

Legal Pluralism and the Post-Conflict Transition in the Solomon Islands

Kastom, human rights and international interventions

Executive Summary

The Solomon Islands is the site of rich legal diversity with multiple customary systems, introduced state law and the intervention of international norms. *Kastom* and the church continue to play an important role in ordering the lives of Solomon Islanders. Customary dispute resolution and governance systems were undermined by the 'tensions' of 1998 to 2003. To date, post-conflict intervention has focused on state institutions, such as police, prisons and courts, and has largely restored peace. A sustainable post-conflict transition, however, requires recognition of societal and legal pluralism and a reflection of customary diversity in the governance mechanisms that are developed and externally supported. Despite constitutional guarantees, human rights remain under protected and have not been incorporated into local structures or domestic advocacy for change. Three proposed principles for outsiders to (humbly) engage in the post-conflict transition are: to focus on decentralised interventions; privilege local participation, and utilise customary mechanisms, including the church. These mechanisms need to be monitored for compliance with the Constitution, including human rights provisions.

1. Introduction

Like many other Pacific Island states, the Solomon Islands faces the challenge of governing and resolving conflict under plural legal orders. Legal pluralism in the Solomon Islands does not simply encompass state law and *kastom*¹, but includes the interaction between diverse indigenous regimes, the fact that state law itself is the product of outside influence, and the direct manipulation of *kastom* by forces emanating from outside the state, such as human rights norms and 'project law'. These interactions play out in both competition and accommodation and at the local level include tensions of generational pluralism. The 'tensions' of 1998 to 2003 arose because socio-economic and ethnic disputes were unable to be resolved peacefully within existing legal orders and governance structures. To date, post conflict transition measures have focused on strengthening state law and institutions. If peace is to hold, customary governance structures will have to be employed as they

¹ *Kastom* is Melanesian pidgin for 'custom' and is used here except when quoting from other sources.

are the only feasible way to reach and connect with a dispersed population with little understanding of formal mechanisms. Attention must be particularly given to mechanisms which accommodate competing customary systems. Traditionally, these customary systems may not have come into contact with each other and they therefore lack adequate processes to deal with conflict in modern settings. Whether outside interventions can constructively assist in this process of accommodation is questionable, but some principles of engagement are recommended, at worst to do no harm and at most to facilitate local processes.

Conflict in the Solomon Islands occurs on many levels and classifying it is difficult as participant identity varies with scale. For example, two disputants in a clan versus clan conflict may be allies in an island versus island dispute. Overall, conflicts can be classed as either 'normal' disputes (most commonly around land, logging, corruption, sexual relations, marriage and inheritance) or those related specifically to the 'tensions.'² To resolve conflict groups influence the design of governance mechanisms and seek access to both *kastom* and law. The World Bank's *World Development Report 2006* states, "Accessibility depends on how compatible laws are with the norms and understandings that shape people's lives." The history of the Solomon Islands' formal legal order (with the Constitution drafted and enacted in the United Kingdom) creates a structure where law is not compatible with local lives and sets an unconstructive framework for legal pluralism and the privileging of local legal orders. This is notwithstanding the Constitution's formal recognition of customary law.

Development work in the law and justice sector has favoured a state-centric, western understanding of law (Sage and Woolcock 2006). This overall strategy has been replicated in approach of international donors to the Solomon Islands,³ including in the Regional Assistance Mission to Solomon Islands (RAMSI).⁴ The World Bank is coming to recognise that human rights are central to development.⁵ Human rights receive protection in the Solomon Islands Constitution, yet the countervailing forces of *kastom* mean they are often undermined in practice and play a small role in ordering Islander societies. Historical sensibilities and the role of international institutions in perpetuating inequalities, two themes from the *World Bank Legal Review: Law, Equity and Development*, will be explored in analysing legal pluralism in the Solomon Islands. The analysis includes both social context, formal law and policies and provides recommendations which recognise that issues of governance,

² These two levels can often be interlinked in any one conflict.

³ AusAID spends AUD\$32 million per annum on the law and justice sector, concentrating on police, prisons and courts.

⁴ RAMSI is a multi-national force, led by Australia, which was invited in to the Solomon Islands in 2003 to restore civil and political order. The original military and police presence has been scaled back and replaced by civilians working in state institutions.

⁵ Dañino (2006) argues forcefully for the legality of the World Bank's inclusion of human rights.

law (including *kastom*) and politics are inseparable in massaging a sustainable post-conflict transition in the Solomon Islands.

