

## **Customary rules and the welfare principle**

### ***Post-independence custody cases in Solomon Islands and Vanuatu***

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SINCE THE ADVENT of independence in Solomon Islands on 7 July 1978 and Vanuatu on 30 July 1980, customary law has been given official recognition as part of the law of the land by virtue of provisions contained in the respective Constitutions of the two countries. Post-independence there has been a somewhat sporadic series of cases where the courts have had to grapple with the two related problems of determining (1) what is the proper place of customary law in the 'league table' of sources of law and (2) how to resolve, as far as possible, conflicts between customary law and the law from outside sources, commonly and in this article referred to as 'received law'.

One area where the conflict between customary law and received law is particularly acute is that relating to the custody of children. In Melanesian society generally a bride price is paid by the husband's line or kinship group to that of the wife upon the marriage. One of the consequences of this payment is often that if the marriage breaks up, any children of the marriage 'belong', as it were, not strictly to the father *per se* but to his line.

As the cases to be analysed make clear this custom rule often applies even after the death of the father/husband, when his family would feel entitled in custom to claim custody of and keep possession of any children of the marriage. Whilst this might seem extraordinary to the modern lawyer

steeped in the welfare principle tradition, the common law position was, as we shall see, rigid and strict. It must also be borne in mind that whereas legal thinking in common law countries is very much based on individual rights, in customary law perceptions are far more group and community oriented.

Before examining the specific cases it will be important to consider the legal position at common law in England with regard to custody of children and to trace the evolution and development of the welfare principle. This is necessary because only by understanding the history is it possible to relate the received law sources to customary law in the context of the constitutional provisions of the two countries under consideration.

At common law the father had virtually an absolute right to custody, with which the courts would interfere only if to enforce it would expose the infant to moral or physical harm. This right even applied to the taking of a breast feeding infant from its mother (*R v De Manneville*<sup>1</sup>) and until 1886 a father could even appoint a guardian for his children after his death to defeat the mother's rights to custody. The high-water mark of the common law doctrine was reached in *Re Agar-Ellis*.<sup>2</sup> Without outlining the facts in detail, the decision of three law lords to refuse a petition by a 16-year-old girl and her mother for the girl to have increased access visits to her mother would today seem extraordinary (as would some of the comments of their lordships). The decision was based largely on the Court's refusal to interfere with the father's absolute right, at common law, to custody of and control over his children under twenty-one years of age.

Partly in response to this case the *Guardianship of Infants Act 1886* gave the first recognition to the welfare principle, which was, together with other factors, to be applied in custody disputes, and the principle became the first and paramount consideration by virtue of the passing of the *Guardianship of Infants Act 1925*. Essentially 'the welfare principle' is encapsulated in s.1 of the 1925 Act, which states:

Where in any proceeding before any Court . . . the custody or upbringing of an infant is in question, the Court, in deciding that question, shall regard *the welfare of the infant as the first and paramount consideration* and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody [or] upbringing . . . is superior to that of the mother or the claim of the mother is superior to that of the father. (emphasis added)

The tenor of s.1 of the Act is now uniformly applied throughout common law jurisdictions and the discussion in this article is limited to consideration of the welfare principle as applied in such jurisdictions in its relationship with customary law.

The welfare principle applies not only to custody disputes but to other areas where the child's welfare is an issue: for a recent interesting example of the principle in action in the area of consent to medical treatment for an infant, see *In Re T* (a minor) (Wardship: medical treatment) reported in *The Times* October 1996.

IT IS NOW appropriate to consider the constitutional position in the respective jurisdictions prior to considering the cases in each country.

The starting point in Solomon Islands is ss75 and 76 of the Constitution, which provide as follows:

- 75 (1) Parliament shall make provision for the application of laws, including customary laws.
- (2) In making provision under this section, Parliament shall have particular regard to the customs, values and aspirations of the people of Solomon Islands.
- 76 Until Parliament makes other provision under the preceding section, the provisions of Schedule 3 to this Constitution shall have effect for the purpose of determining the operation in Solomon Islands—
  - (a) of certain Acts of the Parliament of the United Kingdom mentioned therein;
  - (b) of the principles and rules of the common law and equity;
  - (c) of customary law; and
  - (d) of the legal doctrine of judicial precedent.

