

Colonial legacies?

A study of received and adopted legislation applying in the University of the South Pacific region

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Introduction

When the island countries of the South Pacific moved towards independence (which is intended here to include self-governance),¹ decisions concerning the laws under which they would operate had to be made. Although the desire for laws reflecting local values and objectives can be seen reflected in the Preambles to many of the resulting Constitutions,² the imperial country in control at the time was obviously a strong influence. Apart from direct factors, such as the provision of advice and technical and financial assistance, and the role played in the negotiation and discussions during the transition period, factors such as education and training of emerging leaders in the tradition of the imperial country, and close trade links, financial aid, and general economic relations were indirectly at play.

Not surprisingly, therefore, none of the Pacific Island countries of the University of the South Pacific region opted to reject the laws in force prior to independence. Instead, the general pattern adopted at independence was to represent the new status of the country by replacing the imperial countries' constituent laws with a new Constitution, and establishing a representative parliament that would thenceforth replace the colonial lawmaking body and make laws suited to local circumstances and needs. In most cases, custom was also recognised as part of the law, by express

provision to that effect in some Constitutions.³ As a transitional step, to avoid a vacuum pending the creation of laws by the new legislature, laws in existence at the time of independence were 'saved'. This included legislation in force in England at a particular date,⁴ common law and equity, and 'colonial' legislation made by the legislature of the country whilst it was under the control of the imperial country.

What resulted was a system of complex legal pluralism, with laws being made up of those indigenous laws that survived the process of imperialism; pre-independence laws (from numerous sources) continued in force; and post-independence laws. The position was further complicated in many instances by the fact that introduced laws had often been moulded to take account of indigenous concepts, resulting in a category of hybrid laws, not quite fitting into any of these categories. This might have occurred, for example, when English common law or a statute was adapted to take account of customary factors.⁵

Given the importance of the move to independence, a precise indication of the laws continued in force, and the relationship between the different categories of law, was undoubtedly vital. However, there are many areas of uncertainty. This article examines some of those that surround the application of English legislation in the member countries of the University of the South Pacific,⁶ in the light of regional decisions. The questions discussed can be summarised as follows:

- What is meant by a statute of general application?
- How is applicability proved?
- May an English statute be treated as applicable in part only?
- Is imperial legislation automatically in force, or must a competent court or parliament make a declaration to this effect first?
- Where legislation is subject to such qualifications as local circumstances demand, what does this entail?
- Where do statutes rank in relation to other sources of law? For example, are they subject to custom?

Application and adoption of pre-independence imperial legislation

To set the problems in context, an outline of the provisions saving English legislation as a source of law, in each country, is required. As mentioned above, the controlling power immediately prior to independence played an important role in the choice of law to be applied to the new States. Accordingly, countries have been divided into categories, based on the dominant imperial influence at the time of independence.

Former British colonies and protectorates

Fiji

When Fiji became independent in 1970 the existing Constitution was replaced, and a new parliament established.⁷ However, other laws in force in 1970 were continued in existence. Both the Constitution and parliament were abolished by the Fiji Constitution Revocation Decree, after two military coups d'état overthrew the government of Fiji in 1987.⁸ New constituent laws were enacted, and a new lawmaking body more responsive to the Fijian people was established. Again, however, the bulk of existing laws were continued in force.

This pattern was repeated in 1990, when the Military Government gave up its powers and returned the country to a civilian government. A written Constitution was brought into force by the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990. English Acts were continued in force by section 8(1):

All existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and this Decree.

By virtue of the Supreme Court Ordinance 1875, existing laws included:

35. . . . the Statutes of general application which were in force in England at the date when the Colony obtained a local Legislature, that is to say, on the second day of January, 1875, . . . subject to the provisions of section 37 of this Ordinance . . .

...

37. All Imperial laws extended to the Colony by this or any future Ordinance shall be in force therein so far only as the circumstances of the Colony and its inhabitants and the limits of the Colonial jurisdiction permit and subject to any existing or future Ordinances of the Colonial Legislature, and for the purpose of facilitating the application of the said laws it shall be lawful for the Court to construe the same with such verbal alteration not affecting the substance as may be necessary to render the same applicable to the matter before the Court . . .

The Constitution Amendment Act 1997, which under s.193 (2) is due to come into force on 27 July 1998, retains the current position. Section 195 (2) (d) continues in force all written laws in force as if enacted or made under or pursuant to the new Constitution. Section 195 (3) provides that English laws are to be construed with such modification as is necessary to bring them into conformity with the Constitution.

Solomon Islands

The Constitution of Solomon Islands is scheduled to Solomon Islands Independence Order 1978 (UK). Section 76 of the Constitution continues in force the United Kingdom Acts of Parliament referred to in schedule 3. Paragraph 1 of schedule 3 provides:

Subject to this Constitution and to any Act of Parliament, the Acts of Parliament of the United Kingdom of general application and in force on 1st January 1961 shall have effect as part of the law of Solomon Islands, with such changes to names, titles, offices, persons and institutions, and as to such other formal and non-substantive matters, as may be

necessary to facilitate their application to the circumstances of Solomon Islands from time to time.

The significance of 1 January 1961 is that it is the date referred to in section 15 of the Western Pacific (Courts) Order 1961(UK), which had previously applied in Solomon Islands, and which is discussed below.

