

# Implementing women's and children's rights

## The case of domestic violence in Samoa

Penny Martin

*Can human rights law be used to protect women and children from violence in the home?*



Discussions about legal issues in the 'Asia-Pacific region' often neglect the Pacific part of the equation. The Pacific, which includes a diverse range of countries arranged under the cultural and geographic groupings of Melanesia, Polynesian and Micronesia, has its own very particular legal concerns and needs. To varying degrees, it also has a strong colonial history that has shaped and challenged its evolving legal identity.

The aim of this article is to focus on the legal issue of women's and children's international human rights in the Pacific and the strategies for their implementation, particularly in the Independent State of Samoa (Samoa). I consider the difficulties and issues relating to implementation in that context and suggest directions for future action by both state and non-state actors.

My involvement in this issue was as Legal Officer for the Samoan non-governmental organisation *Mapusaga o Aiga* (Family Haven) that was established to address the issue of domestic violence and sexual assault against women and children. Many of the reflections in this article, which focuses on domestic violence, are based on my personal experiences of human rights in this context.

The Polynesian nation of Samoa (known as Western Samoa until 1997) is a parliamentary democracy with a legal system based on Samoan custom and usage and the laws and procedures of New Zealand. It has a unicameral parliament of 49 seats — 47 are open to *matai* (traditional chiefs), of which there are 25,000 in a population of 180,000. Ninety-five percent of *matai* are men.<sup>1</sup> The remaining two seats are reserved for people of non-Samoan heritage. Under the Constitution of the Independent State of Western Samoa and the *Village Fono Act* (1990), the village-based councils of *matai* (*fono*) are conferred broad administrative and quasi-judicial powers over village disputes according to Samoan custom and usage. They are empowered to fine or banish local villagers for infringements of traditional custom. Samoa is considered a 'least developed country' by the United Nations<sup>2</sup> and its economy relies mainly on agriculture.

Domestic violence and sexual assault are two of the main inhibitors to social development, both in Samoa and throughout the Pacific.<sup>3</sup> Often, *fa'a samoa* (the Samoan way) tolerates the use of violence within the family as a means of resolving disputes or infringements of village custom. In a survey conducted by *Mapusaga o Aiga* in 1996, it was found that 28% of women surveyed had been victims of violence, 70% of whom were aged 15-24 when the violence occurred and in 96% of cases, the perpetrator was the husband of the victim.<sup>4</sup>

A commonly held perception is that violence should be dealt with in the *aiga* (generally, the extended family), as raising it in public fora would bring shame on the family and village.<sup>5</sup> The shame is transferred to the victim and often further violence is perpetuated against her if she attempts to report it to the authorities. Samoa has no specific domestic violence laws and the only legal remedy is a criminal charge or

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punishment by the *fono*. In this context, the question arises: can human rights law be used to protect women and children from violence in the home?

## Women's and children's rights and the application of international human rights law to domestic violence

### *Human rights instruments relating to women and children*

The main international human rights law instruments relating to women's and children's rights are the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>6</sup> and the Convention on the Rights of the Child (CROC).<sup>7</sup> In the case of Samoa, CEDAW and CROC are the only two principal human rights instruments the country has adopted.<sup>8</sup>

Broadly, CEDAW seeks to protect the rights of women to non-discrimination in public and private life. It provides for the right to equally enjoy fundamental human rights, equal treatment before the law, access to health services, access to equal employment opportunities and political participation.

Articles 2, 5 and 24 of CEDAW provide that governments must take all appropriate and necessary measures (including measures within the legal system, local institutions, cultural change and education) to uphold the rights in the Convention.

Article 18 provides that governments that have adopted CEDAW (unless they have specifically made reservations) must report to the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) within one year of the Convention entering into force in that country and thereafter every four years. The CEDAW Committee may then make concluding observations and general recommendations based on the material presented in the country reports.

CROC seeks to protect the rights of children (defined in Article 1 as every human being below the age of 18 years) to life, security, family life, access to education, access to health services, freedom of religion, freedom of expression and political participation.

Article 3 of CROC asserts that states have the obligation to make the 'best interests of the child ... a primary consideration' over the interests of the community and parents or care givers. Article 4 provides that 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention ... States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation'.

