

BALANCING HUMAN RIGHTS AND CUSTOMS IN THE PACIFIC REGION

A PACIFIC CHARTER OF HUMAN RIGHTS?

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Introduction

[1] Custom and collective practices are an integral part of Pacific culture. This research paper will examine whether a Pacific Charter of Human Rights could viably incorporate both human rights norms, and Pacific customs, duties and collective practices. The paper will suggest that human rights and Pacific customs are not antithetical, however there are some areas in which they conflict. The paper will provide examples of human rights that are seemingly contradictory to Pacific customs. These include women's rights, the right to freedom of movement and the rights of migrant and minority populations. The paper will describe and identify Pacific customs and collective practices that violate international human rights norms, including tribal determination of marriage partners and bride payments, and the customary penalty of banishment. The suggested aim of a Pacific Charter of Human Rights would be to protect the human rights of Pacific peoples while safeguarding customary law, values and practices.

[2] There are other practical impediments to the creation of a regional charter, which the paper will outline. The key problem is Pacific governments' apathy towards international human rights instruments, as evidenced by low levels of ratification of international treaties. A Pacific Charter of Human Rights hinges on the common desire and consensus of Pacific governments towards the creation of a regional charter. Another challenge to the creation of a charter is codifying Pacific custom, which is changing and dynamic in nature. The lack of resources and requirement of human rights education will also be discussed. The paper will conclude with recommendations on how non-government organisations (NGOs) and international agencies can support the development of a regional charter.

The Pacific Region

[3] For the purposes of this study, the Pacific region will be taken to include the countries that comprise Melanesia, Polynesia and Micronesia.¹ These terms are based

¹ These countries include American Samoa, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Northern Mariana Islands,

upon racial categorisation used by European colonisers,² however they are widely and contemporaneously used to define Pacific groupings.³

[4] Many diverse cultures, traditions and languages exist throughout the Pacific region.⁴ However it is possible to identify similarities in customs, values and experiences in the region.⁵ The key commonality for the purposes of this study is the central place of the extended family, clan or tribe in Pacific culture.⁶ In addition, the role of customary law in governing the daily lives of Pacific Islanders⁷ is important in the context of this study.

[5] The countries of the Pacific also share commonalities in geography, experiences of colonisation, and widespread practice of Christianity.⁸ The contemporary experiences of the Pacific countries are also similar. Pacific nations face challenges such as remoteness from overseas markets, vulnerability to natural disasters and dependence on foreign aid.⁹ These common experiences and characteristics combine to form an identifiable common ethnicity and a coherent region.

What are human rights?

[6] For the purposes of this study, human rights are the norms set out in international human rights instruments, which have been devised predominantly by United Nations agencies and bodies. The principle document that stipulates human rights is the *Universal Declaration of Human Rights* (UDHR), which was adopted by the United

Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu and Wallis and Futuna.

² Nicolas Thomas, *In Oceania: Visions, Artefacts, Histories* (1997) 133-135.

³ New Zealand Law Commission, *Converging Currents: Custom and Human Rights in the Pacific*, Study Paper 1 (2006) 31.

⁴ Petra Butler, *A Human Rights Charter for the Pacific* (2005) Human Rights Research: Victoria Human Rights Programme 2 <<http://www.victoria.ac.nz/nzcpl/HRRJ/vol3/Butler.pdf>> at 15 August 2009.

⁵ New Zealand Law Commission, above n 3, 30.

⁶ *Ibid* 32-33.

⁷ *Ibid*.

⁸ *Ibid*.

⁹ *Ibid*.

Nations General Assembly in 1948. Seven human rights treaties now constitute the international legal framework that governs the protection of human rights.¹⁰

[7] Human rights are largely considered by the drafters of international human rights instruments to be universal and inalienable norms and ‘inherent in persons by virtue of their humanity’.¹¹ Therefore international human rights treaties are perceived as the codification of rights that already exist.¹² Article 1 of the *Universal Declaration of Human Rights* (UDHR) encapsulates this idea: ‘All human beings are born free and equal in dignity and rights’. However, there is debate as to whether human rights are universal and inalienable, or defined by cultural and social context. This debate is discussed below.

Individual Rights in International Law

[8] International human rights instruments are largely based upon the concept of the rights of the individual. The human rights movement stems from a liberal tradition of Western political and legal thought, which focuses on protection of the individual.¹³ This conception of individual rights as paramount ignores alternative conceptions of rights in non-Western societies, such as Pacific nations.¹⁴

Collective and Cultural Rights in International Law

[9] Paul Hunt contends that international human rights instruments have been formulated to advocate individual rights, at the expense of cultural and group rights:

¹⁰ These are the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), the *Convention on the Rights of the Child* (CRC), and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW).

¹¹ New Zealand Law Commission, above n 3, 60.

¹² *Ibid* 61.

¹³ Henry J Steiner, Phillip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd ed, 2008) 512.

¹⁴ New Zealand Law Commission, above n 3, 61.

Essentially, cultural rights have been the victims of an uneven international human rights system that has privileged civil and political rights.¹⁵

Indeed, the rights contained in the ICCPR are seen as first-generation rights, whereas group and cultural rights are seen as third-generation rights.¹⁶ Furthermore, even where cultural and group rights exist in international treaties, they are formulated from an individual perspective, such as articles 22 and 27 of the UDHR.¹⁷ A Pacific Charter of Human rights would need to incorporate cultural and group rights, which are fundamental to Pacific societies.

Duties in International Law

[10] International human rights instruments largely exclude duties.¹⁸ Andreas Follesdal describes Pacific societies as duty-oriented:

Our cultures, societies and traditions [place] great emphasis on the individual human duties and obligations to respect customary norms, laws and familial and chiefly authority rather than rights.¹⁹

In contrast to the Western liberal conception of human rights as invoking individual rights against the group, the traditional value systems of the Pacific emphasis the duties of the individual to the group.²⁰ The conceptual conflict between duties and rights must be addressed in drafting a Pacific Charter of Human Rights.