Since there has been no provision by Parliament under s.75 in this area of the law, then by virtue of s.76 the application of laws is governed by Schedule 3 of the Constitution. This Schedule raises interesting problems of interpretation but simply stated the league table of sources is probably as follows:

- 1 The Constitution—by virtue of s.2 the supreme law;
- 2 Acts of Parliament—this is not specifically defined in the Constitution but definitely does not include Acts of the UK Parliament. However, it seems that if these form part of the ‘existing laws’ as defined in s.2 of the Solomon Islands Independence Order 1978 they are specifically preserved under s.5(2) of the Order as if they had been made by the Solomon Islands Parliament and would therefore rank alongside them as a source. However, the custody statutes referred to did not form part of the ‘existing law’.
- 3= Customary law—defined by s.144(1) of the Constitution as meaning ‘the rules of customary law prevailing in an area of Solomon Islands’.
- 3= The Acts of Parliament of the United Kingdom of general application and in force on 1 January 1961. This date was adopted as it was already the cut-off date for the application of such Acts by virtue of the Western Pacific (Courts) Order 1961.<sup>3</sup>
- 4 The principles and rules of the common law, and equity—these are to be taken as English common law and equity as at Independence Day (per Kapi JA in *Cheung v Tanda*).<sup>4</sup>

There are four post-independence Solomon Islands decisions in which the relationship between customary rules and received law has fallen to be considered. Three of these were in the Magistrates Courts and one in the High Court. All four involved parties who were from the island of Malaita, where the customary way of life is particularly strong. Chronologically the High Court decision was the first reported one and naturally magistrates have felt bound by statements made by the then Chief Justice.

This case *Sukutaona v Hounihou*<sup>5</sup> (*S v H*) concerned an appeal to the High Court against the refusal by a principal magistrate of a wife’s application for the custody of a four-year-old girl. The magistrate had relied on custom rules in refusing her application. In an oft to be quoted passage the Chief Justice had this to say:

It is quite right that custom law is now part of the law of Solomon Islands and courts should strive to apply such law in cases where it is applicable. However it must be done on a proper basis of evidence adduced to show the custom and its applicability to the circumstances. This evidence should be given by unbiased persons knowledgeable in custom law

or extracted from authentic works on custom. In this case the evidence of custom, as counsel for the Respondent rightly concedes, was very slim and I do not consider there was sufficient for the firm finding reached by the learned magistrate.

In any event it remains open to question to what extent Rules of custom law of the kind discussed in this case should be firmly applied to cases where the welfare of children is at stake.

The courts have always regarded the interest of the children to be of paramount importance and should continue to do so.

Due regard for the custom background may well be an important factor in deciding where that interest lies in the sense that custom Rules may well be designed to protect the children from an unsatisfactory family life where, for example, a husband or a wife has gone off with another partner and the custom Rule says that that parent should not have custody. A thorough consideration of the custom rules will often reveal that they too are founded on the sort of common sense that all courts look for in their laws and the application of them.

Interim custody was given to the mother and the matter remitted back for rehearing by another magistrate as there had been other procedural irregularities in the first hearing. It is clear that the actual place of customary law as a source was not fully argued before the Court and therefore not surprisingly it was not fully considered by the Chief Justice. It is, as we have seen, not correct to say that the Courts have *always* considered the interests of the children to be of paramount importance. The Court also seems to express the opinion—or is it a hope—that custom rules and the welfare principle will often coincide in that custom rules are grounded on what is in the child's best interests. There may be cases where this is so and the common custom rule that the children go to the father's line will not mean their interests are disregarded, as in none of the cases to be considered was it suggested that staying with father's line would result in the children not being adequately and properly cared for.

It is perhaps unfortunate that there was not proper and full argument on the relative positions of customary law and received law in *S v H*, as it is clear that the case was considered to be binding on them by magistrates who heard the subsequent cases.

The case of *In Re B*<sup>6</sup> brought the gulf between customary rules and the welfare principle into sharp focus as there was clear evidence that the custom rules prevailing in the areas from which both the mother and the father came were virtually the same and decreed that following a marriage break up the children belonged to the father's line. This case involved a four-year-old girl who had been with her mother all her life. She was born in 1979 and in 1980 the mother and father married in custom. During the marriage there had been considerable to-ing and fro-ing between her parents' house, a house of the father's relatives in town and the father's village on the parties' home island. The father had spent periods during the marriage away from home working on ships and a period unemployed when he had not provided proper maintenance for the child. Both parties were from the same island, albeit different areas, and the magistrate heard detailed evidence as to the custom in both the wife's area (Kwara'ae) and the husband's area (Areare) and made the following findings of fact:

- 14 That in both Kwara'ae and Areare the children of the marriage, in custom, belongs [sic] to the husband's side once the bride price was paid and that no consideration can be given as to the interest of the child.
- 15 That even when the child lives away from his father's place in custom his rights to land and property still exist and cannot be extinguished by the fact that he lives away from his father's place.

