

A Model Law to Implement the Convention on the Protection of the Underwater Cultural Heritage and its Possible Application in Plural Legal Regimes in Pacific Small Islands States: A Case study of Solomon Islands

Craig Forrest¹ and Jennifer Corrin²
Centre for Public
International and Comparative Law
TC Beirne School of Law
University of Queensland
Brisbane
Australia 4072
Email: c.forrest@law.uq.edu.au¹
Email: j.corrin@law.uq.edu.au²

Abstract

A strategy for promoting the adoption of the Convention on the Protection of the Underwater Cultural Heritage, is the adoption of a Model Law; one that also promotes uniformity, consistency and ease of use. This, however, is a challenge in the Pacific. Solomon Islands, for example, like most Pacific island nations, has a plural legal regime. That is, customary law operates in conjunction with the common law, a legacy of Solomon Islands' colonial past. Legal pluralism raises significant difficulties for the protection and management of cultural heritage, and is especially challenging when the maritime areas beyond the low water mark are involved. This paper considers the barriers to protection of underwater cultural heritage raised by legal pluralism and the further difficulties encountered when considering Solomon Island's possible ratification on the 2001 Convention on the Protection of the Underwater Cultural Heritage. It considers whether a Model Law might be a useful tool in this endeavour.

Keywords: Underwater cultural heritage, Convention, 2001, Law, Legal, Framework, Pacific, Solomon Islands,

The underwater cultural heritage of Solomon Islands

The very nature of Pacific Island peoples means that Solomon Islands has a rich maritime heritage. Unfortunately, few underwater remains of pre-colonial vessels have survived, though terrestrial examples exist (van Tilburg, 2011). Indeed, the largest water craft in the British Museum is a war canoe from New Georgia (Hess et al., 2009). Nevertheless, other heritage, such as underwater caves and sacrificial sites used for shark or crocodile worship, are numerous, especially in the coastal waters of certain

islands, such as Malaita (Lidimani, 2011). There are also submerged islands and villages, inundated by the changing sea levels as well as in the construction of artificial islands such as Langa Langa Lagoon and Lau Lagoon in Malaita Province and Roviana Lagoon in the Western Province (Guérin et al., 2010). Perhaps the most famous historic shipwreck in Solomon Islands is that of the *Boussole*, commanded by Jean-François de Galaup, Comte de La Pérouse, lost in 1788 off the island of Vanikoro. The best known wrecks in Solomon Islands, however, are those of the Second World War. So numerous are they that the waters between Guadalcanal and Savo and Florida Islands are known as Iron Bottom Sound. The *Protection of Wrecks and War Relics Act 1980* restrict access to (including diving) and interference with these vessels (and aircraft) and associated objects, subject to obtaining a licence from the relevant Ministry (Corrin and Forrest, 2013). Such a license is only to be granted to a person who can satisfy the Minister that they are competent and properly equipped to carry out excavation or salvage operations in a manner appropriate to the historical importance of the wreck. Further, limited protection is provided by the *Protected Areas Act 2010*. This Act defines areas which may be declared as protected to include an area which possesses significant 'cultural resources' or 'merits protection under the Convention Concerning the Protection of World Cultural and Natural Heritage' [s 10(1)]. No other national legislation protects the remaining body of underwater cultural heritage in Solomon Islands, and beyond its territorial sea, a problem the 2001 Underwater Cultural Heritage Convention is designed to address.

The Convention on the Protection of the Underwater Cultural Heritage

The Convention on the Protection of the Underwater Cultural Heritage came into force in 2009, almost eight years after its adoption, and currently only has 45 States parties. Moreover, of these 45 States, few have significant underwater cultural heritage (UCH) within their waters, and even fewer are significant maritime powers that have lost vessels in the oceans of the world. The reasons for the slow take up of the Convention have been dealt with elsewhere (Dromgoole, 2013) but include debate concerning the consistency between the Convention and the 1982 UN Law of the Sea Convention (Cogliati-Bantz and Forrest, 2013); the lack of immunity offered to wrecked sovereign vessels; and the non-application of salvage law. That said, recent 'ratifications' do

include maritime States such as France and those with significant wrecks in their waters, such as Belgium, who together with States such as Spain, have an important impact on the manner in which the Convention will ultimately be implemented and applied. It is hoped that more States will follow the lead of these recent ratifications, but for the Convention to be effective, it requires much broader participation by States, particularly in geographical regions such as the Asia-Pacific. The Convention provides an agreed minimum standard for recovery of UCH and sets out the jurisdictional structures and core principles upon which the regime is built, such as non-commercialisation of this heritage, supremacy of in situ preservation, and the encouragement of non-intrusive and non-destructive public access. But above all, the Convention is based on the principle of State co-operation. Without such co-operation, protection beyond the territorial sea is difficult, if not impossible. Accordingly, the Convention can only work if all the States with an interest in a particular wreck, for example, are party to the Convention. This problem is exacerbated in the Asia-Pacific region given the close proximity of many different island nations, and the ability to avoid one jurisdiction and use another as a safe-haven when directing activities at UCH.

