BREAKING THE MOULD: CONSTITUTIONAL REVIEW IN SOLOMON ISLANDS

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On a souvent soutenu que les chances de succès de l'importation d'un système légal étranger dans un autre pays, restaient subordonnées à la nature des textes de lois concernés. Ce constat est plus particulièrement vrai pour les règles de droit public qui sont tributaires d'une nécessaire adéquation avec les spécificités culturelles des pays dont elles sont issues.

La Constitution des Iles Solomon fournit la parfaite illustration de ce postulat, puisque depuis son instauration en 1978 de nombreuses difficultés sont apparues dans la cohabitation entre les règles coutumières et les règles importées. Le constat vaut aussi bien pour les règles de formes que les règles de fond. L'opposition culturelle était si forte que certains n'ont pas manqué de s'interroger sur le bien-fondé de la transposition quasiment à l'identique du système de Westminster au sein d'une société fortement empreinte de pluralisme juridique.

Il a fallu attendre la fin du conflit armé des années 90, pour que l'on commence à s'interroger sur l'adéquation du système de Westminster aux réalités politiques et sociales des Solomon. Toutes les forces politiques des Solomon s'accordaient sur ce constat, et la commission de réforme de la constitution devait permettre le vote du Federal Constitution of Solomon Islands Bill 2004 (SI). Il reste cependant que les réformes ont principalement porté sur les rapports qui doivent s'instaurer entre le droit coutumier et les droits de l'Homme et qu'à l'analyse, ce texte évite soigneusement de remettre véritablement en cause les principes de gouvernement antérieurs qui restent encore aujourd'hui fortement inspirés par le système de Westminster.

The constitutional framework of Solomon Islands is under active consideration as part of the political stabilisation programme of Solomon Islands. This paper comments on the draft for a new constitution and on particular issues of a longstanding nature that remain to be resolved.

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I INTRODUCTION

It has been argued that the success of legal transplants depends on the type of law involved, with public laws being the least likely to succeed due to their cultural specificity.[1] The *Constitution of Solomon Islands* seems to lend support to this contention. Since it was enacted in 1978 a number of conflicts have been revealed between the indigenous and introduced orders. Some of these are conflicts of cultures; others are conflicts of substance, between enacting provisions. From a general perspective, the *Constitution* has given rise to concern about the suitability of the Westminster style of government to the circumstances of Solomon Islands.[2] More specific concern has been expressed about the pluralistic legal system.[3]

No concerted attempt was made to address these problems until the Constitution came under scrutiny during the armed conflict in the late 90's.[4] Under pressure, cracks appeared in the 'Westminster' façade of government and the rule of law disintegrated. The vast divide between the introduced system of law and governance on the one hand and traditional authority and practices on the other was finally acknowledged. During the peace talks, the government was forced by the rebel groups to commit itself to a review of the *Constitution*. This review eventually resulted in the Federal Constitution of Solomon Islands Bill 2004 (SI). Unfortunately this document failed to address some of the fundamental issues. This article does not look specifically at the suitability of the Westminster style of government for Solomon Islands, which has been addressed elsewhere.[5] Rather, it looks at some of the specific problems relating to customary law, human rights and introduced legislation, arising under the current constitutional arrangements. It examines how these matters have been dealt with in the Bill and considers whether the proposed constitution has solved the problems identified and is likely to fulfil the aspirations of Solomon Islanders.

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1 O Kahn-Freund "Uses and Misuses of Comparative Law" (1974) 37 Modern Law Review 1, 5-6.

2 See eg, Sam Alasia "Party Politics and Government in Solomon Islands" 1997, ACT: State, Society and Governance in Melanesia, RSPAS, Discussion paper 97/7 <http://dspace.anu.edu.au/handle/1885/41732> accessed 17 May 2007; J Corrin Care "'Off the Peg' or 'Made to Measure': Is The Westminster System of Government Appropriate in Solomon Islands?" (2002) 27(5) Alt LJ 207.

3 K Brown "Customary Law in the Pacific: An Endangered Species?" (1999) 3 JSPL 8.

4 Although there have been four constitutional reviews since independence: Kausiama 1979, Lulae 1985, Mamaloni 1987 and Kemakeza (Tuhaika) 2001. For an account of the armed conflict see J Fraenkel *The Manipulation of Custom: From Uprising to Intervention in the Solomon Islands* (Victoria University Press, Wellington, 2004); C Moore *Happy Isles in Crisis: The Historical Causes for a Failing State in Solomon Islands 1998-2004* (Asia Pacific Press, Canberra, 2006).

5 Above, n 2.

II BACKGROUND

Like Solomon Islands' three previous Constitutions, Solomon Islands' Independence *Constitution* was brought into force by British Order.[6] Unlike the earlier documents, it was preceded by extensive 'consultation' in Solomon Islands prior to its enactment.[7] It seems clear, however, that this consultation was more in the form of an opportunity to discuss a prepared agenda of items to be included in the Constitution than an opening for ideas as to the form that the country's government and institutions should take.[8] Also, although a delegation from Solomon Islands did travel to England to discuss a draft, those discussions lasted only ten days.[9] Further, rather than permitting the Constitution to be prepared and enacted locally, as was done the following year in Vanuatu,[10] or to be dealt with by a special, locally constituted body, as had been done in Nauru and Samoa,[11] the Constitution was drafted in London and appended to the Solomon Islands Independence Order 1978, which was also made in the United Kingdom.[12] The final version of the Constitution left many important local concerns unaddressed and bears all the hallmarks of a foreign office creation. The similarities of this Constitution to the independence constitutions of the Fiji Islands, Kiribati, and Tuvalu, also drafted by the Foreign and Commonwealth Office, go to prove this point.

The alienation of the general populace from the constitutional arrangements is expressed in the preamble to the Federal Constitution of Solomon Islands Bill 2004 (SI). The slightly toned down version appearing in the latest draft is in the following words:[13]

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6 British Solomon Islands Order 1960 (UK); British Solomon Islands Order 1970 (UK); British Solomon Islands Order 1974 (UK).

7 See, eg, Y Ghai (ed) 1988 *Law, Politics and Government in Pacific States* Suva, Fiji: IPS, USP, 45.

8 For a discussion of the problems inherent in institutional transfer see Peter Larmour, Foreign Flowers: Institutional Transfer and Good Governance in the Pacific Islands, 2005, University of Hawai'i Press, Honolulu.

9 The visit took place between 6 and 16 September 1977: *Report of the Solomon Islands Constitutional Conference*, London, September 1977, Cmnd 6969, Misc 22 (1977).

10 Exchange of Notes between Governments of United Kingdom and France (23 October 1979).

11 Constitution of Nauru 1968, brought into force by a Constitutional Convention in Nauru; Constitution of Samoa 1962, brought into force by a Constitutional Convention in Samoa. The Federated States of Micronesia and Marshall Islands also brought into force their Constitutions by a Constitutional Convention.

12 However the final version of the Constitution did not deal with many important local concerns and bears all the hallmarks of a foreign office creation.

13 The earlier version reads: "On Independence from Great Britain, our dominion over our clan and tribal nations was extinguished and substituted by a system of unitary government enshrined by Solomon Islands Constitution to represent the sovereign rights of a new nation state which in 1978, we were neither prepared for, understood or informed consent given."

> Independence from Great Britain … saw the dominion over our clan and tribal communities substituted under the Solomon Islands Independence Order 1978 for a system of unitary government which is and remains largely foreign to our communities.

More pointedly, the government White Paper on the Reform of Solomon Islands Constitution ('White Paper'), issued in 2005, says:[14]

> The independence constitution is a relic of its time and its regime no longer fits well within Solomon Islands. It has hindered the social, economic, constitutional transformations the country should have undertaken within the last 27 years.

