

# **Ratified International Human Rights Treaties & Our National Law - Are International Human Rights Laws Applicable?**

**By Ken Avere<sup>1</sup>**

## Applicability of International Human Rights Norms

Solomon Islands is a signatory to various international human rights instruments and it is necessary to identify those instruments which are acknowledged as having the greatest impact on areas such as women, children, employment, prisoners and persons living with HIV/AIDS.

These are the:

- Universal Declaration of Human Rights (“UDHR”);
- The International Covenant on Economic, Social and Cultural Rights;
- The International Convention on the Elimination of all Forms of Racial Discrimination;
- Convention on the Rights of the Child (“CRC”);
- The Convention for the Elimination of all forms of Discrimination Against Women (“CEDAW”);
- The Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment; and
- Various International Labour Organisation conventions and recommendations

The Solomon Islands Constitution states<sup>2</sup> that Parliament is the Sovereign lawmaker and provides for the application of laws, including customary laws. The Constitution states<sup>3</sup> that schedule 3 to the Constitution shall have effect unless Parliament provides otherwise. Any amendments to the Constitution requires a special majority of Parliament.

Schedule 3 states:-

“1.—Subject to this Constitution and to any Act of Parliament, the Acts of the Parliament of the United Kingdom of general application and in force on 1<sup>st</sup> January 1961 shall have effect as part of the law of Solomon Islands, with such changes to names, titles, offices, persons and institutions, and 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.

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<sup>2</sup> Section 75, Constitution of Solomon Islands, Schedule I to The Solomon Islands Independence Order 1978 (1978 No. 783)

<sup>3</sup> Section 76 *ibid.*

2.—(1) Subject to this paragraph, 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:--

- (a) they are inconsistent with this Constitution or any Act of Parliament;
- (b) they are inapplicable or inappropriate in the circumstances of Solomon Islands from time to time; or
- (c) in their application to any particular matter, they are inconsistent with customary law applying in respect of that matter.

(2) The principles and rules of the common law and equity shall so have effect notwithstanding any revision of them by any Act of the Parliament of the United Kingdom which does not effect as part of the law Solomon Islands.”

The result is that Solomon Islands legal system which follows that of the UK and many other Commonwealth countries. Parliament is the sovereign law maker. Gaps in the law are plugged by UK legislation pre-1961. The law is complimented by judicial precedent and the rules of statutory interpretation. The law is influenced by decisions in other commonwealth jurisdictions but they are of persuasive authority only.

Chapter II of the Constitution provides for the protection of the Rights and Freedoms of Individuals. The Chapter contains 17 sections protecting individual rights, among other things, security of the person and the protection of the law, freedom of conscience, assembly and association and the protection of privacy and property.

The pre-amble to the Constitution states:

“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:”

The pre-amble goes on to declare:

“(b) we shall uphold the principles of equality, social justice and the equitable distribution of incomes;  
(c) we shall respect and enhance human dignity and strengthen and build on our communal solidarity...”

However, individual rights are not unfettered. The Constitution provides that individual rights are subject to respect for the rights and freedoms of others and for the public interest.

The Constitution does not provide for the application of international human rights law in the interpretation of rights. However, there are specific cases where the conventions have been referred to.

Once adopted, implementation of Conventions once adopted is problematic in Solomon Islands. Particularly as some of the obligations do not always sit with the operation of customary law and the perception that the implementation of such Conventions can be seen as an adoption of alien foreign values, particularly those of the West.<sup>4</sup>

The reluctance of the Solomon Islands legislature to implement Conventions is counter-balanced by what appears to be the ability of the courts to allow the use of human rights to challenge existing customary rights or ideals.

Where a statute is capable of two interpretations, the courts will presume that parliament intended to legislate consistently with the United Nations Convention on Human Rights and when construing statutes enacted to fulfil a Convention obligation the courts will prefer a consistent interpretation provided the legislation was enacted after the adoption of an obligation.<sup>5</sup>

Secondly, in common law if the common law is uncertain, unclear or incomplete, courts will rule, where possible, in a manner which conforms to the Convention.<sup>6</sup>

Thirdly, when courts have to decide where the public interest lies or what public policy demands, international obligations will be considered and provide guidance.

