

# MARRIAGE IN ACCORDANCE WITH CUSTOM: ISSUES WITH MARRIAGE UNDER CUSTOMARY LAW IN SOLOMON ISLANDS

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*A customary marriage in Solomon Islands is a valid marriage under the Islanders' Marriage Act. The operation of the Act in relation to women and girls has the potential to discriminate against them. This article considers parts of the Islanders' Marriage Act in relation to customary marriage and the obligations of the State under CEDAW.*

*Aux Îles Salomon, un mariage coutumier est un mariage légalement reconnu par le 'Islanders' Marriage Act' de 1945.*

*Il reste que certaines des modalités de mise en oeuvre de ce texte sont de nature à discriminer les femmes et les jeunes filles et ce sans pour autant entraîner de sanctions de la part de l'État des Solomon.*

*Dans cet article, l'auteur liste et analyse les dispositions du 'Islanders' Marriage Act' qui apparaissent comme des violations des dispositions de la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes du 18 décembre 1979.*

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## **I INTRODUCTION**

Custom or *kastom* is a concept that some scholars have argued will be difficult to define in black and white because it will always be an evolving entity on its own. Nevertheless, the NZCLE has defined customary law as 'a recognized system of law comprised of values, practices and process... [that] ... has the capacity to change as community opinions change'.<sup>1</sup>

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1 New Zealand Law Commission, *Converging Currents: Custom and Human Rights in the Pacific* – Study Paper 17 (2006) 42-43.

This description of customary law does capture its meaning, but in a country with as much custom diversity as Solomon Islands 'customary law' may be interpreted through the lens of each person. *Kastom* is a reflection of the values, beliefs and traditions that has come to define people, which is why it is still highly regarded. It is still heavily rooted in Solomon Island societies in its natural form and over time has become entwined with religion.

The Constitution recognises customary law:

**75** (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.

**76** Until Parliament makes other provision under the preceding section, the provisions of Schedule 3 to this Constitution shall have effect for the purpose of determining the operation in Solomon Islands –

... .

(c) of customary law

....

Schedule 3

**3** (1) Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands.

The legal recognition along with the societal and cultural significance of customary law gives it its legitimacy, but as it is an evolving entity it has been subject to abuse, misinterpretation and misunderstanding. The current law which governs marriage in the Solomon Islands is the Islanders' Marriage Act [Cap 171]. Under s 4 marriages according to the custom of islanders as one of three forms of valid marriage. However, the later parts of the Act leave customary marriages with the potential of discriminating against women and young girls. Currently the Solomon Islands Law Reform Commission is reviewing the marriage and divorce laws of Solomon Islands and one of the main areas under review is customary marriage and the issues surrounding it.

This paper will focus on particular parts of the Islanders' Marriage Act in regards to customary marriage and the state obligation under CEDAW to which Solomon Islands has been a party since 2002.

## II RECOGNITION OF MARRIAGE BY CUSTOMARY LAW

Customary law is recognised in the Constitution and it is the basis of Solomon Island societies and the traditional law for all indigenous Solomon Islanders. Marriage by *kastom* will vary from place to place in the Provinces and their regions. As a Malaitan woman, when I got married, we had a small ceremony in accordance with the custom from our mothers' side of the family. Things happened in three stages.

The first was when my partner and I informed our respective families of our intention to marry. Then he, along with one of his maternal grandfathers, and both his parents came and met with my immediate family members, my late grandfather, some of my uncles and my aunts. From this meeting it was decided that my 'bride-price' would be a few *tafuli'ae* (shell-money) and cash. This took place roughly a year before we had our religious wedding, whereby our union was registered. My husband and I come from four different cultures: the most similar is our maternal cultures (mine from Tobai'ata and his Are'are), while our paternal cultures are very different (mine from Isabel and his Sikaiana). The tradition of bride-price comes from our maternal sides so there was mutual understanding of this customary rite for a lot of our young people. It legitimised our union in the eyes of our respective families and tribes and the joining of our families. Our customary marriage on our paternal sides were very different.

The second was in accordance with Isabel custom from my fathers' culture. As the daughter of a Zabana man from Isabel Province, *kastom* required that either my father or my eldest female relative would call together all my older male cousins (in my case my brother and older male cousins) and give them a small amount of money as a token before announcing my partner's intention to marry me. This sum can be as little as \$5.00SBD and their acceptance of that money serves as a symbolic acceptance of their sisters' intending marriage. This is a modernised practice but over time it has become a part of our *kastom* and is generally practised by my paternal family.