In contrast to the current Constitution the proposed federal constitution was drafted locally[15] and purports to be 'homegrown'.[16] However, in spite of the consultation which took place,[17] the enacting provisions still bear the imprint of foreign models, and neglect to address some of the specific problems discussed in this article.

Following the release of the draft Constitution, attention turned to the process required to bring it into force. This process was set out in the White Paper, which committed the government to establishment of a Constitutional Congress. The emphasis in the terms of reference for the Congress is on identification and engagement of Solomon Islands political community, which is a vital step in giving legitimacy to the new Constitution. However, the Congress also offers the opportunity to address the issues raised in this article.

III CURRENT CONSTITUTIONAL DILEMMAS

A Human Rights

1 Foreign Models

Solomon Islands Constitution contains a charter guaranteeing 12 rights, including the right to life, liberty, security, protection of the law and privacy; freedom of conscience, expression, assembly and association, and from deprivation of property and discrimination. They are based on

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14 White Paper on the Reform of Solomon Islands Constitution, November 2005.

15 The "final draft" circulated in September 2004 was replaced by a further draft in November 2004.

16 The first draft expressly asserted this fact in the long title. It is now only implicit in the preamble.

17 UNDP's "Support to Constitutional Reform Project", SOL/02/003 assisted Solomon Islands Ministry of Provincial Government and Rural Development by providing support "to ensure that it is highly participatory and transparent", <http://www.undp.org.fj/Templates/SOICurrProjects.htm>. Country wide consultations took place in February and August 2003. A second round of consultations took place in 2005: White Paper on the Reform of Solomon Islands Constitution, November 2005, 25. UNDP is providing assistance in the areas of governance, security and human rights; equitable access to sustainable development opportunities; and access to delivery of quality basic services: see further <http://ww.undp.org.fj/index.cfm?si=main.resources&cmd=forumview&cbegin=0&uid=solomon&cid=44>

rights developed in Europe, as expressed in the United Nations' Universal Declaration of Human Rights, 1948 and the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. Although there have been some concessions to local values, for example, by shielding customary law from certain rights,[18] these rights are transplants from the West and reflect values that are fundamentally different from those underpinning the traditional legal system.[19] For example, human rights provisions emphasise individual rights, freedoms and equality; whereas customary law emphasises community values, status and duties.[20] These provisions also reflect the concerns of countries in the West; priorities may be very different when, for example, the infant mortality rate is high and the literacy level and GDP low.[21]

2 Horizontal or Vertical Rights

Given the prominence of human rights in the independence Constitution it seems surprising that further attention was not given to the extent of application of those rights. In particular there is no express guidance on whether the guaranteed rights are restricted to operation in the public sphere or whether there is a role for them in governing the relationships between private individuals or groups. There are two directly opposing views on this, known as the 'vertical' approach and the 'horizontal' approach. According to the 'vertical' approach constitutionally guaranteed rights apply only to protect the individual against violation of those rights by the State. The 'horizontal' approach allows human rights provisions to be enforced against individuals. The relative merits of these

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18 Constitution of Solomon Islands 1978, s 15(5)(d).

19 An example of the failure to devise regionally appropriate rights is given by the fact that no regional constitution confers a right to recognition and application of customary law.

See further Jennifer Corrin Care "Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Post Colonial South Pacific Societies" Indigenous Law Journal 51-81. For further discussion of legal transplants see, eg Alan Watson "Legal Transplants and Law Reform" (1976) LQR 79,80 (Watson appears to take a more cautious approach in *Legal Transplants and European Private Law*, (2000) 4.4 Electronic Journal of Comparative Law, www.law.kub.nl.ejcl/44/44-2.html>); Otto Kahn-Freund "Uses and Misuses of Comparative Law" (1974) 37 Modern Law Review 1, 5-6.

20 See, eg C J Muria "Conflicts in Women's Human Rights in the South Pacific; The Solomon Islands Experience" (1996) 11(4) *Commonwealth Judicial Journal* 7, where he observes that modern regimes in the domestic sphere are categorised as "foreign" by ordinary islanders.

21 The 2005 estimate of infant mortality rates (deaths/1,000 live births) is 21.29 (Solomon Islands) compared to 4.69 (Australia), 5.16 (United Kingdom), and 6.5 (United States): CIA, *The World Fact Book* <http://www.cia.gov/cia/publications/factbook/rankorder/2091rank.html> accessed 5 May 2005. The literacy rate is 24%, compared to 100% (Australia), 99% (United Kingdom), 97% (United States): CIA, *The World Fact Book http://www.cia.gov/cia/publications/factbook/fields/2103.html* accessed on 5 May 2005. the GDP is US$1,700 per capita (2002 est), compared to US$30,700 (2004 est Australia), US$29,600 (2004 est United Kingdom), US$40,100 (2004 est United States): ; *The World Fact Book http://www.cia.gov/cia/publications/factbook/fields/2103.html* accessed on 19 August 2005.

approaches have been the subject of fierce debate in the United Kingdom, Europe, South Africa, Canada, the United States.

In the South Pacific, however, there has been little discussion of this issue despite its relevance to the wider debate on the suitability of human rights agendas developed in the West to newly emerging nations. Only Fiji Islands, Papua New Guinea and Tuvalu have textual indicators, specifying the extent to which human rights apply. In other countries courts have taken an ad hoc approach, often influenced by judicial decisions from other countries. However, there are distinguishing features in the legal and social systems of South-West Pacific states that increase the significance of the question and demand consideration of local circumstances in the debate. For example, the recognition of traditional authority and customary law in Solomon Islands means that not all law is dependant on State organs for interpretation and enforcement, a premise for the horizontalists' argument that it is unrealistic to separate public from private law.[22] On the other hand, in the Pacific, some rights which are normally violated by State actors only, for example, the right to a fair trial and to protection of law may by violated by non-State actors imposing penalties for breach of customary law.[23] This might defeat the verticalists' argument that rights protection is only required in the public sphere.

Prior to 2002, Solomon Islands courts had held that human rights were not enforceable against individuals. In *Loumia v DPP,*[24] the appellant had been convicted of murder, which occurred during a fight between rival tribes. It was argued that the offence should have been reduced to manslaughter as the defendant had been provoked and that he came within section 204 of the Penal Code (Cap 26), which reduced the offence of murder to manslaughter if the offender 'acted in the belief in good faith and on reasonable grounds, that he was under a legal duty to cause the death or do the act which he did'. It was also argued that the right to life, contained in section 4 of the *Constitution* did not apply between private persons. The Court upheld the conviction for murder. The majority considered that most of the rights guaranteed by the Constitution were principally concerned with the relationship between the citizen and the State. However, it was also held, obiter, that if a customary duty to kill were part of the law of Solomon Islands it would be public law and therefore inconsistent with s 4 of the Constitution. In other words, the court took the stance that all law endorsed by the State was public law and therefore subject to the rights provisions and, to the extent of any inconsistency with such rights, would be invalid. In a separate judgment, Kapi JA took

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22 Colm O'Cinneide "Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights" (2003) 4 Hibernian Law Journal 77, 79-80.

23 See, eg Jennifer Corrin Care, "Customary Law and Human Rights in Solomon Islands: A Commentary on *Remisio Pusi v James Leni & Others*" (1999) 43 Journal of Legal Pluralism and Unofficial Law 135-144; J Corrin Care "A Green Stick or a Fresh Stick: Locating Customary Penalties in the Post-Colonial Era" Oxford University Commonwealth Law Journal vol 6. no 1, 27-60.

24 [1985/6] SILR 158,169.

a different approach, stating that, 'The essence of fundamental rights provisions in Solomon Islands is that they apply to all persons' and that they are limited only by their terms and the qualifications set out in respect of each provision.

