

United Nations  Nations Unies

**United Nations Division for the Advancement of Women
United Nations Economic Commission for Africa**

**Expert Group Meeting on good practices in legislation
to address harmful practices against women**

United Nations Conference Centre

Addis Ababa, Ethiopia

25 to 28 May 2009

**HARMFUL PRACTICES AGAINST WOMEN
IN PACIFIC ISLAND COUNTRIES:
CUSTOMARY AND CONVENTIONAL LAWS**

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** The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.*

Introduction

There is a want of good practices in legislation in the Pacific Island Countries and Territories (PICTs) to combat harmful practices against women. Instead, harmful practices are prosecuted or dealt with under general non-specific criminal laws, outdated and ineffective laws, or laws that are not effectively implemented due to patriarchal attitudes or a lack of resources. Customary law, largely unwritten, plays a big part in sanctioning harmful practices against women. This paper does not address laws on sexual assault, domestic violence, or sexual harassment which have been addressed previously,¹ but attempts to focus on specific harmful practices within the ambit of violence against women and the customary laws and conventional laws that directly or indirectly affect such practices. Due to the significant gaps in legislation the focus will be on the customary law practices themselves and the need for legislation, rather than good practices in legislation.

Harmful practices against women are some of the ways in which violence is used to enforce sexual norms and gender roles on women by the State and non-State actors, including the family and the community.² The more well-known forms of harmful practices such as female genital mutilation (FGM), honour killings and the like do not occur in the PICTs. However other forms of harmful practices, both traditional and contemporary (modified versions of traditional practices), do occur with impunity, in various parts of the PICTs, including the deliberate burning or beheading of women perceived to be witches in parts of Melanesia.

Harmful practices in the Pacific Islands include *brideprice* practices (Melanesia and East Timor), traditional forgiveness practices, the burning of mainly female witches for alleged sorcery (Melanesia) and early or arranged or forced marriages. Some mention will also be made of *payback* or punishment rape (Melanesia), forced marriage to one's rapist, forced marriages as part of dispute settlements (Melanesia), polygamy (Melanesia), imprisonment for adultery (PNG) and the maltreatment of widows (Melanesia and Tonga). Dry sexual intercourse (Kiribati), virginity tests and burning or scarring of brides also highlight that prevailing forms of violence are often either overtly sexual in nature or are related to women's sexuality and have detrimental mental, physical and reproductive health effects on women.³

The Pacific Island region is rich in cultural heritage and diversity, and there are marked differences between the subregions of Melanesia, Polynesia and Micronesia. However, throughout the region, Pacific women cite customary practices and attitudes as putting women at risk of violence and making it difficult or even impossible for them to protect themselves against it.⁴

¹ Jalal, 2008.

² UNESCAP, 2009, 97-98

³ UNESCAP, 2009, 98.

⁴ AusAid, 2008., 17.

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:⁵

- 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.⁶ 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 forms of violence against women, including harmful practices, both traditional and contemporary, are needed in all countries.

Women's overall status in Pacific Islands Countries and Territories (PICTs) bears much similarity to many parts of Asia.⁷ For the most part, the vast majority of PICTs have failed to meet their obligations under Article 2 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the key equality provision, which requires State Parties to eliminate discrimination against women in its various forms. Substantial amendments to law, policy and practice, and the allocation of

⁵ AusAid, 2008.

⁶ WHO, 2005, 14.

⁷ Note from author of paper: In 1998, I published my 700-page book documenting the treatment of Pacific Island women in the justice system, P I Jalal, *Law for Pacific Women: a legal rights handbook*, published by the Fiji Women's Rights Movement, 1998. I have watched closely to monitor changes to their status in the law over the past 10 years. Note: The authour is a human rights lawyer, former Human Rights Commissioner of the Fiji Human Rights Commission, founding member of the feminist NGO, the Fiji Women's Rights Movement, Commissioner of the Geneva based, International Commission of Jurists, and currently, Gender & Human Rights Advisor at the Fiji-based Pacific Regional Rights Resource Team (RRRT/SPC).

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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.

Table 1. Pacific Island Countries showing broad sub-regions		
MELANESIA & EAST TIMOR	POLYNESIA	MICRONESIA
Fiji (Fiji is on the border of Melanesia/Polynesia. The people of the Lau Islands in Eastern Fiji are ethnically more similar to Polynesians, than Melanesians)	Cook Islands*	Federated States of Micronesia (FSM)
Papua New Guinea (PNG)	Niue*	Kiribati
Solomon Islands	Samoa	Republic of Marshall Islands (RMI)
Vanuatu	Tokelau*	Nauru
East Timor	Tonga	Palau
	Tuvalu	
* All Pacific Island Countries and territories shown are independent countries. However, Niue and the Cook Islands are self governing dependant territories while Tokelau is a non-self governing dependent territory.		