The third happened during our religious wedding reception. The Sikaiana are one of Solomon Islands' native Polynesian people and their customary marriage ceremony is based on 'gifting' also known as a *penu penu*. In this ceremony, the paternal side of each party will give their counterpart gifts of cloth, pig, taro and other goods, and the party's maternal side will do the same. This was what happened for us during the end of our wedding reception: my father and mother's side of the family were given food and cloth.

Then we had our wedding feast with our families and friends after our religious wedding ceremony. Afterwards my husband's maternal family conducted a small

*houra*<sup>2</sup> for the people who had contributed to our wedding. This included holding a meal for everyone who had contributed in any way or form, and the sharing of pig with each person who had contributed financially or with food towards our wedding feast. This was in accordance with his custom from Are'are.

These are just a few of the many different kastom marriage traditions and practice that exist in the Solomon Islands.

### III CASE LAW

In the case of *Rebitae v Chow*,<sup>3</sup> a naturalized citizen (non-Islander) had married an indigenous Arosi woman (an Islander) from Makira Province in accordance with her custom. The husband claimed that their customary marriage was invalid for two reasons. The first is that he is not an 'Islander' as defined in s 17 of the Interpretation and General Provisions Act.<sup>4</sup> The second was they had not held the customary feast which would be the final stage at which the bride's family will bring food in exchange for the 'bride-price' from the groom's family. The defendant argued that this meant their marriage was not complete in *kastom*. The Court saw otherwise. It held that the parties' *kastom* marriage was valid because even though the feast was not held, the acceptance by both parties, their families, relatives and communities sealed its validity.

In this case the Judge stated—<sup>5</sup>

What constitutes a valid custom marriage in one community may not be adequate for the same purpose in another community. One thing is however common. A custom marriage is not and cannot be a secret affair in custom. Everyone in the village of the parties, the members of the immediate and extended families and even neighbours are informed. Exchange of food, bride - price and other items are common features of custom marriage. In the past and even now, the marriage contract is always negotiated by the father or male relative of the boy if his father is dead or for some reason is unable to fulfil that duty. Acceptance or refusal on behalf of the girl's family is the duty of the girl's father or male relative of the girl, again if her father is not available. In practice, the girl's consent is sought by her father except where the girl may have to

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2 The *houra* held after our wedding was a miniature of the actual traditional *houra*. A *houra* is a traditional Are'are feast that is hosted for events like a wedding, a death or a friends party.

3 *Rebitae v Chow* [2001] SBHC 85 <http://www.paclii.org>.

4 Interpretation and General Provisions Act (Cap 85) s 17 restricts the definition of an "Islander" to persons of Melanesian, Micronesian and Polynesian descent living in Solomon Islands in the customary mode of life of any such race, group, tribe or line. In this case the defendant was of Chinese descent.

5 *Rebitae v Chow* [2001] SBHC 85 <http://www.paclii.org>.

be persuaded if she refuses to accept. Often the girl accepts out of respect for her father and her close relatives. Nowadays the situation in most cases is that the boy and the girl agree in private and later ratified by the boy's parents and the girl's parents.

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The payment of bride price, exchange of gifts and general acceptance of that status quo is often the ratification of the parties' agreement to live together as husband and wife. In some church communities, the girl can marry without the payment of bride - price although exchange of food may take place. In some cases, the exchange of food may even be scaled down to the point where both sides come together and eat prepared meals to signify the marriage.

The most important thing is that the parties have agreed to live together as husband and wife and is accepted by their families and relatives. All the ceremony and the pomp can be foregone if the circumstances of the case so dictate but without affecting the validity of the marriage.

While true *kastom* and the true tradition of celebrating marriages according to the various customs come with honour and unity, times have changed. Nowadays *kastom* and customary marriages are misconstrued and since it is unregulated it provides a loophole in the legislation that governs marriage, putting women and young girls in vulnerable positions. Unlike a religious or civil marriage under the Islanders' Marriage Act there are areas which are not regulated: the first is age of marriage; voluntary registration of customary marriages; and divorce by customary law.

#### **IV AGE OF MARRIAGE**

Under s 10 of the Islanders' Marriage Act the minimum age of marriage for any religious or civil marriage is 15 years for both parties either with parental consent or that of a guardian in their absence, or judicial consent. However, marriage under *kastom* is not regulated. This is a grey area which the Solomon Islands Law Reform Commission and other Solomon Islands government ministries are working to rectify by advocating the raising of the minimum age of marriage to 18 years for all forms of valid marriage recognized under the Act.