Kiribati

The Constitution brought into force by the Gilbert Islands Order in 1975 was repealed by the Kiribati Independence Order 1979 UK and replaced by a new Constitution. Section 5 of the Constitution continued existing laws in force as follows:

(1) . . . the existing laws shall . . . continue in force on and after Independence Day as if they had been made in pursuance of this Order.

(2) The existing laws and any Act of the Parliament of the United Kingdom or Order of Her Majesty in Council . . . shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring to them into conformity with this Order.

By virtue of section 15 of the Western Pacific (Courts) Order 1961 (UK), existing laws included:

. . . the statutes of general application in force in England on the 1st day of January 1961.

They also included certain specific English Acts and specific subsidiary legislation, applied to Kiribati by the British Government.⁹

Tuvalu

The Constitution of Tuvalu Ordinance 1986 enacted by the Parliament of Tuvalu repealed the Tuvalu Independence Order 1978 (UK), which had had the previous Constitution scheduled to it. The 1986 Ordinance established the current Constitution, which states that:

. . . on and after the appointed day all existing laws shall have effect as if they had been made in pursuance of this Constitution.

By virtue of section 15 of the Western Pacific (Courts) Order 1961 (UK), which is set out above, existing laws included the statutes of general application in force in England on the 1st day of January 1961.

A number of English Acts and some subsidiary legislation, specifically applied to Tuvalu by the British Government, were also part of the existing law, and consequently remained in force.¹⁰

Tonga

The King and Council of Chiefs enacted the written Constitution in 1875. However, this is not the source of imperial law. Although originally applied to Tonga by Pacific Order in Council,¹¹ ‘the statutes of general application in force in England’ have now been adopted in Tonga by the Civil Law Act 1966.

Section 3 of the Civil Law Act provides that:

. . . the Court shall apply. . . statutes of general application in force in England.

Section 4 goes on to say that:

. . . statutes of general application . . . shall be applied by the Court —

(a) only so far as no other provision has been, or may hereafter be, made by or under any Act or Ordinance in force in the Kingdom; and

(b) only so far as the circumstances of the Kingdom and of its inhabitants permit, and subject to such qualifications as local circumstances render necessary.

Tonga is the only country that does not have a cut-off date, that is, a date after which new English legislation will not be applied.

Countries formerly administered by New Zealand

Samoa (formerly Western Samoa)

A written Constitution was enacted by the Constitutional Convention in 1960 and came into force at independence in 1962, after approval by a national referendum. Imperial laws then in force were continued in force by Art. 114. However, in 1972 all English Acts of Parliament in force, except those specified in the schedule to the Act, were abolished by section 8 of the Reprint of Statutes Act 1972. Only the Wills Act 1837 UK was so specified. This has since been repealed by the Wills Act 1975 (WS).

Additionally, a number of New Zealand Acts of Parliament were specifically applied to Samoa. Again, these were continued in force by Art. 114 of the Constitution of Western Samoa, but later repealed by the Reprint of Statutes Act 1972, unless specified in the schedule to that Act. Only four New Zealand Acts appear to remain in force.¹²

Subsidiary legislation, from both sources, was also specifically continued in force by Art. 114. There were about 106 English Regulations still in force in 1978.¹³

It is also interesting to note that German legislation was made for Samoa between 1900 and 1919 by the German administration. This was abolished in 1921,¹⁴ although some doubt appears to have remained as to this, as abolition was confirmed in 1972.¹⁵

Cook Islands

When the Cook Islands attained self-governance in 1965, a written Constitution was applied to Cook Islands by the Cook Islands Constitution Act 1964 NZ, as amended in 1965 by Cook Islands Constitution (Amendment) Act 1965 NZ.

Art. 77 provides that:

The existing law shall, until repealed, and subject to any amendment thereof, continue in force on and after Constitution Day.

By virtue of the Cook Islands Act existing laws included:

The Law of England as existing on the fourteenth day of January in the year eighteen hundred and forty (being the year in which the Colony of New Zealand was established) save so far as inconsistent with this Act or inapplicable to other circumstances of those islands:

Provided that no Act of Parliament of England or of Great Britain or of the United Kingdom passed before the said fourteenth day of January in the year eighteen hundred and forty shall be in force in the Cook Islands unless and except so far as it is in force in New Zealand at the commencement of this Act.

Art. 77 also continues in force New Zealand Acts of Parliament specifically applied to Cook Islands by the 1915 Act¹⁶ or adopted in Cook Islands by the New Zealand Laws Acts 1966 to 70, 1973 and 1979 (CI), on the same basis.

Tokelau

Tokelau is still dependent on New Zealand, but a greater measure of self-governance was achieved by the Tokelau Amendment Act 1996 (NZ). This amends the Tokelau Islands Act 1948 (NZ) by conferring on the General Fono a power to make rules for the peace, order and good government of Tokelau. The amending Act continues in force all existing laws.¹⁷ This includes:

... those Acts of the Parliament of England or of Great Britain or of the United Kingdom passed before the 14th day of January 1840 that —

- (a) Were in force in New Zealand on the 22nd day of July 1969; and
- (b) Were in force in Tokelau immediately before the commencement of this section.