Box 1. The Pacific Islands – Population sizes, socio-cultural similarities and differences in gender equality in the sub-regions

The population of the Pacific Islands was estimated to reach 9.5 million by the end of 2008, and grows by 1.9 per cent annually, a yearly growth of 180,000 people. The total population of SPC's 22 Pacific Island member countries and territories is estimated to reach 9,498,900 people by mid-2008. The population of the Melanesian countries will be 8,310,300, the region of Polynesia will have 655,300 people, and Micronesia will include an estimated 533,300 people. The largest individual country population is that of Papua New Guinea, which has an estimated 6,473,900 people, followed by the Fiji Islands with approximately 839,300 people. The smallest are Tokelau, with 1,200 people, and Niue, with 1,500 people (apart from Pitcairn Island, which has 66 people). Much of the population of the Pacific region live in the four largest countries: Papua New Guinea (PNG), Solomon Islands, Fiji and Vanuatu.⁸

Pacific Islanders are generally grouped by their cultural, ethnic and linguistic similarities: Melanesian, Polynesian and Micronesian. Although the three groups differ they have many socio-cultural similarities. A feature they share in common is that all three groups have traditionally been organised along social, rather than economic lines. However, although largely patriarchal, all place varying degrees of emphasis on factors such as gender and patriarchal authority within society. Therefore, the degree of gender equality differs between the sub-regions as well as within countries and social groupings. In Polynesia and Micronesia, social status has been traditionally based on inherited chiefly status, whereas in Melanesian societies they were traditionally ranked along strict patriarchal gender lines. Thus, while some Polynesian societies have traditionally featured both women and men in high-ranking positions of authority, in Melanesian societies (PNG, Solomon Islands, Vanuatu and parts of Fiji) men are almost always in a higher ranking position than women. Although there is much variation, and Pacific culture is rapidly changing, there is generally more overall gender inequality and gender injustice in Melanesian than in Polynesian and Micronesian societies.⁹

⁸ SPC 2004.

⁹ UNICEF Pacific 2007, 9.

The tensions between customary law and practices and conventional law¹⁰

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'.¹¹ 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.¹² 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 unfortunately often to the detriment of women and girls. Many new cultural practices have been much influenced by western (mis)interpretation of culture and by the huge impact of commercialization of culture by cash input."*¹³

¹⁰ Jalal, 2009. This section of the paper is largely extracted from a forthcoming publication, see References.

¹¹ Makau, Chief Morrison Dick 2005.

¹² Vanuatu Women's Centre as told to the writer, Vila, 2005

¹³ UNESCAP, 2009 95. Dame Carol Kidu, noted in an e-mail correspondence.

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.¹⁴

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.¹⁵ 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 been pitted against each other in the conventional court system administering codified legislation, the national courts have attempted to do justice in some instances with varying results.

There is a significant body of largely unwritten and un-codified custom law enforced by informal, village, *kustom* or magistrate’s courts. In some cases, custom law is also codified and legislated, and mainstream courts are charged with the responsibility of enforcing such law. In most cases however, custom law is broadly recognised in the constitutions, and the courts at all levels are charged with the responsibility of having to determine its impact on other law.

The Constitution of Palau at section 2 for instance recognises customary law in the following terms:

¹⁴ Ali, 2006, 7-13.

¹⁵ Jalal and Madraiwiwi 2008. See in particular PNG cases referred to pp 13-14 in the Editorial Review.

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*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.*¹⁶

The language suggests that both the constitution and custom have equal status even though the constitution is supposed to be the supreme law. In such cases courts have to look at both systems of law, including an ambiguous provision such as the one above, and decide which takes precedence in each case if they cannot be harmonised. In some cases the Courts have given precedence to customary law and in other cases to constitutional gender equality.

Some PICTs have ‘traditional’ courts that exercise minor jurisdiction over village, family and personal matters. They are generally presided over by male chiefs or traditional elders who receive varying degrees of training, and even without formal jurisdiction, operate with significant social legitimacy. These parallel legal regimes scrutinize and control community norms and practices, which often means legitimising male power over women and sanctioning violence against them. When women depart from their traditional gender roles, they may be subjected to violent reprisal from their families or the community. The customary law may also expressly or implicitly authorize violence against women by classifying acts of violence as acceptable under “traditional” or “religious” practices. If women seek justice from the conventional or formal justice system outside of their community, it frequently does not have the power or political will to intervene in a matter which has been dealt with under traditional law.¹⁷

These courts often, unofficially and indirectly, adjudicate the rights of women and have a critical impact on how women experience the justice system. For instance, many civil and criminal matters, including domestic violence, are handled by village *fono* (councils) in Samoa, which vary considerably both in their decision making style and in the number of *matai* (chiefs) involved in the decisions. The Village Fono Act 1990 gives legal recognition to the decisions of the *fono* and provides for limited appeals to the Lands and Titles Court and to the Supreme Court. In 2000, the Supreme Court ruled that the Act may not be used to infringe upon villagers' freedom of religion, speech, assembly or association. More recent court decisions reinforced this principle. Like many other custom courts in Melanesia, the *fono* system in Samoa sits uncomfortably within the formal legal system because of its dual role in administering both *fa'a Samoa* (customs) and village matters under the Act.¹⁸

In Melanesia, the customary law system, rather than the conventional law system, has the more significant impact on women, particularly rural women and women from outlying islands. The tension between women's rights to equality in those constitutions which

¹⁶ Section 2.

¹⁷ UNESCAP, 2009, 98.

¹⁸ See cases in Jalal and Madraiwiwi 2005.