He then went on to refer to the passage in *S v H* and then said:

I have in this proceeding, had the benefit of hearing from Primo Apatu on the question of custom rules on cases of this nature. I have been told that once bride price was paid the children of the marriage would become the property of the buyer if the marriage is broken down. No due regard would be given to the child's welfare or health or age. I find, with respect, the custom rule, is inconsistent with the words of C J Daly in the Sukutaona ats Hounihou case.

He then summarised the facts and after placing considerable emphasis on the tender age of the child and the fact that she had always been with her mother since birth, applied the welfare principle and granted custody to her.

Quite clearly in this case the magistrate was faced with a stark choice. He had heard evidence in custom, which was categoric and clearly clashed head on with the welfare principle, and had to fall back on the decision of the Chief Justice to resolve the matter in accordance with the welfare principle.

Again in this case the provisions of Schedule 3 of the Constitution do not appear to have been raised in argument and consequently were not considered by the magistrate. One cannot really quibble with the final result of the case as the magistrate was faced with a difficult problem, which he understandably resolved by relying on a decision that was binding upon him.

Eighteen months after the decision in *In Re B* the problem was revisited more fully in the case of *K v T and Ku*.<sup>7</sup> This was a decision of the Principal Magistrate Central and for the first time the issue of the proper place of customary law vis-à-vis received law was fully argued and the provisions of Schedule 3 considered. The background facts are a little complex but can be briefly summarised as follows:

K had married one A in church under the *Islanders Marriage Act* and there had also been a custom ceremony where a bride price had been paid. In March 1982 A died. At the time of his death there were seven children of the family and K was pregnant: shortly after the death she gave birth to a child A2, named after his father. After the death five of the children went to live with A's brother T, and K went with the other three children to live with another brother of A, Ku. In November 1984 K went with the children to stay with one R and his wife. T was not happy with this and took two of the children, A2 and M, away from K, who thereupon applied for custody under the provision of s.22 of the *Magistrates Court Act*. That section gives the court the power to make custody orders generally but does not specify which tests should be applied in the making of an order.

Counsel for T and Ku, the respondents, called an expert in the customary law of the Lau area, which was the custom proper to all the parties of the dispute. This was to the effect that the bride price covered two underlying elements: one for the bride and one for the children. In the event of the husband's death the children would normally be taken by the

husband's line, where the mother could stay with them, although the custom expert went on to say that a further payment by them to her line could terminate her rights to see the children. The witness stated that some custom was a matter between the parties and was not too fixed or rigid.

The argument of Respondent's Counsel on Schedule 3 was that it stated that the principles and rules of the common law and equity shall have effect save insofar as in their application to any particular matter they are inconsistent with customary law. Further, customary law shall have effect unless it is inconsistent with the Constitution or an Act of Parliament, an 'Act of Parliament' meaning only one passed by the Solomon Islands Parliament and not including UK Acts. Consequently, he argued, since the welfare principle was the creation of a UK Act, custom took precedence over the welfare principle.

The magistrate, after considering this argument, summarised the statutory origins of the welfare principle and having found that the statutes providing for it were Acts of the UK Parliament of general application in force on 1 January 1961, went on to find that consequently, by paragraph 1 of schedule 3, it (the welfare principle) therefore had effect as part of the law of Solomon Islands. He went on to say that any clash between the common law and custom was not relevant as 'the welfare principle, whilst being common law, was now being incorporated into statute'. This statement is, as we have seen, doubtful, but has no real bearing on the Court's later reasoning. The Court went on to hold that custom and the welfare principle were both part of the law of Solomon Islands and stated:

I cannot follow Mr Brown's conclusion that customary law must be followed in this particular case. The meaning of paragraph 3 simply means that customary law is part of the laws of Solomon Islands unless inconsistent with statute law passed after the 7th July 1978. As are principles and rules of common law and equity unless inconsistent with customary law under paragraph 2. Paragraph 1 also states that statutes passed in the UK and in force on the 1.1.1961 shall also have effect as part of the Solomon Islands law.

