10. Women's dignity and rights: situating Pacific experiences

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Introduction

All Pacific countries are part of the global movement to improve women's rights and to end gender discrimination and violations. Most Pacific countries have ratified key human rights conventions, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The Universal Declaration of Human Rights 1948 (UDHR), which served as a model for the development of most Pacific constitutions, sets out in article 1 that *'*All human beings are born free and equal in dignity and rights*.'* The UDHR gives recognition to the *'*inherent dignity' and 'equal and inalienable rights' to all members of the human family as the foundation of freedom, justice and peace in the world.

Dignity therefore provides the rationale to the requirement of respect of persons.[1] It has also been described as 'the shaping principle…'[2] that reinforces the intrinsic worth and dignity of human beings.

Discrimination against women is incompatible with human dignity. Given the many examples in the Pacific of deep-rooted traditional customs that place women in subordinate positions and practices that prevent women's equal participation with men in political, economic, social and cultural life, there are equally many examples of strategies developed to end unfair treatment and discrimination against women.

There is a great deal to learn from comparative analysis of the directions Pacific countries are taking in relation to gender equality. The following is a review of the attempts and achievements of the legislature and the judiciary.

Non-discrimination on the ground of sex

To gain a fuller sense of the progress made in the last quarter of a century, it would be prudent to begin with the fundamental constitutional principle of equality. The core element of respect for women's human dignity is grounded in this principle. All constitutions give content to the principle of equality by prohibiting any distinction in the

1. Mette Lebech (2004) 'What is Dignity?' *Maynooth Philosophical Papers*, Volume 2, pp.59–69, Faculty of Philosophy, National University of Ireland.
2. Roberto Andorno (2009) 'Human dignity and human rights as a common ground for a global bioethics'. *Journal of Medicine and Philosophy*, Volume 34, Issue 3, p.223–240.

enjoyment of human rights on such grounds as race, colour, creed or sex. There are, however, qualifications to the anti-discrimination clauses which give preferential treatment to certain classes of persons to ensure equality. For example, the constitutions of Papua New Guinea (PNG), Samoa and Vanuatu[3] exempt the making of *'... laws for the ... protection or advancement of females, children and young persons...'* from its anti-discrimination provisions. Customary law in some countries is also exempt from the ambit of the anti-discrimination clauses.[4]

Most constitutions, except for Kiribati, Tonga and Tuvalu prohibit discrimination on the ground of sex. This issue has been highlighted in the Tuvalu High Court's decision of *Tepulolo v. Pou*[5] where the mother of an ex-nuptial child had difficulty in trying to enforce the right to non-discrimination on the ground of sex.[6]

Positioning of customary law in the legal system

Customary law is recognised as an important aspect of our identity, but culture and customary law does not change the law. Law is developed to accommodate culture and customary practices in society.

The law of marriage accommodates both customary as well as civil marriages. Whilst most countries have a single statutory marriage regime, dual marriage regimes are also recognised in Solomon Islands, Vanuatu and Papua New Guinea.[7] In all three countries, where parties have married under custom and who undergo a civil marriage are bound by the rules of monogamy. This ultimately affects those societies that practice polygamy, as adultery is a matrimonial offence and a ground for divorce.

The constitutions of all Pacific countries, except Tonga, make specific provisions for custom and customary laws to be applied and legislations have been passed providing for its recognition.[8]

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3. PNG Constitution article 55(2); Constitution of Samoa article 15(3)(b); Constitution of Vanuatu article 15(1)(k).
4. Solomon Islands Constitution s.15(5)(d); Kiribati Constitution s.15; Constitution of Samoa s.15.
5. Tuvalu Family Appellate Court Case 17/03, 12 January 2005. See pp.63–65, *Pacific Human Right Law Digest* volume 1. Pacific Regional Rights Resource Team (RRRT).
6. Case details in this volume, see chapter 12.
7. PNG The Marriage Act 1963 s.3; 'A native, other than a native who is party to a subsisting marriage ... enters ... into a customary marriage in accordance with the custom prevailing in the tribe or group to which the parties to the marriage or either of them belong or belongs'.
8. For example, Laws of Kiribati Act 1989, Laws of Tuvalu Act 1987, Customs and Adopted Laws Act 1971 (Nauru). See Kenneth Brown (1999) 'Customary Law in the Pacific: an endangered species'. *Journal of South Pacific Law,* article 2 of volume 3. See also D E Paterson (1995) 'South Pacific Customary and Common Law: Their Interrelationship'. *Commonwealth Law Bulletin*, Volume 21, No. 2, pp.660–671.