The Convention is somewhat unusual in its structure with an Annex as an integral part of the Convention. Whereas the Annex addresses archaeological standards in some detail, the Convention itself is designed to set out principles, rights and duties that require implementation, and detail, from each ratifying State. The Convention is not a self-executing convention in the sense that it does not provide rights and duties that can easily be incorporated into a State's national legal system without some form of implementing legislation that provides a detailed protective regime. The Convention, in seeking to harmonise principles, merely provides the skeleton or framework and each State is required to add body to that structure. There is therefore a tension inherent in the implementation of this Convention: the need for harmonisation across jurisdictions given that the Convention is structured on the basis of State co-operation, whilst at the same time giving States the freedom to implement the Convention in ways that make it workable in that particular State. The great difficulty then is to identify the best mechanism through which these international norms, binding on each State, may be translated and transformed into a national protective regime that is effective as the basis

for State co-operation. One possible mechanism is the use of a model law that can play a transformative role, particularly within a particular geographical region.

The transformative function of a Model Law

A model law is a legislative text that is recommended to States for enactment as part of their national law (Faria, not dated). Model laws are used to harmonise and unify law, and have been used by a range of international organisations, including UNESCO, UN Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT) (Siehr, 2012). Essentially the model law sits somewhere on the spectrum between the generality of the norms of international conventions and the specificity of the national legislation. It plays a mediating role in the transformation process from international norms to national law. The extent of that process is dependent on where in that spectrum the model law is to sit. And that is dependent on a range of factors, including the States involved in the drafting of the model law, the specificity of the international norms themselves and the differences in the legal structures of various implementing States (particularly in the same geographical area where this is important to the international context, as it is in this case). The use of model laws in this transformative role has been championed for a number of reasons. By having a more detailed agreed upon instrument, the implementation of the intentional norms is more likely to be applied, interpreted and enforced consistently between jurisdictions (Pistor, 2002). Moreover, the resulting national legislation is also more likely to achieve quality measures of legislation such as its enforceability, consistency, comprehensibility, transparency and accessibility (Poloko, 2012; Muylle, 2003). It also saves time in that the national drafting process is shortened through the collective drafting of the model law. It also allows for the pooling of expertise, particularly where the subject matter of the international norms may be of a technical nature; as is the case with the Annex of the Convention. This is perhaps particularly pertinent in the Pacific, given the limited number of technical experts as well as the limited number of experienced legislative drafters. This has led to a general failure to introduce legislation in many Pacific Islands State to meet their obligations under regional and international conventions. This shortage prompted the member States of the Pacific Islands Forum Secretariat, of which Solomon Islands is one, to

establish a legal drafting unit within the Forum Secretariat in 2006. Its core mandates include provision of legislative drafting assistance to Forum countries in relation to national legislative agendas and in response to the Pacific Plan and any other relevant initiatives. There is already a precedent for the drafting of model laws by the Unit, as in 2008 it completed a Regional Model Law on Customs. Prior to the establishment of the Unit, the Forum Secretariat was a partner in the drafting of the Model Law for the Protection of Traditional Knowledge and Expressions of Culture in 2002. Solomon Islands has not yet developed national law based on this model (Pacific Islands Forum Secretariat; not dated).

The use of model laws in drafting national legislation does, however, have shortcomings. Model laws that lie close to national legislation in terms of specificity may lack a certain amount of democratic legitimacy. It is “a legislative process which may be far removed from those which it affects and in a sense negates trends towards bringing government closer to the people by way of regionalisation and devolution” (Poloko, 2012). The risk lies in implementing a model laws that achieves international uniformity but lacks efficacy in the national legal system. As such, in drafting a model law, consideration needs to be given to the difficulties that might arise in giving national (or even local) effect to the resulting national legislation. Whilst a model law is not, in itself, a legislative instrument, and therefore need not be duplicated in its entirety in the implementing legislation, any divergence will undermine the very purpose of the model law: uniformity and harmonization. Nevertheless, it has the advantage of flexibility and the ability to accommodate national variation in its implementation (Faria, not dated).

