

AN ANALYSIS OF THE RECOGNITION OF CUSTOMARY LAW AND COMMON LAW AND EQUITY IN THE LEGAL SYSEM OF SOLOMON ISLANDS

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INTRODUCTION

The Solomon Islands *Constitution* recognises the customary law and common law and equity as sources of laws of Solomon Islands.¹ Unlike Papua New Guinea (PNG), Solomon Islands does not have any underlying law legislation.

The *Underlying Law Act 2000* of PNG consists of customary law and common law and equity. This paper explores how the similar laws to the underlying law are recognised and used in Solomon Islands. These similar laws in Solomon Islands are customary law and common law and equity. Unlike PNG, Solomon Islands does not have a single legislation that set out how customary law and common law and equity are to be applied.

In Solomon Islands the *Constitution* and other laws recognises customary law. This recognition however comes with restrictions.

The Solomon Islands *Constitution* defines customary law as rules of customary law prevailing in an area of Solomon Islands.² Customary law entirely governed the people of Solomon Islands before the British protectorate era in 1893.

The use and application of customary law in Solomon Islands was drastically modified and restricted during the British protectorate period (1893-1978) and after independence in 1978.

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¹ *Constitution* ss 75 & 76, sch 3.

² *Constitution* s 144(1).

This is because of the introduced legal system which involved introduced laws, courts, and the police who were empowered to regulate and control the people. Nevertheless, customary law is still part of the law of Solomon Islands.

The *Constitution* also explicitly provides for the recognition of the principles of common law and equity as laws of Solomon Islands. The recognition is also subject to restrictions placed by the *Constitution*.

This paper explores and discusses the recognition of customary law and common law and equity in the legal system of Solomon Islands. It has 4 parts. Part 1 is on statutory recognition of customary law and common law and equity. This part describes the *Constitution* and other Acts of Parliament that recognise customary law and common law and equity. Part 2 is on cases decided by the courts of Solomon Islands concerning customary law and common law and equity. It shows the various degrees of courts' recognition of these different sources of law. Part 3 analyses how these sources of laws were recognised and applied in the legal system of Solomon Islands. And finally, part 4 sets out possible ways forward for the recognition of customary law and common law and equity in Solomon Islands.

PART 1: STATUTES RECOGNITION OF CUSTOMARY LAW AND COMMON LAW AND EQUITY

A. Customary law

1. *Constitution*

The Solomon Islands *Constitution* recognizes customs or customary law in its preamble, sections 75, 76, and Schedule 3. This recognition allows customary law as a source of law in Solomon Islands.

The preamble states that:

“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.”³

Section 75 states:

“Parliament shall make provision for the application of laws, including customary laws. In making provision under this section, Parliament shall have particular regard to the customs, values and aspirations of the people of Solomon Islands.”⁴

Section 76 states:

“(1) Until Parliament makes other provision under the preceding section, the provisions of Schedule 3 to this *Constitution* shall have effect for the purpose of determining the operation in Solomon Islands - ...
(c) of customary law; ...”⁵

³ *Constitution* preamble.

⁴ *Constitution* s 75.

⁵ *Constitution* s 76.

Schedule 3 provides:

“Paragraph 3(1) ... customary law shall have effect as part of the law of Solomon Islands.

Paragraph 3(2) The preceding subparagraph shall not apply in respect of any customary law that is ... inconsistent with this *Constitution* or an Act of Parliament.

Paragraph 3(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.”⁶

It is clear from these constitutional provisions that customary law is part of the law of Solomon Islands. In hierarchy of laws, customary law is ranked higher than common law and equity but lower than the *Constitution* and any Acts of Parliament. This means customary law can be applied so far as it is not inconsistent with the *Constitution* or any Acts of Parliament. In the case of *Igolo v Ita*⁷ Daly CJ of the High Court of Solomon Islands held that customary law would prevail over received laws. The received laws he was referring to were the British Acts of Parliament of general application as in force on 1st January 1961 and the principles and rules of the common law and equity.

