

# A QUESTION OF IDENTITY: COMPLEXITIES OF STATE LAW PLURALISM IN THE SOUTH PACIFIC

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## Introduction

Throughout the world, many former colonies are struggling with an inheritance of legal pluralism that gives recognition to both customary law and formal, written law. (See Benton 2002.) The interaction of such laws, which are so different in nature, often raises complex questions. This complexity arises at several different levels; it is not merely a case of conflict between substantive laws from two different systems. In practice, the boundaries between formal and customary law are often blurred. Each has had to adapt to accommodate the other (Corrin 2009: 33-34) and in some cases, hybrids have emerged. There are also questions of jurisdiction; a demand for recognition of a discrete legal system requires definition of the community to which it applies. The basic definition of legal pluralism is 'a situation in which two or more legal systems co-exist in the same social field' (Merry 1988: 870; Griffiths 1986: 38) of law operating within the same country. (For a broader definition see, eg, Sack 1986: 1). But how does one determine which members of the social field are subject to each of the systems in operation? As with so many questions arising from legal pluralism, the answer to this is not straightforward. From a State law perspective, it may depend on a number of factors, for example, whether there is governing legislation defining the class of persons to which that particular law applies. The purpose of the law may also be relevant in determining the extent of its application.

Where different rights and obligations are conferred on different sectors of society

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by legislation, the precise definition of the boundaries of those sectors is obviously important. Unfortunately, statutory guidance does not always exist<sup>1</sup> and, where it does, it is not always clear. This article explores the question of how boundaries between different communities are determined within the State legal system for the purposes of legal jurisdiction. What appears on its face to be a simple question of definition, on further examination is exposed as a matter of some complexity, typical of the issues thrown up by legal pluralism. For example, from both State law and deep legal pluralism<sup>2</sup> perspectives, there is the related question of whether customary law applies territorially, that is to everyone within a jurisdiction, or only to some members of society. If it does not apply territorially, defining those to whom it does apply becomes even more significant.

This article does not cover in depth the broader choice of law issues that arise outside the State law realm in ‘deep’ legal pluralism. These issues could not, of course, be solved by reference to statute as this would presuppose that the applicability of State law is accepted. However, issues of categorisation under State law cannot be kept entirely separate from the broader issues and some reference is made to these, particularly where those issues shed light on the main discussion. The geographical context of this examination is the South Pacific, and in particular Solomon Islands, where the courts have had to grapple with this question on a number of occasions. However, the question of determining the boundaries of legal jurisdiction has relevance in other post-colonial societies struggling with a ‘heritage’ of pluralism.<sup>3</sup>

This article commences with some contextual background to the plural legal systems of the South Pacific and choice of law. It then looks at the history of the term ‘Islander’, which is the principal term used to differentiate between indigenous and non-indigenous members in Solomon Islands’ society. It examines the legislative definitions and the way that these have been interpreted by the courts. In particular it looks at the judicial definition that has evolved in relation to marriage and divorce. It also looks at the dilemmas facing the courts when the

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<sup>1</sup> See, eg, *Local Courts Act Cap 13* (Solomon Islands) which confines jurisdiction to disputes between ‘ Islanders’ but gives no definition of this term.

<sup>2</sup> For a discussion of the meaning of deep legal pluralism and the distinction between this concept and State legal pluralism see: Griffiths 1986: 15; Woodman 1996.

<sup>3</sup> For a discussion of the Canadian experience see: Otis 2007; Fesi 1986.

question of boundaries has arisen in the context of customary law. The article highlights a number of related questions that arise in connection with this problem and draws some conclusions as to the legal position and the need for reform.

## Background Issues

### *Law and Society*

The description of the area included in the South Pacific region differs according to source. Here it is intended to refer to the small island countries within Oceania, from Northern Mariana Islands in the north-west to Pitcairn in the south-east. Oceania is divided for ethnological purposes into the three sub-regions of Melanesia, Micronesia and Polynesia. However, the diversity of cultures, social organisation and practices often defies these boundaries. Customs vary from place to place, even within the same country and they continue to adapt and evolve. Social and economic changes have had a profound impact on customary societies. (See further Crocombe and Meleisea 1994: Ch 1). Many people have moved to urban areas and increasing numbers marry outside their own group; they no longer live a customary lifestyle nor feel bound by customary law. Notwithstanding, for a large proportion of society, particularly in rural areas, traditional ties are still strong and the only law encountered is customary.

Turning to the formal law, most of the island countries of the South Pacific are common law jurisdictions.<sup>4</sup> Their written constitutions are stated to be the supreme law and there is a separation of powers along Westminster lines (e.g. *Constitution of Solomon Islands 1978*, s. 58). In most cases the body of statute law introduced during the colonial era has been retained in force,<sup>5</sup> together with 'English' common

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<sup>4</sup> Non-common law jurisdictions include the Overseas Territories of France, eg, New Caledonia and Easter Island. Vanuatu inherited both common law and civil law. See further Corrin1998.

<sup>5</sup> For example, in Fiji Islands the date is 2 January 1875: *Supreme Court Ordinance 1876*, s. 35; in Solomon Islands it is 7 July 1978: *Constitution of Solomon Islands 1978*, Sch 3, para 4(1); in Vanuatu it is 30 July 1980: *Constitution of Vanuatu 1980*, Art 95(2). In the case of Vanuatu, French law was also 'saved'.

law and equity (Corrin and Paterson 2007: 32-34). These laws were intended to fill the void until they were replaced by new laws enacted by the local parliament, but in some countries an inactive legislature and lack of resources have led to the retention of many out of date foreign statutes. (See further Corrin Care 2002: 31, 34).<sup>6</sup> Similarly, national courts have been slow to forge their own path, often following common law decisions from England and Wales, Australia or New Zealand without considering their suitability for local circumstances.

### *Choice of Law*

Generally, the formal law in South Pacific countries envisages that everyone within the country will be bound by the formal law.<sup>7</sup> In many countries, the Constitution establishes a hierarchy of laws in which customary law is placed below the Constitution and statute, and in some countries, including Solomon Islands, above common law and equity (*Constitution of Solomon Islands 1978* (UK), Sch 3, para. 2(1)(c)). Accordingly, at least in theory, if there is no applicable legislation the courts are required to apply customary law. However, in practice, in spite of such provision, choice of law issues arise, as it is not accepted that customary law necessarily applies to every branch of substantive law or to everyone present in the country. Whilst most South Pacific countries give special treatment to customary land, preserving it from alienation and providing that it is to be dealt with exclusively under customary law,<sup>8</sup> in other areas of law the choice of law rules are unclear. In the absence of statutory provisions, such as those

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<sup>6</sup> Cf *Reprint of Statutes Act 1972* (Samoa); *Civil Laws (Amendment ) Act 2003* (Tonga).