More recently, in *Ulufa'alu v AG and Ors*,[25] the Court of Appeal again discussed the application of the rights provisions This case arose from the coup which took place in Solomon Islands in 2000, during the course of which the appellant, who was then Prime Minister, was forced to resign. The appellant sought declarations that his rights under various sections of the Constitution had been contravened. The Court of Appeal accepted the view of the majority in *Loumia* as applicable, thus, extending the ratio of that case from the right to life to the more extensive menu of rights relied on in this case. However, the Court refused to lay down a general rule that fundamental rights were only applicable vertically, considering that the right relied on and the surrounding context would have to be examined in each case.

Leaving a matter of such importance to the court's discretion has the disadvantage of uncertainty. Further, in Solomon Islands, final appeal court judges are often expatriates who may be hampered in their attempt to contextualise rights by their lack of knowledge of relevant cultural nuances. Textual indicators would provide valuable assistance and reduce the drain on judicial resources caused by the need to grapple with this question each time it arises.

B Customary Law

In the lead up to independence, the spirit of nationalism which came to the fore restored custom and culture to the agenda. This pressure could not be entirely ignored during the in the drafting of the Independence Constitution and whilst it did not result in any significant deviations from the foreign office pattern, it did result in some embroidery around the edges. First, a reference to local values and objectives was included in the Preamble, which began:[26]

> We the people of Solomon Islands, proud of the wisdom and the worthy customs of our ancestors, mindful of our common and diverse heritage and conscious of our common destiny, do now, under the guiding hand of God, establish the sovereign democratic State of Solomon Islands.

More importantly, the enacting provisions recognised customary law as part of the formal legal system.[27] Formal recognition of customary law has a distinct psychological advantage. It acknowledges the importance of the system of law that has developed within the community and for many people is the only law with which they will come into contact. However, mere recognition, without guidance as to how such a fundamentally different type of law is to be administered in the formal system, sets the scene

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25 *Ulufa'alu v AG and Ors* [2005] 1 LRC 698.

26 Paragraph (a) of the declaration in the Preamble to Constitution of Solomon Islands, scheduled to the Solomon Islands Independence Order 1978, SI 1978/783 (UK).

27 Constitution of Solomon Islands 1978, sch 3, para 3.

for conflict. The Constitution does not clearly define 'customary law', stating only that it means 'the rules of customary law prevailing in an area of Solomon Islands'.[28] Apart from making it clear that the rules of custom do not have to be homogenous in order to apply, this is not particularly helpful. It does not assist in resolving conflicts between different customs or between customary law and formal, written law. The Constitution tells us only that customary law is superior to common law and equity[29] and that it does not apply if, 'inconsistent with this Constitution or an Act of Parliament'.[30] Act of Parliament has been defined as an Act of Solomon Islands Parliament and it appears that customary law is on a par with United Kingdom Acts in force,[31] although in practice the Act is more likely to prevail. Other difficult questions of application were left for the Solomon Islands Parliament, which the Constitution invites to:[32]

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

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

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

Unfortunately, Parliament did not rise to this challenge until 2000, over twenty years after independence. The Customs Recognition Act 2000, was based on the Customs Recognition Act 1963 of Papua New Guinea, which was repealed in 2000.[33] It has still not been brought into force, which is not surprising as it is badly drafted and does not adequately address the issues.[34] Conflicts, which continue to occur not only in areas of substantive law, when each type of law prescribed a different rule for the same situation,[35] but also in the process of its administration,[36] are left to be dealt with by the courts.

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28 Section 144.

29 Constitution of Solomon Islands 1978, sch 3, para 2(1)(b).

30 Constitution of Solomon Islands 1978, sch 3, para 3(2).

31 *K v T and KU* [1985/6] SILR 49.

32 Constitution of Solomon Islands 1978, sch 3, para 3(3).

33 Underlying Law Act 2000 (PNG).

34 For a criticism of the Act see Jennifer Corrin Care and Jean Zorn "Legislating Pluralism: Statutory "Developments" in Melanesian Customary Law" (2001) 46 Journal of Legal Pluralism 49, 51.

35 For example there has been a conflict between the rule of custom giving custody of children to the father or his family and the welfare principle: see Jennifer Corrin Care, "Cultures in Conflict: The Role of the Common Law in the South Pacific" (2002) 6 JSPL.

36 One of the difficulties encountered in trying to have customary law dealt with in a more traditional way is that forums may not comply with principles of natural justice; see further J Corrin Care "A Green Stick or a Fresh Stick: Locating Customary Penalties in the Post-Colonial Era" Oxford University Commonwealth Law Journal, vol 6 no 1, 27-60.

C Conflict between Customary Law and Human Rights

A particular striking conflict occurs between the underlying values of human rights and customary law, which, as mentioned above, are fundamentally different. The former seeks to uphold the rights of the individual whereas the latter is based on the communal good; the former is liberal and egalitarian, whereas the latter is conservative and patriarchal; and the former purports to be universal, whereas the latter applies at a particular point of time, in a particular community, in particular circumstances. Given these underlying differences, it is no surprise that conflicts have occurred. One of the prime sources of conflict which have come before the formal court is freedom from discrimination, which has conflicted with the patriarchal and status based norms of customary law. For example, customary law has operated to disentitle a widow to a share of her late husband's estate. [37] Other cases have involved conflict with the right to freedom of movement[38] and freedom of religion,[39] which have conflicted with traditional authority to govern affairs in the village.

Although the Constitution is a source of law superior to customary law, this does not mean that human rights will always prevail. There are a number of reasons for this. First, the Constitution expresses the desire to promote customary law as well as human rights. This fact may influence the court when assessing inconsistency between customary law and human rights, which is often a matter of degree and is a particularly complex task when interpretation of the Constitution is involved. This is especially so in the case of the Bill of Rights which, like the Preamble, Pledge and Declaration, may be viewed more as a manifesto than a set of rules. Accordingly, whether a particular customary law is invalid may be difficult to predict without adjudication.[40] One case illustrating that the supremacy of human rights cannot be taken for granted is *Remisio Pusi v James Leni and Others,*[41] which involved conflict between customary law and the constitutional protection of freedom of movement and related rights. The plaintiff claimed that his rights had been infringed when he had been prevented from entering Koliae village after an argument with members of the local chiefs committee. Muria CJ dismissed the application on the basis that the plaintiff's individual

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37 *Tanavulu and Tanavulu v Tanavulu and SINPF,* unreported, High Court, Solomon Islands, Civ Cas 185/1995, 12 January 1998 CAC 3/97, 23 April 1997. See also the Solomon Islands case of *The Minister for Provincial Government v Guadalcanal Provincial Assembly,* unreported, High Court, Solomon Islands, CIV APP 3/97, 23 April 1997, where the Court of Appeal refused to declare an Act which discriminated against women unconstitutional. This decision is discussed in detail in K Brown and J Corrin Care "More on Democratic Fundamentals in Solomon Islands: Minister for Provincial Government v Guadalcanal Provincial Assembly" (2001) 32(3) VUWLR 653.

38 *Remisio Pusi v Leni and Others*, unreported, High Court, Solomon Islands, cc 218/95, 14 February 1997.

39 *Lobo v Limanilove and Others*, unreported, High Court, Solomon Islands, civ cas 101/2001, 28 March 2002.

40 There are no reported cases on this, but it is a "live" issue for lawyers in Solomon Islands.

41 Unreported, High Court, Solomon Islands, cc 218/1995, 14 February 1997. This case is discussed in Corrin Care J, "Customary Law and Human Rights in Solomon Islands", 1999 Journal of Legal Pluralism, 135.

rights had not been contravened, as he had not established that he was 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 when he insulted the chiefs. Whilst this finding was sufficient to dispose of the matter, His Lordship commented that the Constitution 'clearly embrace[d] the worthiness, the value and effect of customary law', and went on to express the view that:

> 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.