Regional Charters

¹⁵ Paul Hunt, 'Reflections on International Human Rights Law and Cultural Rights' in Margaret Wilson and Paul Hunt (eds), *Culture, Rights and Cultural Rights: Perspectives from the South Pacific* (2000) 25, 25.

¹⁶ Donald K Anton, Penelope Mathew and Wayne Morgan, *International Law: Cases and Materials* (2005) 767.

¹⁷ Hunt, above n 15, 35.

¹⁸ Andreas Follesdal, *Human Rights and Relativism* (2003)

<http://www.etikk.no/globaljustice/papers/GJ2003_Follesdal_Human_Rights_and_Relativism.doc> at 20 August 2009.

¹⁹ Ibid.

²⁰ Guy Powles, 'Duties of individuals: some implications for the Pacific of including 'duties' in 'human rights' documents' in Victoria University of Wellington, *Essays and Documents on Human Rights in the Pacific* (1992) 49, 49.

[11] Regionalism is an alternative view of human rights to the principle of universality.²¹ The inference of regionalism is that the world consists of different heterogeneous collections of people with common outlooks, values and practices. Indeed, the Commission to Study the Organization of Peace found that multilateral institutions function more effectively when based upon ‘the cultural foundations of common loyalties, the objective similarities of national problems, and the potential awareness of common interests’.²² This view supports the establishment of a Pacific Charter based on the commonalities of values, custom and cultures in the region.

[12] A contrasting theory is that regional charters are only supplementary to the existing international system of human rights law.²³ Proponents of this theory contend that international instruments contain the minimum normative standards, while regional instruments may add further rights, refine some rights and take into account differences in the region.²⁴ It is argued that if regional instruments adjust and refine normative standards too much, then regionalism may threaten the human rights of the people of a region, by insulating them from international protections, and giving governments an excuse to ignore global standards set by the United Nations.²⁵ A Pacific Charter of Human Rights must balance the aim of incorporating important Pacific customs and collective rights, with adherence to minimum normative standards contained in international instruments.

[13] In fact, the United Nations General Assembly has encouraged the development of regional human rights instruments from 1977 onwards.²⁶ Regional instruments are seen as more accessible, enforceable and adjusted to local values and practices.²⁷ However, most regional charters are focussed primarily on the rights of the individual, such as the *Convention of Human Rights and Fundamental Freedoms* (European Convention). Several regional charters exist including the European Convention, the *African Charter on Human and Peoples’ Rights* and the *Arab*

²¹ Inis Claude, *Swords into Plowshares* (4th ed, 1984) 102.

²² Commission to Study the Organization of Peace, *Regional Promotion and Protection of Human Rights* (28th Report, 1980) 15.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ New Zealand Law Commission, above n 3, 236.

²⁷ Rhona K M Smith, ‘Regional Systems: An Overview’ in Rhona K M Smith and Christien van den Anker (eds), *The Essentials of Human Rights* (2005) 307, 309.

Charter on Human Rights. Regional human rights mechanisms can also take the form of a court or a commission, such as in the Inter-American System. Regional mechanisms exist throughout the world except in Asia and the Pacific.

[14] It has been suggested by some academics that the Pacific region should be included in an Asia-Pacific human rights mechanism.²⁸ Such an instrument would involve an attempt at reconciling enormous diversity in cultures, religions and political systems. Moreover, it would be impossible to include Pacific custom, values and collective practices in an Asia-Pacific mechanism, because they are not common to countries in the Asian region. Indeed it is preferable to limit a regional mechanism to the Pacific area only.

The Banjul Charter

[15] The *African Charter on Human and Peoples' Rights* (The Banjul Charter) has been suggested as a useful document from which to build a Pacific Charter of Human Rights.²⁹ The Banjul Charter links the concepts of human rights, group rights and the duties of individuals.³⁰ For example, article 27(1) of the Banjul Charter states:

Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international communities.

Petra Butler states that the Banjul Charter seeks to balance the rights of the individual with those of the community and society through the imposition of duties.³¹ However, the charter incorporates duties, collective and group rights only to the extent that they do not infringe on individual rights. A strong focus on duties and collective and group rights is appropriate in the Pacific region where the extended family, clan and tribe play a central role in the peoples' way of life.

LAWASIA Draft Pacific Charter

²⁸ New Zealand Law Commission, above n 3, 237.

²⁹ Law Association for Asia and the Pacific, 'Report on a proposed Pacific Charter of Human Rights prepared under the auspices of LAWASIA, May 1989' in Victoria University of Wellington, *Essays and Documents on Human Rights in the Pacific* (1992) 99, 107.

³⁰ Butler, above n 4, 11.

³¹ *Ibid.*

[16] The Law Association for Asia and the Pacific (LAWASIA) Draft Pacific Charter (1989) is based on the Banjul Charter and encompasses cultural rights, group rights and duties.³² The Draft Pacific Charter also set up a commission to promote and enforce human rights protection.³³ It was hoped that governments of the Pacific would subsequently draft a treaty based on the document prepared by LAWASIA.³⁴ However, Pacific governments are yet to actively or comprehensively engage in the creation of a Pacific Charter of Human Rights.³⁵ LAWASIA are currently revising the 1989 Draft Pacific Charter, and are advocating for Pacific governments to agree to a basic set of human rights principles.

[17] The Draft Pacific Charter has been described as remarkable³⁶ and innovative.³⁷ Petra Butler contends that ‘its only fault seemed to be that it had been initiated by LAWASIA...rather than being a grass roots initiative’.³⁸ Conversely, it has been criticised by Pacific academics as ‘still very much a European document’.³⁹ The New Zealand Law Commission contends that there must be very broad consensus among Pacific governments about the value of a Pacific Charter of Human Rights in order for such a mechanism to be effectively established.⁴⁰

Pacific Customs

[18] Pacific customs are incapable of being strictly identified because of their changing and dynamic nature.⁴¹ The New Zealand Law Commission defines custom broadly as:

³² Law Association for Asia and the Pacific, above n 29, 107.

³³ Ibid 105.

³⁴ Ibid 99.

