FROM HORIZONTAL AND VERTICAL TO LATERAL: EXTENDING THE EFFECT OF HUMAN RIGHTS IN POST COLONIAL LEGAL SYSTEMS OF THE SOUTH PACIFIC

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I. INTRODUCTION

A key issue in countries where human rights charters have been constitutionally enshrined is the extent to which those rights apply. Intertwined with this is the question, crucial to the rational evolution of the interrelationship of public international and private law, of what role should be played by human rights law in governing the relationships between private individuals or groups. There are two directly opposing views on this, discernable from case law and academic literature. The first embraces what has become known as the 'vertical' approach, whereby constitutionally guaranteed rights apply only to protect the individual against violation of those rights by the State or by public bodies or officers acting under State authority.[1] The second is known as the 'horizontal' approach, whereby human rights provisions may be enforced against individuals.[2] Proponents of the vertical approach argue that human rights are an inappropriate legal source for regulation and restriction in the private sphere (a view espoused by classical liberalists); and that human rights concepts cannot be properly translated into the field of private law. This approach is premised on a rigid distinction between the public and the private sphere and presupposes that the role of fundamental rights is to preserve the integrity of the private sphere against state intrusion and that the indeterminate nature of many rights will undermine legal certainty in private transactions and encourage judicial law making. On the other hand, proponents of the 'horizontal effect' argue that the historical origins of human rights are

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[1] William P Marshall, 'Diluting Constitutional Rights: Rethinking "Rethinking State Action"' 80(3) Northwestern University Law Review 558.

[2] Erwin Chemerinsky, 'Rethinking State Action' 80(3) Northwestern University Law Review 503; Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] Public Law 423.

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irrelevant and that as such rights involve fundamental norms, they should apply across the whole legal system.[3]

The relative merits of the two approaches have been the subject of fierce debate in Europe,[4] South Africa,[5] Canada,[6] and the United States.[7] The debate has been particularly prominent in the United Kingdom since the appearance of the Human Rights Act 1998 (UK).[8] It is also a consideration for countries seeking to join the European Union, where implementation of human rights instruments is a relevant factor.[9] In the South Pacific region, the enactment of

[3] For further discussion of the theoretical bases for each approach see, eg, Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (2001) 1; Greg Taylor, 'the Horizontal Effect of Human Rights Provisions, the German Model and its Applicability to Common Law Jurisdictions' (2002) 13 KCLJ 187,191; Katherine E Swinton, 'Application of the Canadian Charter of Rights and Freedoms' in Justice Walter Tarnopolsky and Gerald A Beaudoin, *The Canadian Charter of Rights and Freedoms: A Commentary* (Toronto: Carswell, 1982) 44, quoted in Butler (n 6) 1; Woolman and Davis (n 5) (South Africa) O'Cinneide, 'Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights' (2003) 4 Hibernian Law Journal 77 and Siobhan Leonard, 'The European Convention on Human Rights: A New Era for Human Rights Protection in Europe?' in Angela Hegarty and Siobhan Leonard (eds), *Human Rights: An Agenda for the 21st Century* (Cavendish Publishing Ltd, London, 1999) (Ireland); Slattery, below n 6 (Canada); Peter W Hogg, *Constitutional Law of Canada* (2nd edn, Carswell, 1985) 677 in Butler (n 7).

[4] See, eg Colm O'Cinneide (n 3); Andrew Clapham, 'Opinion: The Privatisation of Human Rights' [1995] European Human Rights Law Review 20.

[5] See, eg Johan Van der Walt, 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation Between Common-Law and Constitutional Jurisprudence' (2001) 17(3) South African Journal on Human Rights 341; Stuart Woolman and Dennis Davis, 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights Under the Interim and the Final Constitutions' (1996) South African Journal on Human Rights 361, discussing *Du Plessis and Others v De Klerk* (1996) 3 SA 850.

[6] See, eg Brian Slattery, 'The Charter of Rights and Freedoms—Does it Bind Private Persons?' (1985) 63 Canadian Bar Review 148; Erwin Chemerinsky, 'Rethinking State Action' (1985) 80(3) Northwestern University Law Review 503; William P Marshall, 'Diluting Constitutional Rights: Rethinking "Rethinking State Action"' (1985) 80(3) Northwestern University Law Review 558; David Dyzenhaus, 'The New Positivists' (1989) 39 University of Toronto Law Journal 361. See also *Manning v Hill* (1995) 126 DLR (4th) 129*; Retail, Wholesale & Department Store Union, Local 580 et al v Dolphin Delivery Ltd* (1986) 33 DLR (4th) 174.

[7] See, eg Andrew S Butler, 'Constitutional Rights in Private Litigation: A Critique and Comparative Analysis' (1993) 22 Anglo-American Law Review 1.

[8] Deryck Beyleveld and Shaun D Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) 118 Law Quarterly Review 623; Sir William Wade, 'Horizons of Horizontality' [2000]116 LQR 217; Dawn Oliver, *The Human Rights Act and the Public Law/Private Law Divide* [2000] EHRLR 343; Tom Raphael, *The Problem of Horizontal Effect* [2000] EHRLR 393; Gavin Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62(6) Modern Law Review 824–849; Hunt (n 2). See also O'Cinneide (n 3) 102–107.

[9] The Declaration of the European Union Council, Copenhagan, June 1993, contains the 'Copenhagen political criteria', the fulfillment of which is seen as a requirement for EU membership. This was a major issue during Turkey's campaign to join the EU, as the country's inability to conform with those criteria, particularly on matters such as restrictions on freedom of expression and association, torture and state violence, and the Cyprus conflict, was a major sticking point in Turkish–EU relations prior to the governmental reforms that began in Turkey in 1999: Thomas Diez and Bahar Rumelili, 'Open the Door: Turkey and the European Union' (2004) 60 (8/9) The World Today 33.

New Zealand Bill of Rights Act 1990 has stimulated debate about the extent of its reach.[10] However, in the small island states of the South Pacific, where human rights charters were embodied in constitutions at independence, there has been little discussion of this issue, despite its particular relevance to the wider debate on the suitability of human rights agendas developed in the West to newly emerging nations.[11]

The horizontal and vertical approaches represent theoretical extremes, at the opposite ends of the spectrum of enforceability. In practice, there is a range of positions between these extremes; the rigid vertical or horizontal approaches are rarely applied.[12] Murray Hunt, in his seminal 1998 article, describes a 'theoretical spectrum', which can be used to compare the application of human rights internationally.[13] He describes four identifiable positions from the experience of several jurisdictions. In between the two extremes, referred to by Hunt as the vertical effect[14] and the 'direct horizontal effect,'[15] lies the 'indirect horizontal effect'[16] or 'intermediate position'.[17] This does not go as far as recognizing the right of individuals to take action against other private individuals based on breach of human rights provisions, but allows courts to take into account the values contained in those provisions

[10] Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 102; Andrew Geddis, 'The Horizontal Effects of the New Zealand Bill of Rights Act, as applied in *Hosking v Runting'* [2004] New Zealand Law Review 681; Claire Charters, 'Maori, Beware the Bill of Rights Act!' (2003) New Zealand Law Journal 401–403.

[11] An example of the failure to devise regionally appropriate rights is illustrated by the fact that no regional constitution confers a right to recognition and application of customary law.

[12] One reason for this is the lack of a clear distinction between the public and private spheres, which detracts from the arguments in favour of a purely vertical effect.

[13] Hunt (n 2).

[14] The United States' position on the application of human rights is closest to the vertical approach. The US requires a claimant to establish that there has been 'state action' for the bill of rights protections to apply. Hong Kong also follows this approach: Hunt (n 7) 427; *Tam Hing-yee v Wu Tai-wai* [1992] 1 HKLR 185. In 1997 the position was changed by the *Bill of Rights (Amendment) Ordinance 1997* which stated:

> (3) It is hereby declared to be the intention of the legislature that the provisions of this Ordinance, including the guarantees contained in the Bill of Rights, apply to all legislation, whether that legislation affects legal relations between the Government, public authorities and private persons, or whether it affects only relations between private persons.

However, the 1997 Act was repealed before coming into force by the Hong Kong Bill of Rights (Amendment) Ordinance 1998, thus restoring the status quo. The Court of Appeal has since held that, since 1997, it is no longer bound by *Tam Hing-yee v Wu Tai-wai* (n 14).

[15] Ireland, with its developing body of *sui generis* constitutional torts, lies at the other end of the spectrum. Here, one private party can bring a cause of action against another private party based on their constitutional rights: Hunt (n 2) 428–429; T Kerr and T Cooney, 'Constitutional Aspects of Irish Tort Law' (1981) 3 Dublin University Law Journal 1.

[16] Hunt (n 2) 431.

[17] *Douglas v Hello (No 1)* [2001] QB 967, 1002 per Sedley LJ. This approach was followed by Baroness Hale in *Campbell v MGN Ltd* [2004] UKHL 22 at [132], but the other members of the House—there and in other cases—seem to be wholly ignorant of such an argument.

to guide it in exercising its inherent jurisdiction.[18] In this way, the common law will be incrementally modified or extended to comply with those values.[19] The fourth position lies, 'between the indirect and direct horizontal effect' and builds on the phrase, 'application to all law'. This approach holds that all law is subject to fundamental rights, giving concrete expression to the idea that the state is behind all law including that regulating private relationships without unduly interfering with private relations by conferring a new cause of action against private parties. Private parties' relationships will remain undisturbed until they become directly regulated by the law (eg involved in litigation or arrested), at which point they have lost their private nature anyway. At this stage, the state, as lawmaker, is bound to act in a way which upholds and protects the rights entrenched in the constitution.[20]

Hunt's four positions are a useful tool for analysis, but it should be borne in mind that within these positions there are more nuanced approaches. For example, in the United States, where the position is probably the closest to the vertical approach, a claimant must establish a 'State action' to have standing to make a constitutional application.[21] However, at least three ways of extending the concept of 'State action' have been devised by the courts to allow them to grant relief against private individuals where the State is in some way responsible for their acts.[22] In the United Kingdom, five possible forms of horizontal application, falling short of direct horizontal effect have been identified.[23]

The applicable position is obviously directed by any textual indicators. However, where these exist, like other constitutional provisions, they are open to quite different interpretations.[24] This leaves domestic courts to decide

[18] There may be some analogy with equitable estoppel, which in some countries, including the United Kingdom, may be used as a 'shield but not a sword'.

[19] This is the approach that has been taken to Canada's Charter of Rights and Freedoms and its application represents a hybrid position which is ostensibly vertical—requiring government action for rights to apply directly—but does permit a degree of horizontal application in private litigation. However, the charter rights do not affect the common law, although courts have allowed its values to guide the court in its 'inherent jurisdiction . . . to modify or extend the operation of the common law in order to comply with prevailing social conditions and values': *Manning v Hill* (1995) 126 DLR (4th) 129, 156: in Hunt, above n 2, 431; Jane Wright, *Tort Law and Human Rights* (Hart, Oxford, 2001): Hart 23. The South African Constitutional Court has arrived at a similar position in *De Plessis v De Klerk* (1996) BCLR 658. Hunt (n 2) 433.

[20] See the dissenting judgment of Kriegler J in *Du Plessis v De Klerk*; Hunt (n 2) 434–435.

[21] For further discussion and examples of government actions see: Andrew S Butler, 'Constitutional Rights in Private Litigation: A Critique and Comparative Analysis' (1991) Anglo-American Law Review 1, 2–5.

[22] John Nowak and Ronald Rotunda, *Constitutional Law* (West Group, St Paul, 2000) 372–373.

[23] Ian Leigh, 'Horizontal Rights, the Human Rights Act and privacy: Lessons from the Commonwealth?' 48 International and Comparative law Quarterly 57, 75–83.

[24] On methods of constitutional interpretation in the South Pacific see, eg *Re the Constitution, Attorney General v Olomalu* [1980–93] WSLR 41; *Henry v Attorney-General* [1985] LRC (Const) 1149; *Reference by the Queen's Representative* [1985] LRC (Const) 56; *Reference by Western Highlands Provincial Executive* (unreported, Supreme Court of Justice, Papua New

where on the spectrum between vertical and direct horizontal application their country lies. In South Pacific island countries, courts have taken an ad hoc approach to this question, often making a decision without reference to the relevant theories or considering the distinctive features of the legal and social systems within which rights operate, which increase the significance of the question and demand a regionally specific solution.

This article considers the vertical versus horizontal debate in the context of small island countries of the South Pacific, and particularly those countries where there has been friction between human rights and other laws and/or where there has been recent conflict between the State and individuals or sections of civil society. Countries in the former category include Kiribati, Samoa and Tuvalu. The latter includes Fiji Islands. Papua New Guinea, Solomon Islands, Tonga and Vanuatu all fall into both categories. References to 'region' or 'regional' in this article are references to the area into which these countries fall. The purpose of positioning the debate in this context is not only to establish where those countries now stand with regard to this aspect of applicability, but also to illustrate the necessity of taking into account locally and or culturally specific factors when establishing a human rights regime in any part of the world. To this extent, the article challenges the universality of human rights and supports a culturally relative approach.[25]

This article examines the current position regarding applicability of human rights in the countries referred to above. It does this by analysing the textual indicators in the relevant constitutions and by reviewing decisions of regional courts in cases where they have been called on to apply human rights provisions horizontally. The facts of these cases are briefly described to illustrate the very different context in which rights operate. Persuasive decisions of overseas courts are also considered. Drawing on these and other regional cases and on legal and anthropological sources, the article identifies some of the unique factors in the legal and social systems of South Pacific Island States and seeks to demonstrate how those factors cast a different light on the arguments that have been used to support a horizontal or vertical bias in other parts of the world. The article draws on transfer theory and considers the doctrine of cultural relativity. The article then considers some of the options for accommodating the distinctive context of rights in the South Pacific including a new, 'lateral' approach.