Customary rules incorporated in statutes

The law accommodates the preservation of particular customary rules[9] as discussed earlier in the Tuvalu case which provides for the two-year old child to be transferred to the father and his family in order to inherit land and property. A similar provision is found in Kiribati.[10] Such customary rules incorporated into statute become frozen and can only be altered or amended through an Act of Parliament.

Transfer of child to the father

Whilst the goal of this provision is to confer land inheritance rights on the child, it also automatically transfers custody rights to the father without enquiry or the application of the child welfare principle. Inheritance rights could be transferred without the child changing residence. The reliance on traditional rules and practices, which is protected by this particular law, is a limitation on the liberties, equality of rights and an affront to the dignity of the mother. In addition, the transfer of custody rights to the father and his family is not subject to challenge as to parental fitness; there is a presumption that the biological tie to the father would serve all the child's best interests. These gender-based customary rules, which deny the mother parental responsibilities and rights, violate equality between men and women as parents.

Repugnancy doctrine

The application of customary law is also subject to the repugnancy doctrine as found, for example, in the constitution of Papua New Guinea.[11] Through the use of the repugnancy principle, courts are able to restrict, adapt or oust customary rules, as found in the Papua New Guinea case of *Raramu v. Yowe Village Court*[12] which provides an example of this process:

> 'In this case, the widow Raramu was sentenced by the village court to six months imprisonment for being involved with another man. The issue whether custom which did not approve of widows in a relationship contravened the equality provision of the Papua New Guinea constitution s.55, the court held that the village court erred as the widows behaviour only breached custom which was oppressive to … women … and not in keeping with the dignity of mankind and such custom was not codified as law.'

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9. Cook Islands Act s.422; Kiribati Magistrates Act 42(2); Nauru Custom and Adopted Laws Act 1971 s.3; Niue Act 1966 s.296; Solomon Islands Islanders Marriage Act Cap.4, Islanders Divorce Act 48; Tuvalu Laws of Tuvalu Act 1987; Vanuatu Constitution articles 45, 49, 72, 93; Samoa Lands and Tiles Act 1981; Village Fono Act 1990.
10. See Kiribati Magistrates' Court Act, Cap.52, s.65(2)(i); Tuvalu Native Lands Ordinance Cap.22, s.20.
11. Constitution of PNG Sch.2, 1.1 (2).
12. [1994] PNGLR (PNG Law Reports) 486.

Status of customary law

Constitutions prescribe the status given to customary law in the legal system; for example the Solomon Islands constitution states that customary law will not be applied if it is inconsistent with the constitution or an Act of Parliament[13] 'or repugnant to the general principles of humanity'.[14]

Whilst the two techniques apply constraints to the use of rules of custom that conflict with the law or are repugnant to humanity in the long term, the *Raramu v. Yowe Village Court* case indicates that courts are likely to make changes, as matters arise for judicial determination, to rules of customs that are oppressive to women. Women, more than before, are encouraged to seek redress when substantially affected by male-orientated customs.

Ascertainment of customary law

The constitutions in the Pacific have entrusted the administration of customary law to local specialist courts such as the village courts (PNG), village and island courts and customary land tribunals (Vanuatu), land courts in Niue, Cook Islands and Kiribati; land and titles courts in Samoa; the Lands Committee in Nauru and the Customary Land Appeals Court in Solomon Islands. These courts are presided over by lay justices and in some countries, also local chiefs[15] who are knowledgeable in custom. The jurisdictions of such courts are determined by their particular warrants.

In order to accommodate the body of customs, the first obligation is the ascertainment of customary law. The scheme for ascertainment as prescribed in the constitution[16] is allocated to parliament to provide:

> '... for the manner of the ascertainment of relevant rules of custom, and may in particular provide for persons knowledgeable in custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in its proceedings.'[17]

Although parliament has a duty to provide for the manner in which customary law is to be ascertained, according to Weisbrot 'in essence the constitutional scheme has failed to propel customary law to the fore ... and ... experience has pointed to several problem areas including the ... enormous difficulties inherent in ascertaining customary law on a case by case basis and in separating customary rules of law from customary processes ... and in overcoming conflicts between different customary regimes ...'.[18]

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13. Sch.3(3)(1)(2).
14. PNG Constitution Sch.2.1.
15. Vanuatu s.52.
16. For example, Solomon Islands Constitution Sch.3s.3(3).
17. Vanuatu Constitution s.51.
18. D Weisbrot (1982) 'The Impact of the Papua New Guinea Constitution on the Recognition and Application of Customary Law' in Peter Sack (ed.) *Pacific Constitutions,* pp.271–290. Canberra: Australian National University Press.