Customary marriage becomes an issue when it is used for the exploitation of young girls and as the justification for their cohabitation with foreign loggers in the provinces in exchange for monetary support. It is increasingly common in rural areas which have a high concentration of logging or mining activities to find teenage girls living with much older men (foreign migrant workers or local workers). Upon inquiry of their relation status the usual answer is that they are 'married' because the girl was arranged or given to the man either by a relative or by their own choice. Nowadays with the increase in reliance on cash, and the very limited, especially in

rural areas, means to generate income, the practice of bride-price may be distorted under "the guise of bride-price families ... selling young girls into marriages".<sup>6</sup>

In some cases, after a few years most of the migrant workers will return to their home country, often leaving behind children with a young single mother. The Social Welfare division had cases where such young mothers will seek assistance to obtain support from the father of her children and it is difficult because some may not even know the last name of the man or have any means to contact him once their employment contract lapses and they return to their home country.<sup>7</sup> After an early marriage, a lot of young girls are not only affected by having their education cut short, but some may experience domestic violence, sexual abuse and exploitation resulting in mental, emotional and physical trauma.

As a party to CEDAW and CRC, Solomon Islands has the obligation to eradicate child marriages. With the current minimum age of marriage, the law allows for child marriages but only if the parent, or a guardian or the court gives consent.

## ***V BRIDE-PRICE: TRADITIONAL CUSTOM OR COMMERCIAL EXPLOITATION***

A good documentation of this form of bride-price was provided by Dr Alice Aruhe'eta Pollard. She wrote about bride-price in Are'are, Malaita. Pollard gave the definition of the term bride-price payment in her local dialect as *hori keniha* that translates to "trading a girl" which reaffirms the stereotype that the woman or young woman is being sold and bought.<sup>8</sup> Pollard goes further by stating that the true meaning of bride-price payment is in the *hua keniha*, the wedding ceremony itself, which translates to 'releasing and exchanging a girl from one authority to another',<sup>9</sup> essentially it is a transaction between the 'bride-givers' and the 'bride-receivers'.<sup>10</sup>

This practice has been defended by staunch culturists that it is a symbolic value of the bride to her family/clan/tribe and her marriage means that her natal family will be losing an irreplaceable valuable so there must be an "adequate counter-gift so that

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6 American Bar Association Rule of Law Initiative Human Trafficking in Solomon Islands. Knowledge, Attitudes, and Perceptions Report (2014) 7.

7 Officer from the Ministry of Health and Medical Services - Social Welfare Division presentation during the 'Endim Vaelens againstim pikinini' workshop by Save the Children, World Vision and Child Play Coalition (3/11/22) Honiara, Solomon Islands.

8 Alice Aruhe'eta Pollard, *Givers of Wisdom, Labourers without gain. Essays on Women in the Solomon Islands* (2000) 57.

9 Above, n 8.

10 Above, n 8

the proper alliance relationship between the bride-giving and bride-receiving groups may be secured".<sup>11</sup>

Regardless of the cultural differences between groups around Solomon Islands, the bride-price system has the same underlying significances which were best summarized by Pollard as:<sup>12</sup>

- Cementing the alliance of friendship between the two families,
- Giving wealth to the bride's birth family,
- Recognising her role in the continuation of the groom's lineage,
- Serving to make permanent their union and as a symbol of their commitment to one another, and
- Ensuring that the bride will be industrious in taking care and looking after her new family, especially the husband and his parents.

Another significant aspect of the practice of bride-price is its longevity. The bride-price payment is a cornerstone for family life in both the rural and urban areas because not only does it legitimise marital unions, but it is an embedded part of *kastom* that people are still unwilling to do away with as the majority were born into and have lived by it. Moreover, it is viewed as a rite of passage in the transition from girlhood into womanhood.<sup>13</sup>

*Kaelonga v Tuita and Kunua* involved a dispute over child custody due to the payment of bride-price of the mother, the custom expert used in the case stated—<sup>14</sup>

any bride price has two underlying elements, one for the bride, and one for the children. In the event of the death of the husband the children would normally be taken by the husband's line. This does not affect the mother's right to see the children and she can remain with them with the husband's line, or can return to her own family. The mother's right to see the children can be terminated by a further payment made by the husband's line, whether the mother stays or goes the children still have rights to the husband's property. If they stay, they will have primary rights, if they go, they have a secondary right. He did say that much custom is a matter as between the parties and that it is not something that is fixed or rigid.

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11 Above, n 8 p58.

12 Above, n 8 p37.

13 Above, n 8.

14 *Kaelonga v Tuita and Kunua* (1985) SBMC 2.

