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Gender equity in justice systems of the Pacific Island Countries and Territories

**Asia-Pacific Human Development
Report Background Papers Series
2010/14**



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**Gender equity in justice systems of the Pacific
Island Countries and Territories
*Implications for human development***

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Abstract

An orchestration of multiple forces determines the overall status of women within the justice system of the Pacific Island countries and territories. The law, whether formal or customary, is neither neutral nor gender blind: nor is it legislated or interpreted in a vacuum without reference to the political, economic, religious, social and cultural contexts. The law, both *de jure* and *de facto*, written and unwritten, by act or omission (failure to act) and by interpretation, significantly affects the capacity of women to harness the full potential of the benefits of development. This paper examines the significant gaps between the law *de jure* and women's experiences of the law on the ground, *de facto* reality. Changing law should not be an end in itself – formal legislative equality by itself is meaningless. Law can enhance human development if it is used positively to expand opportunities for women's greater participation in economic activities, in the political sphere and to alter the outcome of women's overall participation in development.

Key words: human development, gender equality, legal systems, Pacific

The views expressed in this publication are those of the author(s) and do not necessarily represent those of the United Nations, including UNDP, or the UN Member States.

*This paper was commissioned by the Human Development Report Unit as a technical background paper to inform the Asia-Pacific Human Development Report, “**Power, Voice and Rights**”. The data may differ from that finally presented in Asia-Pacific Human Development Report. Readers may contact the author directly for any clarifications, queries on data, inferences, and conclusions or to engage in discussion. This paper has not been copyedited.*

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**Gender equity in justice systems of the Pacific
Island Countries and Territories**
Implications for human development

Executive summary

Gender justice is about achieving substantive equality and equity for women as a group. This means not only addressing formal legislative equality between men and women, but also historical and systemic disadvantage, and the additional responsibilities of paid and unpaid work, pregnancy, lactation, child care and so on. Gender justice recognises also that women are not a homogenous group. They have multiple identities, which also determine their status within society. Multiple religious, economic, political and social forces also operate in concert, often to their disadvantage. The law is one of these forces. Gender justice recognises also the need for temporary special measures, in favour of women, to accelerate *de facto* equality for women.

A key question addressed throughout this paper has been: what impact does the law, written and unwritten, conventional and customary, have on Pacific Island women, and through them, on the lives of their children and families? The findings have been that the law, *de jure* and *de facto*, written and unwritten, by act or omission, and by interpretation, affects the capacity of women to harness the full potential of the benefits of development. It influences and shapes every aspect of their human development – their human security, their entry into the marketplace, their access to land, their capacity to obtain access to funds, their ability to gain political power, and their rights to child custody, financial support and property after separation or divorce. The link between the law and gender justice is therefore both causal and mutually reinforcing. Both conventional and customary legal systems are important for gender justice, and positively shaping and influencing both systems is vital.

In responding to the questions, attention has been paid to the concept of discrimination, which means treating people in different ways, based on their sex, race, religion, political opinions, creed, sexual preference and so on. There are different models of equality, which affect the ways of addressing gender injustice. The "strict equality" approach says that women are the same as men and should be treated the same. According to the "biological differences" approach, women should be treated the same as men except where there must be allowance for biological differences. On the other hand the "everything different" approach says that women are quite different from men and should be given special treatment. Finally, the "anti-subordination" approach holds that women have been treated as inferior to men, and must have special treatment to become equal to men.

The legislature and courts have not adopted a consistent approach, but an *ad hoc* one, based on a mixture of strict formal legal equality and equity, the various models of equality and protectionism. Protectionism, appears to have been the most consistent theme in new legislation, whilst courts have approached the "problem" of gender equality within a formal legal equality paradigm. When assessing what constitutes discrimination, courts generally use male behaviour as the standard; they do not question the ways in which laws or cultures or social traditions have produced and maintained discrimination against women, or the extent to which our institutions are male-defined.

The approach preferred by women's groups in the Pacific region is generally that of substantive equality adopted by the Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which identifies discrimination in terms of historical disadvantage. The disadvantage test is very similar to the anti-subordination approach, and acknowledges that discrimination against women is socially and economically based.

The status of women in the constitution and customary law generally obstructs their access to education, employment and capacity to be heard in decision making, thus hindering their overall capacity to participate in economic activities. The tensions between customary law and mainstream constitutional protections continue to be a source of conflict which manifest themselves as conflicts between the rights of women to equality, versus what is perceived by many to be their traditional and 'proper' status. A legal policy option for mitigating the harmful effects of the customary system on women is to amend those Pacific Island Country or Territory (PICT) constitutions which recognise custom law, so that they contain a specific provision stating that where there is a conflict between women's rights to equality and custom, the former should prevail.

CEDAW is the second most ratified international human rights treaty in the Pacific. The most significant added value for gender justice, of ratifying and reporting under the CEDAW treaty body mechanism, is that it provides an additional layer of accountability. Appearing before the CEDAW Committee every four years, and reporting to it, compels countries to "stock take", and then attempt to improve women's gender justice before the next appearance. It is therefore critical that all Pacific Island countries and territories ratify CEDAW and report on it regularly. Tonga, Nauru and Palau have not ratified CEDAW, arguing for example, that in Palau, their women enjoy higher status than men in their matrilineal society, and ratification might mean a "leveling down of their status".¹ Tonga argues that its land laws cannot be amended to give women equal rights, as land is already a scarce resource. Convincing arguments are needed to demonstrate that treaty ratification can provide new and powerful opportunities to link and address both processes in order to bring them closer to each other.²

Fiji, PNG and Vanuatu have had the most success in passing new legislation, in compliance with CEDAW. In terms of approximate formal legislative compliance with CEDAW, Fiji has the highest compliance rate at 44 per cent ; Vanuatu, 35 per cent; Samoa, 35 per cent; Republic of Marshall Islands, 34 per cent; Papua New Guinea, 24 per cent; Cook Islands 24 per cent; Federated States of Micronesia, 23 per cent federal compliance (State compliance is higher – Yap, 25 per cent; Kosrae, 29 per cent; Chuuk, 29 per cent; and Pohnpei, 31 per cent); Kiribati 23 per cent; Solomon Island 20 per cent; and Tuvalu has the lowest at 18 per cent. No PICT is more than 50 per cent compliant. Fiji and Vanuatu improved their overall compliance, from being amongst the lowest ranked, to amongst the highest, with the passing of the Family Law Act 2003 in Fiji; and the Family Protection Act 2008 in Vanuatu. Until 2003, Samoa was ranked the highest. Samoa has made no significant changes in legislation, despite being the first PICT to ratify CEDAW.

Although formal legislative compliance is an absolutely necessary first step, it is also necessary to develop a set of indicators to measure *de facto* reality, that is, to adequately and

¹ In conversations with the author at the SPC Workshop for CEDAW Non-ratified countries, 5-7 November 2008, Nukualofa. Tonga.

² Jalal, 2006.

accurately reflect the situation on the ground. The real picture of CEDAW compliance can only be measured by the collection of case law, numerical data/statistics and other forms of empirical evidence to assess real compliance with CEDAW.³

The opportunities provided by the Universal Periodic Review (UPR) process, a mandatory reporting mechanism for all UN members before the UN Human Rights Council, is a further possibility for women to hold their countries accountable for gender injustice, before the eyes of the world. Both Tonga and Tuvalu appeared in 2008, and during the Interactive Dialogue made promises about improving women's rights. These promises provide an important entry point for women's groups to mobilise locally to effect change.

No Pacific Island constitution grants women full equality in substantive terms. If this is not protected specifically in the constitution itself, it reduces their ability to challenge inequality on constitutional grounds. The anti-discrimination provisions of the Bill of Rights in most PICTs appear to cover the public sector only. Amendments are needed to specifically cover the violations of human rights committed by the private sector. It is also critical that all PICTs have national human rights commissions and/or a regional human rights commission for the protection of rights outside the court system.

The Pacific region has the lowest percentage of women in national legislatures. Of the eight countries in the world that have no female members in their national legislatures, four are in the Pacific. Access to political power is critical to make a difference in other women's lives, but women make up only 3.7 per cent of PICT legislatures.⁴ No PICT has national legislation for specific electoral quotas or reserved seats for women in the national legislature. Quotas provide a fast-track method to win seats, so reserved seats in legislation, are a necessary and critical policy and legal tool. Policy by itself is inadequate to effect change.

There is no formalised discrimination in the criminal legislation, and the language is generally gender-neutral. For example, there are equal rules of evidence. The lack of gender equality is demonstrated in the interpretation of legislation, common law rules and practices. Violence against women is both a cause and consequence of gender inequality.⁵ It is a serious and endemic problem in the region and cuts across all social and economic classes. For the most part, the laws are ineffective in securing justice for women. Most sexual assault and domestic violence laws are based on myths about women's sexuality and roles, and no PICT has specifically legislated against traditional forgiveness ceremonies having any influence on criminal proceedings. However, Vanuatu's brand new Family Protection Act 2008 states that the payment of *bride price* has no bearing on guilt or punishment in domestic violence cases. Comprehensive stand-alone legislative reforms combating violence against women are needed in all countries.

Despite the complexity and diversity of customary land tenure systems in the Pacific, women usually lack independent rights to land and have less input than men into decisions about land. In all countries, except Tonga, the land legislation does not directly discriminate against women. Indigenous women have, in theory, as much right to control and manage custom land, as men. Discrimination against women in terms of land ownership or access to the use

³ The Secretariat of the Pacific Community (SPC) has embarked on such a project.

⁴ Based on figures from the Inter-Parliamentary Union (IPU) "Women in Parliaments" website (<http://www.ipu.org/wmn-e/world.htm>) at the time of the commissioning of this paper

⁵ WHO, 2005.

of land is indirect. The interpretation of customary law governing the control and management of land gives power over land mainly to men. Tonga is the only country in the region in which the legislation explicitly discriminates against women.

A small number of PICTs have matrilineal systems of land ownership, including across the Western and Northern parts of the Pacific, in which women have more access to, and control over land. Most of Micronesia is matrilineal, and matrilineal societies exist in both Solomon Islands and Vanuatu. However, women's roles in matrilineal societies are increasingly constrained. The power that women exercise over land generally varies across matrilineal areas. Although in some areas, matriliney is tantamount to gender equality and equal political power, in other areas, women have much less power and less say in decision making.⁶ The post-conflict constitutional making process in the Solomon Islands has offered women the rare opportunity to influence their land rights in legislation. They have proposed new language to secure their land rights which will, if accepted: recognise both patrilineal and matrilineal customs; provide constitutional guarantees that none of the custom laws, traditions, systems and institutions shall be applied to unfairly discriminate against women; and ensure that women are entitled to participate equitably in the planning and decision making process, through participation in community land management committees.

The economic and social costs of gender discrimination in the employment, health and education sectors are significant. It impedes women's participation in employment, reduces their productivity, diverts resources and has an overall impact on their empowerment. Legal or other impediments to female employment raise labour costs and lower international competitiveness, preventing women from entering the market and earning decent wages. The region has very little legislative protection for all workers in general, let alone women. The existing legislation is largely inadequate and not properly enforced.

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

A combination of strategies is needed to change outdated legislation, shape discriminatory interpretations of legislation and ensure commitment to the effective implementation of new laws. These include mobilising the women's movement; mass educating at all levels; informing; lobbying and campaigning with all stakeholders about the existing law and the need for law reform; altering the substance of discriminatory legislation through working with members of legislatures; training judicial officials, lawyers and court officials on the new law and in gender equality principles which affect the functioning of law; ensuring that sufficient financial, human and technical resources are allocated to effectively implement

⁶ Stege, Maetala, Naupa, & Simo, (ed) Huffer, 2008, viii.

new laws; and finally, closely monitoring the new law to assess whether it fulfills its promise. Good law is only as good as the political will behind it.

There is an unequivocal link between the law and human development, particularly women's human development. The combined impact of the laws, written and unwritten, formal and customary, case law, and legal practices and rules have a significant impact on Pacific Island women, and through them, on the lives of their children and families. Their legal status in formal and customary law in the Pacific in every area – constitutional and politico-legal, violence against women, education and employment, family law and land rights – has a combined disproportionate influence on human development. Changed, improved, enforceable laws combined with adequate resources to properly resource them; and gender and human rights training for law agency officials, can make an overall, critical difference to the lives of women, and therefore to human development.

Acknowledgements

The writer acknowledges the support of the Pacific Regional Rights Resource Team (RRRT/SPC); RRRT's government and non-governmental partners in the Pacific region; and Hannah Harborow for her editing.

Acronyms

ADB	Asian Development Bank
BCLR	Botswana Law Reports
BOR	Bill of rights
CAP	Chapter of legislation
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CLI	CEDAW Legislative Indicators
CRC	Convention on the Rights of the Child
CRMW	Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CSO	Civil society organisation
FJHC	Fiji High Court Reports
FSM	Federated States of Micronesia
HIV	Human immunodeficiency virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IPU	International Parliamentary Union
KANGO	Kiribati Associations of Non-Government Organisations
K-WAN	Kiribati Women's Activists Network
LGBTFF	Lesbian, Gay, Bisexual, Transgender, Fa'afafine and Fakeleiti
LRA	Land Registration Authority
LRC	Law Reports Kiribati
NGO	Non governmental organisation
NLTB	Native Land Trust Board
PIC	Pacific Island country
PICTs	Pacific Island countries and territories
PNG	Papua New Guinea
PNGLR	Papua New Guinea Law Reports

PR	Proportional representation
RMI	Republic of the Marshall Islands
RRRT	Pacific Regional Rights Resource Team
SBCA	Solomon Island Court of Appeal Reports
SBHC	Solomon Island High Court Reports
SILR	Solomon Islands Law Reports
SPC	Secretariat of the Pacific Community
UN DAW	United Nations Division for the Advancement of Women
UNDP	United Nations Development Programme
UNIFEM	United Nations Development Fund for Women
VAW	Violence against women
VLR	Vanuatu Law Reports
VNCW	Vanuatu National Council of Women
VUSC	Vanuatu Supreme Court Reports
VWC	Vanuatu Women's Centre
WUTMI	Women United Together Marshall Islands

Introduction

There are significant challenges in the Pacific Islands to the achievement of gender justice and empowerment of women. The law, both *de jure* and *de facto*, written and unwritten, by act or omission (failure to act) and by interpretation, significantly affects the capacity of women to harness the full potential of the benefits of development. It influences and shapes every aspect of their human development. This can include: their human (physical and psychological) security; protection from violence; their entry into the marketplace, and thereafter, their upward mobility within it; their access to land and therefore their capacity to obtain collateral for funds; their ability to gain political power and access and influence the highest levels of community; regional and national leadership; and their ability to gain access to funds and property after separation or divorce (see Tables 1 & 2 for additional selected human development indicators for women in PICTS). In these ways the law is a critical determinant of women's economic empowerment and their human development. The link between the law and gender justice is therefore both causal and mutually reinforcing.

An orchestration of multiple forces determines the overall status of women within the justice system. The law, whether conventional or customary, is neither neutral nor gender blind: nor is it legislated nor interpreted in a vacuum without reference to the political, economic, religious, social and cultural contexts. The law is the handmaiden of those who enjoy political and social control in any given society. In this role, the law functions in precisely the same way, whether at a macro level in the national legislatures, courts or justice agencies, or in the *kustom*, village, community or informal courts, *fonos*, *maneabas* and *nakamals* at the micro level of justice systems. The *fono* (Samoa), *maneaba* (Kiribati) and *nakamal* (Vanuatu) are formal and informal semi-traditional village councils, adjudicated by (mainly) male chiefs or elders, which deal primarily with village matters and disputes. Both conventional and traditional legal systems are important for gender justice, and positively shaping and influencing both systems is critical.

If gender discrimination is a key impediment to women's voices being heard, their lack of power, and their lack of participation in economic activities in the region, what role can the law play in removing that impediment and altering the outcome of women's participation?

Even where the statutes secure formal legal equality, the reality may be quite different. There are significant gaps between the law *de jure*, and women's experiences of the law, *de facto* reality. Substantive equality is required to ensure both *de jure* and *de facto* equality. This type of equality recognises systemic and historic discrimination against women, the necessity for special temporary and affirmative action measures for women and is embodied in the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Gender stereotypes, beginning in the home and replicated in technical and professional fields, continue to impede women's access to educational and training opportunities.

Notwithstanding some progress, women remain, to a great extent, underrepresented in decision-making bodies and high-level positions, in and outside government. There is inadequate access by women to both general and reproductive health care in a number of Pacific Island Countries and Territories (PICTs). Violence against women is widespread throughout the region. Other grave emerging issues with the potential to significantly impact the lives of Pacific peoples, and women in particular, include HIV/AIDS, globalisation and

trade liberalisation, labour migration and poverty.⁷ Women are as much affected by their economic status as they are by their gender. Although poor men also experience poverty, women constitute greater numbers of the poor and additionally suffer further multiples layers of discrimination.

Women's overall status in PICTs bears much similarity to many parts of Asia however sub regional differences persist (see Box 1 and Table 3 for listing of Pacific sub regional country listings).⁸ For the most part, the vast majority of PICTs have failed to meet their obligations under Article 2 of the 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 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.

⁷ SPC 2004, 46.

⁸ 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 author 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).

Table 1. Basic Human Development Indicators for Pacific Island Countries and Territories

	Population size (000s) mid-2008 est	Life expectancy at birth		Infant mortality rate	IMR reference period	Year	Adult literacy		Year	Combined school enrolment rate		Year	GDP per capita (\$US)	Human Development Index (HDI)	Gender Development Index (GDI)
		M	F				M	F		M	F				
Cook Is	15.5	68.0	74.3	11.9	2001-05	2001	99	99	2007	92	98	2007	10,007	0.829	0.820
Fiji Is	839.3	63.8	67.6	18.8	2001-03	1996	95	91	2005	90	94	2006	3,182	0.726	0.717
FSM	110.4	67.4	68.0	37.5	2000	2000	94	92	2006	96	100	2007	2,183	0.723	0.714
Kiribati	97.2	58.9	63.1	52.0	2005	2005	93	92	2005	85	89	2006	656	0.606	0.597
Marshall Is	53.2	63.7	67.4	37.0	1999	1999	97	97	2005	81	80	2007	2,851	0.716	0.707
Nauru	10.1	52.5	58.2	42.3	1997-02	2002	99	99	2007	67	73	2005-6	2,820	0.652	0.643
Niue	1.5	67.0	76.0	7.8	2001-06	2006	100	100	2005	86	89	2003	5,854	0.803	0.795
Palau	20.2	66.8	72.1	20.0	2003-05	2005	98	98	2006	98	91	2007	8,423	0.818	0.809
PNG	6473.9	53.7	54.8	64.0	2000	2000	55	44	2000	37	35	2006	1062	0.439	0.430
Samoa	179.6	70.1	75.5	20.4	2006	2004	99	98	2005	87	92	2007	2,860	0.770	0.761
Solomon Is	517.5	60.6	61.6	66.0	1999	1999	84	67	2005	78	74	2006	1100	0.566	0.557
Tokelau	1.2	na	na	na	Na	2006	98	96	2004	87	102	na	na	na	na
Tonga	102.7	67.3	73.0	19.0	2004-05	2006	97	98	2005	101	105	2004	1,874	0.745	0.736
Tuvalu	9.7	61.7	65.1	35.0	1997-02	2002	99	99	2006	100	105	2002	1,563	0.700	0.691
Vanuatu	233	65.6	69.0	25.0	1999	1999	78	72	2004	75	74	2006	1,908	0.648	0.639

Source: Secretariat of the Pacific Community (SPC), 2008b Pocket Statistical Summary.

Table 2. Human Poverty in the Pacific Islands Countries and Territories								
	% of people expected not to survive to age 40	% of adults who are illiterate	% of female adults who are illiterate	% of people without access to safe water	% of people without access to health services	% of children < 5 yrs who are under-weight	% children not attending primary school	Human Poverty Index
Cook Is	7	1	1	8.5	5	10	0	3.7
Fiji Is	7.7	7	9	7.3	n.a.	15	6	9.0
FSM	9.9	7	8	13	n.a.	15	0	11.1
Kiribati	15.2	8	8	50.9	n.a.	13	3	22.9
Marshall Is	14.3	3	3	15.3	n.a.	13	10	12.4
Nauru	20.4	1	1	18.3	n.a.	6	40	15.0
Niue	na	0	0	0	0	0	7	n/a
Palau	10.3	2	2	16.4	n.a.	0	10	8.2
PNG	23.6	51	56	60.3	n.a.	25	58	41.8
Samoa	4.6	1	2	11.4	n.a.	2	10	5.1
Solomon Is	17.8	23	33	70.2	n.a.	14	6	31.3
Tokelau	na	3	4	1.8	n.a.	-	0	n/a
Tonga	6.3	2	2	1	n.a.	2	5	4.5
Tuvalu	13.1	1	1	7.5	n.a.	2	0	9.2
Vanuatu	11.8	25	28	24.7	n.a.	12	7	19.8

Source. SPC, 2008b Pocket Statistical Summary.

A key question addressed throughout this paper will be: what impact do the laws, written and unwritten, conventional and customary have on Pacific Island women, and through them, on the lives of their children and families? Ultimately, what impact does the combination of legislation, case law, customary law and legal practices and rules have on women's incomes, their health, their levels of education and their future prospects, on who they are and what they might become – on the choices they can exercise? In the final analysis, the larger question is: what does their legal status in formal and customary law mean for human development? What contribution then, can improved laws make to the lives of women, and therefore to human development?⁹

This paper attempts to examine these questions and issues in depth. However, the lack of availability of data has hampered this effort, and any numerical data in the region should be viewed with some caution due to the lack of human, technical and financial resources in statistical offices in most PICT governments. This is a desk review relying primarily on secondary information. There are gaps and weaknesses in the information. The last comprehensive research in the area of gender justice in the Pacific island countries was completed some 10 years ago.¹⁰ The CEDAW Legislative Indicators (CLI) research addresses only formal legislative equality and is limited to ten countries.¹¹ Primary research is critical to fill the gap, cover all PICT countries and legislation, record un-codified customary law, carefully examine case law and how the legislation impacts women on the ground, and update outdated information.

There is a dearth of research available on the rights of poor disadvantaged men and sexual minorities, and is not covered in this paper. This lacuna ought to be addressed.¹² Poor men suffer similar disadvantages to women, especially poor women, but they still have more control and autonomy over their own lives. They also control the lives of the women in their families including inflicting violence on them.

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 the Secretariat of the Pacific Community's (SPC) 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 (PNG), 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: PNG, Solomon Islands, Fiji and Vanuatu.¹³

Pacific Islanders are generally grouped by their cultural, ethnic and linguistic similarities: Melanesian, Polynesian and Micronesian. Although the three groups differ they have many

⁹ UNDP 2006 (a), 1.

¹⁰ Jalal 1998.

¹¹ UNIFEM Pacific 2007 & 2008.

¹² Most of the research on sexual minorities in the Pacific is behavioral or anthropological.

¹³ SPC 2004.

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.¹⁴

Table 3. Pacific Island Countries and Territories showing broad sub-regions

MELANESIA	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
	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.		

Hardship and hunger not only exist, but are increasing in the PICTs, although extreme poverty is generally not present. The information relating to poverty is far from complete and the quality is poor. Despite the deficit of information, available evidence unequivocally demonstrates an increasing incidence of poverty in some PICTs. Critical issues in the region include land tenure, subsistence activities and access to natural resources, as well as issues often grouped under the term ‘poverty of opportunity’ (referring to access to education and economic and other opportunities).¹⁵ Poverty and hardship studies undertaken by the Asian Development Bank (ADB) conclude that hardship is much more widespread than generally thought, with at least 20 per cent of households in 12 of 13 PICs studied¹⁶ suffering from basic needs poverty. In the most disadvantaged countries, the proportion is estimated to exceed 33 per cent. Although hunger is less widespread, malnutrition is present, with the proportion of underweight children reaching 27 per cent.¹⁷

In urban and peri-urban areas, as well as in the more isolated rural areas and in the outer islands, poverty exists at a level that leads to difficulties in meeting basic needs in food,

¹⁴ UNICEF Pacific 2007, 9.