2. Pluralism of Societies - Pluralism of Laws

“Solomon Islands is not a ‘nation’ but rather a country of villages”
Maclellan 2006, 18 paraphrasing Wale 2003

The social structures of the Solomon Islands are extremely complex as culture and social organisation vary from island to island and even village to village (Brown 2005, 15; Corrin Care 2000, 14). As a result, “...national identity...if it exists at all, only unites Solomon Islanders who find themselves living or travelling together outside the country’s boundaries” (Corrin Care 2005, 4). The following figure illustrates some indicators of diversity:

- Population: 566 842 [Estimate for July 2007, CIA Factbook]
- Land Mass: 26 islands, plus hundreds of small islets, stretching over 1360 kilometres
- The population is 94.5% Polynesian, 3% Melanesian and 1.1% Micronesian [1999 Census]
- 85% of the population live in rural areas
- Patrilineal, matrilineal and ambilineal descent regimes exist in different regions.
- Estimates of vernacular languages range from 65 [Corrin Care 2000] to 120 [CIA Factbook]
- Physical features (e.g. hair & skin colour) are distinctive across regions
- 41% of population under 15 years of age [Wairiu & Tabo]

Figure One: Societal Pluralism in the Solomon Islands

Whilst not directly diversity characteristics, the small, dispersed and youthful population provides particular challenges for the state in terms of service delivery, which is critical for governance mechanisms in a post-conflict setting. The diversity of the population has a direct (if not fixed) relationship to legal diversity, as the customary group to which a person belongs, carries with it tribal allegiance and submission to customary law (Corrin Care 2005, 1).

Legal pluralism has been defined as “the coexistence of different normative orders within one socio-political space” (von Benda-Beckmann 2005, 1). It is the contradiction of these legal orders and the fact that each has legitimate power, which makes the study of plural legal orders particularly important for analysing and intervening in post-conflict transitions.⁶ The Solomon Islands is a forum of incredible legal pluralism. Not only are there a multitude of different customary groups with different laws, but there is the intersection of these with state law, the church and outside actors as the following figure maps:

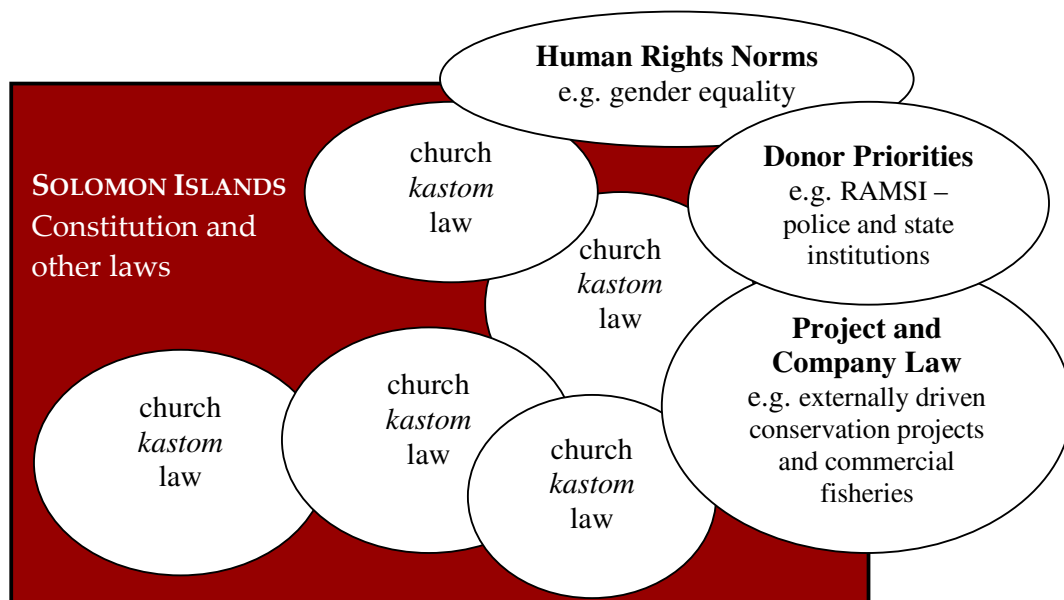


Figure Two: Legal Pluralism in the Solomon Islands

If the above figure appears unwieldy, then it starts to capture legal pluralism in the Solomon Islands. Nevertheless, it hopefully simplifies the situation to some extent (with all the attendant risks) to make certain aspects clear. If the sovereign state of the Solomon Islands is depicted by the rectangular box, within this there are many (overlapping) customary legal orders (represented by the circles). These many local orders coincide with different linguistic and ethnic groups. *Within* each of these groups there are plural legal norms, reflecting the interplay of individual local *kastom* and the influence of ‘outside’ forces, such as the church or the state (through law). These groups are also directly impacted by legal norms coming from outside the sovereign state, for instance via donor (‘project law’) and commercial (‘company law’) projects in individual communities. More broadly, the state as a whole is

⁶ Some anthropologists take issue with the notion of ‘legal pluralism’ as it implies that *kastom* (when framed as ‘customary law’) can be appropriately viewed as ‘law’. These critics argue that this does not compare like with like. This paper takes the view that *kastom* and law are two (equal but incomparable) forms of the same species – a societal ordering mechanism.

affected by the rules of engagement with international organisations via, for example, human rights norms and the programme priorities that international donors are willing to fund. More than one of these influences can be felt within one interaction with an outside actor (e.g. UNICEF pursuing a child rights project in a local village). The separation into only three levels masks much, for instance law at the level of the sovereign state arises under the Constitution, which itself is the product of outside influence. The Constitution was drafted in the United Kingdom (UK) and contains human rights norms based on the United Nations Universal Declaration.