³⁵ New Zealand Law Commission, above n 3, 236.

³⁶ A H Angelo, ‘Lo Bilong Yumi Yet’ in Victoria University of Wellington, *Essays and Documents on Human Rights in the Pacific* (1992) 33, 40.

³⁷ Butler, above n 4, 11.

³⁸ Ibid.

³⁹ Konai Helu Thaman, ‘Cultural Rights: A personal perspective’ in Margaret Wilson and Paul Hunt (eds), *Culture, Rights and Cultural Rights: Perspectives from the South Pacific* (2000) 1, 3.

⁴⁰ New Zealand Law Commission, above n 3, 238.

⁴¹ New Zealand Law Commission, above n 3, 46.

...the values, principles and norms that members of a cultural community accept as establishing standards for appropriate conduct, and the practices and processes that give effect to community values.⁴²

Jean Zorn contends that practices become custom when they are fairly regularly practised by a large segment of the community.⁴³ Customary law is what the people of a particular community consider they are bound to do or not to do.⁴⁴ Examples of Pacific customs that will be discussed in this paper include tribal determination of marriage partners, bride payments and the custom of banishment.

[19] Customary law was used in pre-colonial Pacific societies as the principal means of governance. Zorn describes how Pacific societies functioned without central authority:

Without state mechanisms...the Pacific nevertheless had functioning legal systems. They had complex sets of unwritten rules governing aspects of social, political and economic behaviour. They had effective methods for ensuring that the rules would be followed and they also had workable procedures for settling disputes.⁴⁵

Customary law is still widely used as a means of governance in the Pacific. According to the New Zealand Law Commission, daily life in the small island states of Tokelau and Wallis and Fortuna is almost completely governed by customary law.⁴⁶ Because custom is central to Pacific societies, a Pacific Charter of Human Rights would need to incorporate customary norms, values and practices.

Modern Custom

[20] Custom has altered considerably over time to reflect social, economic, political and religious changes in the Pacific.⁴⁷ Colonisation and Christianity have had a considerable effect on custom, so that it no longer resembles pre-contact custom.⁴⁸ For example, many pre-contact beliefs and values were modified by missionary

⁴² New Zealand Law Commission, above n 3, 47.

⁴³ Jean G Zorn, 'Custom then and now: the changing Melanesian family' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law Society and Governance in the Pacific* (2003) 95, 101.

⁴⁴ New Zealand Law Commission, above n 3, 47.

⁴⁵ Zorn, above n 43, 96.

⁴⁶ New Zealand Law Commission, above n 3, 41.

⁴⁷ Ibid 55.

⁴⁸ Ibid.

teachings.⁴⁹ Globalisation has also affected the traditional way of life of Pacific peoples, resulting in increased urbanisation and a shift to individual economic enterprise.⁵⁰ A question for drafters of a Pacific Charter of Human Rights is whether custom that is included in the charter should reflect traditional or modern custom, values and practices.

Codifying Custom

[21] A difficulty faced in drafting a Pacific Charter of Human Rights is codifying custom, because of its changing and dynamic nature. Zorn contends custom is changing at an accelerated rate due to technological, economic and political changes in the Pacific.⁵¹ Once customary norms are fixed in law they become frozen, and incapable of reflecting the changing nature of customs.⁵²

[22] Another challenge to codifying custom in a Pacific Charter of Human Rights is variance in customs between states and within states.⁵³ As Zorn states, Pacific societies were historically heterogeneous:

Each of the indigenous societies of the Pacific had its own customs. Each of the small village societies of the pre-colonial Pacific was an independent mono-cultural entity.⁵⁴

In order to design an accurate charter, the drafters would have to undertake an inventory of customs applicable to all Pacific nations. Moreover, Pacific governments would need to agree on values, customs and practices common to the region.⁵⁵ Even then, customs could change and consequently render the charter inaccurate.

Collective Practices

⁴⁹ New Zealand Law Commission, above n 3, 58.

⁵⁰ Ibid 55.

⁵¹ Zorn, above n 43, 96.

⁵² New Zealand Law Commission, above n 3, 43.

⁵³ Zorn, above n 43, 96.

⁵⁴ Ibid.

⁵⁵ New Zealand Law Commission, above n 3, 283.

[23] Collective practices are common in Pacific societies, where the extended family, clan or tribe are central to the Pacific peoples' way of life. Collective practices are thus an integral part of Pacific culture and custom. Konai Helu Thaman describes culture in the Pacific context a 'shared way of living of a group of people, which includes their accumulated knowledge and understandings, skills and values'.⁵⁶ Collective rights therefore operate to protect collective practices, custom and culture.

[24] The dominant position of collective practices in the Pacific may mean that collective rights may subjugate certain individual rights. Thaman contends that:

Pacific societies have long recognised the collective rights of groups and have traditionally protected individual rights in the context of these groups.⁵⁷

Collective practices may conflict with international human rights principles such as gender equality. The example provided in this research paper is the collective determination of marital partners in Pacific tribes which conflicts with women's rights. A Pacific Charter of Human Rights would need to find a way to reconcile collective rights with individual rights.

Pacific Constitutions

[25] All Pacific constitutions contain provisions for the protection of human rights, with the exception of Niue.⁵⁸ The rights contained in Pacific constitutions are based on the UDHR, the European Convention, the *Canadian Bill of Rights* and the *Constitution of the United States of America*.⁵⁹ Constitutions are the principal source of law, and prevail over all other laws.⁶⁰ Thus customary law that contravenes human rights is likely to be unconstitutional. Individual human rights are therefore already encapsulated in Pacific law.

⁵⁶ Thaman, above n 39, 1.

⁵⁷ Thaman, above n 39, 3.

⁵⁸ A H Angelo, 'The Niue Constitution' (2009) 15 *Revue Juridique Polynesienne* 157, 177.

⁵⁹ Jennifer Corrin Care, *Conflict between customary law and human rights in the South Pacific* (1999) 4 <www.vanuatu.usp.ac.fj/sol-adobe_documents/usp%20only/pacific%20law/corrin> at 20 August 2009.