2. *Customs Recognition Act 2000*

The *Customs Recognition Act 2000* attempted to fulfil section 75 and Schedule 3, paragraph (3)(3) of the *Constitution*. The Act recognises customs as matters of fact.⁸ A Court is not bound to observe strict legal procedure or apply technical rules of evidence when proving custom.⁹ Sections 7 and 8 of the Act stipulate purposes whereby custom may be considered in criminal

⁶ *Constitution* sch 3.

⁷ *Igolo v Ita* [1983] SBHC 22; [1983] SILR 56 (Daly CJ) <<http://www.paclii.org.vu>>.

⁸ *Customs Recognition Act 2000* s 4.

⁹ *Customs Recognition Act 2000* s 5.

and civil cases. The Act also provides that custom must be considered in deciding questions relating to guardianship and custody of infants and adoption.¹⁰

This Act was passed in Parliament but has not been gazetted to become law in Solomon Islands. It is unknown why the Act has not commenced after its passage in Parliament. However, recent position by the responsible Ministry for the Act was not to commence the Act.¹¹ Two basic reasons for this are: first, commencing the Act may limit the operation of customary law. This is in relation of the use of customary law by the local courts. The *Local Court Act* Ch 19 provides for broad use of customary law so long as customary laws are not contrary to natural justice and humanity.¹² In contrast, the *Customs Recognitions Act 2000* limits its use and application to the areas covered in the Act. Finally, sections 8 and 9 of the *Customs Recognition Act 2000* on the issue of application of customary law to questions of guardianship, custody and adoption of children are ambiguous and inconsistent. In addition, it is not clear how the principle of the best interests of the child (recognised and applied by the Solomon Islands courts) fits with these provisions.¹³

3. *Magistrates' Court Act* Ch 20

The *Magistrates' Court Act* promotes reconciliation in section 35 for both criminal and civil cases. The reconciliation in Solomon Islands is done on the basis of custom and Christianity values. On the basis of customary law, compensation is paid to the victim or the victim's family members.

This provision is mostly utilised for domestic violence cases in Solomon Islands. Sending the spouse to jail is arguably not the best approach to dealing with domestic violence. This is because the Court did not want to disturb the peace and harmony at home between the husband and wife. Arguably it is the paramount interest of the family that the peace and harmonious relation is restored and maintained in the family. In contrast, this approach is considered flawed

¹⁰ *Customs Recognition Act 2000* s 9.

¹¹ Ministry of Justice and Legal Affairs' position on the commencement of the Act as of April 2012.

¹² *Local Court Act* Ch 19 ss 16 & 18.

¹³ Ministry of Justice and Legal Affairs' position on the commencement of the Act as of April 2012.

on the basis that the safety of person experiencing violence should be the paramount consideration.

4. *Local Courts Act* Ch 19

The *Local Courts Act* provides for the Chief Justice to establish local courts throughout Solomon Islands.¹⁴ The Chief Justice shall also appoint the judges of the local courts.¹⁵ The judges are fit and well respected persons in the communities within the jurisdiction of the local courts.

The local courts are established in rural areas to deal with minor civil and criminal matters where parties are all islanders' resident or within the jurisdiction of the local courts as set out in their warrants of establishment.¹⁶ The Act allows the local courts to apply custom of the islanders in the area of the jurisdiction of the courts.¹⁷ They can hear both the law and customary wrongs or breaches. They can impose punishment authorized by law or custom of the islanders that are not contrary to natural justice and humanity. The punishment must always be proportionate to the nature and circumstances of the offence.¹⁸

A Local Court can direct the accused or the respondent to pay fine as compensation to the aggrieved person or the victim on the condition that the victim withdraw any further action for recovery of damages for loss or injury suffered as the result of the action(s) of the accused or respondent.¹⁹

5. *Wills, Probate and Administration Act* Ch 33

This Act recognises the significance of customary law and therefore limits the Act not to apply to customary land²⁰ and any matter regulated by customary usage.²¹

¹⁴ *Local Courts Act* Ch 19 s 2.

¹⁵ *Local Courts Act* Ch 19 s 3.

¹⁶ See *Local Courts Act* Ch 19 s 6.

