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THE LAW

1 The Law

1.1 Sources of Law for Solomon Islands

The sources of law for the Solomon Islands, as provided for in the *Constitution* and in *Schedule 3* to the *Constitution*, include:

- the *Constitution*;
- Acts of the Solomon Islands Parliament;
- certain pre-independence legislation of the British Parliament;
- customary law; and
- The rules and principles of common law and equity.

1.2 The *Constitution*

Section 2 of the *Constitution* states:

> "This Constitution is the supreme law of the Solomon Islands and if any other law is inconsistent with this Constitution, that law shall, to the extent of any inconsistency, be void."

This means any law passed before or after the *Constitution*, including legislation, customary law and the common law, which is inconsistent with the *Constitution* is void.

The Courts have upheld the supremacy of the *Constitution* in several cases. See *Director of Public Prosecutions v Sanau* and *Tanabore v Director of Public Prosecutions* [1987] SILR 1, *R v Rose* [1987] SILR 45 and *Gerea v DPP* [1984] SILR 161.

It is the Courts that interpret and decide the meaning of certain provision in the *Constitution*, so the *Constitution* is affected by developments in the common law.

The *Constitution* can be amended by Parliament only by special majorities. Amendment of most of the provisions requires a vote of not less than two-thirds of all members of Parliament after two separate readings.

Some provisions, such as fundamental rights and freedoms, the legal system, the Parliament, and office of the Ombudsman, can be amended only by at least three-quarters of the members.

1.3 Statute Law

Acts of Parliament

Parliament the power to make laws for the peace, order and good governance of the Solomon Islands: *s59* of the *Constitution*.

In order for a Bill to become law, it must be passed by Parliament, assented to by the Governor General and then published in the *Gazette*.

The legislation passed by Parliament is the next superior law after the *Constitution*.

The laws that are prescribed by Parliament, in the form of statutes, are binding on the Courts and can only be changed by Parliament.

The Courts may also, in certain circumstances, recommend changes to the law, as they did in *Lifuasi v Dainitofea* (unreported Civil Case No. 160 of 1990) or they may declare a specific statute void if it is inconsistent with the *Constitution*.

Some Acts of the Parliament of the United Kingdom

Acts of Parliament of the United Kingdom, which are of general application and are in force on 1 January 1961, will be part of the law of the Solomon Islands, as long as they are not inconsistent with the *Constitution* or Acts of Parliament of the Solomon Islands: *Schedule 3* of the *Constitution*.

Those United Kingdom Acts that apply to criminal jurisdiction include:

- ss3, 4, 5 of the *Criminal Procedure Act 1898*;
- *Bankers Book Evidence Act 1879*;
- ss6, 8 of the *Criminal Procedure Act 1865*;
- ss1, 14 of the *Evidence Act 1851*.

It is the role of the Courts to interpret and apply statutes, whether they are Acts of Parliament of the Solomon Islands or Acts of Parliament of the United Kingdom

Understanding and interpreting legislation

When interpreting statutes in the Solomon Islands, you must consider:

- the *Constitution*;
- the *Interpretation & General Provisions Act 1978*;
- any definitions or rules of interpretation that are provided in the specific Act; and
- common law rules of statutory interpretation.

You must recognise and understand the terms used in statutes to convey a particular meaning, for example:

- when an Act says the Court "may" do something, that means the power may be exercised or not, at your discretion;
- when an Act says you "shall" do something, this means you must. You have no choice.

It is important to note that the meaning of words and phrases in a statute is a question of law and not a question of fact, and that there is procedure that you should follow to determine the meaning of words.

1 Refer to the definition section of the statute you are considering;

2 Refer to *s16 Interpretation and General Provisions Act 1978*;

3 Refer to relevant Solomon Islands cases which may have given a definition for that word or phrase;

4 Refer to overseas case law in some instances;

5 Refer to a respected legal dictionary or legal textbook. This should only be used as a reference and may not be relevant to the particular statute or the context of the Solomon Islands.

1.4 Customary Law

Customary law has effect as part of the law of the Solomon Islands as long as it is not inconsistent with the *Constitution* or with Acts of Parliament: *Schedule 3* of the *Constitution*.

The definition of customary law, set out in the *Constitution*, means rules of customary law prevailing in an area of the Solomon Islands.

Numerous Court cases have ruled on the application of customary law. For instance, in *Igolo v Ita* (1983) SILR 56, Daly CJ, his Lordship held that insofar as customary law does not conflict with the *Constitution* and an Act of Parliament, the rule of received law as to presumption of legitimacy would not override custom. It was argued in that case that, as the appellant was born while the marriage was still subsisting, according to received law there is a presumption that he is a legitimate child in the marriage unless the contrary is proved beyond reasonable doubt. The Local Court and Customary Land Appeal Court, however, dealt with the question of legitimacy of the appellant based on custom that he was an illegitimate child.

Much of the customary law applied in Solomon Islands relates to questions of ownership over customary land. Therefore, the majority of High Court and Court of Appeal decisions touching on customary law pertain to issues arising in connection to customary land. Other issues relate to custody of children. Guidance may still be had in relation to how to reconcile legislation and custom.