¹⁵ SPC 2004, 23.

¹⁶ The study focused on ADB developing member countries in the Pacific including: Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, Papua New Guinea, the Marshall Islands, Palau, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

¹⁷ Abbott and Pollard 2004, 23.

clothing and shelter, as well as severely limited access to education and health services. Largely due to their small size and remoteness, most PICTs have experienced difficulty in developing their economies.¹⁸

Approaches to defining discrimination, equality and equity

The academic debate between the proponents of gender equality and gender equity is an interesting one and is most often noted in opposition to each other.

Equality, it is argued, is sameness, uniformity, objectivity or impartiality. In the common law legal system, a conventional interpretation of equality implies ‘treating likes alike’ or non-discrimination on strict terms which do not recognise historical or systemic discrimination.¹⁹ The principal models of equality are discussed in Box 2. On the other hand *equity* is understood differently based on the context. It ranges from the “commercial world of business, real estate and finance to the world of laws and justice. In the commercial world *equity* is understood as ownership in any asset after all liabilities associated with that asset are paid off. Here, in a broad sense, equity confers ownership that is one’s due. Like equality, equity is also defined as fairness, impartiality. Equity can be on the fringes of law or even outside it. It is sometimes understood as legal principles supplementary to stricter formal laws²⁰ that might operate too rigidly to obtain ‘natural justice’. The concern is with a state of justice rather than being technically legal”.²¹

Box 2. Approaches to defining equality

The "strict equality" approach says that women are the same as men and should be treated the same. According to the "biological differences" approach, women should be treated the same as men except where there must be allowance for biological differences. On the other hand the "everything different" approach says that women are quite different from men and should be given special treatment. Finally, the "anti-subordination" approach holds that women have been treated as inferior to men, and must have special treatment to become equal to men.

Strict equality: Women are the same as men and should be treated the same. The argument is that there are no important and fixed differences between men and women; if men and women were given the same opportunities, they would eventually be on an equal footing. All legal and other discrimination should be removed and men and women should thereafter be given strictly identical gender-neutral treatment. This approach to providing solutions to women's problems is traditional in most law schools, so legislators, state officials, lawyers and judicial officials feel comfortable with it and tend to apply it within the law. However, some practical problems arise.

Equal treatment has been defined by a male-dominated society. Thus women succeed only if they copy male models of success.

The judiciary in some developed countries has been willing to apply the strict identical treatment to help men, but not to help women.

¹⁸ UNICEF Pacific 2007, 9.

¹⁹ Rajivan and Sarangi, 2009.

²⁰ For example laws that are statutory being enacted by legislatures or those established through judicial precedents in court cases.

²¹ Rajivan and Sarangi, 2009.

There is no way of comparing what is strict identical treatment in situations that happen to women but not to men — for example, pregnancy or breast-feeding.

The approach ignores the serious historical and contemporary economic and social disadvantages suffered by women.

Biological differences: Women should be treated the same as men except where we must allow for biological differences. The argument is that women and men should basically be given identical treatment, but where differences cannot be avoided (for example the specific need of women for maternity leave), these differences must be taken into account. The main disadvantage of this approach is that it does nothing about social and economic disabilities or the things that happen mainly to women because they are women. It takes fixed biological differences into account, but approves basically of the way things are.

Everything different: Women are different from men and should be given special treatment. This approach is based on the idea that women are socially, physically and psychologically different from men. Therefore all policies and laws must take account of these differences and give women different treatment. Some of the differences are positive and some negative; not all should disappear. The disadvantages have been brought about by political structures, so positive changes in policies and laws will result in real equality for women. The great advantage of this approach is that it takes into account both the real differences between men and women, and the need for women to receive resources necessary to remove their economic and social disabilities. Its major disadvantage is that it might encourage laws that treat women differently "because they need protection." For example, women may be stopped from working in certain industries or at night or prevented from participating in certain sports "for their own good." Thus discriminatory treatment might continue because men and women are different.

Anti-subordination: the "disadvantaged as a group" approach. Inequality is not defined in terms of differences between men and women, but in terms of women's subordination to men. The argument is that women have been deliberately kept inferior to men by patriarchal political, social and economic structures. The "special treatment" approach to equality neither approves of, nor reinforces, differences arising from historical conditions of inequality. Its most significant aspect is that it allows a judge to ask: Will this decision create further inequality for this woman, or will it bring about an improvement in her life? However, because it has the most potential to redistribute wealth, resources and power, it may be seen as an attack on the foundations of society, and so it is the most difficult to apply.

How do Pacific Island courts use these approaches?

The courts have not adopted a consistent approach, but an *ad hoc* one, based on a mixture of strict formal legal equality and equity, the various models of equality and protectionism. When assessing what constitutes discrimination, courts generally use men as the standard; they do not question the ways in which laws or cultures or social traditions have produced and maintained discrimination against women, or the extent to which our institutions are male-defined. Generally, therefore, they use approaches based on strict equality, biological differences or "everything different." The Supreme Court of Canada has adopted a different way of assessing discrimination in *Andrews v Law Society of Canada*,²² and more recently in

²² (1989) Supreme Court of Canada Reports, 1 (1989) 143.

Fiji, in *Balelala v The State*.²³ This identifies discrimination in terms of disadvantage, not in terms of similarities and differences. If a member of a disadvantaged group proves that a law, policy or practice maintains or worsens that disadvantage, then the law, policy or practice is discriminatory. The disadvantage test is very similar to the anti-subordination approach. It acknowledges that discrimination against women is socially and economically based, and is more in keeping with the object and purpose of the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*.
Source: Jalal, 1998.

The proper approach is one which combines equality and equity principles, and the disadvantaged circumstances of women as a group, and is determined by the context which is being discussed.

Discrimination and equality in the law

Discrimination means treating people in different ways, based on their sex, race, religion, political opinions, creed, sexual preference and so on. Sex or gender discrimination generally focuses on whether a person is male or female.

Discrimination takes many forms, both direct and indirect. Direct discrimination is based on an individual's behaviour or actions even where that behaviour was not intentional. It can directly and expressly be based on a person's sex or it can be a decision based on assumptions about an individual or group of individuals. In law, direct discrimination against a woman might mean that something happens to a woman because she is a woman and not because she is an individual person. The discrimination may be based on a particular characteristic applying generally to women, for example, being able to have children. Or it may be based on a particular characteristic that society may perceive women have, for example, being "too emotional and not logical or objective." Direct legal discrimination may be obvious in the legislation or legal practice. For example, if the legislation states that men are permitted certain rights and women are not, direct discrimination is clear and unsubtle.²⁴

Indirect discrimination is often based on policies, laws and practices that are part of the structures of society. Most legislation is written in gender-neutral form. It may seem not to favour men over women, but it may indirectly discriminate against women, because the courts and law agencies that apply, interpret or enforce the legislation do not consider the other disadvantages of women. If, for example, a police station has one car in working order, the police may not want to use the car to arrest a father who has not paid maintenance for his children. They may prefer to keep it handy in case "something important comes up."²⁵

Indirect discrimination occurs also because social and cultural attitudes cause officers of the courts, law enforcement agencies and associated agencies to interpret laws and procedures in ways that discriminate against women. This type of indirect discrimination may be called "procedural and interpretative discrimination". The law may also be indirectly discriminatory

²³ Fiji Islands, Criminal Appeal No. AAU0003 OF 2004S, 2004.

²⁴ Jalal 1998, 16.

²⁵ Jalal 1998, 16 – 17.

where it fails to address or correct discrimination. This may be called "discrimination by omission."²⁶

The approach preferred by women's groups in the Pacific region is generally that of substantive equality and the disadvantage approach adopted by CEDAW, which is not strictly based on either concept, but a combination of both.

Gender justice is not formal legislative or legal equality between men and women which does not address historical and systemic disadvantage or the additional burdens of pregnancy, lactation, child care and so on. It is based on achieving substantive equality recognising the disadvantage that women face as a group due to historical discrimination. It recognises also that women are not all the same. They have multiple identities which also determine their status within society. Women are not only affected by their gender but by their race, ethnicity, social and economic status and other diversities. Gender justice recognises also the need for temporary special measures so that women as a group can catch up with men as a group.

It should be noted also that gender discrimination can be caused by non-state actors, such as private corporations. The state is complicit in the discrimination if it either fails to address the discrimination, by refusing to address the problem or it fails to put in place policies and laws to achieve substantive equality. The latter requires positive action as a matter of state obligation. Methods of addressing equality and non-discrimination in the law include examining whether the problem is one of substance, structure and context, in order to decide on the appropriate strategy.

If the problem is one of the substance or content of the law then the strategy that ought to be adopted is a legislative strategy of changing the offending legislation. A litigation strategy or a test case to obtain a new precedent or interpretation of existing law may also affect the substance of the law. If the problem is one of structure, for example, a lack of access to courts or inadequate resources to properly enforce laws, then the problem might be addressed by providing access or better human and financial resources. If the problem is the attitudes of justice officials, then gender training may be required to make the law effective. In some cases a combination of all three strategies may be required.

²⁶ *Ibid.*

Chapter 1: Overall legal status of women in the Pacific

The law influences almost every aspect of human endeavor. It is informed by the low overall status of women in society and in turn, the law further influences and determines women's overall legal and other status. The link between the law and women's status is therefore both causal and mutually reinforcing. Although the law has in the past, been an instrument of exclusion and oppression it is increasingly being used, by women's movements and governments, as a tool for empowerment and liberation for women, acting as a catalyst for sweeping social change and advancement.

The tensions between customary law and formal law

The status of women in custom and customary law in the Pacific generally obstructs their access to education, employment and capacity to be heard in decision making, thus hindering their overall capacity to participate in economic activities. Even where formal 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 customary law, this is no longer accurate of most of the Pacific, and there has been significant change over time.

The tensions between customary law and mainstream constitutional protections 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 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.²⁷ 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 (see Box 3 for an example). More research is needed to ascertain the influence of customary law in settling mainstream disputes.

Box 3. Chiefs pass 'new' custom law – a restrictive dress code for women, Vanuatu

In 2005, the traditional *Malvatumauri* (House of Chiefs), supported by Church leaders, attempted to pass a new 'customary 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.'²⁸ 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.²⁹

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

²⁷ Jalal and Madraiwiwi 2008. See in particular PNG cases referred to pp 13-14 in the Editorial Review.

²⁸ Makau, Chief Morrison Dick 2005.

²⁹ Vanuatu Women's Centre as told to the writer, Vila, 2005

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 customary law enforced by informal, village, *kustom* or magistrate's courts. In some cases, customary law is also codified and legislated, and mainstream courts are charged with the responsibility of enforcing such law. In most cases however, customary 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:

*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.*³⁰

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.

Some PICTs have 'traditional' courts that exercise minor jurisdiction over village, family and personal matters. These courts are generally presided over by male chiefs or traditional elders who receive varying degrees of training. 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 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.³¹

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 embody these principles, and their subordinate status in custom, remains a source of much controversy in the region. In Papua New Guinea for example, women in rural areas are still commonly tried, convicted and imprisoned for 'sorcery' (witchcraft) by the village courts.³²

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

³⁰ Constitution of Palau, Section 2.

³¹ See cases in Jalal and Madraiwiwi 2005.

³² *State v Aigal & Kauna*, (1990) PNGLR 318.

conventional courts which administer mainstream legislation. In Papua New Guinea and Samoa, there are specifically constituted courts which enforce customary law. Their powers of enforcement range from fines (Papua New Guinea and Samoa) to imprisonment (Papua New Guinea). In Solomon Islands and Vanuatu, the Local and Island Courts respectively, are lower level Magistrate's courts which enforce both legislation and customary law. However, the overlap between conventional legislation and customary law are considerable and often confusing. Most courts, including those that administer customary law, are constituted under the Constitution and legislation.

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 customary laws 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 customary 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. 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.”³³

Box 4. Religion and gender justice

Religion also influences how women experience gender justice and has an impact on the deepening chasm between men and women. The vast majority of Pacific Islanders are Christian, of all denominations and orthodoxies, ranging from liberal to orthodox, with smaller numbers of Hindus and Muslims (South Asian) in Fiji, with its minority but large Indian-Fijian (37 per cent)³⁴ population. In 1987 the population of Indian-Fijians constituted more than half of the population. Church leadership in all religions in the Pacific is mainly patriarchal. Although all PICTs are secular, except for Tonga, many regard themselves as 'Christian states' and these values are given some form of recognition in national constitutions. The Constitution of Vanuatu's preamble for example states that:

“WE the people of Vanuatu...HEREBY proclaim the establishment of the united and free Republic of Vanuatu founded on traditional Melanesian values, faith in God, and Christian principles...”

³³ 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.

³⁴ Fiji Island Bureau of Statistics 2007.

The majority of the religious hierarchy has an orthodox patriarchal interpretation of religion. In 2003, the Methodist Church in Fiji attempted to stop the passing of the Family Law Act, which removed systemic discrimination against women in family law, on the basis that it was un-Christian and anti-indigenous Fijian. However, it was ultimately persuaded not to officially oppose the Act by the ruling government party, closely aligned to the Methodist Church at the time, and by various prominent individuals. The Vanuatu Family Protection Act 2008, passed in November 2008, and designed to protect women from domestic violence, was challenged by some Christian churches and traditional chiefs on the basis that it is against ni-Vanuatu *kustom*, and Christian and Melanesian values in the preamble of the Vanuatu Constitution.³⁵ The Supreme Court ruled in late November 2008 that the new law was consistent with Vanuatu's Constitution.

CEDAW and the domestic application of international human rights law

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) promotes the fundamental human rights, dignity and worth of women.³⁶ It prohibits discrimination against women on the grounds of sex and gender and legitimates affirmative action for women. CEDAW is the second most ratified international human rights treaty after the Convention on the Rights of the Child (CRC) in the Pacific. The most significant added value for gender justice, of ratifying and reporting under the CEDAW treaty body mechanism, is that it provides an additional layer of accountability, beyond the borders of the Pacific islands, to a global body of experts. Appearing before the CEDAW Committee every four years, and reporting to it, compels countries to conduct a stock take, and to attempt to improve women's gender justice before the next appearance. It is therefore critical that all PICTs ratify CEDAW and report on it regularly.

CEDAW is also linked to regional action plans as the improved economic and political participation of women meets Strategic Objective 8 of *The Pacific Plan*³⁷ and MDG 3, that of improved gender equality. *The Pacific Plan*, a Pacific regional development plan agreed to by all PICTs that are members of the Pacific Islands Forum Secretariat, aims to, step-by-step, envision a region that is 'respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values, and for its defence and promotion of human rights'.

Traditional Pacific aid partners³⁸ have strong and explicit gender policies and look toward the recipient state's commitment in furthering women's equality. Ratification and implementation of CEDAW is one such indicator. Technical assistance to promote and support the state's commitment to gender equality is more likely to be increased and enhanced if CEDAW is ratified.

Although there has been some sensitivity in PICTs when CEDAW compliance has been assessed, unlike other parts of the world, women's NGOs have worked closely with government counterparts in compiling the CEDAW State Reports. Where there has been national data available, the information has been used without objection. In addition, all four countries which have appeared before the CEDAW Committee, Fiji, Samoa, Vanuatu and

³⁵ Ferrieux-Paterson 2008.

³⁶ Comments on value of CEDAW to Pacific region extracted from Jalal 2006, 19.

³⁷ Pacific Islands Forum Secretariat 2005.

³⁸ AusAID, NZAid and the European Union.

Cook Islands, have had NGO members as part of their delegations. In all four countries NGOs also filed parallel or alternative reports, and appeared before the Committee to present complementary and alternative views.³⁹

Pacific Island Table of Treaty Ratification

Table 4 shows which states are a party (indicated by the date of adherence: ratification, accession or succession) or signatory (indicated by an "s" and the date of signature) to the United Nations human rights treaties listed below. Self-governing territories that have ratified any of the treaties are also included in the chart.

	ICESCR	ICCPR	CERD	CEDAW	CAT	CRC	CRMW	CRPD
COOK ISLANDS	28-Dec-78 via NZ	28-Dec-78 via NZ	22-Nov-72 via NZ	1-Oct-85 via NZ & 11-Aug-06	10-Dec-89 via NZ	6-Jun-97		25-Sep-08 via NZ
FIJI			11-Jan-73	28-Aug-95		13-Aug-93		
KIRIBATI				17-Mar-04		11-Dec-95		
MARSHALL ISLANDS				2-Mar-06		4-Oct-93		
FEDERATED STATES OF MICRONESIA				1-Sep-04		5-May-93		
NAURU		S:12-Nov-01	S:12-Nov-01		S:12-Nov-01	27-Jul-94		
NIUE	28-Dec-78 via NZ	28-Dec-78 via NZ	22-Nov-72 via NZ	1-Oct-85 via NZ	10-Dec-89 via NZ	20-Dec-95		25-Sep-08 via NZ
PALAU						4-Aug-95		
PAPUA NEW GUINEA	21-Jul-08	21-July-08	27-Jan-82	12-Jan-95		2-Mar-93		
SAMOA		15-Feb-08		25-Sep-92		29-Nov-94		
SOLOMON ISLANDS	17-Mar-82		17-Mar-82	6-May-02		10-Apr-95		S:23-Sep-08
TONGA			16-Feb-72			6-Nov-95		S:15-Nov-07
TUVALU				6-Oct-99		22-Sep-95		
VANUATU		21-Nov-08		8-Sep-95		7-Jul-93		S:17-May-07
KEY:								
	Indicates the date of adherence: ratification, accession or succession							
	Indicates the date of signature							
	Ratified or signed by New Zealand on behalf of the territory.							
ICESCR	International Covenant on Economic, Social and Cultural Rights							
ICCPR	International Covenant on Civil and Political Rights							
CERD	Convention on the Elimination of All Forms of Racial Discrimination							

³⁹ The author of this paper chaired the Fiji State CEDAW Committee which compiled the State Report as well as headed the NGO delegation in New York which appeared before the Committee. She was also closely involved in the writing of State and NGO reports in Samoa, Cook Islands and Vanuatu.

⁴⁰ For more information, please visit www.rrrt.org

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
CRMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRPD	Convention on the Rights of Persons with Disabilities

Table 5 shows which are a party (indicated by the date of adherence: ratification, accession or succession) or signatory (indicated by an "s" and the date of signature) to the Optional Protocols of United Nations human rights treaties listed above. Self-governing territories that have ratified any of the treaties are also included in the table. No PICT has ever used the Optional Protocol process to file an individual complaint.

	ICCPR-OP1	ICCPR-OP2	OP-CEDAW	OP-CRC-AC	OP-CRC-SC	OP-CAT
COOK ISLANDS	26-May-89 via NZ	22-Feb-90 via NZ	27-Nov-07	12-Nov-01 via NZ	S:7-Sep-00 via NZ	14-Mar-07 via NZ
FIJI				S:16-Sep-05	S:16-Sep-05	
KIRIBATI						
MARSHALL ISLANDS						
FEDERATED STATES OF MICRONESIA						
NAURU	S:12-Nov 01			S:8-Sep-00		
NIUE	26-May-89 via NZ	22-Feb-90 via NZ	7-Sep-00 via NZ	12-Nov-01 via NZ	S:7-Sep-00 via NZ	14-Mar-07 via NZ
PALAU						
PAPUA NEW GUINEA						
SAMOA						
SOLOMON ISLANDS			6-May-02			
TONGA						
TUVALU						
VANUATU			17-May-07	26-Sep-07	17-May-07	
KEY:						
	Indicates the date of adherence: ratification, accession or succession					
	Indicates the date of signature					
	Ratified or signed by New Zealand on behalf of the territory.					
ICCPR-OP1	Optional Protocol to the International Covenant on Civil and Political Rights					
ICCPR-OP2	Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty					
OP-CEDAW	Optional Protocol to the Convention on the Elimination of Discrimination against Women					
OP-CRC-AC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict					
OP-CRC-SC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography					
OP-CAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment					

⁴¹ *Ibid.*

Indicators of gender equality in legislation

UNIFEM, with the support of the UNDP Pacific Centre, has developed a set of indicators to assist PICTs in assessing their domestic legislative compliance against CEDAW (see Table 6). However, the CEDAW Legislative Indicators research⁴² measures only formal compliance with domestic legislation i.e. *de jure* equality and not *de facto* equality. Although formal legislative compliance is an absolutely necessary first step, it is also necessary to develop a set of indicators to measure *de facto* reality, that is, to adequately and accurately reflect the situation on the ground. The real picture of CEDAW compliance can only be measured by the collection of case law, numerical data/statistics and other forms of empirical evidence to assess compliance with CEDAW.⁴³ There is a significant gap in research and data in this area. For example, Article 10 secures the equal right to education for girls and women. Compulsory education is required to realise this right. There may be domestic legislation to legally secure this, in a few countries. If so there would be formal legislative compliance with CEDAW. However, the actual numbers of girls who are registered at both primary and secondary schools, and who complete their education, compared to boys, is needed to assess real, *de facto*, compliance.

Table 6. Extent of full CEDAW legislative compliance with legislation of selected PICTs* ⁴⁴					
CEDAW LEGISLATIVE COMPLIANCE INDICATORS (113 indicators)	Overall domestic legislation <u>full</u> compliance with CEDAW	Gender and constitutional provisions	Political equity provisions	Education provisions	Employment provisions
	Articles 1 to 16 113 indicators	Articles 1 & 2 Eg. Constitutional equality, non-discrimination – sex/gender 33 indicators	Article 7 Eg. Equal eligibility for representation in Parliament (no country has electoral quotas for women MPs) 5 indicators	Article 10 Eg. Temporary Special Measures (TSM) for advancement in education (no PICT has TSM) 6 indicators	Article 11 Eg. Restrictions on women's choice of employment 14 indicators
Fiji (44% compliance)	50	7	3	4	1
Vanuatu (35% compliance)	40*	8	3	3	3*
Samoa (35% compliance)	40	8	2	2	1
Marshall Islands (34% compliance)	39	13	2	2	0
Papua New Guinea (24% compliance)	28	6	3	0	1
Cook Islands (24% compliance)	28	2	4	1	0
Micronesia, Federated States of ** (23% federal compliance. State compliance higher) - Yap (25%) - Kosrae (29%) - Chuuk (29%) - Pohnpei (31%)	26 Yap 29 Kosrae 33 Chuuk 33 Pohnpei 36	2 Yap 5 Kosrae 5 Chuuk 5 Pohnpei 7	2 Yap 3 Kosrae 3 Chuuk 3 Pohnpei 3	0 Yap 5 Kosrae 2 Chuuk 2 Pohnpei 3	1 Yap 1 Kosrae 1 Chuuk 2 Pohnpei 2
Kiribati (23% compliance)	26	0	4	3	0
Solomon Is (20% compliance)	23	5	3	0	1

⁴² UNIFEM Pacific 2007.

⁴³ The Secretariat of the Pacific Community (SPC) has embarked on such a project.

⁴⁴ UNIFEM Pacific 2007.

Tuvalu (18% compliance)	21	1	3	3	0
<p>Source: Based on UNIFEM Pacific 2007 and 2008, but the author has taken a different view on some compliance indicators and this is reflected in this table. It is important to note that these indicators measure only compliance with already existing formal legislation and not common law (case law) or customary law which discriminates on the grounds of gender.</p> <p>*At the time of the writing of this paper Vanuatu had passed the Family Protection Act 2008 and made amendments to maternity provisions in its Employment Act increasing compliance in the area of violence against women protection and maternity leave rights. Although the changes have not been gazetted they have been reflected in the table.</p> <p>** When the states of the Federated States of Micronesia are separately assessed there is a higher degree of compliance.</p>					

Ratification status of core human rights conventions

The ratification, reporting and implementation of CEDAW has had some positive domestic impact in some PICTs depending on the skill and capacity of women’s NGOs to mobilise around CEDAW nationally and internationally. Women’s NGOs in Fiji successfully mobilised around the Concluding Comments of the CEDAW Committee on Fiji’s First State Report, which recommended that Fiji pass new family law legislation to get family law reform back on the legislative agenda after the coup d’état of 2000.