<sup>7</sup> There are exceptions, such as in the case of Vanuatu where, in some circumstances, one may opt for a particular legal regime. See further Jennifer Corrin , ‘Bedrock and Steel Blues: A Study of Legal Pluralism in Vanuatu’, (1998) 24(1-2) *Commonwealth Law Bulletin*, 594.

<sup>8</sup> Cook Islands Act 1915 (NZ), ss. 421, 422; Native Lands Act, Cap 133 (Fiji), s. 3; Magistrates’ Courts Ordinance, Cap 52 (Kiribati), s. 58; Custom and Adopted Laws Act 1971 (Nauru), s. 3; Niue Amendment Act 1968 (NZ), ss. 22, 23; Constitution of Samoa, Art 101(2); Land and Titles Act, Cap 133 (Solomon Islands), s. 239; Tokelau Amendment Act 1967 (NZ), s. 20; Native Lands Ordinance, Cap 22 (Tuvalu), s. 12; Constitution of Vanuatu, Arts. 73-81. In practice, these safeguards have been eroded. See further Corrin 2008b.

discussed later in this article, in most countries the choice between customary law and common law is determined on an *ad hoc* basis. There is surprisingly little case law on point, but what there is appears to reflect a preference for common law. For example, in *Longa v Solomon Taiyo Ltd*<sup>9</sup> the plaintiff claimed damages against his employer, a company incorporated in Solomon Islands. The court assessed damages for personal injuries in accordance with English common law rather than in accordance with levels of customary compensation. The reason given by Daly CJ for doing so was that

the basis of [customary] compensation is often not an attempt to compensate the victim but rather a customary amount paid to restore the peace between the lines of the victim and the wrongdoer.<sup>10</sup>

Why this was an inappropriate basis for assessment, justifying departure from the constitutional mandate to apply customary law in preference to common law, His Lordship did not say.

Even if the court decides that customary law applies, choice of law may still be an issue if the parties are from different areas with differing laws. This is particularly likely in Melanesian countries like Solomon Islands where the law differs dramatically from place to place. In Solomon Islands, the Constitution empowers parliament to “provide for the resolution of conflicts of customary law” (*Constitution of Solomon Islands 1978* (UK), Sch 3, para. 3(3)). Parliament finally took action in this regard in 2000, when it passed the *Customs Recognition Act 2000*, an Act which has yet to come into force.<sup>11</sup> The Act is modelled on the *Customs Recognition Act 1963* of the neighbouring country of Papua New Guinea<sup>12</sup>, which ironically was repealed in the same year.<sup>13</sup> Section 10 of the *Customs Recognition Act 2000* provides that where a court is faced with conflicting systems of custom, if the Court is not satisfied on the evidence that one should

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<sup>9</sup> [1980/81] SILR 239.

<sup>10</sup> *Longa v Solomon Taiyo Ltd* [1980/81] SILR 239: 259

<sup>11</sup> Section 1 requires the Act to be gazetted before it comes into force.

<sup>12</sup> Originally called the *Native Customs (Recognition) Act 1963*.

<sup>13</sup> *Underlying Law Act 2000* (PNG), which came into force on 18 August 2000. Repeal was implied rather than express.

prevail, the court shall consider all the circumstances and may adopt the system that it is satisfied the justice of the case requires. This is a far less detailed provision than that contained in Papua New Guinea's new Act on point, the *Underlying Law Act 2000*. This provides that conflicts between different regimes of customary law should be determined in accordance with the following rules:

1. Where the parties belong to the same community the customary law of that community should apply.
2. Where the parties belong to communities with different customary law on the subject matter of the proceedings they should be governed by the customary law that the parties intended to apply or, if there was no such intention, the law that the court considers most appropriate.
3. In matters of succession, the customary law of the deceased's community should prevail, except with regard to land, where the customary law of the place where the land is situated should apply.
4. In all other cases, the customary law considered most appropriate by the court should apply.
5. In exercising its powers, the court must take into account the place and nature of the transaction, act or event and the nature of residence of the parties. (*Underlying Law Act 2000* (Papua New Guinea), s. 17.)

In a third Melanesian country, Vanuatu, although there is no comparable legislation an interesting approach was adopted in *Waiwo v Waiwo and Banga*.<sup>14</sup> Senior Magistrate (now Chief Justice) Lunabek put forward the following suggestions for dealing with conflict not only between different regimes of customary law, but also between customary law and State law:

1. If the parties are from the same custom area and are governed by the same customary law regime, that regime should be applicable to their case.
2. If they come from the same Islands or different Island but are subject to a different customary law regime, the court should

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<sup>14</sup> Unreported, Magistrates Court, Vanuatu, cc324./95. The decision was reversed on appeal in *Banga v Waiwo*, unreported, Supreme Court, Vanuatu, AC1/96.

look for a common basis or foundation in the customary law applicable.

3. In cases where not all parties are indigenous and which are not governed by the formal law of Vanuatu, the Court should consider British or French laws applicable in Vanuatu, depending on the choice of the non-citizen as to the law to be applied and at the same time, the Court should consider any applicable customary law.

These general choice of law issues are outside the main focus of this article, but choice of law in the matrimonial context is discussed further below. (See further in relation to Africa: Bennett 1985.)

## Legislative Differentiation

### *Historical Perspective*

During the colonial era indigenous people in the South Pacific were often given a measure of legislative protection through paternalistic policies of the coloniser.<sup>15</sup> In particular, the sale of customary land<sup>16</sup> was often outlawed.<sup>17</sup> Distinctions between local inhabitants, usually referred to by the British colonial office and their representatives as ‘natives’, and expatriates were also drawn in other areas, sometimes as a result of specific local legislation which did not apply to foreigners,<sup>18</sup> and often with a less benign intention. Such laws often imposed

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<sup>15</sup> *Pacific Islanders Protection Act 1892* (UK); *Transactions with Native Acts 1958, 1963* (PNG); *Cook Islands Act 1915* (NZ), s. 645.

