

LEGAL TRADITIONS AND SYSTEMS IN THE PACIFIC: AN OVERVIEW OF CHALLENGES AND OPPORTUNITIES FOR LEGISLATIVE REFORM

PROF DON PATERSON, YOLI TOM'TAVALA & ANITA JOWITT
UNIVERSITY OF THE SOUTH PACIFIC SCHOOL OF LAW*

Paper prepared for the Legislative Reform and the Convention on the Rights of the Child (CRC) in the Pacific: Sub-Regional Meeting 25–28 August, 2008, Port Vila, Vanuatu

INTRODUCTION

The Pacific region is very diverse. Within the region there are many different cultures, each with their own customary law traditions. Modern legal and governance systems also vary, as do economies and human development. This, then, is the first challenge for legislative reform – each Pacific country is unique, and a ‘one size fits all’ solution, is not going to be appropriate. However, each Pacific country also has similarities, including that our current legal systems have been adopted from Anglo- American colonisers,¹ and that customary norms and values remain very strong and are often more important than state law in governing behaviour and resolving disputes. In the quest for reform we can and should look to our neighbours and share experiences.

This paper considers some of the challenges for legislative reform to protect and enhance the rights of children in the Pacific. The discussion is organised into three broad areas:

1. Constitutional aspects
2. The social context and customary law
3. Practical issues

Before considering these challenges the paper briefly discusses what legislative reform is and provides a brief overview of the legal systems in the Pacific countries that UNICEF provides assistance to.

What is legislative reform?

Legislative reform is broader than just changing the laws. Experience tells us that just making a new law does not change behaviour, or lead to compliance with the law. Instead:

* Email contacts are paterson_d@vanuatu.usp.ac.fj; tomtavala_y@vanuatu.usp.ac.fj; jowitt_a@vanuatu.usp.ac.fj.

¹ Tonga was not colonised, although it was strongly influenced by the British and adopted an English style legal system.

‘Legislative reform’ involves reviewing and reforming not only laws, but those things necessary to effectively implement them – legal and other governmental institutions, social and economic policies, budget allocations, and the process of reform in the country. From a rights perspective legislative reform is a complex process that should be a catalyst for broad measures that transform [society]...²

A successful legislative reform agenda will therefore involve altering the content of laws, but will also involve supporting wider changes in the legal system and society that will together help to ensure that the law does not ‘remain on paper’ but becomes an accepted part of society’s rules.

The law in UNICEF assisted Pacific countries

The Pacific countries that UNICEF provides assistance to are:

- In Polynesia: the Cook Islands, Niue, Samoa, Tokelau, Tonga and Tuvalu
- In Micronesia: the Federated States of Micronesia (FSM), Kiribati, Nauru, Marshall Islands (RMI) and Palau
- In Melanesia: the Fiji Islands, Solomon Islands, and Vanuatu

As we can see from the table below, all except for Tokelau (which is not an independent country and is therefore unable to ratify an international treaty of its own accord) have joined the CRC.

Parties	Date of Signature	Date of ratification /accession	Domestication Legislation (where available)
Cook Islands		6 Jun 1997	
Federated States of Micronesia		5 May 1993	
Fiji	2 Jul 1993	13 Aug 1993	
Kiribati		11 Dec 1995	
Marshall Islands	14 Apr 1993	04 Oct 1993	
Nauru		27 Jul 1994	
Niue		20 Dec 1995	
Palau		4 Aug 1995	
Samoa	30 Sep 1990	29 Nov 1994	
Solomon Islands		10 Apr 1995	
Tonga		6 Dec 1995	
Tuvalu		22 Oct 1995	
Vanuatu	30 Sep 1990	07 Jul 1993	CRC (Ratification) Act 1992

² UNICEF, *Supporting the Realization of Children’s Rights through a Rights-based Approach to Legislative Reform*, (Programming Guidance Paper Series, January 2007) at p 11 – 12.