All PICTs have ratified the Convention of the Rights of the Child (CRC); all but Tonga, Palau and Nauru have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Papua New Guinea and the Solomon Islands have ratified or signed the International Covenant on Economic, Social and Cultural Rights (ICESCR), whilst Nauru, Samoa, Vanuatu and Papua New Guinea have signed or acceded to the International Covenant on Civil and Political Rights (ICCPR); and Fiji, Nauru, Papua New Guinea, Solomon Islands and Tonga have ratified the Convention on the Elimination of All Forms of Racial Discrimination (CERD). New Zealand has ratified CEDAW on behalf of Niue and Tokelau.

Tonga, Nauru and Palau have not ratified CEDAW for a variety of reasons including the perceived need to amend their Constitutions prior to ratification. Additionally, some Palauan women in government delegations argue that their women enjoy higher status than men in their matrilineal society, and ratification might mean a “leveling down of their status”.⁴⁵ Tonga is reluctant to ratify, arguing that its land laws cannot be amended to give women equal rights, as land is already a scarce resource.

Low ratification and compliance with human rights conventions and CEDAW

The Pacific region has by far the lowest ratification rates worldwide of the core international human rights treaties.⁴⁶ The majority of countries that have ratified various international human rights treaties have struggled to report on them in compliance with the legal obligations defined in the treaty. Most have limited human and financial resources to implement human rights treaties. Governments generally perceive reporting requirements to be the most immediate practical constraint to ratification.⁴⁷ Their priorities are generally limited to issues that are perceived as pressing and of utmost importance to individual countries and to the region, such as sustainable development, fisheries, global warming,

⁴⁵ In conversations with the author at the SPC Workshop for CEDAW Non-ratified countries, 5-7 November 2008, Nukualofa, Tonga.

⁴⁶ Includes the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CRMW).

⁴⁷ Jalal 2006, 11-13.

climate change, international crime, security and anti-terrorism.⁴⁸ Sometimes, it is also supposed that ratification and implementation may take away resources which are already in short supply.⁴⁹

Ratification of international instruments also requires ensuring that customary practices, for example Melanesian *kustom* and *fa'a Samoa*, do not infringe on or conflict with domestic legislation and human rights practice. Although customary values, beliefs and practices greatly vary within each Pacific sub-region, even at country level, and evolve with time, they are considered as a limitation to treaty ratification. Convincing arguments are needed to demonstrate that treaty ratification can provide new and powerful opportunities to link and address both processes in order to bring them closer to each other.⁵⁰

Applicability of international human rights law to domestic law

There is a distinction between countries that follow the American common law system and those that inherited the English common law system.⁵¹ This distinction determines how they apply international conventions domestically. In the American common law countries of Palau and Federated States of Micronesia, once ratification occurs the provisions of the convention have immediate applicability in the courts and on domestic law in general, at least in theory. British common law countries, as well as Vanuatu, must enact domestic legislation before a convention comes into effect as part of the domestic law of the country, so ratification must be followed by domestication in the local legislature. However, only Vanuatu has a specific constitutional provision requiring parliamentary approval to complete the ratification process.⁵² The Marshall Islands follows the English style of requiring further domestic legislation before a treaty comes into effect.⁵³ However some courts have resorted to human rights conventions for guidance and interpretation without requiring domestication.⁵⁴

Some constitutions have specific mandatory provisions that allow for the use of conventions in the courts, apparently without the need for ratification.⁵⁵ These provisions are extremely important for gender justice if they are known about and used. It is critical that judges, lawyers and human rights activists are trained to use such provisions. Organisations such as the Pacific Regional Rights Resource Team (RRRT) have enjoyed marked success in popularising such provisions in judicial and legal training thereby increasing the number of cases which apply such progressive provisions.⁵⁶ However, more training is needed and those Constitutions which do not have such provisions need to be amended to include them.

For example, Article 43 (2) of the Bill of Rights in the Constitution of Fiji states:

⁴⁸ Huffer, E., 2003, 7.

⁴⁹ Jalal 2006.

⁵⁰ *Ibid.*

⁵¹ Paterson, Tavala and Jowitt 2008, 3.

⁵² Section 26, Constitution of Vanuatu.

⁵³ Article 5, Section 1(4) of the RMI Constitution reads 'No treaty or other international agreement which is finally accepted by or on behalf of the Republic on or after the effective date of this Constitution shall, of itself, have the force of law in the Republic'.

⁵⁴ For a full analysis of Pacific Island courts applying human rights conventions see Jalal and Madraiwiwi 2005.

⁵⁵ Section 43(2) Constitution of Fiji; Section 15(5)(c) Constitution of Tuvalu and Section 17 Tuvalu Interpretation and General Provisions Act (Cap 1A); and Section 39(3) Constitution of Papua New Guinea).

⁵⁶ These cases are documented in two volumes of the Pacific Digest of Human Rights Law published by RRRT.

*In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, **have regard to public international law applicable to the protection of the rights** set out in this Chapter.*

In Fiji, the courts have not been reticent about using such a provision to apply conventions to domestic law in innovative and creative ways. Examples from Fiji include the case of *State v Bechu*,⁵⁷ in which the Magistrate chastised the accused during rape sentencing stating:

Women are your equal and therefore must not be discriminated against on the basis of gender. Men should be aware of ... CEDAW which our country ratified ... Under the convention the state shall ensure that all forms of discrimination against women must be eliminated at all costs. The courts shall be the watchdog of this obligation. The old school of thought that women were inferior to men or part of their personal property, that can be discarded or treated unfairly at will, is now obsolete and should no longer be accepted by our society.

These attitudes are not commonplace in the magistracy and ought not to be taken as indicative of magisterial attitudes in general. However they are reflective of a growing trend of willingness to apply women's international human rights standards if domestic legal provisions allow it, and if lawyers make the appropriate submissions.

In contrast, in Kiribati, a prosecution lawyer attempted to use the non-ratified CEDAW (at that time) and the Constitution of Kiribati in *Republic of Kiribati v Timiti & Robuti*⁵⁸ in what was then the first known attempt in a Pacific Island court to apply CEDAW to domestic law. She used similar arguments to that used in *Attorney General v Dow*⁵⁹ and *Balelala v State* but failed to convince the court that CEDAW ought to be used to prohibit the gender discriminatory corroboration rule in rape cases. This rule requires a rape complainant's evidence to be corroborated independently by witnesses and medical evidence; is based on an assumption that women lie about sexual matters; and that they need to show physical evidence of proof of resistance. In 2003, RRRT state and civil society partners successfully lobbied for the passing of the Evidence Amendment Act 2003 which included a provision making the corroboration warning unlawful (for more information on the work of RRRT, please see Box 5). The legislative strategy was necessary given the unwillingness of the court to use CEDAW to outlaw discrimination using the courts and new precedents. In 2004, after the ratification of CEDAW and CRC, in a similar attempt to challenge the corroboration practice in a child sexual abuse case, the Chief Justice held that as the offence had occurred before the passing of the Evidence Amendment Act 2003, the corroboration practice still applied to the case before it. The court refused to apply the ratified CRC to allow a degree of flexibility, stating that the CRC did not form part of the law of Kiribati unless it was given the force of legislation.⁶⁰

Box 5. The Pacific Regional Rights Resource Team (RRRT) – building the capacity of Pacific Island governments and NGOs to promote, respect and fulfill human rights
by Ruby Awa, Solomon Islands, RRRT lawyer

RRRT, established in 1996, the winner of the UNICEF Maurice Pate Award in 1998 and a highly-cited best practices human rights project, is a groundbreaking capacity building, technical support, training and policy advisory project in the Pacific region. It is a regional

⁵⁷ Magistrate Nadakuitavuki, Criminal Case No 79/94.

⁵⁸ High Court Criminal Case 43/97.

⁵⁹ *Attorney General v Dow* 1994, (6) BCLR, 3 July 1992. Botswana.

⁶⁰ *Republic of Kiribati v Iaokiri*, 2004.

project covering 14 Pacific Island countries and consists of Pacific Islanders who are lawyers, trainers and advisers. RRRT advises governments and civil society on promoting human rights based on Pacific constitutional and international standards from UN conventions. It works with Members of Parliament, judges, magistrates, senior decision makers in government, institutions, civil society groups and NGOs.

Over the past decade, RRRT and its partners have made significant headway in the promotion and enforcement of human rights by encouraging compliance with local and international human rights standards. Training of the judiciary has led to growing support for human rights, and a significant increase in the application of human rights conventions in courts in a number of PICs. This training has produced three regional judicial declarations committing judicial officials to the application of gender equality and human rights in the courts including *The Pacific Island Judges Declaration on Gender Equality in the Courts (1997)*. Judgments in Fiji, Vanuatu, Samoa, Solomon Islands, Tuvalu and Kiribati indicate that lawyers, activists and judges use human rights language more often and as guidance in decision making or as the basis of arguments. Major goals for the next five years include the passing of violence against women legislation and exploring the possibility of a regional human rights mechanism under *The Pacific Plan*. RRRT continues to provide gender equality and human rights support to PIC governments and NGOs using tried and tested methods of partnerships between both.

Tuvalu and Papua New Guinea have similar provisions to Fiji allowing courts to apply international human rights standards, while Solomon Islands law states that if a law is capable of two interpretations the one consistent with international law is to be preferred. However they are rarely used or are resisted on grounds that they must be further domesticated in legislation.⁶¹ Despite these empowering provisions, Tuvalu still generally follows the doctrine of non-enforceability of international law.⁶²

None of these provisions are sufficient by themselves to ensure the application of CEDAW or other human rights conventions to domestic situations, and legislation and implementation measures are required in all PICTs to ensure the realisation of rights provided under the international treaty system. However, a starting point is that all PICT constitutions need to be amended to state that human rights conventions must be applied domestically where relevant. Training of judicial officials is also imperative.

Reporting and implementation status of CEDAW for gender justice⁶³

Fiji, Samoa, Vanuatu and the Cooks Islands have appeared before the CEDAW Committee once each to report on CEDAW.⁶⁴ Fiji's second report was due in 2006 but is not yet drafted. Papua New Guinea and Kiribati are at various stages of the process of preparing their first reports. Solomon Islands has set up a taskforce that will oversee the preparation for its initial report. Tuvalu submitted its first report in 2008. New Zealand reports on behalf of Tokelau and Niue, whilst the Cook Islands reported separately in 2007.⁶⁵

⁶¹ Section 15(5) Constitution of Tuvalu; Section 39 (3) Constitution of PNG; Section 12, Interpretation and General Provisions Act [Cap 85].

⁶² This section is extracted directly from Jalal and Madraiwiwi 2005. See the Digest for comprehensive summaries of Pacific Island cases that have applied international human rights conventions in domestic courts.

⁶³ This section largely extracted from Jalal 2007.

⁶⁴ Fiji in (2002); Samoa (2005); Vanuatu (2007); Cook Islands (2007).

⁶⁵ Since March 2009, when this paper was completed, Fiji has appeared before the Committee for the second time; and PNG for the first time at the July 2010 CEDAW Session.

The most significant changes in most countries since ratification have been the setting up of ministries, departments or desks dedicated to women's affairs and implementing CEDAW. Some countries have passed important policies, initiated projects to increase women's economic empowerment and increased budgets for relevant departments, but very few have passed legislation to implement CEDAW in order to secure the rights-based system under it. Thus, implementation is largely dependent on political will and commitment, and not on enforceable rights.

From a gender justice perspective, Fiji has made the most significant progress in implementing CEDAW since 2004, particularly in the area of family law.⁶⁶ In November 2005 the Family Law Act 2003 was implemented with the opening of the new Family Law divisions of the courts towards the end of 2005. The new law, removes systemic discrimination against women and children consistent with CEDAW Articles 1, 2, 3, 5, 14, 15 and 16. By passing this law, Fiji immediately improved its legislative compliance with CEDAW up to 44 per cent, making it the leading country in the region of the nine assessed on legislative compliance.

In 2003, with the introduction of the Criminal Code (Sexual Offences and Crimes against Children) Act 2002, Papua New Guinea, and Marshall Islands in 2005 with amendments to its existing Criminal Code,⁶⁷ changed their sexual assault regimes, attempting to remove legal discrimination against women in sexual offence law and practice.⁶⁸ Kiribati has amended its criminal law to outlaw the gender discriminatory corroboration warning in the law of rape.⁶⁹

In November 2008, Vanuatu passed the Family Protection Act, making it the only PICT to have stand-alone legislation combating domestic violence. The bill is guided by CEDAW and CRC.⁷⁰

General implementation of CEDAW principles is weak in many countries and even where there is political commitment on the part of governments there are insufficient resources either available or allocated to implement the standards in CEDAW. The few countries that demonstrate marked advancement in the implementation of CEDAW are those in which strategic partnerships between government and women's NGOs have together effectively harnessed the most efficient technical capacities and resources for maximum impact.

Universal Periodic Review and the Human Rights Council

The opportunities provided by the Universal Periodic Review process, a mandatory reporting mechanism for all UN members before the UN Human Rights Council, is a further possibility for women to hold their countries accountable for gender injustice. When Tonga appeared before the Human Rights Council in March 2008, the majority of questions asked it related to women's rights in Tonga and democratic reform. Tonga responded by promising to hasten democracy, but balked at committing to improving women's land rights given the constitutional entrenchments. However, Tonga said it was committed to improving human

⁶⁶ UNIFEM Pacific 2007.

⁶⁷ Criminal Code, Cap.1, 1966.

⁶⁸ UNIFEM Pacific 2007, 266.

⁶⁹ Evidence Act 2003, Kiribati.

⁷⁰ The author and RRRT worked closely with the Solomon Islands government to effect the passing of the legislation.

rights in other areas for all groups including free speech, a highly contentious issue in Tonga.⁷¹ In contrast, Tuvalu committed to changing its constitution to prohibit sex and gender discrimination in December 2008 when it appeared before the Council.⁷²

⁷¹ IHRS 2008, 8.

⁷² The author of this paper was an Expert Advisor to the Tuvalu Government delegation, and a member of the delegation during its Interactive Dialogue with the Universal Periodic Review process, Human Rights Council, December 2008, Geneva.

Chapter 2:

Overall constitutional and politico-legal status of women

This section examines how the general constitutional and politico-legal status of women determines their voices being heard in the public world of decision making and power on an equal footing with men; and how it affects their capacity to influence policies and the allocation of resources that affect them.

All independent PICTs have written constitutions mostly granted them after independence from the colonial powers during the 1960s and 1970s. A number of them have made significant amendments to their constitutions in the wake of civil strife, as in Fiji's post-coup d'état constitution in 1997. Most countries have a bill of rights (BOR) in their constitutions, which contain basic civil and political rights. Only a very few, like Fiji and Marshall Islands, have some economic, social and cultural rights, for instance the right to education contained in the BOR.⁷³

The constitution and the bill of rights contained within it is the supreme law of the country in most PICTs. This means that in theory, any law, policy or practice inconsistent with the constitution is unlawful. However, the principle of equality for women is not firmly embedded in the constitutions of most PICTs, even though some outlaw various forms of discrimination, including sex discrimination. If women's rights to equality and non-discrimination are not protected specifically in the constitution itself, it reduces their ability to challenge inequality on constitutional grounds. If it is present, it allows courts to interpret constitutional provisions in an equitable way. However, no Pacific Island constitution grants women full equality in substantive terms. Protection against sex or gender discrimination is not the same thing as full equality, as discussed in the previous chapter. It is therefore critical that women's rights to equality, as well as non-discrimination, are secured in the constitution itself and not only in other pieces of legislation.

Anti-discrimination protection and fundamental rights and freedoms

No PICT has stand-alone, comprehensive anti-discrimination legislation. Some constitutions have a general equality provision with specific definitions of discrimination in which citizens are entitled to certain basic rights, regardless of their religion, race, place of origin, political opinions, colour, religion or creed and so on.⁷⁴ Apart from Fiji, no constitution specifically protects discrimination on the grounds of sexual orientation or disability. Only Samoa, and possibly the states of Chuuk and Pohnpei in Federated States of Micronesia, protect against marital status discrimination. However, in both Micronesian states, the position is not clear, as 'social status', rather than marital status, is mentioned.⁷⁵ It is theoretically possible to argue that marital status falls within the broader ambit of social status. Health status discrimination is not explicitly protected as a prohibited ground in any country, except

⁷³ Section 39, Constitution of Fiji; Article II, section 15 Constitution of the Marshall Islands 1979.

⁷⁴ For example : Section 64 Cook Islands Constitution Act 1975; Section 38 Constitution of Fiji 1997; Section 15 Constitution of the Solomon Islands 1978 ; Section 15 Constitution of Kiribati 1979 ; section 3 Constitution of Nauru 1968; section 4 Constitution of Tonga 1875; section 27 Constitution of Tuvalu 1978; section 5 Constitution of Vanuatu 1980; section 15 Constitution of Samoa 1960; section 55 Constitution of PNG 1975.

⁷⁵ Article III, section 2 Constitution of Chuuk; Article 4, section 3 Constitution of Pohnpei.

possibly in the state of Chuuk,⁷⁶ although all Micronesian states provide for access to health care in their constitutions.

Although all grounds of discrimination are important to the overall situation of women, some grounds, missing in many countries, are of particular importance to gender justice and human development. If the grounds of sex or gender discrimination, sexual orientation, marital and health status, and disability are absent in the constitution, women and minorities are more likely to suffer further layers of discrimination.

Fiji's non-discrimination provision guards against both direct and indirect forms of discrimination at section 38. Fiji's Constitution is the most advanced in the PICTs providing that:

- (1) *Every person has the right to equality before the law.*
- (2) *A person must not be unfairly discriminated against, **directly or indirectly**, on the ground of his or her: (a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of **origin**, **gender**, **sexual orientation**, **birth**, **primary language**, **economic status**, **age or disability**;*

The Fiji Human Rights Commission is empowered to investigate allegations of unfair discrimination and violations of the rights and freedoms set out in the Bill of Rights of the 1997 Constitution and to investigate other alleged violations of human rights.⁷⁷

The Kingdom of Tonga, has an 1875 Constitution that grants equality in most interesting terms:

4. *There shall be but one law in Tonga for chiefs and commoners for non-Tongans and Tongans. No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this land.*

However, legal discrimination against women is evident throughout the legislation in Tonga. For example, women are discriminated against in terms of land and cannot constitutionally inherit land unless the male line dies out.⁷⁸ In Vanuatu, the Penal Code⁷⁹ also makes unlawful discrimination a criminal offence, making it an unusual provision in PICTs.

No person shall discriminate against another person with respect to his right to the supply of any goods or services, or to gain or to continue in any employment, or to be admitted to any public place, by reason of the sex, ethnic or racial origin or the religion of any such person.

No one has ever been prosecuted in Vanuatu for a breach of this section, despite the high level of sex discrimination against ni-Vanuatu (Ni-Vanuatu is the term used to describe people of Vanuatu ethnicity) women in both conventional and *kustom* law systems.

⁷⁶ Article X, section 6 Constitution of Chuuk.

⁷⁷ Section 38, Constitution of Fiji, 1997.

⁷⁸ Article 107, Constitution of Tonga. Discussed fully in Chapter 4.

⁷⁹ Section 150 Cap.135.

HIV legislation

New legislation of very few countries makes HIV discrimination unlawful (see Table 7). Both Papua New Guinea⁸⁰ and Pohnpei State⁸¹ in Federated States of Micronesia have passed relatively new legislation to this effect. The legislation in Papua New Guinea states that:

*'[I]t is unlawful to discriminate against a person to the detriment of that person on the grounds that the person is infected or affected by HIV/AIDS.'*⁸²

Legal anti-discriminations provisions are inadequate in all countries to protect women from discrimination on the grounds of gender and all need strengthening to varying degrees. Only in Fiji are indirect forms of discrimination explicitly recognised and protected, yet the vast forms of discrimination experienced by women fall into this category. All constitutions need to be amended to specifically prohibit both direct and indirect discrimination.

	General discrimination prohibited direct/indirect	Sex /gender discrimination	Sexual orientation	Marital Status	Disability	Health status or HIV status	Economic status
Fiji, s.38	Yes	Yes	Yes	....	Yes	...	Yes
Samoa, ss. 5-15	Partial	Yes		Yes			
Marshall Islands ss. 1-16	Partial	Yes	..	..	....	....	....
Vanuatu S.5 especially s5(k)	Yes	Yes					
Papua New Guinea ss55, 35-38	Partial	Partial (no specific anti-discrimination provision)	....	....	....	....(<i>HIV yes but not in the constitution</i>)	....
Micronesia, Federated States of, Art IV, ss. 1-13 esp ss.3-4; FSM Code Title 1, Cap 1 s. 107 & Title 11, Cap 7 s.702;	Partial	Yes (except Kosrae)	...	The state laws of Chuuk & Pohnpei protect 'social status' not marital status. covered.	...	....(<i>HIV status only in the State of Pohnpei but not in the constitution</i>)	....
Kiribati Ss.3 – 15 esp s.15	Partial	No specific provision against sex discrimination....	....	...	...	...	...
Solomon	Partial	Yes	...	...	...	...	...

⁸⁰ HIV/AIDS Management and Prevention Act 2003 (PNG)

⁸¹ Aids Prevention and Control Act 2006 (Pohnpei)

⁸² Section 6 HIV/AIDS Management and Prevention Act 2003 (PNG).

Islands ss.3 -15 esp s.15							
Tuvalu ss, 11, 16-28 esp s.27	Partial	No specific provision against sex discrimination	....	....	....	....	...
Tonga s.4	Partial -All 'classes' of persons	No specific provision against sex discrimination	....	....	....	....	....
Cook Islands s.64	Partial	Partial (no specific anti-discrimination provision)	...	...	....	...	....
Nauru s.3	Partial	Partial (no specific anti-discrimination provision)	....	....	....	....	....
Palau Art IV, ss1-13 but esp s.5	Partial	Yes	...	....	....	...	...
Source: author created table							

Sexual orientation

In most PICTs it is illegal for men to engage in homosexual acts in public, and in most cases, also in private, under the criminal codes, except for Fiji. The legislation appears to be silent about females or does not appear to contemplate the possibility.

Only in Fiji is it possible to challenge discrimination on the grounds of sexual orientation as it is one of a very small number of constitutions globally that explicitly protects sexual orientation, and is the only one in the Pacific (see Table 7). In the landmark case of *Nadan v McCoskar*, two men were prosecuted for engaging in a homosexual act in a hotel room, under the Penal Code, which only allows for prosecution of men, not women.⁸³ The Fijian High Court ruled that the Bill of Rights, supported by international human rights standards, granted protection of the right to privacy for sexual minorities. The court made it clear that its decision was based on the privacy provisions of the constitution, rather than non-discrimination provisions.⁸⁴ Although the right to non-discrimination on the ground of sexual orientation was raised in submissions, it was not canvassed in the judgment. The issue of whether the relevant provisions are discriminatory awaits further argument. There is some basis for suggesting that the apparent neutral character of the legislation is contradicted by the actual practice of applying them only in sodomy cases involving males. The Director of Public Prosecutions could not point to any example of prosecution against a heterosexual person for sodomy and the court accepted the argument raised by the Fiji Human Rights Commission that the law was selectively enforced against male homosexuals.⁸⁵

⁸³ Sections 175 and 177 Penal Code Cap 17, acts of carnal knowledge against the order of nature and acts of gross indecency.

⁸⁴ Criminal Appeal Case Nos: HAA 85 & 86 of 2005, 6 August 2005 (Fiji) analysed in Jalal and Madraiwiwi 2005, 30.

⁸⁵ Ibid at 86.

When debate and controversy erupted in Palau over the issue of same sex marriage, its legislature hastily moved to ensure that the law was clear and unequivocal by passing the following amendment:

*Section 13. ...All marriages contracted within the Republic of Palau shall be between a man and a woman.*⁸⁶

All PICTs, except for those Melanesian countries that recognise polygamy, define a lawful marriage as the union of one man to one woman to the exclusion of all others.

Scope of applicability of rights – whom does the bill of rights protect?