The drafting of a Model law

The quality of the national legislation that implements the model law is naturally dependant on the quality of the model law itself. In drafting the model law, consideration must be given to the criteria used to ascertain the legislative quality: being its enforceability, consistency, comprehensibility, transparency, plainness, accessibility and clarity (Poloko, 2012; Muylle, 2003). This then will also impact on the generality or specificity of the model law. These criteria would have to be applied in the drafting of a model law implementing the Convention in the Pacific.

1. Enforceability: the model law would need to take into account the practical consideration needed to give effect to the Conventions' articles.
2. Consistency and Comprehensibility: the model law would need to be drafted using concepts, language and structures that give effect to the international norms but which are also consistent with national legal structure and legislation and can be understood in that national context. In geographical area such as the Pacific, this might necessitate a more abstract generalised model law that take into account the differences in national legal structures.
3. Transparency and Accessibility: requires the involvement, or at least consultation, between the drafters of the model law and those responsible for the national drafting and administration of the implementing legislation.

These cautionary points are particularly pertinent in the Pacific, and particularly in relation to States such as Solomon Islands. As a case study, Solomon Islands provide a cautionary seascape within which to consider the use and application of a model law to implement the UCH Convention.

Implementation in legally pluralistic States: Solomon Islands

Solomon Islands, like most other Pacific Island nations, has a plural legal regime. State law co-exists with customary laws, which are largely unwritten. Customary laws have been given formal recognition in the Constitution, but do not depend on the State for their validity. For many Solomon Islanders they are the only laws they will ever encounter. There is a stark distinction between State law and customary laws. In the customary sphere, the distinctive features of the 'legal' and 'social' orders are inextricably intertwined. The State system, on the other hand, is based on the common law, which is a foreign model. Its laws and legal institutions are largely legal transplants. There is a longstanding debate in transplant theory as to whether it is only rules that are transplanted or whether it is law and its surrounding culture. It has been argued that the success of a transplanted law depends on the type of law involved, with culturally specific laws being the least likely to succeed (Kahn-Freund, 1974, 5-6). In the context of Solomon Islands, the objection to transplants is well stated by Gatu:

A Solomon Islander is a unique Melanesian, and whatever laws or regulations are passed should be made to suit the Melanesian lifestyle. ... Too often both

expatriates and Melanesians (especially politicians) make the same mistakes over and over again by trying to implant or impose foreign laws and concepts on Melanesians and expect them to adhere to such changes with a wave of the magic wand (1977: 98)

Model laws are subject to many of the same objections as legal transplants, in that they are not drafted specifically for a country. However, unlike transplants, a model law is not intended to be applied blindly, without modification or supplementation to accommodate local circumstances. However, like transplants, model laws are particularly problematic in plural legal regimes. It is not only the cultural setting of the law that may differ, but also the legal setting. Each of the two legal systems may prescribe a different rule for the same situation. Each may also differ in its approach to process and proof, the appropriate relief and the penalties which may be imposed. Enforceability may also be an issue, particularly given the logistics of Solomon Islands. In practice, particularly in remote areas, traditional leaders may be the only effective authority.

Where legal systems overlap, care must be taken not to introduce laws which will exacerbate tensions between the different systems. This is particularly the case where State and customary norms are radically different, which may well be the case in relation to cultural heritage. The complexities arising from legal pluralism in this area are well illustrated by the disagreement of State and traditional authorities over ownership of the land (or sea) on which tangible cultural heritage is situated or through which it may be accessed. The State law is contained in the *Land and Titles Act* (Cap 133) and the common law, constituted by decisions of Solomon Islands courts. The Act acknowledges the supremacy of customary laws in relation to customary land (which constitutes 87% of the total land area). It states that, 'The manner of holding, occupying, using, enjoying and disposing of customary land shall be in accordance with the current customary usage applicable thereto, and all questions relating thereto shall be determined accordingly' [s 239(1)]. However the legislation does not expressly state whether 'customary land' includes reefs or foreshore, and recourse must therefore be had to the common law on this point.