Guinea, Amet CJ, Kapi DCJ, Los, Brown and Sawong JJ, 20 September 1995), referring to *Minister of Home Affairs v Fisher* [1980] AC 319 and *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231, 236.

[25] See further on the universality/cultural relativity debate Shashi Tharoor, 'Are Human Rights Universal?' (1999/2000) 16(4) *World Policy Journal* 1; Diana Ayton-Shenker, *The Challenge of Human Rights and Cultural Diversity* (1995) United Nations <http://www.un.org/rights/dpi1627e.htm> at 16 December 2005.

The horizontal versus vertical debate is of particular importance in post-colonial societies. Not only is it a fundamental consideration in negotiating the relationship between, and future development of, human rights and private law, as it is in other parts of the world, but it is also relevant to the debate as to the suitability of human rights agendas developed in the West to newly emerging nations. The debate is even more relevant in the South-West Pacific, where Independence Constitutions are being reappraised in the light of weaknesses exposed by recent conflict.[26] Coups in Fiji Islands and Solomon Islands, riots in Tonga, disorder and political skirmishing in Vanuatu, and the Bougainville crisis have all highlighted the fragility of the rule of law and dissatisfaction with introduced values embodied in regional constitutions.[27]

Regional constitutions are inconsistent with each other in the provision made for the application of the bills of rights they contain. Most are silent as to whether the bills of rights they contain are applicable horizontally or vertically. Only three countries specifically address this in the constitution. These are Fiji Islands, where rights are stated to bind the legislature, executive and judiciary only, and Papua New Guinea and Tuvalu where rights are expressed to be enforceable against individuals. In Solomon Islands, although there are currently no textual indicators, the draft Federal Constitution of Solomon Island Bill provides for a degree of horizontal application. This section looks first at these textual indicators and how they have been interpreted by regional courts. It then proceeds to examine the judicial approach in countries where no constitutional guidance has been given. These cases serve not only to provide information on the current application of human rights in the region, but they also provide some interesting examples of the distinctive cultural factors discussed later in the article.

A. Textual Indicators

1. Fiji Islands

Section 21(1) of the Constitution of Fiji Islands provides that its bill of rights chapter binds, '(a) the legislative, executive and judicial branches of government at all central, divisional and local [levels]; and (b) all persons performing

[26] See, eg Solomon Islands, *Reform of Solomon Islands Constitution*, White Paper (November 2005). From 26 to 28 August, 2005 a conference on constitutional change in the region entitled, 'Constitutional Renewal in the Pacific Islands' was held at the University of the South Pacific's Emalus Campus, Port Vila, Vanuatu. Some of the papers are available from Pacific Institute of Advanced Studies in Development and Governance, The University of the South Pacific, Laucala Campus, Suva, Fiji Islands.

[27] See further, Jennifer Corrin Care, 'Off the Peg or Made to Measure: Is the Westminster System of Government Appropriate in Solomon Islands?', in I Molloy (ed), *The Eye of the Cyclone* (2004, Pacific Islands Political Science Association and University of the Sunshine Coast, Sippy Downs, Qld, 2004) 156–170.

the functions of any public office'. Prima facie, this sub-section restricts the application of the bill of rights to State actions. This interpretation is supported by the Report of the Fiji Constitution Review Commission (the 'Reeves Report'), on which the Constitution of the Republic of Fiji islands 1997 is based.[28] It also finds some support from the approach of the Fiji Human Rights Commission, which is an independent statutory body established by the 1997 Constitution, to its investigative functions.[29] The Commission is empowered to investigate allegations of human rights violations and to investigate unfair discrimination in employment. However, the Commission's web site states that the complaints section does not have jurisdiction over, and therefore cannot investigate private disputes, domestic issues, land issues, landlord and tenant disputes.[30]

However, on further analysis, the reference to 'judicial branches' in s 21(1)(a) may give human rights a wider application in Fiji.[31] It has been argued, in relation to similar legislation in other countries, that the reference to the judiciary is significant and that the effect of making courts expressly bound is to give a greater degree of horizontal effect to fundamental rights.[32] Such interpretation would not necessarily be contrary to the intention expressed in the *Reeves Report*, as although the Commission stated that the bill of rights should not apply to private persons,[33] it went on to say that, '[o]n the other hand, nothing should be put in the Constitution to exclude its interpretation through decisions of the courts, in ways that require private persons, as well as the state, to respect a particular right.'[34]

In New Zealand, where s 3(a) of the Bill of Rights Act 1990 is similar (and may have been the model s 21(1)(a)),[35] it has been held to impose an obligation to exercise judicial discretion in accordance with the bill of rights.[36] The New Zealand courts have been prepared to acknowledge that the

[28] *Towards a United Future*, 1996, Parliamentary Paper 34/96, Suva: Government Printer, [7.14]. The Commission considered that 'the application of the Bill of Rights should not be expressly enlarged to require, permit or encourage its application to private persons' in contexts other than discrimination in giving access to public facilities, where it already applied to privately owned premises.

[29] The Commission is responsible for playing a leading role in the protection and promotion of human rights for the people of Fiji and in helping build and strengthen a human rights culture in Fiji: More specifically it is mandated to educate the public about human rights, to make recommendations to the government about matters affecting human rights and to perform such other functions as are conferred on it by a law made in Parliament: See further the Fiji Human Rights Commission's web site: <http://www.humanrights.org.fj/>.

[30] Fiji Human Right Commission, *Jurisdiction*, http://www.humanrights.org.fj/protecting_human_rights/jurisdiction.html >accessed on 21 March 2007. These limitations are not expressly stated in the *Fiji Human Rights Commission Act 1999.*

[31] See Hunt (n 2) 439 and *Du Plessis v De Klerk* (1996) (3) SA 850, 877–878, per Kentridge AJ.

[32] Hunt (n 2) 439; *Du Plessis v De Klerk* (1996) (3) SA 850, 877–878, per Kentridge AJ.

[33] Above (n 53).

[34] Above (n 53) [7.14].

[35] The *Reeves Report* (n 28) is based was compiled by a Commission chaired by a New Zealander, Sir Paul Reeves.

[36] *Police v O'Connor* [1992] 1 NZLR 87, 97–99; *R v Shaw* [1991] 8 CRNZ 511.

reference to the judiciary allows a reinterpretation of the common law, although they have not gone so far as to suggest that it authorises direct horizontal application.[37] Rather, courts in New Zealand, and also in South Africa, which has a similar provision,[38] seem to have taken the approach that this form of wording imports indirect horizontality, requiring modification or development of the common law to achieve compatibility with human rights norms.[39] In this indirect manner, these norms are to be applied to all existing law, but in the absence of direct horizontal effect, no new causes of action based solely on human rights can be created in private law. A similar clause in the Human Rights Act 1998 (UK) has been described as giving the Act 'strong indirect horizontal effect' and this view has largely been accepted by the UK courts.[40]

The courts in Fiji Islands have not dealt expressly with the meaning of s 21(1)(a), but they appear to support the liberal interpretation of this paragraph. In *Prakash v Native Land Trust Board*,[41] the respondent was a State body, rather than an individual. However, it was stated that 'section 21 binds the legislative, executive and judicial branches of government at all levels central, divisional and local. The court understands this to mean that in exercising its judicial function it is obliged to apply the provisions of the Bill of Rights where relevant to all parties'. The court also stated that 'provisions conferring rights must be given a broad and purposive interpretation'.[42] Perhaps, more instructive is the case of *Pafco Employees Union v Pacific Fishing Company Limited*,[43] which involved non-State parties. In that case, the High Court held that it had jurisdiction to hear a trade dispute (notwithstanding that the Pacific Fishing Company argued that trade disputes should be heard by the Arbitration Tribunal, in accordance with the *Trade Disputes Act*, Cap 97) on the basis that s 41 of the Constitution conferred jurisdiction on the Court to hear matters where 'a person considers that any of the provisions of [the Bill of Rights] Chapter has been, or is likely to be contravened in relation to him or her'.[44] After hearing evidence in that case, the court made an order compelling the respondent to reemploy a number of dismissed employees in accordance with an earlier award of the Arbitration Tribunal.

[37] *Lange v Atkinson* [1997] 2 NZLR 22, 45–47; upheld by the Court of Appeal in *Lange v Atkinson* (1998) 4 BHRC 573.

[38] *Constitution of the Republic of South Africa 1996*, s 8(2).

[39] *Lange v Atkinson* [1997] 2 NZLR 22, 32, 45–47; *Du Plessis v De Klerk* (1996) (3) SA 850, 877–878, per Kentridge AJ.

[40] O'Cinneide (n 3) 104.

[41] (Unreported, High Court, Fiji, Madraiwiwi, J, 6 October 2000), accessible via www.paclii.org at [2000] FJHC 141.

[42] (Unreported, High Court, Fiji, Madraiwiwi, J, 6 October 2000), accessible via www.paclii.org at [2000] FJHC 141. This view is supported by *The Minister of Home Affairs v Fisher* [1980] AC 319.

[43] [2002] ICHRL 4; (2003) 4 CHRLD 6.

[44] The court was also influenced to act by the fact that the Constitution, s 33, deals with labour relations.

Section 21(1)(b) also extends the reach of human rights beyond the direct vertical approach. Persons 'performing the functions of any public office' will be bound, whether or not they are State officers. This paragraph leaves it to the courts to decide whether an action amounts to the function of a public office, but they have not yet been called on to interpret its meaning. In New Zealand, the Court of Appeal has interpreted a similar provision widely.[45] In the United States, the concept of 'state action', which is akin to public function, has been extended by the courts.[46] It should be noted that the Reeves Report specifically stated that '[t]he courts in the Fiji Islands should be free to take account of the court decisions in other countries with similar legal systems and values' as well as the 'evolving jurisprudence of United Nations bodies'.[47]

In addition to s 21(1), the Constitution of Fiji Islands contains another hurdle for human rights applications. Section 41(4) provides that the court may decline to exercise its powers if it is satisfied that there are other adequate means of redress available.[48] The rationale for this filtering provision has been said to be that the value of the constitutional remedy will be diminished if it is used as a general substitute for normal judicial review procedures.[49]

2. *Papua New Guinea and Tuvalu*

Papua New Guinea and Tuvalu have both expressly provided for direct horizontal application. Section 34 of the Constitution of Papua New Guinea, which governs the application of the 'Basic Rights' set out in Division 3, provides that each right applies 'between individuals as well as between governmental bodies and individuals' and 'to corporations and associations' except where the contrary intention appears in the Constitution. Section 12(1) of the Constitution of Tuvalu is couched in almost identical terms.[50]

In accordance with the clear mandate in s 34, courts in Papua New Guinea have enforced constitutional rights between individuals, as illustrated by the case of *Re Miriam Willingal*,[51] where it was found that a customary practice called 'head pay', which includes giving young women in marriage as part of a compensation payment, violated, *inter alia*, the constitutional right to freedom and equality of all citizens. Similarly, in *Public Prosecutor v Apava Keru; Public Prosecutor v Aia Moroi*,[52] the Supreme Court addressed the

[45] *R v H* [1994] 2 NZLR 143, 147–148.
[46] Above (n 22).
[47] Reeves Report (n 28) [7.14].
[48] See also; High Court (Constitutional Redress) Rules 1998 (Fiji). The requirements in the Rules may be waived: *Attorney-General of Fiji v Silatolu* (Unreported, Court of appeal, Fiji, Barker, Ward and Davies JJA, 6 March 2003), accessible via www.paclii.org: [2003] FJCA 12.
[49] *Harrikissoon v Attorney-General of Trinidad and Tobago* [1980] AC 265, 268; *Attorney-General of Fiji v Silatolu* (Unreported, Court of Appeal, Fiji, Barker, Ward and Davies JJA, 6 March 2003), accessible via www.paclii.org: [2003] FJCA 12.
[50] Section 12(1)(a).
[51] (1997) 2 CHRLD 57.
[52] [1985] PNGLR 78.

question of 'payback' killings,[53] and whether a killing in such circumstances could be reduced to manslaughter because of custom. The court considered that the custom of payback was contrary to the right to life contained in s 35 of the Constitution. Although these were criminal cases, with the State as the prosecuting party, they are relevant as the applicability of the rights provision was being considered as between individuals, that is, between the accused and the victims. However, despite the recognition that fundamental rights apply horizontally, courts in both countries have placed other restrictions on their application, which have resulted in the refusal to grant relief against individuals. In Papua New Guinea, the courts have demanded that claimants exhaust other remedies before seeking constitutional relief.[54] Further, the courts have required that the infringer be clearly identified.[55] In Tuvalu, whilst the Constitution makes it clear that rights apply horizontally, in a provision that is unique amongst South Pacific countries, it also provides that human rights may 'be exercised only . . . in acceptance of Tuvaluan values and culture, and with respect for them.[56] In a controversial judgment, the High Court, whilst appearing to accept the horizontal applicability of human rights, held that those rights were limited by reference to this qualification, which the Chief Justice held to be an 'overriding condition' for the exercise of some rights. In *Teonea v Pule o Kaupule and Nanumaga Falekaupule*,[57] the applicant, a church leader, had visited an outer island of Tuvalu to spread the Tuvalu Brethren Church faith. The respondents, a village leader and the *falekaupule* (village council), had passed a resolution that there should be no new religions on the island. However, some forty villagers attended meetings arranged by the applicant. During one of these meetings, the building was stoned and some of those who attended were injured. The applicant was advised to leave the island and did so. He then initiated proceedings claiming breach of his constitutional right to freedom of belief (s 23), expression (s 24), assembly and association (s 25), and freedom from discrimination (s 27). The Chief Justice refused to follow decisions from other countries[58] where

[53] 'Payback' is the word used in Melanesia to refer to the custom of avenging the death or injury to a relative by killing or maiming the perpetrator or one of his clan.