The anti-discrimination provisions of the bill of rights in most PICTs appear to cover the public sector and not the private sector (non-state actors), therefore limiting rights protection to that of the relationship between state and citizen – a vertical application, and not a horizontal application between citizens and other private entities (see Table 8). This has significant impact on human development because victims of rights violations committed by the private, non-government or non-state actors have no constitutional legal protection and are therefore unable to enforce their rights. In *Loumia v DPP*⁸⁷ the majority of the Court of Appeal in the Solomon Islands held that human rights concerned the relationship between the state and the individual exclusively; therefore rights were only enforceable vertically.⁸⁸ Rights appear to be enforceable against both public and private entities in Fiji and Vanuatu whilst the provisions in the Constitution of Palau refer repeatedly to ‘the government’, its tenor seemingly designed to apply to the actions of government.⁸⁹ In Kiribati, the court has held that the human rights accountability should be interpreted as applicable only to government, not private entities.⁹⁰ The situation in Solomon Islands is somewhat misleading and it has been suggested that some fundamental rights are enforceable only against government, whilst others are enforceable more generally.⁹¹

Fiji	Yes (but not specifically tested)
Micronesia, Federates States of	Partial
Kiribati	No
Marshall Islands	No
Samoa	Partial through case law
Solomon Islands	Partial (not clear from case law)
Tuvalu	No
Palau	No
Vanuatu	Yes through case law
Cook Islands	Possibly (not tested)
Tonga	No
Papua New Guinea	Yes (but no specific anti-discrimination provision so limited usefulness for women)

⁸⁶ July 15, 2005, *I*. Section 1. Amendment: Article IV, Section 13.

⁸⁷ [1986] SBCA 1; [1985-1986] SILR 125, 24 February 1986

⁸⁸ In New Zealand and Australia rights are generally enforceable against private agents as well.

⁸⁹ Article VI, Constitution of Palau.

⁹⁰ *Teitinnong V Ariong* [1987] LRC (Const) 517.

⁹¹ *Loumia V DPP* [1985-86] SILR 158; *Ulufa'alu V Attorney-General* [2005] ILRC 698. Discussed In Paterson, Tavala and Jowitt, 2008, 4

Nauru	No
Niue & Tokelau	No
Source: author	

In Vanuatu, the Supreme Court has held that rights and freedoms are enforceable against all persons, including private entities.⁹² In *Public Prosecutor v Kota*,⁹³ the courts held traditional chiefs in Vanuatu to be bound by the Bill of Rights in protecting women's freedom of movement (see Box 6).

Box 6. Women's freedom of movement and the Chiefs of Tanna Island - *Public Prosecutor v Kota*

The wife (M) and husband (K) had separated in bitter circumstances. Local chiefs, accompanied by some police officers, tried to reconcile the parties, forcing W to return to Tanna Island from Port Vila saying that it was their customary duty to reconcile the parties. M asked the Vanuatu Women's Centre (VWC) for assistance. K and the group of chiefs who had forced M's return to Tanna, were prosecuted by the state. The court had to consider whether the chiefs of Tanna had the power to force M to return to Tanna under custom law and whether they were bound by the Bill of Rights in the Constitution of Vanuatu (CV) in the same way as the state. The court found K and the chiefs guilty of various offences, but noted a conflict between the constitution and custom. Parliament needed to consider whether any amendments had to be made to the CV or other legislation to clarify the role of the chiefs. If this role was clarified by legislation, the fundamental rights of women in Vanuatu had to be protected. Furthermore, the chiefs had to realise that any powers they wished to exercise in custom were subject to the CV, and also subject to legislation. Article 5 of the CV mandated non-discrimination and made it very clear that women were to be treated the same as men. Whilst custom may have been that women could be treated as property, and could be directed to do things by men, be those men husbands or chiefs, they could not be discriminated against under the CV. The court also observed that the Vanuatu Police had no authority to act as they did in the given case, to bully and force W to attend a meeting. Note: All cases in this paper are real cases based on the author's interpretation.

In other PICTs, the result of the strict application of the vertical rule in terms of human development is that women cannot legally challenge sex or gender discrimination against private corporations. This is highly problematic given the growing impact of large multinational and domestic corporations on the lives of women, particularly in countries where they are the largest employers of female labour. The Constitution of Fiji, together with the Fiji Human Rights Commission Act 1999, would appear to allow for the horizontal enforceability of rights, however this interpretation is yet to be properly tested. In the tax exemption zones in Fiji, which hire extremely large numbers of women in garment or other manufacturing factories, it is not clear whether exploitative labour conditions are able to be challenged on constitutional or human rights grounds. This legal impediment needs to be addressed legislatively through amendments, with clear and unambiguous language.

National or regional human rights mechanisms and accessing justice

On the rare occasion where rights violations come before the higher level courts, they have generally been enforced. Most PICTs have independent judiciaries in general and more often

⁹² *Noel v Toto* [1995] VUSC 3; *Public Prosecutor V Kota* (1989 -93) 2 Van LR 661.

⁹³ (1989 -93) 2 VLR 661

than not the courts have demonstrated a willingness to make findings consistent with the bill of rights where civil or political rights violations are concerned and where victims have been persistent about asserting their rights. Courts are expensive and available mainly to women who have the financial means to afford lawyers or who have access to well-resourced legal aid offices.

There are very few avenues for reporting rights violations in most PICTs and very rarely are human rights violations reported at all. Both issues have a bearing on each other. Apart from Fiji, which has a Human Rights Commission, the only avenues to obtain remedies in most countries are the mainstream courts, which require access to courts, lawyers and funds (see Box 7). Thus the structures and mechanisms for promoting and protecting women's rights are extremely limited. Existing mechanisms like ombuds offices have limited and poor enforcement powers and are inadequately resourced and funded. Most ombuds' powers are also restricted to investigating a limited range of administrative malfeasance. It is critical that all PICTs have national human rights commissions and/or a regional human rights commission for the protection of rights (see Box 8).

Box 7. Fiji Human Rights Commission⁹⁴

Only Fiji has a national human rights commission established by the 1997 Constitution. The Fiji Human Rights Commission is set up under 1999 legislation of the same name. It has 3 Commissioners. Only one, the Chair, who is also the Ombuds, is full-time. The Commission is responsible for playing a leading role in the protection and promotion of human rights and in helping build and strengthen a human rights culture. Specifically it is mandated to educate the public about human rights, to make recommendations to the government about matters affecting human rights and to perform such other functions as are conferred on it by a law made in Parliament. The legislation enables the Commission to investigate allegations of human rights violations and unfair discrimination in employment. The bulk of its work appears to be in the area of employment. It has also enjoyed some success in challenging discrimination in the area of sexual orientation in *Nadan v McCosckar*,⁹⁵ ; and age discrimination in *Martin v Suva City Council*.⁹⁶

Box 8. A regional human rights mechanism

Most Pacific Island countries will have difficulty in setting up national commissions which comply with international standards such as *The Paris Principles on National Human Rights Institutions* which require independence and autonomy from the State. There is ongoing work to consider the possibility of setting up a regional human rights mechanism to serve the needs of all PICTs, especially those smaller countries that lack technical expertise and resources. *The Pacific Plan* encourages the concept of regionalism: that is, countries working together for their joint and individual benefit provided that a regional approach adds value to national efforts.⁹⁷ A regional human rights mechanism or national human rights mechanisms for the protection of rights outside the court system are critical.

⁹⁴ In January 2007 the Director of the Commission, Dr S Shameem, issued a report defending the actions of the Military in its 5 December 2006 takeover of Government and removal of the democratically elected Government. Since that time the Parliament of Fiji remains suspended by the military and Fiji is ruled by a military Government. The Commission has become an institution of controversy and is no longer a member of various international bodies of national human rights institutions.

⁹⁵ Criminal Appeal Case Nos: HAA 85 & 86 of 2005, 6 August 2005 (Fiji) analysed in Jalal and Madraiwiwi 2005, 30.

⁹⁶ Civil Action No 0073 of 2004, High Court of Fiji

⁹⁷ PIFS 2005, 4.

Exceptions to anti-discrimination law and their effects on women

The general limitation on equal rights is that of what is ‘reasonable and justifiable in a free and democratic society,’ such as in section 39 of the Constitution of PNG. If a restriction on a fundamental right is reasonable and justifiable, in a free and democratic society it will be accepted. This general limitation is either explicitly stated in some constitutions as in Papua New Guinea,⁹⁸ or read in by the courts as a matter of common law in others. However, almost all constitutions also provide for specific exceptions to the principle of non-discrimination on the grounds of custom, titles for chiefs and aristocracy or land rights for indigenous peoples; and in some cases citizenship rights are specifically excluded from equality provisions. The issue of land rights is a matter of great controversy in countries like Fiji with its large Indian-Fijian minority, and has been the perceived cause of racial tensions, inter-ethnic political strife and interruptions to the rule of law and democracy.

Sex and gender discrimination

Notably missing from the prohibited grounds in some constitutional definitions of discrimination is sex and/or gender discrimination. In Nauru, Kiribati, Tonga, Tuvalu and the state of Kosrae in the Federates States of Micronesia⁹⁹, it appears to be lawful to discriminate against women on the basis of their gender. For example, in both Tuvalu and Kiribati¹⁰⁰, it is not an oversight that their constitutions define discrimination but do not forbid sex discrimination (see Box 9). It is an omission deliberately made since the definition does forbid discrimination on the grounds of race or religion. The result of this omission is that it has been virtually impossible to challenge gender discrimination in the courts of these countries.

Box 9. Challenging legal discrimination without constitutional protection: The Kiribati K-Wan

Tumai Timeon and Teretia Tokam are two young women lawyers who graduated from the University of the South Pacific’s School of Law and have done the Pacific Regional Rights Resource Team’s (RRRT) human rights course. The course is designed to promote the use of human rights in the Pacific Islands. With other women lawyers and activists they formed a network of women called the Kiribati Women’s Activists Network (K-WAN) in 2008, which focuses on women’s human rights. They have a feminist platform, although unstated. They are in the process of challenging discriminatory legislation. They have no office and staff but have registered as a member of the Kiribati Associations of Non-Government Organisations (KANGO) to secure support and cooperation of the umbrella NGO and other sister associations; and to seek recognition for their platform. They currently ‘Advocate, Train and build public Awareness (ATA)’ on the issues of women’s human rights. As part of their ATA plan they have two strategies: litigation (using private lawyers who are willing to take on *pro bono* cases for the time being) and legislative reform. During 2008 they attempted to challenge two discriminatory laws, one which excludes widows from the definition of ‘beneficiary’ in certain legislation making them ineligible to receive their husband’s pensions (legislative strategy); and second, land codes that discriminate against widows who are not provided specifically for in their husbands’ wills (litigation strategy) but are facing legal structural obstacles. **The biggest legal challenge they face is that Kiribati’s Bill of Rights**

⁹⁸ Section 39, PNG Constitution.

⁹⁹ In relation to Kosrae see UNIFEM Pacific 2006, 52. There would appear to be a conflict with the Federal Constitution of FSM which does make sex discrimination unlawful.

¹⁰⁰ Section 27; section 15.

in the Constitution does not include sex/gender discrimination as a prohibited ground of discrimination, thus allowing discrimination against women. If the definition included sex or gender they could challenge a number of discriminatory laws and practices on the grounds that they are unconstitutional. K-WAN needs to get the constitution amended to make sex or gender discrimination unlawful.¹⁰¹

Custom as an exception to non-discrimination

Custom is accepted as an exception to the principle of non-discrimination on the grounds of sex by the national courts in some jurisdictions. However, courts are ambivalent about this, showing the importance of judicial attitudes in mitigating the discriminatory impact of custom law on women (see Box 10 for an example).

To discriminate against women on the grounds of custom or tradition is in violation of Article 5 of CEDAW.

Box 10. Custom law and widows' pensions: customary law is allowed to discriminate against women

In *Tanavalu v Tanavalu & Solomon Islands National Provident Fund*,¹⁰² the court took the view that the constitution permitted the use of custom law even if it discriminated against women. In this case, pension funds were paid to the father of the deceased, rather than to the deceased's widow. The father then distributed the funds at his discretion, giving nothing to the widow. The court ruled that this was in accordance with the relevant custom, where inheritance was by patrilineal succession. The widow could not object on the ground that the custom was discriminatory, as the constitution specifically exempted custom law from the general prohibition on discriminatory laws.¹⁰³ The result of this decision has a long-term impact on the economic empowerment of widows, whose only source of income following the death of a 'breadwinner' may be their pension funds.

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*.¹⁰⁴ 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.

¹⁰¹ As told to the author, RRRT's Imrana Jalal, by members of K-WAN on 17 October 2008, Port Vila, Vanuatu at RRRT's annual Pacific regional human rights training for lawyers.

¹⁰² [1998] SBHC 4, affirmed [1998] SBCA 8.

¹⁰³ s15(5)(d).

¹⁰⁴ [1994] PNGLR 486 N1262, 22 November 1993.

Citizenship for women and their children

The exclusion of sex discrimination from the definition of discrimination in the constitution, being the supreme law, allows citizenship and immigration laws to discriminate against women in some PICTs (see Table 9). Tonga removed citizenship discrimination recently with the passing of the Nationality (Amendment) Act 2007. Citizenship and immigration laws prohibit citizenship and automatic residency for female citizen's foreign husbands, forcing women to leave their countries. This principle is reflected in the constitutions of Kiribati and Nauru and in ordinary legislation in Vanuatu.¹⁰⁵ Similar legislation in Kiribati discriminates against their children, if born abroad and fathered by foreign husbands, by denying their children citizenship.¹⁰⁶ The same restrictions do not apply to male citizens of those countries. Although this law might be challenged on the grounds of unconstitutionality in Vanuatu, this has not occurred.

Table 9. Pacific Island countries and territories that discriminate against women in full citizenship rights for their spouses and/or children	
Fiji	No
Micronesia, Federated States of	No
Kiribati	Yes
RMI	No
Samoa	No
Solomon Islands	No
Tuvalu	Partial
Palau	No
Vanuatu	Yes
Cook Islands	No
Tonga	No
Papua New Guinea	No
Nauru	Yes
Niue & Tokelau	No
Source: author	

By denying women's foreign husbands (spouses) and children born outside their countries citizenship, automatic residency and the right to work, there is substantial non-compliance with Article 9 of CEDAW, which mandates equal rights for men and women in citizenship and nationality. Such provisions also deny women the right to freedom of movement and the right to family life by either forcing women to leave their countries or to live apart from their spouses and children.

Domicile laws however do not discriminate between men and women, at least in the formal legislation. There is no legislation requiring a woman to adopt or follow the domicile of her husband.

¹⁰⁵ Sections 22 & 26, Constitution of Kiribati; section 74, Constitution of Nauru; section 10, Citizenship Act Cap.112 (Vanuatu).

¹⁰⁶ Jalal 1998, 38.

Temporary special measures or affirmative action for women

Strict formal legal equality principles, forbidding discrimination, are a possible barrier to passing laws or initiating policies that treat women differently or give them an advantage. Temporary special measures, affirmative action, or positive discrimination in favour of women are critical to accelerate *de facto* equality for women and to ensure that that systemic and historical disadvantage is adequately addressed. This principle and the necessity for legislation to specifically cater to this need are recognised, in Articles 3 and 4 of CEDAW.

The constitutions of Fiji, Palau, Samoa, Papua New Guinea, Tuvalu and Vanuatu appear to allow for different or special treatment to assist disadvantaged groups.¹⁰⁷ Vanuatu, Samoa and Papua New Guinea¹⁰⁸ specifically allow for special measures for women as a disadvantaged group. Fiji has a Social Justice Act 2001 to allow for affirmative action for disadvantaged groups, but the legislation has not particularly targeted women as a group,¹⁰⁹ and is limited to certain areas. In the Cook Islands, it would be necessary to prove that the protection of women's rights was a legitimate legislative purpose and that the means by which those rights were protected by the legislation was consistent with that purpose.¹¹⁰

No PICT has national legislation for specific electoral quotas for women in the national legislature (see Table 10), except for Bougainville in Papua New Guinea which is a specially administered territory of PNG emerging from internal conflict. Some countries have generalized legislation which theoretically allows for legislation to be passed enabling reserved seats or electoral quotas for women, but so far no PICT has chosen to exercise this constitutional power to pass such legislation. Samoa's Constitution is typical of the genre:

*Nothing in this article shall prevent the making of any provision for the protection of the advancement of women.*¹¹¹

The gender discrimination or lack of gender equity is therefore one of omission, of failure to act.

Table 10. Pacific Island Constitutions permitting temporary special measures to accelerate gender equality - No Pacific Island country or territory has legislation permitting specific electoral quotas or reserved seats for women in their legislatures.		
	Constitution/legislation allows for temporary special measures to accelerate equality for disadvantaged groups, including women.	Does the constitution therefore theoretically allow for special legislation to be passed for special electoral quotas for women in parliament?
Fiji s.44	Yes (but limited to housing, training, education, land and commerce. Does not include electoral quotas for women)	No. It would need specific enabling legislation.
Palau Art IV, s.5	Yes	This section theoretically allows legislation to be passed but there is

¹⁰⁷ Article IV, section 5, Constitution of Palau; section 44, Constitution of Fiji; section 5 (k), Constitution of Vanuatu; section 27 (3)(f), Constitution of Tuvalu.

¹⁰⁸ Section 55 (2), Constitution of PNG; sections 15(2) and (3), Constitution of Samoa.

¹⁰⁹ The targeted groups have been primarily indigenous Fijians. This has been the source of much controversy in Fiji and was one of the alleged reasons leading to the political conflict in 2006.

¹¹⁰ Section 64(2), Constitution of Cook Islands.

¹¹¹ Section 15 (3) (b), Constitution of Samoa.

		no such legislation.
Samoa s.15(3)(b)	Yes	This section theoretically allows legislation to be passed but there is no such legislation.
Papua New Guinea s.55(2)	Yes	This section theoretically allows legislation to be passed but there is no such legislation.
Tuvalu s.27 (3)(f)	Partial	This section partially and theoretically allows legislation to be passed but there is no such legislation.
Vanuatu s.5 (k),	Yes	This section theoretically allows legislation to be passed but there is no such legislation.
Cook Islands	No	No
Marshall Islands	No	No
Tonga	No	No
Micronesia, Federated States of	No	No
Nauru	No	No
Solomon Islands	No	No
Kiribati	No	No
Tokelau	No	No
Niue	No	No
Source: author		

Political participation and legal provisions

There continues to be a need for women in leadership roles whether in government, the corporate sector, the church or traditional sphere. One such field that requires affirmative intervention is parliamentary seats. I believe in quotas because that is the only way the imbalance of males and females will be readily addressed. This is required because there is no level playing field. The odds are stacked against women from the beginning and it is nonsense to suggest that candidates are selected on merit.

His Excellency Ratu Joni Madraiwiwi¹¹²

One of the primary reasons women are vulnerable to discrimination is that they do not have an equal voice in decision making at home, in the villages, *nakamals*, *fonos*, *maneabas*¹¹³ or in society, and at the national level, even in matters directly related to them (see Box 11 for an example). They are generally powerless intellectually, materially and politically.¹¹⁴ Consequently, even if women are allowed to take autonomous action, their efforts are not productive because they are denied access to resources. Whether it is a question of exercising reproductive rights, actively participating in the work force, or accessing social (health care and education) and material resources (land, houses and credit), women's independence and self-sufficiency play an important role in gender equality.¹¹⁵ Political leadership, by women, for women, can be an effective catalyst toward addressing discrimination against women. Article 7 of CEDAW obliges member states to eliminate both direct and indirect discrimination in women's public and political lives.

¹¹² Madraiwiwi 2006 (Former Judge of the High Court, former Human Rights Commissioner and high Chief of Fiji)

¹¹³ Informal and sometimes formal decision-making bodies at the village or community justice level.

¹¹⁴ UNESCAP 2007, 119.

¹¹⁵ *Ibid.*

Box 11. Palau: The power to choose chiefs but not be chiefs?

Many women in Palau continue to maintain that they have equal, and sometimes higher, status than men, and it is unnecessary to change laws, policies or practices to improve their status. Some maintain that by interfering with laws or customs this could mean a ‘leveling down’ for them in terms of their overall status. However, until research is done in Palau to examine the ‘on the ground’ impact of the legislation, common and custom laws on the lives of Palauan women, it is impossible to reach the conclusion that Palauan women do not suffer from gender injustice. Women agree that the lack of research on women in Palau is a major gap and weakness and urgent research needs to be conducted on gender justice in Palau.¹¹⁶ In the November 2008 General Election, women won an unprecedented two seats in the *Olbiil Era Kelulau* (OEK), the national legislature.¹¹⁷

‘Women in the Palauan life hold a very high profile, esteem and responsibilities within the context of a matrilineal society. Their roles are specific and are different from the male counterpart. They have never been deemed to be of lesser value or leaders – just of a different category. While they hold the sole power of choosing or appointing the chief, they would never become a chief.’¹¹⁸

Statement by Masao M. Ueda, Minister Of Health, Republic of Palau, 1999

The Pacific region has the lowest percentage of women in politics at the national level and shows no improvement, despite two decades of global activism, because contemporary culture in the Pacific still favours men politically, socially, economically and administratively (see Table 11). Of the eight countries in the world that have no female members of in their national Parliaments, four are in the Pacific. They are the Federated States of Micronesia, Nauru, Solomon Islands and Tuvalu. Palau elected its first female candidates in the November 2008 elections, taking the region’s representation from 2.5 per cent to 3.7 per cent. Vanuatu has just two women in parliament, while Tonga, Marshall Islands and Papua New Guinea each have one. Affirmative action and temporary special measures for women are critical to alter the situation.¹¹⁹ The Tongan female member is appointed by the King, in a non-elected seat, and is the Attorney General.

Table 11. Number of women in selected Pacific Island country and territory national legislatures in November 2008				
Country	Electoral system	Size of legislature	No women	% women
Niue	First past the post & block vote	20	4	20
Fiji	Alternate vote	71#	8	11.3
Cook Islands	First past the post	24	2	8.0
Palau	First past the post	29	2	6.9
Samoa	First past the post & block vote	49	3	6.1
Kiribati	Two round system	42	2	4.8

¹¹⁶ As told to the writer of this paper, November 2008 by female government officials from Palau at a CEDAW Workshop for countries that have not ratified CEDAW in Nukualofa, Tonga.

¹¹⁷ Personal knowledge as told to the author by the Palau government delegation, Tonga CEDAW Workshop for PICTs that have not ratified CEDAW, 3-6 November 2008, Nukualofa, Tonga.

¹¹⁸ Ueda 1999.

¹¹⁹ Kidu 2008

Vanuatu	Single non transferable vote	52	2	3.8
Marshall Islands	First past the post & block vote	33	1	3.0
Tonga	First past the post & block vote	35	1	2.9
Papua New Guinea	Alternate vote	109	1	0.9
Solomon Islands	First past the post	50	0	0.0
Nauru	Modified Borda count	18	0	0.0
Tuvalu	First past the post & block vote	15	0	0.0
Federated States of Micronesia	First past the post	14	0	0.0
Average		734	27	3.7
Source: Pacific Islands Forum Secretariat & UNDP Pacific Centre 2009. # Fiji's Parliament is still illegally suspended and Fiji is governed by a military appointed administration. The head of the administration, as 'Prime Minister', is the commander of the military.				