⁶⁰ Ian Fraser, 'Human Rights vs. Custom in the Pacific: Struggle, Adaptation or Game?' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law Society and Governance in the Pacific* (2003) 199, 200.

[26] Most Pacific constitutions also recognise customary law.⁶¹ However, often the recognition of custom is limited by Pacific constitutions to the extent that it conforms with human rights or the protection of justice.⁶² For example section 100(3) of the *Constitution of Fiji 1997* provides that custom will apply unless ‘inconsistent with a provision of this constitution or a statute, or repugnant to the general principles of humanity’.

[27] Furthermore, there is evidence that Pacific courts and legislatures are adjusting the law so that discriminatory customary practices are made illegal.⁶³ For example, section 38(8) of the *Constitution (Amendment) Act 1997* modified the Fijian Constitution, which had previously sheltered custom from the non-discrimination code.⁶⁴ The decision in 1994 of *Noel v Toto* in Vanuatu outlawed any discriminatory customs.⁶⁵ These examples suggest that national courts and legislatures are favouring human rights over customary law when engaging in law reform and dispute resolution.

[28] The biggest challenge to the utility of Pacific constitutions is their continuing incapacity to adequately address the conflict between custom and human rights.⁶⁶ Pacific constitutions do not recognise collective rights or duties, which are integral to the Pacific custom, practices and values.⁶⁷ In practice, courts (which are often comprised of expatriate judges) are reluctant to use custom in their decisions because judges are unfamiliar with Pacific customs, and find it difficult to apply unwritten law.⁶⁸ Therefore human rights are given more attention by the judiciary and customary law is often excluded from consideration. On the other hand, the majority of disputes in Pacific nations are presided over by chiefly authorities and governed by customary law.⁶⁹ Constitutional protections and human rights are not applied in

⁶¹ Caren Wickliffe, ‘Culture Rights, Culture and Human Rights Education’ in Margaret Wilson and Paul Hunt (eds), *Culture, Rights and Cultural Rights: Perspectives from the South Pacific* (2000) 129, 129.

⁶² Corrin Care, above n 59, 7.

⁶³ Kenneth Brown, ‘Customary Law in the Pacific: An Endangered Species’ (1999) 3 *Journal of South Pacific Law* 1, 4.

⁶⁴ *Ibid* 5.

⁶⁵ *Noel v Toto* [1995] VUSC 3.

⁶⁶ Corrin Care, above n 59, 15.

⁶⁷ *Ibid*.

⁶⁸ Zorn, above n 43, 97.

⁶⁹ *Ibid* 130.

traditional dispute resolution.⁷⁰ A fundamental question in creating a Pacific Charter of Human Rights is how a regional charter would impact on traditional dispute resolution where human rights are most likely to be infringed.

[29] It has been suggested by the New Zealand Law Commission that rather than formulating a Pacific Charter of Human Rights, it would be more productive to focus on existing human rights provisions in Pacific constitutions.⁷¹ The commission asserts that resources and time would be better spent on attempting to harmonise existing human rights and custom provisions in Pacific constitutions.⁷² It is contended that Pacific constitutions are more effective and enforceable and are perceived as locally owned, while human rights instruments are seen as imposed by the West.⁷³ However, a Pacific Charter of Human Rights is potentially important in recognising Pacific custom and collective practices, and could play a key role in harmonising custom and human rights.

Pacific Engagement in the International Human Rights System

[30] Pacific nations have a low level of engagement in the international human rights treaty system.⁷⁴ All independent Pacific countries have ratified the *Convention on the Rights of the Child* (1989) (CRC) and many have ratified the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDAW) as the result of civil society and United Nations agencies pushing for the ratification of these treaties.⁷⁵ However where treaties have been ratified, most Pacific nations have failed to meet the reporting requirements of the treaties.⁷⁶

[31] There are many explanations for the perceived indifference of Pacific nations towards international human rights treaties. The primary reason given for low levels of ratification is that many human rights norms are already constitutionally

⁷⁰ Zorn, above n 43, 130.

⁷¹ New Zealand Law Commission, above n 3, 69.

⁷² Ibid.

⁷³ New Zealand Law Commission, above n 3, 69.

⁷⁴ Ibid 68.

⁷⁵ Ibid 69.

⁷⁶ Ibid 68.

entrenched.⁷⁷ Secondly, the lack of economic, technical, human and institutional capacity to fulfil the commitments of international treaties is also seen as a significant reason for low levels of ratification.⁷⁸ Indeed resources may be better spent on other human rights initiatives such as community human rights education. However the lack of resources in the Pacific could potentially be ameliorated by international agencies and NGOs, who could provide assistance so that Pacific nations can engage in the international human rights system.⁷⁹ Finally, international human rights treaties are perceived as a new form of external intervention in newly independent states.⁸⁰

[32] While LAWASIA contends that Pacific countries have relatively good human rights records, they concede that problems still exist in some areas.⁸¹ These include the status of women, the rights of indigenous peoples and the rights of minorities.⁸² On the other hand, Dejo Olowu contends that the human rights provisions contained in domestic constitutions have ‘not generated a vibrant culture of human rights protection in the Pacific’.⁸³ Olowu argues that the Pacific should not be insulated from international human rights protections, and should proceed to ratify all international human rights treaties.⁸⁴

Cultural Relativism vs. Universalism

[33] The conflict between cultural relativism and universalism is central to the debate over whether human rights and customs can be reconciled to create a Pacific Charter of Human Rights. Universalists contend that human rights are absolute and applicable to all societies.⁸⁵ Cultural relativists contend that human rights are based on Western liberal values, and do not necessarily apply to all cultures and societies.⁸⁶ The middle

⁷⁷ Thaman, above n 39, 2.

⁷⁸ Angelo, above n 36, 40.

⁷⁹ Ibid 47.

⁸⁰ Ibid 39-40.

⁸¹ Law Association for Asia and the Pacific, above n 31, 101.

⁸² Ibid.