[54] *Brian Curran v the State; Minister for Foreign Affairs; Arnold Marsupial, Bernard Naracoopa and Lucas Wake, as Members of a Ministerial Committee of Review* [1994] PNGLR 230. While this case considers state actions, it seems likely that the court will require that parties to private law disputes also exhaust their remedies prior to claiming under the Constitution.

[55] *Human Rights Application of Michael Xysters Tataki* [1996] PNGLR 90.

[56] Section 11(2), Constitution of Tuvalu 1986. It is significant that Tuvalu's current constitution was drafted and enacted in Tuvalu to replace the Independence Constitution drafted by England as the outgoing colonial power, which had no equivalent provision regarding the status of customary law.

[57] (Unreported, High Court, Tuvalu, Ward CJ, 11 October 2005), accessible via www.paclii.org: [2005] TVHC 2.

[58] In particular, *Sefo v The Attorney-General and the Alii and Faipule of Saipipi* (Unreported, Supreme Court of Samoa, Wilson J, 12 July 2000), accessible via www.paclii.org: [2000] WSSC 18; *Lafaialii v Attorney General and the Alii & Faipule of Falealupo* (Unreported, Supreme Court of Samoa, Sapolu CJ, 24 April 2003), accessible via www.paclii.org: [2003] WSSC 8.

attempts to prevent the introduction of new religions had been held to breach constitutional rights, pointing out that 'our Constitution is different in that it is firmly founded on the desire of the legislature, as an expression of the wish of the people, to hold to their traditions even if to do so means that some individual rights may be curtailed or restricted.' He pointed out that the freedoms set out in sections 23, 24 and 25 were 'subject to' the protection of Tuvaluan values under section 29. Further, they were limited by other provisions of the Constitution, in particular, s 11, which is referred to below, and the Preamble, paras 3–7 and ss 9, 10, 13 and 29, safeguarding Tuvaluan values and culture. On this basis, His Lordship refused the orders sought. This judgment counters the argument that horizontal application of human rights would result in erosion of customary law. However, the judgment turns on the unique provisions of the Constitution of Tuvalu. A similar decision is precluded in Papua New Guinea by the Underlying Law Act 2000, which provides that customary law will not apply if it is contrary to basic rights contained in Part III.3 of the Constitution.[59] Neither does the decision in *Teonea v Pule o Kaupule and Nanumaga Falekaupule* accord with recent decisions in Samoa in cases based on similar facts, which are discussed below.[60]

3. *Solomon Islands*

Solomon Islands is currently considering the enactment of a new Constitution.[61] Should the draft Federal Constitution of Solomon Island Bill 2004 become law it would introduce textual indicators governing the application of rights. Clause 21(1)(a) states that the rights and freedoms 'bind the branches and levels of government'.[62] Although paragraph (a) does not specifically refer to the judiciary, it is susceptible to the same argument regarding its authorisation of indirect horizontal application as s 21(1)(a) of the Constitution of Fiji Islands.

However, in this case, such argument is to some extent academic, as paragraph (c) binds 'all other persons and bodies', thus allowing direct horizontal application of human rights. However, application to 'other persons and bodies' is limited 'to the extent that it is applicable taking into account the

[59] Section 4(2)(c).

[60] *Sefo v The Attorney-General and the Alii and Faipule of Saipipi* (Unreported, Supreme Court of Samoa, Wilson J, 12 July 2000), accessible via www.paclii.org: [2000] WSSC 18; *Lafaialii and Others v Attorney General and the Alii & Faipule of Falealupo* (Unreported, Supreme Court of Samoa, Sapolu CJ, 24 April 2003), accessible via www.paclii.org: [2003] WSSC 8. See also *Mauga and Others v Leituala* (Unreported, Court of Appeal of Samoa, Cooke, P, Casey and Bisson JJA, March 2005).

[61] See further, Solomon Islands, *Reform of Solomon Islands Constitution*, White Paper (November 2005).

[62] Federal Constitution of Solomon Islands Bill 2004, section 21(b) binds 'all persons performing the functions of any public authority or government office'.

nature of the right and the nature of the duty imposed by the right'.[63] This means that the extent of enforceability of particular rights will not be known until the courts have pronounced on this. Overseas precedents are unlikely to be helpful, given the important differences of context discussed later in this article.

B. Judicial Approaches in Countries without Textual Indicators

In other small island countries of the region there are no textual indicators. As there is no legislative guidance, applicability is a matter for the courts to decide.

1. Kiribati

The Constitution of Kiribati 1979 gives no guidance as to whether the rights it confers are to be applied against individuals as well as the State. However, the High Court of Kiribati has addressed this issue and it did so from the starting point referred to above, that is, that rights were designed to shield the individual from the power of the State. In *Teitinnang v Ariong*[64] the plaintiff had been prohibited from entering the village after he refused to pay a fine for selling pandanus thatches, which was not allowed under custom. The plaintiff's application for a declaration that the defendants had violated his right to freedom of movement under s 14 of the Constitution was dismissed on the basis that '[t]he duties imposed under the fundamental rights provisions of the Constitution were owed by the government to the governed. No such duty was owed by an individual to another individual'.[65] Although the constitutional application was denied, the court granted the accompanying application for an injunction on the basis that the defendants had committed the tort of unlawful interference with the exercise of the plaintiff's legal rights.

Section 3 provides that the provisions of the rights chapter are subject to the limitations stated in the relevant sections and that those limitations are designed not only to protect the public interest, but also 'to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others'. Although it might be argued that this provision suggests some degree of horizontal application, on the basis that it would not be necessary to limit the effect of guaranteed rights on individuals if they were not bound, such a suggestion misunderstands the issues. Even if only the State is bound, in certain circumstances rights of individuals will be limited in order to recognise the rights of others. Horizontal application

[63] Federal Constitution of Solomon Islands Bill 2004, section 21(c).
[64] [1987] LRC (Const) 517.
[65] ibid.

amounts to more than that; it may, depending on the nature of the right, impose binding obligations on individuals through the bill of rights.[66]

Although the Constitution does not provide guidance on whether rights apply horizontally, like Fiji's Constitution, it does provide that the court may decline to exercise its powers if it is satisfied that there are other adequate means of redress available,[67] and this could have formed an alternative ground for the decision in *Teitinnang v Ariong.*[68]

2. *Samoa*

The Constitution of Samoa 1962 does not expressly state whether the rights it confers are to be applied against individuals as well as the State. Section 4, which governs remedies and enforcement of rights says only that any person may apply to the Supreme Court by appropriate proceedings to enforce the rights conferred by the Constitution and that the Court has power to make orders 'as may be necessary and appropriate' to secure the enjoyment of those rights. However, there is one provision of note, which might be relied on to support the horizontal approach, which has been adopted by the courts, at least when human rights have been applied against *matai* (chiefs). Article 3 of Part II of the Constitution, which deals with 'fundamental rights', contains the following definition of 'State':[69]

> *In this Part, unless the context otherwise requires, 'the State' includes the Head of State, Cabinet, Parliament and all local and other authorities established under any law.*

As the authority of *matai* (chiefs) is endorsed by statute (*Village Fono Act 1990*)[70] in Samoa, they would appear to be 'local' or 'other authorities established under any law' and therefore to be within the definition of 'State' for the purposes of Part II of the Constitution. Accordingly, they would appear to be bound by the obligations contained in the bill of rights, even if such rights only apply vertically. The only flaw in this argument is that chiefs were not

[66] It should be noted that not all rights are matched by a corresponding duty. This depends on the nature of the right. For example, the right may be in the form of a liberty, which has no corresponding duty but only lack of a right, or an immunity, to which there is a correlative disability. See further the application of Hohfeld's analysis of private legal relations (WN Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning (1923)) to human rights in Ian Leigh, Horizontal Rights, the Human Rights Act and privacy: Lessons from the Commonwealth?' 48 International and Comparative law Quarterly 57, 60–61.

[67] Constitution of Kiribati 1979, proviso to s 17(2).

[68] *Teitinnang v Ariong* [1987] LRC (Const) 517.

[69] Constitution of Samoa 1962.

[70] The legislation affirms the customary authority of the Village Council and confers further powers on it, but it also allows for an appeal to the Land and Titles Court, which arguably restricts its powers. For further discussion of the flaws in this legislation see Unasa Va'a, 'Local Government in Samoa and the Search for Balance', in Elise Huffer and So'o A (eds), *Governance in Samoa* (Asia Pacific Press, 2000) 151, 159.

established as authorities by written law. Although there is some controversy as to the current status of chiefs and the legitimacy of some of the more recently created titles,[71] it is fairly clear that at least some chiefly authority pre-existed and was merely recognised by the legislation. However, even if this is correct, customary law is a formal source of law in Samoa, recognised by the Constitution,[72] so even if chiefs' authority emanates from customary law, it would still qualify within Art 3, as it includes 'authorities established under any law' within the definition of 'the State'.

Although applications against individuals have appeared most frequently in the form of challenges to the authority of the *Alii ma Faipule* (village council of chiefs), the courts in Samoa have not resorted to this argument to justify horizontal application. In fact they have not expressly discussed the matter, but have shown no hesitation in applying human rights provisions horizontally. Challenges to chiefly authority have taken place in two contexts. The first is customary punishment, where banishment orders expelling villagers from their homes have been imposed by village councils on villagers who have opposed their authority. Such orders have been challenged on the basis that they infringe the right to freedom of movement enshrined in Art 13.[73] The second context is religion, where individuals have sought to worship a different faith from that endorsed by the *Alii ma Faipule*. This has conflicted with the right to religion freedom in Art 11. In a number of cases, these two contexts have converged, as banishment has been the result of refusal to conform to the authorised religion. For example, in *Sefo v The Attorney-General and the Alii and Faipule of Saipipi*[74] the decision of the *Alii ma Faipule* to limit the number of churches in their village and to prohibit the plaintiffs from conducting bible classes was held to be a breach of Art 11 of the Constitution. Similarly, in *Lafaialii and Others v Attorney General and the Alii & Faipule of Falealupo*,[75] the Supreme Court held that the banishment of people from a village for conducting Sunday church services in contravention of orders by the *Alii ma Faipule* infringed Art 11.[76]

[71] See, eg Malama Meleisea, 'Government, Development and Leadership in Polynesia', in Elise Huffer and So'o A (eds), *Governance in Samoa* (Asia Pacific Press, 2000) 188, 198; Abdul Paliwala, 'Law and Order in the Village: the Village Courts' in David Weisbrot, Paliwala, A and Sawyer, A (eds), *Law and Social Change in Papua New Guinea* (Butterworths, Sydney, 1982) 191–218.

[72] *Constitution of Samoa 1962*, Art 111(1).

[73] *Ta'amale and Ta'amale Toelau v The Attorney-General* (Unreported, Court of Appeal of Samoa, Cooke, P, Casey and Bisson JJA, 18 August 1995, 31), accessible via www.paclii.org: [1995] WSCA 12; digested in [1996] 2 CHRLD 257; Jennifer Corrin Care 'A Green Stick or a Fresh Stick: Locating Customary Penalties in the Post-Colonial Era' (2006) 6(1) Oxford University Commonwealth Law Journal 27–60.

[74] (Unreported, Supreme Court of Samoa, Wilson J, 12 July 2000), accessible via www.paclii.org: [2000] WSSC 18.

[75] (Unreported, Supreme Court of Samoa, Sapolu CJ, 24 April 2003), accessible via www.paclii.org: [2003] WSSC 8.

[76] While, strictly speaking, this case was a review of a decision of the Land Titles Court, it considered the decisions of the Alii ma Faipule (on which the decision of the Land Titles Court was based) and held that they too were unconstitutional.

In *Tuivaiti v Faamalaga*,[77] the Supreme Court considered that freedom of religion encompassed the right not to practice any religion and held that banishment for failure to attend church was also in breach of s 11 of the Constitution. Where banishment orders have been imposed for reasons other than religious intolerance, the courts originally took the view that the Constitution had to be interpreted in the context of the history and social structure of Samoa and refused to interfere with the exercise of customary authority. In *Ta'amale and Ta'amale Toelau v The Attorney-General*,[78] for example, the appellants, a *matai* and his family, had been banished from the village for raising questions about other *matai* and their contributions to the village project. The Land and Titles Court upheld the banishment. The Court of Appeal referred to the declaration in the preamble to the Constitution, 'that Western Samoa should be an independent State based on Christian principles and Samoan Custom and traditions.' The Court accepted that banishment was a long established custom, which was seen as an important sanction, essential to the authority of the village council. It was also accepted that it was a penalty imposed in the interests of public order and therefore came within the proviso in Art 13(4), which exempted reasonable restrictions in the interests of, inter alia, public order, from the guaranteed protection. The court therefore dismissed the appeal.

