

Justified Killing in Custom in Solomon Islands : Some Comments

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The Issues

- Whether the existing complete or partial defences to murder provide for intentional killing which might be justified in custom?
- How might killing that might be justified in custom be treated under a reformed offence of murder?

Introduction

- 1995 terms of reference from the Minister of Justice to the Solomon Islands Law Reform Commission to review the Penal Code.
- Murder is an offence in the Penal Code.
- It is too broad in terms of its mental/fault element.
- The penalty for murder is mandatory life imprisonment.

- The offence of murder has certain defences.
- Defences are categorised into two broad areas; complete and partial defences.
- Examples of complete defence: self defence and compulsion.
- The effect of a full defence is that if it is established, it results in an acquittal.
- Partial defences include: provocation, excessive self defence, and killing based on reasonable belief in a legal duty to cause death or do the act that caused the death.
- The effect of partial defences is that it reduces the charge of murder to one of manslaughter.

A Challenge for Law Reform in SI

- One challenge for law reform in Solomon Islands is how to treat intentional killing that is claimed to be justified according to customary beliefs, or customary law.

Scope of Paper

- Consider the constitutional framework of SI regarding the place of custom.
- Three cases from SI courts to illustrate the problem
- Propose reform that can take account of the Constitution and the need to accord greater recognition of circumstances where people kill due to customary beliefs and customary law.

Custom as a Source of Law

- The Constitution recognizes custom as a source of law.
- ‘Customary law shall have effect as part of the laws of Solomon Islands’.
- ‘... [Customary law] shall not apply...to the extent that it is, inconsistent with [the] Constitution or an Act of Parliament’.
- Customary law overrides common law and equity in the event that the common law and equity are inconsistent with custom.
- Common law only has effect if it is applicable or appropriate in the circumstances of Solomon Islands from time to time.

Solomon Islands Constitution RE; Right to Life

- Constitution protects the right to life. Section 4 states:
 - (1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law in force in Solomon Islands which he has been convicted.
 - (2) A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable—
 - (a) for the defence of any person from violence or for the defence of property
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained
 - (c) for the purpose of suppressing a riot, insurrection or mutiny;or
 - (d) in order to prevent the commission by that person of a criminal offence,

Or if he dies as a result of a lawful act of war

The right to life is a significant factor when considering any reform of the offence of murder. Any reform would need to be consistent with it.

The Loumia Case - High Court

- The accused - Loumia and some of his tribe's men (Kwaio people) were charged with murder.
- Loumia advanced two arguments in defence.
- Loumia argued under custom he had a legal duty to kill.
- Loumia saw one of his men was shot and wounded with an arrow and another killed by the Agia men.
- He argued that that according to the customary law of Kwaio people in these circumstances he was under a legal duty to kill.

- Section 204(c) of Penal Code provides:

“Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be of murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely-

.....

(c) that, in causing the death he acted in the belief in good faith and on reasonable grounds, that he was under a legal duty to cause the death or to do the act which he did.”

- Second, Loumia advanced provocation; should be convicted of manslaughter given that during the fight between the Kwaio people and Agia people, Loumia who is from Kwaio saw one of his men was shot and wounded with an arrow and another killed by the Agia men.

- The Court held that the payback killing did not fall within the scope of the exceptions to right to life as provided for by the constitution. As such the custom which Loumia advanced is inconsistent with the constitution. This means that there is no legal duty on the part of Loumia by virtue of clause 3(2) and section 2 of the Constitution.
- The trial judge directed the assessors on provocation in that he said 'It was pointed out that the accused was pagan and that he did as a pagan Kwaio was required to act in accordance with his custom in doing what he did.'

Loumia - Court of Appeal

- Loumia appealed to the Solomon Islands Court of Appeal
- The grounds are:
 - Trial judge had erred: by refusing to allow the matter of whether the accused acted according to the customary duty to kill to be considered by the assessors; and misdirecting the assessors in relation to provocation.

- The Court of Appeal held if the Kwaio custom to retaliate in event that a blood relative is killed is part of the laws of Solomon Islands, it would be inconsistent with the right to life in section 4 of the Constitution. The Court also held that such a custom was also inconsistent with the Penal Code and the common law that it incorporates.
- As to the second ground the Court held that the judge had given a proper direction in relation to provocation, even though the direction did not say that the action of the Loumia had to be assessed according to what a reasonable East Kwaio villager would do in the circumstances.