English Acts in force were those generally applied to Tokelau as part of the laws of England by section 4A of the Tokelau Amendment Act 1948,¹⁸ except so far as inconsistent with the Tokelau Islands Act or inapplicable to the circumstances of Tokelau, and provided also that they were in force in New Zealand in 1969.¹⁹

The Tokelau Islands Act 1948 (NZ) provides that New Zealand Acts apply only if expressly stated to do so. A number of New Zealand Acts of Parliament have been expressly stated to apply.²⁰

Niue

Section 71 of Niue's Constitution, enacted by the Niue Constitution Act 1974 (NZ), continues 'the existing laws' in force. This included English Acts of Parliament, in force in England on 14 January 1840 and in New Zealand in 1916, which had been applied generally to Niue by s.615 Cook Islands Act 1915, which is set out above. Section 615 was replaced, in exactly the same terms, by s.672 of the Niue Act 1966(NZ).

New Zealand Acts of Parliament that had been applied specifically to Niue and were in force in Niue in 1974 were also continued in force.²¹

Further, s.36 of the Constitution provides that New Zealand may legislate for Niue, with its request and consent.²²

Subsidiary legislation made under any of the above legislation and in force in Niue in 1974 was also continued in force by s.71.

Country formerly administered by Australia

Nauru

The adoption of English laws in Nauru follows a different pattern from those described above. When Nauru achieved independence in 1968 a Constitution was brought into force by a Constitutional Convention meeting. Section 85 of the Constitution continued in force those existing Acts of Parliament of Australia and Queensland and Ordinances of Papua New Guinea that had been specifically adopted in Nauru by the Laws Repeal and Adopting Ordinance 1922–1936. However, in 1971, a number of these were repealed by the Custom and Adopted Laws Act.

The Custom and Adopted Laws Act 1971 generally adopted English Acts of Parliament, at a later stage,²³ in the following terms:

Subject to the provisions of sections 3, 5 and 6 of this Act, the common law and the statutes of general application, including all rules, regulations and orders of general

application made thereunder, which were in force in England on the thirty-first day of January, 1968, are hereby adopted as laws of Nauru.

Section 3 relates to Nauruan institutions, customs and usages, which are to be given full force and effect in certain matters, such as land. Section 5 provides:

(1) . . . statutes, rules, regulations and orders adopted . . . shall have force and effect within Nauru only so far as the circumstances of Nauru and the limits of its jurisdiction permit and only so far as they are not repugnant to or inconsistent with the provisions of this Act or of any . . . Act in force at the commencement of this Act or from time to time with any law enacted by Parliament or with any Act . . . of the Commonwealth of Australia, the State of Queensland, the Territory of Papua or the Territory of New Guinea for the time being expressly applied in, or adopted as the law of Nauru by any Act or Ordinance.

...

(3) For the purpose of facilitating the application of any part of the laws of England adopted by this Act it shall be lawful for any Court, and any judge or magistrate thereof, to construe it with such verbal alteration not affecting the substance as may be necessary to render it applicable to the matter before such Court, judge or magistrate.

Section 6 excludes from the general adoption those parts of English statute law that are specified in the First Schedule to the Act. The First Schedule provides that all those parts of the statute law that are printed in the second and third editions of Halsbury's Statutes under an extensive list of headings set out in the Schedule do not apply. These include such wide fields as Admiralty, Banking, Courts, Criminal Law, and Practice and Procedure.

Subsidiary legislation, still in force in 1968, was also continued in force as part of 'the existing laws of Nauru' by s.85 Constitution.

Anglo-French Condominium

Vanuatu

The Anglo-French Protocol relating to New Hebrides, 1914, was rescinded as from 30 July 1980 by the Exchange of Notes between the British and French Governments on 23 October 1979, and a written Constitution was brought into force on 30 July 1980 to provide for the independent government of the country.

Art. 93 of the Constitution continued in force:

. . . the British and French laws in force or applied in the New Hebrides immediately before the day of Independence . . . to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.

This provision has been interpreted as not just perpetuating the pre-independence situation whereby British laws in force applied to British nationals and foreign optants, and French laws applied to French nationals and foreign optants. Rather, those laws now apply to everyone in Vanuatu ‘irrespective of creed, colour or Nationality’.²⁴ In cases of conflict, the court would resolve this on the basis of substantial justice.

The High Court of the New Hebrides Regulation 1976 provided that the British statutes in force were:

so far as circumstances admit . . . the statutes of general application in force in England on the 1st day of January 1976.

Problem areas

As can be seen from the above legislation, the saving provisions are not in uniform terms. However, there are common patterns. For example, with the exception of Tonga, the law adopted is that in force at a particular date, rather than the whole or part of English law ‘for the time being’ in force in England, which was adopted in a few other parts of the Commonwealth.²⁵ Other limitations and required modifications are also common to many

countries of the region, in substance, and sometimes even in form. It is therefore possible to look under general headings at some of the problems that arise.

What is meant by a Statute of general application?

As has already been mentioned, application or adoption of laws can be done either generally or specifically. Cook Islands provides an example of specific adoption, in relation to its treatment of New Zealand Acts, as only named Acts have been incorporated into the law.²⁶ In the case of general application, the phrase ‘statutes of general application in force in England’ was normally used when describing the laws applied. As discussed below, determining what is meant by Acts of ‘general application’ is no easy task. This problem was perpetuated at independence, when ‘existing laws’ were continued in force. This meant that the search for the meaning of ‘general application’ had to continue as, except in the relatively rare cases where there had been judicial determination on point, or where English legislation had been replaced by local legislation, whether an English Act was an existing law would depend on whether it was of general application. Identifying existing law, in the form of English legislation, was also complicated by the fact that it was not restricted to generally applied Acts, but might come from one or more of the following categories, depending on the provisions of the constituent law: legislation specifically applied; legislation generally applied; legislation specifically adopted; and/or legislation generally adopted.