The application of formal law and *kastom* at the village 'coal face' is usually met with confusion and hybridised implementation, not only overlap as the above figure indicates. An example of hybridised implementation is a transgression of customary law being enforced by a police officer, when in fact there are no grounds to act under state law. Chiefs also fuse *kastom* and law when assuming power to enforce state laws. Hybridisation is the source of conflict and can lead to seemingly hypocritical action. In this sense, legal pluralism mirrors the uptake of religion, in that people openly acknowledge they are Christian (or the primacy of formal law) and then most frequently act determined by animalist beliefs (or their customary law). Nevertheless, there is considerable interaction and cross fertilisation in the implementation of both. This is particularly promoted by the few men who understand these differences and can identify which parts of each suit their (often corrupt) ends.⁷

Von Benda-Beckmann distinguishes between 'weak' legal pluralism, where one (dominant) legal order recognises the existence of other normative orders and 'wild' pluralism in which several legal orders coexist irrespective of their mutual recognition (2006, 59). The Solomon Islands presents a mix of both. The (purportedly) dominant state law recognises and accommodates (including via the Constitution) the existence of customary legal orders, indicating 'weak pluralism'. However, horizontal interactions between customary orders (which may or may not have traditional mechanisms for recognition and coexistence) as well as the impact of external legal norms (eg. human rights; project law) with no established system of reconciliation are examples of 'wild pluralism'.

⁷ Thanks to J Ross Sinclair for the insights contributing to this paragraph.

3. Formal Legal Order

“The Constitution and the institutions it embodies have been exposed by the ‘coup’ as ostentatious pageantry”
Corrin Care 2005, 11

Sage and Woolcock’s assert that an historical sensibility is important when discussing institutional origins and trajectories. This is particularly pertinent for an understanding of legal pluralism in the Solomon Islands, where the history of the macro-legal order, from colonisation and the independence constitution, through to the RAMSI intervention, is characterised by the imposition of powerful external norms. The following figure highlights some of these key steps:

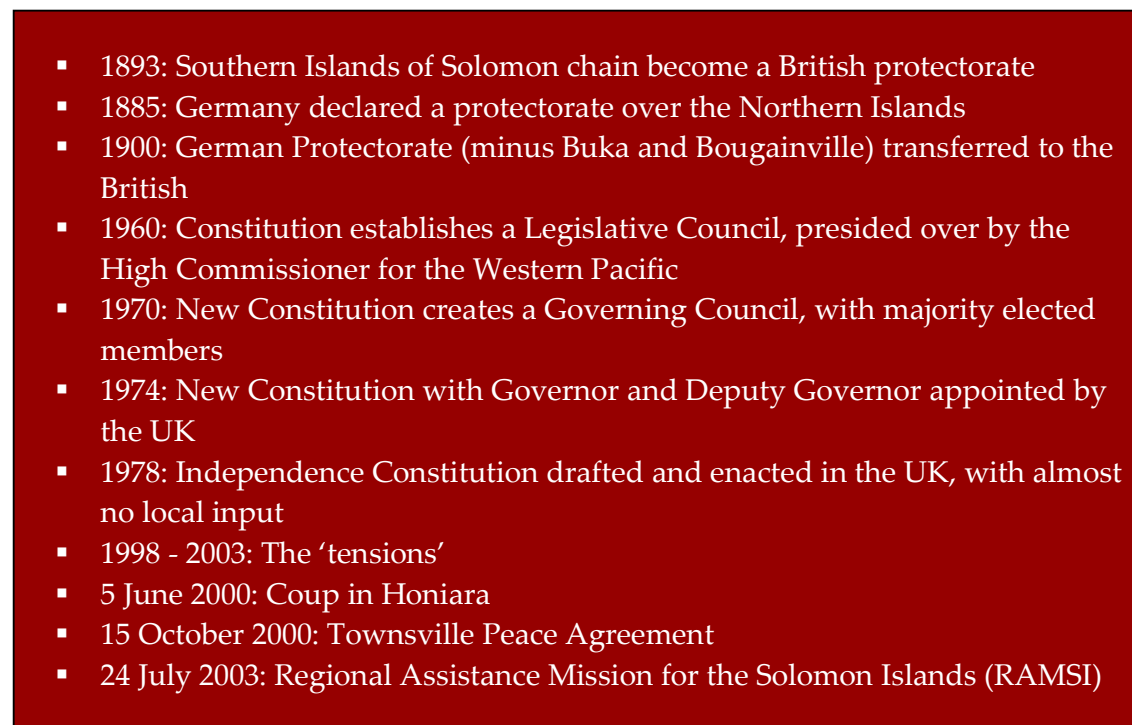
- 
- 1893: Southern Islands of Solomon chain become a British protectorate
 - 1885: Germany declared a protectorate over the Northern Islands
 - 1900: German Protectorate (minus Buka and Bougainville) transferred to the British
 - 1960: Constitution establishes a Legislative Council, presided over by the High Commissioner for the Western Pacific
 - 1970: New Constitution creates a Governing Council, with majority elected members
 - 1974: New Constitution with Governor and Deputy Governor appointed by the UK
 - 1978: Independence Constitution drafted and enacted in the UK, with almost no local input
 - 1998 - 2003: The ‘tensions’
 - 5 June 2000: Coup in Honiara
 - 15 October 2000: Townsville Peace Agreement
 - 24 July 2003: Regional Assistance Mission for the Solomon Islands (RAMSI)