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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.¹⁹

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 address their personal suffering nor guarantee protection. Women say that compensation makes the “family feel happy about the money, but not the girl.”²⁰

Virtually all PICT constitutions state that the Constitution is supreme law and also that the constitution recognises customary law. The anomaly is therefore stated in the same document, giving custom law some degree of constitutional status and adding to the uncertainty. Most PICT Constitutions may not specifically state that where customary and constitutional law conflict there should be precedence given to formal constitutional law, even though it is an edict of general constitutional interpretation. There is little constitutional guidance to state what ought to be given precedence by the courts and it is left to the judge or magistrate to decide. Specific legislation is required to state that where there are conflicts in the law, formal constitutional equality ought to prevail.

Those countries which do not modify all discriminatory custom laws and harmful practices against women have failed to meet their obligations under Article 5 of CEDAW. This requires State Parties to modify the social and cultural patterns of conduct of men and women which are based on the idea of the inferiority of either sex. One legal policy option for partially achieving this is to amend those PICT constitutions which recognise custom law so that they all contain a specific provision stating that where there is a conflict between women’s rights to equality and custom, the former should prevail. In this way harmful practices against women, can be specifically challenged. For example the draft proposed by Solomon Islands women’s NGOs to the proposed Solomon Island Draft Constitution would rule out any ambiguity.

“Where there is a conflict between customary laws or practices and women’s right to equality under this Constitution or any other law, women’s right to equality shall prevail.”²¹

¹⁹ *State v Aigal & Kauna*, (1990) PNGLR 318.

²⁰ AusAid, 2008, 32

²¹ Proposed new clause at s. 9 (4). The writer is part of the team that is working on the Draft Bill of Rights in the proposed Constitution.

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 cited in all countries, except Fiji, as the biggest factor (along with economic dependence) in perpetuating violence by men against their wives as it gives women the status of "property". This together with a lack of economic independence, and dependence on a male breadwinner is a major obstacle to escaping violence.²²

According to those who defend the customary practice, historically, *brideprice* was based on a fair exchange of gifts between families and clans. For example, the *AreAre* clan in Vanuatu used the concept of *brideprice* to describe the release and exchange of a girl from one authority, family, clan or community to another authority, family, clan or community. It did not engage in the selling or buying of girls but involved the exchange of gifts between the two groups of people and was an equal distribution of gifts and recognition of the girls' value rather than as victims of selling and buying.²³ It was traditionally paid so that an alliance between the bride-giving and bride-receiving groups would be forged and secured.²⁴

According to contemporary national customs (*kastom*), the *brideprice* is usually paid to the family of the bride in the form of cash, gifts, *kastom* money or other goods. In today's cash economy, the *brideprice* tradition has become distorted, with the bride becoming more of a commodity.²⁵ It has become commercialised, in that a girl's body is used as a business or a commodity having a price tag of some shell money and some modern dollars.²⁶ In Vanuatu, in an effort to control the amount of money spent on *brideprice*, the Council of Chiefs (the *Malvatumauri*) issued a policy in April 2005, placing an upper limit of 80,000 *vatu* (approximately USD 1,000) on *brideprice*. In conjunction with the Vanuatu National Council of Women, the Council of Chiefs also ruled that *brideprice* should be paid in traditional goods (pigs, mats and kava) rather than money.²⁷

²² AusAid, 2008.

²³ Pollard, 1998.

²⁴ UNESCAP, 2009.

²⁵ UNICEF, 2004, 103-4.

²⁶ Pollard, 1998.

²⁷ Ali, 2006, citing Reported by Claire Slatter, Development Alternatives with Women for a New era (DAWN), New Zealand.

Women's attitudes to *brideprice* appear to be consistent throughout Melanesia and East Timor:

*Once a woman is married, the elders say she must obey her husband because of the cows [paid as bride-price]. All decisions are made by men. They don't listen to women, and the woman is always blamed. (East Timor)*²⁸

Because of paying bride-price in cows, when you talk to a lot of older men [about domestic violence], they say: "I don't hit my wife, I hit my cow" .²⁹(male interpreter, East Timor).

*He will say he's paid bride-price so that gives him the right to hit her. The chief and the family will agree with this. They will say that 'You are his property'. (Vanuatu)*³⁰

*The men come and they say "I bought her for \$5,000. I can do anything with her. She's my property, not yours." (Solomon Islands)*³¹

Box 3. Harmful practices, *brideprice* and polygamy in Melanesia

Among the most frequent explanations women put forward for the violence and discrimination they suffer at the hands of their husbands in the Solomon Islands is the tradition of a 'bride price' given to the parents of a bride at her wedding by the parents of the groom. While customs on bride price vary according to provinces and language groups, the practice encourages an attitude in husbands to treat wives like property: 'As a wife, she is expected to be subordinate to and obey her husband ... She is at the mercy of her husband, who paid bride price for her...' Some Malaitan men confirmed this perception and added that a young husband was under pressure from the male community and his relatives to show his ability to 'control' his often teenage wife, including through violence.³²

Many customary practices are still in place and reinforce certain interpretations of religious (mainly Christian) beliefs about women's roles. Where polygamy is practiced and accepted, violence against women is prevalent. In Papua New Guinea, there is a high level of violence against women by their husbands and also between co-wives. During a visit to a state prison in the highlands of PNG, Fiji Women's Crisis Centre staff found that of 24 women imprisoned, 16 were imprisoned for murder of their co-wives or their husbands. Some local women's NGOs report that approximately 85 per cent of the cases they attend to are polygamy related.³³

How does *brideprice* manifest itself as a harmful practice in modern times? It is used to secure custody rights to children in the event of separation or divorce; and is commonly believed—even by many women—to give men the right to control their wives, with violence if necessary. Men's use of violence appears to be questioned only if a husband beats his wife 'excessively', 'out of drunkenness' or for 'no good reason'.³⁴ In the conventional legal system it is used as a defence to prosecution against domestic

²⁸ AusAid, 2009, 32 - Views expressed by women in East Timor.