Identifying the English Acts continued in force can be broken down into a three-phase process:

- identifying the English Acts that qualified as being of ‘general application’ and ‘in force in England’ at the time of the original general application or adoption;
- identifying the English Acts specifically adopted or applied at any time;
- identifying which Acts falling within the above two categories are still in force, that is, that they have not been repealed or replaced and, presumably, they are still of general application.

This leads back to the vexed question of determining the legislation that fits the description of ‘general application’. The phrase is not defined in any of the legislation in which it is used, and, as Sir Roberts-Wray said in *Commonwealth and Colonial Law*: ‘If the phrase were offered as a novelty to a legislative draftsman today, he would disclaim responsibility for its consequences unless it were defined’ (at 545). Sir Roberts-Wray concludes that the expression is usually regarded as descriptive of Acts that are of general relevance to the conditions of other countries and, in particular, not based upon politics or circumstances peculiar to England (at 556).

The phrase ‘general application’ has received some attention within the region. In *Indian Printing and Publishing Co. v Police* (1932),²⁷ the Supreme Court of Fiji stated that:

The expression is . . . used to distinguish public statutes not necessarily binding upon all the population, e.g. the Companies Act or the Friendly Societies Act on the one hand and the public statutes, which, on the other hand, are binding upon everyone e.g., the Offences against the Person Act or similar legislation.

In *Freddy Harrisen v John Patrick Holloway*²⁸ the Court of Appeal of Vanuatu took a different approach. It concluded that the Police Act 1964 (UK) was not an Act of general application, on the basis of differences between the various police forces in the United Kingdom and the single force in Vanuatu, including the different modes of control and payment, and the fact that Vanuatu was a republic, and Crown Immunity did not apply. Thus the Court appeared to be of the view that to be an Act of general application, the subject matter of the Act must operate in the same way in Vanuatu and in England.

The matter was discussed more fully in *R v Ngena*²⁹ where the High Court of Solomon Islands defined a statute of general application as ‘one that regulates conduct or conditions which exist among humanity generally and in a way applicable to humanity generally’. The Court distinguished this from an Act that is ‘restricted to regulating conduct or conditions peculiar to or in a way applicable only to persons, activities or institutions in the United Kingdom’.

Reference in this case was to the United Kingdom, rather than England, because, as mentioned, it is Acts of the United Kingdom that are continued

in force by the Constitution of Solomon Islands. In countries where English Acts are continued in force, no doubt England would be the country of reference.

The definition of general application applied in *R v Ngena* was followed by the High Court of Tuvalu in *In the Matter of the Constitution of Tuvalu and of the Laws of Tuvalu Act 1987*.³⁰ It would appear that it could be applied equally in other countries of the region.

A problem that has not been resolved by any of the cases mentioned, and that arises in countries such as Kiribati, where subsidiary legislation was not specifically applied, is whether subsidiary legislation is included in the term 'statutes of general application', and therefore forms part of the existing law.

As mentioned at the outset, another unresolved practical problem is that of ascertaining English Acts in force, other than on an individual basis, as the question arises before a court. This problem has been confronted in Solomon Islands, where the matter has been referred to the Law Reform Commission. The Commission has been directed to study 'each Act of the Parliament of the United Kingdom from time to time in terms of section 76 and Schedule 3 to the Constitution'. This would appear to mean that each Act, in force on 1 January 1961, must be examined to ascertain whether it is of general application.

How is applicability proved?

Other questions arise regarding proof of Acts of 'general application'. These include the following:

- Is evidence required, or is applicability a question of law?
- Who bears the onus of proving applicability?

Is evidence required, or is applicability a question of law?

In *Commonwealth and Colonial Law*, Roberts-Wray appears to assume that applicability is a question for judicial notice. Certainly, he states this to be the case in relation to evidence of local circumstances that may be taken into account to qualify an Act of general application (at 546). Regional decisions appear to support this. For example in *Freddy Harrisen v John*

Patrick Holloway,³¹ judicial notice was taken of the differences between the various police forces in the United Kingdom, and the single force in Vanuatu. In *Clements v The Hong Kong and Shanghai Banking Corporation*³² the Court of Appeal held itself to be satisfied that the English Bankruptcy Act 1914 was an Act of general application, but gave no reason for this. In *KHY Co(SI) Limited and Christopher Anthony Kwan v Ling Kun Xiang, Zhao Li Oin, Guangnan Hong Co Limited and Guangdong Enterprises (Holdings) Limited*³³ it was held that the Debtors Act 1869 applied in Solomon Islands, but no evidence was called for from the parties. Similarly in *Allardyce Lumber Company Limited, Bisili, Roni, Sakiri, Hiele, Sasae, Poza, Zongahite, Daga, Pato and Zingihite v Attorney General, Commissioner of Forest Resources, Premier of the Western Province and Paia*,³⁴ the Trustee Act 1925 (UK) was held to apply, without reference to any evidence. Equally, the Partnership Act 1890 (UK) has been applied in Solomon Islands without evidence being adduced.³⁵ In a similar fashion, in Vanuatu, the Fatal Accidents Act 1846 and the Law Reform (Miscellaneous Provisions) Act 1934 were held to be of general application in *Boe and Taga v Thomas*.³⁶

Who bears the onus of proving applicability?