Figure Three: Formal Legal History – A Selected Timeline

The current unicameral Westminster system of government, with imported common law, retains the Queen of England (acting through the Governor General) as head of state. Corrin Care notes that the “Failure to accommodate traditional practices or to consult the community before introducing the Westminster system means that few people really understand it. Consequently, it is open to manipulation by those who do” (2005, 3). The recognition of customary law, decentralisation and human rights are three important aspects which the formal legal order attempts to address. The Constitution attempts to manage diversity but contains inherent contradictions.

These include national unity on the one hand and decentralised power on the other, as well as asserting the primacy of the constitution (including its human rights provisions) whilst also recognising the role of customary law (which often contradicts human rights).⁸ The present formal system does not provide adequate guidance resolving conflicts and inconsistencies between law and *kastom* which is reflected in the fact that legal scholars disagree about the official legal hierarchy:

Corrin Care (2000)		MacFarlane (2006)
Constitution		Constitution
Acts of Parliament of Solomon Islands		Custom
UK Acts of general application (In force on 1 January 1961, if there is no local legislation on point)	Customary law	Acts of Parliament
The principles of common law and equity (In force on 7 July 1978, if they are appropriate to the circumstances of Solomon Islands and are not inconsistent with written laws or custom)		Common Law

Figure Four: Contested Hierarchy of Laws

Despite recognition of customary law in the Constitution, in practice the formal system gives preference to common law and acts of parliament. Unresolved inconsistency between *kastom* and law does not *necessarily* present a problem. As Corrin Care remarks, “at one level, the different systems of law proceed independently in their own spheres, without problems. Outside the commercial centres, introduced law is generally of no account” (2005, 9). This view is challenged by Sinclair and others, who note the pervasiveness of formal norms, even if the attendant institutions may be missing (personal communication, 11 May 2005).

Where customary law(s) and the formal state system do come into contact, there have been efforts to harmonise them. The *Local Courts (Amendment) Act 1985* seeks to

⁸ Section 75(1) of the Constitution states, “Parliament shall make provision for the application of laws, including customary laws.” Section 75(2) adds, “In making provision under this section, Parliament shall have particular regard to the customs, values and aspirations of the people of Solomon Islands.”

divert disputes over customary land to indigenous tribunals. Local courts are prevented from dealing with such disputes until customary mechanisms have been exhausted. Difficulties with the procedure include the unwillingness of unsuccessful parties to abide by decisions of chief, as well as problems in ascertaining the true chiefs. Appeals to the formal court system on matters of law and the identity of chiefs have been used to divert questions away from these indigenous tribunals and the end result is more litigation involving customary land than before the introduction of the Act (Corrin Care 2005, 9). Another piece of legislation seeking to harmonise 'weak pluralism' is the *Customs Recognition Act 2000*. This is not yet in force and according to some is unlikely to ever be.

Law and governance issues are inseparable (Sage and Woolcock 2006, 6) and the distinction between political and legal processes in post-conflict Solomon Islands is especially difficult to draw. The relationship between decentralised societies and a centralised state illuminates further tensions of legal pluralism. Modern governance represents both a threat and a support to the traditional system. 'Government' in the Solomon Islands was customarily identified as an individual. The idea of central government and government by a collective or party, is thus alien. Maclellan notes that "A strong centralised state can be a source of conflict, rather than a solution to it" (2006, 17). There is a history of unsuccessful reform to accord more formal power to local governance systems. These include 1996 legislation creating Provincial Councils which privileged the participation of unelected chiefs and elders. This novel experiment survived a constitutional challenge but not subsequent political pressure.⁹

Discourses on human rights in the South Pacific have been remarkably state centric (Olowu 2006), yet it is the "hegemonic troika" of tradition, church and male authoritarian structures that have made human rights promotion difficult (Shameem 2006). Duties rather than rights remain the dominant paradigm for most Pacific societies. In the context of Africa, Odinikalu has explored examples of customary law out of step with international human rights norms and modern economic relations, yet retaining legitimacy and application (2006).¹⁰ This contrast is equally applicable to the Solomon Islands,¹¹ where the clash between *kastom* and human rights is seen most clearly in gender equality and women's rights. Patriarchy pervades not only social norms but the command and control of institutions, particularly in more formal arenas (Brown 2005). The Constitution attempts to resolve these notions of customary law (based on male domination) and human rights (founded on principles of equality). Chapter II of the Constitution (see

⁹ A new (2004) draft Constitution proposes a federal arrangement with greater regional autonomy.

