

EGM/GPLHP/2009/EP.15

3 June 2009

ENGLISH only

United Nations

---



Women in Melanesia and East Timor regard the following behaviours or practices, in addition to domestic and sexual violence, as serious forms of violence against them:<sup>5</sup>

- arranged marriages,
- forced marriage as part of a dispute settlement,
- mistreatment of widows,
- sorcery accusations,
- violence against sex workers, and
- violence by women against women, particularly in disputes over men.

Violence against women (VAW), including harmful practices against them, is both a cause and consequence of gender inequality in the region.<sup>6</sup> It is a serious and endemic problem and cuts across all social and economic classes. For the most part, the laws are archaic and ineffective in securing justice for women. There are generally no laws specifically outlawing harmful practices against women, and many practices are indirectly sanctioned as being part of customary law. Customary law is recognized both in the Constitution and other legislation of virtually all PICTs. The constitutional recognition of customary law presents specific and taxing problems in challenging harmful practices against women, because the PICT Constitutions are generally regarded as supreme law and all other laws are subordinate to it.

Most laws and legal practices on VAW on are based on myths about women's sexuality and roles, and apart from Vanuatu, no PICT has specifically legislated against gender-based domestic violence. Comprehensive stand-alone legislative reforms combating all

ENGLISH only

resources for implementation, are required for full, or even substantial compliance, in all countries. Although poverty is not experienced in quite the same way in the PICTs, as it is in Asia, women are historically and systemically discriminated against in every sector: in the legal, civil, political, economic, social and cultural, spheres limiting their capacity for autonomy and control over their lives and those of their children.

## The tensions between customary law and practices and conventional law<sup>10</sup>

Many harmful practices against women are regarded as customary law practices and therefore not challengeable on this basis. Customary law is recognized in most PICT Constitutions. The language of recognition is generalized and non-specific, allowing for a wide variety of interpretations. With some exceptions the interpretations work against women's human rights.

The status of women in custom and customary law in the Pacific generally obstructs their ability to challenge harmful practices against them. Even where conventional laws provide some measure of gender equality, there are tensions between the two systems of law, which have a harmful impact on women's empowerment. Historically, even in those islands in which women previously enjoyed some degree of power under custom law, this is no longer accurate of most of the Pacific, and there has been significant change over time. Sometimes "new custom law" is invented to limit women's autonomy.

### Box 2. Chiefs pass 'new' custom law – a restrictive dress code for women, Vanuatu

Ni-Vanuatu women have had to contend with the invention of new so-called custom law. Arguing that "custom law" cannot be invented but is based on historical practice does not appear to deter traditional leaders. In 2005, the traditional *Malvatumauri* (House of Chiefs), supported by Church leaders, attempted to pass a new 'custom law', a dress code restricting the right of ni-Vanuatu women to wearing trousers, shorts, pants or jeans. Chief Morrison Dick Makau said, 'We've made it so that girls wearing trousers when they walk along the road will be fined. And the punishment is that they must kill one pig'.<sup>11</sup> The Vanuatu Women's Centre challenged the code with a media campaign saying it was unconstitutional and against their rights to equality. The dress code was withdrawn, but is still enforced intermittently and informally.<sup>12</sup> The *Malvatumauri* has no formal law making power but it has traditional authority to pass informal decrees and to interpret customary law and practices. Its edicts are generally respected and complied with.

*Source: Vanuatu Women's Centre, 2005*

There is also uncertainty about what constitutes "authentic" customary law and therefore traditional customary practices. Much of what is classified as customary practice, is often a hostile response to the growing assertiveness of women and their changing roles, as well as to rapid economic change.