¹⁷ *Local Court Act* Ch 19 s 16.

¹⁸ *Local Courts Act* Ch 19 s 18.

¹⁹ *Local Courts Act* Ch 19 s 24.

²⁰ *Wills, Probate and Administration Act* Ch 33 s 2(3).

²¹ *Wills, Probate and Administration Act* Ch 33 s 2(4).

6. *Solomon Islands National Provident Fund Act* Ch 109

This Act provides for custom or customary law to be applied for the distribution of a deceased member's contribution in the event that the deceased member did not make any nominee(s). In distribution according to custom, the Act makes reference to the children, spouse, and other person entitled in custom to receive a portion of the deceased contribution.²²

7. *Islanders Marriage Act* Ch 171

This Act recognizes customary marriage as a valid marriage in Solomon Islands.²³ The customary marriage can be registered but it is optional.²⁴

8. *Islanders' Divorce Act* Ch 170

The Act does not apply to customary marriage not registered under the *Islanders' Marriage Act* Ch 171.²⁵ The Act recognises that this type of customary marriage can dissolve, annul or separate in accordance to the custom of the Islanders.²⁶

9. *Law Reform Commission Act* Ch 15

This Act provides that among the functions of the Commission is to make recommendation to restate, codify, amend or reform of traditional or customary law.²⁷ This provision directs the Commission to consider customary law when reviewing laws.

²² *Solomon Islands National Provident Fund Act* Ch 109 s 33(c).

²³ *Islanders Marriage Act* Ch 171 s 4.

²⁴ *Islanders Marriage Act* Ch 171 s 18.

²⁵ *Islanders' Divorce Act* Ch 170 s 3.

²⁶ *Islanders' Divorce Act* Ch 170 s 4.

²⁷ *Law Reform Commission Act* Ch 15 s 5(1)(d).

B. Common law and equity

Common law and equity is a source of law for Solomon Islands. This is given legal recognition by Schedule 3 paragraph 2 of the *Constitution* of Solomon Islands. However, the application of common law and equity is subject to:

- the *Constitution* or any Act of Parliament;
- Solomon Islands circumstances; and
- Customary law.²⁸

Part 2 describes some cases decided in Solomon Islands legal system concerning customary law and common law and equity.

PART 2: DECIDED CASES ON CUSTOMARY LAW AND COMMON LAW AND EQUITY

Below are some Court cases in which customary law and common law and equity were applied.

A. The Allardyce Lumber Company Ltd v Laore case

The *Allardyce Lumber Company Ltd v Laore*²⁹ (Allardyce case) concerns the foreshore, seabed and reefs. This area of dispute was adjacent to a fixed term estate land held by Allardyce Lumber Company. The land was a freehold land originally sold in 1914 by the great grandfather of Laore to Mr. N.C. Tindal for £5.

The defendant claimed that the foreshore, seabed and the reefs were their customary land. The High Court of Solomon Islands accepted the customary claim of ownership over the foreshore after it was satisfied that the custom of the people of the area allowed for customary ownership over the foreshore, and that the foreshore could be customary land under the *Land and Titles Act* Ch 133. However, the Court did not recognise Mr Laore and the people he represented as the customary owners of that foreshore because they failed to prove that the foreshore was not sold

²⁸ *Constitution* sch 3 para 2(1)(a), (b) and (c).

²⁹ [1990] SBHC 46; <<http://www.paclii.org.vu>>.

and transferred to Mr Tindal in 1914. In the absence of proof the Court decided that the foreshore was included in the land sold and transferred to Mr Tindal and that Laore has no right to it. With respect to reefs and seabed, the Court refused to accept the customary law of ownership alleged by the defendant. Instead the Court ruled that it was prepared to accept other customary rights other than ownership to the reefs, seabed and the sea if proved to its satisfaction. This ruling was influenced by English common law in interpreting the words ‘land covered by water’ in the *Land and Titles Act* to not include the seabed and reefs. In this case Mr Laore’s right to fishing was not accepted because he failed to prove it to the satisfaction of the Court. The Court recognised Allardyce Lumber Company as entitled to use the foreshore, reefs, and sea.

