

Family Law in Fiji – The Long March to Reform

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Introduction

Guy Powles was a friend to many Pacific Islanders, regional governments and the University of the South Pacific, School of Law, which benefitted greatly from his commitments and educational endeavours in bringing new ideas, analysis and insights into emerging issues in Pacific constitutions, customary law and the legal and justice systems. Turning his attention to the court and justice systems in 1977, Guy Powles wrote:

*“Courts in the Pacific today are a mixture of old and new ... The British system of justice which together with the concepts of government and administration, were developed over centuries in another part of the world were introduced into the Pacific at different times and in different ways. ... Throughout there are conflict and inconsistencies ... All of which make it hard for the ordinary people to understand what is going on in Pacific Courts today”.*²

Whilst conflict and inconsistencies in the law between the “old and the new” continue to exist today, improvements have been made to court services and family law since 1977. In family law, which is the focus of my paper, the most change occurred in the 1990s through to the 2000s. This paper seeks to highlight some of the changes made to family law in Fiji and draws on materials on family related laws available in other parts of the Pacific region.

Family Law in the Pacific

From the 1970s to the 1980s, little attention was paid to reforming family law and to establish better pathways to resolving family disputes due in part to the long held belief that family

¹ A former Fiji Family High Court Judge, with experience working on legal, gender and human rights issues in the Pacific region.

² Powles.G. 1977 *Court Systems of the South Pacific* (eds Crocombe R, Powles G, Pulea Kite. M) in *Pacific Courts and Justice*, Commonwealth Magistrates Association, London, and Institute of Pacific Studies, University of the South Pacific, pub. Fii Times & Herald Ltd. p. 1-12.

disputes were private or the exclusive domain of customary law and should be resolved within the family. Traditional attitudes and social norms relating to gender roles continued to reinforce the inequalities between the rights of men and women and resistance to closing the gender gap has often led to subjecting women to legal forms of discrimination which are reflected in family law.

Perhaps the starting point on the long march to family law reform began to emerge in the 1990s. In 1994, the University of the South Pacific enrolled its first students in the Bachelor of Laws degree and offered a course in family law stressing the importance of family law in legal practice. Those interested in family law and senior scholars at the University of the South Pacific interested in the family law discipline researched, published and taught family law which was regional in scope. A number of publications such as *Law for Pacific Women, A Legal Rights Handbook in 1998*,³ *Introduction to South Pacific Law in 2007*,⁴ *Law and the Family in the South Pacific in 2011*⁵ and *Supplement to Law For Pacific Women A Legal Rights Handbook*⁶ have also made important contributions to the literature and learning of family law. Secondly, the role of human rights norms and the influence of human rights conventions, such as the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW) and the *United Nations Convention on the Rights of the Child 1989* (CRC) ratified by Pacific Island countries have undoubtedly provided an underlying dynamic to bring about changes to family law. Additionally, the CEDAW and the CRC have been important tools used by civil society groups advocating for women's rights and gender equality in all sectors and for the rights and protection of children in accordance with principles and standards set out in the conventions. Whilst conventions are binding on State Parties, implementing Conventions by legal means is left to the discretion of Member States. The obstacles to implementation of the Conventions have been stated as lack of technical and financial resources⁷ although other obstacles may be suggested. Complex family problems

³ Jalal.P.I. (1998) *Law for Pacific Women, A Legal Rights Handbook*, Fiji Women's Rights Movement, Suva, Fiji.

⁴ Corrin. J and Paterson D (2007) *Introduction to South Pacific Law* (2nd. Ed) see Chapter 7 on Family Law, Routledge Cavendish, London and New York.

⁵ Farran.S. (2011) *Law and the Family in the South Pacific*, University of the South Pacific

⁶ Pacific Regional Rights Resource Team, Secretariat of the Pacific Community, Suva 2013. See <http://www.fwrn.org.fj>.

⁷ "Ratification of International Human Rights Treaties: Added Value for the Pacific Region", United Nations Office for the High Commissioner for Human Rights (OHCHR).

cannot be tackled by good law alone, although such law produces its own institutional dynamics with law firms, legal aid offices and civil society organisations offering a range of specialist family services as evidenced in Fiji. Far-reaching changes in public attitudes, cultural practices detrimentally affecting women's rights, and putting in place a range of appropriate resources to support families, such as counselling and mediation services and an accessible justice system are all necessary components to address and tackle some of the most intractable family problems.

