Customary Law in Conflict: the Status of Customary Law and Introduced Law in Post-colonial Solomon Islands[1]

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I. Introduction

Solomon Islands is made up of twenty-six islands and hundreds of small islets spread out in a 1360 km long, double chain, in the South West Pacific, 1,000 miles north-east of Australia. It has a land area of 30,000 sq. km within a sea area of 1,340,000 sq. km. It has a population of about 400,000, within which not less than 80 vernacular languages are spoken.

A British Protectorate from 1893, Solomon Islands became an independent member of the Commonwealth in 1978. The *Constitution* introduced at independence indicated in its preamble a desire to reflect local values and aspirations in the law. This desire was also evident in the constitutional recognition given to customary law as a formal source of law. However, foreign law, introduced prior to independence was not discarded. Instead, it was 'saved' as a transitional measure, to avoid a vacuum pending the creation of laws by the new legislature. This foreign law included certain English legislation, common law and equity, and 'colonial' legislation, made by local delegates or the local legislature during the colonial era.[2] The result was a complex legal pluralism, with laws made up of those indigenous laws that survived the process of imperialism; foreign law (from numerous sources) continued in force; and post-independence law made by Solomon Islands' parliament and courts.

Unfortunately, precise boundaries of the laws continued in force were not given. Neither was the relationship between the different categories of law made clear. In particular, the status of customary law in relation to introduced laws was left in some doubt, and this exacerbated the conflict between these sources of law.

This paper examines some of the uncertainties regarding the status and application of customary law in Solomon Islands. It looks at the relevant constitutional provisions and at new legislation intended to govern proof of customary law. It also analyses judicial attempts to deal with cases of conflict between customary law and introduced law.

II. Post independence sources of law

1. Introduced law

Section 76 of the *Constitution* of Solomon Islands[3] continues in force the United Kingdom Acts of Parliament specified in Schedule 3. Paragraph 1 of Schedule 3 provides:

1 This article is based on a paper delivered by the author at the Anthropology and the Law Conference, Wolfson College, Oxford University, 5 November 1999. It has been updated to take account of recent legislation.

2 Most of this colonial legislation has been superseded by or adopted as Solomon Islands legislation. See *Gandly Simbe v East Choiseul Area Council and Others*, unreported, Court of Appeal, Solomon Islands, CAC 8/97, 9 February 1999.

3 The *Constitution of Solomon Islands* is scheduled to *Independence Order* 1978 (UK).

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[4] *shall have effect as part of the law of Solomon Islands, with such changes to names, titles, offices, persons and institutions, and as to such other formal and non-substantive matters, as may be necessary to facilitate their application to the circumstances of Solomon Islands from time to time.*

Section 76 also continues common law and equity in force by reference to Schedule 3. Paragraph 2 of Schedule 3 of the *Constitution* states:

(1) Subject to this paragraph, the principles and rules of the common law and equity shall have effect as part of the law of the Solomon Islands. . .
(2) The principles and rules of the common law and equity shall so have effect not withstanding any revision of them by any Act of the Parliament of the United Kingdom which does not have effect as part of the law of the Solomon Islands.

Paragraph 4(1) of Schedule 3 states:

No court of Solomon Islands shall be bound by any decision of a foreign court given on or after 7th July 1978.

This makes it clear that it is only the principles of common law and equity existing prior to independence that form part of the law.[5]

2. Customary Law

During the colonial period, customary law was tolerated and even encouraged as a means of social control. However, its role in the formal system was restricted to minor matters, which were allowed to be dealt with in native courts in accordance with custom.[6] Outside the formal system of courts, customary law has always been and continues to remain the only relevant law. The *Constitution* of Solomon Islands attempted to integrate customary law into the formal system. Section 75 states:

(1) Parliament shall make provision for the application of laws, including customary laws.
(2) In making provision under this section, Parliament shall have particular regard to the customs, values and aspirations of the people of Solomon Islands.

Schedule 3 gives more detail regarding the role of customary law. Paragraph 3 provides:

(1) Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands.
(2) The preceding subparagraph shall not apply in respect of any customary law that is, and to the extent that it is, inconsistent with this Constitution or an Act of Parliament.