Article 44 establishes a five-yearly reporting obligation (after an initial report within two years of the Convention entering into force in that country) to the Committee on the Rights of the Child (the CROC Committee).

### *Domestic violence as an infringement of international human rights law*

Domestic violence is being increasingly recognised as an international human rights issue. Domestic violence is a problem that disproportionately affects women and children. It 'is a manifestation of the historically unequal power relations between women and men, which have led to

domination over and discrimination against women'.<sup>9</sup> Violence also perpetuates the structure of power relations in a society. Consequently, violence is a means by which women are deprived of their fundamental human rights to life, health, freedom from torture and inhumane treatment. The failure of authorities to provide adequate protection and redress in cases of domestic violence is an infringement of the right to equal treatment before the law and the general principle of non-discrimination in the enjoyment of fundamental rights.

Although CEDAW does not directly address the issue of domestic violence, the Declaration on the Elimination of Violence Against Women<sup>10</sup> and the General Recommendations of the CEDAW Committee<sup>11</sup> draw clear links between violence and state responsibility under Articles 1, 2, 5, 11, 12 and 16 of CEDAW.<sup>12</sup> Notably, Article 2 of the Declaration defines violence to include 'physical, sexual or psychological violence' perpetrated within the family, in the general community or by the state. General Recommendation 19 of the CEDAW Committee and the Declaration expand this to include 'threats of such acts, coercion and other deprivations of liberty' whether occurring in public or private life.<sup>13</sup>

As the public/private dichotomy dissolves at the national and international level, it is increasingly accepted that states are responsible for the human rights abuses of private non-state actors, wherever they occur.<sup>14</sup> Paragraph 9 of General Recommendation 19 of the CEDAW Committee states that '[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.'<sup>15</sup>

Article 4 of the Declaration requires states to employ all appropriate legal and administrative means to prevent, investigate and prosecute violence against women. It also requires the development of national plans of action, appropriate victim services, training for law enforcement officers and public officials, specific budget allocations, education to modify cultural and social patterns of behaviour that tolerate violence and research on the incidences of violence.

As for violence against male or female children, Article 19(1) of CROC provides that:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 19(2) requires that 'protective measures' include social programs providing preventative services, child protection services, referrals, investigatory organs, treatment and follow-up services (see also Article 39) and programs that allow for judicial involvement, where appropriate.

## From treaty to reality: cultural relativism and implementation in developing countries

### *The question of cultural difference*

So how then do we put these human rights into practice? First, we need to understand the context into which they are placed. The theory of cultural relativism argues that every culture will see human rights from a different perspective and that there are few, if any, absolutes. Relativists often

argue 'that the introduction of what are often seen as Western concepts, will adversely affect local cultures, and some claim, introduces another form of colonialism'.<sup>16</sup> Universalists argue that there are certain rights that are the basis of a fundamental human culture that should be enforced in all places.

The approach I attempted to take in Samoa came somewhere in between. Rather than seeking to uncover absolutes, I sought to understand what are the most commonly held values in Samoan society — basically, *aiga* (family) and *fa'a samoa* (the Samoan way) as well as the concomitant sense of community. In a communal society, where the group is the fundamental unit, rather than the individual, seeking to implement individual human rights often does not make sense.

However, with culture we must always ask the question: who controls it and who benefits from this conception of social relations? It may be that a particular behaviour held out as 'cultural' may simply be an expression of power. Samoan culture also holds that women are often the decision makers and controllers of household resources and deserve respect as individual members of the community. Very simply put, it was a matter of drawing out this pre-existing counter-argument to the subordinate position of women and highlighting the impact of violence on the community.

Non-Western cultures and human rights do not automatically cancel each other out. Instead, the process is a complex negotiation of cultural practice, perception and change (just as there are factors in contemporary Western culture that some argue rail against the appropriateness of certain human rights norms). To some extent, CROC particularly recognises this in Article 5 (also in Article 14(2)) when it states:

States Parties shall respect the responsibilities, rights and duties 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 recognized in the present Convention.

So the question becomes not 'how do we neutralise and get around culture' but how do we frame human rights norms within existing cultural norms and introduce them in familiar and appropriate fora. Clearly, this is an immensely complicated process and one that requires long-term discussion of human rights principles amongst all levels of civil society, in conjunction with legal, political and attitudinal change.