In *Sukutaona v Houanihou* (1982) SILR 12 at 13, Daly CJ states:

> "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. This evidence should be given by unbiased persons knowledgeable in custom law or extracted from authentic works on customs. In this case the evidence of custom, as counsel for the Respondent rightly consider was very slim, and I do not consider there was sufficient for the firm finding reached by the learned Magistrate.
>
> In any event it remains open to question to what extent Rules of Custom Law of the kind discussed in this case should be firmly applied to cases where the welfare of children is at stake.
>
> The Courts have always regarded the interest of the children to be of paramount importance and should continue to do so."

The Court found that there was a conflict with received law, that of the welfare of children, and declined to follow customary law as it applied to questions of custody. See also *Re B* (1983) SILR 223, which followed and applied that decision.

1.5 Common Law

The principles and rules of the common law and equity shall have effect as part of the law of the Solomon Islands as long as they are not:

- inconsistent with the *Constitution* or any Act of Parliament;
- inapplicable or inappropriate to the circumstances of the Solomon Islands; or
- inconsistent with the customary law applying to the matter: *Schedule 3* of the *Constitution*.

The common law is law made and developed by Judges and Magistrates. Judges and Magistrates can make and develop the law by:

- interpreting existing legislation;
- interpreting the Constitution;
- Covering matters which are not dealt with by statute.

The development of the common law does not mean that Judges can make arbitrary decisions. They must follow the Doctrine of Judicial Precedent and must give reasons for their decision.

Doctrine of Judicial Precedent

The Doctrine of Judicial Precedent means that Judges and Magistrates in lower Courts are bound to follow decisions of higher Courts.

The operation of the Doctrine is regulated in the Solomon Islands by the practice directions given by the Chief Justice: *Schedule 3 Constitution*.

On 4 June 1981, the Chief Justice issued Practice Direction No. 1/81, which states that:

- all Courts other than the Court of Appeal shall regard decision of the Court of Appeal as the binding authority;
- the High Court shall regard earlier decisions of itself as persuasive authority;
- a Magistrate's Court shall regard decisions of the High Court, whether on review of proceedings or otherwise, as **binding** authority;
- a Magistrates Court shall regard decisions of another Magistrates Court as **persuasive** authority.

Binding authority means that lower Courts are "bound to" or **must** apply the legal principles announced in the decision of a higher Court.

Persuasive authority means that the Court **may** apply the decision of another Court, but are not required to do so. You should always carefully consider the decision of the other Court but if the reasoning of the decision does not persuade you, do not apply it.

The Courts are not bound by any decision of a foreign Court given on or after 7 July 1978. However, they may consider decisions from foreign jurisdictions in order to develop the common law of the Solomon Islands. These decisions would have persuasive value only.

2 Criminal Law and Fundamental Human Rights

Chapter 2 of the *Constitution* sets out the fundament rights and freedoms that are to be protected in the Solomon Islands.

Judges and Magistrates should ensure that all fundamental rights are respected in the administration of justice.

The rights to *secure protection of the law*, under *s10* of the *Constitution* are particularly important for criminal trials.

Explanations of some of the rights follow.

Right to a fair hearing within a reasonable time by an independent and impartial Court

Section 10(1) states:

> "if any person is charged with a criminal offence, then unless the charge is withdrawn, that person shall be afforded a fair hearing within a reasonable time by an independent and impartial *Court* established by law."

Reasonable time:

In *Kimisi v Director of Public Prosecutions* [1990] SILR 82, the High Court set out four factors which should be considered when determining if a person has had a fair hearing within a reasonable time. The reasoning of the High Court was upheld on appeal to the Court of Appeal. The four factors that should be considered are:

- the length of the delay;
- the reason for the delay;
- the defendant's assertion of his or her right under *s10(1)*; and
- any prejudice to the defendant.

Independent and impartial Court:

The issue of bias in the Magistrate's Court was raised in *Ngina v R* [1987] SILR 35.

The High Court held that a Magistrate should only disqualify themselves if they harbour malice or grudge against the accused.

The High Court in *Ngina* also applied the test from *Kamai v Aldo* CLAC No. 17 of 1982, which considered the 'likelihood of bias'. The test is "would a reasonable bystander conclude, having observed the proceedings, that justice has been clearly done."

In *Ngina*, it was found that no right-minded member of the public would feel there was a real likelihood of bias and this ground for appeal was dismissed.

In *Gerea v DPP* [1984] SILR 161, the Court of Appeal considered whether an accused was denied the right to a fair hearing by an independent *Court* under *s10(1)*.

The Court ruled that a Court is independent within the meaning of *s10(1)* when, in the exercise of the functions of enforcing the law, it is subject neither to control nor pressure by any outside body.

The Court concluded that judicial independence is not affected by Parliament when it enacts provisions in the *Penal Code* which limits the sentencing discretion of Judges in cases of murder.