However, in the more recent case of *Mauga v Leituala*[79] the Court of Appeal held that the custom of banishment contravened Article 13 of the Constitution, dealing with freedom of movement. The case arose after the banishment of the plaintiff and his family by the village *fono* (council) on the basis of his sons' bad behaviour towards the village pastor and his family. At first instance, Vaai J held that villa fonos (councils) were governed by the *Village Fono Act*[80] and that this did not confer any authority on them to impose a banishment order.[81] Further, whilst banishment might have been necessary as a preventive measure in earlier stages of Samoan society, this was no longer the case. The Court of Appeal appeared to agree and held that it was 'unthinkable that the legislature [in enacting the *Village Fono Act*] would have intended to endorse by silence as drastic a village power as banishment'.[82] According to this decision, the village *fono* is no longer entitled to

[77] [1980–93] WSLR 19.

[78] (Unreported, Court of Appeal of Samoa, Cooke, P, Casey and Bisson JJA, 18 August 1995), accessible via www.paclii.org: [1995] WSCA 12; digested in [1996] 2 CHRLD 257.

[79] (Unreported, Court of Appeal of Samoa, Cooke, P, Casey and Bisson JJA, March 2005), accessible in Leuluaialii Tasi Malifa, *Samoa's Democracy has Come of Age* (2005) Samoa Observer Online <http://www.samoaobserver.ws/news/opinions/op0305/2005op001.htm> at 29 August 2005.

[80] 1990.

[81] *Leituala v Mauga* [2004] WSSC 9 (13th August, 2004); *Mauga v Leituala* (March 2005) full judgment in Leuluaialii Tasi Malifa, *Samoa's Democracy has Come of Age* (2005) Samoa Observer Online <http://www.samoaobserver.ws/news/opinions/op0305/2005op001.htm> at 29 August 2005.

[82] Above n 79, 6.

make an order of banishment, but may only petition the Land and Titles Court to make such an order.

Although most applications that have come before the courts involve a challenge to traditional authority, they are not limited to such cases and the courts have been willing to apply rights provisions horizontally in cases between private individuals. For example, in *Wagner v Radke*,[83] the Supreme Court used human rights principles as contained in the Hague Convention on the Civil Aspects of International Child Abduction to deal with a case concerning the abduction of an 8-year-old boy by his father. In Samoa, the courts have not insisted that parties must exhaust other remedies prior to applying for constitutional relief. In fact, comments by Sapolu CJ at first instance in *Re the Constitution, Taamale v Attorney-General*[84] suggest that Constitutional remedies may be considered an alternative avenue, rather than a last resort.

3. *Solomon Islands*

Unlike the draft Federal Constitution of Solomon Islands Bill, discussed above, the Constitution of Solomon Islands 1978 contains no textual indicators. Section 18, which governs enforcement of protective provisions says only that any person whose rights have been or are likely to be contravened may apply to the High Court for redress and that the Court has power to make orders 'as it considers appropriate' to secure the enforcement of those rights.

In identical terms to the Constitution of Kiribati, s 3, provides that the provisions of the rights chapter are subject to the limitations stated in the relevant sections and that those limitations are designed not only to protect the public interest, but also 'to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others'. As discussed above, this does not necessarily support an argument for horizontal application, as even vertical application will limit the rights of individuals in certain circumstances.

The courts in Solomon Islands have given express consideration to the question of horizontal application. *Loumia v DPP*[85] is one of the few regional cases where counsel presented argument on the application of rights provisions. In that case, the defendant, from the remote *Kwaio*[86] region, admitted killing members of a rival customary group, but argued that he was only guilty of manslaughter, on the basis of provocation. At the time of the killing, the defendant had just seen one brother killed and the other seriously wounded in the same fight. It was argued that the defendant had been provoked and that he came within s 204 of the Penal Code (Cap 26), which reduced the offence of

[83] (Unreported, Supreme Court of Samoa, Sapolu, CJ, 19 February 1997), accessible via www.paclii.org at [1997] WSSC 2.
[84] (Unreported. Supreme Court, Samoa, Sapolu CJ, 1995).
[85] [1985/6] SILR 158, 169.
[86] The Kwaio region is in a remote area on Malaita Island.

murder to manslaughter if, *inter alia*, the offender 'acted in the belief in good faith and on reasonable grounds, that he was under a legal duty to cause the death or do the act which he did'. Evidence was adduced from a local chief that *Kwaio* custom dictated the killing of a person who was responsible for the death of a close relative. As customary law was constitutionally recognised as part of the formal law of Solomon Islands, it was argued that s 204 included a 'legal duty' in custom. More pertinently to the current discussion, counsel for the appellant argued that s 4 of the Constitution, which protects the right to life, and most of the other fundamental rights provisions did not apply to relationships between private persons but only between the State and private persons.

The Court of Appeal upheld the defendant's conviction for murder. Whilst agreeing on the outcome, Connolly and Kapi JJA expressed different views on the applicability of the bill of rights Chapter. Connolly JA, with whom Wood CJ agreed, conceded that most of the rights guaranteed in Chapter II were principally concerned with the relationship between the citizen and the State. He referred in support of that view to two Privy Council decisions on appeal from the Caribbean, *Maharaj v Attorney General for Trinidad and Tobago (No 2)*[87] and *Thornhill v Attorney General for Trinidad and Tobago.*[88] However, His Lordship held that, 'if the Kwaio customary duty to kill were part of the law of Solomon Islands [which, for other reasons, he did not think it was] it would be public law and therefore inconsistent with s4 of the Constitution'. In other words, His Lordship took the stance, akin to Hunt's fourth approach, that all law endorsed by the State is public law and is therefore subject to the rights Chapter and to the extent of any inconsistency with such rights it will be invalid.

In a separate judgment, Kapi JA took a different approach. His Lordship distinguished *Maharaj v Attorney General for Trinidad and Tobago (No 2)*[89] as it was concerned with breach of the right to personal liberty rather than the right of life. Moreover, His Lordship considered that the fundamental rights provisions of the Trinidad and Tobago Constitution were different from the corresponding provisions in Chapter II of Solomon Islands' Constitution. Firstly, the provisions in the Trinidad and Tobago Constitution were based on rights secured by existing laws before the Constitution came into force whereas Solomon Islands' Constitution created independent rights and freedoms. Secondly, being contained in the Constitution, the Solomon Islands provisions were part of the supreme law to which all other laws were subordinate. Thirdly, the protection in the Constitution of Trinidad and Tobago was expressly directed against the State and public authorities, whereas the provisions in the Constitution of Solomon Islands were drafted in greater detail. The extent of their application should be taken from the fundamental

[87] [1979] AC 385; 2 WLR 902.
[88] [1981] AC 61; [1980] 2 WLR 510.
[89] [1979] AC 385; 2 WLR 902.

rights provisions themselves. His Lordship stated that even though most of those provisions were principally concerned with relations between citizen and the State, there was nothing to confine the protection against deprivation of life to protection against the State only. His Lordship examined the words of s 4 itself and, referring to the words of Lord Wilberforce in *Ministry of Home Affair v Fisher and Another*,[90] stated that the words, 'No person shall be deprived of his life intentionally' in s 4, 'must be given a wide and generous application'. He pointed out that s 4 (2) (a) allowed a private person to kill another in defence of another person or property, which inferred that s 4 (1) prohibited deprivation of life by a private person.

Kapi AJ considered that examination of the other provisions of Chapter II also supported a horizontal application of fundamental rights. He pointed out that s 15(3) of the Constitution, which deals with protection from discrimination, prohibits certain types of treatment as between private persons and private bodies. His Lordship concluded that, 'The essence of fundamental rights provisions in Solomon Islands is that they apply to all persons' and that they are limited only by their terms and the qualifications set out in respect of each provision.

More recently, the Court of Appeal again discussed the application of the rights provisions in *Ulufa'alu v AG.*[91] This case arose from the coup which took place in Solomon Islands in 2000, during the course of which the appellant, who was then Prime Minister, was forced to resign. The appellant claimed that his rights under s 3 (fundamental rights and freedoms of the individual),[92] s 4 (protection of right to life), s 5 (protection of right to personal liberty), s 8 (protection from deprivation of property), s 9 (protection for privacy of home and other property), 11 (protection of freedom of conscience), s 12 (protection of freedom of expression), s 13 (protection of freedom of assembly and association) and s 14 (protection of freedom of movement) of the Constitution had been contravened. He sought certain declarations from High Court under s 18(1) of the Constitution, including a declaration that the subsequent election of a new Prime Minister was invalid. At first instance, Palmer ACJ rejected the contention that Chapter II was enforceable between individuals as well as against the State. However, he did so on the basis that there were other means of redress available, rather than on the basis that the Chapter was restricted to a vertical application.

On appeal, the Court of Appeal gave more detailed consideration to the matter, although its comments are strictly obiter, as the case was decided on other grounds. The Court accepted the view of the majority in *Loumia* as applicable, thus, extending the ratio of that case from the right to life to the more extensive menu of rights relied on this case, which are set out above. In doing so, the Court relied for support on the Privy Council decisions in

[90] [1979] All ER 21.
[91] [2005] 1 LRC 698.
[92] Section 3 is a preamble or introductory section to the rights chapter.

Maharaj v Attorney General for Trinidad and Tobago (No 2)[93] and *Thornhill v Attorney General for Trinidad and Tobago.*[94] and academic writing on the Canadian Charter by Hogg[95] and Swinton.[96] However, whilst acknowledging that their stance was contrary to the view of Kapi JA in *Loumia* they did nothing to counter his assertion that the position under the Constitution of Trinidad and Tobago and the Canadian Charter was distinguishable on the basis explained above. However, in *Ulufa'alu's Case* the Court noted that 'how far citizens can rely on fundamental rights inter se' 'is a developing area'. Accordingly, the Court was anxious not be taken as laying down a general inflexible rule that fundamental rights were only applicable vertically. The Court considered that the right relied on and the surrounding context would have to be examined in each case, stating:

> It is necessary to consider the precise rights sought to be relied on and the context in which they are relied on. This Court does not think that it can be said as an absolute principle 'always horizontal' or 'never horizontal'.

Like the Constitutions of Fiji Islands[97] and Kiribati,[98] Solomon Islands' Constitution, provides that the court may decline to exercise its powers if it is satisfied that there are other adequate means of redress available.[99] The case of *Pusi v Leni*[100] is worthy of mention here, although the decision predates *Ulufa'alu's Case* and the question of vertical versus horizontal was not expressly discussed. The case provides a less obvious example of another type of redress which might be available in some parts of the region, and thus lead to refusal to grant constitutional relief against individuals. The case arose after an argument between the plaintiff and members of the local chiefs committee in which the plaintiff shouted offensive words at them and told them to leave his property. The plaintiff made several attempts to apologise but the chiefs refused to accept these, as they were not offered in the proper customary manner. The plaintiff then applied to the High Court alleging that he had been banished from the village and that this breached his the right to personal liberty (s 5), protection from deprivation of property (s 8), freedom of assembly and association (s 13), and freedom of movement (s 14). Muria CJ, apparently proceeding on the common assumption of horizontality, referred to above, found on the facts that the plaintiff had not established that he was subject to a banning order and dismissed the application on that basis.

[93] [1979] AC 385; 2 WLR 902. [94] [1981] AC 61; [1980] 2 WLR 510.

[95] Peter Hogg, *Constitutional Law of Canada* (4th edn, 1977) 858–861.

[96] Catherine Swinton, *The Canadian Charter of Rights and Freedoms: Commentary* (1982) 44–49.

[97] Constitution of Fiji Islands 1997, s 41(4). See above (n 60) and (n 61).

[98] Constitution of Kiribati 1979, proviso to s 17(2). See above (n 77) and (n 78).

[99] Constitution of Solomon Islands 1978, proviso to s 18(2).

[100] (Unreported, High Court, Solomon Islands, cc 218/1995, 14 February 1997). This case is discussed in J Corrin Care, 'Customary Law and Human Rights in Solomon Islands—A commentary on *Remisio Pusi v James Leni and Others*' (1999) Journal of Legal Pluralism 135.

However, His Lordship made it clear that, even if constitutional rights had been breached, they would not be enforced if they were being used as a way to 'circumvent the lawful application of custom' as this might 'engender disharmony in society'. He regarded this limitation as being authorised by the Preamble,[101] s 76 and Sch 3 of the Constitution, which stressed the 'worthiness, the value and effect of customary law' in Solomon Islands. His Lordship pointed out that customary law was constitutionally recognised as a source of law and this led him to the view that customary law was on a par with constitutional law (and legislation) and that 'one is no better than the other'. Which would prevail depended on the circumstances of the case.

Like the Tuvaluan case of *Teonea v Pule o Kaupule and Nanumaga Falekaupule*,[102] this case demonstrates that horizontal application does not necessarily lead to the erosion of customary law.