Paragraph 3, clause (3) goes on to empower Parliament to take the matter further:

(3) An Act of Parliament may:-
(a) provide for the proof and pleading of customary law for any purpose;
(b) regulate the manner in which or the purposes for which customary law may be recognised; and
(c) provide for the resolution of conflicts of customary law.

Parliament finally exercised its powers under this sub-paragraph last year, by passing the *Customs Recognition Act* 2000. The Act is based on a Bill first circulated for comment

4 The significance of 1st January 1961 is that it is the date referred to in s 15 of the *Western Pacific (Courts) Order* 1961(UK), which had previously applied in Solomon Islands.

5 Paragraph 4(1) has been interpreted restrictively: see *Official Administrator for Unrepresented Estates v Allardyce Lumber Co Ltd* [1980-81] SILR 66 at 72, where the High Court held 'that there is no date fixed for the receipt of the common law and therefore decisions of any date must be given consideration'. However, see *Cheung v Tanda* [1984] SILR 108, where the Court of Appeal held that 7 July 1978 was the cut off date for the reception of the common law and equity in Solomon Islands. However, Kapi JA held that declaratory decisions made after that date would be binding.

6 *Native Courts Ordinance* 1942.

in 1993.[7] The Bill and the Act closely follow the *Customs Recognition Act* 1963[8] of Papua New Guinea, which, ironically, was repealed in the same year.[9] The *Customs Recognition Act* 2000 has not yet come into force.[10] Section 6 of the Act bears the marginal note, 'Recognition of custom', and provides that:

> *. . . custom shall be recognised and enforced by, and may be pleaded in, all Courts except so far as in a particular case or in a particular context —*
> *(a) its recognition or enforcement would result, in the opinion of the Court in an injustice or would not be in the public interest, or*
> *(b) be inconsistent with the provisions of the Constitution or an Act of Parliament.*

This would appear to be the intended extent of the restriction on custom as a source of law, pursuant to paragraph 3(3)(b). Unfortunately, ss 7 and 8, which are primarily directed to dealing with pleading and proof of customary law, are badly drafted and, read literally, further limit the purposes for which custom may be taken into account in criminal and civil cases respectively. In criminal cases, custom may only be taken into account in order to:

- ascertain a person's state of mind;
- as a factor in deciding whether a person has acted reasonably;
- as a factor in deciding whether to convict;
- as a factor in determining the appropriate penalty on conviction;
- to avoid injustice.

In civil cases, custom may only be taken into account in relation to:

- rights relating to customary land and things in, on or produce of customary land;
- rights relating to water, the sea, sea-bed, reef, river or lake;
- devolution of customary land on birth, death or the happening of a certain event;
- trespass by animals;
- customary marriage, and divorce, custody and guardianship in connection with a customary marriage;[11]
- a transaction the parties intend or justice requires should be regulated by custom rather than law;
- as a factor in deciding whether a person has acted reasonably;
- the existence of a state of mind;
- to avoid injustice.

Whilst the avoidance of injustice provision may be relied on by a court that is well disposed towards customary law, these two sections have the effect of relegating custom from a general source of law to a source of law in specific cases only. It is doubtful whether this was Parliament's intention.

III. The status of customary law in cases of conflict

Until the *Customs Recognition Act* 2000 comes into force, customary law 'shall have effect as part of the law of Solomon Islands'.[12] After that time, it will remain, at least, as a

7 A slightly amended draft of the Bill was published in 1995.
8 Originally called the *Native Customs (Recognition) Act* 1963.
9 Repealed by the *Underlying Law Act* 2000 (PNG), which came into force on 18 August 2000. Repeal was implied rather than express.
10 Section 1 requires the Act to be gazetted before it comes into force.
11 Section 9 provides that 'notwithstanding any other law, custom shall be taken into account in deciding questions relating to guardianship and custody of infants and adoption'.
12 *Constitution of Solomon Islands*, Schedule 3, para 3(1).

source of law to be taken into account in the cases specified in ss 7 and 8 of the Act.[13] In either case, it is necessary to know the status of customary law when it comes into conflict with other types of law. There is some guidance in the *Constitution* as to the relative weight to be given to customary law. However, this is not comprehensive. Further, interpretation of the relevant sections by the courts has often been conflicting. The *Customs Recognition Act* 2000 has arguably added to the confusion. A summary of the statutory provisions regulating the status of customary law with respect to each competing source is set out below. Some of the most relevant case law is also discussed.