Thirdly, it can be argued that commitments made by State Parties to the conventions and monitored by committees established by the conventions,⁸ have been one of the domestic impetuses to family law reform. Follow up actions by State Parties are required on recommendations made by the committees during the reporting cycle and the official hearings by the CEDAW and CRC committees of reports by State Parties. This is an important mechanism involving the reporting and participation of representatives of Member States and civil society groups to ensure convention standards, principles and recommendations are implemented. For example, the UN Committee on the Rights of the Child on receiving Fiji's report in 1998, recommended that the minimum age for marriage which was set at 18 years for males and 16 years for females should be harmonised with the principles and provisions of the Convention.⁹ Fiji amended the *Marriage Act* accordingly in 2009,¹⁰ making 18 the minimum legal age for marriage for both males and females.

Whilst CEDAW embeds the principle of gender equality and non-discrimination and most Pacific constitutions' guarantee non discrimination on the grounds of sex, implementation of the human rights principles have been slow to achieve. One example is noted in the 1999 case of *State v Bechu*¹¹ where the court held that: '*Under the Convention the State shall ensure that all forms of 'discrimination against women' must be eliminated at all cost. The Courts shall be the watchdog with this obligation. The old school of thoughts, that women were inferior to*

Regional Office for the Pacific and Pacific Islands Forum Secretariat Discussion Paper July 2009.

⁸ See CEDAW Articles 17 and 18 and the CRC Articles 43 and 44.

⁹ UN Committee on the Rights of the Child: Concluding Observations: Fiji 24 June 1998 at <http://www.refworld.org/docid/3aebat3910.html>.

¹⁰ Fiji Marriage (Amendment) Act 2009, "s.12. Any person may contract a valid marriage under the provisions of this Act, if such person is of the age of eighteen years or upwards."

¹¹ *State v Bechu* [1999] FJMC at www.pacii.org/fj/cases/FJMC/1999/3.html.

men; or part of your personal property, that can be discarded or treated unfairly at will, is now obsolete and no longer accepted by our society.”

Seen against this backdrop, there are many challenges to progressive family law reform. Common amongst the list of complaints is overcoming the resistance to enacting equal rights protection for women in relation to a range of family law issues such as parenting, property and domestic partnerships. Article 16 of the CEDAW convention, State Parties are required to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure on the basis of equality of men and women” and lists 8 particular areas where equality should be addressed.

Since Fiji became a party to the CRC in 1993 and CEDAW in 1995, modern family laws have been enacted at different times such as, the Family Law Act in 2003, followed by the Domestic Violence Decree 2009, the Child Welfare Decree 2010 and in 2016 an Adoption Bill to replace the 72 year old Adoption of Infant’s Act Cap.58. These are significant reforms aimed to provide better access to justice and protection to families as well as ending discrimination against women in family law. Progress has been made to family law reform since the 1990s and from the views expressed in 2005 by Macfarlane and Lakshman that “[F]or a long time now, law reform ...apart from the work being done by the Fiji and Papua New Guinea Law Reform Commissions, there is little commitment to law reform by South Pacific states.”¹²

Family Law Reform

Family law reform is a very complex matter as there are many points of view with those in key positions either supporting or opposing the process with the diversity of views making the reform process lengthy. Reform to family law in Fiji was opposed on a number of grounds with claims that making divorce easier as a result of the introduction of one ground - the irretrievable breakdown of marriage, and any legal recognition given to same sex marriage and de facto partnerships would destabilise the family.¹³ Cultural values placed on marriage, parenting children, family support and attitudes surrounding women and family violence were

¹² Macfarlane. P and Lakshman,. C “Law Reform in the South Pacific”, Journal of South Pacific Law Vol.9 No.1, 2005.

¹³ Fiji Family Law Bill Passed at <http://www.wluml.org/node/1198>.

challenges that stimulated in-depth discussions, sometimes controversial with differing points of view, but essential to the public participation process to make any reforms to family law effective.

