not yet arrived. However, the courts have already had occasions to consider cases involving breaches of constitutional rights and freedoms, and in some of those cases persuasive values of international principles on human rights have been applied. The approach taken by the courts in Solomon Islands in enforcing human rights provisions under the Constitution will, on the whole, be applicable as well to enforcing women's human rights principles.

The conflicts, as I have already mentioned earlier in this paper, will however remain. This is because custom will always play an important role in a traditionally based society like Solomon Islands. It will be for the courts to play an important and decisive role in the midst of this conflict, with a view to ensure that human rights, be they those of men or women, are respected and are not allowed to suffer or be sacrificed by reason of differences in sex or gender.