Further, although express constitutional rights generally outrank customary law, some rights are made subject to specific exemptions in favour of customary law. For example, the right to freedom from discrimination is subject to any laws making provision 'for the application of customary law'.[42] Thus, in *Tanavulu and Tanavulu v Tanavulu and SINPF*[43] the Court of Appeal refused to hold a customary law which prevented a wife from obtaining a share of her late husband's provident fund contributions to be discriminatory, on the basis that customary law was shielded by this exemption.[44]

It is also worth mentioning that, even where it is plain that human rights are intended to prevail, protection is limited by access to remedies and evidential problems,[45] particularly for women. Further, even where an individual obtains judgment in his or her favour, this may be a pyrrhic victory when the applicant is ostracised by the local community.

D Saved Law

While customary law is still the most important source of law at village level, in urban centres and commercial dealings the formal, written law usually prevails. Although formal law is now made

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42 Constitution of Solomon Islands 1978, s 15(5)(d).

43 Unreported, High Court, Solomon Islands, Civ Cas 185/1995, 12 January 1998. See also the Solomon Islands case of *The Minister for Provincial Government v Guadalcanal Provincial Assembly,* unreported, High Court, Solomon Islands, CIV APP 3/97, 23 April 1997, where the Court of Appeal refused to declare an Act which discriminated against women unconstitutional. This decision is discussed in detail in K Brown and J Corrin Care "More on Democratic Fundamentals in Solomon Islands: Minister for Provincial Government v Guadalcanal Provincial Assembly" (2001) 32(3) VUWLR 653.

44 Constitution of Solomon Islands 1978, s 15(5)(d).

45 See further, Corrin Care, J and Zorn, (2005) "Legislating for the Application of Customary Law in Solomon Islands", (2005) *Common Law World Review* 144 to 168.

locally through parliament and the courts, neither body has been notably active, in the sense of making new law designed specifically for Solomon Islands. [46] Consequently, a large part of formal law consists of United Kingdom laws, in existence at the time of independence. This law, first introduced during the protectorate era,[47] was 'saved' by the independence Constitution as a transitional measure, with the intention that it would gradually be replaced by local laws.

The precise application of these 'saved' laws is the subject of debate. With regard to legislation, the Solomon Islands' Constitution states:[48]

> Subject to this Constitution and to any Act of Parliament, the Acts of Parliament of the United Kingdom of general application and in force on 1st January 1961 shall have effect as part of the law of Solomon Islands …

This reflects a common pattern of reception rules for former British possessions in the Pacific.[49] As a consequence of this provision, to have effect as part of Solomon Islands' law, United Kingdom legislation must be:

- of 'general application';
- in force on 1 January 1961 (the commencement date for the 1960 Constitution, which introduced local law-making powers) (the 'cut-off date');
- in conformity with the Solomon Islands' Constitution; and
- in conformity with Solomon Islands legislation.

The reception rules are deceptively difficult to apply. For example, the phrase 'general application', although commonly used in late nineteenth and twentieth century reception rules is not legislatively defined. Sir Kenneth Roberts-Wray, in his definitive work on colonial law said: 'If the phrase were offered as a novelty to a legislative draftsman today, he would disclaim responsibility for its consequences unless it were defined.'[50] He concluded that the expression was descriptive of Acts that were of general relevance to the conditions of other countries and, in particular, not based upon politics or circumstances peculiar to England.[51] Judicial definitions from courts throughout the

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46 On the basis of legislation available on Paclii (www.paclii.org) an average of less than 8 statutes per annum were passed from 1996-2005 (78 in total).

47 Western Pacific (Courts) Order 1961 (UK), s 15.

48 Constitution of Solomon Islands 1978 (UK), sch 3, para 1, applying by s 76.

49 See further, J Corrin Care "Colonial Legacies? - A study of Received and Adopted Legislation applying in the University of the South Pacific Region" (1997) 21 Journal of Pacific Studies 34, 43.

50 K Roberts-Wray *Commonwealth and Colonial Law* (Stevens and Sons, London, 1966) 556.

51 Ibid.

Commonwealth are numerous, but conflicting and the recent decision of the Privy Council in an appeal from the Pitcairn Islands Court of Appeal, did little to clarify the position.[52] The Solomon Islands Court of Appeal has defined 'general application' as meaning a statute 'that regulates conduct or conditions which exist among humanity generally, and in a way applicable to humanity generally'.[53] More recently, the Court of Appeal held that 'of general application' refers primarily to the subject matter of the statute rather than its geographical ambit.[54]These definitions add little specificity to the requirement and differ from definitions in other Melanesian countries[55] and in other parts of the Commonwealth.[56]

The variable criteria of applicability have resulted in the same United Kingdom Act being accepted as of general application in some parts of the Commonwealth, but rejected in others. For example, the Guardianship of Infants Act 1925 (UK) has been held to be of 'general application' in Solomon Islands,[57] but has been rejected by courts in Kenya.[58] Of course, there may be good reason for this, if one accepts a definition such as that applying in Vanuatu, which has regard to the subject matter of the Act and the framework of its operation in the country where its applicability is in question. However, as a result, the persuasive value of decisions from other countries on the meaning of the term 'statute of general application' is limited.

Provision is also made in the *Constitution* for formal, non-substantive changes to be things such as names, titles, offices, persons and institutions in UK legislation, to facilitate its application to the circumstances of Solomon Islands.[59] This might give rise to the implication that a statute requiring substantive changes will not qualify as being of 'general application'.

The requirement that United Kingdom legislation be compatible with the *Constitution* and local statute law raises additional uncertainties. As noted above, interpretation of the *Constitution* is a particularly complex task. In areas that are covered by general, vague or ambiguous provisions of the *Constitution*, it may be difficult to predict before adjudication whether saved legislation will be

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52 *R v Seven Named Accused* [2006] All ER (D) 358.

53 *R v Ngena* [1983] SILR 1, 6.

54 *Harry v Kalena Timber Co Ltd* [2001] 3 LRC 24,

55 See, for example, *Indian Printing and Publishing Co v Police* (1932) 3 FLR 142; *Freddy Harrisen v John Patrick Holloway* (1980–88) 1 Van LR 147

56 See, for example, *Krishnan v Kumari* (1955) 28 Law Reports of Kenya 32; *Re Sholu* (1932) 11 NLR 37.

57 *Sukutaona v Houanihou* [1982] SILR 12; *In re B* [1983] SILR 223; *K v T and KU* [1985/86] SILR 49; *Sasango v Beliga* [1987] SILR 91.

58 *Krishnan v Kumari* (1955) 28 Law Reports of Kenya 32.

59 *Constitution of Solomon Islands* 1978 (SI), sch 3.1. See for example, *Constitution (Adaptation and Modification of Existing Laws) Orders* 1988 (SI).

applicable.[60] Further, it remains unclear whether United Kingdom legislation may be used where there is relevant Solomon Islands legislation in the area which does not address the situation in question, or whether the Solomon Islands Parliament is to be taken to have 'covered the field'. This may depend on whether the local Parliament's intention was deliberately to limit the scope of the local legislation, thereby implicitly directing that the UK legislation should not apply,[61] or whether the omission was inadvertent, in which case the UK legislation might be used to bridge the gap.[62] The question of parliamentary intention has been the subject of litigation in numerous cases.[63]

Until a judicial determination by a Solomon Islands court is made on any given United Kingdom statute, the indeterminacy of the reception rule makes it difficult to assess whether it is in force. Uncertainty as to applicable law raises serious questions as to whether the country presently has a coherent, accessible and effective legal system.[64] If the Act is in force its relationship with customary law is uncertain and this has been discussed above.