The low numbers of female politicians in the Pacific might be compared to global numbers for an appropriate analogy. According to a study by UNIFEM, women have entered politics in greater numbers than ever in the past decade, accounting for 18.4 per cent of parliament members worldwide. This means that the proportion of women has increased by seven percentage points since 1995. The increase was attributed to women realising that they needed to attain power rather than just lobby for change. If the rate of change holds constant, it will take until 2045 for women to reach parity in the developing world, which UNIFEM has defined as holding 40 per cent to 60 per cent of elected parliamentary seats. Quotas that reserve seats for women have proved influential in increasing female numbers. The study found that in elections held in 2007, women in countries with some form of electoral quota captured 19.3 per cent of the seats, as opposed to 14.7 per cent in countries without such quotas. Of the 22 countries where women constitute more than 30 per cent of the national assembly, 18 have some form of quota.¹²⁰

The same study found a high degree of association between the number of elected women and legislation related to women's issues, including agriculture services, day care and street lighting for security. It also cited British research that women turned out in higher numbers to vote in elections when there was a female candidate. Another recent global survey by the Inter-Parliamentary Union found that women parliamentarians tend to emphasise social issues, such as childcare, equal pay, parental leave and pensions; physical concerns, including reproductive rights, physical safety and gender-based violence; and development, which includes human development, the alleviation of poverty and delivery of services.¹²¹ This partly demonstrates the principle that political leadership, by women, for women, can be an effective catalyst towards addressing discrimination against women. The closing of the 'democratic deficit,'¹²² meaning equal representation for men and women, is critical

Another recent global survey by the Inter-Parliamentary Union¹²³ found that women and men have different interests and perspectives. Although women parliamentarians were not a homogenous group, they share certain general interests and concerns. More than 90 per cent

¹²⁰ UNIFEM 2008, 17-33.

¹²¹ IPU 2008(a), 2.

¹²² Senator Cecilia López Montaña, the speaker of the opposition Liberal Party in Colombia. Quoted in UNIFEM 2008.

¹²³ IPU 2008 (a).

of all respondents agreed that women bring different views, talents and perspectives to politics. Women parliamentarians tend to emphasize social issues, such as childcare, equal pay, parental leave and pensions; physical concerns, including reproductive rights, physical safety and gender-based violence; and development, which includes human development, the alleviation of poverty and delivery of services (see Box 12 for an example).¹²⁴ The same study noted however that men were also needed to create and build partnerships to effect gender sensitive legislation. However half the women respondents made it apparent that they considered men not to be able to satisfactorily represent the interests of women in politics.

Access to political power is critical for women leaders to make a difference in other women's lives, but women make up only 3.7 per cent of PICT legislatures.¹²⁵ Not only is this important from a simple rights-based representative democracy point of view, but also because of equity, productivity and empowerment. Young girls also need positive role models and to believe that 'women can do anything'. The psychosocial element of women's sense of empowerment, in being able to bring about change, is as important as formal legal equality. Women need to know that they are able, given the right milieu, to access and influence every sphere of human endeavor and development. Parliament is one such avenue, although by no means the only one.

From a practical and productivity perspective, women are generally better able to voice women's concerns, and there is some local evidence to suggest that a greater number of women in the legislature is a catalyst for progressive legislation to be passed.¹²⁶

Box 12. Fiji's female legislators and the historic Family Law Act

In the case of Fiji's progressive Family Law Act 2003, which removed historic and systemic discrimination against women, the overwhelming majority of female representatives in Parliament not only championed and supported the proposed law during parliamentary debate on the bill, but lobbied within their parties for the new law to be passed across party lines. They worked closely with the Fiji Law Reform Commission, the Pacific Regional Rights Resource Team and the Fiji Women's Rights Movement to bring about the passing of the bill into law. Fiji's political parties mobilise largely along racial lines, in a country deeply divided by race. In the informal coalition, women members of parliament mobilised along gender lines, and significantly, also across racial lines, in racially polarised Fiji. This coalition between women politicians was not only unprecedented in Fiji's legislative history, but created a positive side effect by building alliances on the basis of gender, rather than on party lines and racial identity. Only one female MP, refused to mobilise around the new law or to co-operate with women campaigning for it.¹²⁷

The IPU study also shows that numbers do matter; the more women there are in the legislature, the easier it is to address women's issues and to change the gender dynamics in the chamber. Eighty-six percent of MPs questioned agreed that larger numbers of women in parliaments would increase women's influence on political policies and priorities.¹²⁸

¹²⁴ *Ibid.*

¹²⁵ See Table 11.

¹²⁶ UNIFEM 2008(a), 26-27.

¹²⁷ Personal knowledge, the writer was Family Law Commissioner campaigning and lobbying for the new law during 2003.

¹²⁸ IPU 2008 (a), 2.

No legislation in any PICT, formally or directly prohibits women from participating in politics or decision making in both formal and informal political systems. Nor do laws prohibit women from voting. Rather there are many reasons why there are low numbers of women in Pacific Island legislatures (see Box 13). This can include indirect discrimination under the guise of custom and culture and the belief that women should not be leaders that are the biggest impediments. This is particularly so in PICTs where membership of the chiefly or ‘big man’ echelon is an entry point for candidacy in the national legislatures.

Box 13. Reasons why there are low numbers of women in Pacific Island legislatures

1. Most Pacific Islanders vote along the basis of identity politics; but most standing for election are men in any case. This means that Pacific Islanders generally vote for members of their racial or ethnic groups, clans, *wantok*, *aiga*, *mataqali* and cultural groups irrespective of gender, corruption, ability or merit.
2. Entry to many legislatures is directly or indirectly accessed or controlled by membership of traditional chiefly hierarchies, for example, noble, chiefly or other titled systems. This means that chiefly, titled or noble females have a better entry possibility than ‘commoners’ and others. In addition senior chiefs must have precedence over younger chiefs, regardless of the merits of either.¹²⁹
3. Most Pacific countries are patriarchal, even those countries that have matrilineal land systems.
4. Traditional cultural and patriarchal prejudices against women.
5. Membership of political parties and eligibility for candidacy is controlled by powerful political families.
6. Financial constraints.¹³⁰
7. Electoral systems in the Pacific are not conducive to women winning seats.¹³¹
8. Pacific Island political parties are gender-biased and do not field female candidates even when they have affirmative action policies on paper.¹³²
9. There are very few, if any, Pacific women’s NGOs mobilising and dedicated to increasing the numbers of women in legislatures, as there are for other women’s issues like gender justice in the law, violence against women etc, especially across party lines.
10. There are no electoral quotas for women in any Pacific Island country legislation or constitution
11. The strict gendered division of labour; and disproportionate food security and domestic responsibilities prevent women from participating in decision making.
12. Both custom and formal laws do not give women equal rights in any Pacific country, so women are discriminated against in other sectors as well.
13. It is culturally unacceptable for all Pacific Islanders, but especially women, to ‘promote’ themselves, and openly compete with others. It is regarded as being too individualistic and against communal values.

Source: author

¹²⁹ Author’s personal knowledge.

¹³⁰ IPU 2008(a), 21.

¹³¹ *Ibid.*

¹³² In a major political party (Fiji Elections 2006) the party caucus had a bitter dispute about this issue which led to a political rift in 2006 about the fielding of a female candidate in a major non-rationally based Open seat. The female candidate won her seat. Author’s personal knowledge.

The chiefly system and equal political access

Gender and custom also have a big role to play in determining access to political participation. In *Minister for Provincial Government v Guadalcanal Provincial Assembly*¹³³ the court has to consider the possibility that women were discriminated against in the mainstream political system, because they were not able to be chiefs in the traditional *kustom* system, as only chiefs were able to be members of the Provincial Assembly (see Box 14 for an example). As a result of the constitution recognising the validity of *kustom*, the Court of Appeal held that discrimination against women was not unconstitutional, as the constitution itself legitimated that gender discrimination.

Box 14. Women cannot be chiefs and leaders: *Minister For Provincial Government v Guadalcanal Provincial Assembly, Solomon Islands*

When the Constitution of Solomon Islands) came into effect, there were no provisions for a system of provincial government. In the High Court, the Guadalcanal Provincial Assembly attacked the validity of certain provisions of the Provincial Government Act 1996, which it argued were invalid as being inconsistent with the constitution. A point of discussion during the case was to ‘consider the role of traditional chiefs in the provinces’. One of the issues was, how does the Provincial Government Act in providing for traditional representation of custom chiefs in governance, affect the rights of women? The court said that the traditional position was that only a male could be a ‘traditional chief’. The constitution itself therefore recognised this imbalance or discrimination and it would remain until the role of ‘traditional chief’ under the constitution was re-evaluated. Initially the role for women in government at the provincial level would be limited to standing for election to Area Assemblies. It was clear that women were disadvantaged, given that traditional chiefs were male, however this was not unlawful as the constitution itself allowed it.

There is very little discussion in the Solomon Islands courts of the discriminatory effect of laws and practices on women. In this case, two members of the court recognised the effect the particular constitutional provisions had by reinforcing the traditional power structures. At the same time there was an acknowledgement by one Judge that society was changing and not static and there was every likelihood that the question of male traditional chiefs would be re-evaluated in time. Although there was no reference to international instruments that Solomon Islands had ratified, these conventions would have been modified by the constitutional provisions in place, because the Solomon Islands constitution is the supreme law and any conflicting law would be overridden.

Source: author

Women are indirectly discriminated against in a similar manner to the Solomon Islands, in Tonga, Samoa, Fiji and Marshall Islands by indirectly limiting equal eligibility for political representation through the customary title, chiefly or noble system. In these PICTs, membership of such privileged groups is an entry point for eligibility for political representation.

¹³³ (1997) SBCA 1, 11 July 1997.

In the Marshall Islands there appears to be equal eligibility for political representation, but the reality is that the Constitution does not recognise the female equivalent of chiefs,¹³⁴ notwithstanding that women chiefs play a powerful role in society, and that Marshall Islands is primarily a matrilineal society in which women have much say in the control and management of land. The Constitution of the Marshall Islands 1979,¹³⁵ creates the Council of Iroij. Election to the Council of Iroij is restricted to those recognised by customary law or traditional practice as having rights and obligations equivalent to those of the *iroijlaplap* (paramount chiefs). They have the power to veto certain legislation affecting customary law or any traditional practice or land tenure or any related matter passed by the Nitjiela (parliament). Election to the council is limited to those of chiefly status. Although there is no formal barrier to women becoming chiefs, they rarely do. Only one woman has served as a member of parliament in the Marshall Islands.¹³⁶

Similar limitations exist in Fiji where 14 of the 32 seats in the upper house, the Senate, are appointed by the president on the advice of the *Bose Levu Vakaturaga* (BLV), the Great Council of Chiefs.¹³⁷ The president and vice-president are also appointed by the BLV. The numbers mean the chiefs can vote as a bloc to prevent any law from being passed, but they also have legislative power to veto any bill regarding land and customary rights of indigenous Fijians.¹³⁸ Membership to the BLV is limited to traditional chiefs. Women generally become chiefs in only very limited circumstances, but the system is rapidly evolving in some parts of Fiji.

The Bill of Rights in the Samoan Constitution specifically prohibits discrimination on the basis of sex,¹³⁹ and allows for affirmative action. There is no formal legal direct discrimination against women participating in political life but there is a prohibition on non-*matai* (chiefs) standing as candidates for election to the legislature. The traditional *matai* system still plays a dominant role both at the village level and in national politics. However, inheriting a *matai* title is not only through inheritance. It is notable that succession to *matai* titles can be by consensus of the extended family rather than any fixed mode of inheritance. Since about 97 per cent of *matai* are male, it is not surprising that only six per cent of the members of parliament are female.

The Kingdom of Tonga's legislature has three classes of persons, the King and his family, 33 noble families and the remaining group of commoners or ordinary citizens. The 32-member (normally 32 but can be greater) Legislative Assembly is composed of nine directly elected members (commoners), nine indirectly elected members (nobles), and 14 members appointed by the King.¹⁴⁰ Effectively, 70 per cent of the Tongan Parliament is controlled by the nobility.¹⁴¹ Thus equal eligibility for political representation is affected by the overall lack of democracy in Tonga, and membership of social classes.

¹³⁴ Stege, Maetala, Naupa and Simo, (ed) Huffer, 2008, 26.

¹³⁵ Article III.

¹³⁶ UNIFEM Pacific 2006, 249.

¹³⁷ Section 64, Constitution of Fiji.

¹³⁸ Section 185, Constitution of Fiji.

¹³⁹ Section 15, Constitution of Samoa.

¹⁴⁰ IPU 2008(b).

¹⁴¹ Author's interpretation.

Electoral systems, electoral quotas or reserved seats in parliament for women

Electoral systems

Research by the IPU¹⁴² and UNIFEM¹⁴³ suggests that there is a direct link between electoral systems and women's representation; and the proportional representation (PR) system gets more women into legislatures. In terms of women's representation, the vast majority of the top 20 placed countries in the world use proportional representation. In addition, the average level of women's representation is appreciably higher in countries with proportional representation electoral systems than in countries with majority/plurality systems.¹⁴⁴ In some regions the contrast is most striking. For example, in East Asia and the Pacific, an average of 19.1 per cent of seats were held by women in countries with proportional representation systems, compared to 6.3 per cent in non-PR systems.¹⁴⁵

Electoral quotas

The same research reveals that quotas provide a fast track method for women to win seats in parliament. They indicate a policy shift from formal equality in the political sphere, to substantive equality on the ground, as required by CEDAW. Reserved seats are a critical policy tool for increasing women's participation in legislatures. An estimated 40 per cent of countries around the world have put into practice some form of quotas for women, with an average representation of women at 22 per cent. In comparison, in those countries without quotas, the average drops to 14 per cent. The research concludes that the positive effect of quotas in electing women to parliament is now well documented.¹⁴⁶ Other types of temporary affirmative action measures, such as quotas at the sub-national level or political party quotas for electoral candidates (which can be voluntary) raise the number of countries with quotas to 95. The majority of countries with women in 30 per cent or more of national legislature seats applied quotas in some form.¹⁴⁷

The Pacific Island French territories are subject to the French Law on Parity 2000, which requires all political parties to include 50 per cent women on their lists of candidates in a list system. These islands have a proportional representation system, a result of their links to France. As a result of the combination of the electoral system and Parity Law, New Caledonia, has 44.4 per cent and French Polynesia 42.1 per cent women in their legislatures.¹⁴⁸ No other PICT has similar laws.

It is also suggested that constitutional or electoral law quotas are the strongest means of increasing women's engagement in political competition regardless of political system. Other types of temporary affirmative action measures, such as quotas at the sub-national level or political party quotas for electoral candidates (which can be voluntary) raise the number of countries with quotas to 95. The majority of countries with women in 30 per cent or more of national legislature seats applied quotas in some form.¹⁴⁹

¹⁴² IPU 2008(a), 20-24.

¹⁴³ UNIFEM 2008(a), 21.

¹⁴⁴ IPU 2008(a), 20-24 .

¹⁴⁵ UNIFEM 2008(a), 21.

¹⁴⁶ IPU 2008(a), 26.

¹⁴⁷ UNIFEM 2008(a), 21.

¹⁴⁸ Fraenkel 2006, 83, 88.

¹⁴⁹ UNIFEM 2008 (a), 21.

Box 15. Building the women's movement

The building of the women's movement in the Pacific and improving women's capacity to mobilise for political rights is critical for women's political participation. Unlike other issues that women's organisations mobilise around, including violence against women, gender/legal justice, economic empowerment, anti-globalisation and so on, there are hardly any, if at all, Pacific organisations dedicated to increasing the numbers of women in the legislature.

The few local organisations that attempted to mobilise around this issue, in a project supported by UNIFEM in the last decade, failed to be sustainable. They emerged briefly, leading up to elections, and then faded away after elections. Another factor leading to the lack of sustainability of such organisations is that they failed to mobilise across party lines, or in Fiji's case across racial lines, around the goal of gender parity, despite the good intentions of their funder and supporters.¹⁵⁰ One of UNIFEM Pacific's key priorities for the next four years is increasing 'gender justice in democratic governance in stable and fragile states'.

¹⁵⁰ Author's personal knowledge.

Chapter 3:

Criminal law and women's rights

This chapter examines the impact of criminal law on women, looking particularly at how they fare as survivors of gender-based violence or as defendants when they are accused of gender-based crimes. How does this contribute to their health, autonomy, capacity to earn incomes and to participate in the marketplace?

There is no formalised discrimination in the criminal legislation, and the language is generally gender-neutral. For example there are equal rules of evidence and the evidence of women is theoretically given equal weight, unlike some countries in Asia. The lack of gender equality is demonstrated however in the interpretation of legislation, common law rules and practices. The gender discrimination or the lack of gender justice in the area of criminal law is in the discrimination by omission or failing to act to remove gender injustice by legislation.

Violence against women

Violence against women (VAW) is both a cause and consequence of gender inequality.¹⁵¹ It is a serious and endemic problem in the region and is a critical impediment to women being able to fully participate in development processes. It is an important indicator of women's lack of self-sufficiency and autonomy, and cuts across all social and economic classes. Gender-based violence can have a lasting psychological impact on its survivors, lowering women's self-esteem, productivity and wages and destroying marriages. It leads to significant costs for the family, particularly children. Violence before and during pregnancy may also lead to serious health costs: miscarriage, premature delivery and low birth weight. It also carries serious financial costs – counseling fees, medical expenses and legal bills.¹⁵²

For the most part, the laws (legislation, court decisions and legal practices) are ineffective in securing justice for women. Compared to many other regions of the world, there has been a paucity of legislative reform in this region.¹⁵³ With the exceptions of Vanuatu, in domestic violence legislation, and Papua New Guinea and Marshall Islands in sexual assault legislation, reforms have been piecemeal changes to existing criminal and civil legislation, or common law precedents and legal practices, and have provided little but band-aid therapy.

In 2003 and 2005 respectively, Papua New Guinea and Marshall Islands changed their sexual assault regimes, attempting to remove legal discrimination against women in sexual offence law and practice.¹⁵⁴ In Fiji, the innovative Family Law Act 2003 was implemented in the beginning of 2006 and provides a civil protection order to women. In November 2008, Vanuatu passed the Family Protection Act 2008, making it the first country in the region to have targeted domestic violence legislation. Systematic research is required to assess the effectiveness of new legislation.

¹⁵¹ WHO 2005.

¹⁵² UNESCAP 2007, 119.

¹⁵³ Jalal 2008.

¹⁵⁴ Criminal Code (Sexual Offences and Crimes against Children) Act 2002 (PNG); and Marshall Islands in 2005 amended its Criminal Code 1966, Cap 1.

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

The incidence and economic costs of violence against women

The Reserve Bank of Fiji has estimated that violence against women costs the Fijian economy close to FJD300 million a year, 7 per cent of the GDP. Of this, 97 million is in direct costs borne by victims and their families; and government spends a further 200 million annually on welfare, law enforcement and health care for complainants. If opportunity costs are added, the figure could be higher and possibly closer to FJD500 million. It was concluded that the estimated direct cost of violence against women of about FJD300 million was equivalent to the Fiji government's budget deficit; the government total borrowing; the total government capital expenditure; the total income taxes expected to be collected; the total Value Added Tax estimated to be collected; and was greater than the total budget allocated to all the law and order agencies of government in 2003.¹⁵⁵

In the Pacific, Papua New Guinea has the highest rate of gender violence, with 67 per cent of women reporting physical assault by a male partner.¹⁵⁶ In national research conducted in Papua New Guinea it was found that 67 per cent of women in rural areas, and 56 per cent of women in the urban low income category as well as women in the 'urban elite category' were hit by their husbands. There was also a high record of men hit in Papua New Guinea, but further investigation found that these men were hit mainly in self-defence.¹⁵⁷

In Papua New Guinea rapes, knife attacks on wives, beating and sexual abuse of girls, and torture and murder of female 'sorcerers' or 'witches' are among the many forms of violence against women. The threat of rape, sexual assault and other violence is so great that women and girls cannot freely move around their communities, go to school, the markets or places of employment.¹⁵⁸

The Prime Minister of Papua New Guinea publicly noted in October 2008, that he was ashamed about the high level of violence against women in his country, including cases of highly-educated leaders beating their wives. He said that Papua New Guineans had a big attitude problem and had to change, in response to a local newspaper that had published a series of reports highlighting domestic violence. The newspaper's campaign was sparked by the recent severe beating of a woman by her husband who ripped an unborn child from her womb in the Western Highlands Province. That attack prompted a petition to parliament demanding the government act to stop violence against women.¹⁵⁹

In a 10-country study conducted by WHO,¹⁶⁰ Samoa was the only PICT country to be included. The whole of Samoa was the sample study. In studying the prevalence of intimate

¹⁵⁵ Nairube 2002.

¹⁵⁶ UNESCAP 2007, 119

¹⁵⁷ Fiji Women's Crisis Centre 1985.

¹⁵⁸ Amnesty International 2006.

¹⁵⁹ Post Courier 2007.

¹⁶⁰ WHO 2005.

partner violence it was found that over 24 per cent experienced severe violence in the preceding 12 months whilst 17 per cent experienced moderate physical violence. In the 10-country study the highest rate of violence by a non-partner was in Samoa at 62 per cent. In looking at sexual violence since the age of 15 years, when asked whether they had been forced by a non-partner to have sex or to perform a sexual act when they did not want to, the highest levels – between 10 and 12 per cent – were reported in Peru, Samoa, and urban Tanzania. The assailants included strangers, boyfriends, and male family members (not including fathers) or male friends of the family.¹⁶¹ About half the women interviewed in Samoa did not tell anyone.¹⁶²

Table 12 reveals some patterns of domestic violence in Fiji.

Women who had been beaten at least once	66%
Women who had experienced repeated physical abuse	30%
Women who reported being hit while pregnant	44%
Women who report to FWCC who also reported to the Police	40%

The Secretariat of the Pacific Community will be officially releasing its findings on the incidence of VAW in Kiribati and the Solomon Islands in 2009. An initial analysis suggests that the findings are sobering, well beyond global averages and ‘among the highest in the world’.¹⁶⁴ A third stage of the research covers Tonga.

Sexual assault and rape

Sexual assault is widespread and vastly under-reported throughout the Pacific.¹⁶⁵ In some countries, women are made powerless and live in constant fear of being attacked again. The situation is worse in the Pacific Islands with its small populations and even smaller communities. The perpetrator of the crime and the survivor may live in the same village. The survivor’s situation becomes unbearable when the perpetrator goes free because of the prejudices and inefficiencies of the legal system. In some communities some young girls do not even know that they have the right to refuse unwanted sexual advances or that rape is a criminal offence. In a Vanuatu case, an accused said it was his ‘constitutional right to have sex with whomever I want’, whether the woman agreed or not.¹⁶⁶

Sexual assault is also complicated by cultural attitudes that are really excuses for perpetrators. In Samoa, there is a practice of *moetotolo*, or *moetolo* in Tuvalu, where the man creeps into the *fale* (traditional house) and rapes a woman, while others in the *fale* are sleeping, or pretending to sleep. Anecdotal evidence suggests that this practice is quite common but there is a lacunae in the research. If the perpetrator is taken to court, the court may believe that if a woman was really being raped, someone would have taken action to stop it. However, if the watchers believe that women’s role is to please men, they will not interfere. The court often shares this cultural attitude and so takes it for granted that silence means consent. The

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ Sample size: 1540, The Fiji Women’s Crisis Centre, 2002.

¹⁶⁴ SPC Press Release, 2008.

¹⁶⁵ The comments in the introduction largely extracted from Jalal 1998, 73.

¹⁶⁶ Informant: Public Prosecutor, Vanuatu, 1993

problem in Tuvalu is that that the man would be charged in most cases for (house) trespass. If the woman was assaulted she would often be too afraid to tell her relatives.¹⁶⁷

Common features of sexual assault law

Most sexual assault laws in the PICs are based on myths about women's sexuality, no different to the laws that prevailed in most common law countries, prior to more progressive reforms being introduced. The PICTs inherited the worst elements of rape law from the British, most of which remain.

Some salient features of sexual assault laws include – defining rape as limited to penile/vagina rape and not including assault with other objects, rape with other objects become 'indecent assaults' subject to lesser penalties; not allowing prosecutions for marital rape; defining consent from the view of the offender rather than the female complainant; permitting the discriminatory corroboration warning; and allowing the complainant's past consensual sexual experience to be admitted as evidence against her credibility.

Definition of sexual assault

Marshall Islands,¹⁶⁸ Papua New Guinea and the Federated States of Micronesia have broadened the definition of assault to include rape by other objects,¹⁶⁹ but the narrow definition remains in most other countries.