1. Customary Law and Constitutional Law

Paragraph 3(2) of Schedule 3 states that customary law is not to be applied if it is inconsistent with the *Constitution*. This is also the implication from s 2 of the *Constitution*, which provides: 'This *Constitution* is the supreme law of Solomon Islands and if any other law is inconsistent with this *Constitution*, that other law shall, to the extent of the inconsistency, be void.' However, customary law is, in some instances, specifically elevated above the *Constitution*, by means of specific exemptions. For example, s 15(5)(d), potentially exempts customary law from the anti-discrimination provisions in s 15. Whilst the 'Bill of Rights' contained in Chapter II of the *Constitution*, including s 15, is not strictly introduced law, it consists of introduced concepts of human rights, with no concessions for indigenous culture or custom.[14] Not surprisingly, this area has been a particular source of conflict. Unfortunately, the relevant sections have received inconsistent treatment by the courts.[15]

R v Loumia and Others[16] is a vivid example of the conflict between customary law and the Constitution, in the form of enshrined human rights. The defendant admitted killing members of a rival customary group, but argued, on the basis of provocation, that this only amounted to manslaughter. At the time of the killing, the defendant had just seen one brother killed and the other seriously wounded in the same fight. It was argued that any reasonable *Kwaio*[17] pagan villager would have responded as the defendant did. Further, it was argued that the defendant came within s 204 of the *Penal Code* (Cap 26), which reduced the offence of murder to manslaughter if, inter alia, 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.' As customary law was part of the law of Solomon Islands, it was argued that the words 'legal duty' in s 204 included a legal duty in custom. Evidence was adduced from a local chief that *Kwaio* custom dictated the killing of a person who was responsible for the death of a close relative.

The Court of Appeal upheld the defendant's conviction for murder on the basis that the Bill of Rights in the Solomon Islands *Constitution* operated in both private and public fields and that the customary duty to kill in retaliation was inconsistent with s 4 of the *Constitution*, which protects the right to life. Whilst the defendant's action was unacceptable, it was never argued that his action was lawful. The Court appears to have ignored the option of using customary law to take account of the defendant's state of mind as an extenuating circumstance reducing the offence to manslaughter. The *Kwaio* area is one in which villagers live a customary life style in accordance with customary principles.

13 It is arguable that s s 7 and 8 should be interpreted as rules of procedure only, and not as limiting the effect of schedule 3, para 3(1) of the *Constitution*.

14 See further Corrin Care J '*Conflict Between Customary Law And Human Rights in the South Pacific*' Vol 1, Commonwealth Law Conference Papers, 1999.

15 Compare the strict interpretation of the Court of Appeal in *R v Loumia and Others* [1984] SILR 51 with the view expressed by Muria CJ in *Remisio Pusi v James Leni and Others*, 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.

16 [1984] SILR 51. See further Brown K 'Criminal Law and Custom in Solomon Islands' (1986) 2 QIT Law Journal 133.

17 An area within Malaita Province.

International human rights norms, which emphasise individual rights, have little relevance in such an environment, where community values and duties dominate. Taking the reality of the defendant's situation into account would have complied with the constitutional duty of the court to recognise customary law as a formal source of law. Policy considerations might then have been accommodated by way of a deterrent sentence.