B. The Combined Fera case

This case *Combined Fera Group v Attorney-General*³⁰ concerns a waterfront reclaimed land which previously been swallow sea and mangrove swampy area. An acquisition process under Part V of *Land and Titles Act* Ch 133 as *purchase or lease* of customary land was used to acquire the land, on the basis that the land was customary land. The Acquisition Officer made a determination about the groups having interests in the land. However the determination was challenged in the Magistrate Court.³¹ The issue before the Court was whether the reclaimed land (previously under water) was customary land. The Magistrates’ Court interpreted section 10(4) of the *Land and Titles Act* as conferring Crown absolute ownership over the foreshore and seabed. It also applied the reasoning of the High Court in the Allardyce case and set aside the determination of the Acquisition Officer that the reclaimed land was customary land.

The Appellants appealed to the High Court. They claimed that the land was customary land with competing customary rights vested in each of them.

Justice Palmer of the High Court of Solomon Islands ruled that seabed and foreshore could be customary land if customary ownership (including customary use or occupation) could be proved

³⁰ [1997] SBHC 55; <<http://www.paclii.org.vu>>.

³¹ *Francis Waleilia and Others v David Totorea* (May 1992) cited in Frank Kabui, “Crown ownership of foreshores and seabed in Solomon Islands” <http://www.usp.org.fj/editorial/jpacs_new/kabui.PDF> accessed 29 August 2013. Under the *Land and Titles Act* an appeal from a determination by an acquisition officer must go to the Magistrates’ Court.

to have existed before 1 January 1969.³² The High Court sent the case back to the Magistrates' Court to decide which of the appellant tribes had lawful ownership, use or occupation over the land in accordance with current native usage prior to 1st January 1969. After 11 years the Magistrates' Court finally gave its decision on the land in July 2009.³³ The Magistrates' Court decided that the reclaimed land is customary land. The Court relied on documentary evidence, previous land case decisions and sworn evidence to come up with its decision. The Court also identified the landowning groups and their representatives who have the right to sell or lease out the land.

C. Sukutaona v Houanihou case

This is a case that involved a former husband and wife arguing over the custody of their children. The High Court of Solomon Islands held in the case of *Sukutaona v Houanihou*³⁴ that the customary right of custody to a father was subjected to the welfare of the children principle. The High Court also held that the tender age doctrine required courts to make a presumption in favour of giving custody to the mother of a very young child, which the Court did in this case, although this was directly contrary to the customary law of the parties involved which placed the custody of children with the father. The welfare of the children principle, coupled with the presumption of custody to the mother for tender age children was subsequently upheld in the *In Re B*,³⁵ *K v T and KU; In re Custody Application*,³⁶ and *Sasango v Beliga*.³⁷

The next part draws some analysis on the legislation and case laws concerning customary law and common law and equity in the legal system of Solomon Islands.

³² This 1st January 1969 was when the current *Land and Titles Act* Ch 133 has come into force.

³³ *George Tafisisi & Others v Attorney General* CC. Nos 6, 13, 14, 15, 15A & 22/91 (unreported, Maina CM, 2 July 2009).

³⁴ [1981] SBHC 1; [1982] SILR 12 <<http://www.paclii.org.vu>>.

³⁵ [1983] SBMC 2; [1983] SILR 223; <<http://www.paclii.org.vu>>.

³⁶ [1985] SBMC 2; [1985-1986] SILR 49 <<http://www.paclii.org.vu>>.

³⁷ [1987] SBMC 5; [1987] SILR 91 <<http://www.paclii.org.vu>>. The welfare of the children principle is a common law and equity principle held in the case of *R v Gyngall* [1893] 2 QB 232.

PART 3: ANALYSIS OF CUSTOMARY LAW AND COMMON LAW AND EQUITY

This section is an analysis on how statutes and case laws recognise customary law and common law and equity.

A. Customary law

1. Constitution, the Local Courts Act, the Wills, Probate and Administration Act, and the Islanders' Divorce Act

There is strong statutory recognition of customary law in the *Constitution*, the *Local Courts Act*, the *Wills, Probate and Administration Act*, and the *Islanders' Divorce Act*.