<sup>16</sup> Customary land is defined in the *Land and Titles Act Cap 133* (SI) as land “lawfully owned, used or occupied by a person or community in accordance with current customary usage”. It is distinguished from alienated land, which is registered land other than registered customary land. About 87% of the land in Solomon Islands is customary land.

<sup>17</sup> See, eg, *Native Land Transfer Prohibition Ordinance 1875* (Fiji), s. 1.

<sup>18</sup> E.g. *Islanders’ Divorce Act Cap 170* (SI); *Criminal Procedure Ordinance 1875* (Fiji).

restrictions on natives,<sup>19</sup> for example, in some countries they were prohibited from leaving their home island.<sup>20</sup> At, or in the lead up to, independence, these restrictive Acts were usually repealed,<sup>21</sup> as part of the British Government's 'general policy of abolition of any remaining privileges ... based on matters of race'.<sup>22</sup> While laws discriminating against 'natives' were repealed, laws based on protectionist policy often continued in force.<sup>23</sup> Additional affirmative legislative action was often taken in an attempt to allow natives to compete in the commercial sector.<sup>24</sup> Similarly, labour laws required 'an immigrant or non-indigenous worker' to obtain a work permit and certain occupations were reserved for natives.<sup>25</sup> As a result of this legislation, there are still large areas of law which do not apply universally. For this reason it is important to know where the legal boundaries of identity lie.

#### *Legislative Definition of Native and Islander*

During the colonial era a distinction was drawn in many countries between 'natives' and expatriates. In Solomon Islands, the term 'native' was defined by section 2 of the *Definition (Native) Ordinance* Cap 31 as including:

- (a) Any aboriginal native of any island in the Pacific Ocean;
- (b) Any person of mixed European and aboriginal native descent who shall not have been registered by a Deputy Commissioner ... .

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<sup>19</sup> E.g. *Native Affairs and Dealings Ordinance 1904* (Fiji); *Native Criminal Code 1938* JR 1/1938 (New Hebrides).

<sup>20</sup> E.g. *Native Administration Ordinance Cap 32* (BSIP), which required a native to obtain permission to leave the sub-district in which he or she resided.

<sup>21</sup> E.g. *Fairness of Transactions Act 1977* (PNG), repealing the *Transactions with Native Acts 1958, 1963* (PNG).

<sup>22</sup> Legislative Council Debates 1961 (Fiji), 380-381.

<sup>23</sup> E.g. *Labour Act Cap 73* (BSIP).

<sup>24</sup> E.g. *Fairness of Transactions Act 1977* (PNG); *Constitution of Vanuatu 1980*, ss. 73-75.

<sup>25</sup> E.g. *Labour Act Cap 73* (BSIP), s. 37(3).



In the lead up to independence, the term 'native', a word loaded with negative connotations, was replaced in many jurisdictions.<sup>26</sup> In Fiji, for example, the term 'Fijian' was adopted. In Solomon Islands the term 'native' was replaced by 'Islander' in 1974.<sup>27</sup> However, the meaning of this term is not uniform throughout the legislative sphere. It may depend on the purpose of the particular piece of legislation containing the term. Thus, where legislation is designed to protect 'Islanders', the term is usually drawing a distinction between indigenous 'Solomon Islanders' and all others, including those who have become 'Solomon Islanders' through acquisition of citizenship. The test for citizenship is an example of this, confining the right to automatic citizenship on Independence Day to 'indigenous Solomon Islanders'.<sup>28</sup> Interestingly, it also conferred this privilege on persons born in Solomon Islands before Independence who had two grandparents indigenous to Papua New Guinea or Vanuatu.<sup>29</sup> These countries are all part of Melanesia, and share Pijin as a lingua franca, although this language differs quite considerably from country to country.

Protective provisions can also be found in legislation governing land tenure. The *Land and Titles Act (Cap 133)* prevents any person other than a 'Solomon Islander' from holding any interest in customary land (s. 241). This protective provision is obviously intended for the benefit of indigenous people and this is reflected in the definition, which can be found in the Act.<sup>30</sup> A 'Solomon Islander' means 'a person born in Solomon Islands who has two grandparents who were members of a group, tribe or line indigenous to Solomon Islands' (s. 2). Further, protective provisions relating to land are found in the Constitution, which provides

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<sup>26</sup> *Statute Law Revision Act 1974* (BSIP), sch.

<sup>27</sup> *Statute Law Revision Act 1974* (BSIP), sch. In fact, this term was already in use in some earlier legislation, see eg *Pacific Islanders Protection Act 1892* (UK).<sup>27</sup> In some cases, protective legislation uses the term 'immigrant' or 'non-indigenous'. See, eg, *Labour Act Cap 73* (SI), s. 68.

<sup>28</sup> *Constitution of Solomon Islands 1978* (UK), s. 20(1)(a). For an interesting case where the qualifications for automatic citizenship were discussed see *Paia v Soakai* [1980-1981] SILR 86.

<sup>29</sup> *Constitution of Solomon Islands 1978* (UK), s. 20(1)(b).

<sup>30</sup> *Constitution of Solomon Islands 1978* (UK), s. 113(2).

that, subject to certain exceptions,<sup>31</sup> only Solomon Islanders may hold freehold or perpetual estate<sup>32</sup> in land or any interest in excess of 75 years.<sup>33</sup> At Independence any interest held by a non-Solomon Islander which exceeded that term was automatically converted to a fixed-term estate of 75 years.<sup>34</sup> Section 113(2) of the Constitution defines ‘Solomon Islander’ for the purposes of the land chapter by reference to the *Land and Titles Act*. The *Wills, Probate and Administration Act Cap 33*, which provides that a perpetual estate owned by a Solomon Islander devolves in accordance with customary usage rather than in accordance with intestacy rules, also defines ‘Solomon Islander’ by reference to that Act (ss. 3 and 105).

As in the case of protective legislation, statutes designed to accommodate legal pluralism by allowing customary law or a ‘customary’ dispute resolution process to apply will usually differentiate on the basis of ethnicity rather than citizenship. For example, the jurisdiction of the *Local Courts Act Cap 19* is limited to ‘causes and matters in which all the parties are Islanders’, and in this context the term refers to indigenous Solomon Islanders (s. 6).