All of these countries have adopted common law as the basis for their legal systems, although some countries follow the American common law tradition³ and some follow the English common law tradition.⁴ The distinction between countries adopting American common law and English common law is significant because it alters how countries interact with international conventions. In the US common law countries of Palau and FSM, once a country signs a convention then the provisions of the convention have force of law. English common law countries, including Vanuatu, before a convention comes into effect as part of the domestic law the country must enact domestic legislation. As can be seen from the table above, only Vanuatu has a CRC Ratification Act. The RMI also follows the English style of requiring further domestic legislation before a treaty comes into effect.⁵

This should not be taken as an indication that the English common law countries do not have domestic implementing legislation for the CRC currently do not recognize it. It is an international custom that treaty law can be used to guide the interpretation of domestic laws. The CRC is being used to guide court decisions,⁶ particularly in the area of child custody⁷ and the sentencing of young offenders.⁸ Indeed, in Fiji, the *Constitution* requires that, in interpreting the rights provisions:

(2) courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter. (s 43(2))⁹

This should also not be taken as an indication that Vanuatu, FSM and Palau do not need to undertake legislative reform in order to bring the CRC into greater effect. Conventions are written in very general language. In order for the concepts in the CRC to have

³ FSM, RMI and Palau.

⁴ The Cook Islands, Niue, Samoa, Tokelau, Tonga, Tuvalu, Kiribati, Nauru, Fiji, Solomon Islands and Vanuatu. Vanuatu also adopted French law, although in practice English common law is the most significant source of Vanuatu law.

⁵ Article 5, Section 1(4) of the RMI *Constitution* reads 'No treaty or other international agreement which is finally accepted by or on behalf of the Republic on or after the effective date of this Constitution shall, of itself, have the force of law in the Republic.'

⁶ In addition to the two areas mentioned, the CRC is used in a variety of cases. In 2007 it was used in consideration of the legality of corporal punishment in schools (*State v Krishna* [2007] FJHC 26). Recently it was used in Vanuatu in relation to an immigration case, where a person who had been ordered to be deported had a Vanuatu child. The best interests of the child in keeping the father in the country were a relevant consideration (*Ayamiseba v Attorney General* [2006] VUCA).

⁷ See, for example, *In re Lorna Gleeson* [2006] NRSC 8.

⁸ See, for example, *Republic v Rineta - Sentence* [2006] KIH 127; *Police v Kum* [2000] WSCA 6; *Tone v Police* [2004] TOSC 36; *Soeasi v Regina* [2007] SBHC 159; *Regina v K* [2006] SBHC 53; *Regina v Setaga* [2008] TVHC 3; *Simona v The Crown* [2002] TVHC 1.

⁹ Similar provisions can be found in Interpretation Acts around the region. For example, the *Interpretation and General Provisions Act* [Cap 85] (Solomon Islands)⁹ requires 'A construction of an Act which is consistent with the international national obligations of the Crown is to be preferred to a construction which is not.' (s 12). See also s 19(b) *Interpretation Act 1971* (Nauru); s 17(a) *Interpretation and General Provisions Act* [Cap 1A] (Tuvalu).

maximum impact specifically developed local legislation and administration that is appropriate for the context is needed.

This then leads us into a discussion of the challenges in developing such legislation and administration.

CONSTITUTIONAL ASPECTS

All six island countries from the Eastern, Western, Northern and Southern Pacific that are represented at this Conference, ie Cook Islands, Fiji, Kiribati, Palau, Solomon Islands and Vanuatu, have written Constitutions that are stated to be the supreme law of the country, so that any law that is inconsistent with any provision of the Constitution is void to the extent of the inconsistency.

Differences in terms of Constitutional provisions relating to fundamental human rights and freedoms

The Constitutions in all six countries provide for certain fundamental rights and freedoms, but not all in the same terms or to the same extent. The provisions relating to fundamental human rights all owe something to the provenance of the Constitution in which they appear. The provisions relating to fundamental rights and freedoms that are contained in the Constitutions of Fiji, Kiribati, and Solomon Islands, follow a pattern that was developed by Britain for the colonies of the former Empire that were acquiring independence, and was based upon the United Nations Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, and describes the rights and the exceptions to those rights, in specific terms.. The provisions in Cook Islands and Vanuatu follow the more generalised statements that are contained in the Canadian Bill of Rights and also in part of the Constitution of Papua New Guinea. The provisions in the Constitution of the former American Trust Territory District of Palau are based upon the provisions of the Constitution of the United States of America.

Whilst bearing in mind the possibility of differences in the terms of the provisions relating to fundamental rights and freedoms of the Constitutions of the six countries represented here at this Conference, it is still possible to identify some features of those provisions that have some relevance to, and significance for, legislative measures to protect the rights of children.