The only construction this court can place upon Schedule 3 of the Constitution is that UK statute law, Common Law, equity and customary law unless specifically excluded are all part of the Laws of Solomon Islands. The



Courts of the Solomon Islands have applied these principles to custody cases and the High Court has endorsed the view that the interest of the child shall be paramount and not custom. As a subordinate court I must follow that decision until reversed or the law is changed by statute as envisaged by the draftsman in sections [sic] 75.

The Court appears to be placing customary law and the provisions of an Act of the UK Parliament of general application as equals as sources of law and then resolving the deadlock between them by relying on precedent. The only problem with this passage appears to be that the rules of common law and equity should only apply save as insofar as they are not inconsistent with custom. Otherwise it is submitted that to place custom and Acts of general application as complementary and equal sources of law is probably correct. Having applied his reasoning to the facts, the magistrate had no difficulty in granting custody to the mother. Again, as in *In Re B*, he placed considerable emphasis on the children's young age and the fact that they had always been with their mother.

In the final Solomon Islands case, *Sasango v Beliga*,<sup>8</sup> the father was also deceased. S had been married to him in custom and they had seven children. After his death she had lived with the children in his home village. About two years after the death she was caught out in a brief affair with another man and B, the defendant and a brother of the deceased, chased her out of the village and refused to allow her to take with her the children and some property she claimed.

The defendant claimed that since he and his brothers had paid the bride price for the plaintiff after the death of the husband they had control over her and her children in custom, and in view of her breach of custom in having an affair were entitled to chase her away and keep the children. Not unnaturally the plaintiff based her claim on the fact that the welfare of the children was of paramount concern. The magistrate referred to the before quoted passage from *S v H* and concluded: 'In deciding this case I am bound to follow this precedent and accordingly I must consider the interests of the children as the paramount factor'. Applying this test to the facts and in particular the fact that some of the children were very young and had always been with the mother he awarded custody of all the children to her.

Interestingly, with regard to two of the elder children the Magistrate did have this to say: 'I have considered the custom rules put forward by Balasido and accept that in custom the man's line may have rights over the wife and children of the marriage. It could be seen as desirable for the children to follow the rules of custom; however, as far as it affects the welfare of the children I cannot accept that Mariawana's conduct was so bad as to adversely affect the children's welfare or give them an unsatisfactory family life.'

The Magistrate also emphasised as had the Chief Justice in *S v H* that custom law must always be properly proved by impartial and unbiased evidence.

One can only conclude from these cases that the Courts will look at customary law and if it coincides with the welfare principle, will give effect to it. Nevertheless, if it does not coincide, then the welfare principle will always prevail. This seems to be placing one source of law, i.e. an Act of the UK Parliament of general application, above another source, i.e. customary law. This does not appear to be the intention of the drafters of the Constitution as, at the very least, Schedule 3 puts them as equal sources. However, in the absence of legislation by Parliament under s.75 of the Constitution, the Courts are faced with an intractable problem where two supposedly equal sources of law have diametrically opposed basic principles.

It is worth noting here the welfare principle in general terms contained in Article 3 of Part 1 of the 1989 Convention on the Rights of the Child, which states:

- 1 In all actions concerning children whether undertaken by public or private social welfare institutions Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
- 2 State parties undertake to ensure the child such protection and care as is necessary for his or her well being taking into account the rights and duties of his or her parents legal guardians or other individuals legally responsible for him or her, and to this end shall take all appropriate legislative and administrative measures.

Article 5 further states:

State parties shall respect the responsibilities, rights and rules of parents, or where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

Interestingly, in the 1959 United Nations Convention the phrase used when providing for children was that its best interests shall be '*the paramount consideration*' whereas the 1989 Convention uses the phrase '*a primary consideration*'. The 1989 Convention also gives more recognition to the rights of parents and family members other than parents in the child's extended family. It is thought that these significant changes of emphasis have been brought about by a reduction in Eurocentric influence in the UN between 1959 and 1989. The 1989 Convention was adopted unanimously by the UN General Assembly on 20 November 1989 and on 2 September 1990 took effect as international law amongst the nations that had ratified it. Vanuatu ratified on 7 July 1993; Solomon Islands signed it on 10 April 1995 but have not yet ratified it.