In some areas of law where ‘Islanders’ are singled out, the legislation does not give a statutory definition of the term.<sup>35</sup> In this case, the obvious starting point for finding the meaning of the term is the interpretation statute. In Solomon Islands, the legislation has not been consistent over the years. The *Interpretation and General Clauses Act 1954*, which commenced in 1967, defined the term ‘native’ as extending to:

[A]ny other person at least one of whose parents or ancestors was a member of a race, group, tribe or line indigenous to any island in the Pacific Ocean, and who is living in the British Solomon

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<sup>31</sup> For example, a company in which at least 60% of the equity is held beneficially by persons who are Solomon Islanders: *Land and Titles Act Cap 133* (SI), s. 112(4)(e).

<sup>32</sup> Defined by the *Land and Titles Act Cap 133*, s. 112(1), as the right to enjoy land in perpetuity.

<sup>33</sup> *Constitution of Solomon Islands 1978* (UK), s. 110.

<sup>34</sup> *Constitution of Solomon Islands 1978* (UK), s. 100 and 101.

<sup>35</sup> See, eg, *Local Courts Act Cap 19* (SI).

Islands Protectorate in the customary mode of life of any such race, group, tribe or line.

In the same year the definition of the term 'Islander', which had replaced the word 'native',<sup>36</sup> was amended by the *Interpretation and General Clauses (Amendment) Act 1974*. Section 3 changed 'any island in the Pacific Ocean' to 'any island in Melanesia, Micronesia or Polynesia', perhaps as part of the process of decolonisation and due to increased awareness of regional identity. That definition was omitted from the revised version of the Act, substituted by the *Constitution (Adoption and Modification of Existing Laws) Order 1978*.<sup>37</sup> The same year, the whole of the *Interpretation and General Clauses Act* was repealed and replaced by the *Interpretation and General Provisions Act 1978 Cap 85*. That Act did not originally include a definition of 'Islander', but that omission was remedied in 1987,<sup>38</sup> when the following definition was inserted:

'Islander' means –

- (a) any person both of whose parents are or were members of a group, tribe or line indigenous to Solomon Islands; or
- (b) any other person at least one of whose parents or ancestors was a member of a race, group, tribe or line indigenous to any island in Melanesia, Micronesia or Polynesia and who is living in Solomon Islands in the customary mode of life of any such race, group, tribe or line. (s. 17(1)).

This is almost identical to the 1974 definition. The Act also defines a 'non-Islander' as meaning any 'person other than an Islander' (s. 17(2)). This is both unnecessary and a statement of the obvious.

The definition in the *Interpretation and General Provisions Act* may be contrasted with the more restrictive definition of 'Solomon Islander' applying to land set out above.<sup>39</sup> The definition relating to land is narrower than that in section 17(1) of the *Interpretation and General Provisions Act*, according to which the lineage does not

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<sup>36</sup> *Statute Law Revision Act 1974* (BSIP), Sch.

<sup>37</sup> Legal Notice 46(a)/78, para 3.

<sup>38</sup> *Interpretation and General Provisions (Amendment) Act 1987* (Act 15 of 1987) (SI).

<sup>39</sup> *Land and Titles Act Cap 133*, s. 2.

have to be indigenous to Solomon Islands but to ‘any island in Melanesia, Micronesia or Polynesia’. This difference is particularly significant for members of the Kiribati community, resettled in Solomon Islands in the 1950s and 1960s. (Denoon et al. 2004: 56). Provided they are living a customary lifestyle in Solomon Islands, they qualify as ‘Islanders’ under the interpretation legislation as they would have a parent or ancestor who was a member of a race indigenous to an island in Micronesia. However, they do not qualify as ‘Islanders’ for the purpose of land tenure.

### Judicial Interpretation of the Term ‘Islander’

This section examines judicial interpretations of the term ‘Islander’ in the more specific context of matrimonial law. There are two reasons why this is a particularly illustrative area. First, it is in the realm of family relationships that tensions between customary and formal law are at their most acute.<sup>40</sup> Secondly, the matrimonial regime is a particularly pertinent example of the multiple layers of legal pluralism operating in one area of law. This arises from the fact that, in addition to the alternative systems of law provided by written and customary law, there is often more than one statutory regime that is potentially applicable, depending on the class of society to which the parties to a marriage belong. Many former colonies have inherited a legacy of plural marriage and divorce laws. For example, in the Pacific, colonial legislation remains in force in Vanuatu, in the *Marriage Act 1970*, which must be read with the *Civil Status (Registration) Act 1970* and the bizarrely titled *Control of Marriage Act 1966*. There are also similar examples from outside the Pacific, for example, in Africa, where Zambia inherited the *Marriage Act*, originally brought into effect in 1918.<sup>41</sup>

In Solomon Islands, there are three marriage regimes in force. (See further Corrin Care and Brown 2004). The first is governed by Colonial Orders,<sup>42</sup> the second by

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<sup>40</sup> In any such competition legislation has the clear advantage, but the relationship between common law and equity and customary law is often obscure. See further, Corrin and Paterson 2007: 41-42.

<sup>41</sup> *Cap 50, Laws of the Republic of Zambia 1995 Edition (Revised)*. See further: Phillips 1971; Bennett 1985.

<sup>42</sup> This term is used to refer to laws made by the governing power, in this case the Privy Council, specifically for the Protectorate.

local statute,<sup>43</sup> and the third by customary law.<sup>44</sup> The genus of marriage determines what can be termed the 'proper law' of the marriage and this is crucial in divorce and related ancillary issues.<sup>45</sup> The Colonial Orders are used principally where one or both parties are expatriates living in Solomon Islands. However Islanders may also marry under them.<sup>46</sup> The local statutory regime is regulated by the *Islanders' Marriage Act Cap 17*, which recognises the validity of customary marriages, which may, if both parties wish, be registered under the Act (s. 18). The Act provides that 'islanders' may contract a marriage under the Act, either before a minister of religion or a civil official.<sup>47</sup> There is also a tripartite system for the dissolution of marriages other than by death. (See further Corrin Care and Brown 2005: 85-111). Although there are no applicable colonial Orders, United Kingdom legislation of general application applies to non-Islanders.<sup>48</sup> (For a definition of the term 'general application', see Corrin Care 1997: 44-46).