⁸³ Dejo Olowu, ‘The United Nations Human Rights Treaty System and the Challenges of Commitment and Compliance in the South Pacific’ 7 (2006) *Melbourne Journal of International Law* 155, 164.

⁸⁴ Ibid 163.

⁸⁵ New Zealand Law Commission, above n 3, 70.

⁸⁶ Ibid.

ground between these two contrasting positions is that some norms are universal, while others are relative to culture and context.⁸⁷

[34] Universalists dismiss the arguments of cultural relativists as conveniently espoused by those in power. Rosalyn Higgins comments that relativism:

...is a point mostly advanced by states...It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards.⁸⁸

It is possible that universal norms can be altered to incorporate cultural and group rights, which are important in the Pacific context. The New Zealand Law Commission contend that international law is being expanded to recognise custom and group rights.⁸⁹ For example, articles 5 and 34 of the *Declaration on the Rights of Indigenous Peoples* (2007) recognises the right of indigenous people to maintain their legal systems and customs in accordance with international law.⁹⁰

[35] Cultural relativists assert that human rights should be determined by local cultural values and custom.⁹¹ Sally Engle Merry contends that human rights are embedded in Western liberal assumptions ‘about the nature of the person, the community and the state (and) do not translate easily from one setting to another’.⁹² A more extreme view advocated by cultural relativists is that universal norms are destroying the diversity of Pacific cultures,⁹³ and are disruptive of customary social structures and subversive of traditional authority.⁹⁴ In their extreme forms, cultural relativism and universalism are seemingly irreconcilable.

[36] However, there are several means by which cultural relativism and universalism can be made more compatible. First, some norms may exist universally, such as the principle of human dignity.⁹⁵ Jennifer Corrin Care suggests that it is possible to

⁸⁷ Steiner, Alston and Goodman, above n 13, 515.

⁸⁸ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 96.

⁸⁹ New Zealand Law Commission, above n 3, 43.

⁹⁰ *Ibid.*

⁹¹ Dejo Olowu, above n 83, 161.

⁹² Sally Engle Merry, *Human Rights and Gender Violence* (2006) 2.

⁹³ New Zealand Law Commission, above n 3, 21.

⁹⁴ Steiner, Alston, Goodman, above n 13, 475.

⁹⁵ *Ibid* 519.

develop a core of basic rights that are common to all cultures.⁹⁶ Second, culture and human rights are both changing and dynamic, as Engle Merry highlights:

Considering cultures as changing and interconnected, and rights as historically created and transnationally redefined by national and local actors, better describes the contemporary situation. It also reveals the impossibility of drawing sharp distinctions between culture and rights or seeing relativism and universalism as diametrically opposed and incompatible positions.⁹⁷

Indeed, human rights norms are broadly phrased and thus can potentially be adapted according to cultural context.⁹⁸ However there are some Pacific customs that seem to fundamentally conflict with human rights, which suggests that there may be a limit to the compatibility of human rights and custom.

Women's Rights vs. Customary Practices

[37] The dichotomy between women's rights and patriarchal tribal decision-making illustrates the conflict between human rights and Pacific customs. In many Pacific communities, women can neither choose their marriage partners nor terminate a marriage once contracted.⁹⁹ Instead, the men of the tribe determine who a women's marital partner will be. Bride payments are also a 'uniform and widespread custom' in the Pacific.¹⁰⁰ Margaret Jolly illustrates the effect of this Pacific custom on women:

Women are paid in the guise of bride price for their labour, both in the bed and in the garden, they allow their bodies to be battered, to be abused and discarded.¹⁰¹

Anthropologist Douglas Oliver states that the price paid for a bride was usually for her sexual, domestic and reproductive services.¹⁰² Women were chosen as wives based on customary rules governing incest, and on criteria including age, beauty,

⁹⁶ Corrin Care, above n 59, 16.

⁹⁷ Sally Engle Merry, 'Changing Rights, Changing Culture' in Jane K Cowan, Marie-Benedicte Dembour and Richard A Wilson (eds), *Culture and Rights: Anthropological Perspectives* (2001) 31, 39.

⁹⁸ New Zealand Law Commission, above n 3, 70.

⁹⁹ *Ibid* 4.

¹⁰⁰ Brown, above n 63, 3.

¹⁰¹ Margaret Jolly, *Women ikat raet long human raet o no?: women's rights, human rights, and domestic violence in Vanuatu* in Anne-Marie Hilsdon et al, *Human Rights and Gender Politics: Asia-Pacific perspectives* (2000) 124, 134.

¹⁰² Douglas L Oliver, *Native Cultures of the Pacific Islands* (1989) 62.

industriousness and social class.¹⁰³ How should customary practices that infringe women's rights and safety be dealt with when drafting a Pacific Charter of Human Rights?

[38] International human rights law requires equality and non-discrimination between men and women. Articles 2(f) and 5(a) of CEDAW require states to take all appropriate actions to modify or abolish customs and practices that constitute discrimination or that are based on the idea of inferiority, superiority or on stereotyped roles for women.¹⁰⁴ Equality of rights can also be found in articles 2(1) and 3 of the ICCPR and articles 2(2) and 3 of the ICESCR. Drafters of a Pacific Charter of Human Rights would presumably wish to incorporate provisions guaranteeing equality of rights and non-discrimination.

[39] International human rights instruments include provisions guaranteeing the rights of women to enter into marriage only by the full and free consent of both parties¹⁰⁵ and to have the same rights and responsibilities during marriage and in the event of dissolution of the marriage.¹⁰⁶ Some Pacific constitutions, such as the Kiribati and Tuvalu Constitutions, also prohibit gender discrimination.¹⁰⁷ Regardless of these provisions, the custom of bride payments and patriarchal determination of marriage partners continue to be an integral part of Pacific cultures.

[40] Pacific women also experience high levels of domestic violence.¹⁰⁸ Martha Macintyre suggests that in many Melanesian societies there is a belief that husbands gain the right to physically punish their wives by virtue of bride payments.¹⁰⁹ Levels of domestic violence vary greatly throughout the Pacific.¹¹⁰ In Papua New Guinea many women accept the right of their husbands to beat them, whereas in other

¹⁰³ Oliver, above n 102, 63.