Remisio Pusi v James Leni and Others[18] is a recent example of the conflict between customary law and the *Constitution*, where the Chief Justice took a very different approach to that of the Court of Appeal, discussed above. The case arose after an argument between the plaintiff and members of the local chiefs committee in which the plaintiff shouted offensive words at them and told them to leave his property. The next day the plaintiff sent an apology coupled with an offer to pay $20 compensation through one of the chiefs, but the chiefs refused to accept this, on the ground that it was not tendered in the proper customary manner. The plaintiff sent a second apology through the area constable. A third attempt to apologise was made through the plaintiff's solicitor. Both these attempts were unsuccessful. The plaintiff then applied to the High Court for an order to be made against the village chiefs on the basis that he had been banished from the village and that this banishment was 'null and void'. He also applied for compensation for breach of his constitutional rights, in particular the right to personal liberty (s 5); the right to protection from deprivation of property (s 8); the right to freedom of assembly and association (s 13); and the right to freedom of movement (s 14).

Muria CJ dismissed the application with costs, on the basis that the plaintiff's individual rights had not been contravened, as he had not established that he was subject to a banning order. Rather, His Lordship considered that the plaintiff was reluctant to go to the village, as he had not atoned for his breach of custom. Whilst this finding was sufficient to dispose of the matter, His Lordship made the following comment on the conflict between customary law and human rights revealed in this case:

> *Lest it may be forgotten by anyone else and those who intend to apply [sic] the proper and lawful authority of community leaders with constitutional challenges would be advised not to lose sight of the Preamble*[19] *of the Constitution as well as section 76 and Schedule 3 of the Constitution. Those provisions clearly embrace the worthiness, the value and effect of customary law in this country. The Constitution itself recognises customary law as part of the law of Solomon Islands and its authority therefore cannot be disregarded. It has evolved from time immemorial and its wisdom has stood the test of time. It is a fallacy to view a constitutional principle or a statutory principle as better than those principles contained in customary law. In my view, one is no better than the other is. It is the circumstances in which the principles are applied that vary and one cannot be readily substituted for the other.*

His Lordship went on to say:

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

This decision appears to signal an intention to give full effect to customary law and to indicate that, in spite of s 2 and paragraph 3(2) of Schedule 3, human rights provisions will not necessarily be applied in preference to customary law. Rather, that choice of law will depend on the circumstances of the case.

18 Unreported, High Court, Solomon Islands, cc218/1995.

19 Whilst Muria CJ uses the term 'preamble', this terminology is not found in the *Constitution* itself. As the paragraphs in question contain underlying principles and philosophies and use the words 'declare' 'agree and pledge' in capital letters, they might perhaps be more correctly referred to as the 'Declaration, Agreement and Pledge'. Notwithstanding, the term preamble has been used to identify the opening passages of the Solomon Islands *Constitution* in this paper.

2. Customary law and Acts of Parliament

The *Constitution* also states that customary law is not to apply if inconsistent with 'an Act of Parliament'.[20] What is not clear is whether all statutes are superior to customary law or only those passed by Solomon Islands' parliament. Taking the phrase 'Act of Parliament' in the context of Schedule 3 as a whole, it appears to refer only to Acts of the national parliament. Paragraphs 1 and 2(2) of the Schedule refer specifically to 'Act(s) of the Parliament of United Kingdom', to distinguish them from the term 'Act of Parliament', meaning Acts of the local legislature. Further, s 144 of the Constitution defines 'Parliament' to mean the National Parliament of Solomon Islands. This was the view adopted in *K v T and KU*,[21] where the Principal Magistrate upheld the contention that the term 'Acts of Parliament', when used in Schedule 3, referred only to Acts passed by Solomon Islands' Parliament. This interpretation is also supported by dicta in *Igolo v Ita*.[22]

The contrary argument is founded on the *expressio unius est exlusio alterius* principle.[23] Given that the limitations on United Kingdom Acts are specifically dealt with in paragraph 1 of Schedule 3, which states that they are subject to the '*Constitution* and to any Act of Parliament', it could be inferred that imperial legislation is not subject to any further fetters. However, the provisions of Schedule 3 must be read in the context of the *Constitution* as a whole, which stresses the importance of customary law and the general objective of promoting it.[24]