As customary law is an integral part of the justice system, Kenneth Brown believes that 'attempts to institutionalise customary practices by codification tend to produce the same outcome and create a customary code steeped in a rule-centred paradigm. They also entrench regimes that are conservative and reflect the ideology of those who are consulted in the preparation'.[19]

Local courts are left to ascertain customary rules on their own and it would be a disservice not to acknowledge the rich source of decisions made on the most controversial issues affecting the rights of women. The codification of reformative principles in local court judgments pertaining to women's customary rights, in the various areas litigated, would provide guidelines in conflict of law situations.

Whilst there are difficulties in codifying customary laws, there are advantages in codification in that common customary rules will be settled and known to all. There are other views, which state that custom will be frozen and it should be left to evolve and change to meet changing circumstance. The advantage of codifying custom is that the need to prove custom in the courts and varying interpretations of custom will be reduced.

WOMEN'S INHERITANCE AND SUCCESSION RIGHTS

Women's inheritance rights to land

The law accommodates customary law that regulates inheritance and succession rights to customary land. Land rights in the Pacific are not uniform as the land holding system is both patrilineal and matrilineal. Customary tenures are not only very diverse, changes to the tenure systems have undergone continual reinterpretation and often the reinterpreted forms are declared as custom.[20] However there are some common features:

- Gender, kinship and rules of inheritance are central to the way in which women's rights to land are determined. Whilst there is an assumption that all members of the kin-group have equal rights to land, in practice there are principal and subordinate rights and various types of rights to portions of land where females also receive shares (e.g. Tuvalu,[21] Kiribati).[22] There are many different kinds of

19. K Brown (1999) 'Customary Law in the Pacific: an endangered species'. *Journal of South Pacific Law*, article 2, volume 3.

20. H W Scheffler (1977) in R Crocombe (ed.) *Land Tenure in the Pacific,* p.287. Melbourne, New York, London: Oxford University Press.

21. T Laupena and K Lutelu (1987) 'Providing for the Multitude' in R Crocombe (ed.) *Land Tenure in the Atolls,* p.158. Suva, Fiji: Institute of Pacific Studies, University of the South Pacific.

22. Bernd Lambert (1977) 'The Gilbert Islands: micro-individualism' in R Crocombe (ed.) *Land Tenure in the Pacific,* pp.164-166. Melbourne, New York, London: Oxford University Press.

tenures which are not equally distributed amongst the family group. The influence of colonial administration in Pacific Islands land registration and land becoming a more marketable commodity have brought about significant adjustments in land tenure systems.

- Women's inheritance rights to land in the Eastern Pacific (Cook Islands and French Polynesia) are more equal to those of men, while those from the Western side of the Pacific have not made much progress.[23] In Cook Islands, women have, over time, through court interventions, gained the same rights in ownership and control over land as men.
- Where Patrilineal inheritance transmits land through the male line and where there are no male heirs, to daughters. Matrilineal inheritance, largely dominant in Micronesia and parts of Melanesia, assures females rights of ownership which are transmitted through the female line to the next female and male beneficiaries. In some societies, where there are no female heirs, land can pass to the sister's daughters or other close female relatives.[24] In Tonga, if there are no male heirs, an unmarried daughter may hold land for life or several unmarried daughters may hold land jointly.[25] Women who marry and live with their husband's lineage retain their user rights to lands in their natal lineage.
- Widows can be particularly disadvantaged under customary hereditary and tenure rules. Any rights of continued occupancy of the family home and user rights to land are subject to the authority of the deceased husbands' family.

In recent years, progress has been made in some countries where women in urban societies are able to own both freehold and leasehold land in their own right (e.g. Fiji).

Whilst land claims are predominantly through the patrilineal line, the judiciaries in Pacific countries have made closer examination of customs as a consequence of appellate reviews. We now consider a specific context – judicial decisions surrounding women's rights to customary land.

In the Vanuatu case of *James Abel v. Kalram Timothy and Bersi Timothy*[26] the magistrate's court ordered transfer of this case to the island court where chiefs knowledgeable in custom would sit and decide the matter.