²⁹ AusAid, 2008, 55.

³⁰ AusAid, 2008, 55.

³¹ AusAid, 2008, 55.

³² Amnesty International, 2006.

³³ Fiji Womens' Crisis Centre 2008.

³⁴ AusAid, 2008, 55.

violence, and if there is successful prosecution, to reduce the punishment or the amount of compensation paid.

Only one country in the Pacific has attempted to legislate against the harmful use of *brideprice* as a defence to domestic violence. The opposition to the new law in Vanuatu was fierce and long (over 10 years) and culminated in an unprecedented court case pitting the Office of the President (which challenged the new law on Constitutional grounds) against the Office of the Attorney General (supporting the new law with the women's movement), with the latter finally triumphing.³⁵

Vanuatu's Family Protection Act 2008 creates a specific criminal offence of domestic violence and states clearly that the payment of *brideprice* has no bearing on guilt, and is not a defence to prosecution in domestic violence cases.

10. (1) A person who commits an act of domestic violence is guilty of an offence punishable on conviction by a term of imprisonment not exceeding 5 years or a fine not exceeding 100,000Vatu, or both.

It is not a defence to an offence under subsection (1) that the defendant has paid an amount of money or given other valuable consideration in relation to his or her custom marriage to the complainant.

The new law has only recently come into effect in March 2009. The provision referred to above, is sound legislative practice and is to be recommended. However, it is too early to assess whether the law will be implemented and whether it will be effective. Given the constitutional recognition of customary law, such provisions need to be put in place together with corresponding constitutional amendments which do not allow customary law or harmful practices to be invoked as a defence to VAW so that the principle becomes part of the overriding supreme law of the country.

Customary Forgiveness, Compensation and Reconciliation to Maintain Peace

There are two elements of customary forgiveness practices linked with payment and compensation, which will be considered here. The first is that of the forgiveness ceremonies which seek the forgiveness of the female complainant's family and community, when a woman has been sexually assaulted or beaten. These include the *i-bulubulu* (Fiji), *ifoga* (Samoa), *te kabara bure* (Kiribati) and the compensation practice

³⁵ *President of Vanuatu v Speaker of Parliament* [2008] VUSC 77, Constitutional Case No 6 of 2008, 22 November 2008.

in most of Melanesia. The second is that of compensation and reconciliation within a situation of armed conflict

Traditional reconciliation and forgiveness ceremonies are widely practiced in cases of VAW, and justice agencies generally encourage forgiveness and reconciliation, both in the informal or village courts, or the national level courts which administer formal law. The effect of this is that there is either no prosecution, finding of guilt and punishment deserving of the crime or the forgiveness practice is used to lessen the punishment of the perpetrator of violence.

If sexual assault or domestic violence cases are dealt with by the village or *kustom* or informal courts by default, the cases may not end up in the formal courts with formal criminal charges being laid. Or if they do, the charges may be reduced to lesser charges, which generally attract lesser punishment. Sometimes they are used to reduce the punishment, after a finding of guilt. The customary reconciliation practices of ceremonies of forgiveness generally involve the perpetrator's and complainant's families or communities. It is of interest to note that these 'forgiveness ceremonies' have dramatically changed over time and now often take place without the complainant's actual permission or participation.

Box 4. Customary practices of forgiveness – *Public Prosecutor v Tabisal, Vanuatu*³⁶

The accused had pleaded guilty to rape. He said that he when he saw the nine-year-old girl walking along the road, he got aroused and raped her. He paid the chiefs customary settlement of three pigs and six mats in total valued at 74,000 *vatu*. Neither the rape survivor nor her parents shared in the compensation. In court, the charge was reduced from rape to unlawful sexual intercourse. The High Court said that the offence was very serious because of the girl's tender age. However, because the accused was a first offender and had made a customary settlement, his sentence was reduced to only three years.

Traditional reconciliation and compensation to maintain peace between groups and their (male) leaders is often accorded greater priority than women's wellbeing. The practice of compensating women's husbands, fathers or tribal group creates a deterrent for addressing violence against women.³⁷ In most rural areas or outlying islands there is no permanent police presence. Thus when women report a sexual assault to the chief of the village, the chief might order the family of the perpetrator to pay compensation to the complainant's family, which might take the form of pigs, woven mats, kava, shell money, whale's teeth or cash. Some magistrates have even argued that cases of sexual assault should be dealt with by chiefs rather than courts, and that it would decrease the likelihood of *payback* sexual assault.³⁸

I think the most that can be done is to call the parties involved, maybe the chief can do it in a chief's hearing—he will take a walk over to the house of the man,

³⁶ Jalal 1998.