Scope of enforceability of rights

First, there is the issue of the extent or scope of the enforceability of the fundamental human rights that are recognised by the Constitution. The Constitution of Fiji expressly states that the Chapter containing the provisions relating to fundamental rights that it recognises 'binds... the ...branches of government at all levels...and all persons

performing the functions of any public office.’¹⁰ The provisions relating to fundamental rights contained in the Constitution of Palau refer frequently to ‘the government’, and seem to be designed to apply in relation to actions of government.¹¹ In Kiribati, it has been held by the courts that the provisions relating to human rights should be interpreted as applicable only to government, not private individuals.¹² On the other hand, in Vanuatu, the Supreme Court has held that the rights and freedoms are enforceable against private persons.¹³ In Solomon Islands it has been suggested that some fundamental rights are enforceable only against government, whilst others are enforceable more generally.¹⁴

Right to equality of treatment

The Constitutions of Cook Islands, Fiji, Kiribati, Marshall Islands, Palau, Solomon Islands and Vanuatu expressly recognise a right to equality of treatment and lack of discrimination, or equality before the law, which might be considered to preclude special measures to protect children. The Constitutions of Fiji, Kiribati, Palau, Solomon Islands and Vanuatu, however, expressly recognise an exception to that right of equality and lack of discrimination in the case of disadvantaged people, and, in Palau and Vanuatu, this exception is expressly stated to include minors or children. In these countries therefore the Constitutional provisions for equality of treatment and lack of discrimination appear to contain sufficient exceptions to exclude legislation to protect the rights of children.

The Constitution of Marshall Islands allows for ‘non-arbitrary preferences for citizens pursuant to law.’ This exception also would seem to be broad enough to include special legislation to protect the rights of children.

So it appears that in these countries of Fiji, Kiribati, Marshall Islands, Palau, Solomon Islands and Vanuatu, the right to equality of treatment stated in the Constitution does not appear to provide a constitutional impediment against legislating for special needs of children.

In the Constitution of Cook Islands, the right to equality before the law is not stated to be subject to any express exception in favour of disadvantaged groups. It is, however, expressly stated to be subject to ‘such limitations as are imposed by any enactment or rule of law for the time being in force, for protecting the rights and freedoms of others or in the interest of public safety, order, or morals, the general welfare, or the security of the Cook Islands.’¹⁵ This provision was discussed by the Court of Appeal of Cook Islands in *Clarke v Karika*¹⁶, where the Court said: ‘The question is whether the challenged provisions are discriminatory in a way which singles out persons for reasons not consonant with a legitimate and apparent legislative purpose.’¹⁷ In that case the

¹⁰ S21(1) *Constitution of Fiji*.

¹¹ Article VI, *Constitution of Palau*

¹² *Teitinnong v Ariong* [1987] LRC (Const) 517.

¹³ *Noel v Toto* [1995] VUSC 3; *Public Prosecutor v Kota* (1989-93) 2 Van LR 661.

¹⁴ *Loumia v DPP* [1985-86] SILR 158; *Ulufa’alu v Attorney-General* [2005] ILRC 698.

¹⁵ s64(2) *Constitution of Cook Islands*.

¹⁶ (1985) LRC (Const) 732.

¹⁷ *Ibid*, p 746.

legislative purpose of the *Te Puna Lands Act 1980* was to remove continuing fighting and disorder resulting from a very controversial decision of a land court in 1908 by providing a rehearing of the case. The Court held that the removal of fighting and disorder was a legitimate legislative purpose, and that the legislation which provided for a rehearing of the case was consistent with that purpose. Accordingly in Cook Islands, it would be necessary to prove that the protection of children's rights was a legitimate legislative purpose, and that the means by which those rights were protected by the legislation was consistent with that purpose.

Right to privacy of the home

There is also a possible Constitutional problem arising out of the right to personal privacy and privacy of the home which is recognised by the Constitutions of Fiji, Kiribati, Solomon Islands and Vanuatu. There has been very little judicial discussion as to the scope and the limits of this right. Recently, however, in Vanuatu, it has been claimed by none other than the Head of State, who is a lawyer, that this right is infringed by the provisions of the Family Protection Bill which authorise a court to make a protection order to exclude a person from a house. As a result, the Family Protection Bill 2008, of Vanuatu, which was approved by Parliament on its last sitting day this year, has been referred to the Supreme Court to determine whether or not it is constitutional.¹⁸ The decision is not expected for several months.

If the Courts of Vanuatu should hold that there is an inconsistency between the Bill and the fundamental rights provisions of the Constitution relating to personal privacy, it would raise questions as to the constitutional validity of other legislation designed to protect the rights of the child, not only for Vanuatu, but also for Fiji, Kiribati and Solomon Islands, the Constitutions of which also recognise the right to privacy of the home.

