LAWS532 COMPARATIVE INDIGENOUS LAW

The Implementation of International Frameworks on Cultural Practices that Affect Women's Rights

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I Introduction

International frameworks which recognise individual rights has always been a difficult issue to solve when dealing with customary practices. This problem is substantially evident when dealing with issues involving gender equality. The Solomon Islands and other countries which practice customs which objectively disadvantage women have found it difficult to find the balance between preserving unique cultural traditions while also recognising individual rights under international frameworks.

Like many Pacific jurisdictions, the Solomon Islands tries to recognise customary law. With custom practices being predominantly based around the principles of patriarchy, women are often left disadvantaged and are limited in achieving certain rights. The application of custom within these frameworks have often been difficult, with Courts unsure of the degree in which to apply customary law and subsequently implementing international agreements.

This paper will be split up into three parts. First, to analyse the issues that surround cultural practices that potentially infringe on individual rights. The customary practice of brideprice will be used to illustrate tradition which implicitly treat women in a derogatory manner and the subsequent issues that arise from it as a result. Second, an analysis of international frameworks to identify the extent in which customs may be practiced and the limitations to which certain customs may be practiced regarding individual rights. Third, to discuss the possible ways international frameworks can be effectively implemented through local legal regimes.

II Background: Custom

A The Evolution of Custom

Pacific societies have always had their unique customs prior to outside influence and colonial contact. These customs varied from society to society and determined the norms and rules that communities practiced. Usually these norms were unwritten and functioned as the governing laws that determined social, political and economic behaviours of these societies.[1]

Customs and cultural practices have always had an evolving nature over time. Like how modern societies evolve, Pacific societies and customs were always changing even before colonial intervention[2]. As Jean Zorn describes, these changes came about as a result of a number variables and affected behavioural patterns including agriculture, hunting, fishing, feasts and ceremonial exchanges. Different variations of styles of dress, ornaments, tattooing and body paint changed over time with songs and rituals being changed, substituted and evolving generation after generation.

[1] Jean G Zorn "Custom Then and Now: The Changing Melanesian Family" in Anita Jowitt and Newton Cain (eds) *Passage of Change: Law, Society and Governance in the Pacific*, (ANU Press, Canberra, 2010) 93 at 96.
[2] Zorn, above n 1, at 97.

But the introduction of colonialism influenced significant changes to culture and customs. The adoption of new legal regimes and legal systems significantly altered the ways in which indigenous societies practiced their existing customs including customary dispute settlement mechanisms.[3] An example of this can be seen in which disputes that regard infringement of customary norms can nowadays be settled in Courts rather than through cultural means of recourse.

However, it is incorrect to say that colonialism was the only factor to significantly produce change to custom. The biggest misconception is that custom is and was a stagnant ideology which did and does not change. But the influence brought by colonisation meant that there was a significant change in customary practices and these changes have had a continuous effect resulting in cultures evolving and producing practices that have been significantly different over time. The economic, social and political demands introduced by colonialism required that custom adapt to these changes in line with the developing modern society. Customary practices as a result were affected and evolved accordingly.

It can be argued that women have always been disadvantaged regarding equal treatment because of the predominantly patriarchal societies of Melanesia. The traditional practices surrounding cultural marriages are no exception to this ideology of evolving custom.

Among other traditions, customary marriages traditionally indirectly impose derogatory treatment to women. Women are disadvantaged when claiming property, custody of children and general matrimonial rights under custom. But with the evolution of custom and society, there have been significant legal ramifications and cases in which Courts have tried to find the balance between custom, recognised local regimes and even international obligations.

To better understand how custom affects women's rights, traditional marriages, brideprice and the issues it subsequently brings up will be discussed.

B Traditional Marriage and Brideprice

Traditional marriage through bride price in Melanesia is a norm. It has been practiced down through countless generations and variants of its practices are seen across societies in Papua New Guinea, Solomon Islands and Vanuatu. Unlike Western societies, where marriage is primarily planned and acted upon by the individual parties, traditional marriages involve extended families, tribes and even villages. There is no standard type of traditional marriage, or brideprice in that regard, primarily because of the diversity of cultures in Melanesia.

The tradition stems from a general exchange of goods in which valuable commodities and artefacts highly regarded in communities were issued during traditional marriages. Families of both parties would agree and allow a marriage to take place upon exchange of goods at an accepted and recognised value in custom. The male's family would present a recognised commodity, usually a form of currency in traditional society, while the female's family would

[3] Zorn, above n 1, at 97.

also bring various gifts which would presumably be valued to equate the same monetary value as those of the male party. A female party would bring gifts in the form of traditional food, taro, yams, pigs and other recognised and valued products. The male's party would produce an artefact of high value recognised as traditional currency. These artefacts vary from society to society and were used not only to barter, but to also foster peace during times of tribal warfare and to pay for debts – the modern equivalent of money.

In reality, it was an exchange ceremony with the idea of bringing the families and communities of a bride and groom together. But since only the products issued by the male party were seen to have monetary value, it brought about the notion that a bride is paid for and essentially a "brideprice" while at the same time overlooking the benevolent nature of the traditions.