As only 'Islanders' may marry or petition for divorce under the local statutes, it is necessary to know who is within the definition of 'Islander' to determine whether those Acts apply. Neither the Colonial Orders nor the *Islanders' Marriage Act Cap 171* nor the *Islanders' Divorce Act Cap 170* defines the term 'Islander' or 'Solomon Islander'. This has necessitated an extensive review by Solomon Islands courts of these terms, largely in the context of divorce and nullity petitions. The first case in which the meaning of 'Islander' was in issue arose in 1978, the year of Independence. In *Luaseuta v Luaseuta*<sup>49</sup> the wife petitioned for divorce under

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<sup>43</sup> *Islanders' Marriage Act Cap 171* (SI); *Islanders' Divorce Act Cap 170* (SI).

<sup>44</sup> Customary marriage is specifically recognised by the *Islanders' Marriage Act Cap 171* (SI), s. 4.

<sup>45</sup> Whilst crucial in divorce and ancillary proceedings, the choice of law in matrimonial issues does not impact on intestacy issues except where the deceased had more than one wife under customary law: *Wills, Probate and Administration Act Cap 33* (SI), s. 84(4).

<sup>46</sup> *Mahlon v Mahlon* [1984] SILR 86.

<sup>47</sup> *Islanders' Marriage Act Cap 171* (SI), s. 4.

<sup>48</sup> For example, *Matrimonial Causes Act 1950* (UK).

<sup>49</sup> Unreported, High Court, Solomon Islands, Davis CJ, Civ Cas 34/1978. The precise date of this decision is unknown as the original judgment is missing from the High Court registry in Solomon Islands.

the *Islanders' Divorce Act Cap 170* on the grounds of her husband's adultery and cruelty. As noted above, at that time there was no definition of 'Islander' in the *Interpretation and General Provisions Act 1978*. Although the jurisdiction of the court was not in issue, both parties being indigenous Solomon Islanders, Davis CJ noted that if the definition of 'Islander' in the *Interpretation and General Clauses Act 1954* had still been in force, the parties in the case before him would have fallen within it. In the absence of any definition to replace this, His Lordship stated, obiter and without giving a reason, that, in the absence of a current definition, for the purposes of the *Islanders' Divorce Act*, 'Islander' meant anyone who was domiciled in Solomon Islands. This is a broader interpretation than the pre-existing statutory definition, which includes the indigenous requirement, but the Chief Justice gave no reason for adopting it.

The definition laid down by *Luaseuta v Luaseuta* was adopted by a differently constituted High Court in *Mahlon v Mahlon*.<sup>50</sup> The parties in this case had purported to undergo a ceremony of marriage under the *Islanders' Marriage Act Cap 171*. The Petitioner applied for a declaration of nullity on the basis that the respondent was not an 'Islander'. In 1984, when this case was decided, there was still no definition of this term in the *Interpretation and General Provisions Act 1978* to govern the matter. Accepting Davis CJ's definition of 'Islander', Freeman C held that that *Islanders' Marriage Act Cap 171* did not apply as it only extended to 'Islanders'. Whilst the Petitioner was an indigenous Solomon Islander, the respondent did not qualify as, at the time of the marriage he was not domiciled in Solomon Islands, but in Vanuatu. Consequently, the parties had to look to the requirements of the Colonial Orders in relation to the validity of the marriage, and to the *Matrimonial Causes Act 1950 (UK)* for any proceedings in relation to annulment or divorce. However, in this particular case, Freeman C upheld the validity of the marriage on the basis that a marriage complying with the formal requirements of the *Islanders' Marriage Act* also satisfied the requirements of the *Matrimonial Causes Act 1950 (UK)*. The Commissioner went on to suggest, obiter, that the definition of 'Islander' by reference to domicile 'should be held to apply to all statutes where the word appears'. This ignores the fact that, as discussed above, some Acts have their own definition, and the fact that the definition may differ depending on the intention of the legislation.

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<sup>50</sup> [1984] SILR 86 (heard together with *Reid v Reid*).

Ten years later, after the re-insertion of a definition of 'Islander' in the *Interpretation and General Provisions Act*, the meaning of the word was again discussed. In *Edwards v Edwards*,<sup>51</sup> the validity of a customary marriage between members of the Kiribati community was in issue in the context of a disputed application for letters of administration in respect of the applicant's deceased partner's estate. It was argued that section 4 of the *Islanders' Marriage Act Cap 171* only recognised statutory marriages and marriage celebrated in accordance with 'the custom of Islanders', and that this meant custom of the indigenous people of Solomon Islands. Palmer J held that a marriage between I-Kiribati qualified as 'a marriage celebrated in accordance with the custom of Islanders'. His basis for this was that the only limitation on 'customary law' as defined by s. 144(1) of the Constitution was that it must 'prevail in an area of Solomon Islands'. That qualification was met in the case of the Kiribati community who had been resettled by the colonial government in certain parts of the country. His Lordship noted that the replacement of the word 'native' with the term 'Islander' was of more than cosmetic effect as it widened the category of persons enveloped by the legislation. He considered that that the term 'native' is precise and restrictive, whereas the term 'Islander' is generic and extensive.

The court was apparently unaware of the statutory definition of 'Islander' in the *Interpretation and General Provisions Act*, or at least made no reference to it. In fact, that Act had already extended the meaning of 'native', before its replacement by the term 'Islander'. The judgment refers only to the definition in the *Australian Little Oxford Dictionary*, which defines 'Islander' as 'inhabitant of island'. Had the statutory definition been applied, it would clearly have lent further support to the court's decision, as I-Kiribati were clearly a 'line indigenous to ... Micronesia'.<sup>52</sup>

More recently, the definition of 'Islander' was considered in the case of *Kevisi v Mergozzi*.<sup>53</sup> On a petition for divorce by the wife on the grounds of her husband's adultery, the respondent applied to have the marriage declared a nullity on the basis that the formalities required by the *Islanders' Marriage Act Cap 171* had not

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<sup>51</sup> Unreported, High Court, Solomon Islands, Palmer LJ, 12 January 1996, accessible via [www.pacilii.org](http://www.pacilii.org) at [1996] SBHC 75.

<sup>52</sup> *Interpretation and General Provisions Act Cap 85*, s. 17(1).