A related question arises as to who bears the burden of proof in relation to applicability. Is it assumed that a statute is applicable until proved otherwise, or does a party seeking to rely on an imperial statute bear the burden of proof? To put it another way, is there a general presumption in favour of general applicability, which throws the burden of proof onto the party disputing this? In Fiji, the case of *Mohammed Isaac v Abdul Kadir*³⁷ supports the latter view. There the Supreme Court stated that it was prepared to assume that the Forfeiture Act 1870 (UK) was a statute of general application.

In *Commonwealth and Colonial Law*, Roberts-Wray extracted, from Canadian cases, the principle that English statutes did not apply unless shown to be suitable; as opposed to the common law, which applied unless shown to be unsuitable (at 555). However, he conceded that this might not be the case in jurisdictions where common law and statute were given effect subject to exactly the same qualifications for local circumstances. Unfortunately, he did not go on to say what he considered the test would be in that case.

The willingness of the courts to apply English statutes without supporting evidence, and without giving reasons, demonstrated by the cases cited in the preceding section, appears to support the contention that there is a general presumption, and that the onus of proof rests on a party trying to show inapplicability.

May an English statute be treated as applicable in part only?

Whilst this question does not appear to have been directly addressed within the region, there is conflicting authority from other. In the New South Wales case of *Quan Yick v Hinds*³⁸ it was held that if an Act is generally inapplicable, individual sections that are not in themselves objectionable cannot be selected for use. To the contrary, in *Miller-Morse Hardware Co Ltd v Smart*³⁹ it was held that sections from Acts could be held to be in force, without considering whether the rest of the Act was in force. Further, it has been held in *Attorney-General for New South Wales v Love*⁴⁰ and *R v Robin*⁴¹ that where one or two provisions of an Act cannot be applied, that does not render the whole Act inapplicable. Similarly, it has been held that technical and procedural provisions may be excluded without prejudicing the application of the remainder of an Act.⁴²

The question was raised before the Chief Justice of Vanuatu in *Coombe v Whittle*.⁴³ His Lordship made no formal ruling as he dealt otherwise with the matter before him, but he appears to have found nothing objectionable in applying one section of an Act (in that case, section 69 of the Solicitors Act 1974 (UK)).

The severability approach can be supported by reference to the general principle governing severance of a partly invalid instrument or action. Unless the invalid part is inextricably interconnected with the valid, a court is entitled to set aside or disregard the invalid part, leaving the rest intact.⁴⁴

Is imperial legislation automatically in force, or must a competent court or parliament make a declaration to this effect first?

In most jurisdictions of the region Imperial Acts were stated to be ‘in force’, or ‘part of the law’, or some other wording was used to make it clear that those Acts were automatically in force. However, in former British dependencies subject to the Western Pacific (Courts) Order 1961, the position is not as straightforward. Examination of section 15, the source of applied English statutes, reveals the following wording:

the civil and criminal jurisdiction of the High Court shall, so far as circumstances admit, be exercised upon the principles of and in conformity with:

(a) the statutes of general application in force in England on the first day of January 1961. . .

This section is no longer in force in Solomon Islands, Kiribati or Vanuatu but still applies in Tuvalu, where a similarly worded provision is contained in the Magistrates Courts Act.

Further, a similar situation exists in Tonga, where section 4(b) of the Civil Law Act 1966 provides:

. . . the Court shall apply the . . . statutes of general application in force in England.

The wording of these provisions does not appear to elevate English Acts of general application automatically to part of the local law. Rather, it states that only if and when a court of competent jurisdiction is called upon to do so shall such laws be considered for inclusion in the local body of law.

The proper interpretation of section 15 fell for consideration when an advisory opinion was sought in *In re the Constitution of Tuvalu and the Laws of Tuvalu Act 1987*.⁴⁵ Donne CJ pointed out that the proviso to 15(1) of the 1961 Order directs the Court to apply the law to Tuvalu only to the extent that:

- (a) the circumstances of Tuvalu and its inhabitants permit it,
- (b) the limits of the jurisdiction of government permit it,
- (c) it is in accord with any qualifications rendered necessary by local circumstances.

His Lordship held that these matters had been considered, and any necessary adaptations made before English statutes were applied. Consequently:

. . . unless an imperial law has been either expressly adopted by the Parliament of Tuvalu or the Court has applied it as such by declaring it, it does not have effect as part of the law of Tuvalu . . .

This approach is diametrically opposed to that discussed in the foregoing section on who bears the onus of proof, where it is suggested that there is a general presumption in favour of applicability.

Whilst the Tuvalu decision is only persuasive in Tonga, it appears likely that the decision would be followed. In addition to making the application of imperial laws conditional upon local adoption or declaration, this approach severely limits the number of English statutes of general application in force.

Where legislation is subject to such qualifications as local circumstances demand, what does this entail?

Where legislation has been made in a foreign country, there will obviously be technical changes, such as of names of persons and bodies, that have to be made in order to make that legislation fit into the scheme of things in Pacific island countries. In some countries specific modifications have been enacted. For example, the Cook Islands Act 1915 (NZ)⁴⁶ applied certain New Zealand legislation to Cook Islands, and expressly stated the changes that were to be made to take account of local conditions. Similar specific provision was made by the New Zealand Laws Act 1966 (Cook Islands). Similarly, in Solomon Islands, Constitution (Adaptation and Modification of Existing Laws) Orders⁴⁷ spelt out the obviously necessary technical changes. Another example can be seen in sections 679 to 705 of the Niue Act 1966, which applies certain New Zealand legislation to Niue and expressly states the changes to be made. There is similar specific provision in the New Zealand Laws Act 1979 (Niue).

