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Good Practices in Legislation on Violence against Women: A Pacific Islands Regional Perspective

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Compared to many other regions of the world, there has been a paucity of legislative reform in the area of violence against women (VAW) in the Pacific Island region.[1] The absence of comprehensive, all encompassing VAW legislation is regrettable, but characteristic of the legal milieu in the Pacific. For the most part reforms have been piecemeal changes to existing criminal and civil legislation, or common law precedents and legal practices, and have provided little but band-aid therapy.

Positive legal changes in the Pacific have arisen by way of litigation with new legal precedents being established in the courts, as a result of the advocacy of feminist and human rights lawyers, rather than through legislative change.[2] Although this is far from ideal, as precedents can be reversed by superior courts, it is legal activism, and not legislative change, which has borne the greatest success in improving the legal protections that woman and girls have.

In 2003 with the introduction of the *Criminal Code (Sexual Offences and Crimes against Children) Act 2002* Papua New Guinea (PNG) changed its sexual assault regime attempting to remove legal discrimination against women in sexual
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For the purposes of this meeting, commentary is confined to most of the fully independent Pacific countries (PICs), [4] which have inherited a largely British Westminster system of governance and the British common law system. Some Pacific Island countries are still, wholly or partially, "colonized", or under pacts of "free association" or other arrangements, by either France or the US; or under the protection, or partial jurisdiction, of New Zealand. In those semi-autonomous countries, some of the laws of the metropolitan power prevail. In the French occupied territories, the laws of the metropolitan power wholly prevail. These legal nuances add a further layer of complexity to law reform plans. In this paper, therefore, reference will be made mainly to those PICs which are fully autonomous in passing legislation; and where there is no extra-territorial jurisdiction of the metropolitan power over them.

Women's status in PIC society, and in the justice system, is no different from the rest of Asia or Africa.[5] In general, how women are treated in the justice system reflects their overall status. If women's status is comparatively low in society then this will be reflected in the justice system, with notable, but rare exceptions. In Melanesia, the customary law system, rather than the formal law system, has the more significant impact on women, particularly rural women. In PNG for example, women in rural areas are commonly tried and punished for "sorcery" (witchcraft) by the village courts. [6] Changes have been rare, and transformative change even rarer. Only mixed successes can be reported.

This paper acknowledges the multifold manifestations of violence against women as reflected in various UN documents but is confined to commentary on sexual assault (rape), domestic violence and the extent to which family laws provide an adequate response to domestic violence (DV) in the home, in the Pacific Island region. Despite the fact that in comparison to some other regions there has been very little legislative change, this paper will attempt to identify some strengths, weaknesses and commonalities of VAW legislation, highlighting some effective approaches and noting some good practices.

All PIC states that are parties to Convention on the *Elimination of All Forms of Discrimination Against Women* (CEDAW) are required by Article 2(f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women. So far, most countries in our region are in breach of Article 2(f). As well, states that have signed the *Convention on the Rights of the Child,* have an obligation to protect children against abuse of all kinds.

Most attempts to change sexual assault laws through comprehensive dedicated legislation have so far failed e.g. rape law draft legislation[7] in Fiji has been thwarted for a variety of reasons, including disputes about the substance of the draft law; that it favoured the victim over rights of due process awarded to the accused, and the perception that the draft was too "western", feminist, radical and clashed with so-called Pacific culture. Added to this, Fiji has experienced 3 military coup de'tats in 20 odd years, thus interrupting the rule of law and the space for legal reform. Other PICs show similar recalcitrance in passing new laws.

Common Features of Sexual Assault Law

Most rape laws in the PICs are based on myths about women's sexuality, no different to the laws that prevailed in most common law countries, prior to more progressive reforms being introduced. These myths informed legislation and the interpretation of it as well as the legal practices and rules. The PICs inherited the worst element of rape law from the British, most of which remains.

Some salient features of sexual assault laws in most PICs include – defining rape as limited to penile / vagina rape and not including assault with other objects; rape with other objects become "indecent assaults" subject to lesser penalties; not allowing prosecutions for marital rape; defining consent from the view of the offender rather than the survivor; and allowing the survivor's past consensual sexual experience to be admitted as evidence against her credibility. The admission of the rape survivor's past sexual history can affect her credibility to the extent that she is not believed, the prosecution does not succeed and the rapist is acquitted. If he is sentenced, her past sexual history may reduce the severity of the sentence. Common to most PICs is also the common law practice

[7] The campaign for new sexual assault laws by the Fiji Women's Rights Movement,based on a draft prepared by Ratna Kapur, has been shelved.

of physical "proof of resistance" which, due to power imbalances further victimizes a victim.