That quotation demonstrates the substantial value bride-price has, because not only does it legitimise a couple's marriage but also the status of their children and their inheritance rights. Therefore, it confirms what a respondent in Pollard's book said: "[the practice of paying bride-price] is in my blood and I am not going to give it up. My children have been born into it and I am going to die in it."<sup>15</sup>

In Solomon Islands, despite a range of languages and cultural diversity, the practice of bride-price payment has the same underlying principles, as stated above, but with the cash economy it has earned a negative reputation where women and young girls are now viewed as assets and as commodities.

The 2002-2012 CEDAW Shadow Report gave emphasis to how the cash economy has distorted the customary practice and today it has led to the idea of "ownership" by the husband which has become prevalent, leaving women and young women particularly vulnerable to not only violence but to early and forced marriages, especially in rural and other areas where there are limited economic opportunities.<sup>16</sup> From this particular report recommendations were given for the Solomon Islands Government for legislation to put an end to the practice of bride-price payment as it is detrimental and discriminatory to a woman's rights under CEDAW, especially Article 5.<sup>17</sup>

## **VI VOLUNTARY REGISTRATION OF MARRIAGE BY CUSTOM**

Under the *Islanders' Marriage Act*, registration of a marriage by *kastom* is voluntary under s 18(1). This provision does not take away from the marriage's legitimacy or validity but it does make it exempt from offences such as bigamy, which is recognized under the marriage legislation s 14 and the Penal Code [Cap 26] s 170. Section 170(2) of the Penal Code makes it clear that 'For the purposes of this section a ceremony of marriage under customary law shall not be deemed to constitute a valid previous marriage unless it has been registered under the provision of the Islanders' Marriage Act Cap. 171'.<sup>18</sup>

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15 Above, no 8 p30.

16 CCC & Others, NGO Shadow Report on the Status of Women in Solomon Islands: Initial, Second and Third Report (2012) 17.

17 Convention on the Elimination of All Forms of Discrimination against Women (1981).

Article 5. States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

18 Penal Code [Cap 26] <http://www.paceli.org>.



However, other legislation does recognise the validity of marriages in accordance to *kastom* whether registered or not. One such Act is the Affiliation, Separation and Maintenance Act [Cap 1]. In the case of *Balou v Kokosi*<sup>19</sup> the Judge ruled that even though the marriage of the parties was celebrated in accordance with their custom and it was unregistered by the time of their separation, since s 4 of the Islanders' Marriage Act recognises customary marriages, it was a valid marriage, thereby entitling the respondent (former wife) be able to apply under the Affiliation, Separation and Maintenance Act for maintenance from the former husband.

## **VII DIVORCE UNDER CUSTOMARY LAW AND CHILD CUSTODY**

According to s 4 of the Islander's Divorce Act, in the event a marriage celebrated in accordance to the Islander's Marriage Act breaks down, the marriage can be annulled or dissolved only according to the *kastom* of which they were married by. Depending on the *kastom* of the parties to the broken-down marriage, the woman will most likely leave the marital home. The Act does not provide any protection for women in these cases.

By the *kastom* of the societies that do practise 'bride-price' it is not only for the bride but also for the children born of their union. Once it is paid completely the children of that union will be recognised by the man's family/tribe as theirs.<sup>20</sup> Thus if the marriage breaks down and the woman returns to her natal family, the children must remain with the father or if he is absent or dead then the children will remain with his family.

The *Sukutaona* case has made it clear that the courts in cases of child custody will always regard the interest and welfare of the children first and foremost.<sup>21</sup> The courts do not abide by customary law but grant custody in the best interest of the child. That does not change the societal and cultural conduct where the rights of a mother who was married with bride-price are discriminated against. This is a violation of art 16(d) of CEDAW because in customary law the mother does not possess the same rights as the father in regards to their children. However, it is commendable that the courts have set a balanced procedure and principle, as outlined by the *Sukutaona* case, which gives priority to the interest and welfare of the child.

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19 *Balou v Kokosi* [1982] SBHC 6; [1982] SILR 94 <http://www.pacilii.org>.

20 *Kaelonga v Tuita and Kunua* (1985) SBMC 2.

21 *Sukutaona v Houanihou* (1982) SILR.

### ***VIII INCONSISTENCY FOR THE RECOGNITION OF CUSTOMARY MARRIAGE AS A VALID FORM OF MARRIAGE.***

The Islanders' Marriage Act makes bigamy an offence under s 14, however it does not apply if the subsisting marriage is an unregistered customary marriage. This makes s 14 inconsistent with s 4 of the same Act which recognises marriage "in accordance with the custom of Islanders". This may make both parties vulnerable to being abandoned with little protection from the law.