The scope of the right to privacy has also been raised recently in New Zealand, where social service agencies have felt it necessary to share otherwise confidential information relating to the domestic lives of families in an endeavour to protect children from abuse by family members.¹⁹

It is clear that in those countries the Constitutions of which recognise a right to personal privacy or privacy of the home, some work, probably some quite extensive work, will need to be done to adjust such rights to ensure that the rights of children are adequately protected.

IMPLICATIONS OF CULTURE AND CUSTOMARY LAWS ON LEGISLATIVE REFORM IN THE PACIFIC ISLAND COUNTRIES

1. Children in Pacific societies

¹⁸ 'Four Provisions inconsistent with Constitution: President', *Vanuatu Daily Post*, 19 August 2008, p1.

¹⁹ 'Privacy broken to save lives', *The Dominion Post*, 20 August 2008.

2. Duties of children in customary societies
3. Duties of parents and adults in customary communities
4. Biblical influence on parenting
5. Customs under contemporary legal systems
6. Challenges and opportunities for legislative reform

The legal systems in contemporary Pacific Island countries (PICs) are “plural” because they operate under the influences of two distinct legal traditions. The first is the Anglo-American common law tradition which underpins the existence and functioning of the modern institutions and systems of state and government such as the legislature, executive, judiciary, public service and the cash economy. These are especially evident in the urban areas but have reach and influence that extend across the length the breadth of each country. The other legal tradition is the customary systems that operate not only in the rural villages and far flung islands but, so far as indigenous people are concerned, also in urban areas.

Each legal tradition consists of rules governing conduct as well as mechanisms and processes for ensuring that breaches of rules are remedied. In some areas of life, both systems can operate independently of each other. Unfortunately, in most other areas of life, both systems impose their own requirements on the same matter so a person who is subject to both systems will have to consider these requirements and respond as s/he sees fit. Sometimes, the requirements imposed by the two legal traditions are reconcilable. At other times, these requirements differ or even contradict each other. Then it becomes necessary to devise legal and other ways to reconcile these or to proceed with future action.

These observations apply equally to the subject matter and theme of this conference because children and parents in Pacific Islander families are subject to the dictates of both law and customs which sometimes impose similar requirements but at other times contradict each other. Where it is proposed that the law be reformed in order to give effect to the protective requirements of an international treaty, customs must not be overlooked! Instead, as has been advocated elsewhere, ‘Both traditional practices that promote children’s and women’s rights and those that are incompatible with them should be identified as part of the law review’.²⁰ Understanding the opportunities and challenges posed in part by customs and culture will enable a more effective law review process.

To that end, this section of the paper examines the status and roles of children and their parents from the perspectives of indigenous Pacific Island cultures and customary legal traditions. Some mention will also be made of the influence of Biblical precepts on parenting views of Pacific islanders. Then the paper examines the place of customs under the law and concludes with some observations about the implications of customs on legislative reform for protection of children.

1. Children in Pacific societies

²⁰ UNICEF, *Supporting the Realization of Children’s Rights through a Rights-based Approach to Legislative Reform*, (Programming Guidance Paper Series, January 2007) at p. 36.

Many hundreds of indigenous cultural or customary groups exist within the PICs. Within some countries, the indigenous people have a relatively homogenous cultural system because only one language is spoken (with variations in dialects) and many of their traditions or customary norms or practices are quite similar. In other countries, there are plural customary societies because the indigenous people speak hundreds of different languages and often have distinct traditional or customary norms or practices on a lot of things. Thus, it is unwise to make generalizations about Pacific-wide customary legal practices on a lot of issues. This applies equally to the status and roles of children and parents in Pacific Islander families. Nevertheless, based on published anthropological and other literature and anecdotal observations, I state below some observations about the status of children in indigenous Pacific Island communities which are quite commonly held Pacific-wide.

a) *Children are valued and loved*

In customary societies, children are highly valued because of psychological, economic, political and other reasons. Because of this, the more children a family has the more esteem it has in the eyes of the community. On the other hand, a barren couple or one which has only a few children feels at a loss. In order to compensate this want, adoptions allow parents to add children to their family unit. The value of children is expressed best by a Tongan mother who said 'It is paradise for one's stay on earth to have children';²¹ the idea is that children are 'intrinsically valuable social beings who give meaning to life and social institutions such as marriage'.²²

Apart from being valued, children are also much loved and are treated with great care and concern not only by the parents but also by other family members too.

b) *Children as a family member*

At birth a child is given a name and is an integral part of the family to which s/he is born or adopted by. In some places, a child is not known by his or her name but is referred to as 'child of So and so'.²³ This implies that a child is important and must thus be treated with respect just like all other members of that family. Their membership of a family gives children their rights, obligations and status within a community. Apart from their position within the family, children as a group are an important segment of the wider community and have their peculiar interests that have to be respected by other groups within the community. This is best illustrated in Samoan society where *tamaiti* (children) are one of five recognized groups in a village setting and have their own status and roles within that setting.²⁴

²¹ Quoted in Helen Morton, *Becoming Tongan: an Ethnography of Childhood* (University of Hawaii Press, Honolulu, 1996) at p 44.