First, the *Constitution* recognises customary law and places it on hierarchy just after the *Constitution* itself and Acts of Parliament. Common law and equity and British statute of general application are ranked below customary law. In the case of *Igolo v Ita*³⁸ Daly CJ of the High Court of Solomon Islands held that customary law would prevail over received laws. The received laws he was referring to were the British Acts of Parliament of general application as in force on 1st January 1961 and the principles and rules of the common law and equity.

The *Constitution* sets down that laws made by the National Parliament of Solomon Islands can override customary law to the extent of its inconsistency. Further, the *Constitution* in section 75 provides that any law that Parliament applies to Solomon Islands must have particular regard to the customs, values and aspirations of the people of Solomon Islands. This is a good provision to ensure that any law applied in Solomon Islands must first have customary law considerations. Applying any law in Solomon Islands without any customary law consideration could be argued as unconstitutional in light of this section.

Secondly, the *Local Court Act* establishes the legal framework for recognition, application and uses of customary law in the rural areas of Solomon Islands. It allows the local courts to resolve

³⁸ *Igolo v Ita* [1983] SBHC 22; [1983] SILR 56 (Daly CJ) <<http://www.pacii.org.vu>>.

customs or customary wrongs or breaches. The local courts also have the power to direct the accused or the respondent to pay compensation to the victim. However, the Solomon Islands Government has failed to utilise the *Local Courts Act* to embrace customary law. There were more local courts in the past than now. Currently, the few local courts that exist are located only in the provincial centres as opposed to the local rural areas which the *Local Court Act* envisaged. Also, currently, the few existing local courts focus more on settling customary land disputes other than customary wrongs or breaches and minor criminal and civil cases.³⁹ This makes it impossible for serious customary wrongs like adultery and fornication (which are not criminal offences under the State law) to be resolved at the local courts. The result is people just resort to *self help approach* to seek compensation and beating of the accused. This sometimes results in escalation of violence in the communities. If local courts exist in their full capacity, they could resolve customary wrongs amicably.

In the past when local courts were active, they upheld customary laws, which on appeal to the High Court were also upheld. This was reflected in the *To'ofilu v Oimae*⁴⁰ case. The brief facts of the case were that the To'ofilu's son married Oimae's daughter. Pride price was paid by To'ofilu to Oimae in order for his son to marry Oimae's daughter. The marriage only lasted for 1 ½ months due to the fact that To'ofilu's son rejected his newly wedded wife after he found out that his wife was pregnant to another man prior to their marriage. In the Local Court, To'ofilu asked for pride price and marriage expenses to be refunded by Oimae because Oimae was not honest about the status of his daughter during their pre-marriage discussions. Oimae should have told To'ofilu of the pregnancy status of his daughter. This would allow To'ofilu to decide whether his son would marry Oimae's daughter. This is according to their custom. The Local Court accepted To'ofilu's claims and ordered full refund of the pride price and marriage expenses. Oimae appealed the Local Court's decision to the Magistrate Court which ordered that Oimae can only repay half of the pride price and marriage expenses. To'ofilu appealed the Magistrate Court's decision to the High Court which upheld the decision of the Local Court and quashed the decision of the Magistrate Court in relation to the correct application of customary law as to the determination of payment of pride price in the area. The High Court held that the

³⁹ The Author's personal knowledge with the justice system of Solomon Islands.

⁴⁰ [1997] SBHC 33; <<http://www.paclii.org.vu>>.

customary practice of determining payment of bride price would be best dealt with by the Local Court of the area of which both parties were originated.

Thirdly, the *Wills, Probate and Administration Act* provides for strong recognition of customary law. This is because the Act restricts its application from customary land and properties that are regulated by customary law.

Finally but not the least, and the *Islanders' Divorce Act* also limits the Act from applying to customary marriage which are not registered under the *Islanders' Marriage Act*. This is a strong recognition of customary law as it provides for the recognition of customary divorce or separation.