4. Tonga

Like the other constitutions discussed in this section, the Constitution of Tonga 1875 does not expressly state whether the rights it confers are to be applied against individuals as well as the State. In Tonga, the dynamics are different from most other regional countries, as customary law is not constitutionally recognised as a general source of law. Both customary laws and traditional institutions have been transferred into the public sphere, the former incorporated into statute law and the latter reinvented as the King and Nobles.[103]

For this reason conflict does not appear to arise so often between individuals and non-state parties and there is no direct judicial authority on whether rights may be enforced horizontally. However, in *Pohiva v Prime Minister and Kingdom of Tonga*,[104] although the action was taken against the State, the Supreme Court, in holding that the Prime Minister (who had attempted to ban a 'foreign' newspaper that had been critical of him) had a duty to permit the exercise of the right to free of expression, stated that there was, 'a duty on every person to permit exercise of that right'. This could be taken to mean that the Supreme Court regarded, at least, this particular right as applying horizontally as well as vertically. Perhaps even more persuasive is the more recent

[101] Whilst Muria CJ uses the term 'preamble', this terminology is not found in the Constitution itself. As the paragraphs in question contain underlying principles and philosophies and use the words 'declare' 'agree and pledge' in capital letters, they might perhaps be more correctly referred to as the 'Declaration, Agreement and Pledge'. Notwithstanding, the term preamble has been used to identify the opening passages of regional constitutions in this paper.

[102] [2005] TVHC 2.

[103] The customary rules of succession to chiefly titles have been entirely replaced by rules of succession contained in the Constitution: Constitution of Tonga 1875, Clauses 32, 35, 60 and 67. See further, Powles, 'The Place of Chiefly Systems in Constitutions' in Fiji and the World, 1997, Suva: SSED, USP, 323.

[104] [1988] LRC (Const) 949.

case of *Pale v Pohiva.*[105] In considering whether to grant an interlocutory injunction in a defamation case between private individuals, the Supreme Court held that the principles differed from those applying to the grant of an injunction in other cases, as the right to freedom of speech had to be taken into consideration. Again, this suggests that the right to freedom of expression applies horizontally as well as vertically in Tonga.

5. Vanuatu

The only guidance on the scope of human rights protection in the Constitution of Vanuatu 1980 is in section 6, which governs enforcement of rights and freedoms. This states only that any person whose rights have been or are likely to be infringed may apply to the Supreme Court for enforcement and that the Court has power to make orders 'as it considers appropriate to enforce the right'.[106]

Until recently, although the courts had not expressly discussed the issue, they appeared willing to apply human rights provisions horizontally. For example, in *Nagol Jump, Assal and Vatu v Council of Chiefs of Santo*[107] the petitioners claimed that their right to freedom of expression, freedom of assembly and association, freedom of movement, and equal treatment[108] had been infringed when the council of chiefs determined that they were not allowed to perform the nagol jump (a custom ceremony involving land diving originating in Pentecost) in Santo. Although the court concluded that their rights had not been breached it took no issue with the fact that there was no State party to the matter.

The Supreme Court has also granted relief in cases involving claims against individuals, rather than the council of chiefs. In *John Noel v Obed Toto*[109] a land dispute raised the question of whether family members had individual rights to the use of land and to the benefits that arose from any activity related to, or conducted on that land. Under custom, it is generally the case that family members have to ask the head of the family (who holds the land in a representative capacity) to approve any individual rights with respect to land. However, female family members who marry lose their 'rights' to the land, or at the very least have their rights made subordinate to that of any male family members. The Court stated that, while custom was the proper means through which to determine land rights, it was subject to the fundamental rights recognised by the Constitution.

[105] [2006] TOSC 16.
[106] Section 6(2).
[107] [1989–1994] 2 VanLR 545.
[108] See Art 5(1)(g), (h), (i), and (k) respectively.
[109] (Unreported, Supreme Court, Santo, Vanuatu, 1998), cited in Imrana Jalal, *Law for Pacific Women* (Fiji Women's Rights Movement, Suva, 1998) 65.

Similarly, in *The Constitution of the Republic of Vanuatu and the Infant P and her Natural Mother S*,[110] which arose on the island of Santo, the Court of Appeal appears to have assumed that rights applied horizontally. In that case, the Petitioner alleged that her brothers had forced her to allow her sister to adopt her illegitimate child. When she complained they kidnapped her and took her to the family village where she was effectively held captive for nearly six months. The Court of Appeal, commented that, if proved, the actions of the woman's male relatives, namely using threats of force to induce the Petitioner to agree to the adoption; false imprisonment; interference with her employment to the extent of tendering a false resignation purporting to come from her, represented, 'a gross interference with the fundamental rights of a citizen as detailed in the Constitution, chapter 2, part 1'. The matter was remitted to a single judge of the Supreme Court for further evidence to be taken. Unfortunately, the outcome of the hearing is not reported.

However, these cases all precede *Family Kalotano v Duruaki Council of Chiefs*,[111] which is the only case in Vanuatu that appears to address the matter directly. In that case, the Supreme Court made a complete about-face on the issue of horizontal application. The Kalotano family was disputing the title of custom chief. They alleged that, in dealing with the dispute, the Council of Chiefs and a number of individual chiefs had breached the family's rights under Art 5(1)(d) (the right to protection of the law), (g) (the right to freedom of expression) and (k) (the right to equal treatment), of the Constitution. Lunabek CJ struck out the Petition, stating as his 'substantive reason' which 'on its own [could] dispose of the entire case' that 'The allegations of constitutional rights breach are levelled against individual persons. There is no legal remedy available to the Petitioner by way of constitutional petition such as in the present case'. The decision does not contain any further reference to this point and there is no indication that the parties had the opportunity to submit argument on this point.

C. *Current Position—Summary and Lessons*

It is clear from the foregoing that regional Constitutions are inconsistent in the provision which they make for the application of human rights. Only three countries (Fiji Islands, Papua New Guinea and Tuvalu) have textual indicators, and these do not all point in the same direction. In countries without textual indicators, countries have taken an *ad hoc* approach. This has usually involved either a vertical or a horizontal approach, rather than an intermediate position on the spectrum.

[110] [1980–88] 1 VLR 130. See also *Public Prosecutor v Silas* [1989–1994] 2 Van LR 659, where a man was convicted of abducting his sister and forcing her to go to live with another man, which was an offence under the *Penal Code* (Cap 135) but permissible under customary law.

[111] (Unreported, Supreme Court, Vanuatu, Lunabek CJ, 24 May 2002), accessible via www.paclii.org: [2002] VUSC 32.

Given that, historically, human rights were developed as a means of shielding the individual from the power of the State, it could be argued that the starting point should be vertical application. In other words, rights should remain within their original limits unless the Constitution dictates that they apply to private relationships. In fact, the regional decisions discussed reveal that, apart from in Kiribati, there has been a reverse approach. In the majority of countries, until recently, it appears to have been largely assumed that rights apply horizontally, without any express consideration of either the theoretical arguments or the distinguishing features of South Pacific legal or social systems, which might demand a *sui generis* approach. Solomon Islands is the only country where the courts have had any debate on the issue and, whilst it has indicated an intention to take a flexible approach, the factors that might determine the courts' decision have not been fully explored.

The cases discussed above highlight the need to provide a firm basis for courts dealing with human rights issues. The unpredictability of the current position is well illustrated in Vanuatu, where the position has changed abruptly from one approach to the other, without any prior warning. This position is obviously unsatisfactory and a consistent approach is required that is appropriate to regional circumstances. The cases also illustrate the diverse settings in which human rights are played out and their facts serve as useful examples of the distinctive features which are drawn out in the next section.

III. THE DISTINCTIVE CONTEXT OF THE SOUTH PACIFIC

A. Cultural Relativity

In spite of the importance of determining the scope of the protection provided by human rights guarantees, to date there has been little informed debate within the region about the role human rights law should play in governing the relationships between private individuals or groups. Nor has there been any detailed consideration of the distinguishing features in the legal and social systems of South Pacific States. The significance of such factors depends to some extent on whether human rights are culturally relative. Cultural relativists take the view that moral values operate within a framework of cultural bias, rather than a neutral vacuum and that each culture should be judged on its own merits or, to put it another way, in its own context.[112] The idea is of particular importance in plural societies and in considering whether substantive laws and the legal system as a whole are suitable for the culture in which they operate.[113]

[112] The idea was developed by the anthropologist Franz Boas, *Race, Language and Culture* (Macmillan, New York, 1948). See further Ben-Ami Scharfstein, *The Dilemma of Context* (New York University Press, 1989).

[113] See further, Jennifer Corrin Care (n 73) 27–60. The doctrine has perhaps achieved its greatest notoriety in debates on the legitimacy of the 'cultural defence', which seeks to have

Cultural relativism has specific relevance in the field of human rights.[114] It challenges the 'universalist' approach, which regards human rights as universally applicable across cultural boundaries.[115] Rights enshrined in constitutions of many former colonies are mainly transplants from the West rather than the product of local discussion and negotiation. The agenda from which the models for these charters were negotiated in Europe and amongst the United Nations is not necessarily that of the recipient nation. The values that they represent often diverge from those underpinning the traditional legal system, some of which are discussed below.[116] It has been argued that the success of transplanted laws depends on the type of law involved and that public law is the least likely to succeed.[117] If, as appears to be the case, transplant involves not only the transfer of foreign laws but also the surrounding culture, the cultural specificity of human rights laws would appear to doom transplanted rights to failure.

Even if a universalist approach is taken, the distinguishing features of local legal and social systems are still of relevance to a meaningful deliberation on the scope of application of human rights, particularly where there are no textual indicators available to guide the courts. For example, in deciding whether rights impose obligations on private individuals generally, the nature of a particular right may supply the answer. That is because some rights, such as the right to legal counsel in criminal cases,[118] may not be susceptible to enforcement against private individuals. However, a complete assessment of whether this is the case cannot be made without reference to the context in which the right applies. Conclusions about enforceability based on assumptions that the State and society operate in the same way as they do in the West may lead to false conclusions and some examples of this are given below.

cultural beliefs and practices taken into account in assessing culpability for a crime. See, eg Alison Dundes Renteln, 'Culture and Culpability: A Study of Contrasts' in Renteln and Dundes (eds), *Folk Law* (University of Wisconsin Press, 1994) 863; Carolyn Choi, 'Application of a Cultural Defense in Criminal Proceedings', (1990) 8 UCLA Pacific Basin Law Journal 80. Compare *R v Loumia and Others* [1984] SILR 51, where the court refused to take into account the cultural context of a killing, with *R v Rumints-Gorok* [1963] P&NGLR 203, where the court considered it a relevant factor.

[114] Peter Schwab and Adamantia Poliis (eds), *Towards a Human Rights Framework* (Praeger Publishers, New York, 1982).

[115] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca, 1989; John Tilley, 'Cultural Relativism', Human Rights Quarterly, May 2000, 22(2), 501–547.

[116] See further Jennifer Corrin Care, 'Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Post Colonial South Pacific Societies' (2006) 5 Indigenous Law Journal 51.

[117] Otto Kahn-Freund, 'Uses and Misuses of Comparative Law', (1974) 37 Modern Law Review 1, 5–6.

[118] See, eg Constitution of Samoa 1962, s 6(3).

B. Cultural and Social Issues in the South Pacific

The South Pacific is a region with a rich cultural heritage illustrated, particularly in Melanesia, by linguistic and tribal diversity.[119] This section of the article draws out from the decisions discussed above, and from other regional case law and secondary sources, the distinctive features in the legal and social systems of island countries. These features cannot easily be divided into separate spheres of activity, as the 'legal' and 'social' orders are inextricably intertwined. For example, the boundaries between 'custom', in the sense of traditional practices, norms and values of indigenous people, and 'customary law', in the sense of rules of custom which are enforced to maintain order and resolve disputes, are largely illusory.[120] Further, the notions of custom and tradition are not objective and distinct concepts.[121] Accordingly no attempt has been made to categorise them. Rather, some of the more striking distinctions colouring the application of human rights in the South Pacific context are set out below under general, overlapping headings. The relevance of these factors to the theoretical bases for the vertical and horizontal approaches is also highlighted.

1. Plurality and traditional authority

For the majority of people in many parts of the region, the social system within which they go about their daily lives is far removed from the realms of central or even, in some cases, provincial government. The continuing strength of traditional authority is illustrated in many of the cases discussed above, including the banishment cases from Kiribati, Samoa and Solomon Islands and the kidnapping case from Vanuatu.[122] In rural areas, traditional

[119] There are about 740 different languages in Papua New Guinea, 65 in Solomon Islands and 100 in Vanuatu. Whilst only 0.1 per cent of the world's population lives in the Pacific region, it contains one-third of the world's languages: Pacific Island Populations, Report prepared by the South Pacific Commission for the International Conference on Population and Development, 5–13 September 1994, Cairo.

[120] In fact it has been argued that the whole concept of custom is not objective or distinct, but is often subjectively interpreted to serve symbolic and political ends See further, eg Roger Keesing, *Cultural Anthropology: the Science of Custom* (Rhinehart & Co, New York, 1960) 384; Roger Keesing and Robert Tonkinson, 'Reinventing Traditional Culture: The Politics of Kastom in Island Melanesia' (1982) 13 (4) Mankind, 300, 302–305, 336, 357–373; Margaret Jolly and Nicholas Thomas, 'The Politics of Tradition in the Pacific' (1992) 62(4) Oceania (Special Issue) 241–243.