<sup>53</sup> Unreported, High Court, Solomon Islands, Cameron LJ, 18 March 2008, accessible via [www.pacilii.org](http://www.pacilii.org) at [2008] SBHC 13.

been complied with.<sup>54</sup> The petitioner's identity as a Solomon Islander was not in question but a question arose as to whether the husband qualified as an 'Islander' so as to come within the jurisdiction of the Act. He was born in Switzerland and was a naturalised Australian citizen. The court noted the absence of a definition of 'Islander' in the *Islanders' Marriage Act* and was not referred to any other current legislative definition of the term. His Lordship noted that the *Interpretation and General Clauses Act 1954* had defined 'Islander', but that this definition had been repealed when the *Interpretation and General Provisions Act* came into force in 1978.<sup>55</sup> His Lordship considered that it would be overstepping judicial boundaries simply to import the definition of 'Islander' from the previous version of the Act. Indeed, "[t]he deletion of the term 'islander' by legislation suggests to the contrary, namely that the old definition based on lineage is no longer intended to have any application".<sup>56</sup>

In the belief that there was no current definition of 'Islander', Cameron LJ drew on the reasoning of Davis CJ in *Luaseuta v Luaseuta*.<sup>57</sup> As discussed above, in that case it was concluded that for the purposes of the *Islanders' Divorce Act* 'an Islander' meant anyone domiciled in Solomon Islands. Cameron LJ considered that it would be illogical for a different test to apply to the *Islanders' Marriage Act* and noted that this had also been the conclusion of Freeman C in *Mahlon v Mahlon*.<sup>58</sup> Accordingly, His Lordship accepted that this was the relevant test. In addition to drawing on *Luaseuta*, His Honour drew support from Form A of the First Schedule to the *Islanders' Divorce Act Cap 170* which required a statement in the petition for divorce that "The petitioner and the respondent are both domiciled in Solomon Islands".

Having come to this conclusion, His Lordship considered the meaning of 'domicile' by reference to *Rayden on Divorce* (Rayden 1964: 33). He concluded that a person who resides and intends to continue to reside in Solomon Islands on

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<sup>54</sup> The main objection was that the appropriate notice of the intended marriage had not been given and the marriage had not been celebrated in a church but had taken place on the jetty.

<sup>55</sup> *Kevisi v Mergozzi*, paras. [13]-[14].

<sup>56</sup> *Kevisi v Mergozzi*, para. [15].

<sup>57</sup> Unreported, High Court, Solomon Islands, Davis CJ, Civ Cas 34/1978.

<sup>58</sup> [1984] SILR 86 (heard together with *Reid v Reid*).



an indefinite basis, and who has no intention of returning to reside permanently in the country where he was previously domiciled, qualified as an 'Islander' for the purposes of the *Islanders' Divorce Act Cap 170*. Cameron LJ decided on the evidence that the respondent had discharged the burden of proving he was domiciled in Solomon Islands and granted a decree of nullity due to the failure to fulfil the formal requirements of the *Islanders' Marriage Act Cap 171*.

What was overlooked by Cameron LJ in this case was the reinstatement of the definition of 'Islander' by the *Interpretation and General Provisions (Amendment) Act 1987* in 1987,<sup>59</sup> after the decisions in *Luaseuta v Luaseuta* and *Mahlon v Mahlon*. As discussed above, the statutory definition requires indigenous lineage rather than domicile in order to qualify for 'Islander' status. So, as in *Edwards v Edwards*, decided twelve years previously, to which the court also failed to refer, the applicable statutory definition was ignored. However, unlike *Edwards v Edwards* where application of the definition would have supported the outcome, in this case the decision went against the dictates of the Act. For this reason the case is arguably decided *per incuriam*.

Even if this case had not been decided in contravention of applicable legislation, the introduction of a domicile requirement into an Act where it does not exist can be criticised on a number of levels. From a statutory interpretation perspective, it offends against the literal approach<sup>60</sup> by moving beyond the plain words of the text. The reference to domicile in Schedule A is merely in the context of a draft petition, setting out suggested wording and is intended to be adapted to the factual circumstances of the case. The literal approach to statutory interpretation has fallen out of fashion in favour of a purposive approach.<sup>61</sup> However, this does not justify the introduction of a domicile test either, as such a requirement bears no relationship to the true purpose of the legislation. Originally enacted in 1945,<sup>62</sup> this Act was passed to allow indigenous members of society to marry in accordance with customary law. The question of marriages between indigenous and non-indigenous members of society was not something which the legislative body would have set its mind to at that time. To the contrary, the purpose of the Act

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<sup>59</sup> Act 15 of 1987.

<sup>60</sup> *Sussex Peerage Case* (1844) 1 Cl & Fin 85

<sup>61</sup> *Pepper v Hart* [1993] AC 593; *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408.

<sup>62</sup> Act 4 of 1945.

was clearly linked to lineage. To introduce a requirement based on residency and intention is moving beyond the bounds of interpretation. However, there is another, more substantive, problem with the use of a test based on domicile in that this relationship is between a person and a country.<sup>63</sup> No one may have more than one domicile, which equates with the civil society of which a person is a member. The law of that society is the law of that member. Domicile never arises from membership of a sub-group within country and thus it is a totally inappropriate concept to deal with the type of distinctions required to be made to accommodate legal pluralism, where a sub-group has its own system of law.

A further problem with the domicile test is that, in effect, it allows self-identification. Apart from the difficulty that arises in the case of individuals without full capacity, a unilateral intention does not guarantee acceptance into a community. Membership of a customary group requires mutual recognition of the relationship. In other words, it is not just a matter of individual choice; the community must be in agreement with it. From a broader perspective, use of the domicile test may be viewed as another example of the perpetuation of reliance on introduced common law, as opposed to the development of a jurisprudence that is more suited to the circumstances of the South Pacific. (See further Corrin Care 2002).

## Differentiation and Customary Law

### *Application of Customary Law*

It is not only in the legislative arena that the boundaries of differentiation between different sectors of society are of relevance. In the customary arena, the question arises as to whether customary laws bind everyone in a country ('territorial' application) or only those members within the customary group within which the law has evolved ('personal' application). There is potential for this issue to arise in numerous fields of law but, perhaps surprisingly, it has seldom been raised before South Pacific courts. In the few cases where it has been raised the courts' approach has been inconsistent. In *Funua v Cattle Development Authority*,<sup>64</sup> for example, the High Court of Solomon Islands avoided the territorial approach,

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<sup>63</sup> *Whicker v Hume* (1858) 7 HL Cas 124 at 160.