2. *Pusi v Leni*

The case of *Pusi v Leni*,⁴¹ was an example of a Court case that the Court strongly recognised customary law. In that case, the plaintiff swore at the village chiefs. The chiefs insisted that the plaintiff must settle the matter with them according to their custom. The plaintiff did not. He then however brought a case against the chiefs alleging that the chiefs banned him from the village. He argued that the chiefs breached his constitutional rights to personal liberty; right to property; right to freedom of assembly and association; and freedom of movement. He sought compensation for breaches of his constitutional rights as recognized in Chapter II of the Solomon Islands *Constitution*. The High Court of Solomon Islands found that the chiefs did not ban the plaintiff from the Village. It was the plaintiff who did not want to go to the Village because he was ashamed of the wrong he had done to the chiefs, which he did not settle it in custom. The Court refused his application. In stressing the importance of custom, the then Chief Justice John Muria said:

“Lest it may be forgotten by anyone else and those who intend to apply the proper and lawful authority of community leaders with constitutional challenges would be advised not to lose sight of the Preamble of the *Constitution* as well as section 76 and Schedule

⁴¹ [1997] SBHC 100; <<http://www.paclii.org.vu>>.

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

I have made those 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.”⁴²

However, in some cases on a similar issue, the courts in Solomon Islands applied customary law inconsistently. In one case the court applies customary law and in another case the court refuses to apply it, even with cases with similar facts. This inconsistency was evident in the *Allardyce Lumber Company Ltd v Laore*⁴³ and the *Combined Fera Group v Attorney-General*.⁴⁴ In the Allardyce case the High Court of Solomon Islands refused to accept customary law that places ownership of the seabed and reefs on customary landowners. To the contrary, in the Combined Fera case, the High Court accepts the customary law that customary landowners can own the seabed and the reefs.⁴⁵ Another example was evident in the *Loumia v Director of Public Prosecutions*⁴⁶ as opposed to the case of *Orinasikwa v Regina*.⁴⁷ In the Loumia case, the Court placed little emphasis on a reasonable Kwaio pagan’s conduct and refused to accept provocation to reduce murder to manslaughter. In contrast, the Court accepted the Kwaio pagan’s conduct in the Orinasikwa case and reduced murder to manslaughter because of provocation.

⁴² *Pusi v Leni* [1997] SBHC 100; (Muria CJ) <<http://www.paclii.org.vu>>.

⁴³ [1990] SBHC 46; <<http://www.paclii.org.vu>>.

⁴⁴ [1997] SBHC 5; <<http://www.paclii.org.vu>>.

⁴⁵ Followed in the Magistrate case of *George Tafisisi & Others v Attorney General* CC. Nos 6, 13, 14, 15, 15A & 22/91 (unreported, Maina Chief Magistrate, 2 July 2009).

⁴⁶ [1986] SBCA 1; <<http://www.paclii.org.vu>>.

⁴⁷ [1999] SBHC 28; <<http://www.paclii.org.vu>>.

The inconsistent application of customary law gives no certainty for customary law. The use of customary law depends more on who is on the bench than as to the certainty of the customary law. Judges who understand the significance of customary law will apply customary law as opposed to judges who do not see any significance in customary law.

In some cases, the courts in Solomon Islands treated customary law as inferior law to common law and equity which should be subject to customary law. Often a judge would demand prove of customary law before the Court can accept that customary law. This approach of proving customary law is degrading to the status of customary law as a source of law. The proponents of this approach perceive customary law as inferior to other State law. In the cases of *Sukutaona v Houanihou*⁴⁸ and *Allardyce Lumber Company Ltd v Laore*,⁴⁹ the High Court of Solomon Islands ruled that evidence must be adduced to prove the alleged customary practice or customary law. The approach taken by the courts were reflected in the *Customs Recognition Act 2000*.⁵⁰ The Act treats custom or customary law as a matter of fact rather than a matter of law. In Papua New Guinea, the *Underlying Law Act 2000* elevates custom as a matter of fact⁵¹ to a matter of law. It is submitted that customary law as a source of law applicable in Solomon Islands should have the same status as other laws. In that, when customary law is pleaded, it should be accepted as a matter of law rather than a matter of fact, at least in cases where the judges know well that the customary law claimed are true.