Traditional marriages were recognised as a means to foster unity between both parties to the marriage. In some circumstances, marriages were arranged and used as means for brokering peace between warring tribes. In modern times however, the introduction of money has altered some of the initiative and has led to subsequent problems.[4]

I Brideprice and Rights of Women

The term 'brideprice' itself from the outset sets a negative tone towards the cultural practice. It implies the commercial sale of women in a matrimonial relationship and paints a negative picture on this tradition. 'Price' suggests that something is being bought and overtime this has developed to local indigenous groups who now when speaking of such practices claim to 'buying' a bride.[5] Unfortunately, there are certain truths to this.

The intrusion of money into the practice has negatively developed the perception that people have towards brides. Unlike the original traditional ceremonies which involved mainly goods, money has often made a groom's family perceive a bride as a purchase. With this view, they expect her to redeem the brideprice by working for the family and bearing children, who will also be seen as property of the husband and his family.[6] The effects of this, although not in all, has in many instances led to men totally controlling marriage relationships. For example, husbands see their wives as products of a transaction or property which has led to further subsequent issues which severely affect the rights of the women involved including domestic violence.

In similar sub-Saharan African societies where similar traditions are practiced, similar sentiments have been uttered with the intrusion of money into the practices. The handing over of brideprice represents the transfer from one family to another of the rights over productive and reproductive rights of a woman.[7] In some instances, the interruption of reproduction or

[4] Jennifer Corrin Care and Kenneth Brown "Marit Long Kastom: Marriage in the Solomon Islands" (2004) 18 Int'l J.L. Pol'y & Fam. 52 at 54.
[5] Zorn, above n 1, at 103.
[6] At 104.
[7] Corinne A Packer *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women's Reproductive Health in sub-Saharan Africa* (Intersentia, Cambridge, 2002) at 40.

cease of childbearing can be negatively perceived – as if the husband and his family have not got their money's worth.[8] There are also issues of the value of brides in these societies in which the virginity of a woman leads to a higher valued bride. This has led to these societies going to extreme measures and controversial traditional practices including female circumcision because of the incentives this would provide. This has also contributed to arranged marriages which are formed with girls below the age of 18.[9]

Although some of these sub-Saharan African societies take these cultural practices to a very serious extreme, there are variables in these practices that are similar to some Melanesian societies. Even though arranged marriages are not as common as they used to be, and Melanesian brides would not succumb to practices of infibulation, it would not be unusual for girls to be arranged in traditional brideprice marriages while still minors.

II Custodial Rights and Property Rights

There is also the issue of custodial rights of children as a result of brideprice marriages. Traditionally, it is custom that children in patrilineal societies live with their father's family.[10] Children being born into societies practicing brideprice belong to the family of the husband – the family paying the brideprice. This means that custody of the children remain with the father's family regardless of number of children, age and other determinative factors. Melanesian societies presumed that children lived in a wider communal set up and were cared for by the clan or village and extended relatives and were not only cared for by a nuclear household consisting of the mother and father. Therefore, customary law accordingly recognised the importance of living within one's own clan depending on the type of society the child presided in.[11] This was the primary reason for custodial rights over children given to a family upon dissolution of marriages in custom. Women, as a result, were largely disadvantaged since it is customary for children to leave them upon dissolution of marriages and their custodial rights over children were very limited.

Similarly, in patriarchal societies, women had very little property rights under custom. When a marriage was dissolved, women were entitled to very little matrimonial property – presuming there was such a concept in custom. One of the primary reasons for this was women were already disadvantaged upon marriage. Women would usually leave their family group and subsequently be affiliated with the family of their husband and upon dissolution of the marriage, they would subsequently be proprietally estranged from any property claims according to tradition.[12] This led to them being unable to claim any sort of property.

[8] Packer, above n 7, at 40.
[9] At 41.
[10] Zorn, above n 1, at 107.
[11] At 107.
[12] Kenneth Brown & Jennifer Corrin Care "Conflict in Melanesia: Customary law and the rights of women" (1998) 24:3-4 CLB 1334 at 1348.

Although in modern times, with the evolving nature of society, some of these practices have been relaxed. But there are still rural societies that practice these customs to a certain extreme. It would be ignorant to say that these customs are no longer practiced because of the "developing" nature of society. However, the same can be said if there was a notion that all societies in the Solomons still vigorously practice all these customs.

C Issues with These Customs

Some general issues arise as a result of these cultural practices. First, there are the potential infringement of women's rights under international obligations which States are obligated to conform to. These arise when practicing customs like brideprice and women's rights to custody over children and property.

Countries like the Solomon Islands have signed up to a number of substantial international conventions obligating them to the recognition of the rights of women and children. Although some of these frameworks recognise the importance of cultural practices, the issue is generally when these cultural practices infringe other individual rights.

The general issue then becomes how States implement rights of individuals under international frameworks while at the same time respecting cultural practices of indigenous societies. If individual fundamental rights is seen as a more optimal approach, there is the issue of whether there should be more encouragement of aggressive implementation programmes promoting female equality even if it draws serious cultural resistance. On the other hand, considerations would be whether customary law should take priority and societies concede to the status quo even if it means overriding some fundamental individual human rights.[13]

Finding the balance between both these approaches has been difficult. Analysis of it will be done by firstly looking at international frameworks and obligations that State parties like the Solomon Islands has.