[121] See further, eg Roger Keesing, *Cultural Anthropology: the Science of Custom* (Rhinehart & Co, New York, 1960) 384; Roger Keesing and Robert Tonkinson 'Reinventing Traditional Culture: The Politics of Kastom in Island Melanesia' (1982) 13 (4) *Mankind*, 300, 302–305, 336, 357–373; Jolly and Thomas (n 120) 241–243.

[122] *Teitinnang v Ariong* [1987] LRC (Const) 517; *Pusi v Leni* (Unreported, High Court, Solomon Islands, cc 218/1995, 14 February 1997); eg *Sefo v The Attorney-General and the Alii and Faipule of Saipipi* (Unreported, Supreme Court of Samoa, Wilson J, 12 July 2000), accessible via www.paclii.org: [2000] WSSC 18; *The Constitution of the Republic of Vanuatu and the Infant P and her Natural Mother S* [1980–88] 1 VLR 130.

authority is far more relevant than the State system of government embodied in the Constitution.[123] The State system brings with it the distinction between the public and private sphere, which has been used as an argument against horizontal application of rights.[124] Whilst there does not appear to be any specific authority on point, 'public authority' has generally been taken to refer to State authorities established under the framework provided by the constitution or constituent laws. Accordingly, traditional leaders and institutions are not regarded as 'public' authorities, unless they have been given statutory recognition.[125]

Where such individuals or bodies are not formally endorsed by the State in some way, they are not bound by rights that apply only vertically. However, if traditional authorities are in reality a de facto form of local government, as they have been demonstrated to be in cases such as *Teitinnang v Ariong*[126] and *Pusi v Leni*, discussed above, the private and public divide becomes blurred. As mentioned above, there are no firm boundaries between 'custom' and 'customary law'.[127] The authority of traditional leaders extends to both areas and accordingly includes matters categorised by the State as private as well as public.

The most common argument used to support the vertical application of human rights derives from their original conception. Historically, rights were developed as a means of shielding the individual from the power of the State. Consequently, it has been argued that to extend the application of rights and freedoms would be to take them out of their original context.[128] Although this may provide persuasive argument against horizontal application in countries which share that history, this justification has little force in Pacific Island countries. This is not part of their story; rights did not develop historically but were transplanted, often as part of a Westminster-style Constitution. If the political reality is that traditional leaders wield as much or more power than the State, the historical justification for applying rights vertically has a hollow ring.

[123] See, eg the comments in the Law Reform Commission of Solomon Islands, 1996 Annual Report, 1996, para 10.11, where it was said that for Solomon Islanders, 'Whiteman law is not their business'.

[124] See further, O'Cinneide (n 3) 79–80.

[125] See, eg the Village Fonos in Samoa, which have been endorsed by the *Village Fonos Act 1990* (the legislation is controversial and it has been held to restrict the authority of fonos. See further Jennifer Corrin Care (n 73) 32 to 33. Another example is the Great Council of Chiefs (*Bose Levu Vakaturaga*), which has been given a formal role by the Constitution of Fiji Islands 1997, s 116. See further, Geoffrey White, and Lamont Lindstrom, *Chiefs Today* (Stanford University Press, 1997). In *Alama v Tevasa* [1987] SPLR 385, it was held, obiter, that in the culture of Tuvalu, *matais* were required to make decisions to guide the people and foster their welfare. It was consistent with their traditional role for them to be concerned with politics and express their views to the people. This did not make them an agent of a political candidate for whom they spoke: at 393.

[126] [1987] LRC (Const) 517.

[127] Above (n 136).

[128] Daniel Friedmann and Daphne Barak-Erez (eds) (2001) *Human Rights in Private Law* 1; Greg Taylor, 'The Horizontal Effect of Human Rights Provisions, the German Model and its Applicability to Common Law Jurisdictions' (2002) 13 KCLJ 187,191.

2. *Status-based, patriarchal society*

Generally speaking, customary societies in many parts of the region are patriarchal and status-based. For example, as illustrated by *Re Willingal*,[129] discussed above, women may be regarded as chattels, capable of being disposed of as part of compensation arrangements. Leadership and major decision-making may be regarded as a male domain.[130] Applying Bills of Rights provisions across the board without reference to these norms may result in disrespect for human rights, and this may be seen as dictating against a horizontal approach.

On the other hand, horizontal application may be regarded as imperative if human rights are to be upheld.[131] The cases discussed above, where customary laws relating to head pay and banishment were found to violate human rights, provide clear examples of the need to apply these rights against individuals.[132]

3. *Emphasis on collective rights and duties*

Another relevant factor is the significance of collective rights, status[133] and duties, which have more resonance in the Pacific than individual rights, freedoms and equality, which are emphasised in human rights provisions.[134] For example, in Tonga, 'Alisi Taumoepeau, the Solicitor General recently said:[135]

> We don't believe in individual rights . . . The Tongan way of life is not based in the right of the individual but that of the extended family, the church and the whole country. We have a collective peoples value, and that is where our strength is, and we do not want to give that up.

The emphasis on collective rights within the region may be seen as supporting the restriction of human rights to a vertical application, rather than allowing individuals to challenge traditional practices by constitutional means. On the

[129] (1997) 2 CHRLD 57.

[130] See further K Brown and J Corrin Care, 'Conflict in Melanesia—Customary Law and the Rights of Melanesian Women' (1998) 24 (3 & 4) Commonwealth Law Bulletin 1334; J Corrin Care, Negotiating the Constitutional Conundrum' (2006) 5 Indigenous Law Journal 51. For a contrary view, see Narokobi, B, 'There's No Need for Women's Lib Here, because "Melanesian Women are already Equal"' in *The Melanesian Way* (Institute of Papua New Guinea Studies, Port Moresby, 1980) 70.

[131] See, eg Penny Martin, '"Implementing Women and Children's Rights": the case of domestic violence in Samoa' (2002) 27 Alternative Law Journal 227.

[132] See, eg *In Re Miriam Willingal* (1997) 2 CHRLD 57; *Italia Ta'amale and Ta'amale Toelau v The Attorney-General* (Unreported, Court of Appeal of Samoa, Cooke, P, Casey and Bisson JJA, 18 August 1995).

[133] See, eg CJ Muria, 'Conflicts in Women's Human Rights in the South Pacific; The Solomon Islands Experience' (1996) 11(4) Commonwealth Judicial Journal 7, where he observes that modern regimes in the domestic sphere are categorized as 'foreign' by ordinary islanders.

[134] See further M Hartney, 'Some Confusions Concerning Collective Rights' in W Kymlicka (ed), *The Rights of Minority Cultures* (Oxford University Press, New York, 1995).

[135] *Matangi Tonga*, Vol 18, No 2 (2003) <http://www.matangitonga.to/scripts/artman/exec/view.cgi?archive=3&num=282> at 26 January 2007.

other hand, as illustrated by *Re Willingal*[136] and *The Constitution of the Republic of Vanuatu and the Infant P and her Natural Mother S*,[137] the fact that traditional leaders are making decisions on the basis of the collective good, without reference to individual rights, may be viewed as increasing the need to provide for horizontal application.

4. *Legal pluralism*

A more specific and obvious distinction lies in the plural system of laws. There is a stark distinction between formal, written law on the one hand and customary, unwritten law on the other. The relationship between these two distinct systems is often unclear. So too is the relationship between the different customary laws of different groups. The existence of customary law in regional legal systems belies the assertion that all law is dependant on State organs for interpretation and enforcement.[138] This is an argument advanced by supporters of the horizontal approach to reject the assumption of verticalists that there is a rigid distinction between public and private law in this context;. that human rights are an inappropriate legal source for regulation and restriction in the private sphere;[139] and that human rights concepts cannot be properly translated into the field of private law. Although customary law has been given formal recognition in some regional countries,[140] it does not depend on the State for its validity. It remains important throughout the region, whether or not it has been given formal effect.[141] There is potential for the development of an indigenous jurisprudence based on customary law under the auspices of the State, as envisaged, for example, by the framers of the Constitution of Papua New Guinea[142] and the Underlying Law Act,[143] and by some regional scholars[144] and judges.[145] However, that does not detract from the fact that customary law is regarded as binding by those within its sphere,

[136] (1997) 2 CHRLD 57.

[137] [1980–88] 1 VLR 130.

[138] See, eg Woolman and Davis (n 5) (South Africa) O'Cinneide (n 3) and Siobhan Leonard, 'The European Convention on Human Rights: A New Era for Human Rights Protection in Europe?' in Angela Hegarty and Siobhan Leonard (eds), *Human Rights: An Agenda for the 21st Century* (Cavendish Publishing Ltd, London, 1999) (Ireland); Slattery (n 6) (Canada).

[139] O'Cinneide (n 3) 79–80.

[140] See further Jennifer Corrin Care and Don Paterson, *Introduction to South Pacific Law* (2nd edn, 2007) chap 3.

[141] See, eg Gordon R Woodman, 'Problems and Techniques in the Adoption of Customary Laws as Underlying Law' (1993) 21 Melanesian Law Journal 28, 29–35.

[142] 1975. See further Jean Zorn and Jennifer Corrin Care*, Proving Customary Law in the Common Law Courts of the South Pacific* (British Institute of International and Comparative Law, London, 2002) 17.

[143] 2000. See further Jean Zorn and Jennifer Corrin Care, 'Everything Old is New Again: the Underlying Law Act of Papua New Guinea', [2002] LAWASIA Journal 61–97.

[144] See, eg Bernard Narakobi, *Lo Bilong Iumi Yet* (University of the South Pacific, Suva, 1989).

[145] See, eg *Madaha Resena v PNG* [1991] PNGLR 174 at 187–189, where the court discussed the development of an indigenous common law being based on customary traditions and life.

without reference to the State.[146] Customary law remains important throughout the region, whether or not it has been given formal effect.

In this context, the rationale that the State is constitutive of all legal relations because law is a State construct,[147] which is often advanced in favour of the horizontal approach, is inapplicable.

It is also important to note that, as well as recognizing customary law, some regional constitutions also emphasise the importance of customary law by shielding it from human rights provisions, either generally, as in Tuvalu,[148] or specifically in the case of selected rights, as in Samoa[149] and Solomon Islands.[150] This emphasis puts a different spin on the horizontal versus vertical debate, as deliberate limitation of rights strongly suggests an intention by the framers of those constitutions to confine the application of rights.

5. *Plural dispute resolution forums*

In addition to plurality of substantive law, there is another relevant distinction within legal systems arising from the separate dispute resolution forums and the adjectival law applying to them. In many cases, disputes will not be resolved by a formal court, but by a village leader or elder or by a group of traditional leaders in a customary forum. For example, in *Teitinnang v Ariong*[151] the decision-making in the village was by the elders committee rather than a court. This distinction raises an additional question to the one that divides verticalists and horizontalists elsewhere. There the argument is about whether human rights law is relevant in a dispute between private parties governed by common law, where the only public authority is the court itself. In the South Pacific, there is the additional question of the relevance of human rights where the dispute resolution forum is a customary body not established by the State.[152]

6. *Disparity in socio-economic circumstances*

The disparity in the socio-economic circumstances of those within the region may also cast a different light on human rights provisions. At one end of the

[146] See, eg J Rivers and HA Amankwah, 'Sovereignty and Legal Pluralism in Developing Nations: A New Appraisal of the Papua New Guinea Case' (2003) 10 James Cook University Law Review 85.

[147] See, eg Hunt (n 2) 424.

[148] Constitution of Tuvalu 1986, s 11 (2). See *Teonea v Pule o Kaupule and Nanumaga Falekaupule* (Unreported, High Court, Tuvalu, Ward CJ, 11 October 2005), accessible via www.paclii.org: [2005] TVHC 2.

[149] *Constitution of Samoa* 1960, Art 13(4) restricts the right to freedom of movement.

[150] *Constitution of Solomon Islands* 1978, s 15(d) restricts protection from discrimination.

[151] [1987] LRC (Const) 517.

[152] See Kenneth Brown, 'Indigenous forums: laughed out of court?' (2000) 25(5) Alternative Law Journal 216 for a discussion of the attitude of common law to plurality and nexus with indigenous forums.

spectrum there are sophisticated commercial entities engaged in development and natural resources, which are seen as necessary for economic success. At the other, there are villagers living a subsistence lifestyle, substantially unaffected by many of the social and cultural changes brought by industrialisation. In between there are a variety of groups and individuals.[153] For some villagers, at the far end of the spectrum, living in remote rural areas, the written law, including the constitution, has little meaning. This could be seen as another reason for restricting human rights to the State sphere. On the other hand the disparity between the groups at either end of the spectrum might be seen as all the more reason for providing constitutional protection, for example, from exploitation by multi-national companies, who would not be restrained from breaches of human rights under a vertical approach. This has particular application in industrial relations[154] and in resource exploitation.