Accordingly, it is argued that, as a general rule, customary law should be applied in preference to United Kingdom Acts. The only apparent exception to this is provided by s 5(2) of the *Solomon Islands Independence Order* 1978. This sub-section continues in force legislation that fails 'to be prescribed or otherwise provided for under the *Constitution* by Parliament', as if it had been made under the *Constitution* by the National parliament. Thus, for example, in *Y Sato & Company Limited v Honiara Appointed Council* and *Solomon Motors Limited v Honiara Appointed Council*[25] the Court of Appeal concluded that legislation falling within that category, such as the pre-independence *Local Government Act* had effect as if it 'had been made in pursuance of the *Constitution*'.[26] However, s 5(2) does not apply to pre-existing legislation on matters that are not required by the *Constitution* to be legislated for.

Even if it is not accepted that customary law ranks above United Kingdom Acts, there is nothing to suggest that it is inferior. At the very least, it is of equal weight to a United Kingdom Act. If this is the case, which will be applied will presumably depend on the circumstances of the case. Again, this view is supported by *Remisio Pusi v James Leni and Others*,[27] where Muria CJ said:

> *It is a fallacy to view a constitutional principle or a statutory principle as better than those principles contained in customary law. In my view, one is no better than the other. It is the circumstances in which the principles are applied that vary and one cannot be readily substituted for the other.*

Accordingly, if the case in question relates to customary matters, such as customary land or customary title, it would appear reasonable to expect that customary law would prevail. Similarly, a United Kingdom Act would appear likely to prevail when the context

20 Schedule 3, paragraph 3(2).
21 [1985/6] SILR 49.
22 [1983] SILR 56 at 58.
23 For an explanation of this principle see eg Bennion, F, *Statutory Interpretation*, 2nd ed, 1992 873.
24 For judicial support of this view, see eg *Remisio Pusi v James Leni and Others*, unreported, High Court, Solomon Islands, cc 218/1995, 14 February 1997.
25 Unreported, Court of Appeal, Solomon Islands, CAC15 & 16/1998, 21 January 1999.
26 See also *Gandly Simbe v East Choiseul Area Council and Others*, unreported, Court of Appeal, Solomon Islands, CAC 8/97, 9 February 1999.
27 unreported, High Court, Solomon Islands, cc 218/1995, 14 February 1997.

is not customary. This view is supported, at least in the context of customary land, by the obiter remarks of Chief Justice Daly in *Igolo v Ita*,[28] where he said:

> *. . . this is a case in which customary land is under discussion and rights to customary land should, on the basis of common sense, be dealt with in accordance with the customary traditions and any principles which have evolved from them. To try to impose in such traditional situations a received law. . .is, to say the least, unsatisfactory. I therefore conclude that both in law and common sense a customary law in the circumstances referred to would take priority over a received law.*

It also appears that a United Kingdom Act would prevail if the customary law were unclear. This was the case in *K v T and KU*,[29] where the mother took custody proceedings against her dead husband's relatives. The Magistrate held that the evidence of the customary law governing the matter was not clear, and he therefore applied the *Guardianship of Infants Act* 1886 (UK).

The *Guardianship of Infants Act* 1886 (UK) has been applied in preference to customary law in other cases regarding custody of minors. This is arguably an instance of another category of case where United Kingdom Acts are likely to prevail, that is, where the customary law in question is contrary to public policy. Thus, for example, in Solomon Islands' custom, custody is generally determined by reference to the payment of the brideprice. If the husband's family makes payment to that of the wife, the children prima facie remain with the father on dissolution or with his family on his death.[30] Under introduced law, on the other hand, the welfare of the child is said to be the paramount consideration in determining custody. The 'welfare principle' is enshrined in s 1 of the *Guardianship of Infants Act* 1925 (UK).[31] This Act has been held to be in force in Solomon Islands by virtue of paragraph 1 of Schedule 3 of the *Constitution*.[32] In a series of custody cases (*Sukutaona v Houanihou*,[33] *In re B*,[34] *K v T and KU*[35] and *Sasango v Beliga*[36]) the courts have applied the United Kingdom Act in preference to customary law. In *K v T and KU*, discussed above, this step was taken, in spite of the fact that customary law was admitted to be a superior source of law, on the grounds that the evidence of the custom in question was not clear.[37]

As originally drafted, the *Customs Recognition Bill* would have given statutory priority to the welfare principle by virtue of a proviso to the recognition and enforcement of custom in all courts, which prevented its application, 'in a case affecting the welfare of a child under the age of 16 years' where, 'it would not [be] in the best interests of the child.'[38]

28 [1983] SILR 56 at 58.