<sup>64</sup> [1984] SILR 55, 57.

expressing the view that damages for personal injuries in a case between an indigenous Solomon Islander and a statutory corporation could not be assessed on the basis of customary compensation principles but must be assessed in accordance with common law.<sup>65</sup> A similar approach was taken in *Longa v Solomon Taiyo Ltd*, which was discussed earlier in this article. If customary law does not apply to everyone, it becomes even more vital to know precisely what criteria must be satisfied for a person to be bound by that law. However, in two other cases, discussed below, customary law has been held to apply to non-indigenous members of society, although the courts did not go so far as to suggest that it would apply territorially.

### *Judicial Interpretation*

In two Solomon Islands cases, the facts in dispute raised the question of the application of customary law in a matrimonial context. The main issue in dispute in both cases was whether a non-indigenous person could contract a customary marriage. These cases raised similar issues to *Edwards v Edwards*, discussed above, but were decided without resort to the legislative regime. The first case, *Hepworth v Sikela*,<sup>66</sup> arose on an application for custody in the Magistrates' Court. Jurisdiction depended on whether there was a valid marriage, and this question was referred to the High Court for determination. The parties to the case had lived together as man and wife. During that time a bride price of \$500.00 was requested by a relative of the 'wife' and \$60.00 of this was paid. The parties had two children and adopted a third, but after nine years they separated. On an application for custody by the 'husband', the 'wife', an indigenous Solomon Islander, argued that they had not been validly married in custom. The 'husband' was a Solomon Island citizen but was not indigenous and it was argued that this precluded him from entering into a customary marriage. As stated by Chief Justice Muria, this "begs the question as to whether there is any difference between a custom marriage contracted between two Solomon Islanders one of whom is indigenous and the other, a non-indigenous and a custom marriage entered into between two

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<sup>65</sup> See also *Semens v Continental Airlines Inc* 2 FSM 131 (Pon 1985) 140, where customary law was not applied in an employment law case.

<sup>66</sup> Unreported, High Court of Solomon Islands, Muria CJ, 16 February 1994, accessible via [www.paclii.org](http://www.paclii.org) at [1994] SBHC 2.

Solomon Islanders both of whom are indigenous”.<sup>67</sup>

At the date of this case, the omission in the *Interpretation and General Provisions Act 1978* had been remedied and ‘Islander’ had been defined in the way set out above. If this definition had been applied the ‘husband’ would not have been regarded as an ‘Islander’ as his parents were not ‘indigenous to Melanesia, Micronesia or Polynesia’, and even if they had been, he was not ‘living in Solomon Islands in the customary mode of life’ (s. 17(1)(b)). However, although counsel for the respondent sought to bring the case into the legislative regime by referring the court to the term ‘Islander’ in the *Islanders’ Marriage Act Cap 171*, which in turn would have led to the definition in the *Interpretation and General Provisions Act*, the court dismissed this as irrelevant. Rather, the court, in upholding the marriage, held that “the reality of Solomon Islands changing circumstances” would make the suggestion that only indigenous Solomon Islanders could marry under the customary regime “difficult to maintain and in some cases impracticable”.

The second case to consider this question was *Rebitai v Chow*,<sup>68</sup> where it was necessary for the court to decide whether the parties were validly married. The plaintiff was an indigenous Islander. The defendant was of Chinese descent but had been born in Solomon Islands. They began living together in 1972 and had a child, but did not marry. In 1974, the defendant’s parents arranged a Chinese bride for him and he went to Hong Kong to marry her. He returned with his wife to Solomon Islands but left his wife with his parents and went back to live with the plaintiff with whom he had a second child. The defendant’s marriage to his Chinese wife was dissolved by the Solomon Islands High Court in December 1975. The parties continued to live together and had a total of five children. In 1996, their relationship broke down. The plaintiff claimed that they were validly married in custom but the defendant denied this. Firstly, he argued that, as a matter of law he, as a person of Chinese descent, could not marry in custom. Kabui LJ held that he could find no custom that prohibited a customary marriage between an indigene and a person of another race. On this basis he concluded that the marriage was valid. However, the defendant had also argued that section 4 of the *Islanders’ Marriage Act* only provided for customary marriage between Islanders and that he was not within the definition of that term. Whilst His Lordship did not answer this proposition directly, this argument could have been

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<sup>67</sup> *Hepworth v Sikela*.

<sup>68</sup> [2002] 4 LRC 226.

met by pointing to the fact that section 4 is permissive rather than prohibitive. In other words, it allows Islanders to marry in custom but in no way bars non-Islanders from doing so. This argument also provides justification for the court's refusal to take the legislative definition of 'Islander' into account in *Hepworth v Sikela* discussed above.

### The Boundaries of 'Islander'

The courts in Solomon Islands have fallen well short of a territorial approach to the application of customary law. Accordingly, it is important to know precisely where the boundaries of 'Islander' are drawn. Obviously neither Hepworth nor Chow (of British and Chinese parentage respectively) qualified as an 'Islander' under the definition in section 17. They were both citizens of the country, and therefore 'Solomon Islanders' in the wide sense. In turn citizenship may be some evidence of 'domicile', but neither term is mentioned in any of the definitions of 'Islander'. Is either status sufficient to justify subjection to customary law? Or is there still some question of choice, requiring a person to opt to accept customary law as their personal law? This question was not explored in *Hepworth v Sikela* nor in *Rebitai v Chow* and neither was the related question of the significance of customary lifestyle.

Customary law derives its authority from its acceptance by members of a particular customary group. It could be argued that persons not belonging to that group and not living in a customary way should not in principle be regarded as being subject to customary rules. A territorial approach would subject individuals to an unfamiliar system of law founded on norms that may conflict with those prevailing in their own sector of society. On the other hand, if it is accepted that customary law may be voluntarily chosen as a party's personal law, as opposed to only being available through birth or descent, the adoption of a customary lifestyle would be an indication of such choice. (On choice of law issues in African countries see Bennett 1985). If the wife in *Hepworth* had argued that they had never lived a customary lifestyle, the judge might have found it difficult to say that they were married in custom. Similarly, in *Rebitai*, the wife might have strengthened her case that there was a customary marriage by adducing evidence that her husband had adopted a customary lifestyle. This argument finds support in section 17(1)(b) of the *Interpretation and General Provisions Act 1987*, which requires parties from other parts of Melanesia, Micronesia or Polynesia to be living 'in the customary mode of life' in order to qualify as 'Islanders'. If they choose to live and work in an urban centre and adopt a western style of living, it

might well be argued that they are not living ‘in a customary mode of life’ and thus cannot qualify as ‘Islanders’ for the purposes of the Act.