Unfortunately, the cases are conflicting. At one time, the High Court regarded the issue as governed by the common law, and accordingly, areas below high watermark were regarded as belonging to the Crown (*Allardyce v Laore* 1990). However, according to the latest High Court decision (*Combined Fera Group v Attorney General* 1997) reefs and foreshore may be under customary management if it can be proved that this was the case prior to 1 January 1969. This means that if customary owners have undisputed evidence that they owned an area on which cultural heritage is situated or accessed before that date they may be able to establish a legal right to ownership. Customary laws differ significantly from place to place in Solomon Islands, so it is not possible to state categorically what these laws say about reef and foreshore. One fundamental point of difference is that 'ownership' is not an adequate term to describe the rights and obligations of members of customary society regarding their land, which are intimately bound up in an intricate web of relationships. The customary concept of land-holding recognises multi-layered rights of ownership and use. It may be more accurate to refer to 'rights to use' than to ownership, but even this does not give the full picture (Corrin, 2008). What can be said is that customary land tenure includes tenure of the land below high water mark. Such tenure carries with it the right to control the use of the marine area and resources, including heritage resources. Solomon Islands Law Reform Commission has considered this matter in some detail. The Commission's 2012 report recommends amending the definition of customary land in the *Land and Titles Act* to include land below the low watermark up to the limit of Provincial boundaries ([1.26]). It also recommends abolishing the need to prove ownership prior to 1 January 1969 and relying on proof of current customary usage ([1.26]). To date, these recommendations have not been implemented. If implemented they will have significant consequences for the national government in attempting to implement the Convention in its territorial waters below the high watermark. Another important aspect of legal (and cultural) pluralism to be taken into account is the authority of traditional chiefs, who play a role not only in making, but also in administering and enforcing customary laws. The *Constitution of Solomon Islands* puts an onus on Parliament to legislate for the inclusion of traditional chiefs in provincial governance (s 114).

Provincial governments

It is also important to bear in mind that legislative reform in Solomon Islands may be in the form of national or provincial legislation. Provincial governments may make laws in the form of ordinances on matters devolved to provinces or 'incidental to or consequential on' such matters (s 31(1)). Devolved areas include 'Historical remains' (Provincial Government Act 1997, Sch 3, para 2). In the original Act, passed in 1981, the *Protection of Wrecks and War Relics Act 1980* was excluded from the devolved powers. The extent of this exclusion is unclear, but this is now academic as it does not appear in the 1997 Act. Provincial Ordinances only have effect within the province, and provincial governments are specifically precluded from making laws affecting Solomon Islands' international obligations (s 31(4)). Nevertheless, given the political and practical importance of provincial governments, it is important to bear their role in mind when drafting model laws. It is also necessary to take into account the existing provincial initiatives. Guadalcanal and Western Province both have policy frameworks on culture, although these are fairly rudimentary (Guadalcanal Policy Statement on Culture 1987; Western Province Policy on Culture 1989). However, five provinces have Ordinances providing some degree of protection for cultural heritage. These are the Guadalcanal Province Protection of Historic Places Ordinance 1985; the Malaita Province Preservation of Culture Ordinance 1995; the Makira-Ulawa Council (Prevention of the Sale of Traditional Artifacts) Bylaws 1977; the Temotu Province Preservation of Culture Ordinance 1993; and the Western Province Preservation of Culture Ordinance 1989.

The *Moli Ward Chiefs Council Ordinance 2010* provides a more recent and locally specific example of a piece of sui generis legislation, drafted within Guadalcanal Province to regulate the use of 'traditional practices or heritage'. This is defined to include, 'song, chant, dance costume or clothing, ritual, ceremonial object or practice, folklore, painting, carving, art, weapon, architecture, traditional knowledge and any other authentic activity or object attributed to the customs and traditions of Moli Ward.'

Conclusion

While sui generis legal solutions are always the preferred option, the drafting of a Model Law for the implementation of the Convention in the Pacific has much to offer. It is both

resource and time efficient and its inherent flexibility in its transformative role is capable of addressing individual State's particular circumstances. That's said, the drafting a Model Law with sufficient flexibility to address the distinctive features of a State such as Solomon Islands is not without significant challenges. Solomon Islands' rich cultural heritage, illustrated by its linguistic and tribal diversity (there are, for example, 65 different languages in Solomon Islands), and the peculiar nature of its legal and social systems, requires input from Solomon Islanders as well as from technical experts on maritime archaeology and the functioning of the Convention.