29 [1985/86] SILR 49.

30 *In re B* [1983] SILR 223 fully sets out the basic position in Melanesian custom. Even on the death of the husband the children were to remain with his family: *Sasango v Beliga* [1987] SILR 91.

31 Section 1 states: 'Where in any proceeding before any court (whether or not a court within the meaning of the *Guardianship of Infants Act*, 1886) the custody or up bringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.'

32 But see *Krishnan v Kumari* (1955) 28 Law Reports of Kenya 32, where the court held that the *Guardianship of Infants Act* 1925 (UK) was not an act of general application in Kenya.

33 [1982] SILR 12.

34 [1983] SILR 223.

35 [1985/86] SILR 49. In this case the mother was pursuing custody against paternal relatives: the father of the children had died.

36 [1987] SILR 91.

37 See below. In *Allardyce Lumber Company Limited v Laore* cc 64/89, unreported, High Court, Solomon Islands, 10 August 1990, Ward CJ went even further and suggested that the courts should not be dealing with customary law until Parliament had provided for its proof and pleading as required by paragraph 3(3) of Schedule 3 of the Constitution, see above.

38 Section 6(1)(c). This paragraph was deleted from the 1995 draft of the Bill.

That paragraph does not appear in the Act. Section 9 of the Act provides that 'Notwithstanding anything in any other law, custom shall be taken into account in deciding questions relating to guardianship and custody of infants and adoption'.[39] Unfortunately it is unclear whether the section is intended to ensure that custom should prevail over the welfare principle. Without express words to that effect, a more reasonable interpretation would appear to be that the section is designed to ensure that customary law is a factor to be weighed in the decision making process, rather than to make it a determining factor.

4. Customary Law and common law and equity

Schedule 3, paragraph 2(1)(c), makes it clear that customary law is to prevail over English common law and equity. This is in contrast to a number of other South Pacific countries, where the position has been left in doubt.[40] Paragraph 2(1)(c) states that:

> *the principles and rules of the common law and equity shall have effect as part of the law of Solomon Islands, save in so far as. . .in their application to any particular matter, they are inconsistent with customary law applying in respect to the matter.*

However, the courts have not always given full effect to this provision. For example, in *Longa v Solomon Taiyo Ltd*[41] the court assessed damages for personal injuries in accordance with English common law rather than in accordance with levels of customary compensation. In fact, there may be good reason for this, in that customary compensation is not necessarily awarded to compensate the victim, but may be awarded to repair the relationship between the family of the victim and the family of the perpetrator. This raises one of the greatest difficulties facing the courts in applying paragraph 2(1)(c): in order to apply customary law it is necessary to know what that law is and how far it applies. This is discussed further under the next major heading.

The *Customs Recognition Act* 2000 has introduced another complication. As mentioned above, the Act limits the categories of case in which customary law may be taken into account. The question then arises whether common law that is inconsistent with customary law in cases outside those categories will now be part of the law. The better view would appear to be that it will not, as Parliament would surely have expressly referred to this change if it had been intended. If the Act comes into force, this is one of many questions that the court will have to address.