One argument has been that the type of law to be followed should depend upon the type of marriage. In Solomon Islands there are three alternatives:

- (a) a purely custom marriage as in *S v K*, *In Re B* and *S v B*;
- (b) a marriage in custom registered under the *Islanders Marriage Act (K v T and Ku)*; or
- (c) a marriage under the Act only.

Unfortunately the *Islanders Divorce Act*, which only applies to (b) and (c), does not set out any principles on which custody disputes should be decided. The *Islanders Marriage Act* provides that an unregistered custom marriage can only be dissolved in accordance with custom. Does this mean that the actual dissolution can only be done following custom rules or could it be argued that on its dissolution, customary rules should also apply to ancillary matters, i.e. custody? There is often quite strong genuine

dissatisfaction expressed by members of the father's lineage group that foreign or imported principles are applied to what are solely customary unions contracted in accordance with customary principles, and certainly in none of the cases under review is it suggested that the fathers or their line had acted in bad faith or could not provide proper care for the children. However, to apply a customary rule to purely customary unions would of course severely prejudice mothers who sought custody when their marriage was not registered and naturally a husband could always prevent registration by refusing to agree to it. There is no doubt that many women were and still are often under very strong pressure, if not actual threats, to accord with custom and are consequently forced to live with husbands or their husbands' families rather than fight over custody; and in some cases, mothers faced with pressure in custom give up the struggle for custody altogether. That mothers often have a difficult battle was acknowledged by the Magistrate in *K v T and Ku* when he said: 'She has shown remarkable tenacity to keep her children and provide for them in spite of financial hardships and a strong male customary dominance. To take this case to Court and challenge custom shows courage and a deep love for her children.'

Before analysis of two cases from Vanuatu, the status of custom as a source of law in Vanuatu must be considered. The Vanuatu Constitution on this issue is vaguer and somewhat more general than that of Solomon Islands and has no equivalent of Schedule 3. Section 47(1) provides:

The administration of justice is vested in the judiciary who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it the Court shall determine the matter according to substantial justice and whenever possible in conformity with custom.

Sections 51 and 52 state:

#### Ascertainment of Rules of Custom

51 Parliament may provide for the manner of the ascertainment of relevant rules of custom, and may in particular provide for persons knowledgeable in custom to sit with judges of the Supreme Court or the Court of Appeal and take part in its proceedings.

- 52 Parliament shall provide for the establishment of village or island courts with jurisdiction over customary and other matters and shall provide for the role of chiefs in such courts.

Section 95 provides:

Existing Law

95. (1) Until otherwise provided by Parliament, all Joint Regulations and subsidiary legislation made thereunder in force immediately before the Day of Independence shall continue in operation on and after that Day as if they had been made in pursuance of the Constitution and shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution.
- (2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.
- (3) Customary Law shall continue to have effect as part of the law of the Republic of Vanuatu.

There is under s.95 no joint regulation to be applied in custody disputes and there must be some doubts as to the precedence of British or French laws over custom in view of the general tenor of both ss47 and 95.

In *M v P*<sup>9</sup> a child G was born to a ni-Vanuatu mother and a French father in 1975. The case came before the Court when the child was about 13 in 1988. Shortly after birth the applicant mother M had placed the child in the care of her brother K. The Respondent P was the son of K and hence the nephew of M and the child was at the time of application, in the care of him and his wife. P and K both considered that the child had been legally adopted in custom, by P, and P's evidence was that M had given the child to him for adoption. M denied this, saying she had given the child to K and denying that she had ever done so with any view to adoption. Somewhat remarkably,

on the child's birth certificate there was a declaration of adoption, which according to the mayor of Erakor (who was also the Registrar of Births) had been put there as K had made a declaration to the village Chief, in the Mayor's presence, that the child was given in adoption to his son P. This was remarkable as neither the mother nor the father was present at the time of the declaration and it also seems that the child possessed French nationality. The Mayor's evidence on the adoption as recounted in the judgment seems to be that he had registered the custom adoption on the birth certificate because he had been asked to.

Throughout his life G had lived with P and was settled in school in Erakor and had many friends locally. He was interviewed by the Chief Justice and explained that he did not wish to go to Noumea with his mother but wanted to stay in Vanuatu. The Chief Justice referred the case to the President of the Malvatumauri (The National Council of Chiefs of Vanuatu), who reported that custom adoption ceremonies varied between islands. The Chief Justice then went on to accept the evidence of the Mayor and K and P that the child had been adopted legally in custom by K and his son P. This would have been enough in law to dispose of the matter, for if there was a legal adoption then the adoptive parents would automatically have been entitled to custody. Nonetheless the Chief Justice felt constrained to add that 'the welfare of the child is the paramount question to be decided in all these cases and I therefore order that the child remain with the adoptive parents'.