Common law and equity were also 'saved' by the *Constitution* and raise further problems of interpretation. For example, although no cut-off date has been expressly provided the *Constitution* states that the courts shall not be bound by any decision of a foreign court after 7 July 1978, when the *Constitution* came into effect.[65] The High Court originally regarded this provision as merely confirming that Solomon Islands was not to be bound by a foreign court such as the Privy Council.[66] However, in *Cheung v Tanda*,[67] the Court of Appeal interpreted this as providing a cut-off date for common law and equity. However, it also held that this did not mean that subsequent decisions of English courts were all irrelevant. If later decisions were declaratory of the law prior to the cut-off date they would form part of the law of Solomon Islands. On the other hand if they were making new law they would not. The distinction between declaratory decisions and decisions which

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60 There are no reported cases on this, but it is a "live" issue for lawyers in Solomon Islands.

61 See for example, *Korean Enterprises Limited and the premier of Guadalcanal Province v Shell company (Pacific Islands) Limited*, unreported Court of Appeal, Solomon Islands, CAC 10/2001, 13 December 2001.

62 Law of Property Act 1925 (UK) s 81(1) has been held to apply even though the *Land and Titles Act Cap 133* (SI) covers property law generally: *Aseri Harry v Kalena Timber Company Limited* (Unreported, Court of Appeal of Solomon Islands, Mason P, McPherson and Los JJA, 19 April 2000).

63 See, eg, cases cited in Francis Bennion *Statutory Interpretation* (4 ed, London, Butterworths) chap 8.

64 L L Fuller *The Morality of Law* (New Haven, Yale University Press, 1968) 39; J Rawls *A Theory of Justice*, (Oxford, Oxford University Press, 1972) 235.

65 Constitution of Solomon Islands, Sch 3, para 4(1).

66 *Official Administrator for Unrepresented Estates v Allardyce Lumber Co Ltd* [1980–81] SILR 66; *Tanda v Cheung* [1983] SILR 193.

67 *Cheung v Tanda* [1984] SILR 108.

make new law is not always easy to make. In practice Solomon Islands courts tend to follow English precedents whenever made, rather than developing the law based on local circumstances.

IV FEDERAL CONSTITUTION OF SOLOMON ISLANDS BILL

A Introduction

The Federal Constitution of Solomon Islands Bill 2004 is the result of a call for constitutional reform, particularly from the Provinces, which gained momentum during the armed conflict, and a pledge to proceed with this was embodied in the Townsville Peace Agreement.[68] On 5 November 2002, in accordance with the government's Programme of Action,[69] the Prime Minister signed an agreement committing the government to creation of a state government system. The proposed system was reported to be 'homegrown' and to be based on sharing of 'powers, functions, costs, and decision-making between central and federal government'.[70] The agreement involved conducting assessments in all provinces, to be followed by the drafting of a federal Constitution resting on five principles, namely, inclusive development, the rule of law, transparency, accountability and fiscal responsibility.

The 'homegrown' quality of the new constitution was repeated in the long title, of the first 'final' draft ('September Draft'), which proclaimed the Act's purpose to be 'to enact a home-grown Constitution to create a Federal Republic'. The long title has disappeared from latest draft ('the Bill') and, whilst both documents undoubtedly pay more attention to local concerns than the current *Constitution* and make all the right noises in the non-justiciable sections and in relation to customary land, there is still a strong scent of overseas constitutional models. The following sections examine the treatment of the areas discussed in the first half of this article, and consider whether the Bill includes any 'homegrown' solutions to the pressing problems that were identified.

B Human Rights

1 Perpetuation of Foreign Models

The Bill contains an extended Rights Chapter, which was prepared and lobbied for by the Regional Rights Resources Team ('RRRT'),[71] a regional body funded as a United Nations Development Programme project. The Rights Chapter takes a more robust approach than the existing Constitution, with 38 sections (as opposed to the current 17),[72] not including the rights

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68 Townsville Peace Agreement, 15 October 2000, [4.1].

69 SIG, *Programme of Action: Policy, Objectives, Strategies and Targets 2002 – 2005*, January 2002.

70 SIBC Online, 7 November 2002.

71 RRRT, RIGHTHIA, July-September 2004, 3.

72 Federal Constitution of Solomon Islands Bill 2004, chap four, cls 21 to 58.

relating to customary land.[73] For example, the right to equality before the law, the right to freedom from discrimination and the rights of women are separately guaranteed.[74] However, whilst the rights include matters of regional concern, such as the rights of 'cultural and linguistic communities', provisions are modelled on the Universal Declaration of Human Rights[75] and the International Covenant on Civil and Political Rights.[76] Leaving aside the rights relating to customary land, which are in a separate chapter of the Bill,[77] there is little evidence that the Rights Chapter has been negotiated from the starting point of a local agenda or that attention has been given to the particular circumstances of Solomon Islands.

2 The Horizontal or Vertical Debate and the Implications of a Federal System

Unlike the existing Constitution, the Bill does give some textual indication as to the application of rights. The September Draft stated that:[78]

> (2) The Rights and Freedoms apply to all laws, and shall bind –
>
> (a) the legislative, executive and judicial branches of all levels of government;
>
> (b) all persons performing the functions of any public office; and
>
> (c) all other persons and bodies if, and 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 November 2004 replaces paragraph (a) with 'the branches and levels of government' and adds 'or government office' at the end of paragraph (b), with the apparent intent of covering all aspects of government.[79] Although the amended paragraph does not specifically refer to the judiciary, the fact that all branches of government are bound makes it is susceptible to the argument which has been put forward in other countries, that the effect of binding the courts is to give a greater degree of horizontality to fundamental rights.[80] Here, however, the argument is largely academic, as paragraph (c) allows enforcement against individuals. However, the application to

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73 Federal Constitution of Solomon Islands Bill 2004, chap three.

74 Federal Constitution of Solomon Islands Bill 2004, cls 23, 27(1) and 54 respectively.

75 Adopted by General Assembly resolution 217 A (III) of 10 December 1948.

76 Adopted by General Assembly resolution 2200 A (XXI) of December 16, 1966, entered into force on March 23, 1976, in accordance with Article 49.

77 Federal Constitution of Solomon Islands Bill 2004, chap 3.

78 September Draft, cl 22 (2).

79 Federal Constitution of Solomon Islands Bill 2004, cl 21 (1)(a).

80 Murray Hunt "The 'Horizontal Effect' of the Human Rights Act" [1998] *Public Law* 423; *Du Plessis v De Klerk* (1996) (3) SA 850, 877-878, per Kentridge AJ. It should be noted, however, that the term "organ of government" is defined so as to exclude a court or judicial officer: cl 267.

'other person and bodies' 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'. This paragraph, which bears some similarity to s 8(2) of the Constitution of the Republic of South Africa 1996, accords with the approach favoured in *Ulufa'alu's Case*. Rather than horizontal, it introduces a nuanced approach, by providing that whether or not the bill of rights binds an individual depends on the 'nature of the right' and 'the nature of the duty'. However, unlike s 8, it does not give any guidance to the court on how it may develop the common law in order to put into effect the application or limitation of rights in the private sphere.[81] This introduces a new source of uncertainty, particularly as overseas precedents will not be applicable, given the important differences of cultural context discussed earlier in this article.

The proposed federal system also opened up the potential for the states to adopt and enforce their own human rights norms but no provision has been made for this in the Bill.[82] It has been suggested that such an arrangement could encourage experimentation with respect to the incorporation of human rights norms into law.[83] However, conditions in Solomon Islands may not lend themselves to a clear demarcation of jurisdictions and efficient enforcement. This is an issue which requires discussion and resolution based on research.

C Customary Law

Commitment to custom and culture is resoundingly proclaimed throughout the Bill. The prefatory provisions contain a commitment 'to uphold our worthy customs and traditions so that future generations will inherit all that is valuable of our heritage'. The Foundation Provisions in Chapter 1 also refer to the Republic being based on 'worthy customs and traditions'[84] and the Social Charter make several references to culture and custom.[85] A provision in the September Draft imposing a duty on the President to 'promote the respect of custom and the traditions of the people'[86] no longer appears.