In this case, the plaintiff claimed ownership of a coconut plantation through his mother. The defendant brothers claimed that there was no surviving patrilineal bloodline and

23. P Sack and E Minchin (eds.) (1986) See Preface, *Land Rights of Pacific Women*. Suva, Fiji: Institute of Pacific Studies, University of the South Pacific.
24. Ibid, p.79, D Kenneth and H Silas 'Vanuatu, Traditional Diversity and Modern Uniformity'.
25. A Maude (1977) 'Tonga Equality Overtaking Privilege' in R Crocombe (ed.) *Land Tenure in the Pacific,* p.113. Melbourne, New York, London: Oxford University Press.
26. Malekula Island Court, Civil Case 34, 2005.

therefore the land must pass to the fire tribe. The rule of custom is that the matrilineal system will only triumph on the ground that it is proven before the court that there is no surviving male issue of the bloodline. The court decided on the evidence to adjust the custom ownership of the coconut plantation and that the matrilineal system can be followed in cases where there is no surviving male issue.

In the Papua New Guinea case of *Hila v. Eno,*[27] the local land court had to decide whether under Motuan custom, the male or female line can succeed to customary land in a patrilineal society. Under custom, ownership land vests in the eldest son through the father and not through a daughter, with the exception where no male child is born to the man, then the first-born female child can inherit the right of succession, ownership and control of the land from her father. In this case, the court awarded the ownership and control of customary land to the next female claimant.

The Supreme Court in Vanuatu went further in the case of *Noel v. Toto,*[28] where there was a conflict between constitutional provisions and customary law with respect to land. In this case, the women of a clan sought a share of the income from the land but Toto claimed that it was customary practice to recognise men's rights to land but not those of women. The Supreme Court held:

> '… customary practice was discriminatory and that female members of a family had equal rights over land as men … customary practice of differentiating between male and female was inconsistent with the constitution of Vanuatu which guaranteed equal rights for women [and] ... that the sisters and female descendants of Toto's family were all entitled equally with the male members to the land and a share in the income.'

Laws of succession

Succession practices in this region have traditionally been based on custom, but today there is a mixture of customary rules, introduced statute law and applicable UK legislation. There is no distinctive South Pacific model of succession as statutes and the customary principles of succession are so diverse.[29]

With respect to testate succession, many countries have enacted their own legislation.

The rights to the inheritance of customary land are still determined by custom but other aspects of the deceased estate are determined by specific laws.

Family provisions are one of the most contested areas of succession law. In most acts, there are family provision schemes which accommodate challenges to the provisions

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27. PGLLC 3, DC554, 29 December 2006.
28. 1995 Supreme Court, Luganville, Santo. Case 18, 1994. See *Pacific Human Rights Digest*, p.27. RRRT.
29. RA Hughes (1999) *Succession Law in the South Pacific*, p.18. Suva, Fiji: Department of International Justice and Applied Legal Studies, University of the South Pacific.

under the will.[30] In such situations, a court will not issue a document of authority unless satisfactory provision has been made for the deceased's spouse and children. Such provisions have been aimed to eliminate discrimination against the surviving spouse, but the family schemes may not be altogether open as to the class of those who might apply and the types of orders sought. There are also some distinctive features.

In **Solomon Islands**, the court may refuse an application under the Family Scheme of the Wills, Probate and Administration Act 1987, on the basis of character and conduct of the applicant.[31]

Under **Fiji's** Inheritance (Family Provision) Act Cap.61 daughters, sons and a parent could apply for family provisions only if they are incapable of maintaining themselves due to mental or physical disabilities. Married daughters are precluded, but it appears that daughters who were previously married but have become single may apply provided they fit the above criteria.

In **Samoa**, the Administration Act 1975 makes provision for family protection whereby relief out of a deceased's estate will be granted if the court is satisfied that the claimants' are insufficiently provided for (s.47).

The **Kiribati**, Gilbert and Phoenix Islands Land Code Cap.61 has well-defined schemes of succession which differ from island to island. The next of kin can be disinherited if he or she has neglected the property owner.

The **Vanuatu** Will's Act Cap.55 limits those who may benefit from the deceased's estate to spouse and children younger than 18 years, provided that adequate provision has not been made for their maintenance.

For **intestate succession,** some countries such as Tonga, Tuvalu, Tokelau and Vanuatu have no local statutory provisions but the constitutional arrangements are that UK law is in principle applicable[32] if deemed appropriate to the local circumstances.

The principles of succession under customary law are integral to the existence of the local indigenous communities and kinship relationships, thus practices in this region are underpinned by the rules of patrilineal and matrilineal inheritance and are so diverse that only examples can be highlighted. Women suffer injustices when their husbands die intestate and where succession is based on patrilineal descent (e.g. in Tuvalu)[33] and on the rules of primogeniture.