R v Maelonga

- Originates from the East Kwaio as Loumia's case
- All accused Taelamo Maelonga, Peter Sutaфанabo and Willie Maelonga (respectively accused 1, 2, 3) were charged with murder.
- Accused 2, Accused 3 and the deceased are blood brothers.
- Accused 1 is the son of Accused 3.
- Accused 1 and 3 are heathen people who continue to live a traditional way of life, and practise ancestral worship.

- In November 2009, following a participatory effort of Accused 2 and 3, Accused 1 executed a premeditated act in the presence of Accused 2 and 3 by slashing the deceased's neck with a bush knife which caused fatal injuries and subsequently resulted in the death of the deceased.
- However, from the report of the case it appears that there was some evidence of extenuating circumstances based in custom that might justify a reduction of murder to manslaughter.
- Some of these factors were:

- One of the three accused, stated that he retaliated because the deceased swore at his devils.
- The deceased had sexual affair with his niece (the daughter of Accused 3).
- The deceased swore blocking the allegation, and swore not to pay any compensation (as required under custom).
- There had been no compensation transacted to solve the issue of sexual affair due to the negative respond of the deceased and continuous persistent not to pay compensation.
- Lack of compensation and continuous arrogance by deceased defiled the head and devil of Accused 3 given that Accused 3 is a heathen man.
- It became apparent that the news became public knowledge at Lausia village including the surrounding villages.
- All the accused were aware that the deceased had refused to pay any compensation and that caused them anger, anxiety and resentment.

R v Orinasikwa

- Accused was charged with murder.
- He shoot the deceased with arrows.
- When the deceased was incapable to stand-up, the accused cut the hands and the back of the neck of the deceased.
- The accused admitted that he killed the deceased but raised the defence of provocation.
- The fact was that during that material time, the accused was with other relatives at the burial of his father whom the deceased killed, when the deceased threatened and made provocative shouts.

- Sir John Muria CJ back then said:

“I accept the contention that the intention to kill the deceased arose out of the threatening and insulting shouts by the deceased at the bereaving moment when the accused and his relatives were grieving and burying the body of the late Meke who was killed by the deceased (Jimmy Geniamoe) himself. There can be no doubt in my mind and in common sense bearing in mind the custom also of the people in East Kwaio, and for that matter, any other places in Solomon islands, that such a behaviour of the deceased was provocative. I find that the provocation arising out of the events on that morning of 8 October 1997 by the deceased has not been sufficiently countered by the prosecution.”

COMMENTS

- In *Regina v Maelonga* the partial defence of provocation was not advanced. This may be because of the position in *Loumia*.
- The problem is that following *Loumia* it is unclear whether the actions of the accused would be assessed against those of the ordinary East Kwaio villager.
- However, an important characteristic of the two cases (*Loumia*, *Maelonga*, *Orinasikwa*) is that they show situations where the accused believed that the killing was justified in custom.

- Another similar characteristic is that the accused in *Loumia*, *Orinasikwa* and the two accused in *Maelonga* are people who practised ancestral worship
- They live traditional/customary life style which means that their worldview in terms of how they see the world is rooted in custom.
- These people live a life (largely) out of the formal institution.

- Custom regulates the socio-economic and spiritual fabric of their existence.
- This means custom is more meaningful than state law and formal institutions which is both largely irrelevant and inaccessible.
- As such it is important that the defence such as provocation clearly accommodates such circumstances.

OPTIONS

- One option is to reform the defence of provocation so that it is clear that characteristics of the accused can be taken into account in determining whether the accused was provoked, and whether the actions were reasonable in all the circumstances.
- Another option is to change the punishment for murder, and to do away with the partial defences (including provocation).
 - This means the punishment of mandatory life and the partial defences, including provocation should be abolished.
 - Given this context, circumstances where people kill because of customary beliefs and obligations, such as the ones in the cases of *Loumia* and *Maelonga* could be taken into account at the sentencing stage.
 - This option would also be consistent with the right to life requirement in the Constitution.

Thank you barava