The Bill continues to recognise custom as a source of law, but refers to it as 'customary practice' rather than 'customary law'[87] (although this has not been done consistently and in clause 19 and

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81 Constitution of the Republic of South Africa 1996, s 8(3).

82 The power to legislate rights does not appear to have been allocated to federal or state governments. The federal government could of course rely on its external affairs powers as other countries have done.

83 JJ Spigelman "Rule of Law: Human Rights Protection" Address at 50th Anniversary of Universal Declaration of Human Rights National Conference, Human Rights and Equal Opportunity Commission, 10 December 1998.

84 Clause 1(b).

85 Federal Constitution of Solomon Islands Bill 2004, cl 10.

86 September Draft, cl 81(c).

87 Federal Constitution of Solomon Islands Bill 2004, cl 9(1)(d).

Schedule 5 we are back to 'customary laws'; and in clause 154 the terms 'traditional law practice' and 'traditional justice' are used). This raises the new question of what is meant by 'customary practice'. The definitions section states that it means the rules 'prevailing in and applying to an area of Solomon Islands'.[88] This is almost identical to the definition of customary law in the current Constitution;[89] it avoids the question of how widespread a customary practice must be to warrant recognition, but otherwise is unenlightening. It may be that the change of term is intended to avoids arguments about the, often illusory, line between 'custom' and 'customary law' and the use of the word 'rules' suggests that there will be little difference in practice. However, the previous theoretical certainty as to the superiority of custom over common law and equity has been removed by a proviso that allows a court to prefer common law and equity 'in the interests of substantive fairness and justice.'[90] No solution has been found for the perplexing questions regarding resolution of conflicts of customary law, its proof[91] or application. Instead the task of making laws for the application of customary law has been placed exclusively within State jurisdiction,[92] together with the power to make law for the codification of customary laws.[93] Codification is a dubious objective, which has been dismissed by many scholars and commentators as misguided.[94]

A new difficulty has been introduced in chapter 3, which deals exclusively with customary land, resources and property rights. Clause 19 specifically retains the 'legal effect' of 'custom laws,[95] traditions, land tenure systems and institutions of the regulation of clan and tribal village societies', but no indication is given as to whether this overrides the earlier provision that common law and equity may be preferred in the interests of justice.[96]

The Bill also provides that state legislatures must enact laws to allow clan or tribal communities to administer their own system of justice in a designated area according to their 'distinctive juridical

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88 Federal Constitution of Solomon Islands Bill 2004, cl 267.

89 Section 144.

90 Federal Constitution of Solomon Islands Bill 2004, cl 9(3).

91 *Tahinao v Regina* [2006] SBCA 12.

92 Federal Constitution of Solomon Islands Bill 2004, Sch Five, List II, para 1(a).

93 Federal Constitution of Solomon Islands Bill 2004, Sch Five, List II, para 1(b).

94 See, eg TW Bennett and T Vermeullen "Codification of Customary Law" [1980] Journal of African Law 206; J Corrin Care "Cultures in Conflict: The Role of the Common Law in the South Pacific" (2002) 9(1) Journal of South Pacific Law (electronic format). See also Allott AN (ed) *The Future of Law in Africa*, (Butterworths, London, 1960).

95 It is unclear why this term has been used instead of "customary practice", which is used elsewhere in the Bill and is defined in cl 276.

96 Federal Constitution of Solomon Islands Bill 2004, cl 9(3).

customs, traditions and procedures', to the extent compatible with the Constitution.[97] More specifically they may determine disputes and impose punishments in accordance with customary practice. This section introduces new problems. The distinction between 'juridical customs' and 'customary practices' is not explained, adding another layer to the pre-existing problems of definition.[98] The procedure for the implementation and regulation of traditional justice is left to be provided by the states, which leaves them to grapple with a number of difficult issues, such as whether decisions are subject to review and the related question of whether the rules of natural justice are to apply. There is also the potential for the imposition of dual penalties, one being imposed by the community and the other by the formal courts, and for conflict where punishments contravene human rights.

1 Conflict between Customary Law and Human Rights

Customary law is specifically stated not to apply if it is inconsistent with the constitution or legislation, presumably federal or state.[99] Further, some of the exemptions which customary law previously enjoyed have disappeared.[100] This suggests that human rights are intended to prevail over customary law. However, clause 21(1)(b) casts doubt on this intention. It states that the rights in chapter 4 ('fundamental rights and freedoms'):

> include the rights of clans and tribal village communities to maintain and develop laws or customary practices whereby they –
> (i) determine the responsibilities of individuals within their communities;
> (ii) promote, develop and maintain their institutional structures and their distinctive customs, traditions, procedures and practices;
> (iii) determine the methods customarily practised by clan or tribal communities for dealing with offences or breaches of custom.

What happens when those laws and customary practices conflict with rights that are expressly guaranteed is not made clear. Is clause 21(1)(b) intended to grant a general exemption in favour of customary law as had been done in Marshall Islands and Tuvalu,[101] as opposed to the specific

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97 Federal Constitution of Solomon Islands Bill 2004, cl 154.

98 For a discussion of these problems see, eg J Corrin Care "Customary law in Conflict: The Status of Customary law and Introduced Law in Post-Colonial Solomon Islands" (2001) 21(2) UQLJ 167 - 177. See also above, text at nn 26 to 28.

99 Federal Constitution of Solomon Islands Bill 2004, cl 9(2).

100 For example, there is no equivalent to s 15(5)(d), which exempts customary law from the anti-discrimination provision, but it is provided that a "Federal law may provide for areas of legitimate exception to this general freedom"

101 Constitution of Marshall Islands 1978, art X; Constitution of Tuvalu 1986, s 11(2)(b).

exemptions shielding customary law from some rights in the current Constitution?[102] This does not really seem likely. Rather it would appear that these paragraphs are intended to accommodate the rights of the communities within the country and to allow wider scope for the promotion of customary practices, but without having giving thought to the conflicts that will emerge.

The next paragraph, clause 21(2) provides:

> The Rights and Freedoms in this Constitution shall be subject only to such
>
> reasonable limitations found in law or custom as may be demonstrably justifiable in a free and democratic society, taking account of the objectives of this Constitution, the cultures in Solomon Islands society and the state of development of the country.

The extent of this provision is far from clear. Obviously it means that any limitation on the rights and freedoms must by justifiable in a free and democratic society, but does the reference to limitations found in law or custom mean that such ordinary laws, which are otherwise justified, may limit a constitutionally enshrined right? To confuse matters further, clause 21(4) states:

> Any law and any action taken pursuant to a law may interpret the application of
>
> a Right and Freedom having regard to the collective right[s] and responsibilities of an individual in his or her traditional community.

Presumably, this means that rights and freedoms must be interpreted in the context of collective nature of Solomon Islands' society.

To summarise, this leaves an extensive set of specific, transplanted rights, together with a much more general outline of 'tribal' rights, all of which must be interpreted in the light of communal rights and liabilities and subject to any reasonable limitations found in any law, customary or formal.

There is also the question of how the fundamental rights in chapter 4 intersect with the rights conferred in chapter 3, which deals exclusively with customary land, resources and property rights. This places special emphasis on customary rights of ownership and control of land and cultural and intellectual property and the right to preservation of custom laws and traditions.[103] Similarly, rights of cultural and linguistic communities have also been constitutionally enshrined.[104]

All this exacerbates the potential for conflict that exists under the present *Constitution* and fails to explain how such conflict should be resolved. Now that the right to 'maintain and develop laws or customary practices' has been given the status of a fundamental right, the courts will have to grapple

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102 See above, text at n 39-41.