*"I think it is important that it is clarified that what is cultural practice now is not traditional practice. It is an evolution from traditional practices and  
"I3f Tw7*

ENGLISH only

The discriminatory invoking of culture and custom is often used to justify the violent treatment of women. However, the “customs” and “traditions” that are invoked are often hazy manifestations of the original, which have been distorted to suit community or family convenience. For example, in PNG, some fathers have used the “tradition” of *brideprice* to justify trading their daughters for cash or goods from transient logging and mining workers. Yet the same family and community will often overlook other traditions and expectations associated with the *brideprice* custom. Some PNG communities which did not practice the *brideprice* tradition in the past have adopted the practice as a way of demanding cash for the marriage of a daughter.<sup>14</sup>

The tensions between customary law and mainstream constitutional protections guaranteeing equality continue to be a source of conflict in all Pacific Island communities. The few cases that end up in court tacitly acknowledge the contradiction between the traditional Pacific Islands and the ‘modern way of life’. Many of those conflicts manifest themselves in tensions between the rights of women to equality versus what is perceived by many to be their traditional and ‘proper’ status. This proper status includes the implicit acceptance of harmful practices. This ambivalence resonates throughout the Pacific and sometimes has political repercussions, reflecting the sensitivities that are involved and the caution about concepts such as human rights.<sup>15</sup> Customary law is enforced through either social sanctions, village courts that are specifically empowered to enforce customary law through mainstream legislation, or the conventional law courts.

The experience of women within the customary law system appears to be largely a harmful one in the contemporary context in most countries, particularly in the areas of violence against women, land rights and family law. Where the two systems of law have

ENGLISH only

*Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law.*<sup>16</sup>

ENGLISH only

embody these principles, and their subordinate status in custom, remains a source of much controversy in the region. In PNG for example, women in rural areas are still commonly tried, convicted and imprisoned for ‘sorcery’ (witchcraft) by the village courts.<sup>19</sup>

There is a significant gap in the information about enforcement of customary law, and in most of the Pacific, customary law is “enforced” either by social sanction or by the conventional courts which administer mainstream legislation. Many women have no option but to resort to the traditional patriarchal justice systems because the formal or conventional justice systems are not within their reach. They express dissatisfaction with these traditional systems, which largely determine disputes through compensation to male-kin groups, which women feel neither a



## **Brideprice**

One of the most widespread customary practices in the Melanesian region and East Timor, which put women at risk of violence is the *brideprice* practice. In much of Melanesia, the payment of *brideprice* by the husband's family to the wife's family is used to justify domestic violence, secure rights to custody over children and to some extent also, property. The sexual assault of a woman or loss of virginity will affect a woman's *brideprice*. This practice is somewhat similar to the *dower* or *mehr* practice in South Asia, and parts of Africa, but specifically involves the giving of gifts and money from the bridegroom's family to the bride's family. Throughout Melanesia and East Timor *brideprice* is





EGM/GPLHP/2009/EP.15

3 June 2009

ENGLISH only



ENGLISH only

social cohesion and the sustainability of good relations after conflict. Social cohesion is highly prized, even if it covers up simmering tensions, and is usually given greater value than individual rights or women's rights.

In Vanuatu the new law derogated from its promise by stating that a person who has paid traditional compensation would be entitled to have this taken into account when the court was making a decision about the length of punishment or amount of the fine.

*10. (5) If a person is convicted of an offence against this section, a court may, in determining the penalty to be imposed on the person, take into account any compensation or reparation made or due by the person under custom.*

*(6) If under custom such compensation or reparation has not been determined and a court is satisfied that a determination is likely to be made without undue delay, the court may postpone sentencing pending the determination.*

Thus, although *brideprice* is not a defence to prosecution and guilt, it is relevant to the punishment. The Samoan proposed new law, the Family Safety Bill 2009, which covers only Protection Orders, makes no attempt to create a specific offence and actually legitimises the use of customary processes to deal with domestic violence by allowing village authorities to resolve certain cases of domestic violence in accordance with custom.<sup>42</sup>