It is not clear to whom the Chief Justice was referring when he used the phrase 'adoptive parents'. If he meant P and his wife T, with whom the child had been living, this is odd as P was not married to T at the time of the adoption and there was no evidence she was any part of the 'adoption proceedings'. Maybe he meant P and his father K, as he had made a finding they had adopted the child. Again this would be odd, as K's evidence was that the child had been given in adoption to P only.

Naturally there was a strong case for custody of the child to remain with P and his wife in view of the background and the child's own wishes. Nevertheless the Court's approach seems unusual. It is interesting that neither counsel appeared to argue custom as a source of law; and that it was accepted that there was a valid custom adoption on the basis of the declaration, when neither the father nor the mother of child was present and it seems no enquiries were made of them as to their views or wishes. This seems to go against all basic principles of natural justice, particularly where issues of status and parental rights are concerned.

Also it seems strange that the Court would refer the matter to the President of the Malvatumauri of its own motion, and it is not clear under what provision this was done. Of course a Court can always call such witnesses as it wishes but if it does, they are in the position of any other witness and may, for example, be cross-examined by the other parties. To ask for a custom opinion with neither party having the opportunity to test that opinion again seems to run contrary to general natural justice principles.

It is clear from the evidence of both P and K that adoption in custom is a relatively informal process unfettered by the strict statutory rules and procedures that must be followed before adoption can proceed in common law systems. An adoption recognised as complete in custom obviously must comply with customary rules; but it seems from this case that the mother's placing her child with a relative and then not paying support for the child over a long period of time, coupled with a declaration by the relative, is sufficient. Emphasis was placed on the lack of support as being 'proof' of an adoption in custom, as it was argued that if there had been no intention by the mother for the child to be adopted then she would have sent money for the child's support over the years.

Clearly the Court was trying to do broad justice and undoubtedly this was achieved by a hybrid solution of finding that there was a valid custom adoption and applying the welfare principle. If the case is to be regarded as one in which the place of customary law can be measured in Vanuatu legal structure then it would appear to give it high status, as there was a finding of an adoption in custom, on somewhat questionable evidence and procedure; but in the absence of full argument from counsel on this issue and hence of full consideration by the Court it is perhaps safer to regard the case as being decided on its own peculiar facts.

The final case to be considered is the Vanuatu one of *G v L*.<sup>10</sup> This case, heard by the Acting Chief Justice, concerned a child of G and L, one S, who was at the time of the case two years old. G and L had never married and had in fact parted before the child was born. The father had gone back to live with one E, with whom he had fathered a child earlier, and E was expecting another child by him on the date of the hearing. After the birth L went to live with her parents, and for a brief period with the father, then went back to her parents and subsequently married Mr L. The child seems to have been in contact with the father's family regularly but essentially since birth had lived with the mother. The Court application was precipitated by Mr and

Mrs L intending to go and live in France where Mr L was to work for his father's business. The father opposed the removal of the child from Vanuatu on the basis that it would be removed from its native country and the support of its extended family. The Acting Chief Justice regarded this as a serious issue.

Incidentally, the Court judgment never makes clear the sex of the child. The Malvatumauri were again consulted, it seems by the parties not the Court; their decision was that the child represented the blood of both the father and the mother and should spend time with each of them. This is no doubt sensible but did not address the particular problem. The Court stated:

They [the Malvatumauri] add that custom dictates that the child should stay under the control of its father. I respect that too, although I am obliged by law to apply different principles. I am obliged by law to put the welfare of the child as the first and paramount consideration.

On the evidence, he granted custody of the child to the mother.

Two issues arise from the above passage. First, it seems somewhat surprising that in custom the control over an illegitimate child should remain with the father. One of the bases of much custom is the need for communal stability and harmony, and generally, as far as can be ascertained, the fathers of illegitimate children do not have the rights in custom as would those of a father's line who had paid the bride price. Secondly, of interest is the Court's statement 'Although I am bound by law to apply different principles'. This is obviously a reference to the welfare principle but unfortunately the Court does not state which law it is bound by: presumably it is by the welfare principle under the English 1925 Act.