103 Federal Constitution of Solomon Islands Bill 2004, cl 14, 15, 18 and 19.

104 Federal Constitution of Solomon Islands Bill 2004, cls 41 and 50.

with the question of which will prevail. The failure to provide a means for resolving conflicts between different rights is likely to pose a significant problem if the Bill becomes law in its present form.

The provisions of clause154, which authorise tribal communities to administer their own system of justice, discussed above under customary law, are also likely to be as source of conflict. They are specifically to 'decide or resolve a matter or punish in accordance with methods customarily practised by the peoples concerned for dealing with offences'.[105] These provisions could well come into conflict with human rights as they have already done when the power to impose customary punishment has been exercised on the general authority of customary law.[106] This has also been the experience in Samoa, where the power of the village *fonos* to administer punishment was recognised by legislation there has been conflict concerning the penalty of banishment culminated in the Court of Appeal of Samoa determining that the relevant legislation had limited the fono's authority in this respect.[107]

The September Draft specifically stated that traditional justice had to be exercised in accordance with recognised human rights standards,[108] but it was unclear whether these standards were those referred to in chapter 4 or whether reference was to benchmarks to be found elsewhere. The Bill is clearer, recognising the exercise of traditional authority 'to the extent compatible with the Constitution'.[109]

2 The Constitutional Court and the Human Rights Commission

Whilst no specific principles for resolving conflicts between customary law and human rights have been provided, the Bill does provide two further forums for consideration of such issues. The first is a Constitutional Court, to be constituted by three judges from amongst its members who are the Chief Justice, as president, Justices of Appeal and other justices appointed by the President, acting in accordance with the advice of the Judicial and Legal Services Commission.[110] The Constitutional Court has exclusive first instance jurisdiction in all disputes at government level involving constitutional matters, including disputes between federal and state organs and

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105 Federal Constitution of Solomon Islands Bill 2004, cl 154(2).

106 See,eg, *Remisio Pusi v Leni and Others*, unreported, High Court, Solomon Islands, cc 218/95, 14 February 1997.

107 See further, Jennifer Corrin Care "A Green Stick or a Fresh Stick: Locating Customary Penalties in the Post-Colonial Era" (2006) 6(1) Oxford University Commonwealth Law Journal, 27.

108 Federal Constitution of Solomon Islands Bill 2004, cl 161(1).

109 Federal Constitution of Solomon Islands Bill 2004, cl 154(1).

110 Federal Constitution of Solomon Islands Bill 2004, cl 189(2).

constitutionality of bills.[111] The Bill also introduces another level of appeal in constitutional matters, conferring jurisdiction to hear appeals from all final judgments of the Court of Appeal.[112]

It also directs the Federal Parliament to establish a Human Rights Commission by legislation within two years of the Constitution coming into effect.[113] The Commission's functions are concerned with promotion of human rights, monitoring observance and adjudication on human rights disputes.[114] How that adjudication would fit in with the role of the proposed Constitutional Court is not clear.

D Saved Laws

1 Perpetuation of Dependence

In spite of the dissatisfaction with colonisation of institutions and the aspirations to shake off the shackles of the past, the Bill does not sever the ties with introduced law. Instead, clause9(1)(c) includes 'Applicable laws of the United Kingdom' as part of the laws of Solomon Islands without any reference to this being a transitional measure. No mention is made of the relationship between Acts of the United Kingdom and customary practice, thus missing the opportunity to resolve this uncertainty. Not only does the Bill perpetuate dependence on foreign legislation without clarifying the problems surrounding its application, but also it does so in terms that give rise to two serious problems of interpretation, which are discussed in the next two paragraphs.

2 Absence of Express Restriction to Acts of General Application

Clause 9(1)(c) includes in the laws of Solomon Islands, 'Applicable laws of the United Kingdom in force in Solomon Islands as at 7 July 1978'. The word 'applicable' is not defined, but would appear to result in the incorporation of the original reception rules into the new constitution. In other words, United Kingdom laws will apply if they were in force on 7 July 1978 and the only Acts which were 'in force' were those meeting the requirements of the reception rules. Thus although the words 'of general application' do not appear[115] it would still appear to be necessary for an Act to meet that requirement for it to be applicable.

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111 Federal Constitution of Solomon Islands Bill 2004, cl 189(5).

112 Federal Constitution of Solomon Islands Bill 2004, cl 189(5).

113 Federal Constitution of Solomon Islands Bill 2004, cl 238.

114 Federal Constitution of Solomon Islands Bill 2004, cl 239.

115 They did appear in the earlier draft in a proviso to this paragraph, which stated that "no Act of the Parliament of the United Kingdom of general application passed after 7 July 1978 shall extend to Solomon Islands". Taken literally, this could have been interpreted to mean that the cut-off date only applied to Acts of general application and that other Acts formed a part of the law whenever passed.

3 A New Cut-Off Date?

The intention of the Bill appears to be to provide a new cut-off date for United Kingdom statutes. There is no mention of the current cut-off date (1 January 1961); instead clause 9(1) (c) states that 'Applicable laws of the United Kingdom in force in Solomon Islands as at 7 July 1978' comprise part of the law, and a separate subclause (cl 9(4)) goes on emphsise that 'No Act of the Parliament of the United Kingdom passed after 7 July 1978 shall extend to Solomon Islands as part of its law'. Two reasons can be found for the alteration of the cut-of date. First, it brings the cut-off date into line with that which appears to apply to common law and equity.[116] Second, it updates the United Kingdom legislation that applies in Solomon Islands to include more recent reforms. However these reasons do not justify perpetuating post-independence legal dependence. Nor do they justify the uncertainty caused by the fact that United Kingdom Acts that had been held by the courts or generally accepted to be in force may have been repealed between 1 January 1961 and 7 July 1978. Solomon Islands will also have to deal with a whole new body of legislation applying in a variety of fields such as the Unfair Contract Terms Act 1977 (UK) and the Family Law Act 1969 (UK).[117]

In any event, it is arguable that the cut-off date is still 1 January 1961. This argument is based on the same logic that results in retention of the general application requirement, discussed above. Only Acts in force in Solomon Islands as at 7 July 1978 are part of the law and as only pre-1961 Acts applied on that date,[118] they are the only ones that can be 'saved' by clause 9(1)(c).

4 Common Law and Equity

As discussed above, the existing Constitution appears to have placed a cut-off date on the application of common law and equity by stating that the decisions of foreign courts are no longer binding after 7 July 1978. This restriction does not appear in the Bill. In fact, the only express reference states that the laws of Solomon Islands include 'the principles and rules of law known as the common law, and the rules of law as they may be applied by the Courts of Solomon Islands'.[119] There is no reference to the common law and equity of the United Kingdom, but this could be included in 'Applicable laws of the United Kingdom', which, as mentioned above, are stated to apply if in force in Solomon Islands on 7 July 1978.[120] If this is correct, the position remains the same as

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116 Constitution of Solomon Islands 1978, sch 3, para 4(1) as interpreted in *Cheung v Tanda* [1984] SILR 108 overruling the High court's decision in *Tanda v Cheung* [1983] SILR 193. See contra *Official Administrator for Unrepresented Estates v Allardyce Lumber Co Ltd* [1980-81] SILR 66.

117 Local legislation governs and marriage and divorce of "islanders" but United Kingdom legislation is still relevant to unions involving expatriates and to financial settlement.