Other acts of forgiveness and compensation for harm done women which indirectly legitimise VAW, occurs in relation to violence against women within the context of armed conflict and emergencies. After periods of conflict the maintenance of peace between groups and their (male) leaders remains a high priority and subordinate to women's rights. The interests of women are not seen as separate from those of the group, so injuries against a woman or girl are dealt with by compensating the males who had rights to her (father, brother, husband). This has happened in East Timor during the Indonesian occupation; in Solomon Islands after the ethnic conflicts in 1998 and 2000; and in the highlands of PNG after tribal fighting. Women have expressed unhappiness about family members benefiting from their injuries and feel it undermines their future safety.<sup>43</sup>

*If a suspect is doing violence and he can afford to pay compensation for that, then by accepting the compensation, the violence is allowed to continue (village*

ENGLISH only

rights defender who went to negotiate the release of the girls with a team of community leaders refused to take part in so called "peace negotiations" designed to resolve the matter by way of a compensation payment between the fighting tribes. Although she refused to allow the rape of the young girls to be viewed merely as a "*payback*" tool used by one tribe against the other to avenge some perceived wrong, no charges were laid against any of the perpetrators. The girls were, however, returned to their families.<sup>44</sup>

There are no specific laws against *payback* rape nor against forgiveness ceremonies or compensation influencing prosecution except for Vanuatu which is confined to domestic violence situations only, and not to the particular situation of forgiveness or compensation for harm done women during periods of conflict. This is a serious lacunae and legislation is needed to outlaw customary practices which further harm women. The amendments need to be done in PICT constitutions and must clearly state that custom cannot be invoked to justify harmful practices nor to influence prosecution nor punishment. In fact there is argument that using customary harmful practices to justify behavior ought to increase not lessen punishment. However, this is not an argument about outlawing forgiveness ceremonies or traditional ceremonies altogether, which are necessary to heal the rift between families, groups and communities but to ensure that they are not used to escape legal responsibility, prosecution or punishment.

ENGLISH only

allow marriage for ages ranging from between 14 to 16 for females with parental consent, and 16 to 18 for males, including the FSM states of Kosrae, Chuuk and Pohnpei.<sup>49</sup> Niue allows marriage with parental consent for females who are 15 and males who are 18.<sup>50</sup> The state of Chuuk in FSM has minimal legislation in the area of marriage, therefore there is no technical legal prohibition on child marriage.<sup>51</sup> Apart from Kiribati, the minimum legal ages for marriage in all PICTs is in violation of international law.

Forced marriage is often associated with early marriage but women over the age of consent are also forced to marry in some parts of the Pacific. “Fixed” or arranged marriages are also common in Indo-Fijian communities. Research in 1994 indicated that close to 20 per cent of Indian Fijian girls were taken out of school in fifth form (around the ages of 15-16, two years short of graduating from high school) to marry, in mainly arranged marriages.<sup>52</sup> It is not clear whether this pattern remains and more research is needed. Young girls are betrothed to marry as young as age 15. As a response to perceived racism and ethno-nationalism in Fiji, young girls are married off to men who are overseas nationals, in the hope of migration and of securing a good life overseas. Indo-Fijian parents believe that their daughters will have a materially good life, without considering their daughters’ feelings or whether their lives may even be in danger.<sup>53</sup>

### *Custom and religious marriage*

Custom marriages are recognised in Palau’s Code,<sup>54</sup> in the FSM states of Chuuk and Pohnpei,<sup>55</sup> and in most parts of Melanesia. In Melanesia, where customary marriage is recognised, there is no legislative protection for young males or females marrying in custom. Given that the vast reach of the population in PNG is far away from the formal courts, this presents serious problems for protecting the rights of young females.<sup>56</sup>



ENGLISH only

In some parts of Melanesian customary law allows girls to be married at puberty – at around 12 or 13 years old. Customary law can be overruled if challenged as violating minimum marriage ages in formal legislation, although it rarely is. A difficulty faced in PNG and Solomon Islands in enforcing the legal minimum age for marriage is that only around 2% (PNG) and 15% (Solomon Islands) of births are registered so there is often no means of legally verifying the age of a child.<sup>58</sup> In Kiribati, many parents are not aware of the legal age of marriage and decisions are culturally, rather than legally, based. Generally, marriages take place after a girl reaches puberty.<sup>59</sup> These conflicts are a result of legal pluralism which allows customary law, including many harmful practices, to exist alongside the formal conventional legal system.