Proof of resistance

Common to most PICTs, except Marshall Islands, is the practice of the requirement of physical 'proof of resistance' which requires complainants to prove that they fought their assailants to escape, in order to be believed that they were raped.¹⁷⁰

The discriminatory corroboration warning

Many countries still allow the highly discriminatory corroboration common law practice in relation to the evidence of the complainant, in which the court gave a warning to itself or a jury that it was dangerous to convict on the independent uncorroborated evidence of the victim. The corroboration warning, based on a belief that women lie about rape habitually, is the worst of all practices. The rule is still practiced in Vanuatu, Solomon Island, Federated States of Micronesia (all states) and other PICTs. It has been removed by legislation in Marshall Islands, Papua New Guinea, Kiribati and the Cook Islands¹⁷¹; and by common law in Tonga¹⁷² and Fiji¹⁷³ (see Box 16).

¹⁶⁷ Informant: Tuvaluan male lawyer, 14 November 2008.

¹⁶⁸ Section 151(13) Criminal Code, Cap.1 1966.

¹⁶⁹ Section 17, Criminal Code (Sexual Offences and Crimes Against Children) Act 2002 (PNG); Kosrae State Code, Title 13, Cap.3, 1997, s.13.311; Chuuk State Code, Title 12, Part 1, Cap.4, 2001, section.2051; Pohnpei State Code, Title 61, Cap.5., 2006, s.5.141 (4); Yap State Code, Title 11, Cap.2, 2000, s.201(f)

¹⁷⁰ Criminal Code, Cap.1, 1966, s.153 93

¹⁷¹ UNIFEM Pacific 2006.

¹⁷² *R v Tangi*, 343/1992.

¹⁷³ *Balelala v State*, Criminal Appeal No. AAU0003 OF 2004S, 2004.

Box 16. The rape case that outlawed the gender discriminatory corroboration rule - *Balelala v State, Fiji*¹⁷⁴

In 2002, the accused (B) held prisoner and raped the complainant (C), three times at a popular nature reserve. B was found guilty and corroboration of the evidence was a point of discussion. The case went all the way to Fiji's highest court on appeal, the Supreme Court. B argued it was dangerous to convict him on C's words alone as per the corroboration warning and his conviction should be overturned. In a groundbreaking precedent, the court removed the corroboration practice ('the rule') after examining the legal basis of it, the rationale behind the rule, the laws of Fiji and other jurisdictions on the rule. The legislation did not require corroboration in a rape offence or other sexual offences. However, the rule was enforced in Fiji as a long-standing practice under common law, in which the court gave a warning to itself that it was dangerous to convict on the uncorroborated evidence of the victim. The court examined the origin of the rule and said it was representative of the practice in force in England at the time the evidence legislation was enacted in 1944. The rule was based on an outmoded and fundamentally flawed rationale, which was unfairly demeaning of women. The rule had been applied to victims of either gender. In other jurisdictions it had been confined to women and girls because, under criminal law, rape and other sexual offences were crimes committed against women. The effect had been to place victims of sexual offences in a special category of suspect witnesses. This resulted in convictions which were solely based on the complainant's evidence being regarded as unsafe and unsatisfactory. Moreover, it afforded the accused protection which did not exist in other cases of serious criminality. In addition, it almost certainly had the effect in many instances of deterring the rape victims from reporting offences committed against them or from cooperating in the prosecution of offenders. The rule discriminated against women who were victims of sexual violence, which was a violation of Article 38(1) of the Constitution of Fiji. Under Article 43(2) also, the court was required to interpret the provisions of the Bill of Rights '*to promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the rights set out in the Bill of Rights*'. CEDAW was then cited as prohibiting any form of discrimination against women. The removal of the rule placed C's evidence in sexual offences on the same basis as the evidence of victims in other cases of criminality. However the court advised that legislation might be necessary to put any residual question to rest.

Comment. The training of lawyers and Judges is critical in bringing about changes in the law. In this case the attitudinal changes of the prosecutors and Judges were apparent. Women's NGOs in Fiji have been vigilant in reminding the judiciary that it has to comply with equality principles in the Constitution of Fiji and CEDAW. Note: All cases in this paper are real cases.

The past sexual history of the complainant

The admission of the rape survivor's past sexual history can affect her credibility to the extent that she is not believed, the prosecution does not succeed and the rapist is acquitted (see Table 13). If he is sentenced, her past sexual history may reduce the severity of the sentence. Papua New Guinea and the Cook Islands have changed the credibility practice, not allowing the admission of the survivor's past sexual history through legislation, whilst the Federated States of Micronesia has only partially addressed this, still leaving it to the discretion of the

¹⁷⁴ Fiji Islands, Criminal Appeal No. AAU0003 OF 2004S, 2004.

court.¹⁷⁵ Tonga and Fiji have also partially addressed the practice through landmark court cases and new precedents.

	Permits gender discriminatory corroboration warning in sexual assault cases; has not removed the practice by legislation. Yes indicates gender discrimination.	Permits questioning of the complainant’s past sexual history with men other than the defendant during court case; has not removed the discrimination by legislation. Yes indicates gender discrimination.
Fiji	Partial – only through court precedent not legislation	Yes
Papua New Guinea	No	No
Marshall Islands	No	Partial
Vanuatu	Yes	Yes
Solomon Islands	Yes	Yes
Tonga	Partial – only through court precedent not legislation ¹⁷⁷	Yes
Nauru	Yes	Yes
Cook Islands	No	No
Kiribati	Partial	Partial
Samoa	Yes	Yes
Tuvalu	Yes	Yes
Micronesia, Federated States of	Yes	Partial (all states except Pohnpei)
Niue & Tokelau	No	No
Source: author		

Customary practice of forgiveness

If sexual assault cases end up in the village or *kustom* or informal courts by default, the cases rarely end up in the formal courts with formal criminal charges being laid. There are customary reconciliation practices of ceremonies of forgiveness in most PICTs, (for example *I-bulubulu* in Fiji or *ifoga* in Samoa) generally involving the rapist’s and survivor’s families, which the police and courts use to justify the reduction of sentencing of those convicted, or in some cases not allowing charges to be filed at all (see Box 17). 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 17. Customary practices of forgiveness – *Public Prosecutor v Tabisal, Vanuatu*¹⁷⁸

¹⁷⁵ UNIFEM Pacific 2006. See all compliance indicators under 1.21 and at 53.

¹⁷⁶ Jalal 1998 for all countries except RMI and FSM. Source of information for these two countries, UNIFEM Pacific 2006.

¹⁷⁷ *R v Fungavai* 2007, TOSC 8.

¹⁷⁸ Jalal 1998.

The accused had pleaded guilty to rape. He said that 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.

No PICT has specifically legislated against the forgiveness ceremonies having any influence on criminal proceedings. However Vanuatu's Family Protection Act 2008 states that the payment of bride price has no bearing on guilt or punishment 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.

Marital rape

Most PICTs do not have specific laws covering prosecutions for marital rape, with the result that most rapes within marriage or after separation are not prosecuted. A few countries allow for prosecutions in limited circumstances. In Santo, Vanuatu in 2008, a marital rape was prosecuted by the police but was dismissed by the court.¹⁷⁹ The Cook Islands, Niue, Tonga and Samoa have legislation stating that marital rape is only illegal if the parties are separated, divorced or where 'consent has been withdrawn through the process of law'.¹⁸⁰ Papua New Guinea has removed the marital immunity in their legislation that had previously prevented husbands from being prosecuted for a charge of rape.¹⁸¹ The states of Chuuk and Kosrae in the Federated States of Micronesia also permit the prosecution of husbands, at least on paper.¹⁸²

Changes in the law of sexual assault

In 2003, with the introduction of the Criminal Code (Sexual Offences and Crimes against Children) Act 2002 Papua New Guinea dramatically changed its sexual assault regime. A number of new offences were introduced extending penetration to all orifices by the penis or any other object. The offences were graded according to the gravity of the harm and integrate the many ways in which women are sexually violated. Harsher sentences were introduced, the marital immunity that had previously prevented husbands from being prosecuted for a charge of rape was removed, and the common law practice of requiring corroboration as evidence was abolished.¹⁸³ The new legislation did remove the admission of the prior sexual history of a victim but did not legislate against the requirement for proof of resistance by the

¹⁷⁹ Informant, Vanuatu Women's Centre legal adviser, Agathe Malsungai at

RRRT Regional Lawyers Training Workshop, Port Vila, Vanuatu, 13-17 October 2008.

¹⁸⁰ Section 141 (3) Crimes Act 1969 (Cook Is); section 118 (2) Criminal Offences Act, Cap 18 (Tonga); and section 46 Crimes Act (Samoa).

¹⁸¹ Criminal Code (Sexual Offences and Crimes against Children) Act 2002 (PNG).

¹⁸² UNIFEM Pacific 2007, 83, 145.

¹⁸³ UNIFEM Pacific 2007, 266.

victim. It also allows victims of sexual and domestic violence to claim compensation from the perpetrator.¹⁸⁴ The claiming of compensation for wrongdoing is a common feature of Papua New Guinea custom law in general, and is meant to reduce the possibility of ‘payback’ crimes, potentially against the women of the perpetrator’s *wantok* or clan. Payback is a common practice in PNG and may involve the men of the survivor/complainant’s clan, sexually assaulting women of the perpetrator’s clan.

Most attempts to change sexual assault laws through comprehensive dedicated legislation have so far failed. For example, rape law draft legislation¹⁸⁵ in Fiji has been thwarted for a variety of reasons, including disputes about the substance of the draft law (see Box 18); that it favoured the victim over rights of due process awarded the accused, and the perception that the draft was too ‘western’, feminist, radical and clashed with so-called Pacific culture. Added to this, Fiji has experienced three military coups d’état in 20 odd years, thus interrupting the rule of law and reducing the space for legal reform. Other PICTs show similar recalcitrance in passing new laws.

Box 18. Fiji’s Proposed Rape Law Reforms

The draft legislation proposed by the Fiji Women’s Rights Movement and largely accepted by the Fiji Law Reform Commission at the time has some of the following necessary features:

1. The grading of sexual assault to reflect degrees of harm including penetration of all orifices;
2. Expanding the definition of assault to include all forms of sexual assault including assault with an object;
3. Removing the corroboration warning;
4. The removal of the need to demonstrate proof of resistance on the part of the complainant to demonstrate lack of consent;
5. The forbidding of questions of the complainant’s past sexual history with men other than the accused by the accused person’s lawyer;
6. Allowing the prosecution of marital rape, that is, removing marital immunity and making spouses competent and compellable witnesses;
7. Forbidding the use of ceremonies of forgiveness like the *bulubulu*, to influence prosecution, the trial and sentencing; and
8. The recognition of sexual harassment as a civil offence within the workplace.

The legislation has been controversial and three successive governments have balked at tabling a Bill before Parliament.

Source: author

The most success has been achieved in the non-legislative field through landmark cases but such changes are vulnerable to new judges, and changing precedents in the superior courts, hence the need for new legislation to be passed in all PICTs.

Domestic violence

The implications of not protecting women against domestic violence are considerable and include significant economic costs (see Box 19). There are overarching implications for

¹⁸⁴ Criminal Law (Compensation) Act 1991.

¹⁸⁵ The campaign for new sexual assault laws by the Fiji Women’s Rights Movement, based on a draft prepared by Ratna Kapur, has been shelved.

women's empowerment and productivity in the workplace and home. The key role of the mother in household matters – particularly in children's health and education – means that her physical and mental protection, education and hopes can shape a family and home.¹⁸⁶ Discriminatory laws reinforce women's disadvantages.

Box 19. Domestic violence includes financial abuse¹⁸⁷

'The definition of domestic violence leaves out financial abuse, which is when the victim has no access to bank accounts, is not given enough money to provide essentials for family, major family belongings are in the perpetrators name ... or the perpetrator prevents the victim from getting a job.'

Domestic violence, and a lack of legal responses to it, is common and widespread throughout the Pacific. Despite efforts by women's NGOs (see Box 20), there has been minimal legislative change in the area of domestic violence.

Box 20. The Pacific Women's Network Against Violence and the Fiji Women's Crisis Centre (FWCC), by Shamima Ali

Violence against women is prevalent in the Pacific and for most of the past ten years, there has been a deathly silence surrounding the issue except for that raised by the women NGOs working towards its elimination. Violence against women remains largely under-reported in all countries of the Pacific and is often sanctioned by various cultural practices. The Pacific Women's Network Against Violence against Women, initiated by the Fiji Women's Crisis Centre, was formed in 1992 and includes 23 organisations from 10 different countries of the region. The network's members are at the forefront of work against violence against women and are constantly battling traditional attitudes, bureaucratic processes and the low status accorded to women in the Pacific. Grudgingly the issue of violence against women has been acknowledged by various authorities and is slowly being recognised as a serious issue of concern.

Source: Provided by Shamima Ali of the Fiji Women's Crisis Centre

Gender-based violence is not recognised generally as a specific crime. Police and court officials are unsympathetic to women whose husbands beat them, and usually do not encourage legal solutions. The complainant is responsible for laying and pursuing charges and there is a consistent focus on reconciliation, whatever the circumstances. Courts and police accept customary practices of reconciliation such as *i-bulubulu* (the Fijian customary forgiveness ceremony) in lieu of punishment of the offender or to reduce the punishment; and non-molestation orders or protective injunctions are difficult to obtain and enforce. There is also a belief amongst women that the law cannot help them.

Common features of domestic violence law

No specific domestic violence criminal or civil legislation

The Cook Islands has a specific domestic violence provision in its criminal legislation.¹⁸⁸ Vanuatu has brand new stand alone or separate domestic violence legislation, which attempts to encompass all criminal and civil elements of domestic violence in one piece of legislation

¹⁸⁶ UNESCAP 2007,107.

¹⁸⁷ Kotoisuva, *Fiji Women's Crisis Centre*, 2008.

¹⁸⁸ Crimes Act 1969.

(see Box 21). However, in all other PICTs a domestic assault is prosecuted under general assault laws, giving domestic violence no special status, nor treatment, by justice agencies. However, some countries have set up VAW units to attempt to change this. Domestic violence is generally not considered a gender-based crime in most of the Pacific islands. No PICT has yet passed comprehensive integrated VAW legislation covering all forms of violence against women consistent with substantive equality standards.

Box 21. *The Family Protection Act 2008, Vanuatu – combating domestic violence in the home*¹⁸⁹

VAW against women is a widespread problem in Vanuatu. In 2008, two men were facing trial in Vanuatu for breaching common law restraining orders. The first cut off four of his wife's fingers with a coconut husker; and the second used a bush knife to cut off his wife's hand and four fingers of her other hand.¹⁹⁰ In 2008, the Vanuatu Parliament passed the Family Protection Act 2008 a result of more than 10 years of intense lobbying and campaigning by the Vanuatu Women's Centre (VWC), Vanuatu National Council of Women (VNCW) and other women's NGOs. The first draft of the Bill was circulated in 1998. In 2008, the government side finally voted unanimously for the bill but the Opposition walked out of Parliament. Many people and groups were consulted including the churches and the *Malvatumauri* (House of Chiefs). Neither chose to make submissions. However, the Shefa Council of Chiefs worked with the Department of Women's Affairs and women's NGOs and supported the Bill.

The law was drafted by the Attorney General's Office and covers violence within the family. The Pacific Regional Rights Resource Team (RRRT) provided technical support to both government and NGOs, including working with Members of Parliament to help them gain an understanding of the proposed law. The new law is designed to combat domestic violence and to provide for enforceable protection orders. Although by no means perfect legislation, it is a major advancement in women's rights in Vanuatu, in the area of domestic violence.

The legislation's main features are:

1. It recognises domestic violence as a specific offence;
2. It makes domestic violence both a criminal offence punishable by imprisonment; and a civil offence attracting protection orders;
3. All forms of marriage are implicitly recognised so that any person in a domestic relationship of some sort is entitled to a protection order, thus implicitly including a *de facto* spouse and a custom marriage;
4. One of its innovative features, designed to deal with the remoteness of populations living in the outer islands far away from courts, is the authority given to trained 'authorised persons' in remote villages to give special temporary protection orders to women who are being beaten;
5. It is illegal to use culture, custom or the payment of bride price as a defence to a prosecution;
6. Given the remoteness of Vanuatu's populations it allows for court orders to be obtained by telephone or fax.; and
7. It removes various legal impediments which prevent successful prosecution. The Police have extensive powers and can arrest without a warrant. They can investigate an offence

¹⁸⁹ VWC, 2008.

¹⁹⁰ Informant, Vanuatu Women's Centre legal adviser, Agathe Malsungai, Pacific Regional Rights Resource Team (RRRT), Annual Regional Lawyers' Human Rights Training, Port Vila, Vanuatu, 13-17 October, 2008

and charge on the basis of a specific domestic violence offence. The Police are required to bring an arrested person to court within 48 hours of arrest

The law was sent to the President for his signature as his formal assent is required under law. Some churches and chiefs lobbied the President not to sign arguing that it was ‘un-Christian’, against Melanesian values, discriminated against men, and was unconstitutional. However Vanuatu’s Constitution makes discrimination against women unlawful. It also allows special measures, including legislation to be taken for disadvantaged groups, including specifically, women. The President filed a case in the Supreme Court seeking a technical opinion on whether the bill was unconstitutional based on several sections of the bill, including whether it was consistent with Christian principles outlined in the Preamble.¹⁹¹ In November 2008, the Chief Justice ruled that the bill was constitutional. This is an important legal milestone for ni-Vanuatu women. Only time will tell whether there is sufficient human, financial, training and technical resources allocated to implementation so that the new law lives up to its promise.

Customary and formal reconciliation processes

Traditional reconciliation, forgiveness practices and ceremonies, and justice agencies widely encourage forgiveness and reconciliation, both in the informal or village courts, or the national level courts which administer formal law (see Box 22). The effect of this is that there is either no prosecution, finding of guilt and punishment deserving of the crime or the forgiveness is used to lessen the punishment.

Box 22. Customary practices, bride price and domestic violence 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.¹⁹²

Many customary practices are still in place and reinforce certain interpretations of religious (mainly Christian) beliefs about women’s roles. In Melanesian countries, apart from Fiji, bride price is still used to justify binding women in violent marriages. 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.¹⁹³

¹⁹¹ *President of Vanuatu v Speaker of Parliament* [2008] VUSC 77, Constitutional Case No 6 of 2008, 22 November 2008.

¹⁹² Amnesty International 2006.

¹⁹³ Fiji Women’s Crisis Centre 2008.

The attitude of the police and courts to domestic violence

With some notable exceptions there is a general unwillingness to exercise powers of arrest, to lay charges and to follow through with criminal prosecutions. As domestic violence is considered a minor criminal assault, prosecutions are generally conducted by untrained non-lawyer police prosecutors in the lower courts. This decreases the likelihood of securing criminal convictions. When ni-Vanuatu women go to the police to attempt to file charges, the police send them to the Vanuatu Women's Centre (VWC) to get civil protection orders against further abuse, but refuse to prosecute under the criminal law, by filing criminal charges.¹⁹⁴ The VWC assists women obtain civil protection orders but civil orders are generally poorly enforced. When young, gender-trained police officers try to file charges, their senior officers refuse to follow through.¹⁹⁵ Court attitudes also reflect ambivalence. In a Fiji case in the Magistrate's Court recently, a female prosecutor lawyer said that the magistrate had asked the complainant wife: 'Why did you get beaten?' rather than to ask the husband why he beat his wife.¹⁹⁶

No drop prosecution policies

There has been some anecdotal evidence to suggest improvements to rates of prosecutions in PICTs where police and prosecution offices have introduced 'No Drop' policies of prosecution, regardless of the view of the forgiving wife/partner. This means that the Police are not permitted to drop the prosecution of the offender even if the spouse is unwilling to pursue a prosecution after first having laid criminal charges. However, these are policy decisions, which cannot be enforced by the courts, as they are internal organizational policy. Such policies can be enforced by internal disciplinary measures only. The policies require police to follow through with prosecution following incidences of domestic violence, without any discretion being exercised. These policies have been applied inconsistently depending on the commitment of the police commissioners. Many women's NGOs are of opinion that prosecutions and sentencing must be mandatory and secured in legislation. In addition, specialist units need to be set up within the police force in all countries to deal with VAW. Some countries including Nauru, Fiji, Vanuatu, Cooks Islands, Papua New Guinea, Samoa and Solomon Islands, have units within the police dedicated to investigating and prosecuting violence against women, either domestic violence or sexual assault (see Box 23). They vary in terms of size, resources, sophistication and effectiveness. Anecdotal evidence suggests that there are slightly higher rates of detection prosecution and conviction, where such units exist but there is no methodical research in the area. It is likely that a combination of policies and special units will enhance rates of detection and conviction.

Box 23. Domestic Violence Units in the Pacific

Some countries including Fiji, Vanuatu, Cooks Islands, PNG, Samoa and Solomon Islands, have units within the Police dedicated to investigating and prosecuting violence against women (either domestic violence or sexual assault). They vary in terms of size, resources,

¹⁹⁴ Informant, Vanuatu Women's Centre legal adviser, Agathe Malsungai, Pacific Regional Rights Resource Team (RRRT), Annual Regional Lawyers' Human Rights Training, Port Vila, Vanuatu, 13-17 October, 2008.

¹⁹⁵ NGO Lawyer, Pacific Regional Rights Resource Team (RRRT), Annual Regional Lawyers' Human Rights Training, Port Vila, Vanuatu, 13-17 October, 2008.

¹⁹⁶ Pacific Regional Rights Resource Team (RRRT), Annual Regional Lawyers' Human Rights Training, Port Vila, Vanuatu, 13-17 October, 2008.

sophistication and effectiveness. Anecdotal evidence suggests that there are slightly higher rates of detection, prosecution and conviction, where such units exist, but there is no methodical research in the area.

Samoa. A Domestic Violence Unit has been set up near the new Police Headquarters to handle complaints by victims and to offer support and assistance in 2008. The police in Samoa have said that they are going to take a much harder line on domestic violence. The Minister of Police said that the government is considering amending laws to impose heavy penalties for domestic crimes. The Minister hopes more people will be encouraged to report domestic violence. An NGO, which deals with incidences of sexual abuse and domestic violence, Mapusaga o Aiga in Samoa, has welcomed the initiative.¹⁹⁷

Nauru. Frustrated with the pace of change 3 Police Officers set up their own Domestic Violence Unit (DVU) funding it from their own pockets. The Nauru Police has a small unit comprising three women and two men constables and is headed by a woman constable who has attended training organised by the NZAID Pacific Prevention of Domestic Violence Programme (PPDV). The main obstacle faced by the DV unit in their attempt to address DV in Nauru was the lack of a safe place where women survivors could be sheltered whilst their cases were being investigated. Nauru has a population of around 12,000 living on one island. In many cases, women survivors had no choice but to 'reconcile' with their husbands straight after filing their complaints as there was no alternative accommodation for them. This prompted the 3 women constables of the DVU to set up a temporary shelter in 2007 after obtaining permission from Government to use some buildings in the abandoned Australian refugee processing centre. Because of a lack of resources within the Nauru Police, the three women constables have been running the Shelter (in terms of food and drinks for the survivors) using their own funds. The only assistance from the Nauru Police is the security that it provides to the Shelter. To date this Shelter has accommodated 6 women survivors.¹⁹⁸

Lack of availability and enforcement of protection orders in legislation

Non-molestation, protective orders or injunctions are generally available through the common law as a rule of practice in some PICTs (see Table 14). However, there is generally no legislative basis for providing such protection. The courts exercise their discretionary power to make the order sparingly and inconsistently. Only married women, and not *de facto* wives or girlfriends, are entitled to seek the order. When the orders are granted and disobeyed, the police habitually do not enforce the orders through imprisonment, partially because the orders are vague, and also because there is no legislation setting out clear guidelines. Imprisonment requires lengthy and complex contempt of court proceedings, and domestic violence is not high on the police list of priorities. The perpetrator is usually summoned to the police station or court, 'reprimanded' and allowed to leave. There is no specific protection order by legislation in Samoa but the Divorce and Matrimonial Causes Act 1961 section 20 makes it a criminal offence to molest a wife after divorce.¹⁹⁹

¹⁹⁷ Radio New Zealand International www.rzni.com posted 09 July, 2008

¹⁹⁸ As told to RRRT.