5. Conflict between different systems of customary law

One of the reasons often advanced as dictating against a major role for customary law in the legal system of Solomon Islands is that it is not a homogenous body of law applying throughout the country. Custom differs from island to island and from village to village. Paragraph 3(3)(c) of the *Constitution* left the thorny problem of how to resolve such conflicts to Parliament. No action was taken to deal with this until the passing of the *Customs Recognition Act* 2000. Section 10 provides that where a court is faced with conflicting systems of custom and the Court is not satisfied on the evidence that one should prevail, the Court shall consider all the circumstances and may adopt the system that it is satisfied the justice of the case requires. This is a far less detailed provision than that contained in the recent *Underlying Law Act* 2000 of Papua New Guinea. That Act provides that conflicts between different regimes of customary law should be determined in accordance with the following rules;

39 Section 9.

40 See eg, *Constitution* of Marshall Islands 1978, art X, ss1 and 2; *Constitution of Samoa* 1962, art III(1); *Constitution of Vanuatu*, s 45(1) (See further *Banga v Waiwo*, unreported, Supreme Court, Vanuatu, Appeal Case 1/96, 17 June 1996, where Vaudin d' Imecourt CJ took the view that customary law was a source of last resort, only to be applied in the absence of any other applicable law. See further Corrin Care J, 'Bedrock and Steel Blues: Finding the Law Applicable in Vanuatu' (24) *CLB* 594 at 601-603.

41 [1980/81] SILR 239 at 259.

(1) Where the parties belong to the same community the customary law of that community should apply.
(2) Where the parties belong to communities with different customary law on the subject matter of the proceedings, they should be governed by the customary law that the parties intended to apply or, if there was no such intention, the law that the court considers most appropriate.
(3) In matters of succession, the customary law of the deceased's community should prevail, except with regard to land, where the customary law of the place where the land is situated should apply.
(4) In all other cases, the customary law considered most appropriate by the court should apply.
(5) In exercising its powers, the court must take into account the place and nature of the transaction, act or event and the nature of residence of the parties.[42]

An interesting approach is also revealed by a first instance decision from Vanuatu. In *Waiwo v Waiwo and Banga*,[43] Senior Magistrate (now Chief Justice) Lunabek, put forward suggestions for dealing with conflict not only between different regimes of customary law, but also between customary law and introduced law;

(1) If the parties are from the same custom area and are governed by the same customary law regime, that regime should be applicable to their case.
(2) If they come from the same Island or different Islands but are subject to a different customary law customary law regime, the court should look for a common basis or foundation in the customary law applicable.
(3) In cases where not all parties are indigenous and which are not governed by the formal law of Vanuatu, the Court should consider British or French laws applicable in Vanuatu, depending on the choice of the non-citizen as to the law to be applied and at the same time, the Court should consider any applicable customary law.

Whilst the courts in Solomon Island have a much wider discretion under the 2000 Act, the rules put forward in this case, and the provisions of the *Papua New Guinea Act* provide useful suggestions as to how that discretion should be exercised.

IV. Proof of Customary Law[44]

Regardless of the status of customary law, a serious impediment to its application has been the insistence by the courts that it was required to be proved by evidence. Examples of this stance are provided by *Sukutaona v Houanihou*[45] and *Sasango v Beliga*.[46] In fact, until the *Customs Recognition Act* 2000 comes in to force, it is arguable that customary law is a matter of law, not fact, under the *Constitution* and does not have to be proved by adducing evidence.[47] Paragraph 3(1) of Schedule 3 of the *Constitution* provides that, 'Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands'. To insist that customary law is to be proved as a matter of fact is to derogate from the constitutional status of customary law as a recognised, formal source of law as provided by Schedule 3.

The view that customary law is a question of law has been given statutory recognition in other countries of the Pacific region. For example, the *Laws of Tuvalu Act* 1987, s 5(3)

42 Section 17.
43 Unreported, Magistrates Court, Vanuatu , cc324./95. The decision was reversed on appeal in *Banga v Waiwo*, unreported, Supreme Court, Vanuatu, AC1/96.
44 See further Corrin Care and Zorn, 'Proving Customary Law in the Common Law Courts of the South Pacific', accepted for publication in 2001 by *International and Comparative Law Quarterly*.
45 [1982] SILR 12.
46 [1987] SILR 91.
47 *Constitution of Solomon Islands* 1978, Schedule 3, para 3(1).

and Schedule 1 provide that questions of customary law shall be determined as questions of law. If the court is in doubt it must hold an inquiry. The technical rules of evidence will not apply; the court may call evidence, and may consider primary and secondary materials. The *Laws of Kiribati Act* 1989, s 5(3) and Schedule 1, is to like effect. These countries have a historical bond with Solomon Islands from the point of view of practice and procedure, as they were part of the Western Pacific area, governed by the Western Pacific (Courts) Order in Council, 1961.