References

Allardyce v Laore [1990] SILR 174

Combined Fera Group v Attorney General (Unreported, High Court, Solomon Islands, Palmer J, 19 November 1997)

Cogliati-Bantz, B., and Forrest, C., 2013. Consistent: The Convention on the Protection of the Underwater Cultural Heritage and the United Nations Convention on the Law of the Sea. *Cambridge International and Comparative law Journal*, Vol. 2 (3): 1-26.

Corrin, J., 2008. Customary Land and the Language of the Common Law. *Common Law World Review*, Vol. 37: 305 - 333.

Dromgoole, S., 2013. Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage. *Marine Policy*, Vol. 38: 116-123.

Faria, J. A. E., *Legal Harmonization through model laws: The experience of the United Nations Commission on International Trade Law (UNCITRAL)*, retrieved 28 December 2013, from

http://www.justice.gov.za/alraesa/conferences/2005sa/papers/s5_faria2.pdf.

Forrest, C., and Corrin, J., 2013. Legal Pluralism in the Pacific: Solomon Island's World War II Heritage. *International Journal of Cultural Property*, Vol. 20: 1-21.

Gatu, B., 1977. Dispute settlement in the Solomon Islands. In G. Powles, R. Crocombe, and M. Pulea, (Ed.), *Pacific Courts and Justice*, Institute of Pacific Studies, Fiji: 98-100.

Guérin, U., Egger, B., and Penalva, V., 2010. *Underwater Cultural Heritage in Oceania*. UNESCO, Paris.

Hess, M., Robson, S., Miller, F. S., Were, G., Hviding, E., and Berg, A. C., 2009. Niabara - The Western Solomon Islands war canoe at the British Museum - 3D documentation, virtual reconstruction and digital repatriation. Berg, Arne Cato 2009 15th International Conference on Virtual Systems and Multimedia: proceedings: VSMM 2009 Vienna Austria, retrieved 15 December 2013, from <http://discovery.ucl.ac.uk/1305320/1/1305320.pdf>.

Kahn-Freund, O., 1974. Uses and Misuses of Comparative Law. *Modern Law Review*, Vol. 37 MLR: 1 - 27.

Lidimani, D. B., 2011. *Cultural Mapping Report: Solomon Islands*. Secretariat of the Pacific Community, Fiji.

Muylle, K. J., 2002. Improving the Effectiveness of Parliamentary legislative procedures. *Statute Law Review*, Vol. 24 (3): 169-186.

Poloko, L., 2012. *Drafting of legislation in compliance with model laws*. LLM Thesis, Institute of Advanced Legal Studies, University of London.

Siehr, K., 2012. *Model Laws for Implementing International Conventions - The Implementation of the 1970 UNESCO Convention on Cultural Property*. Max Planck Private Law Research Paper No. 12/25.

Solomon Islands Law Reform Commission., 2012. Review of the Law that Applies to Land below High Water Mark and Low Water Mark (Solomon Islands Law Reform Commission, 2012).

Pacific Islands Forum Secretariat. Legislative Drafting, retrieved 8 January 2014, from <http://www.forumsec.org/pages.cfm/political-governance-security/legislative-drafting/>.

Van Tilburg, H., 2011. Historic Period Ships in the Pacific Ocean. In A. Catsambis, B. Ford and D. L. Hamilton (Eds.), *The Oxford Handbook of Maritime Archaeology*, Oxford University Press, Oxford

Watson, A., 1976. Legal Transplants and Law Reform. *Law Quarterly Review*, Vol. 79- 84

Biography

Craig Forrest is a reader in law and Director of the Marine and Shipping Law Unit at the University of Queensland. He was a member of the South African UNESCO delegation that drafted and adopted the 2001 Convention and has participated in a number of UNESCO workshops on the implementation of the Convention. In 2013 he assisted in drafting a Model Law for the implementation of the Convention in the Caribbean. He is a member of the International Law Association's Cultural Heritage Law Committee and is editor of the Australian and New Zealand Maritime Law Journal.

Jennifer Corrin is Director of the Centre for Public, International and Comparative Law, University of Queensland, and currently an Australian Research Council Future Fellow undertaking research on law reform and development in plural legal regimes. Jennifer has published in the areas of South Pacific law, customary law, human rights, court systems, evidence, land law, constitutional law and contract. Current projects include the status of French law in former colonies; carbon rights in Melanesia; and legal pluralism and theories of law. Jennifer is on the Editorial Boards of the *Journal of Legal Pluralism*, and the *Journal of South Pacific Law*.