A harmful cultural practice existing as *kastom* on the island of Tanna in Vanuatu is for the family of a murderer to give a girl child to the victim's family (for purposes of marriage) as an apology. Often, culture

ENGLISH only

- Customary law cannot be invoked to justify early marriage and enforcement must address the customary system as well as the conventional system; and
- Requiring compulsory registration of custom marriages and allocating resources to ensure this.

There is a need to make the arrangers, aiders and abettors of early/forced marriage criminally liable, even if they are the parents. At the moment the only remedies are civil and allow for the annulment of marriages when a marriage is entered into through force, duress or undue influence. However, these provisions are rarely used to escape a forced

ENGLISH only

The accused women are usually economically dependant older women who are seen as a financial burden on their tribes, usually with no extended family to defend them. Perpetrators are usually young men whose actions are supported by other villagers and tribesmen . Those accused of witchcraft face inhumane treatment such as beating with barbed wire, broken bones, burning with red hot metal, rape, hanging over fire, cutting of body parts, amputation of limbs and pulling victims behind moving vehicles. Of the murders reported to police, victims have been buried alive, beheaded, choked to death, thrown over a cliff or into rivers or caves, starved, axed, electrocuted, suffocated with smoke, forced to drink petrol, stoned or shot.<sup>66</sup>

A few PICTs still have “withcraft” laws. For example Niue’s law is couched in the following terms:

*Witchcraft - Everyone is liable to imprisonment for a term not exceeding 6 months who pretends to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertakes to tell fortunes.*<sup>67</sup>

Vanuatu, like most other countries in the Pacific, prohibits the practice of sorcery in its *Penal Code*. Section 151 provides that ‘No person shall practise witchcraft or sorcery with intent to cause harm or detriment to any other person’. The penalty is imprisonment for 2 years.<sup>68</sup>

Section 7 of the PNG Sorcery Act 1971 criminalises acts of “forbidden” sorcery and imposes a penalty of 5 years maximum imprisonment. Forbidden sorcery is distinguished from “innocent sorcery” in the Act, as being legal (associated with healing people, fertility rites and so on). The Preamble to the Act states that “ Some kinds of sorcery are practised not for evil purposes but for innocent ones and it may not be necessary for the law to interfere with them, and so it is necessary for the law to distinguish between evil sorcery and innocent sorcery”.

Although seemingly gender neutral, the laws are selectively enforced against women, especially older women in PNG. It is not clear why this is so, but there is some anecdotal evidence that HIV is often blamed on witchcraft, and that women gain power as they grow older in Melanesian society, and this is a means of “keeping them in their place”. Rarely are cases brought before the national mainstream courts but when they do, courts have attempted to do justice.

**Box 6. Witchcraft and sorcery – *The State v Aigal & Kauna*<sup>69</sup>, PNG**

A, the defendant, was suspected of practicing witchcraft ending up in the alleged execution of a woman

<sup>66</sup> Amnesty International, 2009.

<sup>67</sup> Niue Act 1966.

<sup>68</sup> Forsyth, 2006.

<sup>69</sup> (1990) PNGLR 318.

ENGLISH only

and the alleged detention and torture of seven others. A won her appeal against sentence on the basis that the case was investigated long after it occurred and the possibility of A being the community scapegoat. The Court said that the secret killing of women suspected of witchcraft as a practice within the Simbu province was considered. There is a belief that witches were a public menace, causing death and disease, from whom society was justly entitled to protection. It was a pattern of socially-approved customary terror exercised against elderly women, to keep them in their place. The power of older women, as against men, was limited by the threat of an allegation of witchcraft which usually resulted in their death. The terror was institutionalised, there was some evidence that the Village Courts were involved, and it was kept secret from the authorities. A more recent understanding of the social role of witch-hunts emphasises their context in sexual politics. The political role of the witch-hunt is a form of terror that holds women in their place.