In both *Hepworth v Sikela* and *Rebitai v Chow*, the fact that the court did not consider a ‘lifestyle’ test casts some doubt on the correctness of the decisions on the facts. However, it having been found that the parties had gone through customary marriages, it could be argued that this in itself amounted to an ‘opting into’ the customary system, whether or not the parties lived a customary lifestyle every day. There is perhaps some support for this view in the dicta in *Edwards v Edwards*, where Palmer J observed that if members of an indigenous tribe married in custom in Honiara or a provincial capital, the mantle of their customary law would still prevail even though they did not reside in their home village. However, as noted, the court’s attention in *Edwards* was not drawn to the statutory definition in section 17(1)(b) and the reference to a person living ‘in the customary mode of life.’ Nevertheless a party may contend that they are living in a customary lifestyle even if they reside in an urban area.

Two further points require mention. First, this discussion has proceeded on the basis that parliament and the judiciary are the legitimate authorities to define the membership of the different communities within society. From a formal legal perspective, in countries where the Constitution is the supreme law (e.g. *Constitution of Solomon Islands 1978*, s. 1), that may be the case. From a deep pluralism perspective, however, the position may not be so clear. The communities themselves, and, more particularly, the chiefs or other traditional leaders, may have different views from the State as to who is within their group and who is not.<sup>69</sup> As stated by Pradhan, “different legal orders construct the identity of the population differently and thus the same group of people may be categorised differently by different legal orders and have different statuses, rights and obligations” (Pradhan 2006: 2). Self-identification is another possibility but, as discussed above, one that is not without difficulties. An alternative would be the case-by-case approach suggested by the Law Reform Commission of Western Australia in relation to the determination of Aboriginality. This would allow a

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<sup>69</sup> See for example *Ah Koy v Registration Officer for the Suva City Fijian Urban Constituency* [1993] 39 FLR 191 where the community and the court had different views as to who was a ‘Fijian’ and therefore entitled to be on the ‘Fijian register of voters. The patrilineal descent requirement for qualifying as a ‘Fijian’ under the *Constitution of Fiji 1990*, s. 156(a) was acknowledged to differ from the requirement of patrilineal descent in custom: [1993] 39 FLR 191, 195.

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range of factors to be taken into account including genealogical evidence, evidence of genetic descent, evidence of self-identification and evidence of acceptance by an indigenous community (Law Reform Commission of Western Australia 2006: 7).

The second point that should be mentioned is that the question of identity has been discussed in the context of custom's interaction with State law. A question which was raised in the choice of law section above and which may be obscured in a discussion of weak legal pluralism is whether and to what extent the customary law of one community is binding on members of another. (For a criticism of the tendency to overlook this see Corrin 2009: 33-34). Customary law often differs from group to group within the same country, particularly in Melanesia. In this context, the question is not who is within customary boundaries, but who is within the boundaries of each customary group. As mentioned above, this is a choice of law issue which demands further attention but, unfortunately, one which is outside the ambit of this article. (See further in relation to Africa, Bennett 1985).

### Conclusion

In countries with a plural legal system, State law frequently distinguishes between different classes of subjects, and applies different rules depending on the characteristics of the members. During the colonial era, indigenous people were often singled out for different treatment. Since independence, legislation prescribes citizenship as a distinguishing marker for some purposes. Other statutes still draw a distinction between 'natives' and other members of society, although the colonial language has been abandoned. Whatever term is now used, the precise boundaries of the different sectors of society are far from clear. In some cases, a specific statutory definition has been provided for the purposes of the Act in which it is contained. Those definitions sometimes draw a distinction between indigenous and non-indigenous Islanders. This is particularly the case where the legislation is protective, such as where customary land is concerned.

In cases where there is no specific definition one is usually provided by the interpretation statute. In Solomon Islands, that definition is based on lineage. There is a clear distinction between indigenous and non-indigenous Islanders, the latter not being included within the term, unless they are indigenous to another island in Melanesia, Micronesia or Polynesia and are living in Solomon Islands in

the customary mode of life.<sup>70</sup> However, the waters have been muddied by the fact that this definition has been ignored in some cases.<sup>71</sup> Instead, a definition dependent on domicile has been used. This is an inappropriate test for countries with a plural legal system; it is only appropriate for establishing a relationship between an individual and a country, not where distinctions between different classes of persons are subject to different systems of law within the same country. It might also be viewed as yet another example of the tendency to impose the English common law rather than develop a uniquely South Pacific jurisprudence. However, the decisions in question are arguably *per incuriam* and, in due course, may be overruled by the Court of Appeal.

In cases outside the legislative regime, the extent of the application of customary law is even less clear. According to the cases discussed above, its application extends beyond indigenous Solomon Islanders, at least in the context of marriage. Whether it may extend to non-citizens is more doubtful. The courts have certainly leant against applying customary law to corporations. A territorial interpretation would subject individuals to an unfamiliar system of law, largely inaccessible to outsiders, founded on norms which they do not necessarily accept.

The question of the identity of ‘Islanders’ is just one of the complex questions arising from legal pluralism in the Pacific and in other parts of the world. It is imperative to have clear definitions, or at least a clear process for identification, in place, as without this firm basis a plural system cannot flourish. In cases of uncertainty, as has been demonstrated time and time again, the rules underpinning the State system are often adopted by default. ( See the discussion of this in the context of land in Samoa in Corrin 2008a: 31-46). If South Pacific jurisprudence is to develop then more appropriate solutions must be found. This is not to advocate an intrusive and arbitrary fixing of definitions by the State. Rather it is to advocate facilitating an exploration of the boundaries of legal identity together with the communities themselves.

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<sup>70</sup> *Interpretation and General Provisions Act Cap 85*, s. 17(1)(b).

<sup>71</sup> *Kevisi v Mergozzi* (Unreported, High Court, Solomon Islands, Cameron J, 18 March 2008), accessible via [www.paclii.org](http://www.paclii.org) at [2008] SBHC 13.



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