³⁷ AusAid, 2008, 16

³⁸ AusAid, 2008, 16.

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*and ask him to pay compensation to her or to the family (usually not her). The payment is to prevent a payback against him, maybe to rape his daughter (male magistrate, Solomon Islands).*³⁹

A Kiribati study noted that the cultural practice of *te kabara bure* (formal apology), which takes place between families to compensate one family for a crime committed by the other, not only makes the crime public but serves as a strong disincentive for committing the crime. However, men or boys do not have much to lose if they commit a sexual assault. The perpetrator only has to practice *te kabara bure* to regain his social standing if the girl has accepted the apology (which is invariably the case); but the girl has to live with the shame and social exclusion forever. There were also cases noted where *te kabara bure* leads to courting and engagement of the victim and perpetrator.⁴⁰

Box 5. Domestic violence is not a private matter but not serious enough for a long prison sentence - *Toakarawa v The Republic of Kiribati*⁴¹

T, the defendant, was a 22-year-old married man whose wife was four months pregnant. Whilst intoxicated, T beat her, dragged her by the hair and bit her on the nose, cheek, lips and fingers of both hands. He resisted attempts by neighbours to intervene. The injuries were permanent and included the upper and lower lips being bitten off, exposing the teeth. T maintained that he was so intoxicated that he did not know what he was doing; that he had apologised for his actions and had later reconciled with his wife. The Chief Justice(CJ) emphasised that domestic violence was not a private matter; that it was shameful, that it was to be severely punished and that it was a serious crime no matter whom the victim, but that it was T's wife, made it worse. The CJ noted, however, the traditional apology and reconciliation, the state of drunkenness, the absence of previous convictions and the early plea of guilt. T was sentenced to three years' imprisonment. T challenged the sentence, arguing amongst other things that he needed to earn money for the family. An issue for consideration was whether the apology, reconciliation and that T was the main breadwinner, relevant to sentencing in a domestic violence case? Was domestic violence a private or public matter? The Court of Appeal refused to lessen the sentence saying that assaults on wives were to be treated as serious matters of public concern and that the extraordinary ferocity, the duration of the attack and the permanent disfigurement made the sentence appropriate.

Comment. Although this judgment demonstrates the positive changes in judicial thinking – for example that traditional reconciliation, apologies and the famous ‘breadwinner’ argument are not relevant issues to reduce sentencing – it still falls short of awarding a sentence adequately reflecting the seriousness of the offence. This is particularly so in a region where wife beating is regarded as a customary ‘right’ of a husband.

In virtually all forgiveness ceremonies (involving not only VAW but other forms of conflict) throughout the Pacific Islands, it is not possible for the female complainant or survivor or other victim to reject the apology and gifts or compensation that comes with it, as the pressure to heal the rift between the two families, communities or tribal groups, is considerable. It would be considered bad form and might even lead to banishment and social exclusion from the village or community. Indeed most Pacific Islanders regard such ceremonies with pride and as a unique aspect of their culture because they allow

³⁹ AusAid, 2008, 16.

⁴⁰ UNESCAP 2009, 101 citing *Source*: UNICEF, 2004, 26- 28.

⁴¹ Criminal Appeal 4 of 2006, 26 July 2006, Court of Appeal, cited in Jalal, 2009.

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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.⁴²

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.⁴³

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 woman, East Timor).

In a "typical" PNG Highlands case involving the abduction and rape of 3 young girls, from 7 -- 11 years old, in the context of tribal fighting in the Eastern Highlands, a human

⁴² Section 16 of the draft law.

⁴³ AusAid, 2008, 19-20.

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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.⁴⁴

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.

Forced and Early Marriage

Traditionally and historically, most countries in the Pacific Islands allowed the betrothal of children at an early age for strategic reasons, to build alliances and for families to acquire more power, wealth, land and authority in their respective communities.⁴⁵ Today, more couples are choosing to marry on their own, rather than submitting to such arrangements. However, in Fiji, Kiribati, Solomon Islands, Papua New Guinea and Vanuatu, the practice of early marriage, or children being traded according to the wishes of parents and extended families, still continues even though it is reported that such instances are decreasing.⁴⁶ A new form of early marriage is the sale of daughters to foreigners in return for large cash payments, for example, in Kiribati, and in Fiji amongst the Indo-Fijian community, and in PNG.⁴⁷

Minimum legal age and consent to marriage

The age of 18 is regarded as the appropriate minimum age for the law to permit marriage under the UN Convention on the Rights of the Child.⁴⁸ Most PICTs, except for Kiribati,

⁴⁴ Amnesty International USA , 2009 , quoting an interview with Sarah Garap.

⁴⁵ UNESCAP, 2009, 31.

⁴⁶ UNESCAP, 2009, 34.

⁴⁷ The CSEC study from Papua New Guinea highlights blatant practices of early marriage, (40 UNICEF, "Situation Analysis of the Commercial Exploitation of Children and Child Sexual Abuse in the Solomon Islands", 2004, 24.