Despite the challenges, state leadership to reform family law have evolved in positive directions in some Pacific countries in the 2000 period. The most recent examples show the initiative taken in 2015 by the Government of Niue. The Niue Ministry of Social Services and the Ministry of Justice initiated the reform to its *Family Law Code 2007* with a new *Family Law Bill 2016*. This Bill in its first draft will be submitted to the usual processes of consultations in Niue in 2017. A new comprehensive *Family Law Bill* for Cook Islands developed in 2011 is still awaiting further consultations and Parliamentary approval. Samoa enacted far-reaching amendments in 2010 to modernise its 1961 *Divorce and Matrimonial Causes Ordinance*. The shifts to reforming family law is a consequence of the dissatisfactions felt over the inadequacies of existing laws; the lack of services for families and an awareness of more comprehensive tools and better resolution techniques that are now available as part of modern family law adopted by other countries.

Creating A Specialist Family Court

Almost three decades after Guy Powles' comments in 1977,¹⁴ Jalal wrote in 1998¹⁵ that *we need new legislation and courts where families in the process of breaking up are treated as human beings who are undergoing an emotionally disturbing process*. Cases involving families are complex and slow to resolve. Hardship within families are common with loss of income over time spent in court appearances, while access to court itself may be impacted by lack of finance, geographical distances to court centres, and in some cases, lack of child minding support. The establishment of family courts to deal exclusively with family disputes is a recognition of the necessity for a different approach to provide better services to assist divorcing and separating families and their children than that traditionally available in other courts and under the old matrimonial causes law. The establishment of family courts is another landmark development in our region. Nauru's Family Court is a separate court established

¹⁴ In article *Court Systems in the South Pacific* in *Pacific Courts and Justice* (1977) pub by Commonwealth Magistrates Association, London and Institute of Pacific Studies, University of the South Pacific Fiji.

¹⁵ Jalal (1998) p.277.

under the *Family Court Act 1973*. Fiji's *Family Law Act 2003*, creates a separate Family Court as a division of the High Court and the Magistrates' Court. Samoa's *Family Court Act 2014* establishes a Family Court as a division of the District Court.

The Family Court's Response

Family Courts are designed to be accessible user-friendly courts that have comprehensive jurisdiction to deal with a full range of family matters with court connected support services to meet the needs of litigants in resolving their disputes. This model is a fundamental change to judicial institutions such as courts which are generally regarded as bureaucratic and complex. This is particularly illustrative in the address given by the Chief Justice of Fiji, the Honourable Mr. Justice Daniel Fatiaki at the opening the Family Court in 2005, where he stated:

Over the years, the Courts in Fiji have undergone various transformations in an effort to respond more appropriately to changes in our society. These changes have influenced how our Courts are administered with more attention being given to accessibility by members of the public. The development of the Family Court; the appointment of a new Master of the High Court; the implementation of case management systems (which was unheard of a decade ago) are examples of this transformation.¹⁶

Resolving legal family disputes requires a court system that is accessible and a case management system with alternative dispute mechanisms that produces effective results for litigants. There are increasing numbers of litigants who are unable to afford legal services and are turning to self-representation to gain access to courts. Self-represented litigants provide challenges to both the courts and the legal profession. In Fiji, self-representative litigants have faced multiple problems with court procedures. To meet these challenges, Fiji Family Court has gone some way towards reducing barriers by waving fees for those eligible, making available in court registries and other locations, easy to follow court forms and supplemented by brochures and pamphlets prepared and provided by the Fiji Women's Rights Movement which sets out easy to follow steps and the forms to use for the various family related

¹⁶ Speech by His Honourable Mr. Justice Daniel Fatiaki, Chief Justice of Fiji, at the opening of the Family Court of Fiji in Suva on 31st October 2005.(unpublished).

applications for order and remedies. Other assistance provided includes information on the availability of community services and the eligibility for and referral to legal aid.