7. *Level of development*

The different level of development in emerging States is also a relevant factor. Countries where, for example, infant mortality rates are high[155] and literacy and education levels are low[156] may have different priorities. The priorities driving values may be very different in less developed countries where basic education, and even survival, cannot be taken for granted.[157] The relative importance of certain customary laws and the human rights with which they may conflict may change as a society evolves and this is a fact that South Pacific countries themselves have already recognised. In *Ta'amale and Ta'amale Toelau v The Attorney-General*,[158] discussed above, the Court of Appeal of Samoa refused to set aside a banishment order even though it

[153] Bruce L Ottley, "Reconciling Modernity and Tradition: PNG's Underlying Law Act" (2002) 80 Reform 22, 24–25.

[154] *Pafco Employees Union v Pacific Fishing Company Limited* (2002) 4 CHRLD 6.

[155] Vanuatu has the 55th highest infant mortality rate and Papua New Guinea 59th, out of 221 countries listed: CIA, *The World Factbook*, https://www.cia.gov/cia/publications/factbook/rankorder/2091rank.html accessed 11 May 2007.

[156] The literacy rate is 90 per cent (Kiribati), 64.6 per cent (Papua New Guinea), 99.7 per cent (Samoa), 24 per cent (Solomon Islands), 53 per cent (Vanuatu); compared to 100 per cent (Australia), 99 per cent (United Kingdom), 97 per cent (United States): CIA, *The World Fact Book http://www.cia.gov/cia/publications/factbook/fields/2103.html* accessed on 5 May 2005; The Flag Company <http://www.flagco.com/kiribati.shtml> accessed on 5 May 2005.

[157] The 2005 estimate of infant mortality rates (deaths/1,000 live births) is 48.52 (Kiribati), 51.45 (Papua New Guinea), 27.71 (Samoa), 21.29 (Solomon Islands), 55.16 (Vanuatu); compared to 4.69 (Australia), 5.16 (United Kingdom), 6.5 (United States): CIA, *The World Fact Book* <http://www.cia.gov/cia/publications/factbook/rankorder/2091rank.html> accessed 5 May 2005. The literacy rate is 90 per cent (Kiribati), 64.6 per cent (Papua New Guinea), 99.7 per cent (Samoa), 24 per cent (Solomon Islands), 53 per cent (Vanuatu); compared to 100 per cent (Australia), 99 per cent (United Kingdom), 97% (United States): CIA, *The World Fact Book http://www.cia.gov/cia/publications/factbook/fields/2103.html* accessed on 5 May 2005; The Flag Company <http://www.flagco.com/kiribati.shtml>accessed on 5 May 2005.

[158] (Unreported, Court of Appeal of Samoa, Cooke, P, Casey and Bisson JJA, 18 August 1995).

contravened the constitutional guarantee of freedom of movement[159] because it was a long established custom, which was seen as an important sanction, essential to the authority of the village council. However, the Court commented that, although banishment was at that time a reasonable restriction imposed by law, this would not necessarily always be the case. As society developed the court envisaged that there might come a time when it would no longer be justifiable. Nine years later, in *Leituala v Mauga*,[160] the Supreme Court of Samoa held that that time had come.[161]

8. *Fragility of the rule of law*

Another differentiating factor in some countries of the region is the fragility of the rule of law. At the time of writing both Tonga and Vanuatu have declared a state of emergency in response to rioting;[162] Fiji Islands has just suffered its fourth coup since 1987;[163] and Solomon Islands is still dependent on the Regional Assistance Mission to Solomon Islands ('RAMSI') to enforce law and order.[164] In these circumstances human rights abuses may commonly be inflicted not by the State or by traditional chiefs or elders, but by self-appointed leaders. For example, following the most recent coup in Fiji Islands human rights abuses were perpetrated by members of the armed forces acting not under State authority but as part of a rebel force.[165] Similarly, in *Ulufa'alu v AG*[166] the main allegations of contravention of human rights were levelled against members of the joint Malaita Eagle Force, a paramilitary rebel group. In Vanuatu, human rights abuses have occurred in the context of inter-tribal violence between rival groups from Tanna and Ambrym islands, after allegations of murder by 'nakaimas' (black magic).

[159] Art 13(1)(d).

[160] (Unreported, Supreme Court of Samoa, Vaai J, 13 August 2004), accessible via www.paclii.org: [2004] WSSC 9.

[161] This decision was upheld by the Court of Appeal in *Mauga v Leituala* (Unreported, Court of Appeal of Samoa, Cooke, P, Casey and Bisson JJA, March 2005).

[162] In Tonga, a State of Emergency was declared on 6 November 2006 and extended four times: In Vanuatu a State of Emergency was declared by the Council of Ministers on 5 March 2007 and came to an end on 18 March 2007.

[163] See further Brij Lal, 'Anxiety, Uncertainty, and Fear in Our Land: Fiji's Road to Military Coup' (unpublished, 2006).

[164] See further, Jonathon Fraenkel, *The Manipulation of Custom: From Uprising to Intervention in the Solomon Islands* (Victoria University Press, Wellington, New Zealand, 2004); Clive Moore, *Happy Isles in Crisis: The Historical Causes for a Failing State in Solomon Islands 1998–2004* (Asia Pacific Press, Australian National University, Canberra, 2006). Although RAMSI has officially moved from phase 1 (restoring law and order) to phase 2 (long term capacity building), events in April 2006, when rioting destroyed China town, have emphasised that law and order has not yet been restored. These phases are outlined in Elsina Wainwright, *Our Failing Neighbour: Australia and the Future of Solomon Islands* (ACT: Australian Strategic Policy Institute, 2003).

[165] Coups took place in 1987, 1990, 2000 and 2006.

[166] [2005] 1 LRC 698.

In these cases, power lies neither with the State nor with traditional leaders. Rather it is in the hands of individuals or groups who have taken advantage of the ambiguity of political frameworks and the lack of support for the State system.[167] The fact that this is Fiji's fourth coup since 1987[168] demonstrates that these are not isolated occurrences. The vertical application of human rights provides inadequate protection for victims of insurgent forces in 'fragile States'.

IV. ASSESSING THE OPTIONS

The cases discussed in this article and the factors outlined above highlight some of the distinct differences that distinguish South Pacific societies from the countries where human rights were developed. As seen in many of the cases discussed earlier in this article, cultural distinctions often lead to conflicts. However, these factors do not supply a ready answer to the question of whether rights should be applied horizontally in the region in the future. At present, there is no discernable trend or regional approach to the application of human rights. Rather, there is an ad hoc approach from country to country. There are a number of alternatives which regional countries might consider for dealing with this problem: vertical application, direct horizontal application, or one of a range of options offering an intermediate approach. These alternatives are discussed below. The section then moves on to suggest moving beyond this sphere to a 'lateral' application of human rights.

A. Vertical Application

This approach would involve introducing clear textual indicators restricting human rights from applying to the private sphere. The rational for such an approach would be that bills of rights have not been negotiated locally and are a bad fit with some of the values and practices underlying customary law. It might be argued that it is inappropriate to impose human rights on interpersonal relationships that are far removed from those conceptualized by the framers of the allegedly 'universal' human rights instrument.[169] Human rights should not be applied to interpersonal relationships in societies where they

[167] For further commentary on the causes of recent coups within the region see Jennifer Corrin Care, 'Off the Peg or Made to Measure: Is the Westminster System of Government Appropriate in Solomon Islands?', in I Molloy (ed) *The Eye of the Cyclone* (Pacific Islands Political Science Association and University of the Sunshine Coast, Sippy Downs, Qld, 2004) 156–170; Jonathon Fraenkel, *The Manipulation of Custom: From Uprising to Intervention in the Solomon Islands* (Victoria University Press, Wellington, New Zealand, 2004); Brij Lal, '*Anxiety, Uncertainty, and Fear in Our Land': Fiji's Road to Military Coup*, 2006 (unpublished); Clive Moore, *Happy Isles in Crisis: The Historical Causes for a Failing State in Solomon Islands 1998–2004* (Asia Pacific Press, Australian National University, Canberra, 2006).

[168] See above (n 165).

[169] Clifford Geertz, *The Interpretation of Cultures* (=Hutchinson, London, 1975) 40–41.

have little relevance and could potentially sow social discord and undermine local institutions. They are a legal transplant,[170] and their effect should be limited until the societies involved can develop and adapt the legal norms to their own needs and situation. Further, balancing competing rights in the context of a legal system with several sources of law, and populations of varying degrees of sophistication is fraught with peril. Judges could potentially undermine faith in the law and the judiciary by making culturally insensitive decisions that were unacceptable to the community.

Whilst having the advantage of certainty, this approach is unlikely to be adopted. Such an approach would no doubt be frowned on by the international community, including aid donors and, more importantly from a legal, if not economic perspective, it would breach governments' obligations under treaties such as CEDAW.[171]

B. Direct Horizontal Application

As in Papua New Guinea and Tuvalu, provision could be made for direct horizontal application. This would require legislative action or, in Fiji Islands, where the presence of s 21(1) in the Constitution would appear to render introduction of horizontal application by statute unconstitutional, constitutional amendment. The rationale for this approach is that horizontal application is the only way to provide effective protection where it is most likely to be required.[172] Furthermore, as many of the state in the region are developing countries, they may require added protection from exploitation by multinational companies, who would not be restrained from breaches of human rights under a vertical approach. This has particular application in industrial relations.[173] The difficulty with this approach is that it would have profound implications for common law rules of private law. Judges already have a multilayered task to fulfil when considering whether common law is applicable. For example in most countries common law developed in England or within the Commonwealth will apply, but only if it is appropriate the circumstances of country.[174]

[170] O Kahn-Freund, 'Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1.

[171] Samoa, Kiribati, Federated States of Micronesia, Fiji Islands, Marshall Islands, Papua New Guinea, Tuvalu, Solomon Islands and Vanuatu have all acceded to CEDAW. Cook Islands, Niue and Tokelau are bound by New Zealand's ratification and French Polynesia, New Caledonia and Wallis and Futuna by France's. See further Jennifer Corrin Care (n 73).

[172] See, eg *Re Miriam Willingal* (1997) 2 CHRLD 57; *Italia Ta'amale and Ta'amale Toelau v The Attorney-General* (Unreported, Court of Appeal of Samoa, Cooke P, Casey and Bisson JJA, 18 August 1995).

[173] *Pafco Employees Union v Pacific Fishing Company Limited* (2002) 4 CHRLD 6.

[174] See, eg Laws of Kiribati Act 1989, s 6(b)(2) (Kiribati); Civil Law Act 1966, ss 3 and 4(b) (Tonga). See further Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (2nd edn, 2007) chap 2.

In its report on custom and human rights in the Pacific, the New Zealand Law Commission concluded that:[175]

> Custom and human rights can be better synthesised by constitutional or statutory provisions for the horizontal application of human rights, so that they come to apply between individuals, including between customary leaders and their people.

This preference for horizontal application of rights seems to be based on the view that:[176]

> Broader responsibility for human rights also helps promote a strong human rights culture. Human rights come to flavour relations between individuals, rather than only applying to relations between individuals and the state. In many ways, making constitutional provision for horizontal application of rights would simply reflect the common perception that rights do apply between individuals. Horizontal effect also incorporates the notion of corresponding duties, as individuals have responsibilities to ensure the rights of others are respected.

They also stated that '[h]orizontal application of rights overcomes the distinction between the public and private spheres',[177] but just how it was thought to achieve this end is unclear. Perhaps the Commission meant only to state that the approach does not require a distinction to be made.

The Commission acknowledged that horizontal application 'would mean that both rights and custom would operate in the customary sphere and that traditional leaders in making decisions based on custom would also be obliged to accommodate human rights, and this could be enforced in the courts'. So what would happen in the case of conflict? The Commission's answer is put forward in a short paragraph of three sentences:[178]

> Under horizontal effect, where custom is incompatible with human rights, community justice bodies would have to modify custom. A potential disadvantage of giving horizontal effect to human rights is that customary 'person-to-person' disputes might be taken to court instead of being resolved in a customary way. This shift need not occur, however, if traditional decision-makers receive proper training in human rights.

But can it be as simple as that? Applying all rights horizontally, regardless of local priorities, runs the risk of social dislocation. Can 'training' alter embedded values and attitudes? Education rather than training, if conducted in a culturally appropriate manner may assist, but is likely to be a lengthy process. Another question which arises is whether traditional leaders 'trained' to make decisions in accordance with human rights norms would be administering

[175] New Zealand Law Commission, Converging Currents: Custom and Human Rights in the Pacific, 2006, NZLC SP17, Wellington, New Zealand, Suggestion 14.2, 216.
[176] NZLC SP 17 (n 175) [14.42].
[177] NZLC SP 17 (n 175) [14.40].
[178] NZLC SP 17 (n 175) [14.43].

customary law in cases where it encompasses different norms or some hybrid form of law. Following on from this, as traditional leaders derive their authority from customary law, does this authority subsist if they administer some other form of law? This argument is similar to that which has been raised in relation to conferral of formal status on traditional leaders through written law.[179] These questions may be countered by reference to the flexibility of customary law, which is proclaimed as one of its main advantages. But is customary law able to adapt to incorporate values which conflict with those which are embedded in the fabric of the society in which it is placed, such as patriarchy and respect for status? These questions obviously deserve consideration before assuming that training will resolve the issue of conflict.