Finally, in matters covered by the law of the United Nations Convention on Human Rights, courts may be bound to give effect to Convention rights where they are recognised as part of the United Nations. (Solomon Islands is a member of the United Nations).

The following decisions illustrate ways the courts incorporate international instruments:-

### **Sukutaona v Houanihou<sup>7</sup>**

The Magistrates' Court relied on custom to refuse a wife's application for custody of her children. On appeal it was held that while custom is part of the law of Solomon Islands, the best interests of the children are paramount. Although the court recognised customs and values as a source of law, it refused to allow customary rights to interfere with the interests of the children. This decision was

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<sup>4</sup> Tamata L, 'Application of Human Rights Conventions in the Pacific Islands Courts', 2000, Journal Of South Pacific Law, University of the South Pacific.

<sup>5</sup> From Lord Bingham's maiden Speech to the House of Lords in Hunt, 1999, 10.

<sup>6</sup> *ibid.*

<sup>7</sup> Civil Appeal Case No. 7 of 1981, 9<sup>th</sup> December 1981.

taken prior to the adoption (even the drafting) of the Convention on the Rights of the Child but was in line with international thinking and case law<sup>8</sup>.

### **Regina v Rose<sup>9</sup>**

The High Court, hearing an appeal on the acquittal of a teacher who had caned a student in the sight of other children, applied the European Court of Human Rights test to determine its position on inhuman and degrading treatment. The Convention on the Rights of the Child had not yet been drafted when this case was decided.

### **Kelly v Regina<sup>10</sup>**

The Appellant, who was 14½ years of age at the time of a murder raised the impact of the Convention on the Rights of the Child, as part of his appeal against conviction. The court stated:

“This leaves for consideration the propriety of prosecuting the appellant for a murder committed at so young age, having regard to his understanding and appreciation of the nature of the proceedings in which he was tried. Solomon Islands has acceded to the Convention on the Rights of the Child, which came into force on 2 September 1990. The Convention has not, however, been ratified by Parliament so as to incorporate it into the domestic law of Solomon Islands. As most, therefore, it serves as a guide to the procedure to be followed in case of this kind at common law or under statute. In fact, the only relevant provision of real consequence is article 37 (a) providing that life imprisonment "without possibility of release" shall not be imposed on a person under 18 years who commits an offence", but this is relevant to the sentencing of young offenders rather than to their prosecution or conviction. The International Guidelines for the Administration of Juvenile Justice 1985 (the "Beijing Rules"), which do not constitute the terms of a binding treaty, lay down desiderata which appear to have been complied with in the appellant's case. So far as relevant here, those rules are again material only in relation to sentencing. In addition, reference was made to an Amnesty International policy paper on the prosecuting of child soldiers. It does not possess authoritative status in international law or in Solomon Islands law except as the opinions of persons who are expert in the subject in question. The emphasis in paragraph 6 of the paper is that "where persons under 18 acted entirely voluntarily, and were in control of their actions, they should be held to account for their actions in the appropriate setting." Paragraph 6.1 remarks that the Convention on the Rights of the Child "does allow

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<sup>8</sup> Tamata L, above.

<sup>9</sup> S.I.L.R. 1987/45 High Court of Solomon Islands.

<sup>10</sup> Kelly v Regina (2006) SBCA 17, CA-CRAC 019 of 2006 Unreported Court Of Appeal of Solomon Islands (25 October 2006).

young people to be prosecuted if the procedure can be fair and takes into account the particular needs and vulnerability of young people.””

These cases show a willingness on the part of the courts in Solomon Islands to implement international human rights standards where appropriate.