¹⁹⁹ Section 20, Divorce and Matrimonial Causes Act 1961

Table 14. Pacific Island countries and territories that have specific legislation enabling the granting of protection orders for married women

Fiji	Yes, Family Law Act 2003, section 202.
Solomon Islands	Yes, Amendment Act 13/1992 of the Affiliation, Separation and Maintenance Act, 1971.
Vanuatu	Family Protection Act 2008, a variety of sections.
Cook Islands	Yes, the Cook Islands Amendment Act 1994, sections 523 G – K.
Source: author	

Sentencing of offenders

A considerable challenge is that in most PICTs, courts rarely award custodial (prison) sentences that reflect the seriousness of the crime; despite the fact that domestic violence is a recidivist or repeated, habitual crime (see Box 24). Courts tend to give bind-over (probationary type) orders, which command the offender not to commit another crime for a specified period. If the offender does commit the crime again, he will be punished for the original crime. It is in effect a ‘keep the peace’ order. However, in practice, the courts usually refuse to imprison a ‘breadwinner’ even when a further crime is committed. Crimes against theft or damage of property regularly attract greater sentences throughout the Pacific. Courts routinely say that that if they imprison a breadwinner there will be no-one to financially support the family. Interestingly, the only time this justification is ever used is in domestic violence cases and not in mainstream criminal cases. As a matter of policy courts should order a 24-hour jail sentence to mitigate the breadwinner argument or imprison at night only.

Box 24. Domestic violence is not a private matter but not serious enough for a long prison sentence - *Toakarawa v The Republic of Kiribati*²⁰⁰

T 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 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 apology, 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 reconciliation, apologies and the ‘breadwinner’ argument are not

²⁰⁰ Criminal Appeal 4 of 2006, 26 July 2006, Court of Appeal.

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 in which wife beating is regarded as a customary ‘right’ of a husband.

There have been some haphazard improvements to lengths of sentences for domestic violence offenders, but this is still dependent on individual judicial attitudes. The ‘breadwinner’ philosophy still largely prevails.

Legislation on protection orders in family law

Fiji, Cook Islands, Solomon Islands each have a legislative basis for civil protective orders in the family law.²⁰¹ The problems with the new provisions in Fiji lie not in its legislative framework, but in the inability of enforcement agencies to understand the new legislation, to leave the unwieldy and inefficient old system of enforcement behind, and in the attitudes of police officers who are supposed to enforce the new legislation. Powers in the legislation are broad and sweeping, but the police and various court officials appear not to understand what is required of them under the new law, despite the clear and simple procedures. The new law has enjoyed moderate success in Suva where there is a full time dedicated Family Court, with four dedicated family court magistrates, and effective NGOs that closely monitor the implementation of the new law.²⁰² Both the Cook Islands and Solomon Islands have specific legislation regarding injunctions. The legislation is gender-neutral and applies only to persons married by law or by custom.²⁰³

Magistrates and women’s NGOs say that the biggest problems are a lack of training in the new legal regime, and the historic recalcitrance of police and enforcement officials to imprison men for what has always been regarded as culturally acceptable behaviour. However, for the tenacious domestic violence survivor, and the women’s NGOs that support them, the new provisions have been innovative and useful.²⁰⁴

Women as criminal defendants

Abortion and infanticide

Laws on abortion, infanticide (the killing of a child under the age of 12 months) and prostitution or commercial sex work, are heavily influenced by religious and social beliefs. Strict legislation making abortion illegal, weigh most heavily on poor women, who have no alternative but to resort to unsafe, mostly dangerous, and amateur back-street abortions. Wealthy and middle-class women go to other countries close by, like Australia and New Zealand, where abortion is available, safe and legal, or to private hospitals where the law is less vigilant.

Abortion and infanticide are criminal offences in most PICTs. Both occur when poor women have little control over their own fertility, and because of the social and economic conditions

²⁰¹ The writer of this paper, P I Jalal, was Commissioner for Family Law, and prepared the Fiji Law Reform Commission report, Jalal 2000.

²⁰² Fiji Women’s Crisis Centre and the Fiji Women’s Rights Movement.

²⁰³ Cook Islands Amendment Act 13/1994; Affiliation, Separation and Maintenance Act 1971 (Solomon Islands).

²⁰⁴ Jalal 2008.

of their lives.²⁰⁵ This has serious consequences for women's health and capacity to control their lives and productivity. Article 12 of CEDAW mandates States Parties to ensure that women have access to health care services, including those related to family planning. Those countries that do not provide such medical services fall short of the standards set by CEDAW.

Palau, the Federated States of Micronesia and the Marshall Islands recognise some semblance of the right to health, although not in clear terms. The Micronesian Constitution grants Congress the power to promote health by setting minimum standards²⁰⁶ whilst the Constitutions of the Marshall Islands²⁰⁷ and Palau²⁰⁸ recognise the right to health care. These provisions allow some room to maneuver for countries wishing to legalise abortion. All PICTS need to explicitly recognise the right to health care and specifically reproductive health care, and to non-discrimination on the grounds of health status.

Abortion laws

Abortion is specifically illegal in most PICTs, except for the Marshall Islands and three states of the Federated States of Micronesia.²⁰⁹ Penalties for the women procuring the abortion range from two years in Vanuatu to seven years' imprisonment in much of the Pacific; to life imprisonment in Kiribati.²¹⁰ There appear to be no specific criminal provisions against abortion in the Marshall Islands nor in three out of the four states of the Federated States of Micronesia: Kosrae, Pohnpei, and Yap, leading to the conclusion that it is not possible to prosecute either the medical practitioner or the women procuring an abortion in these states.²¹¹ Their state constitutions also mandate the provision of health care but without providing safe facilities for abortion to be carried out, so the *de facto* right is probably limited even if the law *de jure* permits it.²¹² Only the state of Chuuk specifically criminalises abortion providing for penalties up to nine years' imprisonment for anyone involved in the act, including the mother²¹³, except where the mother's physical health is at stake.²¹⁴ Chuuk also mandates that there shall be no discrimination in health care, so the position in Chuuk is unclear.²¹⁵ In the area of the law on abortion, medical policy and actual approaches on the ground, there is a clear gap in information and research is needed in this area for all Pacific countries.

Abortion is prohibited in Palau unless it is deemed medically necessary to save the mother's life.²¹⁶ However, in the case of *Palau Trust Territory v Tarkong*,²¹⁷ the court ruled that the abortion provisions were invalid because they were so broad and vague so as to constitute a denial of due process. The court objected to the fact that no circumstances were laid down

²⁰⁵ Jalal 1998, 193.

²⁰⁶ Article IX, section 2.

²⁰⁷ Section 15.

²⁰⁸ Section 6.

²⁰⁹ UNDESA 2002. UNIFEM Pacific 2006, 239.

²¹⁰ *Ibid.*

²¹¹ Title 11 of the FSM code is silent about abortion. See also UNIFEM Pacific 2006, 170.

²¹² Constitution of Kosrae 1989, Article XII, s.1; Constitution of Pohnpei, Article 7, s.4(1); Constitution of Yap, Article XI, s.1.

²¹³ Chuuk State Code, Title 12 Cap. 4.

²¹⁴ UNIFEM Pacific 2006, 56.

²¹⁵ 1989 Art x, s.6.

²¹⁶ Ueda 1999.

²¹⁷ UNDESA 2002, 23.

under which abortion was legal. This decision is important for women in Palau and allows medical practitioners wider discretion.

Although abortion is illegal, on the face of the legislation, the legislation in some countries, and the courts in others, have introduced defences to charges of abortion, where it is necessary for the ‘preservation of the mother’s life’,²¹⁸ or to ‘save the mother’s life’ or if the ‘health’ of the mother is in danger (see Table 15). This is generally taken to mean the ‘physical’ and not ‘mental or psychological health’ of the mother in most countries. However, in Fiji, the courts have interpreted the legislation to include both the ‘physical and mental health’ of the patient as being justifiable grounds for medical intervention.²¹⁹ In *The State v Tabua*²²⁰, the judge went so far as to say that the laws were not only outdated but further implied that they also discriminated against poor women. The legislation has not been amended to reflect evolving standards in the courts in Fiji.

Table 15. The interpretation of abortion law and policies of selected Pacific Island countries and territories						
	Medical intervention to save life of mother (life grounds)	Preservation of physical health (Narrow health grounds)	Preservation of mental health of women (broad health grounds)	Termination of pregnancy as a result of rape/incest (juridical grounds)	Suspicion of fetal impairment	Termination due to social and economic grounds/Available on request (social grounds)
Palau	Yes					Under certain grounds but unclear <i>Palau Trust Territory v Tarkong</i> .
Fiji	Yes	Yes	Yes			Has been recognised through Court cases.
Cook Islands	Yes	Yes	Yes			
Kiribati	Yes					
Marshall Islands	Yes	Yes	Yes	Yes	Yes	Yes. There is no criminal legislation covering abortion.
Micronesia, Federated States of	Yes Governed by State law. Only illegal in Chuuk.	Yes Governed by State law. Only illegal in Chuuk.	Yes Governed by State law. Only illegal in Chuuk	Yes Governed by State law. Only illegal in Chuuk	Yes Governed by State law. Only illegal in Chuuk	Yes. There is no legislation covering abortion in Title 11 of the federal Code nor in the 3 states of Kosrae, Pohnpei or Yap. Only specifically Chuuk criminalises it, with an exception for saving the mother’s life. Therefore, in theory, abortion is legal in 3 states.
Nauru	Yes	Yes	Yes			
Niue	Yes	Yes	Yes			
Papua New Guinea	Yes	Yes	Yes			
Samoa	Yes	Yes	Yes			
Solomon	Yes					

²¹⁸ For example, Section 234 Penal Code, Chapter 17 (Fiji).

²¹⁹ *R v Emberson* (1976) Criminal Appeal 16/1976.

²²⁰ Fiji Criminal Appeal 6/1991.

Islands						
Tonga	Yes					
Tuvalu	Yes					
Vanuatu	Yes	Yes	Yes			
Sources: Original table developed by author. Jalal 1998 and UNDESA 2002.						

In a recent and high profile Fiji case, *State v Mudaliar*,²²¹ the necessity for illegal backstreet abortions led to the death of a young university student and the conviction of the medical practitioner to three years' imprisonment for manslaughter. Very few cases reach the courts and the present case only did because of the death of the pregnant girl.

Fiji, Cook Islands, Nauru, Vanuatu, Papua New Guinea, Niue and Samoa seem to interpret existing abortion laws relatively liberally, whilst Tonga, Kiribati and Tuvalu only permit legal abortion to protect the physical health of the mother (see Table 15). Although not specifically legislated for, anecdotal evidence suggests that a rape complainant who becomes pregnant will be allowed a legal abortion in some PICTs. However the lack of safe medical facilities might make any such right illusory in countries where there appears to be a degree of legal flexibility.

Infanticide laws

Infanticide is not widespread in the region but is a defence to a charge of murder, when a woman takes her child's life in circumstances in which it is medically proven that she is suffering from depression up to 12 months after birth.²²² In most cases the charges are reduced from murder to manslaughter. In a number of cases the courts have recognised the link between poverty and infanticide, and in some cases, domestic violence. In *The State v Mala Wati*²²³ a woman was given a two-year suspended sentence for causing the death of her five-month-old baby. The court noted that the woman had been a battered wife, was living in an impoverished squatter settlement, was unable to provide her baby with nourishing food and was the sole supporter of her seven children.

Commercial sex work, prostitution and trafficking

Prostitution as well as so-called sorcery and witchcraft, are very close linked to poverty. Women turn to such forms of earning an income in desperation. Prostitution or commercial sex work appears to be illegal in all PICTs (for both the owner/keeper of the premises and the woman (or man) soliciting for the purposes of prostitution, except for Niue where it appears to be illegal only for the keeper of the premises.²²⁴ In the states of Yap and Kosrae of the Federated States of Micronesia, soliciting is not an offence, while it is in the others.²²⁵

Prostitution laws are based on double standards, which view prostitution (sex work) as a necessary evil, but choose to criminalise mainly the women who provide the service, and the brothel keepers, but not the men that are their clients.²²⁶ Couched in gender-neutral language, the legislation in most PICTs, therefore indirectly discriminates against women under Article

²²¹ [2006] FJHC 45, 46, 47.

²²² Section 205, *Penal Code*, Chapter 17. Similar in rest of region see Jalal, 1998 607 at note 18.

²²³ *The Fiji Times*, 27 October 1993

²²⁴ Section 175 Niue Act 1966.

²²⁵ Chuk State Code, Title 12, Part II, Cap 28 s.9025. Pohnpei State Code, Title 61, Cap 8, s.112.

²²⁶ Jalal 1998, 191.

6 of CEDAW, and under those Constitutions that outlaw discrimination on the grounds of sex or gender. CEDAW requires state parties to suppress all forms of traffic in women, and exploitation of women in prostitution. Poor women should not be further penalised for being poor.

Throughout the region, sex work is a criminal offence, the penalties for which range from fines to imprisonment.²²⁷ Most countries' legislation is couched in gender-neutral language except for the Marshall Island²²⁸ where the act of soliciting is an offence for both sex workers (men and women) and their clients. Although this measure does introduce formal equality between men and women, full compliance with CEDAW requires that sex workers not be criminalised,²²⁹ in recognition that sex workers ought not to be penalised for being poor, but also to give them the same protections as other workers. The operation of organised premises and the aiding and abetting of soliciting is criminalised in most PICTs, despite research and experience demonstrating that organised premises, rather than street work, are safer for sex workers.²³⁰ Few women are prosecuted for sex work. They tend only to be charged for this offence when they are also arrested for theft from clients.²³¹ From an equity perspective to empower sex workers, they need conditions of employment (albeit very limited conditions in most PICTs) similar to that of other mainstream workers.

This paper does not cover female sex trafficking in any great detail, as regional intelligence reports do not support high levels of human trafficking in the Pacific.²³² The same research noted that some countries report anecdotal evidence of trafficking through their borders, including Fiji, the Marshall Islands, Palau, Papua New Guinea, Tonga and Vanuatu. In 2005, a Chinese national of Palau was convicted of smuggling and trafficking offences for recruiting women from China, ostensibly for waitressing work, but who were ultimately coerced into prostitution.²³³ There is very little Pacific research on female adult trafficking for sexual purposes, although some US based organizations believe that between 18,000-20,000 women are trafficked into the USA from Asia and the Pacific Islands annually.²³⁴ In addition, the UNHCR reports that PNG has become a problematic area in recent times (see Box 25).

Box 25. Sex Trafficking in Women - *Trafficking in Persons Report 2008 - Papua New Guinea*²³⁵

Papua New Guinea is a country of destination for women and children from Malaysia, the Philippines, Thailand, and the People's Republic of China trafficked for the purpose of commercial sexual exploitation to brothels in Port Moresby and at isolated logging and mining camps. Some foreign women travel to Papua New Guinea willingly on tourist or business visas and may be aware they will engage in prostitution. They are dispersed to various nightclubs, bars, or employee dormitories, and some may end up in a situation of involuntary servitude. Some of the logging camps bring Asian women into Papua New Guinea by indicating in their visa applications that they will work as cooks or secretaries. It is unclear whether they are aware they will be induced into sexual servitude. Internal trafficking

²²⁷ *Ibid.*

²²⁸ Section 503, Prostitution Prohibition Act 2001.

²²⁹ UNIFEM Pacific 2006, ix

²³⁰ UNIFEM Pacific 2006, 248

²³¹ Jalal 1998, 191.

²³² PIFS 2006.

²³³ *Ibid.*

²³⁴ Asian American Legal Defense and Education Fund 2008.

²³⁵ Extracted largely without amendment, but summarized, from UNHCR, 2009.

of women and children for the purposes of sexual exploitation and involuntary domestic servitude occurs. Women are occasionally sold as brides. Children are held in indentured servitude either as a means of paying a family debt or because the natural parents cannot afford to support the child. Some children may be given to another family of greater wealth to serve as a housekeeper or nanny – a practice that can lead to trafficking in persons. Children in prostitution are common in the bars and nightclubs in the larger cities. There are no official statistics kept on trafficking of persons, mainly because of the tendency of the communities to remain silent about the problem.

The Government of Papua New Guinea does not fully comply with the minimum standards for the elimination of trafficking. While the government is becoming aware of trafficking as a challenge distinct from sexual violence or human smuggling, its current legal framework does not contain elements of crimes that characterize trafficking. No one has been arrested, prosecuted, or convicted for trafficking in persons, and there have not been any anti-trafficking operations conducted by any law enforcement agency. The government lacks victim protection services or a systematic procedure to identify victims of trafficking from among vulnerable populations, such as foreign women arrested for prostitution or children in prostitution. Although the law does not prohibit all forms of trafficking, its criminal code prohibits the trafficking of children for commercial sexual exploitation, slavery, and abduction. Most internal trafficking-related crimes occur in rural areas and are referred to village courts which administer customary, rather than criminal law, resolving more cases through restitution paid to the victim.

It is also to be noted, that in a recent study on child sexual exploitation covering Fiji, Kiribati, Papua New Guinea, Solomon Islands and Vanuatu it was confirmed that in each country children are sexually abused by family members and neighbours and, to varying degrees, that child prostitution, child pornography, early marriage, child sex tourism and trafficking (for sexual purposes) occurred. Perpetrators of the abuse and exploitation were found to be overwhelmingly males, and typically men with resources or power in the community. The research also revealed that, contrary to popular opinion, the perpetrators of sexual abuse and sexual exploitation of children are also predominantly men from the local community. While the study highlights some prevalence of sexual abuse and sexual exploitation committed by foreign tourists and foreign workers in the Pacific, children are most at risk in their homes and communities and with people they know and trust.²³⁶

Most countries have adopted a watchful approach to the exploitation of girls under 18 and women who have been forced into sex work without their consent and trafficked to other locations within the country or abroad in generalized criminal laws but have failed to translate this into legislation. Only a few have specific legislation against the trafficking of women. No PICT has specific laws against sex tourism (see Table 16). Papua New Guinea has introduced a range of offences and severe penalties for the generalized exploitation of children, including criminalizing the clients of children in its new legislation mentioned.²³⁷

Papua New Guinea, Kiribati, Solomon Islands and Tuvalu provide some limited protection for girls and women who have been trafficked to other locations both within the country or abroad, but the low punishment of two to three years' imprisonment is an insufficient

²³⁶ UNICEF Pacific 2007, viii.

²³⁷ Criminal Code (Sexual Offences and Crimes against Children) Act 2000.

deterrent.²³⁸ It is difficult to judge the extent to which the formal legislation is actually enforced in any of these countries without careful research. No country appears to have specific laws against sex tourism.

Table 16. Pacific Island countries and territories that have specific legislation on trafficking and sex tourism	
Kiribati	Only on trafficking, s.136 Penal Code Cap 17, 1966
Papua New Guinea	Only on trafficking, ss. 218 -219, Criminal Code 1974
Solomon Islands	Only on trafficking, ss 144-145, Penal Code 1966
Tuvalu	Only on trafficking, s136, Penal Code 1965
Source: UNIFEM Pacific, 2007.	

Witchcraft, adultery and other custom laws and practices

Witchcraft

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, possibly because villagers suspected her of being a witch. The killing of those suspected of witchcraft and sorcery is not uncommon. The victims are often scapegoats for someone else's unexplained death -- and bands of tribesmen often collude to mete out justice to them for their supposed powers. 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. More than 50 people were killed in two Highlands provinces last year for allegedly practicing sorcery.²³⁹

A few PICTs still retain certain discriminatory arcane laws on sorcery or witchcraft as a means of controlling women. 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.*²⁴⁰

Although seemingly gender neutral, the laws are selectively enforced against women, especially older women. It is not clear why this is so, but there is some anecdotal evidence that HIV/AIDS 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" (see Box 26).

A recent report by an Australian think-tank, the Centre for Independent Studies, found that "sorcery, witchcraft and other supernatural forces" were widely blamed for the disease in PNG. The report stated that "The mysterious deaths of relatively young people, thought to be deaths from HIV/AIDS, are being blamed on women practising witchcraft ... Women have

²³⁸ UNIFEM Pacific 2007, 214. s.136 Penal Code Cap 17, 1966 in Kiribati; ss 218 -219, Criminal Code in PNG; ss 144-145, Penal Code 1966 in Solomon Islands; s136, Penal Code 1965 in Tuvalu

²³⁹ 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.

²⁴⁰ Niue Act 1966.

been beaten, stabbed, cut with knives, sexually assaulted and burnt with hot irons." In one recent incident, two suspected witches were tortured and set on fire.²⁴¹

Box 26. Witchcraft and sorcery – *The State v Aigal & Kauna*, PNG²⁴²

A was suspected of practicing witchcraft ending up in the alleged execution of a woman 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 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. 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 to the victims.

Slavery

In a case involving slavery, the court said in *The State v Kule*,²⁴³ the customary practice of giving a daughter to the murder victim's family in Papua New Guinea was 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, 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.

Adultery

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

²⁴¹ Centre for Independent Studies, 2008.

²⁴² (1990) PNGLR 318.

²⁴³ [1991] PNGLR 404 (3 December 1991)

‘seducer’. So far the defendants appear to have been women.²⁴⁴ Solomon Islands’ law is openly gender-biased allowing only husbands to claim damages.²⁴⁵ Adultery is a serious offence under custom, and in *Banga v Waiwo*²⁴⁶ 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.

²⁴⁴ Jalal 1998, 224.

²⁴⁵ *Ibid.* See also Nina Hicks on the South Pacific in Bainham (ed) 1997.

²⁴⁶ 324/1995, 28/2/96, Magistrates Court, 1/1996, 17/6/96 Supreme Court of Vanuatu.

Chapter 4: Women and land in the Pacific

‘There is a strong positive association between women’s land rights and poverty reduction; this is because women’s control over land assets enhances household welfare, women’s cash incomes and spending on food, children’s health and education.’²⁴⁷

Customary systems of land ownership

The vast majority of Pacific Islanders are indigenous peoples and are customary owners of their land. This means that they own land primarily under unwritten customary law. Only Fiji has a large minority population of Indian Fijians who comprise some 37 per cent of the population.²⁴⁸ Indigenous peoples in the PICTs are not generally marginalised or disenfranchised of their land. Protected, native or custom land makes up more than eighty per cent of the total land area,²⁴⁹ with some countries, such as Fiji, at about eight per cent, and to a limited extent Samoa (four per cent), having small but significant amounts of freehold land which can be bought and sold freely. Decisions about land use are made by many individuals or in Fiji’s case the Native Land Trust Board (NLTB) in Fiji. Customary ownership is secured in most constitutions, or land codes and is governed by mainly unwritten, complicated rules of inheritance and traditional practices.²⁵⁰ For example, Article 72 of the Vanuatu Constitution states that ‘the rules of custom shall form the basis of ownership and use of land’, but provides no other guidelines.

Traditional, customary or ‘native land’ ownership is the principle form of land ownership in virtually all PICTs. Land is owned either communally; or in some cases, individually with the permission of the relevant tribe or other forms of land owning units (the *mataqali* in Fiji is the traditional land owning unit), on lease. In Fiji, it is possible to lease native land through the NLTB which is authorised to control the management of native or customary land.²⁵¹

Although traditional or customary ownership protects the rights of native owners against exploitation by outsiders or foreigners, it restricts land development, and the access of women to land.²⁵² With the advent of the modern cash economy, many people no longer enjoy secure land tenure, nor do they have confidence that their rights (or their group’s rights) to land will be respected, legally or otherwise, by others, and protected in cases of challenge.²⁵³

‘Rights to land’ mean different things in various countries, and even within countries, and depend mainly on highly localised practices which are determined by kinship ties, lineage and social and cultural practices.²⁵⁴ Each form of rights influences women’s rights to control, use or obtain funds using land as collateral. Land ownerships systems are either patrilineal or matrilineal and have shifted over time. For example, on Gaua in Vanuatu, inheritance patterns have swung back and forth between patrilineal and matrilineal systems, leading to conflict

²⁴⁷ United Nations Human Settlements Programme 2008, 15.