¹⁰⁴ Steiner, Alston and Goodman, above n 13, 542.

¹⁰⁵ ICESCR art 10(1), ICCPR art 23(3) and CEDAW art 16(b).

¹⁰⁶ ICCPR art 23(4), CEDAW art 16(c).

¹⁰⁷ *Kiribati Constitution 1979* s3, *Tuvalu Constitution 1986* s11(1).

¹⁰⁸ Amnesty International, *Pacific Leaders must address high rates of violence against women* (2009) <<http://www.amnesty.org.au/news/comments/21494>> at 20 August 2009.

¹⁰⁹ Martha Macintyre, 'Hear us, women of Papua New Guinea!': Melanesian women and human rights' in Anne-Marie Hilsdon et al, *Human Rights and Gender Politics: Asia-Pacific perspectives* (2000) 147, 150.

¹¹⁰ Steven Roger Fischer, *A History of the Pacific Islands* (2002) 277.

Melanesian societies physical abuse requires payment of a fine to a wife.¹¹¹ Domestic violence is often justified as a customary practice based on traditional patriarchal relationships.¹¹²

Historical Analysis of Gendered Customary Practices

[41] Steven Fischer contends that the subordinate position of women in the Pacific only worsened as a result of colonisation and the widespread introduction of Christianity in the Pacific.¹¹³ Custom was strongly influenced by the introduction of Christianity.¹¹⁴ Christianity had a detrimental effect on Pacific women through missionary doctrine on the subordinate position of women, forcing women to adopt men's surnames,¹¹⁵ and abolishing separate men's houses which resulted in an increase in domestic violence.¹¹⁶ On the other hand, some traditional brutal practices against women were abandoned with the introduction of Christianity,¹¹⁷ and some churches have assisted women in advocating for equality.¹¹⁸ There is no doubt that customary practices changed due to the introduction of Christianity and colonisation, however it is debatable whether these forces operated to increase the discrimination and inequality suffered by Pacific women.

[42] Conversely, Macintyre contends that discrimination against women in the pre-colonial era was analogous to the discrimination experienced by Pacific women today.¹¹⁹ Macintyre suggests that most customary groups had no tradition of rights for women prior to colonisation; women's lack of capacity was ubiquitous and extended to all forms of law.¹²⁰ In addition, the customary system was based on male domination and traditional dispute resolution has always been presided over by

¹¹¹ Macintyre, above n 109, 150.

¹¹² Ibid.

¹¹³ Fischer, above n 110, 276.

¹¹⁴ New Zealand Law Commission, above n 3, 88.

¹¹⁵ Ibid.

¹¹⁶ Jean G Zorn, *Women, Custom and International Law in the Pacific* (Occasional Paper 5, University of the South Pacific, Port Vila 2000) 13.

¹¹⁷ New Zealand Law Commission, above n 3, 88.

¹¹⁸ Keiti Ann Kanongata'a, 'Pacific Women and Theology' (1995) 13 *Pacific Journal of Theology* 17, 17.

¹¹⁹ Macintyre, above n 109, 151.

¹²⁰ Brown, above n 63, 4.

men.¹²¹ It is important to note that women's status varied greatly between Pacific nations and societies. Kenneth Brown asserts that while pre-colonial societies were undeniably patriarchal, colonial administrations played a role in institutionalising and entrenching patriarchy by codifying customs, laws and structures that operated to fossilise discrimination against women.¹²²

[43] Determining whether pre-contact custom was similarly discriminatory to the modern treatment of Pacific women has been made difficult by loss of knowledge and by biased recordings.¹²³ Loss of traditional knowledge upon colonisation resulted in reliance upon the literary recordings of missionaries, colonists and ethnographers.¹²⁴ The New Zealand Law Commission contends that these people interpreted custom from a Western male perspective, leading to a bias in recordings of Pacific customs.¹²⁵ The Fiji Women's Rights Project states that:

Tradition, culture and custom in the main is defined by men, not women- therefore there is a conflict about whose custom is being applied, especially given that custom is largely unwritten.¹²⁶

Indeed men have assumed a central role in recording and codifying custom.¹²⁷ Fischer states that through Western education Pacific women have begun to question their traditional obligation of subordination due to this bias in recordings.¹²⁸

[44] The key question is whether custom can be adapted to accommodate equality in status, a right guaranteed by international human rights instruments. The paper has previously highlighted the changing and dynamic capacity of custom, and its previous adaptation to Christianity and colonisation. The New Zealand Law Commission points out that acknowledgement of women's rights and equality in status in other societies (including Western societies) has only been a recent development.¹²⁹ Thus it

¹²¹ Corrin Care, above n 59, 2.

¹²² Brown, above n 63, 4.

¹²³ New Zealand Law Commission, above n 3, 87.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Submission by Fiji Women's Rights Movement and the Crisis Centre: *Report of the Commission of Inquiry on the Courts* (1984) 172 in Jennifer Corrin Care, *Conflict between customary law and human rights in the South Pacific* (1999) 4 <www.vanuatu.usp.ac.fj/sol-adobe_documents/usp%20only/pacific%20law/corrin> at 20 August 2009.

¹²⁷ Jolly, above n 101, 135.

¹²⁸ Fischer, above n 110, 276.

¹²⁹ New Zealand Law Commission, above n 3, 84.

seems possible that custom could change to accommodate modern notions of the equal status and rights of women.

Resistance to Equal Rights

[45] The resistance to equal rights for women, and to other human rights protections, is coming predominantly from those who benefit from the status quo.¹³⁰ Former Vice-President of Fiji, Ratu Joni Madraiwiwi, has observed:

In the Asia-Pacific region there is some resentment about the concept of human rights...Interestingly it is not the downtrodden, the oppressed or the marginalised who make the criticism. It is those of us who are part of established power structures that query the applicability of these rights.¹³¹

Pacific women, particularly poor rural women, complain about their inability to participate in political decisions and about increasing levels of male violence.¹³² The drafters of a Pacific Charter of Human Rights must ensure broad and extensive consultation in determining which customs and human rights should be included in such a document, including comprehensive consultation of women.