Alternatively, or additionally, instead of precisely specifying the changes to be made to applied or adopted legislation, in some countries of the region, provision has been made in very general terms for adaptation and/or

modification. The conditions in question are to the effect that the applied or adopted legislation must be construed or applied with such changes or modifications as are necessary to apply to the circumstances of the country. Examples of this can be seen in section 15 of the Western Pacific (Courts) Order 1961 and section 4 of the Civil Law Act 1966 (Tonga), which are referred to above. Other illustrations can be found in section 24, Supreme Court Ordinance 1875 (Fiji); section 5(2), Custom and Adopted Laws Act 1971 (Nauru); and schedule 3, Constitution of Solomon Islands.

These general qualifications leave a number of questions unanswered, including the following:

- At what date must the local circumstances be examined for compatibility?
- Are substantive changes allowed?
- How are local circumstances proved?
- How are changes to be physically recorded?

These questions will now be examined in turn.

Date of local circumstances

Another question that arises in considering the effect of local circumstances on applied or adopted law is the relevant date of those circumstances. Should courts consider local circumstances applying at:

- a) the date of enactment of the legislation under consideration;
- b) the so-called cut-off date;
- c) the date of adoption (if any);
- d) the date of the events giving rise to the action; or
- e) the date of the proceedings?

Option a) has no apparent merit. Not only may it be a date long past, but also it has no connection with the countries of the region. Surprisingly, authority supporting this as the appropriate date can be found in the Hong Kong case of *Quan Yick v Hinds*.⁴⁸ Option b) may also be in the distant past, but again has some authority to support it in the New Zealand case of *Brett*

v Young.⁴⁹ Another New Zealand case, *Re Lushington, Manukau County Council v Wynyard*⁵⁰ supports options a) and b). Date c) is more attractive from the point of view of relevance, but may also be long past.

Whilst d) and e) will normally produce the same result, where this is not the case e) must be discarded in normal cases,⁵¹ as it might involve retrospective alterations of the law to take account of local circumstances. Turning to option d), whilst it has the advantage of flexibility to take into account modern circumstances, it may be criticised as leading to uncertainty, going further than advances allowed by common law, in that legislation previously rejected as unsuitable to local circumstances could later be revived by the courts. Although the matter has not been expressly debated within the region, dates d) and e) appear to have been assumed to be correct in several cases. For example, in *Freddy Harrisen v John Patrick Holloway*⁵² the Court of Appeal of Vanuatu looked at the current circumstances surrounding the police force. In the New Zealand case of *Ruddick v Weathered*,⁵³ Counsel's implication that date b) was correct was rejected in favour of dates d) and e), between which there was no significant difference on the facts. Date d) also finds support in the Privy Council decision in *Cooper v Stuart*.⁵⁴ On the basis of relevance, and with support from the preponderance of authority, it is contended that dates d) and e) are correct where their application produces the same result, and where it does not, date d) must be used.

Are substantive changes allowed?

In some countries, such as Solomon Islands, it is clearly specified that the only changes that can be made are technical, or non-substantive changes.⁵⁵ It is also stated to be the case in Tonga. Further, the Laws of Tuvalu Act has been interpreted as authorising only changes of a formal and non-substantial nature.⁵⁶

It is arguable that if substantive changes are required, then the Act in question is not a statute of general application (as the term is defined in *R v Ngena*⁵⁷), and thus will fail at that hurdle. This approach renders academic the question of whether such changes can be made by a court, and renders unnecessary an extension of the normal ambit of judicial lawmaking, which many consider objectionable.⁵⁸

How are local circumstances proved, and who bears the burden of proof?

This question has already been examined in relation to proof of general application, and the same arguments would appear to apply.

How are changes to be physically recorded?

The provisions authorising modification in general terms allow the courts or, in some cases, the officer applying the legislation to interpret the legislation as if the changes had been made. However, they do not specify who is physically to make the changes to the text. This problem was remedied in Kiribati and Tuvalu, where sections 8 to 10 of both the Laws of Kiribati Act 1989 and the Laws of Tuvalu Act 1987 authorise the Attorney-General to amend applied laws to take account of local circumstances, and to lay a transcription of the adaptation before the legislature. Unless it is rejected, it then becomes part of the law of the country.

The introduction of such legislation in other countries would avoid the problem of amendments to legislation not being recorded outside the written judgment. Given that judgments are not reported in many countries of the region, present practice means that the changes are not publicised, which is obviously a serious criticism.

Where do statutes rank in relation to other sources of law?