III International Frameworks

A Recognition of Custom Practices

There are various international frameworks which protect the rights of people to practice their customs and traditions. The United Nations Declaration of the Rights of Indigenous People (UNDRIP) recognises the rights of indigenous peoples to the full enjoyment of all human rights and fundamental freedoms recognised under United Nations Charter and other various international frameworks.[14] Indigenous peoples also have the right to practise and revitalise their cultural traditions and customs including the right to protect and develop manifestations of their cultures and ceremonies.[15] The Universal Declaration of Human Rights (UDHR), the foundational document of international human rights law, also recognises individual rights to

[13] Brown & Care, above n 12, at 1335.
[14] United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, 61st Sess, UN Doc A/Res/61/295 (2007) [*UNDRIP*] art 1.
[15] Article 11.

participate and enjoy the benefits of cultural practices.[16] This implicitly includes cultural practices involving women and children.

Children's rights are covered in the Convention on the Rights of the Child (CRC). It states that Parties are to respect the rights, responsibilities and duties of parents, legal guardians, or "where applicable, the members of the extended family or community as a provided for by local custom" to provide "appropriate direction and guidance in the child's exercise of rights".[17] There is also reference in the preamble of the Convention to take into account the importance of traditions and cultural values of each people for the protection and harmonious development of the child. The CRC therefore recognises the importance of customary practices in the development of children.

B Limitations on Cultural Practices

However, under international frameworks, customary practices can only be enjoyed to a certain extent. International frameworks such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), the CRC and UNDRIP protect a wide number of civil, social, cultural and human rights for women and children. They also prohibit discrimination on any ground, including sex, ethnicity and other status.[18]

As a starting point, UNDRIP states that rights of indigenous peoples and their customs enunciated in the declaration shall be subject only to limitations determined and in accordance with international human rights law obligations. Any limitations shall be non-discriminatory and necessary for the purpose of recognising the rights and freedoms of others.[19] Simply, recognition of cultural practices are limited if they infringe individual human rights.

CEDAW requires State parties to "take all appropriate measures, including legislation, to modify or abolish laws, regulations, customs and practices which constitute discrimination against women",[20] and "to modify social and cultural patterns… with a view to achieving the elimination of… customary and all other practices which are based on the idea of the inferiority of either of the sexes."[21] Some of these instruments require that States party eradicate harmful

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[16] *Universal Declaration of Human Rights* 217 A (III) (entered into force 10 December 1948) [*UDHR*] art 22 & 27.
[17] Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006) at 104; Convention on the Rights of the Child, 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [*CRC*] art. 5.
[18] "An Assessment of Human Rights Issues Emanating from Traditional Practices in Liberia" (December 2015) United Nations Human Rights Office of the High Commissioner <https://www.ohchr.org/Documents/Countries/LR/Harmful_traditional_practices18Dec.2015.pdf> at 6 [*Liberia Report*].
[19] *UNDRIP*, art 46.2.
[20] *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981) [*CEDAW*] art 2(f).
[21] *CEDAW*, art 5(a).

practices. Obligations and targeted policies which States commit to is of an immediate nature meaning States cannot justify delays on any grounds, whether it be for culture or religion.[22]

Similarly in the CRC, the freedom to manifest beliefs may be subject to limitations where individual freedoms are restricted. [23] Other agreements such as the ICESCR also obligates States to take necessary steps and legal measures to ensure that rights stipulated within the Covenant are sustainably realised.[24] Although the right to freely participate in cultural life are provided for in these Conventions,[25] the conventions themselves place limitations on when such practices of culture infringe on other fundamental rights.[26] Similar provisions are found in the ICCPR. [27] Therefore these international conventions, provide that State parties are to make provisions when necessary to limit practices that could be harmful in order to protect fundamental rights and freedoms.

In addition to this framework, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child issued a joint General Comment guidelines for States as to what practices may be seen as harmful. These guidelines provided that harmful traditional or cultural practices had four characteristics: [28]

i. A denial of the dignity and/or integrity of the individual and a violation of the human rights and fundamental freedoms enshrined in the convention.
ii. They constitute discrimination against women and are harmful insofar as they result in negative consequences for them as individuals.
iii. They are traditional, re-emerging practices kept in place by social norms that perpetuate male dominance and inequality of women.
iv. Imposed on women by family members, community members or society at lawrge, regardless of whether the victim provides, or is able to provide, full free and informed consent.

The Committee on Economic, Social and Cultural Rights therefore stated "applying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances,

[22] *Liberia Report*, at [28]; CEDAW's Committee of implementing progress requires States to submit on legislative, judicial, administrative and other measures which they have adopted to give effect to the provisions of the Convention. Reports are to be submitted one year after entry into force of the Convention of that State and thereafter every four years, and whenever the Committee so requests.
[23] Convention on the Rights of the Child, 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [*CRC*] art. 14(3).
[24] International Covenant on Economic, Social and Cultural Rights, 933 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), [*ICESCR*] art 2(1).
[25] Article 15(1)
[26] Article 5(1).
[27] International Covenant on Civil and Political Rights, 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [*ICCPR*] art 18(3).
[28] Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices*, 16, UN Doc. CEDAW/C/GC/31- CRC/C/GC/18 (14 November 2014); referred to in *Liberia Report*, at [30].

in particular in the case of negative practices, including those attributed to customs and traditions that infringe upon other human rights."[29]

Therefore, States party to agreements such as CEDAW, ICESCR and ICCPR are obligated to take the necessary steps to ensure that the rights outlined within the agreement are realised.[30] The Covenants guarantee the recognition of the highest attainable standard of physical and mental health and a right to an adequate standard of living amongst others.[31] So when States such as the Solomon Islands practice traditional brideprice marriages, or other customary practices that may directly or indirectly affect the enjoyment of the rights of women, there is an obligation to conform to these rights. The denial of these rights would essentially mean that Solomon Islands is not meeting its international obligations under the various treaties.