Another evidence of the inferiority of customary law is the fact that the *Islanders Marriage Act* and the *Penal Code* excludes unregistered customary marriage from the offence of bigamy.⁵² This is diminishing to the status of unregistered customary marriage. It can be inferred that customary marriage is inferior to registered marriage under the State law.

⁴⁸ [1981] SBHC 1; [1982] SILR 12 <<http://www.paclii.org.vu>>.

⁴⁹ [1990] SBHC 46; <<http://www.paclii.org.vu>>.

⁵⁰ This Act was passed by Solomon Islands Parliament in 2000 but yet to be gazetted.

⁵¹ Matter of fact in the *Customs Recognition Act of 1964*.

⁵² *Islanders Marriage Act* Ch 171 s 14; *Penal Code* Ch 26 s 170(2).

B. Common law and equity

Common law and equity as a source of law of Solomon Islands is ranked below customary law. The courts however in some cases use common law and equity instead of customary law. This happens even where there was customary law on the subject that could be utilised. One area that this is obvious is in child custody cases. In such cases, the courts in Solomon Islands upheld common law principle of the welfare of the children, and often coupled with the presumption of custody to the mother of tender age children as opposed to the customary law on custody of children. This approach was held in the case of *Sukutaona v Houanihou*⁵³ and subsequently in cases such as *In Re B*,⁵⁴ *K v T and KU*; *In re Custody Application*,⁵⁵ and *Sasango v Beliga*.⁵⁶ This approach of custody was opposite to the customary law on custody of parties involved in these cases. The customary law on custody of the parties involved in the cases cited above required that custody of children goes to the father or father's side. The reason is for their security to inheritance of their fathers' properties like land and edible trees. It is a customary wish that the children are not alienated from where they can inherit properties. This is to ensure that they are not landless in the future.

However, the courts in Solomon Islands in the light of the welfare of the children principle accompanied by the tender age doctrine do not give 100% guarantee to the mother to take custody of the child or children. In the case of *Choi v Choi*⁵⁷ the High Court of Solomon Islands awarded custody of a tender age girl to her father. In this case the Court considers the welfare of child principle on the premises as to who would best raise up the child. The Court gave custody to the father because the father had a home of his own unlike the mother, the Court was of the view that the father was more responsible to raise the girl, and lastly the father had a settled family where the girl could best be raised. It is submitted that this case move away from the cases that always grant custody of tender age children to the mother. It is further submitted that this line of welfare of the children principle could be extended to say that the children to stay where they can inherit the immovable properties like land and edible trees is also for the welfare

⁵³ [1981] SBHC 1; [1982] SILR 12 <<http://www.paclii.org.vu>>.

⁵⁴ [1983] SBMC 2; [1983] SILR 223; <<http://www.paclii.org.vu>>.

⁵⁵ [1985] SBMC 2; [1985-1986] SILR 49 <<http://www.paclii.org.vu>>.

⁵⁶ [1987] SBMC 5; [1987] SILR 91 <<http://www.paclii.org.vu>>.

⁵⁷ [1993] SBHC 1; <<http://www.paclii.org.vu>>.

and best interest of the children, for a secure future to land and other inheritance from membership of their tribe and from the parent that the children will inherit their properties.

In the case of *Kasa v Biku*⁵⁸ the Court accommodated equitable principle of accountability to customary law on land. The Court agreed that the tribal representative who sold or leased the land must be accountable to the people he represented from the proceeds of the tribal land transaction. The tribal representative hold a position akin to that of constructive trustee in which the principles of trusteeship can apply to regulate the proceeds arising out of the use the customary land. Therefore the Court agreed that the tribal representative must produce to other tribal members an account of all the money he had received for the use of the land.