Another matter requiring consideration in any legal system opting for horizontal application is the extent and nature of the changes that will be necessary to adapt rights concepts to make them fit into the private law environment.[180] Similarly private law will have to adapt as new 'tools' will be required for it to accommodate constitutional human rights.[181]

C. A Degree of Horizontal Application

As discussed above they are numerous degrees of horizontality between the extremes of the spectrum. Within these degrees it is suggested that there are two possibilities which might be considered for use in the South Pacific: the coordinate model and the nuanced model.

1. The coordinate model

An approach which has not yet been considered in the South Pacific, but which might have potential is that referred to by Canadian constitutional commentator, Brian Slattery, as the co-ordinate model.[182] According to this model, bills of rights are not merely concerned with reviewing government action in the courts. They impose equal responsibilities of all three branches of government to act in accordance with a 'constitutional code of behaviour directly regulating governmental activities as a whole'.[183] Thus government institutions must, and according to Slattery by and large do, act in accordance with the bill of rights standards when formulating policy and the law. The model calls on courts to investigate whether an existing legislative, administrative or common law scheme actively and fully protects and vindicates the constitutional right in question. However, it dictates that the courts should only accept a constitutional application based on alleged infringement of

[179] See, eg Powles, 'The Place of Chiefly Systems in Constitutions' in *Fiji and the World* (SSED, USP, Suva, 1997) 323.
[180] Friedmann and Barak-Erez (n 2) 3.
[181] Aharon Barak in Friedmann and Barak-Erez (n 2) 30–31.
[182] Slattery (n 6) 707.
[183] Slattery (n 6) 712–713.

human rights where there is no adequate statutory, administrative or common law action or remedy.[184] The merit of this approach is that is allows courts to consider the merits of the actions, rather than the identity of the actors, but still maintains the primacy of alternative schemes to protect the right.[185]

The co-ordinate model may be particularly useful in the South Pacific where there are plural sources of law that often include avenues for protecting rights. Between them, customary law, common law and legislation frequently offer claimants at least one avenue for protection of human rights. For example, in *Pusi v Leni*,[186] discussed above, the court denied the plaintiff relief on the facts, but was clearly of the view that there were existing remedies for the alleged breach of freedom of movement, specifically, those in custom. This model may help to obviate the cultural clashes inherent in the application of transplanted human rights norms to regional circumstances, but would provide recourse if an individual's rights were not adequately protected, as in the banishment cases discussed above. This could enhance trust and respect for the courts and legal system and, in the long term, provide the stability required for foreign investment and development. The emphasis on the equal responsibilities of all branches of government might also encourage good governance practices in a region that has not always enjoyed a smooth path to democracy either before or after independence. This model also circumvents the problems of deciding who is and who is not a state actor, which is a difficult task in countries where customary institutions have quasi-governmental functions, and often perform several different law making and interpretive functions.

2. *The nuanced model*

The diversity of social circumstances and the gulf between the theory and practice of the rules governing law and the State, which makes the coordinate model attractive also suggests another approach, referred to here as the 'nuanced model'. As opposed to the 'all or nothing' approach of the kind warned against in *Ulufa'alu's* case,[187] the nuanced model is based on flexibility. However, this does not mean that the courts would be left floundering in the dark; clear textual indicators would be provided, expressing the boundaries within which the courts are to carry out clearly defined tasks. This nuanced approach would acknowledge that the applicability of human rights provisions may depend on the right relied on in the case in question, the circumstances in which the alleged breach arises and any relevant cultural considerations. This would be accompanied by a provision akin to s 8(3) of the

[184] Slattery (n 6).
[185] Butler (n 8) 13–14.
[186] Unreported, High Court, Solomon Islands, cc 218/1995, 14 February 1997. This case is discussed in J Corrin Care, 'Customary Law and Human Rights in Solomon Islands—A commentary on *Remisio Pusi v James Leni and Others*' (1999) Journal of Legal Pluralism 135.
[187] [2005] 1 LRC 698.

Constitution of the Republic of South African 1996. Section 8(3) clarifies s 8(2), which in effect introduces a nuanced approach, by providing that the bill of rights binds a natural or a juristic person if, and 'to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. Subsection (3) expressly states that in giving effect to subsection (2), a court must, if necessary, develop the common law 'to the extent that legislation does not give effect to that right' and 'may develop rules of the common law to limit the right'. Such limitation must not exceed the boundaries set out in s 36(1), which states that limits may be 'only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. In considering whether a limitation qualifies under this provision, a non-exhaustive list of factors to take into account is provided. These are:

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

With regard to (a), the nature of a right often suggests whether or not it is capable of being applied horizontally. Some rights are usually violated by state actors, such as right to fair trial, false imprisonment etc. However, in the context of the Pacific, there may need to be a second level of analysis, as non-state actors often take on these functions, for example, when resolving disputes at a village level and imposing customary penalties.[188] A suggested approach to all issues of constitutional rights would be to ask: who is capable of exercising this right? Has the exercise been lawful?

D. The Lateral Approach

Although these models hold promise, it is also arguable that, within the region, human rights should be applied outside the two dimensional spectrum represented by the vertical, intermediate and horizontal approaches. Recognising the plural nature of society, the 'lateral' approach involves extending the application of human rights beyond the State, to make them enforceable against traditional leaders. This would allow human rights to be enforced in the parallel realm of customary society, where, particularly in rural areas, traditional leaders often act not as 'private individuals', but as a de facto form of government. In this context the arguments against extension of rights provisions to individuals do not apply. The 'lateral' approach could be introduced in one of two ways. The first is by specifically including a person or body

[188] See further, Jennifer Corrin Care (n 73).

exercising traditional authority within the definition of 'public' when they are involved in matters of law or governance of customary society. In the paragraph of its report preceding the conclusion that direct horizontal application was the best option for applying human rights in the Pacific, the New Zealand Law Commission expressed the view that the same result could be achieved by regarding custom chiefs as 'performing a public function' and therefore bound by rights provisions in the same way as the State.[189] It is not clear why the Commission discarded this as a possible solution.

The second way in which the lateral approach could be introduced involves a broader change, akin to that in the Fiji Islands Constitution,[190] extending the application of rights to any person or body performing a public function. If this option were chosen it would be necessary to specify that traditional leaders would be regarded as fulfilling such functions, either generally or in clearly defined cases, for example, when resolving disputes. This would avoid the type of questions that have arisen in New Zealand as to whether Maori organisations are bodies performing a public function.[191]

This novel approach would pose some challenges for the drafter. Some of these might by resolved through research and careful drafting. For example, terminology for identification of traditional leaders might be found in existing constitutional provisions designed to give traditional leaders a role in the State[192] or highlight the intention to do so in the future. For example, the Constitution of Marshall Islands refers to 'iroijs',[193] the Constitution of Samoa to 'matais'[194] and the Constitution of Tonga to 'nobles'.[195] In countries such as Solomon Islands, where the Constitution refers to 'traditional chiefs',[196] further research and consultation would be required to identify terms with local resonance.[197] However, there are other questions that arise, which are not so easily resolved. The suggestion that traditional leaders be regarded as performing a public function could raise old spectres relating to customary law. Unanswered questions include whether such law applies to all or only to members of the customary group.[198] This could be grounds for a distinction between parts of the region with heterogenous customary laws and Melanesia, where it is not just a question of whether customary law applies to non-indigenous people or bodies, but also whether it applies outside a small tribe or clan. Is law making a public function if it is being made only for a narrow group? Is there a stronger case for classifying traditional leaders' lawmaking as a public function when such laws apply to all?

[189] NZLC SP 17 (n 175) [14.41].

[190] See above, text at n 28 to 49 [does this mean sections from the footnote ref 28 to 49? If so, use another way of saying it???).

[191] See Charters (n 10) 403.

[192] See above (n 125) for examples.

[193] Art III.

[194] Art 100.

[195] Sections 60 and 67.

[196] Section 114(2)(b).

[197] See further, G White and L Lindstrom, *Chiefs Today*, (Stanford University Press, 1997).

[198] See further, Jennifer Corrin Care, 'Wisdom and Worthy Customs: Customary Law in the South Pacific', (2002) 80 Reform 31–36.

These questions are raised in order to emphasise the need for thorough research, to inform the consultation and debate, which should be prerequisites to the reform process, rather than to explore them further, which is outside the realm of this article. Some of these questions could be resolved by clear legislative provisions but careful consideration is required to ensure that any provision for the extension of human rights into the customary sphere does not fall foul of the many pitfalls arising from the deceptively difficult questions regarding the nature and application of customary law.

The lateral approach could be adopted in addition to either the coordinate model or the nuanced model, neither of which would have the advantage of expressly recognizing the plural nature of Pacific Island societies. A combined solution would also allow for human rights protection against those wielding power without state or customary sanction.[199] It should also be emphasised that none of these three approaches would necessarily mean that rights would always trump custom. There are circumstances where human rights should not prevail over customary law. This might be due to the existence of other avenues for enforcement of human rights, which, as illustrated by *Pusi v Leni*,[200] would be particularly pertinent under the coordinate approach. On the other hand, it might be due to the circumstances of the case, which would be particularly pertinent under the nuanced model. Again, regional case law provides an example in *Teonea v Pule o Kaupule and Nanumaga Falekaupule.*[201]

V. CONCLUSION

The extent of the application of human rights in some South Pacific Island countries is currently unclear. As discussed above, only Papua New Guinea and Tuvalu have clear textual indicators. Fiji Islands makes reference to the matter in the text, but those indicators are capable of different interpretations. That in itself is not necessarily a cause for concern; in the United Kingdom it appears that the drafters of the Human Rights Act deliberately left the question of horizontal application open.[202] However, in the Pacific the current position it is not a matter of choice but rather a result of a failure to debate the issues when the Constitutions were drafted. Even in Fiji Islands where a constitutional review took place between 1995 and 1996, there has been no detailed debate on this issue.[203] Further, regional courts have failed to take on the role that absence of textual indicators assigns to them. The most extensive

[199] See above (n 162)–(n 168).

[200] (Unreported, High Court, Solomon Islands, cc 218/1995, 14 February 1997). This case is discussed in Corrin Care J, 'Customary Law and Human Rights in Solomon Islands- A commentary on *Remisio Pusi v James Leni and Others*' (1999) Journal of Legal Pluralism 135.

[201] [2005] TVHC 2.

[202] House of Lords Select Committee, *Report of the Select Committee on a Bill of Rights*, HL 176 (1977–78), para 41, referred to in Ian Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' 48 International and Comparative Law Quarterly 57, 59, n 10.

[203] Above (n 57) [17.12–7.15].

consideration has been in Solomon Islands and, even there, the treatment was rather one-dimensional.[204] There are a number of factors which may have inhibited the ability of courts to investigate and balance relevant local circumstances and, more generally, to develop a South Pacific jurisprudence.[205] Apart from a lack of resources generally, the fact that appeal courts, outside Papua New Guinea, are often made up of foreign judges, who may visit the country for one or two weeks, two or three times a year only, makes it particularly challenging to conduct a contextual consideration of the relevant issues, including those canvassed above.

In all countries of the region the extent to which the provisions will be applied depends, to a greater or lesser extent depending on the textual indicators, on the approach adopted by the court. An ad hoc approach prevails and the extent of the application of human rights protections is unpredictable, lurching from vertical to horizontal in some countries without prior warning.[206] The courts' approach may itself depend on a variety of matters, such as whether traditional leaders are formally recognised in the state system, which may have been the result of historical factors, politics or pure chance, rather than rational decision-making. Leaving matters of such importance to the court's discretion has the disadvantage of uncertainty. In the South Pacific region, there is also the problem, touched on above that final appeal court judges are often *ex patriates* who may be unaware of all the relevant cultural nuances. Textual indicators would provide valuable assistance and reduce the drain on judicial resources caused by the need to grapple with this question each time it arises. However, that is not to say that the textual indicators must plump for an 'all or nothing' approach of the kind warned against in *Ulufa'alu's* case.[207] A coordinate or nuanced approach would provide a more appropriate option.

If rights are to provide effective protection, especially for women, an intermediate level of horizontal application should be coupled with a regionally specific solution. In this article, a possible solution has been advanced in the form of a lateral approach. This would acknowledge that, in those areas where custom is still strong, traditional leaders are the heads of local communities and the de facto power, from which protection may be required, is in their hands. Such a regionally grounded approach would provide a link between the horizontal versus vertical debate and the practical reality of social structures in the small island countries of the South Pacific region.

The importance of local circumstances has been stressed throughout this article. Consequently, if the mistakes of the colonial era are to be avoided,

[204] *Ulufa'alu v AG* [2005] 1 LRC 698.

[205] See further, Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (2nd edn, London: Routledge Cavendish, London, 2007) chap 1.

[206] See, eg *Family Kalotano v Duruaki Council of Chiefs* (Unreported, Supreme Court, Vanuatu, Lunabek CJ, 24 May 2002), accessible via www.paclii.org: [2002] VUSC 32.

[207] *Ulufa'alu v AG* [2005] 1 LRC 698.

neither Slattery's coordinate model nor 'nuanced' or 'lateral' approaches put forward by this article should be pursued without fully informed discussion at the local level. Experience in the South Pacific and elsewhere demonstrates that changes must have the backing of the population in which they are to operate, if they are to be successful. The distinctive features in the legal and social systems discussed above and highlighted in the case law demonstrate the need for culturally specific consideration of the questions involved, rather than universal incorporation of a generic regime. While overseas models are a useful resource to draw upon, transplants are no substitute for sui generis solutions.