⁴⁸ Under the CRC Art 1 a person under 18 is a child. CEDAW, General Recommendation 21

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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.⁴⁹ Niue allows marriage with parental consent for females who are 15 and males who are 18.⁵⁰ The state of Chuuk in FSM has minimal legislation in the area of marriage, therefore there is no technical legal prohibition on child marriage.⁵¹ 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.⁵² 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.⁵³

Custom and religious marriage

Custom marriages are recognised in Palau’s Code,⁵⁴ in the FSM states of Chuuk and Pohnpei,⁵⁵ 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.⁵⁶

Some 27 per cent of Fijian Muslims also enter into *nikah* without ever legalising their marriages.⁵⁷ Customary marriages are recognised by law but de facto and religious marriages are not. In a custom marriage, there is usually some form of customary ceremony or ritual in which the parties participate. There may be no legal requirements but there are customary practices that must be complied with, before the tribe or community will accept that the parties are married, for example, the payment of *brideprice*, the giving of other gifts, feasting and the like.

⁴⁹ UNIFEM Pacific 2007, 57.

⁵⁰ Section 525, Niue Act 1966.

⁵¹ UNIFEM Pacific 2007, 57.

⁵² Fiji Ministry of Women & Culture, *A Statistical Gender Profile*, 1994.

⁵³ UNESCAP, 2009, 106.

⁵⁴ Title 21 of Palau’s Code - marriages in custom are valid; Also see Ntuny, 1993, 587.

⁵⁵ UNIFEM Pacific 2007, 57.

⁵⁶ Section 526, Niue Act 1966.

⁵⁷ Women Living Under Muslim Law (WLUML) 1996-7.

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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.⁵⁸ 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.⁵⁹ 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 contributes to the problem, with *kastom* focusing more on protecting the family or community from shame than punishing or dealing with the perpetrators.⁶⁰

A modern manifestation of early and forced marriage practices exist in those countries where large scale logging industries have developed. In Solomon Islands it is not uncommon for a girl in Year 6 (11-12 years) to be forced to marry under custom law, foreign loggers who are much older than them because their parents desire the money (*brideprice*) and food. In such logging marriages, when the young girls become pregnant the loggers move onto another logging area and repeat the same practice all over again, leaving young girls, "logging brides," with children, without any financial and other support.⁶¹

Enforcing even the legal minimum age for marriage (15 year) in the Solomon Islands is very difficult because customary law has constitutional status; many Solomon Islanders are not in possession of a birth certificate; and registration of marriages in the Solomon Islands is voluntary.⁶²

These points are significant for the future protection of young girls against forced and early marriage. Good legislation must address the following:

- Enforcing registration of births;
- Amending legislation so that young girls cannot be married until they are 18; the marriageable age must be 18 for both girls and boys;

⁵⁸ UNESCAP, 2009, 37.

⁵⁹ UNESCAP, 2009, 109.

⁶⁰ UNESCAP, 2009, 108- 110.

⁶¹ UNIFEM Pacific, 2009.

⁶² UNIFEM Pacific, 2009.

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- 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 marriage and most women accept their lot. In any case, apart from Fiji, the family law legislation in most PICTs is heavily weighted against women, and women are unable to fairly obtain custody of their children, financial support and property after annulment or divorce, giving them little choice but to remain in unhappy marriages.

Sorcery and Witchcraft

Sorcery related killings (*sangumas*) of mainly innocent women are common in parts of PNG, and to a lesser extent in Vanuatu. Courts in Fiji have also noted the practice of sorcery. In the Western division, one magistrate had dealt with 30 cases in one court alone over a period of one year, in which people were attacked for suspected sorcery.⁶³ *Puripuri*, the traditional belief in sorcery is used to justify serious acts of violence against women, and women are 6 times more likely to be accused of sorcery than men in PNG. Within traditional tribes, sorcery is thought to account for sudden and unexplained deaths and mysterious illness. Women suffering from HIV/AIDS are often seen as victims of sorcery and blamed for spreading the disease into their community.

As recently as January 2009, a woman in rural Papua New Guinea was bound and gagged, tied to a log and set ablaze on a pile of tires, because villagers suspected her of being a witch. In this specific incidence, a group of people dragged the woman to a dumping ground outside the city of Mount Hagen. They stripped her naked, bound her hands and legs, stuffed a cloth in her mouth, tied her to a log and set her on fire.⁶⁴ In another well-publicized case last year, a pregnant woman gave birth to a baby girl while struggling to free herself from a tree. Villagers had dragged the woman from her house and hung her from the tree, accusing her of sorcery after her neighbor suddenly died. More than 50 similar cases were reported in the Highlands of PNG in 2008.⁶⁵

⁶³ Forsyth, 2006.

⁶⁴ http://www.nydailynews.com/news/2009/01/08/2009-01-8_woman_suspected_of_witchcraft_burned_alive.html. Thursday, January 8th 2009, 6:18 AM.

⁶⁵ Amnesty International, 2009.

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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.⁶⁶

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.*⁶⁷

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.⁶⁸

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*⁶⁹, PNG

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

⁶⁶ Amnesty International, 2009.

⁶⁷ Niue Act 1966.

⁶⁸ Forsyth, 2006.

⁶⁹ (1990) PNGLR 318.

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.

The power of older women, as against men, is limited by the threat of an allegation of witch-craft, and its consequences in coercion. As the surviving victims in this case showed, there is no defence to an allegation of witchcraft. The assertion proves itself, and the victims can only hope that they will not be killed. Witch hunting also violated the constitutional rights of the victims – the right to life, the right to freedom from inhuman treatment, and the constitutional direction to improve the status of women in the National Goals and Directive Principles.