Apart from saving imperial legislation, constituent laws also usually make some reference to how such law ranks in relation to other types of law. In all cases it is clear that imperial legislation is inferior to the Constitution. Even if there is nothing specific to say so, English law will be void if it is contrary to the Constitution, as the latter is expressed in all countries of the region to be the supreme law. It is a logical consequence of this that any law that is inconsistent is abrogated. It is also inferior to local legislation.⁵⁹ One illustration of this is provided by *Kingdom of Tonga v Save*⁶⁰ where it was held that the Limitation Act 1980 (UK) did not apply to extend the time limit for allowing a claim under the Fatal Accidents Act of Tonga, as section 6 of the Tonga Act expressly limited such claims to twelve months after the

death in question. Another example is provided by *R v Ngena*, which is referred to above. In that case it was held that the Homicide Act 1957(UK) could not be applied to reduce the offence of murder to manslaughter in a suicide pact, as it was contrary to the Penal Code.⁶¹ On the other hand, imperial legislation is superior to common law and equity.⁶²

The position regarding customary law is more difficult, and this article does not purport to deal with this in detail. However, an example from one jurisdiction should serve to illustrate the type of problem that has arisen. In Solomon Islands the Constitution makes it clear that customary law is subject to the Constitution and 'an Act of Parliament'. What is not clear is whether the term 'Act of Parliament' includes United Kingdom Acts. Taking the phrase in the context of schedule 3 as a whole, it would appear that it does not. Paragraphs 1 and 2(2) of the schedule refer specifically to 'Act(s) of the Parliament of the United Kingdom', to distinguish them from the term 'Act of Parliament', meaning Acts of the local legislature. Further, section 144 of the Constitution defines 'Parliament' to mean the National Parliament of Solomon Islands established by the Constitution, 'unless the context otherwise requires'.

The contrary argument is founded on the *expressio unius est exclusio alterius* principle.⁶³ Given that the limitations on United Kingdom Acts are specifically dealt with in paragraph 1 of schedule 3, which states that they are subject to the 'Constitution and to any Act of Parliament', it could be implied that imperial legislation is not subject to any further fetters. In practice, this approach is more likely to be taken.

The matter was considered in the case of *K v T and Ku*,⁶⁴ where the Principal Magistrate upheld the contention that the term 'Acts of Parliament', when used in Schedule 3, refers only to Acts passed by the Solomon Islands parliament. However, he did not conclude that customary law was consequently superior to United Kingdom Acts, but rather, he appears to have been of the opinion that they were both part of the law, and it was for the courts to decide which should be applied. In that case the Guardianship of Infants Act 1886 was followed, as opposed to the customary law on point, which in any event was unclear.

Leaving such important issues to the courts' discretion obviously leaves uncertainty in the law, and leaves parties with no alternative other than litigation, to determine disputes where customary law renders a different result from English legislation.

Conclusion

In *Commonwealth and Colonial Law*, Sir Kenneth Roberts-Wray follows up his criticism of the phrase ‘statutes of general application’ by saying:

But it has been in use for many decades, it has been the subject of judicial interpretation, it does not appear to have given the Courts serious trouble, and it has much the same effect as the common law rule [that introduced statutes are subject to implied exception for rules inapplicable to the local circumstances]. So a change of formula might do more harm than good. (at 545)

However, he later observes that ‘The qualifications, referable to local circumstances, subject to which English law is applied generally, leave a wide field for litigation’ (at 547).

Roberts-Wray goes on to point out that the uncertainties have sometimes been eliminated or restricted by local legislation. The clear intention of the countries of the region on independence was that new laws would be made locally. Imperial laws were saved only as a transitional step, to avoid a vacuum, whilst the new parliaments had the chance to enact laws suited to local circumstances. This is no doubt why a cut-off date was inserted, after which legislation passed overseas was not part of the law. However, whilst local legislation is gradually replacing English law, in most cases this is a slow process. Further, cut-off dates mean that advantage cannot be taken automatically of English legislative reforms in the interim. Thus one encounters outdated and inappropriate laws, such as the Matrimonial Causes Act 1950, applying to expatriates and indigenous people married to expatriates in Solomon Islands.

The 1995 reference to the Law Reform Commission of Solomon Islands, requesting a report on the Acts applying and the need for modernisation, referred to above, is a welcome sign of action. However, the Commission’s *1996 Annual Report* reveals that no work has yet been done on this, and lists ‘lack of research officers’ as the reason for the delay. The problems are more fully explained in the paragraph of the report explaining the Commission’s constraints:

The commission does have fundamental constraints. Funding research staff and research facilities are the major constraints. They can be overcome if the Government is determined to make law reform work. The other constraints are cultural and geographical in nature. Solomon Islands is subsistence agriculture based. Daily life revolves around families, land, sea, and religion. The basic incidents of life are derived from our relationships with these factors. The transition to cash economy and the incidents of modern life have taxed time, attention, energy and have become a preoccupation of everyone who strives to attain the good things in life. People do not have the time to talk about law reform. It is too abstract and technical. They tend to have this attitude because there are already local customs to regulate their daily lives. Whiteman law is not their business. Let the enlightened ones deal with what is wrong with the law. Population is also scattered over many islands. Scattered communities with bad communication links can be difficult for law reform work. They cannot easily be reached. If efforts however are made to reach them, they are expensive business. Research officers would largely be on their own. The pool of lawyers in town with whom one can consult or who can assist in law reform work is negligible. It is a vicious circle for small countries like Solomon Islands. It is almost a luxury to engage in law reform. (at 10, 11)

Given the common problems and the lack of resources available to any one country, perhaps a regional approach to solving the problems highlighted would have merit. The starting point suggested by the Solomon Islands reference, that is the identification of Acts in force, would obviously involve some individual consideration, but there would also be likely to be a considerable overlap, particularly in the groupings referred to above. Once the identification process was completed, or even simultaneously, the task of regional reform could be carried out. Again, local circumstances would, of course, have to be taken into account, including different customs and cultures. However, the supersession of outdated English laws by regional codes, covering areas where there are common values, would have the advantage, not only of expediting a long and expensive procedure, but also of introducing uniformity within the region for the first time.