It seems that even if, under s.95(2) of the Constitution, the 1925 Act continued to apply as an Act of the UK Parliament of general application in force as at 1 January 1961, it would only do so 'taking due account of custom'; and it seems this phrase, at the very least, means that if a received law that continued to apply after independence conflicted with custom, then the custom rule should prevail. It seems strange that the judgment should not address the interrelation of customary law and received law under s.95(2).



WHAT CONCLUSIONS can be drawn from these cases? First, it is clear that where there has been a clash between customary rules and the welfare principle, the latter has prevailed. This is not really surprising: in sporting parlance, customary law has been 'playing away from home' in that the Courts that have decided the issues have been part of an imported court structure staffed by judicial personnel trained and qualified in 'received law' principles. Is there then a case for custody disputes relating to children of marriages in custom being determined by the Local Courts (in Solomon Islands) or the Island Courts (in Vanuatu), where one could assume customary rules would generally be followed? There would appear to be two problems here. First, these courts would, in following custom rules of the kind discussed, not be inclined to favour women who applied for custody of their children. As Melanesian society becomes more developed and as women in it become more educated and aware, the number of women who as in the past may be prepared to go along stoically with custom is likely to be fewer; more are likely to pursue their own personal rights in custody matters, and it seems the present court system will be supportive of them. Secondly, even if local courts followed custom rules, unless their decisions were made non-appealable, then if the decision in *S v H* is any guide (and it should be noted the initial decision in that case was made by an expatriate legally qualified magistrate) then it seems that on appeal or review the welfare principle would prevail. Also, the courts would have to be given exclusive jurisdiction in such cases: otherwise any party not willing to have customary rules applied to the case could bypass them by applying directly to the Magistrate Courts.

As to the future, unless there is intervention by parliament it seems that the only way in which customary principles will have any weight is as one factor in deciding what is best for the child. It is interesting to note that in Solomon Islands the leading cases were all argued over a relatively brief period (1982–1987) and the last of them was decided over ten years ago. Since legal advisers consider it settled law that the welfare of the child will be the overriding and paramount consideration, arguments that customary rules should apply are basically no longer advanced and custom is simply one factor put forward for consideration in the overall context of the dispute. As long as this remains the position it would seem that the present judicial structure of qualified judicial officers is equipped to determine the disputes that arise, as they are able to balance all factors including custom.

This is becoming increasingly so as the judiciary become more and more localised and therefore represent, more accurately, local opinion. Naturally if custom or customary rules were by law reform to be given a more prominent position then there would be a compelling case for persons to be appointed to sit in custody disputes who were conversant with customary rules.

A second conclusion must be that except in the case of *K v T and Ku* and to a lesser extent that of *In Re B*, there has been a failure or reluctance by Counsel and the Judiciary really to address and confront and analyse the fundamental problem of the relationship between the different sources of law in a legally pluralistic system, and in any event in both those cases the Magistrates felt bound by the decision in *S v H*. This is perhaps unfortunate as it means that the welfare principle has prevailed without, it is submitted, proper juridical analysis and without a proper examination of the intention the framers of the Constitutions were possibly seeking to achieve. Supporters of customary law would argue that customary rules are designed to promote the best interests of children and thus serve the welfare principle, and that their best long term interests are, in a customary society, best served by being brought up in accordance with customary norms. However, if the court followed an approach where customary law was to be followed in custom marriages in a customary setting and the welfare principle followed in respect of other marriages where the parties resided not in villages but in urban centres, this would result in a legal dualism, bringing with it its own problems.

There appears to be no easy quick-fix solution to the problem. The welfare principle is firmly established as the prevailing one. Of course, if there were sufficient grass-root feeling against the legal state of affairs then theoretically, Parliament in the respective countries could legislate to provide for custom to assume a more prominent position as a source of law. However, this solution is fraught with all sorts of problems of its own, not the least being how to provide for conflict between different customs, particularly in Melanesia, where there are many diverse groupings, often with different rules.

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**Notes**

- 1 (1804) 5 East 221.
  - 2 (1883) 24 CH 317.
  - 3 S.I. 1961/1506.
  - 4 (1984) Solomon Islands Law Reports (SILR) 108.
  - 5 (1982) SILR, 12.
  - 6 (1983) SILR 223.
  - 7 (1985/6) SILR 49.
  - 8 (1987) SILR 91.
  - 9 Vanuatu Law Reports (VLR) Vol 1 1980–88 p333.
  - 10 VLR Vol 2 1989–94 p486.
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