Most PICs still allow the highly discriminatory corroboration warning, a long-standing practice under common law, whereby the Court gave a warning to itself or a jury, that it was dangerous to convict on the independent uncorroborated evidence of the victim. Corroboration was a requirement in sexual offence cases except when the Court was satisfied a complainant was speaking the truth. The corroboration warning, based on a belief that women lied about rape habitually, has been considered to be the worst of all practices.

If sexual assault cases end up in the village or *kustom* or informal courts by default the cases rarely end up in the formal courts with formal criminal charges being laid. This is highly problematic as the Constitutions of most PICs recognize custom laws (which do not generally favour women) and there are uncomfortable tensions between the two systems of law. Specific legislation is required to state that where there are conflicts in the law, formal constitutional equality ought to prevail.

Added to this are customary reconciliation practices of ceremonies of forgiveness in most PICs, (for example *I-bulubulu* (Fiji) or *ifoga* (Samoa)) generally involving the rapists' and survivor's families, which the police and courts use to justify the reduction of sentencing of those convicted, or in some cases not allowing charges to be filed at all. It may be on interest to note that these "forgiveness ceremonies" have dramatically changed overtime and now often take place without the victim's actual permission or participation.

Sexual Assault Law - Changes and Effectiveness of new legislation
Most features remain largely untouched by legislation save for a few changes. PNG has broadened the definition of assault to include rape by other objects through legislative change, [8] but the narrow definition remains in other PICs. Cook Is, Tonga and Samoa have legislation stating that marital rape is only illegal if the parties are separated, divorced or where "consent has been withdrawn through the process of law".[9]

In 2003 with the introduction of the

introduced extending penetration to all orifices by the penis or any other object. The offences are graded according to the gravity of the harm and integrate the many ways in which women are sexually violated. Harsher sentences were introduced, the marital immunity that had previously prevented husbands from being prosecuted for a charge of rape was removed, and the common law practice of requiring corroboration as evidence was abolished. [10] The new legislation did not remove the admission of the prior sexual history of a victim in order to establish that she consented to the sexual act in question, based on the myth that a victim's previous sexual relationship with either the accused or others makes it more likely she consented. PNG, however, has not legislated against the requirement for proof of resistance by the victim. There has been no formal evaluation of the effectiveness of the new law but anecdotal evidence suggests mixed success.

The discriminatory cautionary corroboration warning is still practiced in Vanuatu, Solomon Islands and other PICs. It has been removed by legislation in PNG, Kiribati and Cook Islands[11]; and by common law in Tonga[12] and Fiji[13]. In *Balelala v State of Fiji* the Court of Appeal finally declared the corroboration warning a violation of women's rights and unconstitutional. In cases where there has been change, the ratification of CEDAW provided a sound basis for

Some salient features of domestic violence (DV) law include[16] - prevailing attitudes of state agencies are fundamental in determining the extent to which batterers are prosecuted even where a crime does exist under existing laws; and domestic assault is not recognised as a specific crime except in the Cook Islands, and hence general assault laws are used. Police and court officials are unsympathetic to women whose husbands beat them, and usually do not encourage legal solutions; the victim is responsible for laying and pursuing charges; there is a consistent focus on reconciliation, whatever the circumstances; courts and police accept customary practices of reconciliation such as *i-bulubulu* in lieu of punishment of the offender or to reduce the punishment; and non-molestation orders or protective injunctions are difficult to enforce.

Non-molestation, protective orders or injunctions are generally available through the common law as a rule of practice in most PICs. Thus, there is generally no legislative basis for providing such protection. The courts exercise their discretionary power to make the order sparingly and inconsistently. Only married women, and not *de facto* wives or girlfriends, are entitled to seek the order. When the orders are granted and disobeyed, the police habitually do not enforce the orders through imprisonment, partially because the orders are vague, and also because there is no legislation setting out clear guidelines. Imprisonment requires lengthy and complex contempt of court proceedings, and domestic violence is not high on the police list of priorities. The perpetrator is usually summoned to the police station or court, "reprimanded" and allowed to leave.

A considerable challenge is that in most PICs, courts rarely, if ever, give custodial (prison) sentences that reflect the seriousness of the crime; despite the fact that DV is a recidivist crime. Courts tend

Only the Cook Islands, perhaps reflecting New Zealand influence, has a specific domestic violence offence[17]. However this has had little effect on making the legislation more effective, as records show no greater length of sentencing of offenders nor better treatment of the survivor.

PNG has removed the marital immunity in their legislation that had previously prevented husbands from being prosecuted for a charge of rape.

The family law in most PICs is archaic and based on outdated colonial legislation. The legislation, common law and legal practices are discriminatory against women and they legitimate violence against women . Rigid concepts of women's roles within the family are the basis for how these laws have been devised. Divorce in most cases cannot be obtained without proving fault (including proof of habitual or persistent cruelty for a specified period over 2-3 years), and women's adultery is often held against them when they seek custody or contact with their children, maintenance and matrimonial property. In much of Melanesia, the payment of *bride price* by the husband's family to the wife's family is used to justify domestic violence, and to secure rights to custody. There are no equal rights to property after divorce through legislation, and distribution is generally based on the principle of financial contribution, thus disentitling the vast majority of Pacific Island women and greatly increasing their own and dependant children's likelihood of living in poverty.