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30. For example, Fiji's Inheritance (Family Provision) Act Cap.61; Vanuatu Wills Act Cap.55.
31. Section 93.
32. R A Hughes (1999) *Succession Law in the South Pacific*, p.17. Suva, Fiji: Department of International Justice and Applied Legal Studies, University of the South Pacific.
33. Ibid p.27.

In the Solomon Islands case of *Tanavalu v. Tanavulu and Solomon Islands National Provident Fund*,[34] the pension fund was paid to the father of the deceased, rather than the widow. The court ruled that this was in accordance with the customary rule of inheritance by patrilineal succession. The widow could not object that the custom was discriminatory as the constitution specifically exempts custom law from the general prohibition on discriminatory laws.

Not only is the widow denied benefits of the pension fund, her welfare and wellbeing would be in serious jeopardy. The contribution she has made in the lifetime of the marriage has no value in the property distribution scheme. The widow's impoverishment is solely due to her gender.

Women who suffer in both urban and rural areas have little knowledge and few resources to pursue their rights to the deceased estate. Given the restrictions placed on women in both law and customary law, reforms that are not discriminatory to women are needed to settle the basis upon which property and assets of the deceased are effectively and efficiently distributed to those who are deemed entitled.

MARRIED WOMEN'S PROPERTY AT THE DISSOLUTION OF MARRIAGE

Customary Rules

The customary rules involved in the distribution of matrimonial property upon divorce are diverse. In all jurisdictions, customary land cannot be regarded as marital property as it is communally owned. Such land is protected from being sold or alienated by both customary and statute law.

The gifting of land during marriage is well established in Kiribati under the Native Land's Act Cap.61 and the Gilbert and Phoenix Islands Land Code. With the approval of the court, gifts of 'one land and one pit' from husband to wife and vice versa during marriage do not revert to the donors.[35]

Family homes in villages *'provide legitimacy for one's place in the locality, [and] relationship to the village ... and are regarded as family possession.*'[36] Today the village family home presents more complex issues at the dissolution of marriage. There is a trend for family homes to be built, renovated and maintained by financial contributions from both husbands and wives. This signals the importance, particularly for a wife, to retain evidence in order to prove separate contributions made at the dissolution of marriage in order to obtain her fair share or be compensated for loss.

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34. 1998 SBHC 4, affirmed 1998 SBCA 8.

35. s.17(2)(3).

36. A Ravuvu (1983) *Vaka I Taukei, The Fijian Way of Life*, p.14. Suva, Fiji: Department of International Justice and Applied Legal Studies, University of the South Pacific.

The only property that could be termed as 'matrimonial property' and divisible under customary law is that personally owned by the parties such as mats, household furniture, utensils and marriage gifts. The separate property that might be claimed by a wife such as personal jewellery must be specifically determined. Under patrilineal rules of inheritance, a wife is dependent upon her husband and her assets and labour are subject to his control. Property disputes and settlement negotiations are family matters. A wife could leave with little marital assets or none at all.

In the Solomon Islands case of *Sasango v. Beliga*,[37] evidence was given that under Malaita custom, upon payment of the bride price, a wife had no right to children and to property of her own. The court ordered that there must be formal proof of custom and decided to award the disputed property to the wife, not on any discernible principle of property distribution under customary law but on the basis that the wife was a credible witness.

Statutes

Matrimonial property under local introduced law is the least developed. The division and distribution of matrimonial property is increasingly complex with more women in the workforce and with the acquisition of material wealth.

In response, a number of countries have enacted specific laws on matrimonial property:

- **Cook Islands:** The Cook Islands Matrimonial Property Act 1991–1992 gives recognition to the contributions made by the husband and wife to the marriage partnership and to provide for a just division of matrimonial property between spouses when their marriage ends. The New Zealand Matrimonial Property Act 1976 is also part of the Law of Cook Islands. Native land is exempt from the application of this act.
- **Fiji:** the Family Law Act 2003 makes extensive provision for the distribution of matrimonial property, including homemaker contributions, and gives the court extensive powers to alter interests in property (s.161(1)) and in all circumstances, orders made must be just and equitable (s.161(6)). The presumption of equal contribution is applied which may be rebutted on the facts of the case and the repugnancy principle (s.162(2)).
- **Tuvalu:** The Matrimonial Proceedings Act (Cap.21) gives the court powers to adjust the property rights of the parties to a marriage as considered necessary and desirable and any orders made to divide, transfer or vest property of the parties, 'shall not be unreasonable or inconsistent with any other law or any applicable Tuvaluan custom' (s.13). In order to limit as far as possible the continuing bad effects of the breakdown of a marriage, the court shall use its best endeavours to

37. 1987 SILR 91.

finally conclude all matters to which this section relates, before the divorce is granted, and as far as practicable by consent.