C Obligation of States to Traditional Practices

Under international law, States are responsible for the acts and omissions of their organs.[32] If a state facilitates, accommodates, conditions or tolerates private denials of women's rights, the State will bear responsibility. The State will not be responsible for the private acts, but for its own lack of diligence to prevent these acts through its executive, legislative or judicial organs.[33]

However, it is difficult to establish a definitive relationship between these cultural practices and violations of women's rights in international frameworks.[34] Even if it is perceived as substantially decreasing the status of women in society with such practices, it is arguable to say that is infringing upon women's rights. The rights of women do not specifically discourage traditions of societies that regard males over females or encourage marriage and reproduction in communities.[35] Traditions and customs are to be recognised, and there are a lot of traditions in Solomon Islands society that recognise the generic rights of men over women. However, this does not inherently mean that such practices are acceptable and tolerable when rights of women are blatantly abused.

There is the argument that for harmful popular customs to be changed, there is a need to tackle the beliefs that effectively bolster them.[36] Packer makes the argument that the fact that widespread popularity of the customs needs to be prevented, rather than the individual actions, means that there is a need for the perceptions and attitudes of society to be changed.[37] How this

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[29] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, (17 September 2018) Ref World <http://www.refworld.org/docid/4ed35bae2.html>

[30] *ICESCR* Art 2(1) obligates States to undertake steps to achieve the full realisation of rights within the Covenant by using its "maximum available resources".

[31] *ICESCR* Article 11 and 12.

[32] See generally Packer, above n 4, at 49.

[33] Rebecca J Cook "State Responsibility for Violations of Women's Human Rights" (1994) 7 Harv. Hum. Rts. J. 125 at 147.

[34] Packer, above n 4, at 53.

[35] At 53.

[36] Packer, above n 4, at 54.

[37] At 54.

change comes about requires a proactive approach which can only be fully understood by evaluation of international frameworks and placing specific obligations on States to discourage traditional practices that disadvantage women. So the argument made is that rather than concentrating on a rights-based approach, where individual rights are focused on, concentration needs to be placed on States to seek ways to change perceptions on such issues and cultures. International obligations also recognise this and provide for it.

D Specific Sub-Saharan African and Americas Frameworks

Countries in various regions around the world, in recognising the need to change customary practices which negatively affect women, have introduced regional frameworks specifically catered towards their circumstances. In sub-Saharan African countries and the Americas, where similar traditional customs are practiced, and subsequently women face similar issues, specific international agreements have been adopted which reflect obligations under CEDAW and CRC, but engineered to cater for their respective regions. For sub-Saharan countries one of the treaties is the African Charter on the Rights and Welfare of the Child (ACRWC)[38] which has provisions aimed at harmful traditional practices involving marriage brideprice. The Americas similarly have the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belem do Para)[39] also identified to target harmful traditional practices considered to be contrary to human rights standards.[40]

I Obligations to Eliminate Harmful Customs and Practices and Change Socio-Cultural Behaviour

Similar to CEDAW article 2(f), which obligates States to change customary practices which tolerate violence against women, the ACRWC and the Convention of Belem do Para have similar clauses. ACRWC states that 'Child marriage and betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age at marriage to be 18 years…'[41] More specifically, appropriate measures shall be taken to "eliminate harmful social and cultural practices which affect the normal growth and development of the child… in particular customs and practices discriminatory to the child on the grounds of sex."[42] These provisions reflect provisions within CRC which obliges states to abolish traditional practices prejudicial to the health of children.[43] This is in relation to child marriage using customary practices like brideprice.

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[38] African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49 (opened for signature 11 July 1990, entered into force 29 November 1999) [*ACRWC*].
[39] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, (open for signature on 9 June 1994, entered into force 5 March 1995) [*Convention of Belem do Para*].
[40] See generally Packer, above n 4, at 49.
[41] *ACRWC*, above n 30, art 21.2.
[42] *ACRWC*, above n 30, art 21.1(b)
[43] *CRC*, above n 23, art 24.3

The Convention of Belem do Para similarly provides that appropriate measures to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women.[44]

There are also obligations to States to change the socio-cultural behaviour. As outlined in CEDAW Articles 5(a) and 10(c), states shall modify cultural patterns with a view to achieve elimination of prejudices and customary practices based on stereotyped roles of sexes. This shall be done through various forms of education and adaptation of school programs aimed at teaching the elimination of these stereotypical roles of men and women. The Convention of Belem do Para similarly provides that States are to:[45]

> 'to modify social and cultural patterns of conduct of men and women, using various educational methods to counteract prejudices, customs based on the idea of the inferiority of sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women.'

However, the effect of these frameworks in sub-Saharan African States is that most have attained the stage of *respect*. There have been minor interferences with campaigns to end harmful traditional practices and none of the States have adopted legislation neither favouring nor enforcing harmful traditional practices. There have been some States which have enacted legislation against harmful traditional practices, which require Police and medical practitioners to act as agents on behalf of the State, but the general perception is that sub-Saharan are far from fulfilment.[46] In other words, the frameworks do not really have any effect.