Notes

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1 For details of the former status of the countries of the region see R Crocombe *The South Pacific* (5th ed) (1989) 231 onwards.

2 See, for example, paragraph (a) of the declaration in the Preamble to the Constitution of Solomon Islands, scheduled to the Solomon Islands Independence Order 1978, SI 1978/783 (UK).

3 See, for example, section 76 and schedule 3, Constitution of Solomon Islands 1978.

4 Except in Tonga, where no cut-off date was specified, Civil Law Act 1966 (Tonga), section 4.

5 Cf. the examples of introduced law that has become regarded as 'traditional', in Powles & Pulea (eds) *Pacific Courts and Legal Systems* (1988)7.

6 The member countries of the University of the South Pacific are Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa (formerly Western Samoa), Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu. This article does not deal with the position in Marshall Islands, where different factors apply.

7 Fiji Independence Order 1970 (UK).

8 This decree was made by the Head of the Military Government of Fiji.

9 The Laws of Kiribati Revised 1977 listed six specifically applied British Acts and fifteen pieces of subsidiary legislation in force.

10 A project for the 'patriation' of applied laws began in 1991.

11 Section 20, 1893.

12 Note to Reprint of Statutes Act 1972 lists Bankruptcy Act 1908, Companies Act 1955, Property Law Act 1952, Samoa Act 1921, Estates and Gift Duties Act 1955. The latter has since been repealed by the Estate and Gift Duties Act 1978 (WS).

13 See the Alphabetical List of Notices, Orders, Regulations in Western Samoa Statutes Reprint 1977.

14 Samoa Act 1921.

15 Reprint of Statutes Act 1972, section 8.

16 Sections 621 to 641.

17 Section 4, which repeals the pre-existing 'saving' sections (4A and 5), and substitutes a new section 4A and 4B.

18 Inserted by section 3, Tokelau Amendment Act 1969.

- 19 There is no official statement as to how many British Acts of Parliament fall within this category.
- 20 The Reprint of the Tokelau Islands Act 1948 (NZ) notes 44 Acts expressly applying.
- 21 Niue: Constitution, Statutes and Subsidiary Legislation (1990) lists 243 such Acts in force in 1990.
- 22 Niue: Constitution, Statutes and Subsidiary Legislation (1990) lists only one such Act, being the Citizenship Act 1977 (NZ).
- 23 As amended by the Custom and Adopted Laws (Amendment) Act 1971.
- 24 *Banga v Waiwo*, unreported, Supreme Court, Vanuatu, AC1/96, 17/6/96 at 9.
- 25 K Roberts-Wray *Commonwealth and Colonial Law* (1966) at 545. All subsequent references to this work are made in-text.
- 26 Cook Islands Act 1915, sections 618 and 622–641.
- 27 (1932)3 FijiLR 142
- 28 (1980–88)1 VLR 147.
- 29 [1983]SILR 1.
- 30 Unreported, High Court, Tuvalu, No.4/1989.
- 31 See n.28 above.
- 32 (1980–88)1 VLR 416.
- 33 [1988/9]SILR 63.
- 34 [1988/9]SILR 78 at 97.
- 35 *Buchanan v Wilikai* [1982] SILR 123.
- 36 (1980–88)1 VLR 293.
- 37 (1962)9 FijiLR 152.
- 38 (1905)2 CLR 345.
- 39 (1917) 3 WWR 1113 (Saskatchewan).
- 40 [1898] AC 679.
- 41 (1862)21 UCQB 352.
- 42 *Sheppard v Sheppard* (1908) 13 BCR 486; *R v Hall* [1941] 2 WWR 245 (both British Columbia).
- 43 (1980–88)1VLR 340.
- 44 *1 Halsbury's Laws of England* (4th ed) para 26.
- 45 See n.30 above.
- 46 Sections 622–640A.
- 47 LN46A/1988; (No 2) Order LN88/1988.
- 48 (1905) 2 CLR 345 at 356.
- 49 (1882) NZLR 1 SC 262 at 264.

50 [1964]NZLR 161 at 171,179.

51 See Roberts-Wray *op.cit.* at 546, for an explanation of the exceptional cases.

52 See n.28 above.

53 [1889] 7 NZLR 491 at 493.

54 (1889) 14 App Cas 286.

55 Paragraph 1, schedule 3 to the Constitution authorises changes ‘to such formal and non-substantive matters, as may be necessary . . .’

56 *In the Matter of the Constitution of Tuvalu and In the Matter of the Laws of Tuvalu Act 1987*, unreported, High Court, Tuvalu, No 4/1989.

57 See n.31 above.

58 See PW Young ‘Courts Making Law’ (1997) 71 ALJR 324, for a brief summary of some of the relevant issues in an Australian context.

59 See for example paragraph 1, schedule 3, Constitution of Solomon Islands.

60 Unreported, Court of Appeal, Tonga, 626/1993.

61 Cap 5.

62 *Canadian Pacific Railway v Roy* [1902] AC 220.

63 For an explanation of this principle see F Bennion, *Statutory Interpretation* (2nd ed) (1992) 873.

64 [1985/6]SILR 49. _____