The application of Human Rights Conventions by Commonwealth courts is important. These decisions, while not binding in Solomon Islands, are persuasive and the approach taken in them is likely to be followed here in the future. In the United Kingdom case law suggests that Conventions are readily applied by the courts even where they have not been enacted locally.<sup>11</sup> Elsewhere in the Pacific the judicial trend is to incorporate Conventions into domestic law regardless of the legislative position.<sup>12</sup>

In conclusion, it is fair to say that in the prisons context there is no case law dealing with international human rights norms and values but the system is flexible enough so as to be enable those seeking recourse to seek redress for any breach of their rights under international law.

### A snapshot of the current position

<i>Human Rights Norm or Value</i>	<i>International Obligation</i>	<i>Status of Solomon Islands Legislation or other provision.</i>
Non-discrimination	<u>UDHR</u> Art. 7	S. 15 Constitution but is limited in its application –general anti-discrimination provisions not meet international obligations.  No anti-discrimination legislation.
Life	<u>UDHR</u> Art. 3	S.4 of the Constitution enshrines the right to life.
Health	<u>UDHR</u> Art. 25  <u>ICESCR</u> Art. 12	No right to health in Constitution and legislation is limited in terms of enforceable rights. Legislation simply mandates the government to provide what healthcare provision it deems appropriate.
Liberty and security of the person	<u>UDHR</u> Art. 3	S.5 of the Constitution provides some protection.

<sup>11</sup> See R v Home Secretary ex parte Venables and Thompson, (1997) 3 WLR 23.

<sup>12</sup> Tamata L, above.

Freedom of Expression	<u>UDHR</u> Art. 18	S.12 of the Constitution gives protection but rights can be denied.
Freedom of movement	<u>UDHR</u> Art. 13	S.14 guarantees this freedom but again can be limited.
Privacy	<u>UDHR</u> Art. 12	S.3 of Constitution protects privacy but this is limited to privacy of home and other property, not personal privacy hence no protection of confidentiality and freedom of the person. There is no specific legislative provision in this area.
To marry and found a family	<u>UDHR</u> Art. 26  <u>ICESCR</u> Art. 13	No provision enshrined in Constitution. Legislative provision governing marriage and family law. Case law to back this up and impose some standards in terms of guiding principles.
Education	<u>UDHR</u> Art. 26  <u>ICESCR</u> Art. 13	No right enshrined in Constitution nor any legislative provision. Limitations on freedom of broadcasters contained within the legislation.
Work	<u>UDHR</u> Art. 23  <u>ICESCR</u> Arts. 6,7 & 8	No right to work in Constitution.  Legislation protecting employment rights is also very limited in its scope though does address many international issues and requirements.
Adequate standard of living	<u>UDHR</u> Art. 25  <u>ICESCR</u> Art. 11	No provision either in Constitution or in the legislation.
Social security, assistance and welfare	<u>UDHR</u> Art. 25  <u>ICESCR</u> Art. 10	No provision either in Constitution or in the legislation.

Seek and enjoy asylum	<u>UDHR</u> Art. 14	No provision either in Constitution or in the legislation.
Share in scientific advancement and its benefit	<u>ICESCR</u> Art. 15	No provision either in Constitution or in the legislation.
Participate in public and cultural rights	<u>ICESCR</u> Art. 15	The Constitution recognises the rights of people in terms of their diversity as a result of their ethnicity and cultural practices.  Legislation limited although Customs Recognition Act 2000 does not actually give any rights (and incidentally is not in force having been passed by Parliament but not gazetted by the Minister).
Rights of Children	<u>CRC</u>	No special status given to children in the Constitution. Some adherence in legislation by way of Penal Code, Juvenile Offenders Act and Affiliation, Separation and Maintenance Act.  Case law also incorporates some of the key concepts of the convention albeit more a capacity than actual decisions.  Draft Protection of the Rights of the Child Bill (2000) prepared and continually undergoing discussion..
Rights of women	<u>CEDAW</u>	No special status acknowledged by the Constitution nor by legislation.  No precedent through case law though capacity is there given recent ratification of the Convention.  Provisions of CEDAW not yet implemented as required under the Convention.  Recent programme of work being undertaken.