E Effectiveness of Specific Frameworks Such as ACRWC – just another layer of meaningless International Law?

Analogies for gender equality and women's rights can be taken from the above example. The effectiveness of international frameworks seeking to restrict traditional practices seen as disadvantageous to women is very minimal. As seen from the sub-Saharan African States example given above, it is difficult to implement obligations on societies that have a fixed way of doing things. Although there are elements of these frameworks which are practical and easier to achieve, such as setting of minimum age requirements in legislation for women to be married, but there are other practices which are harder to restrict societies from doing which require the changing of attitudes towards these potentially harmful practices that interfere with individual rights. Finding practical approaches towards changing perceptions and cultures surrounding these practices can be difficult however. The same can be said for societies experiencing gender inequality because of customary practices that do not hold women to the same regard as men.

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[44] *Convention of Belem do Para*, art 7(e).
[45] Article 8(b).
[46] Packer, above n 4, at 57.

Frameworks such as CEDAW and Convention of Belem do Para recognise these gaps and try to place obligations on states to tackle the problems by using various educational methods to change these cultures and perceptions as mentioned above. The issue with this is, even if such policies were implemented by local regimes, there is no real guarantee of the effectiveness such policies would have on societies. It is unlikely that indigenous societies would change their traditions because of a few new policies. Another layer of international frameworks targeted specifically for regions would almost definitely experience the same redundancy as bigger frameworks such as CEDAW and CRC.

In the Solomon Islands context, being party to CEDAW, CRC, ICESCR and other international obligations which provide for protection against traditional practices that are disadvantageous to women has not made any real impact on the perceptions of people regarding these practices. A different approach should be taken since there is no real practicality to conforming to international obligations. Especially to traditions like brideprice where it is culturally engrained that brideprice is a prerequisite to marriage equivalent to the taking of vows. Subsequent issues that rise as a result of the practice are just part of the culture. This same logic is applicable to other customary practices which do not highly regard women as much as men. Even with the evolving nature of custom and society, the cultural mind-set that women are not as equally capable will always be apparent and is evident in systemic inequalities in modern societies.

In a CEDAW Committee resolution based on Article 5(a) of CEDAW, regarding harmful traditional practices on women, one of the recommended plan of actions was for Governments to condemn traditional practices of brideprice and to make it illegal.[47] Such a policy if implemented, would be absurdly outrageous and highly controversial and in of itself inapplicable to laws of the Solomon Islands which recognise custom.[48]

V Domestic Legal Regime

A Rights under the Constitution

For international frameworks to be appropriately recognised in the domestic legal spectrum, there has to be recognition rights at a domestic level. The Constitution under Chapter II recognises basic fundamental individual rights adopted primarily from the UDHR.

Regarding discrimination, s 15 provides:[49]

> (1) … no law shall make any provision that is discriminatory either of itself or in its effect.
> (2) … no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

[47] Fact Sheet No.23, *Harmful Traditional Practices Affecting the Health of Women and Children* (18 September 2018) United Nations Human Rights Office of the High Commissioner for Human Rights <https://www.ohchr.org/Documents/Publications/FactSheet23en.pdf> at [50].
[48] Customary law and practices are recognised in the Constitution of Solomon Islands in Schedule 3.
[49] Constitution of the Solomon Islands 1978 (Solomon Islands).

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(4) … "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex…

…

(5) (d) … this section shall not apply to any law … for the application of customary law;

Simply, it is unconstitutional to make laws or recognise laws that are discriminatory in nature. These clauses can be implicitly referring to rights of women. However, in s 15(5)(d), the exception is that these discrimination provisions are not applicable to customary law. In other words, this could mean that customs of a discriminatory nature towards women are exempted and not seen as discriminatory.

B Recognition of Custom in the Constitution

The Constitution recognises custom in s 75 which 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 provides for the application of laws and outlines a certain hierarchy which states:

(1) …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.

Customary law is therefore applicable to the extent that it is inconsistent with the Constitution or Acts of Parliament as outlined in Schedule 3(2). Paragraph 2(3) of Schedule 3 provides that principles of common law and equity are not to apply "if they are inconsistent with customary law applying in the respect of the matter". This results in customary law being subordinate to the Constitution and Acts of Parliament of the Solomon Islands, but overriding the principles of common law and equity.[50]

This should mean however that customary law that is inconsistent with rights under s 15 of the Constitution would be unconstitutional since custom has to conform to the Constitution. This should encompass all customs that are discriminatory in nature to women. But as seen above, the exception in s 15(5)(d) covers this and although in a way contradictory, protects custom.

C Approach of Courts to Custom

Due to the evolving nature of custom and society, Courts have been reluctant to fully recognise all customary practices. There have been few instances where the superior Courts have directly addressed custom with regard to its applicability within the Constitution. In *Balou v Kokosi*[51]

[50] Jennifer Corrin Care and Don Patterson *Introduction to South Pacific Law* (4th ed, Intersentia, Cambridge, 2017) at 60.
[51] *Balou v Kokosi* [1982] SILR 12.

the issue involved whether a woman married under custom could claim for orders against her husband under the relevant marriage legislation.[52] It was eventually held, inter alia, that the Constitution had recognised all forms of customary law as a part of the law, including customary marriages enabling the woman to make the matrimonial claims.