In some instances women's NGO have regarded it as more strategic to lobby for legislative protection against DV in family law rather than criminal law. This was a deliberate action taken by the architects of the *Fiji Family Law Act (FFLA*).[20] The underlying logic is that because the burden of proof in establishing criminal guilt is much more difficult to establish i.e. beyond reasonable doubt, providing a legislative basis for it in the new family legislation, with its lesser " balance of probabilities" burden of proof, courts are more likely to grant the protective injunction.

Family Law on VAW – Changes and Effectiveness of new legislation

The most comprehensive reform legislation affecting women has been in the family law field in Fiji. . The resulting law, the *Fiji Family Law Act 2003 (FFLA*), which is based on a no-fault principle of divorce, utilises a non-adversarial counselling system and a specialist Family Division of the Court which prioritises children's needs and parental support. It removes all forms of formal legal discrimination against women and grants them rights to enforceable custody and financial support for them and their children. It legitimates and requires recognition and implementation of the major human rights United Nation conventions affecting family law, especially CEDAW and the CRC.[21] Such human rights conventions are highly contentious in a country in which

[20] The writer of this paper, P I Jalal, was Commissioner for Family Law, and prepared the Fiji Law Reform Commission report, *The Fiji Family Law Report 1999: Making a Difference to Families in Fiji, 2000*. This report provided the basis for the new law.
[21] Section 26 (e)

human rights are regarded as foreign impositions. From early results it appears that the new Act will substantially reduce

the unwieldy and inefficient old system of enforcement behind, and in the attitudes of police officers who are supposed to enforce the new legislation. Powers in the legislation are broad and sweeping, but the police and various court officials appear not to understand what is required of them under the new law, despite the clear and simple procedures. The problems are exacerbated in the Magistrates' courts outside Suva where there is no dedicated family law court. The new law has enjoyed moderate success in Suva where there is a full time dedicated Family Court, with 4 dedicated family court magistrates, and effective NGOs which closely monitor the implementation of the new law.[25]

Magistrates and women's NGOs say that the biggest problems are a lack of training in the new legal regime, and the historic recalcitrance of police and enforcement officials to imprison men for what has always been regarded as culturally acceptable behaviour. However, for the tenacious DV survivor, and the women's NGOs that support them, the new provisions have been innovative and useful.

Initial research, based on a one year study of the new FFLA in operation[26], indicates that family law litigation had been reduced by about 90%. Most disputes, (especially those regarding children), at Suva Court, were settled by counselors and conciliators, on average, after 3 sessions with trained counsellors. These results have not been made public, as the officials need to do a more stringent follow-up survey.

The problems with the implementation of the FFLA stem from: [27]

- Most of the positive results are from Suva, the capital city with the largest population, and the only center with a dedicated family court
- There are insufficient resources to implement the Act properly outside Suva
- Only Suva has a good complement of court counselors to settle disputes without litigation
- The magistrates and lawyers are still caught up in the former "blaming" culture of the old legislation, especially the older lawyers .2(ewyers4)100(ghe magi TD.0)

children. These are the ones who complain constantly, with nostalgia, for the old law. The new lawyers, however, have embraced the new law and are doing well in it; and

- More training is needed for judicial officers who resist legislative changes that impact on prevailing social attitudes.

The evaluations are not yet publicly available as they form part of the overall longer term evaluation. It was also noted at an evaluation session about the new law with Judges and Magistrates:[28]

> "There were the usual sexist magistrates making comments and suggesting doom and gloom for men under the FLA during the training but in general the mood is one of optimism and relief at the Act's attempt at justice. Also, there is a greater intolerance to those who make anti-human rights comments which I find really positive. This is a noticeable trend compared to when I first started to attend the annual judicial training many years ago. Again and fortunately for me, I was the only non Judge / magistrate attending the meeting and was allowed absolute unfettered entry to everything, and allowed to intervene even in the sessions that had nothing to do with me or RRRT directly. It is a privilege that I never take for granted."

Solomon Islands has specific legislation regarding injunctions. The legislation is gender-neutral. The *Amendment 13/92 to The Affiliation, Separation and Maintenance (Amendment) Act, 1992*, was considered at the time to be a radical and progressive piece of legislation that created a lot of controversy. [29] Unfortunately the legislation applies only to persons married by law or by custom . It does not include single people and *de facto* spouses. [30]

Section 17 of the legislation replaces the old, ineffective, long-winded and 2830

police officer to make an application for a restraining order by telephone, in the