Another method introduced to reduce economic barriers to litigants is through the use of alternative dispute resolution techniques and services. The Fiji *Family Court Rules 2005* require divorcing couples and separating partners to participate in pre-action procedures before filing an application for final orders, particularly in property settlement. Courts spend much time untangling matrimonial assets and determining whether they relate to the marriage or not. To enable the court to deal efficiently and fairly with disputing litigants, there is reliance on a case management system set out under Order 9 of the Family Court Rules 2005. There are generally three distinct steps to the case management system as set out below:

(a) Case assessment conference

Using the settlement of property matters as an example, the first event is a case assessment conference conducted by the Court Registrar after the parties have filed an application for final orders. The purpose of the conference is to enable the parties to resolve their case or any part of it. The parties and their lawyers (if represented) participate in these conferences and parties are required to make a “bona fide endeavour to reach agreement”¹⁷ on issues between them. Where issues have been resolved or not at the case assessment conference, the parties must attend a procedural hearing where the Registrar will make appropriate directions to facilitate the progress of the case.¹⁸

(b) Conciliation conference

Conducted by the Court Registrar, all issues relating to the possibility of settlement of any issue to the proceedings, defining the orders sought by the parties and documentation relating to the property such as valuation, ownership, location, title and other documentations and procedural matters such as filing and service of affidavits are all considered. The Registrar may issue any further directions to ensure that the proceedings are ready for a pre-trial conference.¹⁹

(c) Pre-trial Conference

¹⁷ Order 9 r.9.01 and r.9.02.

¹⁸ Rule 9.05.

¹⁹ Rule 9.08.

At a Pre-trial conference all issues such as the date of hearing and likely length of hearing, the filing of documents before the hearing are considered. The Registrar may issue other directions to ensure that the proceedings are ready for trial. On being satisfied that the proceedings are ready for trial, the Registrar may fix a date for the case to be heard.²⁰

The case management system is designed to reduce costs to litigants and to ensure fairness and timeliness in resolving cases from the commencement to finalisation.

Parenting Plans

Another landmark development is the emphasis given to building communication between parents, whether married or never married, as well as step-parents. Fiji's *Family Court Act* (s.56) provides that parents of a child should as far as possible agree on matters concerning their child rather than seeking a court order. Parenting planning is a participatory format designed to assist parents move away from fighting a win/lose custody battle to cooperatively decide on the parenting arrangements and draw up a written plan for their children.

A parenting plan is a written agreement between parents.²¹ The plan must deal with issues such as child welfare provisions, which include decisions with whom the child should live, and what contacts the child may have with the non-custodial parent or other persons. A parenting plan may be registered in court. The application to register the plan must be accompanied by a copy of the plan, a statement that each party has been provided with independent legal advice and a statement that the plan was developed after consultation with a counsellor or court registrar.²² The court may set aside a registered parenting plan, if fraud, duress or undue influence is used to obtain agreement.²³

Educating parents about parenting plans is a necessary first step. It needs input from various professional sources such as counsellors and lawyers who deal with children's issues. The child's needs and interest will change as the child grows and develops. The circumstances of one or both parents may change. Any such change to a registered plan entails the development

²⁰ Rules 9.09. & 9.10.

²¹ Fiji *Family Law Act 2003*, s. 57.

²² Fiji *Family Law Act 2003*, s. 59.

²³ Fiji *Family Law Act 2003*, s. 62 (1) (a).

of a new plan²⁴ which will become effective on registration, but some parents might not want or be able to return to court to do this.

Family Violence and Protection

The 2000 decade is a landmark era for the drafting and implementation of other family related legislation. Twelve Pacific Islands countries have passed comprehensive family protection/domestic violence legislation in the first half of the 2000s.²⁵ Treated in the past as a family matter that should be resolved by the family, the law has come a long way in treating family violence as a crime. There are various statutory definitions for family violence. For example, *Solomon Islands Family Protection Act 2014 (s.4)* defines family violence as physical, sexual, psychological and economic abuse whilst *Fiji's Domestic Violence Decree 2009 (s.3)* includes physical injury and sexual abuse including ...”behave in an abusive, cruel, inhuman or degrading way , threaten, intimidate or harass...” a family or household member.

Early intervention

A key intervention strategy adopted in recent family protection legislation to prevent abuse from escalating is the authorisation given to police officers to serve a safety order or safety notice on the alleged perpetrator where there is probable cause to believe physical abuse has or is about to occur within the family. Serving a police safety order or notice acknowledges that family violence is a crime and keeping the victim and family safe are matters that cannot be resolved within the family where abuse has taken place.