See also *s9 Magistrates' Courts Act* and *s67(1) Criminal Procedure Code*, which reinforce the principle that the Court should be impartial:

- *Section 9 MCA* states that "where a Magistrate is a party to any cause or matter, or is unable, from personal interest or any other sufficient reason, to adjudicate on any cause or matter, the Chief Justice shall direct some other Magistrate to act instead….";
- *Section 67(1) CPC* states that whenever it is made to appear to the High Court that a fair and impartial inquiry or trial cannot be held in any Magistrate's Court, the Court may order that the case be transferred to another Magistrate's Court, or that the case be committed to the High Court for trial.

Presumption of innocence

Section 10(2)(a) states:

> "every person who is charged with a criminal offence shall be presumed innocent until he is proved or has pleaded guilty".

This is an extremely important principle in criminal law.

Judges and Magistrates must ensure that:

- they do not base their finding of guilt on previous knowledge of the accused; and
- the prosecution bears the burden of proving the accused's guilt beyond reasonable doubt.

For a good statement on presumption of innocence by the Court of Appeal, see *David Kio v R* (Unreported Criminal Appeal Case No. 11 of 1977).

Right to an interpreter

Section 10(2)(b) & (f) states:

> "every person who is charged with a criminal offence shall be informed as soon as practicable, in detail and in a language that he understands, the nature of the offence charged; … and shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge."

An accused must be able to:

- fully understand the charge(s) he or she faces;
- fully understand the implications of the charge(s);
- instruct his or her legal representative, if he or she has one.

For the accused to have a fair trial, interpreters must be impartial, fluent in the language(s) being interpreted, and understand that they need to be accurate.

Section 184 CPC and *s59 MCA* reinforce the principle of having the right to interpreter:

- *Section 184 CPC* states " whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language which he understands";
- *Section 59 MCA* provides that any proceedings in the Magistrate's Court, where the language of a party or witness requires interpretation into English, the Magistrate may appoint suitable persons as interpreters.

Right to adequate time and facilities

Section 10(2)(c-e) states:

> "every person who is charged with a criminal offence shall be given adequate time and facilities for preparation of his defence, shall be permitted to defend himself before the *Court* in person or by a legal representative of his own choice, shall be afforded facilities to examine in person or by his legal representative the witness called by the prosecution…"

It is essential to uphold this right in order to guarantee a fair hearing for the accused.

In many cases, it will be important for an accused to have legal representation, or at least the advice of a lawyer, in order to understand the charges against him or her and to be able to defend him or herself against those charges.

The Court must not deny an accused time to meet with a legal representative if he or she so chooses.

What constitutes adequate time will be dependent upon the circumstances of the case.

Right not to be held guilty of a criminal offence if, at the time, it does not constitute an offence

Section 10(4) states:

> "no person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence…"

Upholding this right prevents a person from being tried for something that is not an offence in law at the time they committed an act or omission. If there is no law, there is no offence. Therefore, the charge must either be thrown out or the accused be charged with some other offence that exists in law.

This right also prevents a person from being tried in the future according to future legislation, for an act or omission they committed before the legislation making it unlawful came into existence. For example, if a person commits an act in 2001, but no legislation exists regarding that offence

until 2003, the person cannot then be tried for the act committed in 2001 using the 2003 legislation.

Right not to be tried again for the same offence

Section 10(5) states:

> "no person who shows that he has been tried by a competent *Court* for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at trial for that offence, save on the order of superior *Court* in the course of an appeal or review proceedings…"

In particular, this right prevents three abuses:

- a second prosecution for the same offence after acquittal;
- a second prosecution for the same offence after conviction; and
- multiple punishments for the same offence.

Upholding this right also guarantees that a person will not be subjected to endless proceedings regarding the same set of circumstances.

Right to be present in Court

Section 10(2)(f) states:

> "except with his own consent, a trial shall not take place in his [the accused] absence unless he so conducts himself as to render the continuance of the proceedings impracticable and the Court has ordered him to be removed and the trial to proceed in his absence."

Section 179 CPC supports this principle by requiring that "except as otherwise expressly provided, all evidence taken in any inquiry or trial under this Code shall be taken in the presence of the accused, or when his personal attendance has been dispensed with, in the presence of his advocate".

An exception to the need for the accused to be present during his or her trial is provided for in *s86(1) CPC*. A Magistrate may dispense with the personal attendance of the accused in cases where:

- a summons is issued for any offence other than a felony; **and**
- the punishment is only by fine, or imprisonment not exceeding 3 months, or both; **and**
- the accused consents to the trial taking place in his or her absence, and pleads guilty, in writing or through a lawyer or advocate.

Right not to give evidence in Court

Section 10(7) states:

> "No person who is tried for a criminal offence shall be compelled to give evidence at the trial."

In criminal cases, the prosecution has the burden of proving the charges against the accused.

The accused may give evidence in his or her own defence once the prosecution has finished presenting his or her case, but is not required to do so.

The Court may not infer anything whatsoever from the accused's choice not to give evidence. The Judge or Magistrate must base their decision solely on the evidence presented by the prosecution and whether the prosecution has met the burden and standard of proof.