### ***Human rights in developing countries***

In many Pacific island nations, the challenge of implementing human rights is even greater in that many are developing countries. Evidently, a developing country has fewer resources to deliver even basic human rights, to support governance reform and to fund human rights-based programs. Training opportunities often do not exist for citizens who are well placed to ensure human rights are respected from the perspective of the local culture (for example, police officers, government officials, magistrates and lawyers).

Developing countries must inevitably rely on funding organisations — often the United Nations, the European Union or the overseas aid programs of industrialised countries. Often assistance comes in the form of tied aid<sup>17</sup>

delivered by external consultants with cursory regard for long term effectiveness or the assistance is conferred with excessive or ineffective reporting requirements. Although aid programs are turning their focus to sustainable development and culturally appropriate, long-term change, the reality is that the priorities are still largely determined from afar or by what will maintain the interest of funders. Small non-governmental funders go some way to addressing these issues, but they are generally only able to fund small, stand-alone projects.

Many nations, both developing and developed, can also be accused of entering into human rights obligations as a political tool to bolster trade relations. In the case of developing countries, conditional aid can have them undertaking human rights obligations they have neither the ability, nor willingness, to uphold. Hence, a cycle is created as lack of development leads to the absence of human rights and the absence of human rights prevents substantive development.

### **A network of human rights implementation strategies**

Human rights implementation activities can be seen as a network of cumulative, concurrent and often chronological strategies. As human rights go to the core of complex social issues, a number of legal and non-legal strategies are required to effectively address the problems and effect a lasting solution. The choice of these strategies needs to be guided by the particular 'geography' of the situation at hand: the legal system, cultural factors, the position and status of people affected by the human rights issue, physical geography and material resources.

Implementation of human rights is both a process and an end. It is the goal of international human rights law but also a process for public education, governance and institutional strengthening, the integration of traditional law and custom and greater participation in democratic institutions. Implementation, in its broadest sense, is, and should be, carried out by all levels of civil society through non-governmental organisations, regional organisations and individuals, although the primary legal responsibility remains that of the state.

### ***Legislative change***

In countries that do not provide for automatic incorporation of human rights obligations on ratification, the primary implementation strategy is legislative change. In the case of domestic violence, the CEDAW Committee General Recommendation 19 suggests both criminal and civil penalties to overcome domestic violence.<sup>18</sup> In this regard, Article 15 of the Samoan Constitution empowers parliament to enact laws providing for substantive equality between women and men.

In reality, however, legislative implementation is less effective than it may appear. Although legislation 'on the books' is an important statement of public will, in Samoa law enforcement outside the capital city is limited. The combined effects of geography, police numbers and the power of the *fono* mean that often violence does not come to the attention of the police and that generally police will not interfere unless there is a complaint from the victim. The *pulenu'u* (village religious leader or pastor) may also protect women, by offering them a safe house or by intervening in domestic disputes.

Any legislative attempts (for example, to introduce 'intervention' type orders) would need to integrate with the existing village institutions to ensure that any law has the support of police, the *fono* and religious leaders and that the law takes into account limited law enforcement resources.

### ***The Constitution, judiciary and common law***

The Constitution of Samoa provides for fundamental human rights, including freedom from inhuman treatment and discriminatory legislation. The fundamental rights and the remedies in Article 4 of the Constitution apply to laws enacted by the legislature and institutions created under the Constitution. *Sefo v The Attorney-General* SC 12 July 2000<sup>19</sup> holds that the *fono* cannot act in breach of the fundamental rights set down in the Constitution.

Similar to many common law countries,<sup>20</sup> Samoan courts are adopting international human rights instruments as a means of interpreting national laws (for example, the use of the Hague Convention on the Civil Aspects of International Child Abduction of 1980 in interpreting the common law in *Wagner v Radke* (1997) Supreme Court of Samoa (Misc) 20701 and the use of CROC in criminal sentencing in *Police v Taivale* SC 29 September 2000 and *Police v Howard Masimasi* CA 7/99 27 August 1999, 'All Samoan Courts should have regard to this convention in cases within its scope').<sup>21</sup> Lawyers and non-government organisations can encourage the protection of human rights by the judiciary by arguing for their relevance in civil and criminal cases.