In some countries where there are no domestic provisions relating to matrimonial property, UK legislation which has not been repealed forms part of the law of the country and will apply. Some examples are:

- **Tonga**: The Divorce Act of Tonga (Cap.29) does not provide for matrimonial property. However under the Matrimonial Causes Act 1973 (UK legislation applying to Tonga), Part II provides for property settlement, adjustment and transfer orders for the parties at the termination of marriage. In making orders, the court takes into account income and future earnings, financial needs, standards of living, age, physical or mental disability and contributions made by each party to the marriage. The Matrimonial Homes Act 1967 (UK Law applying to Tonga) protects a spouse who has no legal or beneficial interest in the matrimonial home against eviction or being excluded from the matrimonial home except with the leave of the court. This is a right of occupation but confers no proprietary interest.
- **Vanuatu**: The Vanuatu Matrimonial Causes Act Cap.192 does not provide for matrimonial property. The Matrimonial Causes Act 1973 and the Matrimonial Homes and Property Act 1973 (UK legislation applying to Vanuatu) empowers the court to settle, adjust and transfer property as considered just.

Traditional roles and fault in property distribution

Under statute law, most Pacific countries still retain the fault grounds for divorce with the exception of Fiji, where marital fault is not a factor in obtaining a divorce on the irretrievable breakdown of marriage. The complete breakdown of marriage as the sole ground for divorce is found in Nauru, Tuvalu and Tonga,[38] but marital fault is still to be proved before a divorce can be granted.

The traditional roles of husbands and wives tend to persist in divorce and the distribution of marital property. Central to the fault-based divorce rules is marital misconduct, which still plays a role in determining spousal support, child custody and distribution of marital property. For example in the Fiji case of *Philp v. Tupounia*[39] the court took into account the adultery of the wife in making a division of property, which under the new Fiji Family Law Act 2003 would not be a factor.

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38. Cook Islands Matrimonial Proceedings Act 1993 (NZ) applying to Cook Islands; Fiji Family Law Act 2003 s.30; Nauru Matrimonial Causes Act 1973 s.3; Tonga, under the Divorce Act Cap.29, s.3 provides for fault grounds but under the Matrimonial Causes Act 1973 (Laws of the United Kingdom applying to Tonga) s.1 provides for the irretrievable breakdown of marriage as the only ground for divorce.
39. Civil Action 92, 1977.

The issue of fault in the property distribution schemes is complex, particularly where homemaker responsibilities, disproportionately borne by women, are not taken into account. It can be argued that using fault factors in the distribution of marital property produces unfair results, while supporters of the fault factors claim that they serve a legitimate purpose as a spouse should be held accountable and should not be rewarded for marital misconduct.

The division of marital property under the Family Law Act of Fiji is based on financial needs of the parties rather than fault. Homemaker responsibilities, income, property and financial resources are taken into account to determine equitable distribution. Where the law does not provide for the presumption of equal contribution, the courts have applied this principle as found in the Solomon Islands case of *Chow v. Chow*.[40]

In Vanuatu, the Matrimonial Causes Act (Cap.192) contains no power to distribute property but the Court of Appeal's ruling in *Joli v. Joli*[41] has important implications in solving the division of matrimonial property, governed by customary law, through the use of the Matrimonial Causes Act 1973 (UK). Farran[42] states that the Court of Appeal's use of the UK act to fill the lacunae in the Vanuatu Matrimonial Causes Act '… opens the possibility that a number of parts or sections of UK legislation (which has not been repealed) might be relied on to supplement or fill gaps in existing Vanuatu legislation…'

DOMESTIC VIOLENCE

Violence against women

The law has been slow to move to protect women from domestic violence. Domestic violence is a breach of women's human rights and an affront to their dignity.

Tireless efforts have seen women victims now increasingly turning to the courts for protection. The subordinate role of women in traditional societies and the accepted practice of wife-beating as a form of discipline is common. Women have traditionally been reluctant to come forward due to a lack of financial resources, knowledge and access to legal counsel and courts combined with shame, fear, intimidation and family collusion with abusers – and often a belief that remaining with an abusive husband is in the children's best interests.

In examining the trends in cases with domestic violence issues, several themes emerge, some indicating promising practices whilst others remain problematic.