But it has not always been so straight forward and there have been instances that customary law is not always recognised. In *Loumia v DPP*,[53] the custom of payback killing was raised as a defence to reduce murder to manslaughter. The Defendant argued that he had acted in good faith and on a reasonable ground that he had had a legal duty to cause the death based on tradition.[54] This argument was unanimously disregarded by the Court of Appeal and seen contrary to the Constitution, the Penal Code and common law.[55]

D Courts and Customs Affecting Women

In *Sukutaona v Hounanihou*, a magistrate had relied on custom to refuse custody of a child to the mother. On appeal, the High Court stated:[56]

> It is quite right that custom law is now part of the law of Solomon Islands and courts should strive to apply such law in cases where it is applicable. However, it must be done on a proper basis of evidence adduced to show the custom and its applicability to the circumstances.

In application of this, in *In re B*[57] a magistrate applied this principle where custom was clearly proved. A couple was married in custom and had separated, with the child remaining with the mother. Since bride price had been paid, according to tradition, this meant that the child belonged to the family of the father. The magistrate refused to follow these customary laws and applied the common law presumption that the young children remain with their mothers.[58] The same principle was also applied in the custody case of *K v T and KU* where a mother was granted custody for her 8 children even though it was custom practice that the children belong to the father's family.[59]

In *The Minister for Provincial Government v Guadalcanal Provincial Assembly*, the Court of Appeal discussed whether a new piece of legislation enacted to set out procedural matters for a Provincial Government was unconstitutional. The legislation provided for a Provincial Councils system with members indirectly elected by Area Assemblies. The Area Assemblies were made up of 50 per cent elected and 50 per cent non-elected chiefs and elders. It was noted that only males could be "traditional chiefs" which essentially meant males would

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[52] Campbell McLachlan "State Recognition of Customary Law in the South Pacific" (PhD thesis, University of London, 1988) at 196 – under the applicable *Islanders Divorce Act*, the granting of divorce for customary marriages were excluded from the jurisdiction of the High Court. Orders relating to the divorce of such marriages could only be ordered 'in accordance to custom'.
[53] *Loumia v DPP* [1986] LRC (Crim) 62.
[54] Section 197(c) of the Solomon Islands Penal Code created this defence.
[55] McLachlan, above n 52, at 198.
[56] *Sukutaona v Hounanihou* [1982] SILR 12.
[57] *In re B* [1983] SILR 233.
[58] McLachlan, above n 52, at 197.
[59] *K v T and KU* [1985-1986] SILR 49.

predominantly make up half of the assembly and females would subsequently be denied of an equal opportunity. It was eventually held that the Constitution recognised 'traditional chiefs' as an essential part of Provincial Government and that this process was not unconstitutional, but affirming the Constitution – even though it was clear, the Court conceded, that women were being disadvantaged.[60]

Scholars have argued however, that the Court had failed to directly address whether the legislation was contrary to s 15 of the Constitution and its exemption of customary law under s 15(5)(d). Although s 75(1) provides for the recognition of customary law, it is arguable that the legislation in question fell within those limits and could be considered as an outright custom that would be exempted under the discriminatory clause of s 15(5)(d).[61] Simply, the Provincial Government, which the Act was made for, was not an outright customary law and the Act should have been seen as discriminatory towards women.

In the neighbouring Melanesian country of Vanuatu, Courts have also had issues regarding custom and the Constitution. Unlike the Constitution of Solomon Islands which provides for an exception to discriminatory laws for customary law, the Vanuatu Constitution does not have such a clause.[62] In effect, Courts were more willing to condemn actions deemed by custom to be acceptable even though disparaging to women. The cases of *Noel v Toto*[63] and *Public Prosecutor v Walter Kota and Ten Others*[64] illustrate this.

In *Noel v Toto*, the claim was for a declaratory judgement regarding ownership and profits of customary owned land. In a preceding judgement, the respondent was held to be the customary owners of the land. The applicant, the son of the respondent's sister, sought that the land was held in a representative capacity and that he should therefore be qualified for benefits of the land. Evidence given was that custom differentiates between male and female ownership of land and that if women married, they would subsequently be denied of any customary ownership to land. Kent J considered Article 5 of the Constitution, which contains the fundamental rights clauses, and stated that the Article was clearly intended to guarantee equal rights for women. However, the Constitution also stated in Article 74 that custom was to be the basis in which ownership and usage of land was to be performed. To this he replied:[65]

> Does this mean that if custom discriminates with respect to land rights of women the fundamental rights which are recognised in Article 5, do not apply? I do not think that this can be so. It is clear, as I have stated that the Constitution aims to give equal rights to women.

Kent J concluded that by not specifically permitting discrimination to land rights, it should be seen that discrimination should not be allowed whatsoever. He followed up on this by stating

[60] *Minister for Provincial Government v Guadalcanal Provincial Assembly* [1997] SBCA 1.
[61] Brown & Care, above n 12, at 1342.
[62] At 1338.
[63] *Noel v Toto* [1995] VUSC 3.
[64] *Public Prosecutor v Walter Kota and Ten Others* [1993] VULawRp 7.
[65] *Noel v Toto*, above n 63, at 3.

that Vanuatu had adopted Human Rights Charters with respect to women's rights and "it would be entirely inconsistent with the Constitution and the attitude of the Parliament to rule that women have less rights with respect to land than men."[66]