¹⁰ Faundez (2006) has also highlighted concerns about the non-adherence of non-state justice systems to current standards of human rights.

¹¹ See Appendix Two for a simplified summary of the main differences between customary law and human rights.

Appendix One) contains a catalogue of well known rights of Western origin.¹² However, the 'customary exception' in Section 15 of the Constitution, has been interpreted by the courts to allow derogation from these principles in the face of *kastom*.

Civil society has been ineffective in promoting human rights and holding successive governments to account. It has been especially weak in utilising outside legal processes, such as directly accessing UN human rights treaty monitoring processes, for instance through shadow reports. This is disturbing as the Solomon Islands has been (perhaps not surprisingly given events) extremely lax in complying with its international reporting obligations. It is yet to submit a report under the Convention on the Elimination of All Forms of Discrimination Against Women and globally ranks as one of the nations with the highest number of overdue reports under the Convention on the Elimination of Racial Discrimination (Olowu 2006).

4. Legal pluralism: The Descent into Conflict and Paths to Peace

"...given the incongruous foundations of government is it any surprise that it was unable to uphold the rule of law?"
(Corrin Care 2005, 1)

Conflict in post-colonial Melanesia is often attributed to overwhelming cultural and linguistic diversity. Sage and Woolcock (2006, 2) note that in many countries, the prevalence of multiple, competing rules systems, and the lack of reconciliation mechanisms perpetuates inequalities and fuels conflict. This description accurately fits the case of the Solomon Islands where political instability arose because the formal system is ill-fitted to the traditional framework on to which it is grafted (Hegarty et al. 2004). Kua and Sore (Undated) argue that non-recognition (by decision makers and development partners) of diversity and the multi-layered nature of society led to the ethnic crisis. Whilst other commentators challenge this ethnic attribution for the crisis,¹³ the failure of state systems to effectively deal with diversity and mediate plural claims contributed to insecurity (and continues to do so). The weakness of the state is matched by the strength of societies and most Solomon Islanders see the state as a competing political entity (Upton 2006, 1).¹⁴ Sinclair claims that the real complication comes not with the interaction of formal and customary law, but from modern movements of significant numbers of people

¹² Chapter II was drafted by the UK government on the basis on the UN Declaration of Human Rights and the European Communities' European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹³ See for example Fraeknel, 2004 who concludes that custom was manipulated to justify the conflict.

¹⁴ See also Migdal, Joseph (1988) *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World*, Princeton University Press, Princeton.

resulting in two (often conflicting) sets of customary laws coexisting in one place, with no traditional way of reconciling them (personal communication, 11 May 2005).¹⁵

The United Nations Development Program has identified the following factors as contributing to the descent into conflict: tensions around land; traditional versus non-traditional authority structures; access to services and information; economic opportunities and law and justice (UNDP 2004). Within traditional versus non-tradition authority structures, tension arises at the village level when young men, schooled away from the village (and often with outside work experience), return 'smarter' than the chiefs. They often act with contempt towards the chiefs and the decisions they make. The young men are hesitant to act in this manner towards the police, as police can use force and arrest them. Traditionally, chiefs have also had the power to use force but are now constrained by modern criminal law (J Ross Sinclair, personal communication 11 May 2007). This generational pluralism sees the younger generation schooled more in formal law, conflicting with older generations steeped in *kastom* but without the power to enforce it.

Kastom has proved fragile in the face of disorder, with conflict being described as times when people do not listen to the chief (Oxfam 2005).¹⁶ Leveraging legal pluralism, McDougall (2007) suggests adopting the following three (overlapping) paths to peace:

- *Church*: the most "pervasive and fundamental" peacemaking institution in the Solomon Islands (McDougall 2007, 5). The church offers both community level justice mechanisms and more recently the country's five main churches have formed the Solomon Island's Christian Association which is outspoken on national governance issues (Wairiu and Tabo 2003).
- *Kastom*: aims to restore relationships between differentiated groups.
- *Law*: has not been readily available because of state weakness (especially between 1998 and 2003), but represents an important backstop to *kastom*.