Comment. The role of witchcraft in sexual politics is a reflection of male dominance in certain communities in Papua New Guinea. It is used as a means to ensure elderly women remain in submissive roles. The practice is both discriminatory, and an implicit threat, against elderly women. The allegation of witchcraft is difficult to disprove and engenders strong community feelings. Tragically, once such accusations are made, it results in death or great harm for the victims.

The fact that the PNG government recognizes sorcery under the Sorcery Act 1971, reinforces prejudices against so-called witches. Defenders of such legislation argue, while noting the problems with adjudicating custom law, that as there is widespread belief in sorcery and witchcraft, the legislation must recognize this, and put in place defences for those who injure or kill witches and sorcerers out of fear and revenge.⁷⁰ There are no specific laws against the burning or torture of witches and if their murders are prosecuted, which is rare, they occur under general criminal laws. Those accused of sorcery are sometimes tried in local courts, with village adjudicators meting out death sentences. If the matter goes before the mainstream courts, the allegation of sorcery as a defence might be considered to reduce the sentences of the accused.

PNG's Constitutional Review and Law Reform Commission has indicated that the issue will be given priority in 2009. Existing laws on sorcery will be reviewed, and stronger laws developed in consultation with church organisations, government agencies and ethnic groups. New legislation will address the past leniency in prosecutions, and force rural courts to charge those accused of sorcery-related killings with premeditated murder and face all implications.⁷¹

There is a need to make witch hunting, torture and killing a specific crime and to recognise the specific gender based violence associated with it. One possibility suggested by Amnesty International is to introduce legislation similar in form to the Mpumalanga

⁷⁰ Forsyth, 2006.

⁷¹ Amnesty International, 2009.

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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.⁷² 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

The widow of an estate holder does not have an automatic right to live on her husband's land.⁷³ The Tongan Constitution and *Land Act* give the widow of a tax or town allotment holder (*'api 'uta* or *'api kolo*) a right to succeed to the allotment until she dies, or remarries or 'fornicates'. This means that once a widow has sexual relations with another man, she loses her right to live in the home that she lived in before her husband's death. For the rest of her life, she must be sexually faithful to her dead husband or risk losing her home.⁷⁴ Women's land rights in Tonga are very limited; they depend on the goodwill of men and on the custom of *fahu*, the traditional duties of a brother to his sister. In theory, *fahu* includes the right of women to access to land by requesting it from their brothers, or from their maternal uncles. *Fahu* still exists but has been weakened, at least as regards land, by the increasing pressure on land use.⁷⁵

PNG

In contrast, a custom not allowing widows to have relationships was held to be *ultra vires* (beyond the power of) the equality provisions of the Constitution of Papua New Guinea in *Raramu v Yowe Village*.⁷⁶ Raramu was a widow, but was nevertheless convicted and sentenced by a village court to a term of six months' imprisonment. The customary practice in many areas of PNG does not allow widows to have subsequent relationships. One of the issues for consideration was whether the custom contravened the constitution in that it was discriminatory towards women. The court refused to recognise such a practice because it was oppressive and discriminatory towards women and offended the equality provision at section 55. The custom failed to recognise the inherent dignity of humankind. The village court erred in imprisoning people for breach of what was only custom and not codified as law. Accordingly, Raramu was to be released, together with her four-month-old child, also in custody. In this case, Raramu persevered and used the courts despite the odds being stacked against her.

⁷² Amnesty International 2009.

⁷³ Jalal 1998, 58.

⁷⁴ Jalal 1998, 58.

⁷⁵ Jalal 1998, 60.

⁷⁶ [1994] PNGLR 486 N1262, 22 November 1993.

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.⁷⁷ In some cases, to “payback” the rape of a complainant, the men of the complainant’s clan will rape a woman of the perpetrator’s clan. Sexual assault on a girl, to rupture her hymen, may also be perpetrated to force her into marriage; the rape being seen to culturally “devalue” the girl by taking her virginity. Even after the cessation of tensions in the Solomon Islands, women married to men from the opposite side were still being raped, as punishment.⁷⁸

Marrying the Perpetrator of the Sexual Assault

In many parts of the PICTs, a woman or girl who has been raped might be made to marry her rapist to normalise relations between the two families and clans. In Kiribati virginity is highly prized. When a young woman loses her virginity or is raped by a boy or man, it is not uncommon for reconciliation to be sought with her parents to obtain agreement for the two to marry.⁷⁹

Slavery

The giving of women as compensation or as an apology is practiced in some parts of Melanesia. In a case involving slavery, the court said in *The State v Kule*,⁸⁰ the customary practice of giving a daughter to the murder victim’s family in PNG is not a mitigating factor for murder. It violated constitutional prohibitions on slavery. The Convention on the Abolition of Slavery and Slave Trade was applied, as well as the constitution, to reach that conclusion. The handing over of the child was an institution or practice similar to slavery and therefore prohibited by the Constitution of PNG, even if the evidence showed that such a custom was a common practice. Whilst compliance with customary obligations was a matter to be taken into account, the particular custom had to be proven by evidence and consistent with human rights provisions of the constitution. There have been no reported slavery cases in recent times, demonstrating the positive effect of this decision. This is an encouraging example of the influence of the law in shaping the evolution of custom. However, without systematic research it is impossible to infer that slavery is not practiced in remote areas of PNG as the bulk of the population does not live in urban centres.