Freedom of Movement vs. the Customary Penalty of Banishment

[46] Banishment is another example of a Pacific custom which conflicts with individual rights contained in international human rights instruments. Village councils generally exercise the customary penalty of banishment in Pacific communities, although in Samoa only the Land and Titles Court may issue banishment orders.¹³³ Samoan Chief Justice, Patu Tiava'asu'e Falefatu Sapolu gave an explanation of the custom of banishment:

Banishment is a measure of social control which is applied in the village to maintain peace, harmony and order within a family, or between families, and within the village itself. It is also a measure of law enforcement within the village in the sense that

¹³⁰ New Zealand Law Commission, above n 3, 84.

¹³¹ Ratu Joni Madraiwiwi, 'Rights and Rites: A Discourse', New Zealand Law Commission Custom and Human Rights Workshop, Nadi 2008.

¹³² Jolly, above n 101, 136.

¹³³ *Taamale v Attorney General* [1995] WSCA 12.

banishment is a sanction which may be imposed for certain misconduct or disobedience of the rules and regulations made by the village.¹³⁴

Contemporarily, customary law has also been exercised by chiefly authorities in Vanuatu to send people back to their villages, due to an increase in crime and social problems in urban centres.¹³⁵

[47] Freedom of movement is guaranteed both by international human rights instruments and Pacific constitutions. Freedom of movement is encapsulated in article 13(1) of the UDHR and article 12 of the ICCPR. Freedom of movement is also guaranteed by most Pacific constitutions, such as in article 13(1)(d) of the Samoan Constitution which states ‘all citizens of Samoa shall have the right to move freely throughout Samoa and to reside in any part thereof’. Banishment cases that have been appealed to national courts on the basis of the constitutional right to freedom of movement have had varied outcomes. These cases are mentioned below, and illustrate situations in which national courts enforce human rights against customary law and vice versa.

[48] The conflict between freedom of movement and customary banishment illustrates that custom and human rights must be carefully balanced, and must be considered with reference to cultural context. For instance, guaranteeing the right to freedom of movement may undermine the ability of communities and customary authorities to maintain social order in villages and urban centres. Corrin Care asserts that ‘value judgements should not be made in ignorance of the complexities of customary law’.¹³⁶ She states that particular customs may be viewed as acceptable if the operative infrastructure is taken into account, for example Pacific villages that lack rehabilitative programs.¹³⁷

Use of Custom and Human Rights by Pacific Courts

¹³⁴ Patu Tiava’asu’e Falefatu Sapolu, *Role of banishment in Western Samoa* (1995) in Lance Polu, ‘Cultural Rights and the Individual in the Samoan Context’ in Margaret Wilson and Paul Hunt (eds), *Culture, Rights and Cultural Rights: Perspectives from the South Pacific* (2000) 57, 63.

¹³⁵ Parkinson Wirrick, ‘Restricting the Freedom of Movement in Vanuatu’ (2008) 12(1) *Journal of South Pacific Law* 76, 76.

¹³⁶ Corrin Care, above n 59, 15.

¹³⁷ *Ibid.*

[49] The Solomon Islands case of *Pusi v Leni*¹³⁸ is a recent example of the conflict between customary law and the freedom of movement. The decision is authority for the proposition that human rights provisions will not be applied over customary law, or vice versa; instead it is the circumstances of the case that determine the outcome.¹³⁹ In the Samoan case of *Taamale v Attorney General* the Court of Appeal upheld the customary penalty of banishment as a well-established custom, which is an important sanction essential to the capacity of the village council to ensure public order.¹⁴⁰ There are other cases in which the right to freedom of movement has been enforced against the customary penalty of banishment.¹⁴¹ Pacific courts have made attempts to reconcile custom and human rights by not giving preference to either principle: however the cases still illustrate the conflicting nature of human rights and custom.

Indigenous Custom vs. the Rights of Minority and Migrant Communities

[50] Any attempt to create a Pacific Charter of Human Rights that includes custom must take account of the rights of minority and migrant communities living in the Pacific. While some Pacific countries only have small minority and migrant populations, non-indigenous people comprise more than a quarter of the populations of Fiji, Nauru and Palau.¹⁴² A document that incorporates the customs and collective practices of indigenous Pacific peoples may result in marginalisation of minorities and migrant communities and restrict these groups from practicing their own culture and customs.¹⁴³ The rights of indigenous people to equality and freedom, and to practice their own culture are contained in article 1 of the UDHR, article 27 of the ICCPR, article 15(1) of the ICESCR and in the *Declaration on the Rights of Indigenous Peoples*.

[51] The experience of indigenous Fijians demonstrates the complexities in attempting to balance respect for migrant communities while safeguarding Pacific custom and practices. In 2004, Indigenous Fijians constituted approximately 54% of

¹³⁸ *Pusi v Leni* [1997] SBHC 100.

¹³⁹ *Ibid.*

¹⁴⁰ *Taamale v Attorney General* [1995] WSCA 12.

¹⁴¹ See for example *Teitinnang v Ariong* [1986] KIHIC 1.

¹⁴² New Zealand Law Commission, above n 3, 84.

¹⁴³ *Ibid.*

the population.¹⁴⁴ Fiji has a large population of migrants from India who constitute approximately 38% of the population and other significant Chinese and European populations.¹⁴⁵ The 1990 *Constitution of Fiji* effectively precluded Indian Fijians from possessing political power and cultural autonomy.¹⁴⁶ However this was altered in 1997 by amendments to the Constitution. The preamble of the *Constitution (Amendment) Act 1997* reaffirms ‘recognition of the human rights and fundamental freedoms of all individuals and groups’ and recognises Fiji’s multicultural society. However, former Minister for Education, Taufa Vakatale is sceptical of the policy of multiculturalism, which in effect is contributing to the diminishing of Fijian culture.¹⁴⁷ He contends ‘equality in principle becomes discrimination in practice’.¹⁴⁸ Indeed the situation in Fiji illustrates the difficulties of endeavouring to protect both human rights and culture.