²² *Ibid.*

²³ Such is done in Tikopia, Solomon Islands. Related by Raymond Firth, *We the Tikopia: Kinship in Primitive Polynesia* (Beacon Press, Boston: 1957, 2nd ed.) at p 117.

²⁴ *A Situation Analysis of Children and Women in Western Samoa 1996* (Government of Western Samoa and UNICEF, 1996) at p 4.

c) *Children as service providers*

Children are valued not only for what they are but also for what they can do. As they mature and pass through different stages of growth children acquire increasing responsibilities (see section 2, below) until they become adults and marry. They then assume responsibility for looking after their parents or other elderly relatives and carry out other tasks required within the family or community. As has been written about children in Vanuatu culture, 'Children provide security for parents in old age and [in] return acquire family property such as land'.²⁵ Similarly the following comments about Tongan children are equally true for children in other PICs:

'The high value of children is most often talked about in terms of the contribution they can make to their household through their labor and, as they get older, their financial, material, and emotional support of their parents'.²⁶

In some Melanesian countries female children are especially valued for the bride-price that they are likely to earn for their families when they get married.

2. Duties of children in customary societies

Customary communities universally recognize that as members of a family and community, children have responsibilities.

Thus from the ages of about 4-6, when children are able to walk and understand instructions, they are taught proper ways of behavior and social conduct. Some of the most basic values that are taught include 'quietness and self-effacement';²⁷ 'to be seen and not to be heard',²⁸ obedience, politeness, hard work, kindness, respect for parents and elders, regular church attendance, and generally behaving in ways that do not bring shame on themselves and their families.

Apart from behaving well, children are also obliged to provide material labor. Initially, they are required to fetch or carry things or even babysit their siblings. As they grow older sexual division of labor emerges so girls and boys do different tasks. Girls often handle on their own or help their mothers with the minutiae of household tasks such as collecting water and firewood, cooking, doing the laundry, cleaning the house or compound, foraging in the forest or reefs for food and weaving fine mats, baskets, bark-clothes, etc. A relatively recent study of the household work carried out by Tongan adolescent girls concluded that the work they do is often very tiring and leaves them little

²⁵ *A Situation Analysis of Children and Women in Vanuatu 1998* (Government of Vanuatu and UNICEF, 1998) at p 4 .

²⁶ Per Helen Morton, above n 21, p 44.

²⁷ Firth, above n 23, at p 137.

²⁸ *A Situation Analysis of Children and Women in Western Samoa 1996* (Government of Western Samoa and UNICEF, 1996) at p 7; this is also the case in Tongan communities as related by Morton, above, n 21, at p 166.

or no time for school homework or recreation.²⁹ Perhaps there is a moral lesson from this story for USP academics?

Boys handle such tasks as clearing forests for farming, collecting material to make houses or canoes, planting and tending of farms, harvesting, hunting and fishing. All in all, children are expected to behave well and to be good workers. A child who fails to display these traits is likely to be ridiculed or even ostracized and other parents will likely shun them when it comes to choosing future spouses for their children.

3. Duties of parents and adults in customary communities

The immediate or natural parents of children and even other customary ‘parents’ also have duties concerning their children.

The most basic of these is to love and provide food and other material needs for their children. An attribute of a good parent is one who is not ‘harsh with his (or her) children, beats them, is careless about their safety and their food...’³⁰ So parents who are lazy or fail to provide the material needs of their children will be scorned and ridiculed.

Also, parents are expected to advise or instruct their children the proper ways for social conduct and to teach them the skills required of economic, social and all other life’s pursuits within the community. The following quote written about the Tikopia is basically correct for most other Pacific Island societies:

It is a canon of the society that parents are most fitted to coach their offspring in manners and customs and the obligation of so doing lies on them. Of a child which is a nuisance in public gatherings...people say, ‘Why do its parents not instruct it? Why is it not told by its parents not to act thus?’³¹

Instructions or advice are given both formally and informally. In a case where a child misbehaves, instructions are often accompanied by threatened or actual use of physical force. These can include a smack on the head or butt with the hands or an implement, a pinch of the ears or such like. The gravity of the offence determines the amount of force that is applied. These serve not only to punish the child but to prevent future misconduct. It may seem ironical to outsiders but for Pacific Islanders, the threat or use of punishments are meted out as an expression of love for the child and a desire for the development of the child’s best interests.³²

4. Biblical influence on parenting

²⁹ Per Helen Morton, above n 21, p 142.