However, this would act as merely a 'defensive' strategy in the absence of effective domestic violence legislation. It can be used, for example, to potentially increase the sentence imposed for a particular offence. Human rights law in the domestic courts cannot act as an 'offensive' strategy — it cannot require police to fully investigate allegations of violence, to charge alleged offenders with the highest charge warranted on the facts and to provide adequate protection to victims before and after trial — and government lawyers need to be trained in human rights law to effectively argue for its application.

### ***Governance, institutional strengthening and participatory democracy***

Human rights also require a governance-based approach. Evidently, human rights cannot be guaranteed without the support of strong, representative democratic institutions as '[t]hese things are interdependent and mutually reinforcing'.<sup>22</sup>

The introduction of a Ministry of Women's Affairs (as is the case in Samoa) and children's or youth departments can effect change in access to policy formulation fora and to the distribution of resources. The intention is that such agencies raise the issues of women's and children's rights to redress the lack of women in legislatures. Women must also be provided with information about their voting rights, information about government and support to stand for elections. Effective public service regulation and Ombudsmen can ensure government representatives act in the best interests of the public. Further, with adequate funds, governments can establish effective and independent national human rights institutions to promote human rights.<sup>23</sup>

Further, law enforcement agencies need to be strengthened to ensure that extant laws are fully enforced. Police must be aware of the elements of criminal charges, must be willing and able to objectively and thoroughly gather evidence and

must be aware of the gender (and seniority) issues associated with prosecuting acts of domestic violence. Training, effective leadership, change in organisational values and encouraging more women to join police forces can begin this process.

Wider than this, governments also need to co-ordinate and consult with non-governmental organisations working in the field of human rights. Particularly in developing countries, governments (and non-governmental organisations) can benefit from sharing skills, capacity, research, statistics and resources<sup>24</sup> — as long as non-governmental organisations maintain their independence and critical capacity to comment openly on government policy.

### ***Traditional law and custom and fa'a samoa***

It is possible that traditional law and custom can be used as a means to promote women's and children's rights. Although it has been argued there are:

... fundamental differences between customary law and human rights. Customary law is indigenous, fragmentary (on a geographical basis), binding only on those who accept it as the law applicable to them. It is basically conservative and patriarchal. Human rights, on the other hand, are introduced concepts, purported to be universal, and founded on liberal, egalitarian principles. Customary law also emphasises status, duties, and community values, whereas human rights provisions emphasise individual rights and freedoms and equality and reflect internationally accepted value.<sup>25</sup> [footnotes omitted]

It can also be argued (as it has been in an earlier section of this article) that particular aspects of tradition or custom can be identified that reflect the issues human rights campaigners are attempting to address. For its very survival, any concept of culture requires respect for the individual (even if the concept of the individual is seen as less important than that of the broader community) and protection of life and health. Even if human rights are then formulated in terms of rights *and* concomitant duties to the community, if they still achieve the goal of protection of the fundamental rights of the individual, they should be acceptable in the human rights discourse.

Under the *Village Fono Act* (1990), the *fono* has power to punish for 'village misconduct', which is widely accepted to include acts of domestic violence. The system functions concurrently with the common law system and the judiciary. Traditional punishment is taken into account in criminal sentencing. Anecdotally, the *fono* often do not punish the offenders, they fail to prevent continuing abuse (hence allowing it to become more severe) or may choose to counsel the victim, rather than the perpetrator. They often prevent victims from reporting matters to the police. Further, a *fono* is not required to make written records of its proceedings.<sup>26</sup>

However, Article 3 of the Constitution provides that 'the State' includes 'all local and other authorities established under any law' and article 111(1) provides that 'the Law' includes 'any custom or usage that has acquired the force of law ... under the provisions of any Act or under a judgment of a court of competent jurisdiction'. Hence, it may be argued that, forming part of the State, *fono* are directly bound by Samoa's adherence to CEDAW and CROC. At very least, it has been held in *Sefo v The Attorney-General* SC 12 July 2000<sup>27</sup> that the *fono* cannot act (or fail to act) contrary to the fundamental rights set down in the Constitution. One would assume this would include the right to equality before the law and freedom from torture.