Defining Human Rights and Customs in the Pacific Context

[52] Custom is changing and dynamic and thus is capable of adapting to modern notions of human rights.¹⁴⁹ Human rights thinking must also take into account customary perspectives of Pacific peoples. International agencies and NGOs could play a role in preparing literature which suggests ways of harmonising human rights and Pacific custom and collective practices to create a viable Pacific Charter of Human Rights.¹⁵⁰ Integral to this process is to create an inventory of Pacific customs, values and practices that are common to and reflective of the entire region.

[53] A core of basic human rights common to all cultures in the Pacific must also be developed in order to create a workable charter.¹⁵¹ The constitutions of the Pacific

¹⁴⁴ Fiji Government, *Fiji Today 2006-2007* (2006-2007) <<http://www.fiji.gov.fj/index.shtml>> at 20 October 2009.

¹⁴⁵ Fiji Government, *Fiji Today 2006-2007* (2006-2007) <<http://www.fiji.gov.fj/index.shtml>> at 20 October 2009.

¹⁴⁶ Amnesty International, *Fiji: new era for human rights with new constitution* (1998) <<http://asiapacific.amnesty.org/library/Index/ENGASA180011998?open&of=ENG-FJI>> at 20 October 2009.

¹⁴⁷ Taufa Vakatale, ‘Multiculturalism vs. Indigenous Cultural Rights’ in Margaret Wilson and Paul Hunt (eds), *Culture, Rights and Cultural Rights: Perspectives from the South Pacific* (2000) 70, 74.

¹⁴⁸ Ibid.

¹⁴⁹ Brown, above n 63, 7.

¹⁵⁰ Angelo, above n 36, 47.

¹⁵¹ Corrin Care, above n 59, 16.

already include human rights based on international norms and Canadian, British and American human rights documents. Thus the foundations of a Pacific Charter of Human Rights may already exist in Pacific Constitutions. However, as mentioned earlier, a key deficiency of Pacific constitutions is their inability to harmonise custom and human rights. A Pacific Charter of Human Rights would need to effectively incorporate custom, culture and collective rights to reflect the cultural characteristics and uniqueness of the Pacific region. This would increase sentiments of ownership and acceptance amongst Pacific peoples towards a regional charter.

[54] Corrin Care suggests that an alternative way forward that involves exploring and redefining human rights to suit the Pacific context.¹⁵² She states:

This exploration could take the form of re-analysis of the list of human rights with a view to introducing new rights or perhaps more aptly, new duties and discarding inappropriate ones.¹⁵³

Indeed, duties and collective rights must be added to any inventory of Pacific cultural rights. Brown is sceptical of this process; he contends it would necessitate a ‘careful and painstaking’ and ‘time consuming and expensive’ process of collecting all Pacific customs, values and practices to ascertain whether commonalities can be distilled.¹⁵⁴ He doubts that there are adequate resources in the Pacific to support such a process.¹⁵⁵ This could be ameliorated by international agencies and NGOs who could play a role in supporting and funding the process. An additional problem with Corrin Care’s suggestion was mentioned earlier in the discussion of regional charters, that regional instruments that adjust and refine human rights principles too much might threaten the human rights of the people of a region, by insulating them from minimum international normative standards.¹⁵⁶

Importance of Education

[55] LAWASIA state that there is very little focus in Pacific countries on education regarding rights and duties. Irene J Taafaki suggests that education is critically

¹⁵² Corrin Care, above n 59, 15.

¹⁵³ Ibid.

¹⁵⁴ Brown, above n 63, 4.

¹⁵⁵ Ibid.

¹⁵⁶ Commission to Study the Organization of Peace, above n 23, 15.

important to the protection of human rights, cultural rights and custom in the Pacific.¹⁵⁷ Education is essential to successfully implementing a Pacific Charter of Human Rights. The LAWASIA Draft Pacific Charter proposes the creation of a commission for the protection of human rights. The commission would have a function in education, promoting and protecting rights, and finding ways to balance custom and human rights.¹⁵⁸ Human rights education would need to be widespread and comprehensive, occur at a grassroots level and take into account customary perspectives.¹⁵⁹ In particular, education must extend to potentially vulnerable and marginalised Pacific peoples such as women.¹⁶⁰

Conclusion and Recommendations

[56] A Pacific Charter of Human Rights is achievable, however there are several impediments to its creation and implementation. NGOs and international agencies could play a key role in addressing several of the challenges involved in devising a regional charter. First, the Pacific region lacks vital resources, infrastructure and personnel to invest in the creation of a charter, which could be ameliorated by NGOs and international agencies. Second, more research needs to be conducted on methods of harmonising and codifying custom and human rights. This research must be based on comprehensive consultation of Pacific peoples, and must be sensitive to Pacific cultural context. Research would be aimed at finding ways to present human rights so that they reflect the values, practices and customs of Pacific societies, and vice versa.¹⁶¹ This is particularly so in the areas of women's rights, the freedom of movement and the rights of minority and migrant communities. Indeed if human rights and Pacific customs can be reconciled through such research, then it is more likely that Pacific governments will be willing to engage in the creation of a Pacific Charter of Human Rights.

¹⁵⁷ Irene J Taafaki, 'Cultural Rights: A curriculum and pedagogy for praxis' in Margaret Wilson and Paul Hunt (eds), *Culture, Rights and Cultural Rights: Perspectives from the South Pacific* (2000) 104.

¹⁵⁸ Law Association for Asia and the Pacific, above n 31, 102.

¹⁵⁹ Ana Taufe'ulungaki, 'Cultural Rights in the Tongan Context: some issues' in Margaret Wilson and Paul Hunt (eds), *Culture, Rights and Cultural Rights: Perspectives from the South Pacific* (2000) 93.

¹⁶⁰ Ibid.

¹⁶¹ New Zealand Law Commission, above n 3, 12.

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