Another inconsistency is whether or not a spouse married and divorced by custom can claim maintenance under the Affiliation, Separation and Maintenance Act 1971. In *Balou v Kokosi*, the main issue the Court dealt with was whether or not a woman married under custom fell within the definition of 'spouse' under s 10 of that Act. The Court found that a woman married under custom qualifies under the words 'married woman' under section 10. The Judge also highlighted the fact that pursuant to Schedule 3(3) of the Constitution, the court will be required to apply customary law and that when this Act refers to marriage, it refers to all forms of valid marriage including marriage under customary law.<sup>22</sup>

### ***IX MOLI WARD CHIEFS COUNCIL ORDINANCE 2010***

Currently there is no Act of Parliament that defines bride-price or regulates it. However the Guadalcanal Provincial Government has. Currently a clear regulation of marriage in accordance with *kastom* under is the Moli Ward Chiefs Council Ordinance 2010<sup>23</sup> enacted by the Guadalcanal Provincial Assembly pursuant to s 30 of the Provincial Government Act 1998. The Ordinance empowers the Council of Chiefs to oversee and regulate all matters relating to marriage under custom by setting the standard bride price, how to handle separation and even child maintenance in the event of the breakdown of any marriage in their community. The Ordinance is explicit that the sections on customary marriage apply only in the Moli Ward according to the traditional practice of giving and receiving of bride price.<sup>24</sup>

The Ordinance makes two very important definitions. The first is under s 33(1) where, for the purpose of the section, 'marriage' is defined as the union of one man to one woman under customary law or practice. The second is under s 35(2) that defines bride-price as '... money (whether traditional shell money or modern currency or in any other form), other items such as foods, calico or other valuables

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22 *Balou v Kokosi* [1982] SBHC 6 <http://www.paclii.org>.

23 Provincial Government Act 1998 - Moli Ward Chiefs Council Ordinance 2010 <http://www.paclii.org>.

24 Section 35(1) Provincial Government Act 1998 - Moli Ward Chiefs Council Ordinance 2010 <http://www.paclii.org>.

presented as gifts during the marriage ceremony'.<sup>25</sup> Subsection (3) acknowledges the practice of the families of the intending parties to wed to meet, discuss and agree upon the bride-price prior to the marriage ceremony.

Section 43(1) prohibits the arrangement or organising of any custom marriage between an adult and a child or between children.<sup>26</sup> The Ordinance denounces such practices and imposes a fine not exceeding 500 penalty units and one pig, one *chauvati*<sup>27</sup> and one chupu.<sup>28</sup>

The Ordinance also regulates the payment of bride price<sup>29</sup> based on the following standards:

- (a) For a virgin bride, one *chausangavulu*,<sup>30</sup> two *chauvati* and \$1000.
- (b) For a single mother, who prior to the marriage, has a child's father as a person other than her groom: two *chauvati* and \$500.
- (c) For a bride who has been separated from an earlier marriage, one *chauvati* plus \$300.

The Council of Chiefs under the Ordinance can make orders for separation only for marriages under custom.<sup>31</sup>

## **X CONCLUSION**

In conclusion, while customary law on marriage is a part of the being of an ordinary Solomon Islander it cannot be denied that there are gaps in the current marriage law under the Islanders' Marriage Act. These are areas which are sensitive and may be difficult to legally regulate in a diverse society. How can state law co-exist with customary law? The Constitution provides that if there is any inconsistency between an Act of Parliament and customary law, then the Act of Parliament takes precedence. But then, how will people and society accept a law that

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25 Section 35(2) Provincial Government Act 1998 - Moli Ward Chiefs Council Ordinance 2010 <http://www.pacli.org>.

26 The Ordinance defines child as "a person under 18 years" under section 2(1).

27 'Chauvati' means the common four string shell money with each string measuring one fathom.

28 Section 43(2)(a) and (b) *Provincial Government Act 1998 - Moli Ward Chiefs Council Ordinance 2010* <http://www.pacli.org>.

29 Section 35(4) Provincial Government Act 1998 - Moli Ward Chiefs Council Ordinance 2010 <http://www.pacli.org>.

30 'Chausangavulu' means the ten string shell money with each string measuring one fathom each in length.

31 Section 34(5) Provincial Government Act 1998 - Moli Ward Chiefs Council Ordinance 2010 <http://www.pacli.org>.

would ban a cornerstone practice such as 'bride-price' which is tied to their identity, inheritance rights and the legitimacy their family unit?

These are questions which may one day be answered, or which may never be answered.