118 By virtue of Constitution of Solomon Islands, s 76 and sch 3, para 1.

119 Clause 9(1).

120 Clause 9(1)(c).

under the current Constitution. The alternative is to interpret 'applicable laws' as referring only to legislation, meaning that Solomon Islands is no longer bound by any overseas common law. This interpretation has the advantage of freeing Solomon Islands courts to develop their own jurisprudence, although, in fact the courts always had this freedom as they were entitled to reject English common law and equity on the grounds that it was 'inapplicable to or inappropriate in the circumstances of Solomon Islands from time to time'.[121] However, this provision has the disadvantage of uncertainty, particularly given the breadth of matters governed by common law, resulting from the dearth of modern legislation to be relied. This is such an important point that the position should be put beyond doubt.

V FEDERALISM AND THE CONSTITUTIONAL CONGRESS

There are two obvious problems with a federal system. The first is the cost of a system that multiplies the cost of a Head of State, legislature, executive, justice system and public service[122] by between nine (the existing number of provinces) and twelve (the maximum number of States allowed by the Bill).[123] The Asian Development Bank ('ADB') has pointed out that the benefits, costs, and implementation challenges of a federal system require careful assessment. It will also face Solomon Islands with major challenges in public administration due to limited managerial capacity and substantial differences in the capacity of the nine provinces to take on new state government functions of policy development, planning, financial and operational management, regulation, and supervision. The ADB suggests that the creation of state governments may simply increase the financial burden of government without improving public service delivery and accountability.[124] The second problem is that a federal system does not necessarily have any more resonance for Solomon Islands than a unitary system.[125] The questions remain, is it relevant to and accessible by the majority of citizens and can it succeed if it is not.

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121 Sch 3, para 2(1)(b).

122 Federal Constitution of Solomon Islands Bill 2004, cl 150(3) and sch 7.

123 Federal Constitution of Solomon Islands Bill 2004, cl 151(2).

124 Asian Development Bank, "Country Strategy and Program Update 2005-2006: Solomon Islands" http://www.adb.org/Documents/CSPs/SOL/2004/csp0100.asp, Accessed on 15 June 2005.

125 Solomon Islands did experiment with a departure from the Westminster system between 1970 and 1974, when the Constitution set up a Governing Council, which operated on the committee principle and combined the functions of executive and legislature. Members were divided into five committees, each with a responsibly for a particular part of government. The rationale was that decisions reached by discussion in committee would result in a style of government more appropriate and therefore more acceptable to Melanesian people. Unfortunately, this experiment was unsuccessful, but more due to personalties and politics divisions than principle.

The importance of finding a resonant system is recognised in the government's White Paper.[126] This document was issued in 2005, following the release of the Bill. Superficially it is concerned with the process required to bring this into force. However, it goes much further than that in raising a vital question for resolution during the constitutional process, which is how to accommodate the diverse clan and tribal communities in an inclusive political entity, and this is discussed further below. The document explains the rationale for constitutional reform. It also frames general principles on which the new constitution should be based, which can be summarised as follows:

- Agreement on a common polity to unite the country.
- Restoration of political and economic fairness and justice.
- Fair sharing of powers, resources and revenues between the federal and state spheres of government.
- Realisation and guarantee of traditional rights of communities and fundamental rights and freedoms in a mutually compatible way.
- Legitimate and representative governments and institutions that promote respect, harmony and peace.
- Opportunity for all to fulfil their aspirations and potential under conditions of tolerance and respect for each other.

The White Paper was endorsed by the 2005 Parliament and adopted by the new government in 2006. The process required the establishment of a Constitutional Congress, the objectives of which have recently been defined as being to:[127]

(a) complete a final content of a new constitution

(b) prepare a detailed report setting out the reasoning for the content of the new constitution

(c) define Solomon Islands political community

(d) recommend an appropriate ratification procedure to bring a new constitution into effect.

The congress is to have 32 members, 18 nominated by the provinces, 2 by Honiara City, 2 youth representatives and 10 individuals. The provincial, Honiara and youth members will be gender balanced and representative of their respective provincial and local communities. Members are to represent a broad cross section of community leaders of Solomon Islands both in civic and traditional capacities. Congress is to be assisted by an Elders Group and independent experts and to connected to provincial committees through their nominee representatives.

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126 White Paper on the Reform of Solomon Islands Constitution, November 2005.

127 Terms of Reference.

Although the emphasis in the White Paper is on process, and the terms of reference for the Constitutional Congress state that the Bill is the 'base document the Congress will work from',[128] it seems from the context of the terms of reference as a whole that the Congress is free to come up with its own draft, but within the federal structure. The most important issue for Congress is to find a means of recognising and protecting the pre-existing communities and accommodating them within the political system, without derogating from their independent integrity. This task is made more difficult by the lack of existing links between national government and local communities, as opposed to the artificially constructed provinces. Interestingly, there is no specific provision for church membership.[129] Congress has not only to define the political communities, but also to find a way of structuring the federal system in a way that encapsulates existing arrangements and forges a united identity whilst supporting the constituent parts.

Apart from the challenge of devising a unique system, there is also the question of how such a proposal will be received by the provincial governments, particularly if it infringes on the authority and revenue that they would expect to receive when reincarnated as states. The last time national government sought to strengthen traditional participation in regional government at the expense of elected provincial members was in 1991, when it was sought to give further seats to chiefs. This initiative was strongly resisted by the provincial government of Guadalcanal and ended with the national government repealing the relevant legislation.[130]

VI CONCLUSION

The proposed Constitution does not solve the pre-existing problems in the areas discussed in this article. With regard to human rights, the range of protected rights has been increased and more regionally specific rights have been added. However, no light has been thrown on how the delicate balancing act between human rights and culture and custom, based on diametrically opposed values and with an increased potential for conflict, is to be conducted. As to the applicability of those rights, no debate appears to have taken place in a local context as to whether rights should be enforceable horizontally or as to whether States should be encourage to develop their own regional rights. The application of customary law remains in the 'too hard' basket along with the fate of the Customs Recognition Act 2000.

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128 Terms of Reference, p 6.

129 Solomon Islands is devoutly Christian with church membership as follows: Church of Melanesia or Anglican Church (35%); the Roman Catholic Church (20%); the South Seas Evangelical Church (18%); the United Church (11%); and the Seventh Day Adventist Church (10%). The Baha'i faith and Jehovah's Witnesses also have a presence in Solomon Islands and there is a small number of hindus and muslims.

130 See further Ken Brown and Jennifer Corrin Care "More on Democratic Fundamentals in Solomon Islands: Minister for Provincial Government v Guadalcanal Provincial Assembly" (2001) 32(3) VUWLR 653.

The failure to deal thoroughly with foreign law is perhaps the greatest disappointment in the Bill. Since Independence the reliance on applicable UK legislation has progressively enlarged a problem of antiquation. The content of this legislation has been petrified at the cut-off date and updating this to 7 July 1978, if this was the intention, is a token gesture which brings with it a new set of problems. Solomon Island continues to rely on legislation that is not designed for the circumstances of the country. What is called for is a legislative program for the patriation of relevant United Kingdom legislation, the possible preservation of any legislation that might be of symbolic significance for Solomon Islands; and the subsequent general repeal of all other United Kingdom legislation applicable to Solomon Islands.[131]

If Solomon Islands is to fulfil the aspirations expressed in the preamble to the Federal Constitution of Solomon Islands Bill, the mould of foreign models for constitutions and instruments of government must be broken. The Congress and working structure surrounding it offer the opportunity to debate the relevant issues from a local perspective. Constitutional renewal in Solomon Islands requires regionally specific solutions founded on dedicated research rather than transplanted models designed to meet a different agenda.

131 Samoa patriated most of its laws in 1972: Reprint of Statutes Act 1972 (Samoa); Tokelau in 1997 and 2004: Repeal of Laws Act 1997 and Application of New Zealand Law Rules 2004 (Tokelau); Tonga in 2003: Civil Laws (Amendment) Act 2003 (Tonga); Niue in 2004: Interpretation Act 2004 and Legislation (Correction of Errors and Minor Amendments) Act 2004 (Niue).