Whilst safety orders and notices are an important step to keeping victims safe, the adoption by the police of “no drop” policies” in some Pacific states permits the state to proceed with the prosecution, even if the victim does not wish the case to proceed for a variety of reasons. An example is Kiribati’s *Te Rau N TeMwenga Act 2014 (Family Peace Act 2014)* which provides:

²⁴ Fiji *Family Law Act 2003*, s.58.

²⁵ Fiji, *Domestic Violence Decree 2009*; Kiribati, *Te Rau N TeMwenga Act 2014*; Kosrae (FSM) *Domestic Violence Act 2012*; Palau *Family Protection Act 2012*; Papua New Guinea, *Family Protection Act 2013*; Pohnpei (FSM) *Family Protection Act 2012*; Marshall Is, *Domestic Violence Chapter 9, 2011*; Samoa, *Family Safety Act 2013*; Solomon Is. *Family Protection Act 2014*; Tonga *Family Protection Act 2013*; Tuvalu *Family Protection and Domestic Violence Act 2014*; Vanuatu *Family Protection Act, 2008*.

30. Duty to prosecute

(1) Where there is a report of domestic violence and provided that there is sufficient evidence for doing so, every police officer handling the matter shall ensure and undertake to do all things necessary in order that a charge or information is laid with the court in order to commence prosecution of the matter in court.

(2) In addition to subsection (1), every police office shall not endeavour to provide counselling to the parties to the proceedings to reconcile or to withdraw a charge or information laid under subsection (1).

Access to the Courts

Accessing the justice system can be intimidating particularly for women. Family violence legislation has made it easier for complainants to access the courts when applying for a civil protection order. A complainant can apply in person orally, in writing, by telephone, text or e-mail or through a relative or friend with the consent of the complainant.²⁶ Courts have also offered assistance to reduce the complaint in writing on the relevant court form when complaints are made orally. Barriers to accessing the court have been reduced with some countries adopting simple forms which could easily be filled out by complainants, family or friends with the consent of the complainant.

Monitoring Implementation of The Law

The *Solomon Islands Family Protection Act 2014*, s.49, establishes a Family Protection Advisory Council which must advise and make recommendations on the availability of legal aid for victims and perpetrators and the funding needed to support initiatives addressing domestic violence including, amongst other things:

- *material support for victims of violence;*
- *assistance to domestic violence victims support centre and shelters; and*
- *training, public awareness and educational programmes on domestic violence.*
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²⁶ Kiribati Te Rau N TeMwenga Act or Family Peace Act 2014; Solomon Islands Family Protection Act 2014; Tonga Family Protection Act 2013; Tuvalu Family Protection and Domestic Violence Act 2014.

The *Tonga Family Protection Act 2013*, s.37 establishes the Family Protection Advisory Council, with functions to advise on “the adequacy of preventative measures, responses, shelters, healthcare and counselling support services provided to victims and children of domestic violence;” How a society priorities protection and safety of victims of violence can be measured the role played by advisory councils, the treatment the courts metes out to perpetrators of violence and how the police act towards complaints of family violence.

Concluding Comments

This article is an attempt to highlight some of the reforms undertaken in Fiji and elsewhere in the Pacific to family related law since 1977. The changes made to family law in Fiji and other Pacific countries to the ways courts handle the problems of families and children during separation, divorce and family violence have been substantive. These are major undertakings for any country, but much more needs to be done to improve systems and support services to families and children. The problems of families and children are ever-present in our society and can only be dealt with as resources allocated to the judicial and legal services will allow. A comprehensive system of family law with a range of support services will go a long way to assisting families and giving them better protection and options in resolving their disputes. Whilst the first half of the 2000 decade has seen unprecedented growth in family related legislation and court services to litigants, there is promise that the second half of the 2000 decade will see more Pacific countries undertake family law reform with easy to follow processes that will bring about long lasting and substantive improvements to the situation in 1977 when Guy Powles observed that its “*hard for ordinary people to understand what is going on in Pacific Courts...*”