In Samoa, *fono* could be used as means to genuinely protect women — punishing offenders according to traditional law but also supporting victims to report matters to the police. However, this would require significant attitudinal change, greater understanding of the impact of violence and the meaningful participation of women.

### **Human rights education and training**

Human rights training programs for civil society, government officials, police and religious leaders are essential to effective human rights implementation.

In the case of women and children, directed local programs that take into account literacy and practical constraints empower attendees with knowledge of the law and different ways to see their place in society. Education programs also allow critical feedback on individual views about human rights and enable an assessment of the effectiveness of existing programs and campaigns.

### **Non-governmental organisation campaigns**

Non-governmental organisations have an increasingly powerful role in human rights at the national and international level. Non-governmental organisations can effectively use the media to undertake education and awareness programs. For example, at Mapusaga o Aiga, International Children's Day was marked with a national television campaign highlighting the provisions of CROC and their application to Samoa.

Non-governmental organisations have a critical role in building public goodwill and acceptance in relation to human rights issues. They are also critical in representing a particular issue, for example, child abuse, in a range of international and national fora as it arises.

### **Governmental and non-governmental support services**

Governments and non-governmental organisations can provide effective individual support, rehabilitation services and access to information (eg legal aid, police liaison assistance, referrals to other organisations and counselling). These services can ensure individual rights are guaranteed in substance and ensure that individual cases are attended to in the absence of broader, systemic, change. These services should extend to offender's rehabilitation and anger management programs and potentially extend to men's discussions groups, a proposed project in Samoa, where men can discuss rights and their impact on traditional male roles.

### **Treaty body reporting requirements, international benchmarking and regional institutions**

As discussed above, Samoa has undertaken reporting obligations to the CEDAW and the CROC Committees. As is the case with many signatory states, Samoa has not yet reported to either committee on its implementation of its obligations under CEDAW and CROC although it is currently carrying out consultations on a draft report. Although reporting can be a burden on developing countries with limited resources and expertise it can provide a valuable means for government and civil society consultation to review the progress made towards implementation. Although the treaty body committees have no coercive powers, representations before a committee and the submission of non-governmental 'shadow reports' can encourage wider discussion of the human rights performance of the signatory (which can partly explain the reluctance of some governments to submit to the scrutiny of the committees).

The declarations and platforms for action arising from the United Nations Fourth World Conference on Women (held in Beijing in 1995), the Twenty-third Special Session of the General Assembly, 5-9 June 2000 (Beijing +5) and regional fora such as the Pacific Women's Network Against Violence Against Women also provide opportunities for ideas-sharing, goal-setting and lobbying of governments on human rights issues. In the Pacific, this has resulted in the formulation of the Pacific Platform for Action,<sup>28</sup> which has proposed the creation of a Pacific Human Rights Charter and has established a monitoring mechanism to ensure states implement the Platform's provisions.

### **Strategies for the future**

Governments are legally bound to implement the human rights set down in the international instruments they have ratified. Even in the absence of coercive international remedies and abundant resources, these obligations cannot be ignored or deemed optional. The essential precursors to effective implementation are civil society participation, local control and broad normative assent with the local culture. Civil society must be made aware of international human rights and be in a position to discuss their application to the domestic context, particularly in an area of perhaps greater social complexity, such as domestic violence. Government structures must be well prepared to deliver human rights — both legally and institutionally. Non-governmental organisations must then be allowed the voice and have the courage and capabilities to promote human rights and to demand their protection.

In the Pacific, the discussion about human rights is just beginning. In the Pacific, as elsewhere, the critical questions (in both senses) are: who will drive the process and where will its limits lie? With matters of implementation, one must be pragmatic about the expected goals. Implementation strategies will interact with each other and the local 'geography' and, over the long term, can perhaps deliver a culture of human rights. Even if governments do not have the means or the will to implement human rights, a large range of non-governmental actors can take an effective role in human rights implementation. Human rights is a discourse that has not only just spoken, but continues to speak in many different places and contexts. Our challenge, in all parts of the Pacific, is to remain open to what we hear.

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7. GA res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), entered into force 2 September 1990.
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