The mutually reinforcing link between *kastom* and law is regularly noted by commentators on the Solomon Islands. Chiefs can act as the mediators between the traditional and the modern, which has structural advantages for local governance, but also opens up new forms of exploitation (White 2006). One of the most positive outcomes of RAMSI for Solomon Islanders is regular policing. A regular police service reinforces local capacity to manage serious conflict. Local leaders refer to the law as the next step in managing a dispute if disputants will not accept their

¹⁵ For example, the Maliatan and Quala systems in Guadalcanal

¹⁶ This is not to romanticise the traditional rule of Chiefs, when life was often nasty, brutish and short.

authority and offenders know that if they don't submit to local settlement then outsiders can be brought in (McDougall 2007, 10/12).¹⁷

Corrin Care claims that "The present arrangements between central and local governments satisfy no one" and the division of resources which has always been the focus of grievances remains so (Corrin Care 2005, 8). The Townsville Peace Agreement commits the government to rewrite the constitution so as to give more power to the provinces (Part 4, clause 1(b)) and the current government's plan of action includes commitments to do so. Whether Solomon Islanders should seek more emphasis on traditional governance structures is an open question. Participation is the "bread and butter" of traditional governance systems (Wairiu and Tabo 2003, 165) and people understand them better and feel greater ownership of them than they do for introduced systems.¹⁸ However, given societal change there are issues which traditional mechanisms may not be equipped to deal with (e.g. resource disputes involving outsiders) and modernisation has distorted customary governance (e.g. in the misuse of compensation) (Wairiu and Tabo 2003). The most blatant forms of extortion have been couched in terms of customary claims for compensation (Fraenkel 2004). Generational change means that formal recognition of *kastom* may cause conflict within communities, with older people adhering to traditional laws much more than younger people. Such an outcome would not be sustainable in securing peace, given the large percentage of the population under the age of 15. Furthermore, particularly as a result of the 'tensions' *kastom* has acquired a bad name for many (McDougall 2007, 9). Government through customary groups has been called "an unrealistic dream" (Corrin Care 2005, 13) yet it remains the most relevant and understandable system for the population.

As mentioned above, RAMSI has had positive impacts for local dispute mechanisms. However, like most international post-conflict interventions, it has focused on centralised state building, which is instinctively at odds with a 'nation of villages'. As Maclellan notes "...rebuilding the state is not, and cannot be, a conflict neutral process – the model of a stronger centralised state in itself has implications for the dynamics of conflict and the allocation of power and authority in society" (2006,

¹⁷ One beneficial link between *kastom* and law is seen Ranonggan (in the Western Solomons) where local Chiefs are currently seeking recognition by the state for customary rules, including fine amounts and customary processes. They hope that this will both reinforce their authority and allow recourse to the police in cases they are unable to solve (McDougall 2007, 11). On the island of Simbo, the translation of resource management *kastom* into laws, which are then locally enforced, has also been effective (J Ross Sinclair, personal communication, 11 May 2007).

¹⁸ "People see traditional governance as 'part of themselves'" and feel alienated from modern governance because of the lack of shared decision making or participation in the implementation of programs (Wairiu and Tabo 2003, 186). The Centre for Public and International Comparative at the University of Queensland law recommends "reviving traditional social systems and enhancing the role of customary law" (2007).

18).¹⁹ RAMSI could ultimately undermine, rather than further, the promotion of peace. The ‘tensions’ severely challenged customary authority to deal with conflict, yet resources allocated to local dispute mechanisms by overseas donors are nowhere near those allocated to the central machinery of government (Maclellan 2006). The perception that RAMSI is being driven by external objectives (and the fact that it is staffed almost completely by Australians) disturbingly mirrors the history of external constitutional development and reinforces another layer of legal pluralism that is discordant with local societies.

5. International Interventions

The ability of outsiders to positively influence plural legal orders is questionable and beset with difficulty and danger. As McDougall frames it, “How can well meaning outsiders help local people restore peace using those methods that ... only those deeply involved will be able to devise?” (2007, 4). Local people who are in the best position to foster peace rarely have meaningful decision making roles and the *World Bank Legal Review: Law Equity and Development* highlights the role of international organisations in perpetuating inequalities. Given the inequality of many traditional arrangements, strengthening local legal orders (were it to work) may legitimate highly unequal distribution of productive resources (von Benda-Beckmann 2006, 64). In relation to the South Pacific, MacFarlane (2006) reflects that outside assistance (especially through foreign judges, prosecutors and other legal professionals) has undermined the development of local jurisprudence and particularly inhibited the recognition of *kastom* in the formal system. If, indeed, the benefit of local justice mechanisms is that they are appropriate for the specific conditions in which they are applied, then outside support may distort and therefore undermine the very elements it is trying to encourage. Does that leave outsiders with no role to play? McDougall (2007) and Hegarty et al. (2004) suggest that there *can* be a positive role for outsiders but only by focusing on process rather than content. Their findings almost perfectly fit with the strategic conclusions arising from the World Bank’s study of collective grievances in Cambodia.²⁰ Cockayne offers an additional approach, suggesting that “transformative justice” (as opposed to transitional justice) is required to overcome the conflicts of the past, and for this focus needs to extend beyond political and legal institutions, to economic ones (2004).