First, domestic violence case management by law enforcement agencies has been a high priority for action over some years. The development of 'No Drop Policies' was

40. [1991] SBHC 34; High Court Civil Case 248 of 1989.

41. [2003] VUCA 27; Civil Appeal Case 11 of 2003 (7 November 2003).

42. S Farran (2003) 'The Joli Way to Solving Legal Problems: A New Vanuatu Approach?' *Journal of South Pacific Law*, volume 7, issue 2.

a first major step for the police force to take domestic violence cases seriously. Training provided by various women's groups and regional agencies such as those under the Pacific Prevention of Domestic Violence Programmes (PPDVP), implemented by the New Zealand Police with support from New Zealand Aid and the Pacific Chiefs of Police, have gone a long way to improving police responses to domestic violence.

Second, men's involvement in anti-violence efforts, with encouragement from women's groups, is providing leadership to improving responses to victims of violence. Many more are needed.

Third, training of judicial officers and the legal fraternity by the Regional Rights Resource Team (RRRT), the Pacific Judicial Development Programme (PJDP) and the understanding that their efficacy is directly linked to the victim's ability to stay safe. In 2008, under the PJDP, the training of magistrates in Kiribati piloted safety planning, risk assessments, action plans for victims and making appropriate referrals to counselling services to become an integral part of the courts' intervention practices in domestic violence cases.

Fourth, the issue of domestic violence under national laws remains problematic. There is wide concurrence that national level law reforms are needed as far too many victims of violence are left unprotected and inadequately served. The criminal laws on assault cover all types of assault, such as aggravated assault and assault occasioning grievous bodily harm, but domestic assault is not a separate category of offence under this head of the law.

Assault on a person is a crime and the customary practice of wife-beating is not a defence. Protection orders[43] and good behaviour bonds are often too difficult to enforce and are insufficient to deal with the specific issues of violence.

Whilst courts in the Pacific are empowered to hear cases of assault, specific legislation on domestic violence remains a priority. 'Fiji and Vanuatu have specifically targeted domestic violence laws. Papua New Guinea and Marshall Islands have passed legislation dealing with sexual violence.'[44] Cook Islands enacted legislation in 1994 to provide for separation, occupation and non-molestation orders.

Enacting specific laws for domestic violence is one measure to protect victims. A variety of measures are needed to eliminate domestic violence as some interventions have limited ability to make a difference to the lives of women victims, particularly in serious dysfunctional cases. Courts would need to determine the set of responses that would keep victims safe, as sanctions against abusers in small close-knit communities are difficult to enforce. Victims and their children need a variety of community services, which in some communities are limited or do not exist at all.

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43. See Cook Islands Amendment Act 1994 which makes provision for separation and non-molestation orders.

44. I Jalal (23 March 2009) *Fighting Violence Against Women in the Peaceful Pacific Islands* UN Radio. See http://www.unmultimedia.org/radio/english/detail/71648.html

INTERNATIONAL HUMAN RIGHTS CONVENTIONS

The ratification of international human rights treaties has significant implications for the administration of justice.

All Pacific countries are parties to:

- The Convention on the Rights of the Child (CRC), and
- With the exception of Nauru and Tonga, all countries are parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),
- Nauru, Papua New Guinea, Samoa and Vanuatu are parties to the International Covenant on Civil and Political Rights (ICCPR), and
- Papua New Guinea and Solomon Islands are parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR).

These core conventions embed gender equality, human rights and human dignity.

The Bill of Rights in Pacific constitutions is strengthened by international human rights treaties mandating protection against gender discrimination. Treaties will however not be recognised by the courts unless given domestic effect by enabling legislation.

A device available under the 1997 Fiji constitution contained an effective model to overcome the difficulties posed by the lack of enabling domestic legislation and is found in section 43(2) which provides:

> 'In interpreting the provisions of this chapter (i.e. the Bill of Rights) the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regards to public international law applicable to the protection of the rights set out in this Chapter'.

The domestication of international human rights treaties has been a slow process in the Pacific and in some cases, the courts have taken the view that if ratified treaties have not been incorporated into domestic law, no account will be taken of them. This is the case in Cook Islands, Kiribati and Tuvalu.

In the Cook Islands case of *R v. Smith,* the High Court held that the ICCPR Convention does not apply because the covenant had not been enacted as part of the law of the Cook Islands and had no legislative effect.

In the Kiribati Case of the *Republic of Kiribati v. Iaokiri*[45] the High Court held that the CRC did not form part of the laws of Kiribati, unless it was given the force of law there.