³⁰ Firth, above n 23, at p 147.

³¹ Firth, above n 23, at p 139.

³² For example, a Tongan explained to Helen Morton (above n 21, p 2) that a mother beats her children in order to show the children that she loves them. The idea is that if the mother fails to do so and the children grow up to be misfits, then they will suffer the consequences of it.

The prevalence of the use of force or corporal punishment by parents in Pacific Island households is justified not only by customary norms but also by the Bible. Most Pacific Islanders are professing Christians and subscribe to very strict or narrow interpretations of the Bible which expressly says that the man is the head of the household and parents have a duty to discipline their children. One oft quoted scripture is this: 'He who spares the rod hates his son, but he who loves him is careful to discipline him' (Proverbs 13:24).³³ This view is illustrated by the following excerpt from a written comment by a Ni-Vanuatu in response to the adoption by the Parliament in July 2008 of the Family Protection Bill:

God's instruction of disciplining (in Proverbs) is in fact the best means of disciplining so far although our human eyes come short of its advantages and beauty. This is not only the fact of God's words but it has been proven scientifically in many empirical studies. So if we resort to a lesser view of disciplining, as many western world have done, we're not only removing God, but we are paving the way for more troubles ahead...³⁴

Other Christians believe that the same Bible requires a more humane and 'christian' approach to parenting.

5. Customs under contemporary legal systems

Granted that indigenous Pacific Islanders have their own customs and traditions concerning children, what status do these have under the contemporary legal systems of PICs?

The answer in short is that the legal systems in most PICs recognize customary laws or authorize the courts to recognize and apply customs generally or respecting certain areas of life. This is permitted subject to certain conditions such as that customs:

- must not contradict Constitutions and statutes,
- are not likely to cause injustice,
- are not against the public interest, or
- are not repugnant to general principles of humanity.

Cooks Islands

A law made during the colonial period originally confined recognition of customary law only for the purpose of determining interests in customary land. However, the

³³ Similar sentiments are expressed in Proverbs 19:18, 22:15 and 23:13.

³⁴ Per A. S. Mwarakurmes as published in the *Vanuatu Daily Post*, Saturday 5 July 2008 at p. 16. This and other comments are also published online under 'Family Protection law may ban the rod of correction' *Vanuatu Daily Post* <http://www.dailypost.vu/index.php?news=2791&VivvoSessionId=30f5025e48a90aa24ab79> (Accessed 22 August 2008).

Constitution Amendment (No 17) Act 1994-95 has given greater recognition of custom by requiring Parliament to make laws to recognize or giving effect to custom and usage. Until Parliament does so, article 66A (3) says ‘custom and usage shall have effect as part of the law of the Cook Islands, provided that (these are not) inconsistent with a provision of this Constitution or of any enactment’.

Fiji Islands

The situation in Fiji is somewhat similar to the Cook Islands in that colonial-era legislation preserved the role of customs in determining interests over native land. The 1990 Constitution elevated the place of customs by giving them a position similar to what has been done for the Cook Islands. The current *Constitution (Amendment) Act 1997* has minimised the role of customs in that Parliament is required only to ‘make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes’ (186(1)).

Kiribati

This is provided for under the *Laws of Kiribati Act 1989*. Section 4(2)(b) says clearly that customary law forms part of the laws of Kiribati. Section 5(1) defines ‘customary law’ and affirms that it ‘shall have effect as part of the law of Kiribati’ subject to the conditions that customary law is not-

- inconsistent with the Constitution: s. 4(1);
- inconsistent with an enactment and an applied law: s.5(2);
- unjust or against the public interest: Clause 2, Sch.1.

Schedule 1 of the act sets out the rules about how the courts will deal with issues of customs and the matters in relation to which they can recognize I-Kiribati customary law. The matters that relate to children are—

g) the legitimacy, legitimation or adoption of children; or

(h) the rights of married persons arising out of their marriage or on the termination of their marriage by nullity, divorce or death, the right of a member of a family to support by other members of that family, or the right to the custody or guardianship of infants.