¹⁹ Dinnen challenges that it is a case *rebuilding*, as it is not so much that the state has fallen apart, but rather that it was never properly built (Dinnen 2004). Nevertheless, Maclellan’s point holds.

²⁰ Personal communication with Daniel Adler, and see also Center for Advanced Study/World Bank (2006) “Justice for the Poor? An Exploratory Study of Collective Grievances over Land and Local Governance in Cambodia,” Center for Advanced Study and the World Bank.

Whilst Solomon Islanders are used to living in multi-cultural environments and co-opting outside sources, "...where cultural difference does seem important is when European outsiders attempt to intervene to solve disputes" (McDougall 2007, 15). McDougall analyses a World Wildlife Fund project in the Western Solomons and illustrates how "well meaning outsiders" end up causing bitter disputes (2007, 4). She notes that, "Instead of putting in place structures that would allow those people who knew the complexities of the situation to manage it in the way they felt best, this external organisation attempted to direct and control the process" (McDougall 2007, 18).

In addition to RAMSI's focus on state justice sector institutions, the Solomon Islands own Law and Justice Sector Strategic Framework 2005 – 2010 emphasises formal structures, albeit with 'community involvement.' The political goals of the Grand Coalition for Change Government (elected May 2006) include recognition of localised justice. They prioritise, however, national systems and leave integration of traditional justice systems for the longer term policy horizon (Solomon Islands Justice Sector Consultative Committee, Undated). A number of donor governance programs do emphasise the role of non-state actors, including churches, NGOs and private sector organisations. However, these programs have often failed to define the place of customary authorities and indigenous structures (Maclellan 2006). Some specific programmes include:

- AusAID: Community Support Programme (formerly Community Peace and Restoration Fund)
- JICA: Japanese Grassroots Project
- EuropeAID: European Union Micro Projects
- ROC/SIG: Republic of China/Solomon Islands Micro projects

The donor trend to programmatic (as opposed to project) support may further tend away from buttressing informal mechanisms, as it preferences government and formal structures of law and justice. MacFarlane concludes that there is definitely scope for improving engagement as "...the current form of aid is compromising the development of a jurisprudence particular to South Pacific Island States, namely one based on reconciliation, harmony and community and the devolution of authority" (2006, 104). Given the geographic reality of the Solomon Islands, with a small population spread across remote islands, it would be difficult for even a strong state to provide access for all citizens to formal institutions, such as police and national courts. Resources are therefore more effectively invested in supporting the pervasive local governance mechanisms which are already embedded.

A regional outlook provides some insights in terms of best practice,²¹ with village courts in Papua New Guinea identified as an “excellent (and fairly unique) example” of an institution which straddles plural legal orders, in a setting with dynamics broadly similar to the Solomon Islands (Sinclair Dinnen, personal communication, 25 April 2007). Papua New Guinea’s village courts are able to move between the realms of official (state) and unofficial (*kastom*/non-state) law according to the particularities of individual cases and local circumstances. They are officially viewed as *kastom* courts, operating on the margins of the national judicial system, even though they have become increasingly formalised in practice

6. Recommendations

“Rather than focussing on content we should focus on questions of structure”

McDougall 2007, 18

Recognising both limitations to intervention and the programmes which are already being undertaken, how should outside actors respond to legal pluralism in the case of the Solomon Islands? Four overall options could be framed as follows:

- I. Continue to focus on strengthening state structures (in line with RAMSI)
- II. Turn attention towards non-state systems
- III. Build ‘bridges’ between I. and II.
- IV. All of the above.

Option IV makes the most sense in light of von Benda-Beckmann’s reflection that “Given the manifold interdependence of legal orders in plural legal systems, the functioning of one such order cannot be looked at in isolation” (2006, 63). Supporting this, Wairiu and Tabo (2003) find that communities themselves view integration of traditional and modern governance structures as the best way forward. Practically, such an option runs the risk of recommending ‘do everything’ and failing to recognise resource and capacity constraints whilst overlooking possible benefits from sequencing.

Within the overall aim of “...improving the coherence, accessibility, capacity and accountability of the legal and rule based systems that underpin them” (Sage and Woolcock 2006, 2), this paper won’t suggest specific recommendations²², but will

²¹ There has been relatively more work done on legal pluralism in Fiji and Vanuatu, than the Solomon Islands (Rochelle White, AusAID, personal communication 7, May 2007).

²² To suggest specific recommendations would not privilege local views and contradict the overall spirit of the findings.

outline some principles for engagement and record those recommendations found in the literature. Given the existing focus on Option I (above), it is recommended that programmes to address Options II and III be considered on the basis of the following principles.