In the Tuvalu case of *Tepulolo v. Pou and Attorney General,* the court was of the view that although Tuvalu had ratified the CRC and CEDAW they were not made part of

45. [2004] KIHC 142; Criminal Case 25 of 2004.

domestic law and no account could be taken of them in the awarding of the ex-nuptial child to the father.

The three above cases are indicative of the dualist approach in countries which have been influenced by the UK-style legal system. Ratified treaties do not automatically apply unless appropriate national legislation has been passed to give the treaty the force of law domestically.[46]

However, in Samoa, Chief Justice Sapolu applied an international convention to which Samoa was not a party in the child abduction case of *Wagner v. Radke*[47] and held:

> 'Even though Samoa is not a signatory or party to the Hague Convention of Civil Aspects of International Child Abduction of 1980, the court must have regard to the principles and philosophy of the convention in applying common law principles to the case ... and ... as a tool to guide and aid the court, it could use the Conventions'.

Resorting to international human rights conventions as a tool to guide the courts has been used in other jurisdictions, particularly to strike down gender discrimination, even though the convention has not been made part of domestic law. States are obligated to respect and protect human rights and governments are required to put in place domestic measures and legislation compatible with ratified treaty obligations. The effect of the failure to make the convention part of domestic law is that women's rights do not improve.

The High Court of Australia, in the *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) considered whether ratification of the CRC by the Australian government meant that the executive arm of government had to abide by the principle of the convention. The court held that:

> '... ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention'.

This was the position of the High Court of Australia, despite the fact that enabling legislation had not been passed to incorporate the provisions of the CRC.

'There is a positive duty which the High Court held existed as compared with the insistence by courts in some Pacific jurisdictions for the passing of domestic legislation to give effect to ratification.'[48]

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46. School of Law, University of the South Pacific.
47. [1997] WSSC 2; Supreme Court of Samoa (Misc.) 20701 1997.
48. P I Jalal and J Madraiwiwi (eds.) pp.88-90, *Pacific Human Rights Law Digest* volume 1; RRRT.

The Chief Justice of New Zealand, The Rt. Hon. Dame Sian Elias, commented in her paper 'Vindicating the Rights of Women'[49] that:

> '… the conditions that promote the observance of human rights within the community lie substantially outside the courts. The law has a part to play – but it is only a part … we should not however feel discouraged or impatient about the progress in implementing the human rights of women. Nor should we feel that cultural and social diversity blocks their achievement domestically. We are part of the process that may be lengthy. Domestic application of international law standards entails translation and care'.

The question is whether women in the Pacific are able to rely on international human rights conventions and the notion of human dignity to bring about gender equality? The short answer is yes. Ratification of human rights conventions is a major step and signals a promise that women in our diverse communities may enjoy the guarantees of equality, but implementing domestic legislation is necessary to meet this goal.

Conclusion

There is no question that legal pluralism in Pacific countries poses many challenges, but some themes emerge:

- Where domestic law has made inadequate provisions on a particular subject matter, solutions for a fair outcome have been found in received law, as in the Vanuatu case of *Joli v. Joli*.
- The courts in the region have made inroads into correcting discrimination against women in situations where customary law only benefits those of patrilineal descent to land ownership. The trend in court judgments is that women are able to claim land rights in the event the male claimant line is exhausted. Women are able to own land (Kiribati, Nauru, Niue, Cook Islands), freehold and leasehold land in their own right (Fiji) and obtain shares in land (Tuvalu).
- The courts in the Pacific have had many years of interpreting and addressing the conflicts between the constitution, statutes and customary law and they are influential in trying to correct discriminatory practices. Effort is needed to consolidate the principles in court decisions that address violation of women's rights to equality and to build jurisprudence around women's human rights and dignity.
- The ascertainment, harmonisation and codification of customary law continue to be a challenge.
- One of the strongest features that have emerged in the Pacific is the lack of legislative attention paid to the trends in judicial decisions and court responses in

49. S Elias (26 July 2005) Address given at the South Pacific Judicial Conference, Port Vila, Vanuatu.

cases where litigants try to use ratified international human rights treaties to gain equal rights. The judicial responses, in noting the failure to implement enabling legislation, are all too evident. The effect of this lack of enabling legislation continues to prolong the long-term discriminatory laws and practices that disadvantage women.

A nation's reputation rests on national standards and benchmarks in all sectors. Human resource development benchmarks can only be achieved on the foundations of human rights protection, achieving equality between men and women, respect for diversity and respect for women's dignity.

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