Palau

Article V of Palau’s *Constitution* deals with traditional rights. Section 1 maintains the role or functions of traditional leaders to the extent that these are not unconstitutional. Section 2 preserves customary law in these terms:

Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law.

Clearly, traditional norms or principles are recognized as part of law.

Solomon Islands

The *Constitution* 1978 mandated Parliament to ‘make provision for the application of laws, including customary laws’ (s 75(1)). Until Parliament does so, section 76 refers to the temporary arrangements as made under Schedule 3 to the Constitution. Clause 3 of Schedule 3 states ‘customary law shall have effect as part of the law of Solomon Islands’ and authorizes the making of a legislation to regulate the way that the courts deal with matters of customary law. The *Customs Recognition Act 2000* was enacted to this end but some say that it has not yet entered into force. Under this act, courts are allowed to consider customary law in cases concerning, *inter alia*, ‘marriage, divorce or the right to the custody or guardianship of infants, in cases arising out of or in connection with a marriage entered into in accordance with custom’ (s 8(f)) and guardianship and custody of infants and adoption’ (s 9).

Vanuatu

The *Constitution*, article 95(3) says ‘customary law shall continue to have effect as part of the law of the Republic’. Article 51 requires Parliament to enact a law to provide for the ascertainment of relevant rules of custom. Even though that law has not been passed, issues of customary law are sometimes raised and considered by the courts or in other public offices.

This is illustrated by events connected with the Family Protection Bill. This bill was conceived around the mid to late 1990s as a means to minimize domestic violence. It was greeted with much enthusiasm in some quarters (such as the Vanuatu National Council of Women and Vanuatu Women’s Centre) and disdain in others (such as some chiefs and religious leaders). So it gathered dust until November 2005 when it was first read then shelved again in order to allow for more consultations. This did not eventuate for want of resources. Just before Parliament was dissolved in order to prepare for national elections, the government hastily passed the bill into law (in June 2008) without the support of the opposition who walked out of the chamber.

The law was then forwarded to the President whose was to sign it before it comes into force. The President declined to sign it and instead referred it the Supreme Court to ascertain the constitutionality of the law. His objections relate to various provisions of the act such as those that intrude on the rights to enjoy privacy at home and to a fair trial. But the most contentious point of objection (judging by the amount of newspaper columns devoted to it) is the view that “domestic violence” as defined in the act is inconsistent with Christian principles as recognized in the preamble of the Constitution. In particular the concern is physical discipline of children by parents would render the parent’s acts as

‘domestic violence’ and thereby lead to criminal charges or penalties which can only be detrimental to the whole family.³⁵

6. Challenges and opportunities for legislative reform

Customs and customary law offer opportunities and challenges to law reform for children.

On the positive side, both customs and law agree that children are special and worthy of special love, care and attention. On the other side, we have certain customary practices that are arguably inimical to the child’s best interests. An example of these is the customary practice of requiring children to provide labor and services to the family or community. Another is the use or threat of use of force against children as means to discipline them. Another is the customary practice that children should only be seen but not be heard.

Clearly any law that is passed without due regard to customary law, culture and tradition will be opposed or will not be effectively implemented.

PRACTICAL ISSUES

This leads to the practical issues. In developing legislative reform, if there is no careful regard of the cultural context then laws will either be opposed, maybe through the device of arguing unconstitutionality, or ignored, by the general public and the agencies who should be upholding the law. This ‘cultural resistance’ can also reduce the political will to implement law changes. There are also resource issues, both in terms of money and human resources, which may limit which reform options can be implemented. Another issue is that legal services tend to be urbanized and unavailable or ‘irrelevant’ to rural populations. Simply passing a law will not automatically change practices, values and norms in society.

In trying to come up with legislative reform solutions that will be able to address these multiple practical issues it may be helpful to think of “minimum standards” for the operation of law. Guy Powles’ has provided us some:

- ▶ law should be responsive and understood
- ▶ dispute resolution should be fair and effective
- ▶ legal services should be appropriate and available³⁶

³⁵ Comments for and against this view are published in the webpage ‘Family Protection law may ban the rod of correction’ above n 34.

³⁶ Guy Powles. ‘Introduction’, in Guy Powles and Mere Pulea (eds) *Pacific Courts and Legal Systems* (1988).