Principles of engagement

- Pursue decentralised programmes as state-based, government centred 'solutions' are unsustainable in a 'country of villages.'
- Participation is the key to promoting traditional practices which people understand and also ensures outside norms are tempered.
- Capitalise on and take seriously local customary *processes* (including the church) whilst monitoring *outcomes* against Constitutional (including human rights) standards.

Collated recommendations

- Hamilton (2007):²³
 - Conduct a baseline survey of current local justice mechanisms
- McDougall (2007):
 - Support local chiefs' councils
 - Train locals how to make peace
 - Continue to recognise the importance of police and other Western forms of justice for local systems
- MacFarlane (2006):
 - Greater involvement of regional indigenous judges, including creating a regional Supreme Court
 - Judges from Australia, New Zealand and the United Kingdom should not sit as sole judges where custom is raised as an issue
 - Workshops to discuss how to integrate custom and introduced law.
- Kaua and Sore (Undated)
 - Legalise community structures²⁴

²³ Hamilton notes that no baseline of local justice systems exists upon which to develop future policy (personal communication, 6 April 2007). It is hard to recommend that something be supported without knowing exactly what it is.

- Wairiu and Tabo (2003)
 - Greater empowerment and formal recognition of the role of chiefs and including them on the government payroll²⁵
 - Provision of community training to ensure greater awareness of governance systems by the entire community
 - Incorporation of traditional practice in formal education curriculum
 - Inclusion of elders and chiefs in the provision of instruction on tradition governance

7. Conclusion

Post-conflict society in the Solomon Islands displays a multiplicity of highly interconnected legal systems, notwithstanding the weakness of state law. The legal orders which are most apparent and available to the people of the Solomon Islands are *kastom* and the church and it is therefore these that should be utilised for developing conflict resolution and governance mechanisms. Ultimately, however, in the steamy conditions of an unstable South Pacific, local traditional mechanisms need to operate in the comforting shadow of effective state-based law. A longer term goal for the Solomon Islands is to foster a sense of national identity, perhaps around national sporting teams.²⁶ Fostering of a sense of nationalism serves the purpose of positively connecting different customary groups with a view to mitigating conflict. These customary groups have found themselves as part of one nation but without traditional reconciliation mechanisms for the modern world.

²⁴ Legalising community structures has worked well in resource management situations. In communities with a long history of resource use, local laws are often derived from long-term natural history observation and are in the form of management prescriptions that translate easily into formal law. For example, no killing of adult megapodes because they lay they eggs we eat. (J Ross Sinclair, personal communication, 11 May 2007).

²⁵ The danger with this is the commodification of power and the distortion of local incentives to seek and exercise power.

²⁶ The Solomon Islands has a strong soccer culture.

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Appendix One

Constitution of the Solomon Islands 1978

CHAPTER II

PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL

3. FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL
4. PROTECTION OF RIGHT TO LIFE
5. PROTECTION OF RIGHT TO PERSONAL LIBERTY
6. PROTECTION FROM SLAVERY AND FORCED LABOUR
7. PROTECTION FROM INHUMAN TREATMENT
8. PROTECTION FROM DEPRIVATION OF PROPERTY
9. PROTECTION FOR PRIVACY OF HOME AND OTHER PROPERTY
10. PROVISIONS TO SECURE PROTECTION OF LAW
11. PROTECTION OF FREEDOM OF CONSCIENCE
12. PROTECTION OF FREEDOM OF EXPRESSION
13. PROTECTION OF FREEDOM OF ASSEMBLY AND ASSOCIATION
14. PROTECTION OF FREEDOM OF MOVEMENT
15. PROTECTION FROM DISCRIMINATION ON GROUNDS OF RACE, ETC.
16. PROVISIONS FOR PERIODS OF PUBLIC EMERGENCY
17. COMPENSATION FOR CONTRAVENTION OF RIGHTS AND FREEDOMS
18. ENFORCEMENT OF PROTECTIVE PROVISIONS
19. INTERPRETATION AND SAVINGS

Appendix Two

CUSTOMARY LAW	HUMAN RIGHTS
<ul style="list-style-type: none">• indigenous	<ul style="list-style-type: none">• introduced concepts
<ul style="list-style-type: none">• fragmentary	<ul style="list-style-type: none">• internationally accepted values
<ul style="list-style-type: none">• conservative	<ul style="list-style-type: none">• liberal
<ul style="list-style-type: none">• patriarchal	<ul style="list-style-type: none">• egalitarian
<ul style="list-style-type: none">• emphasises status	<ul style="list-style-type: none">• emphasises equality
<ul style="list-style-type: none">• duties	<ul style="list-style-type: none">• rights and freedoms
<ul style="list-style-type: none">• emphasises community values	<ul style="list-style-type: none">• emphasises individual rights

Corrin Care (Undated)