Criminalisation of adultery

⁷⁷ Ali, 2006.

⁷⁸ AusAid, 2008, 13.

⁷⁹ UNESCAP, 2009, 103.

⁸⁰ [1991] PNGLR 404 (3 December 1991)

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In some parts of Melanesia adultery is an offence under custom law deserving of either imprisonment or compensation. Tonga, Vanuatu, Cook Island and Solomon Islands also retain some elements of this law by allowing a claim for damages for adultery against the 'seducer'. So far the defendants appear to have been women.⁸¹ Solomon Islands' law is openly gender-biased allowing only husbands to claim damages.⁸² Adultery is a serious offence under custom, and in *Banga v Waiwo*⁸³ a decision involving the payment of large sums of damages ordered by the chiefs against a man who had seduced a married women, was challenged in the lower and higher courts.

Polygamy

The traditional practice of polygamy, although less common in most parts of the Pacific Islands, is still widely practiced in many parts of Melanesia and is also closely linked with VAW. In Solomon Islands, this practice has become common enough that the women in a man's life are referred to colloquially by numbers (Wife No 1, No 2, No 3, etc.) according to the order in which the relationships began. Women complaining about the 'other women' is one main cause of wife-beating and sometimes of fights between women.⁸⁴

When a man marries subsequently, his first wife and children are frequently neglected. If she receives visits from her husband and refuses when he demands sex, she is customarily beaten. Imprisonment for abuse and murder of their wives, is rarely a consequence for men.⁸⁵

Conclusion

Comprehensive laws not only criminalising harmful practices against women, but providing for preventative, educative and empowerment measures are critical. An integrated, multi-sectoral, one-piece-of-legislation approach, with the resources and technical support to implement the laws is also to be preferred.

A starting point must be PICT Constitutions, which need to be amended to state that where there is a conflict between women's rights to equality and custom or other harmful practices, the former should prevail. All reforms must address the traditional justice systems which administer customary law otherwise there is no point in putting in place good legislative practices. In PICTs where parallel systems of justice operate, women need to have their rights upheld through both formal and traditional systems, and training is needed to ensure the just implementation of good legislation by customary law adjudicators as well.

⁸¹ Jalal 1998, 224.

⁸² Jalal 1998, 224. See also Nina Hicks on the South Pacific in Bainham (ed) 1997.

⁸³ 324/1995, 28/2/96, Magistrates Court, 1/1996, 17/6/96 Supreme Court of Vanuatu.

⁸⁴ AusAid, 2008, 18.

⁸⁵ Dinnen & Thompson, 2004.

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 acc 21/5, 2009

Amnesty International USA, 2009, 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).

Makau, Chief Morrison Dick. 2005. Interview 16 February 2005.

[www.abc.net.au/abccontentsales/s1303923.htm. Accessed 13 November 2008.]

Ntuny, Michael. (ed). 1993. *South Pacific Islands Legal System*. Honolulu: University of Hawaii Press.

Pollard, Alice, 1998, "Bride Price and Christianity" *State, Society and Governance in Melanesia Project*, Australian National University

Post Courier, http://www.nydailynews.com/news/2009/01/08/2009-01-8_woman_suspected_of_witchcraft_burned_ali-2.html. Thursday, January 8th 2009, 6:18 AM

SPC (Secretariat of the Pacific Community). 2004. *Pacific Islands Regional MDG Report*. [<http://www.spc.int/mdgs>]. Last accessed 26 August 2008.

UNICEF (United Nations Children's Fund) Pacific, UNESCAP (United Nations Economic and Social Commission for Asia and the Pacific) and ECPAT (End Child Prostitution & Trafficking of Children for Sexual Purposes) International. 2007. *Child Sexual Abuse and Commercial Sexual Exploitation of Children in the Pacific: A Regional Report*. Prepared for UNICEF Pacific by the Pacific Regional Rights Resource Team, Suva, Fiji. As yet not available publicly.

UNESCAP, 2009, "Pacific Perspectives on the Commercial Sexual Exploitation and Sexual Abuse of Children and Youth"

UNICEF Pacific and UNIFEM Pacific 2006, "The Elimination of all forms of Discrimination and Violence Against the Girl Child: Situation Paper for the Pacific Islands Region".

UNICEF, "Commercial Sexual Exploitation of Children and Child Sexual Abuse in the Republic of Kiribati: A Situation Analysis", 2004.

UNIFEM (United Nations Development Fund for Women) Pacific Regional Office and UNDP (United Nations Development Programme) Pacific Centre. 2007. *Translating CEDAW into Law: CEDAW legislative compliance in Nine Pacific Island Countries*. Suva, Fiji.

UNIFEM Pacific, 2009 forthcoming publication "Protecting Women's Human Rights in Solomon Islands Law".

WLUML (Women Living Under Muslim Law). 1997. Unpublished research conducted in 1996-7 Fiji by the Pacific Regional Rights Resource Team (RRRT) for a global survey on *Women and Family Law in the Muslim World*. [<http://www.wluml.org>]