The minimum standards are useful because they can help us to identify what we do not want in legislative reform. For instance, if a legal reform

- requires people to use lawyers in order to have their rights upheld, but lawyers are too expensive, then the reform is not appropriate as legal services are not available to everybody.
- requires people to use lawyers in order to have their rights upheld, but lawyers are mainly in town and the majority of the population lives in rural areas, then the reform is not appropriate as legal services are not available to everybody.
- requires people to go to court in order to have their rights upheld, but people do not go to court because of cost, or because they do not understand the court procedures, or are uncomfortable in the language used, or because there are no courts where they live, then the reform is not appropriate as legal services are not available to everybody.
- requires people to go to court in order to have their rights upheld, but instead matters are dealt with in customary law by customary authorities who do not recognize the law, then the reform will be ineffective.
- allows people to get court orders, but then the enforcement agencies (such as the police) will not uphold those orders, either due to lack of resources, or because they think the orders are unfair, then the reform will be ineffective.
- is not used by people because they do not understand what the law is, or how to use it, then the reform will be ineffective.
- is not made because people in society want or demand it, but instead is seen to be 'imposed' by outsiders, then the law is not being responsive to the needs of the people, and is less likely to be understood.

Such legal reforms have limited value. They may be expensive and time consuming to make. And, whilst they may look good on paper, they have limited impact on the day to day behaviours of people.

The minimum standards are also helpful because they provide us with a framework to think about what we do want in legislative reform.

In order to have legislative reform that is responsive to the needs of the people, there will need to be discussion with all stakeholders as to what sorts of needs there are, and what sorts of solutions will be appropriate, effective and recognized as fair. In the case of the CRC everyone is a stakeholder – children obviously have a stake in discussion about their rights, and all adults live in families and communities and interact with children. If law reform comes from the demands of the public, and there is public input at all steps of the reform process then 'cultural resistance' is unlikely to be a problem. Resistance by politicians to passing new laws is also going to be lessened.

This discussion can also play an educative function about the CRC, rights of children in general, and the operation of the legal system, which helps to build understanding, and

may in itself lead to behaviour and attitude changes that enhance the respect for rights of children.

It may also be helpful to think of a list of things that must be done in order to make legislative reform effective. Based on what has been said above about the importance of discussion, a list of steps for legislative reform based on the CRC may look something like this:

1. Public awareness on the CRC
 - a. General awareness to everyone (which shows how the CRC relates to and enhances existing cultural values about children and constitutional values)
 - b. Specific awareness to specific groups (such as legislators, chiefs, children, teachers, churches...)
2. Legislative review of strengths and weaknesses in the existing legal framework and socio-cultural review of current attitudes and behaviours that support the values in the CRC and that may be problematic
3. Public discussion on which gaps to fill and the best ways to fill those gaps
 - a. All stakeholders involved (and everyone is a stakeholder!)
4. Solutions drafted into a Bill or Bills if needed (new laws are not always required)
 - a. Particular discussion with enforcement agencies to ensure laws will be enforceable
5. Make Bill(s) public
6. Further public discussion on Bill(s) before being enacted

Whilst the practical issues may seem almost insurmountable challenges, in truth they are opportunities. This set of challenges means that we need creativity in coming up with solutions that really meet the needs of our societies. We all know that the state legal systems that were adopted from colonial authorities do not always work, for a variety of reasons, so we should be cautious of solutions that rely on the use of state legal systems as they currently operate. We also know that within the family the way that children are treated depends on culture, not state law, and that customary law may actually be more relevant in resolving issues. Solutions need to relate to the cultural context.

We need broad discussions in society about what sorts of legislative reforms are needed. These discussions, can play a useful role in building knowledge and changing attitudes and behaviours, and build public will for change, which in turn can create pressure for political will to change.

These discussions will use resources but again it is possible to be creative with how discussions take place. Newspapers and radios are powerful tools that are inexpensive to use. Discussions do not need to be centrally controlled. A law student returning home from the holidays and talking to family about the CRC; a pastor whose sermon relates the CRC to Christian values; a teacher who explains at a school meeting what the CRC is and

how it affects the school; all these things contribute usefully to the discussion. Relying on discussions may also lead to slower changes. But, it is far better to spend time and resources to develop legislative reform that will have a lasting impact, rather than to quickly create a new law that is ignored and ineffective.

CONCLUSION

This then leaves us with the question of who will begin the discussions about the CRC in different countries? The discussion does not have to be started by governments, but can be started by NGOs or other groups within civil society. But, if the will, or desire, or motivation, to do this is lacking then the promise and possibility of meaningful legislative reform that is culturally and contextually appropriate collapses. The fact that this meeting is happening is the start of building a will to change. Participants will have the knowledge, skills and, hopefully, enthusiasm to take the discussion forward after the meeting concludes.