But in coming with this conclusion, he was aware that this might set a bad precedent towards land rights in the future. It was therefore considered that general ownership of land would not change and customary law would still provide the basis of determining ownership but only subject to the limitation that it was discriminatory to women, it could not be applied.[67]

In *Public Prosecutor v Walter Kota and Ten Others*, the first defendant and his wife were experiencing problems with their marriage. Matters got worse when the wife and her sisters attended a nightclub much to the husband's disapproval. Subsequently, chiefs from the defendant's province, where the wife was also from, were visiting town and sought a meeting to sort out the problems with the marriage. With the help of Police, the wife was brought to the meeting and the chiefs suggested reconciliation with the husband to which she refused. The chiefs then declared that she was to return to the Province and no longer reside in town. She was then essentially put on a boat, under duress, and shipped from the capital Port Vila to the home province. She attempted to report the matter to Police in the island and eventually returned to the capital where she consulted the Women Against Violence Woman's Association.[68]

The defendants were charged and convicted of kidnapping. Downing J commented on the discrepancies of managing customary law and Constitutional law, especially customs which regarded rights of women. He stated:[69]

> I think that the Chiefs must realise that any powers they wish to exercise in Custom is subject to the Constitution of the Republic of Vanuatu, and also subject to the Statutory Law of Vanuatu. Article 5 of the Constitution makes it quite clear that men are to be treated the same as women, and women are to be treated the same as men. All people in Vanuatu are equal and whilst the Custom may have been that women were to be treated or could be treated as property, and could be directed to do things by men, whether those men be their husbands or chiefs, they cannot be discriminated against under the Constitution. A significant number of cases that come before this Court are as a direct result of the failure to treat women equally, and therefore in so treating women as property as a substantial breach of the Constitution. The Constitution by Article 5(1)(b) provides for the liberty of people. It also by Article 5(1)(i) provides for the freedom of movements. The Constitution provides therefore that no person shall be forced by another to do something against his or her will. The Section 105 of the Penal Code makes it quite clear that no person shall by force compel any person to go from any place to another place. This is merely another way of expressing the right to liberty which is given under the Constitution. The use of the word "force" in Section 105(b) in my view clearly refers not only

[66] *Noel v Toto*, above n 63, at 3.
[67] At 3; referred to Brown & Care, above n 12, at 1343.
[68] *Noel v Toto* [1995] VUSC 3 at 3; referred to in Brown & Care, above n 12, at 1343.
[69] *Public Prosecutor v Walter Kota and Ten Others*, above n 64, at 7.

> to physical force, but coercion and the threats of force. Whilst I appreciate in this case that the Chiefs were trying to resolve a problem, they did so from a very biased point of view.

The approach taken by Vanuatu Courts in application to their Constitution sets an optimistic approach for Courts in the Solomons to follow. By recognising fundamental rights and not limiting its usage to custom has proven to be beneficial to the recognition of women's rights as is seen in *Noel v Toto* and *Public Prosecutor v Walter Kota and Ten Others*. But one of the main reasons that Courts were more willing to follow this approach in Vanuatu is because of more of an outright acceptance in the Constitution to individual rights which is not limited by custom. Does this mean that if the Solomons' Constitution followed the same approach regarding discrimination clauses and custom, the Courts would be more willing to follow a stance to recognise women's rights? It is arguable, as was the case in *The Minister for Provincial Government v Guadalcanal Provincial Assembly*. A change to the Constitution not limiting fundamental rights to custom would need implementation and recognition from Courts. Even if this was case, it would still take time for wider acceptance to give equality to women.

VI Implementation

Essentially, the most practical way for international frameworks to be implemented in Solomon Islands is through proactive recognition through domestic legal regimes. This may be through Courts, policy and even legislation. However, the major issue with policy and legislation is political will. It is difficult to obtain sufficient backing not only from the legislature, but society as a whole. To implement changes that will drastically change the cultural mind-set of the population is difficult.

This is not to say that changes to the Constitution and having no customary limitations to fundamental rights will essentially drastically change approaches towards recognition of women's rights. Customary beliefs and social attitudes have been embedded within the culture in society and conditioned through a background of generations of customary norms. For progress in women's rights to be achieved, wide-ranging programmes need to be implemented to change the social and cultural mind-sets of society and slowly integrate the recognition of equal rights.

International frameworks such as CEDAW recognise the importance of changing mind-sets and perceptions and try to obligate states to adopt policies that will gradually overtime change perceptions. But as was seen from the earlier analysis of international obligations and the example of sub-Saharan specific multilateral agreements, a similar specific regional international framework will not suffice. The current international frameworks which recognise women's rights does not seem to be the problem. It's the policies that these frameworks promote and its implementation is where the difficulty lies.