Until the passing of the *Underlying Law Act 2000* (PNG), the *Customs Recognition Act* 1963, of Papua New Guinea, represented the opposite view, treating customary law as a matter requiring evidentiary proof. The *Customs Recognition Act* 2000 of Solomon Islands closely resembles the Papua New Guinea Act. Section 3 provides that questions as to the existence of any customary law, the nature of that law and its application or relevance to the circumstances of the case, are to be ascertained as matters of fact. However, s 5 provides that in considering such questions, the court is not bound to observe the strict rules of procedure or evidence. The court is specifically permitted to refer to, and accept as evidence, books, treatise, reports or other reference works, statements by chiefs or provincial governments.

Proving customary law as a question of fact involves adducing evidence on point. Apart from being a costly exercise, it may also involve complicated rules of evidence, inapplicable to customary matters. Treating customary law as 'law', on the other hand, does not require evidence to be adduced. It also puts customary law on the same level as other sources of formal law.

V. Conclusion

In summary, customary law has been afforded formal recognition by the *Constitution* of Solomon Islands as a general source of law. That recognition has arguably been limited to specific cases by the *Customs Recognition Act* 2000. However, that Act is yet to come into force, and according to local sources, is unlikely to do so. In any event, formal recognition is not required for customary law to apply outside the introduced system of law. At a village level, customary law will continue to be 'the law'.

In cases of conflict with other sources of law, the prima facie position of customary law is that:

- It is subordinate to constitutional provisions, including human rights provisions, unless specifically exempted from their protection.
- It is subordinate to Acts of Solomon Islands' Parliament.
- It is superior to Acts of the United Kingdom Parliament continued in force.
- It is superior to common law and equity.

However, case law shows that reference to status in the hierarchy is an over-simplistic way of dealing with conflict between customary law and other sources of law. Other factors are relevant, such as the requirement by the courts and by the *Customs Recognition Act* 2000 (if and when it comes into force) that customary law be proved by evidence, in the absence of which other sources of law will prevail.

Further, the hierarchical approach ignores fundamental differences between the nature of customary law and that of introduced law, as highlighted in cases such as *Longa v Solomon Taiyo Ltd.*[48] Caution must be exercised in weighing concepts from different legal systems. The temptation to oversimplify the process was judicially recognised in *Lilo and Another v Ghomo*,[49] where Daly CJ said:

48 [1980/81] SILR 239.
49 [1980/81] SILR 229 at 233-234.

> *. . . how can one express customary concepts in the English language? The temptation which we all face, and to which we sometimes give in, is to express these concepts in a similar manner to the nearest equivalent concept in the law received by Solomon Islands from elsewhere, that is the rules of common law and equity. The result is sometimes perfectly satisfactory in that the received legal concept and the Solomon Islands custom concept interact to give the expressions a new meaning which is apt to the Solomon Islands context. . .[Some] concepts of received law have not developed a customary law meaning and the use of expressions which denote those concepts can produce difficulties of some complexity. This is particularly so when the custom concepts which they are said to represent are themselves undergoing modification to fit them to the requirements of a changing Solomon Islands. . .*

The system of legal pluralism operating in Solomon Islands brings with it a number of problems, which do not appear to have been appreciated at independence. The first statute to be passed in this area since independence, the *Customs Recognition Act* 2000, has been copied from the *Customs Recognition Act* of Papua New Guinea, rather than based on sound research.[50] The Act still leaves the courts to perform a balancing exercise between very different types of law. This exercise should involve taking into account not only the hierarchical status of a law, but also local context, a starting point for which is perhaps the opening words of the preamble to Solomon Islands' *Constitution*:

> *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. . .*

50 The 1996 Annual Report of Solomon Islands Law Reform Commission records lack of progress due to insufficient resources.