ENGLISH only

Witchcraft Suppression Bill of 2007, introduced (but not yet passed) in South Africa. The Act will outlaw the making of accusations of witchcraft, and the harming of individuals suspected of practicing sorcery.<sup>72</sup> In addition any legislation attempting to amend sorcery/witchcraft laws must contain provisions which outlaw customary law and practices as a defence to prosecution.

## **Other Forms of Harmful Practices**

### *Maltreatment of Widows*

Tonga is one of 3 countries in the PICTs that has not yet ratified the Convention on the Elimination of All Forms of Discrimination against Women. The legal status of women, including access to and ownership of land and natural resources, remains restricted to decisions made by traditional customs and practices. For example, whereas widowers are permitted to remarry and have sexual intercourse, this would be considered adultery for widows and may put them at risk of losing any land or property rights.

#### **Box 7. The Maltreatment of Widows**

##### **Tonga**

***Payback Rape***

*Payback* rape, punishment rape or “revenge rape” still occurs in several Pacific countries. In such cases a group of men or youths rape a girl to punish her father or brothers.<sup>77</sup> In



**REFERENCES**

Amnesty International, <http://www.amnesty.org/en/for-media/press-releases/papua-new-guinea-authorities-must-act-now-prevent-more-witch-hunts-20090>, acc 21/5, 2009

Amnesty International Australia, 2009, [www.amnesty.org](http://www.amnesty.org) acc 21/5, 2009

Amnesty International USA, 2009, [www.amnesty.org](http://www.amnesty.org) acc 21/5, 2009

AusAid, (Australian Agency for International Development), 2008, “Violence Against Women in Melanesia and East Timor: building on global and regional promising approaches.”

Christian Care Centre of the Church of Melanesia and the Regional Rights Resource Team (RRRT), 2004, “Commercial Sexual Exploitation of Children and Child Sexual Abuse in the the Solomon Islands”, Unpublished report commissioned by UNICEF Pacific, Suva.

Dinnen, S., and Thompson, E., 2004, “Gender and Small Arms Violence in Papua New Guinea in *State, Society and Governance in Melanesia*, Discussion Paper 2004/8, Australia National University.

Fiji Ministry of Women & Culture. 1994. Booklet. *A Statistical Gender Profile*. Also available at [<http://www.adb.org/Gender/country/fiji002.asp>].

Forsyth, Miranda, 2006. “Sorcery and the Criminal Law in Vanuatu”. [2006] *Lawasia Journal*.

Jalal, P. Imrana. 1998. *Law for Pacific Women: a legal rights handbook*. Suva: Fiji Women’s Rights Movement.

Jalal, P. Imrana. 2008. “Good Practices in Legislation on Violence Against Women: A Pacific Islands Regional Perspective.” Paper presented at Expert Group Meeting on *Good Practices In Legislation On Violence Against Women*, United Nations Division for the Advancement of Women in collaboration with United Nations Office on Drugs and Crime (UNODC).United Nations Office. Vienna, 26-30 May 2008.

Jalal, P. I., 2009 Forthcoming publication, “Gender Equity in Justice System of the Pacific Island Countries and Territories: Implications for Human Development,” Technical background paper for the Asia-Pacific Human Development Report on Gender ‘Addressing Unequal Power and Voice’ , P Imrana Jalal, Fiji Islands 29 March 2009

Jalal, P. Imrana & Madraiwiwi, Joni (eds). 2005, 2008. *Pacific Human Rights Law Digest, Volumes 1 and 2*. Suva, Fiji: Pacific Regional Rights Resource Team (RRRT).