CEDAW proposes great initiatives to effectively change perceptions of societies which traditionally disadvantage women. One such proposition is in Article 10 where States are to

take appropriate measures to eliminate discrimination against women by adopting educational approaches that eliminate the stereotyped concept of roles of men and women. Instead of drastically trying to revolutionise the perceptions and force equality for women in societies that have strong cultural backgrounds, simple policies that encourage the education of gender equality is probably the most practical approach. These policies can be implemented in educational systems, welfare and other social streams that influence society. Such changes, which eventually aim to change cultural mind-sets and systemic inequality and will undoubtedly be slow, but progressive. The benefits of such policies to influence educational systems will take time and can only be reaped after subsequent generations. But this is possibly the most applicable way to implement and recognise

Recognition of equality through Courts is also essential. Courts have shown that they have been much more open to disregarding practices of custom when it has been seen to be inapplicable to the modern society. Although approaches in neighbouring countries have been more optimistic for women's rights, there are aspects of their approaches which can be applicable to Solomon Courts because of the similarities in custom. In the Vanuatu case of *Noel v Toto*, the approach which was adopted by the Court was that since Vanuatu was a party to these human rights treaties which recognised equal rights, it was only reasonable that customary practices that affect women's rights, when contradicting these other fundamental rights be put aside. It is not the intention of the legislature and the Government to simultaneously sign up to supposedly legally binding international obligations and then completely disregard them in the Court. It would be hard for Courts in the Solomons to not follow this approach because of its reasonability. If there were cases which seemed to affect women's rights, and subsequently international conventions affecting fundamental rights and equality of women arose, Courts would understandably also consider international frameworks when coming to conclusions.

VII Conclusion

International frameworks recognise the practice of cultural traditions but also limit their use if they infringe other rights. The recognition of changing perceptions of societies, that inherently disadvantage women through cultural practices, is one of the more optimistic approaches, but has seen difficulty with implementation.

Although there is recognition of fundamental rights in instruments such as the Constitution, in countries like the Solomons, these rights are still limited by custom, which essentially disadvantages women. But it is arguable that even amendments to the Constitution will change underlying customary beliefs.

Courts in other similar jurisdictions have optimistically held that women should be treated equally, but with further review of substantial other cases, it will be realised that there is still a deeper sense of patriarchal attitudes.[70]

It seems that for progress to be made, there needs to be a proactive approach to policies that change social attitudes. However, the implementation of such programmes must also note that to provide a way forward, it will be difficult to implement changes overnight to systemic problems that affect women. Policies that encourage drastic changes too quickly might encounter fierce criticism from a general social standpoint in these societies. However, this does not excuse countries to simply conform to the status quo.[71]

With the ever-changing and evolving nature of society, it is essential that women be aware of the traditional practices that limits their perspective. It is encouraging that more women are getting educated and there is becoming an increase in social pressure groups that encourage gender equality. By realising the evolving nature of society, only through awareness of customary law and contemporary values that are sought by frameworks such as CEDAW can women achieve equality overtime against a backdrop of cultural disadvantage.

(7,339 Words)

[70] Brown & Care, above n 12, at 1350.
[71] At 1351.

VIII Bibliography

I Legislation

A Solomon Islands

Constitution of the Solomon Islands 1978 (Solomon Islands)

II Cases

A Solomon Islands

In re B [1983] SILR 233

K v T and KU [1985-1986] SILR 49

Loumia v DPP [1986] LRC (Crim) 62

Minister for Provincial Government v Guadalcanal Provincial Assembly [1997] SBCA 1

Sukutaona v Hounanihou [1982] SILR 12

B Vanuatu

Noel v Toto [1995] VUSC 3

Public Prosecutor v Walter Kota and Ten Others [1993] VULawRp 7

III Books and Chapters in Books

Campbell McLachlan "State Recognition of Customary Law in the South Pacific" (PhD thesis, University of London, 1988)

Corinne A Packer *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women's Reproductive Health in sub-Saharan Africa* (Intersentia, Cambridge, 2002)

Jean G Zorn "Custom Then and Now: The Changing Melanesian Family" in Anita Jowitt and Newton Cain (eds) *Passage of Change: Law, Society and Governance in the Pacific*, (ANU Press, Canberra, 2010)

Jennifer Corrin Care and Don Patterson *Introduction to South Pacific Law* (4th ed, Intersentia, Cambridge, 2017)

Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006)

IV Journal Articles

Jennifer Corrin Care and Kenneth Brown "Marit Long Kastom: Marriage in the Solomon Islands" (2004) 18 Int'l J.L. Pol'y & Fam. 52 at 54.

Kenneth Brown & Jennifer Corrin Care "Conflict in Melanesia: Customary law and the rights of women" (1998) 24:3-4 CLB 1334

Rebecca J Cook "State Responsibility for Violations of Women's Human Rights" (1994) 7 Harv. Hum. Rts. J.

V International Materials

African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49 (opened for signature 11 July 1990, entered into force 29 November 1999)

Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices*, 16, UN Doc. CEDAW/C/GC/31- CRC/C/GC/18 (14 November 2014)

Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981)

Convention on the Rights of the Child, 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990)

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, (open for signature on 9 June 1994, entered into force 5 March 1995)

International Covenant on Civil and Political Rights, 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976)

International Covenant on Economic, Social and Cultural Rights, 933 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976)

United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, 61st Sess, UN Doc A/Res/61/295 (2007).

Universal Declaration of Human Rights 217 A (III) (entered into force 10 December 1948)

VI Internet Materials

An Assessment of Human Rights Issues Emanating from Traditional Practices in Liberia" (December 2015) United Nations Human Rights Office of the High Commissioner <https://www.ohchr.org/Documents/Countries/LR/Harmful_traditional_practices18Dec.2015.pdf>.

Fact Sheet No.23, *Harmful Traditional Practices Affecting the Health of Women and Children* (18 September 2018) United Nations Human Rights Office of the High Commissioner for Human Rights <https://www.ohchr.org/Documents/Publications/FactSheet23en.pdf>

UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, (17 September 2018) Ref World <http://www.refworld.org/docid/4ed35bae2.html>