PART 4: WAYS FORWARD

A way forward to properly address the recognition of customary law and common law and equity is to introduce legislation to deal with customary law and common law and equity. Learning from the experience of PNG underlying law can put Solomon Islands in a good position to achieve the appropriate recognition of customary law and common law and equity. The legislation should be a comprehensive one on the use and application of customary law and common law and equity. After passing such legislation, the Government must conduct continuing legal education for all stakeholders in the Solomon Islands legal system. This is to ensure stakeholders have knowledge of the legislation. Also this will ensure more proper utilisation of customary law and common law and equity in courts by counsels and simultaneously acceptance by judges of these laws. This too will avoid the inconsistent recognition of customary law and common law and equity.

A contrary argument would be to leave the laws as they are now and allow the courts to decide which law to use in the circumstance of each case. The courts should be the right body to deal with the use and application of customary law and common law and equity as the circumstance of a case may require. It is submitted that such approach will only perpetuates inconsistency of decisions as seen in the *Allardyce case* and *Combined Fera case* and *Loumia case* and

⁵⁸ [2000] SBHC 101; <<http://www.paclii.org.vu>>.

Orinasikwa case. A comprehensive legislation is recommended. Learning from PNG's underlying law experiences would assist Solomon Islands to avoid or minimise any problems that PNG might have gone through in its use and application of its underlying law since 2000.

For customary law, another way forward is through a *piece meal approach* to mend the defects of the current laws on customary law. Outlined are some ways forward for this *piece meal approach* which uses legislative reform and practical utilisation of the existing legal frameworks.

First, the *Local Courts Act* should be amended to provide the local courts with unlimited powers to hear and give penalties over customary disputes according to customary law. Further to this, there should be local courts established for all regions in the Solomon Islands. This will ensure the people's sense of ownership and closeness to the local courts. Through this closeness, people will treat local courts as their courts to settle their disputes as opposed to what is happening now where the people perceive the local courts as foreign institutions. It is submitted that having more local courts in the rural areas will ensure that all customary wrongs which are not criminal offences are resolved by the local courts to give a fair punishment or compensation. This will avoid the *self help approach* that people often resort to which sometimes escalate violence in the communities.

Secondly, the government should amend the *Customs Recognition Act 2000* to provide for: a) that customary law must be treated as a matter of law rather than a matter of fact; b) rectify any inconsistency within the current Act on the issues of guardianship, custody and adoption of children; c) clarify in the Act that it does not limit the *Local Court Act* in its application of customary law; and d) rectify any obsolete provision in the Act. The Act should come into force after the amendments in order to avoid courts refusing to apply customary law.

Finally, section 14 of *Islanders Marriage Act* and section 170(2) of the *Penal Code* should be amended to provide for the offence of bigamy to apply to unregistered customary marriage. This is to elevate unregistered customary marriage the same status as marriage under the introduced law. Also, this is to provide punishment for unfaithful spouses who may wish to use unregistered customary marriage just to escape the offence of bigamy.

CONCLUSION

The Solomon Islands legal system applies customary law and common law and equity on an ‘*a la carte*’⁵⁹ basis. This is because:

- 1) Customary law can be strongly recognised in one legislation and not strongly recognised in another legislation. This is the same for the courts: one court case strongly upholds customary law and not in the other court case. Furthermore, the low utilisation of the existing legal frameworks such as the *Local Court Act* which strongly recognises customary law too is a hindrance to the strong recognition of customary law.
- 2) Common law and equity can be strongly recognised in one case and remain conform to its status in another case. There needs to be proper guidelines in legislation as to when common law and equity principles can apply instead of customary law. This is because arguably there will be instances that principles of common law and equity can be accommodated in customary law issues for the justice of the case.

The ways forward described and discussed above should be considered in order to have customary law and common law and equity accorded their proper recognition in the Solomon Islands legal system. As reflected in the ways forward, reforms or amendments of the existing laws whether in a *comprehensive legislation* on customary law and common law and equity or a *piece meal approach* to address the defects of current customary laws is crucial in order to advance and develop customary law and common law and equity jurisprudence in the Solomon Islands. Only then, the two sources of law can be asserted to be fully recognised in the Solomon Islands legal system.

⁵⁹ A system which involves making preferences.

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