²⁴⁸ Fiji Islands Bureau of Statistics 2007.

²⁴⁹ AusAID 2008, xi.

²⁵⁰ Jalal 1998, 53.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ AusAID 2008, xi.

²⁵⁴ AusAID 2008, 6.

among men and women over the character of 'custom' itself. In a similar vein, in parts of Espiritu Santo in Vanuatu, lines of descent and marriage are influenced by reference to the mother, but land is inherited through the father and domicile is determined by the location of the father. Thus the local system has matrilineal, patrilineal, patrilocal and significant patriarchal notions. This means that rights to land are determined not only by reference to gender but also by kinship, marriage and locality.²⁵⁵

Land laws affecting women

It is important to note that the legislation does not directly or formally discriminate against women. The discrimination exists in the interpretation of custom and in unwritten land codes. All countries have both matrilineal and patrilineal land systems, and there is variation and diversity on all islands. There is a significant lacunae in the information, and research in this area is imperative.

Recent research indicates that despite the complexity and diversity of customary tenure systems in the Pacific, which are constantly evolving in response to contemporary pressures, it is possible to make two general statements about women's rights to customary land in the region.²⁵⁶

- Ø Women usually lack independent rights to land
- Ø Women usually have less input than men, into decisions about land

However, in all PICTs countries, except Tonga,²⁵⁷ the land legislation does not formally nor directly discriminate against women. Indigenous women have, in theory, as much right to control and manage custom land, as men. Control and management of the land means having the right to say how the land should be used, whether it can be mortgaged as security to obtain loans for development purposes and whether it can be leased to individuals.

Discrimination against women in terms of land rights or access to the use of land is indirect. Thus, although the legislation itself might not discriminate against women, the interpretation of customary law governing the control and management of custom land gives power over land mainly to men. Tonga is the only country in the region in which the legislation explicitly discriminates against women.

Women's access to land in patrilineal systems

In patrilineal societies, land is passed on from generation to generation through the male line. Land control and management are in male hands. Most Pacific Island societies are currently patrilineal, even if there was more matrilineality in the past. The fact that a society is patrilineal does not necessarily mean that the society is also patriarchal, and that women do not have any access to land at all. However, if the society is both patrilineal and patriarchal, land is passed through the father's line, and men control and manage it: and women's access is determined through family patronage.²⁵⁸ Some areas in the Pacific trace rights to land through the female line, although not necessarily from mother to daughter. However, even in such matrilineal societies, women do not necessarily control or manage the land. Some women have *usufruct*

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ Article 107, Constitution of Tonga.

²⁵⁸ Jalal 1998, Chapter 3.

rights over land only; they have the right to use it, but do not control or manage it. It is often a woman's brothers or uncles on the mother's side who have control,²⁵⁹ and women's access to land is therefore often dependent on whether or not they enjoy good relationships with the men in their social and kinship groups.²⁶⁰

Traditional customs usually ensured that vulnerable groups such as widows, unmarried or elderly women had some form of access to land to protect women from poverty. Where strong gender discrimination exists, it often arises 'from the interaction of custom with social and economic pressures, including increases in economic activity and making customary land available for development'.²⁶¹

Women have been affected differently by the changing patterns of land use. Some women now have fewer rights and less access to land than they had under traditional arrangements. However, if women are able to understand how modern land uses affect their rights they can shape and influence not only better land policies but more equitable legislation. This will provide more economic benefits for women and children.²⁶²

Women have also lost access to land from interaction with outsiders who tend in the main to deal with men, based on assumptions about land ownership. Research into the matrilineal system of Mele on the island of South Efate, Vanuatu, concluded that this undermines the rights of women and may result in changes in customary ownership.²⁶³

Solomon Islands examples demonstrate the risks to women's rights over land, of over-simplifying and reinventing custom. In the Marovo area of New Georgia, descent lines were simplified in answer to a private developer's requests for custom to be represented in a clear and concise way; on Choiseul, people with customary rights to use land have altered their genealogical charter so as to show themselves as patrilineal descendants of the first occupants of the area, thus granting themselves rights to control the land. Genealogies on Malaita have been changed to rule out group members who have become residents of other areas.²⁶⁴

Box 27. Male primogeniture and male privilege in land rights in Tonga

Tonga is a highly socially stratified society presided over by a hereditary monarch. Significant power is vested in the King, the royal family and nobles. The 1875 Tongan Constitution and the Land Act ensure that land is vested in the Crown. The legislation establishes male primogeniture and male privilege, in which the eldest male of the male line is preferred over others and women.²⁶⁵ There are three kinds of land entitlements: the hereditary estate (*tofia*); the tax allotment ('*api 'uta*); and the town allotment ('*api kolo*). The Land Act governs rights to town and tax allotments and provides that every Tongan male is entitled to a tax and town allotment when he reaches 16. Scheduled hereditary estates (*tofia*) are held by nobles and *matapule*. The Land Act states that inheritance of hereditary estates will take place according to Article 107 of the Constitution. Article 107 of the Constitution indicates those who are eligible to inherit land:

²⁵⁹ *Ibid.*

²⁶⁰ AusAID 2008, 82.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ Stege, Maetala, Naupa & Simo, (ed) Huffer 2008, 103-115.

²⁶⁴ AusAID 2008, 85.

²⁶⁵ Jalal 1998, 58.

Legitimate children, male and female but primarily the eldest male and his heirs; then the second male child if the eldest son has no heirs; and so on until the male line ends. If the male line dies out, the eldest female line will succeed. If then the female line dies out the land reverts to the male line.

The widow of an estate holder does not have an automatic right to live on her husband's land.²⁶⁶ 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.²⁶⁷

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.²⁶⁸

Nearly all Tongan women know about the land laws even if they know little about the other laws affecting their lives.²⁶⁹ It especially affects widows who cannot lease out life estates or mortgage life estates, because the Bank does not regard a life estate as good security. As women have little access to land, they have limited means to obtain loans. They need the consent of husbands, fathers, brothers and sons to borrow money, as they cannot be legal owners of land unless they are registered lessees.

Women's access to land in matrilineal societies

A small number of PICTs have matrilineal systems of land ownership, including across the Western and Northern parts of the Pacific. Most of Micronesia is matrilineal including Palau, the Federated States of Micronesia (except for Yap), the Marshall Islands and Nauru.²⁷⁰ Matrilineal societies exist in both Solomon Islands and Vanuatu.²⁷¹

In many cases, women managed land, were the primary advisers on land use, the primary caretakers of the clan's assets and settled disputes over land. However, recent research reveals that women's roles in matrilineal societies are increasingly constrained by male domination, not only in terms of decisions about land but in society generally.²⁷² The power that women exercise over land generally varies across matrilineal areas, because although in some areas matriliney is tantamount to gender equality and equal political power, in other areas, women have much less power and less say in decision making.²⁷³

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ One senior woman licensed lawyer said that Tongan women get very angry about land, personal communication.

²⁷⁰ Stege, Maetala, Naupa, & Simo. (ed) Huffer, 2008. viii.

²⁷¹ See also Jalal, 1998 64.

²⁷² Stege, Maetala, Naupa & Simo. (ed) Huffer, 2008 viii.

²⁷³ *Ibid.*

With the advent of colonisation in the Pacific some matrilineal areas gradually became patrilineal in terms of title, inheritance and/or land ownership and transmission.²⁷⁴ This happened in many parts of the region including Fiji, Tokelau, the Marshall Islands, Vanuatu and Solomon Islands.²⁷⁵ It is recorded that Pohnpei in Micronesia was a clear example of introduced German law codifying land laws into patrilineal inheritance and awarding ‘each adult male a piece of land’. The result of this, is that now land is commonly transferred from father to son, although daughters can also inherit land.²⁷⁶ The downfall of matriliney has been attributed to social disruption caused by changing population shifts; colonial-era land alienation; patriarchal land laws; the promotion of males in education and the formal economy; women’s exclusion from public office and political power and the pressing need for cash.²⁷⁷

Political power in the hands of men can also influence changing land ownership from men to women. Recording or registering customary law in legislation or policy has buttressed male control over land. The Custom Policy in Vanuatu for example, provides that the ‘true custom owners’ of land are men whose lineage is directly linked to the community domiciled within the borders of the land. If these men die, male guest residents (who were originally outsiders a few generations previously but now living in the locality) may assume ownership rights, if they have lived there for at least four generations. If the long-term guests have also died out, adopted sons and their descendants may assume rights. Control over land may pass to a ni-Vanuatu woman only if all these men are dead, and none of her uncles are alive. This means that women in Vanuatu ‘own’ land only as a last resort under the Custom Policy.²⁷⁸ Men from outside the area, i.e. guest residents, and even adopted males, have precedence over local women.

Women rarely assert their rights using the formal court system, particularly in Melanesia, although there is some anecdotal evidence that women use the court system more often in Polynesia.²⁷⁹ The unwillingness of women to use the formal court system is due partially to the system being culturally alien, based on colonial adversarial or inquisitorial methods, and in conflict with cultural values of consensus. There is also a lack of women lawyers, magistrates and judges in the judiciary. Other obstacles to women accessing formal institutions of justice include limited access to transport, inadequate support from court staff, the technical nature of procedures, a lack of time, and poverty.²⁸⁰ In addition, apart from Vanuatu and Fiji, women’s NGOs rarely engage in the legal processes to assert women’s rights. Women lawyers, even men lawyers, who are willing to challenge cases in court, are few and far between. Another significant reason is the lack of access to legal aid. In small Pacific Island societies, challenging the status quo also runs the risk of social ostracisation, alienation and exclusion, a price few women are prepared to pay (see Box 28 as an example).

Box 28. Challenging customary interpretations of land law in Vanuatu – *Noel v Toto*, Vanuatu²⁸¹

Occasionally women do use the court system to assert their rights and there are surprising

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ AusAID 2008, 85.

²⁷⁹ Writers personal knowledge, based on experience from studying the Pacific Islands societies over 16 years. Jalal 1998, Chapter 3.

²⁸⁰ AusAID 2008, 85.

²⁸¹ Case no 18/1994, April 1995

results in their favour. Although in this case, a woman's son filed a court case on behalf of his mother and her family, the dispute was essentially about women's access to land in a predominantly patrilineal and patriarchal community. All the people involved belonged to the same *wantok* (clan). Crero Toto, the father of Obed Toto and grandfather of John Noel, had been the custom owner of a piece of land known as Champagne Beach on Espiritu Santo Island. He had two wives, one from Hog Harbour and the second, *de facto* wife, from Kolo. He had several children with both wives including an eldest daughter, Julie, from the first wife. Custom evidence had established that Obed, and not Crero's eldest child Julie, was the head of the family. Obed argued that he could decide what to do with the money from the land: he normally would give some money to the family, but was not obliged to do so. He further argued that the family members should ask the head of the family for land, and that when women married, they lost their customary rights to their fathers' land. Therefore his married sisters (including Julie) had lost their rights to Champagne Beach, and their children had no rights either. The legal issue at the centre of the argument was Article 5 of the Vanuatu Constitution which grants equal rights to men and women. However Article 72 says that 'the rules of custom shall form the basis of ownership and use of land'. If there is conflict between the interpretation of customary law and the Constitution, which law should prevail? The court said although customary law was the basis of land ownership in Vanuatu, it was still subject to the constitution and cannot be applied if it discriminates against women. This is a fundamental principle, which overrides any law or custom that is contrary to it. Further, a decision giving more rights to men than to women would be contrary to CEDAW, which the Vanuatu Parliament had recently adopted. Therefore, Obed's sisters and brothers were equally entitled to a share in the income from Champagne Beach. No distinction should be made between the legitimate children of Crero's first wife, and the children of his *de facto* wife. Obed Toto was the head of the family but was obliged to share the income equally with his sister, brothers, half-sisters and half-brothers and descendants.

In the RMI a legislative strategy was not attempted. Instead, women's groups mobilised, campaigned and lobbied against proposed legislation that they considered would deprive them of their traditional land rights (see Box 29).

Box 29. The defeat of Land Bill 84 in the Marshall Islands – women re-asserting rights over matrilineal land²⁸²

Historically in the Marshall Islands, land was owned collectively by lineage groups (the *bwij*) whose basic tenets were: matrilineal dominance in land; a two tiered system with varying levels of usufruct rights; and flexible customary practices. Women possessed authority and influence directly connected to their matrilineal rights to land, with men having a complementary role as lineage heads in the public sphere, acting on behalf of the group. Men of the chiefly (*irooj*) class were *iroojlaplap*, women *lerooj*, but the basic chiefly duties were left to the junior male relatives. In the exercise of power and duties consultation with the *lerooj* was critical. Female and male chiefs sat in equal numbers in the Council of *Irooj* (Chiefs) The *alap* was the lineage head of the *bwij*, responsible for the overall productivity of land and for being a liason between the *irooj* and others. The *alap* was traced through the female line but both genders could be *alap*.

²⁸² Stege, Maetala, Naupa and Simo, (ed) Hufffer 2008, PIFS

In contemporary Marshall Islands, due to complex kinship relationships, land tenure and usage is difficult to explain. However traditional matrilineal based practices have been challenged and modified, especially in the capital of Majuro, where there are significant population pressures. Land disputes ending up in litigation are common in Majuro. In stark comparison, the rural atoll of Namdrik is still governed by matrilineal lineage, and disputes over land are largely settled through negotiation and consensus. Marshallese women have a critical political power base because of matrilineal heritage, and they have direct power in decision making over land, notwithstanding an emerging patriarchal political power structure dominated by men.

In December 2003, the government established a Land Registration Authority (LRA) to allow for voluntary registration of interests which require the consent of all senior land owners including chiefs of both genders. However there has been barely any participation in the LRA due to a lack of interest, costs of registration and because of the lack of involvement of the people in designing the scheme. In recent times there have been tensions about the legitimacy of females to be *alap* and to participate in the public and political spheres. In 2005, the High Court, with the concurrence of the Traditional Rights Courts, decided in favour of two female plaintiffs claiming *alap* and senior *rijerbal* rights on Kwajalein Atoll (where the Ronald Reagan Ballistic Missile Defence Site is located and which brings huge income to traditional land owners).²⁸³ Subsequently two male senators of the *Nitijela* (Parliament) introduced Bill 84 to codify Marshallese customary law so as to define the term *alap* only as a male elder person.

Women United Together Marshall Islands (WUTMI), a woman's NGO, mobilised to defeat Bill 84. They conducted a strategic campaign relying heavily on the media (even on Radio Australia) using especially the voices of the female *lerooj* in newspapers, radio, community wide petitions targeting elected members of the *Council of Irooj* as the government monitors of custom. The lobbying effort was successful and demonstrates the extent of female authority in custom, as many women saw themselves not as feminists, but as traditionalists protecting Marshallese *manit* (custom). However, WUTMI conducted a very modern, smart, strategic and media effective campaign, reminiscent of modern feminist campaigns to either pass or defeat proposed law, as in other countries.

Limited access to land has severe consequences not only for the general human need for shelter but also for the ability of women to obtain money without reference to men. Without land as security, there is very limited access to credit or loans from commercial banks. This ultimately reinforces women's dependence on men. In the Pacific Islands, as in other countries, possession of land is a very important factor in being able to obtain loans to start businesses, develop property, grow produce, participate in the cash economy and build homes. If women do not have access to land they have no means of acquiring money or obtaining any real economic power.

Most Pacific Island countries have special constitutionally recognised land courts that adjudicate disputes over land (see Box 30 for an example). These land courts usually have male judges. In some cases, as in Fiji, women are traditionally not allowed to give evidence as expert witnesses, as a matter of practice not law, despite the fact that women are regarded as primary caretakers of tradition. The current interpretation of customary law gives control

²⁸³ Stege, Maetala, Naupa and Simo, (ed) Hufffer 2008, PIFS 19 (Case MIJ 4/1/2005, MIJ 4/22/2005 see endnote 26 to 29, 33.

and management of custom land to men, particularly to men of high rank. Thus land rights are affected both by sex and by social class. Except in the Marshall Islands and the Cook Islands, women rarely take action in the various land courts. The complicated legal processes and the expenses of taking cases further operate against women and the poor.²⁸⁴

Box 30. Land and decision making in the Solomon Islands - The Proposed Solomon Islands Draft Constitution

The post-conflict constitutional making process in the Solomon Islands has offered women the rare opportunity to influence their land rights in legislation. They have mobilized in partnership with the Women's Ministry to make submissions to the National Constitutional Congress.²⁸⁵ They have proposed the use of new language:

“Patrilineal and matrilineal customs shall be equally recognised.”

“None of the custom laws, traditions, systems and institutions referred to shall be applied to unfairly discriminate against women.”

“Women are entitled to participate equitably in the planning and decision making process.”

²⁸⁴ Jalal 1998, Chapter 3.

²⁸⁵ Ministry of Women and Culture, Solomon Islands 2008.

Chapter 5: Health, education, employment and economic issues

It is widely accepted that women's contributions need to be better harnessed in support of economic productivity. The full economic potential of a country can only be realised when the abilities of its entire people, both men and women, are fully garnered. The UNESCAP *Economic and Social Survey for Asia and the Pacific 2007*, found that discrimination against women costs Asia-Pacific economies almost US\$80 billion a year.²⁸⁶ The survey stated that gender discrimination in the region is most visible in the low access women and girls have to education and health services, to economic opportunities and to political participation. The law has a significant role to play in bringing about gender justice, to achieve gender equality in these and other areas, in order to address these historic inequalities.

Gender discrimination has widespread consequences and clear economic and social costs. The *UNESCAP Economic and Social Survey 2007* states that although the Asia-Pacific region has made good progress in reducing gender discrimination in recent years, 'appalling disparities' remain. The survey states that the region is losing \$42-\$47 billion per year because of restrictions on women's access to employment opportunities, and another \$16-\$30 billion per year because of gender gaps in education.²⁸⁷

Article 13 of CEDAW mandates State Parties to ensure that women are granted equal rights to bank loans, mortgages and other forms of financial credit free from discrimination. There are no direct legislative barriers to women obtaining bank loans and mortgages in any PICT, but indirect discrimination, in the form of informal restrictions on women's access to employment, continues to deter women from obtaining credit and loans to purchase property or small businesses. Their limited access to land in most PICTs adds a further layer of discrimination, preventing women from being able to provide the collateral necessary to obtain funds for a variety of income earning opportunities. A combination of these factors interferes with women's autonomy and ability to earn a livelihood. How do the laws contribute to gender discrimination in health, education and employment?

Gender, health and the law

No PICT explicitly makes health status discrimination illegal in their Constitution. However, Palau, the Federated States of Micronesia and Marshall Islands recognise some semblance of the right to health. The Micronesia Constitution grants Congress the power to promote health by setting minimum standards²⁸⁸ whilst the Constitutions of the Marshall Islands²⁸⁹ and Palau²⁹⁰ recognise the right of the people to health care. The Constitution of the State of Chuuk in Micronesia provides that no person shall be discriminated against in the distribution of medical care or refused medical care because of financial inability.²⁹¹ Given that the Federates States of Micronesia federal constitution prohibits sex discrimination, a combination of the provisions of the Chuuk state and federal laws would allow for a lawsuit on the basis of health status discrimination in that state. All PICTS need to explicitly

²⁸⁶ UNESCAP 2007, 4

²⁸⁷ *Ibid.*

²⁸⁸ Article IX, section 2.

²⁸⁹ Section 15.

²⁹⁰ Section 16.

²⁹¹ UNIFEM Pacific 2007, 92.

recognise the right to health care, and specifically, reproductive health care, and to non-discrimination on the grounds of health status, specifically in their constitutions.

Gender, education and the law

Surveys show conclusively that women's education, particularly its intergenerational effects on children's health and education, is directly linked to human development.²⁹² There is also a positive relationship between women's education and economic growth.²⁹³

Compared to Asia, recent research indicates no huge gender disparities in enrolment rates in the Pacific region²⁹⁴, and in most cases, girls outnumber boys' enrolment numbers in high school (see Table 17), as well as in university. For example, current enrolment rates at the regional University of the South Pacific, indicate that 11,224 females and 9,842 males are registered as students, whilst there are 221 female and 391 male staff.²⁹⁵ However there are huge disparities between islands and the quality of education differs greatly between them as well.²⁹⁶ From the Pacific region Kiribati and Tonga were the best performers.²⁹⁷ However numbers drop significantly for both groups for secondary school compared to primary school, and women enter the paid work force at significantly lower numbers.

What is not clear is the comparative fall out rate for girls from secondary school. In the Marshall Islands for example, despite the figures apparently indicating gender parity, at both primary and secondary levels, female drop-out rates are higher than for males, resulting in a higher proportion of males completing Grades 6, 8 and 12 than females. Reasons for this include the rise in teenage pregnancy rates and socio-cultural expectations requiring females to be at home to help their parents take care of younger children and other family members.²⁹⁸

	Adult literacy rate (%)		Primary school enrolments (%)		Secondary school enrolments (%)	
	Male	Female	Male	Female	Male	Female
Papua New Guinea	63	51	80	70	29	23
Fiji	96	92	107	105	85	91
Solomon Islands	77		99	94	32	27
Vanuatu	74		120	116	44	38
Samoa	99	98	100	100	76	85
Micronesia, Federated States of	91	98	116	113	83	88
Tonga	99	99	118	112	94	102
Kiribati			111	113	82	93
Marshall Islands	94	94	105	100	75	78
Cook Islands	95					

²⁹² UNESCAP, 2007 111.

²⁹³ *Ibid.*

²⁹⁴ Hughes and Sodhi 2008.

²⁹⁵ USP 2008.

²⁹⁶ Hughes and Sodhi 2008, 10.

²⁹⁷ UNESCAP 200, 111.

²⁹⁸ WHO 2004.

Palau	93	90	110	100	97	105
Niue	95					
Nauru, Tuvalu, Tokelau	N/A					
Source: Hughes & Sodhi, 2008.						

There are no formal laws that prohibit access to education for girls or women. Rather, it is gender discrimination by omission, for example, in failing to legislate in areas affecting girls and women's education. However, they are disadvantaged because of informal and structural impediments such as poverty, cultural attitudes and perceived gender roles. This means that if there are limited education funds available within the family, girls may be withdrawn from school first. Cultural reasons are also important. 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.²⁹⁹ It is not clear whether this pattern remains and more research is needed.

There is no legislation creating special measures for education of girls, whether in the form of temporary special measures or the requirement of special budgets for female education, despite the laws of several countries allowing such measures for disadvantaged groups. Some informal policies for affirmative action for the education of girls appear to exist but there is no data supporting this. There is no legislation preventing schools from expelling girls who fall pregnant, or mandating schools to allow them to complete their education, after childbirth. It is the norm in most PICTs schools for pregnant girls to be expelled.³⁰⁰

Article 10 of CEDAW mandates State Parties to ensure that women and men have equal rights and opportunities in the field of education. Fiji has made equal access to education a constitutional requirement,³⁰¹ and has specifically allowed for legislation to be passed to provide equality of access in the field of education.³⁰² However, this provision has not been used to pass laws on affirmative action or to encourage female education. The Marshall Islands' Constitution recognises the right of the people to education³⁰³ and Vanuatu specifically mentions educational disadvantage arising from the gender of the child.³⁰⁴

It is widely accepted that legislating for compulsory education is critical to ensure that girls are equally prioritised and not discriminated against in education.³⁰⁵ CEDAW General Recommendation 5 also encourages States to make more use of temporary special measures such as affirmative action, preferential treatment or female quotas to promote women's participation rates in education.³⁰⁶

Several PICTs have introduced compulsory schooling at both primary and secondary levels up to certain ages, generally around 14 years of age.³⁰⁷ The Federated States of Micronesia in

²⁹⁹ Fiji Ministry of Women & Culture, *A Statistical Gender Profile*, 1994.

³⁰⁰ DAV Secondary School is the only school in Fiji with a deliberate policy of allowing young mothers from any school to complete their education.

³⁰¹ Section 39(1), Constitution.

³⁰² Section 44, Constitution; Section 21, Human Rights Commission Act 1999.

³⁰³ Article II, section 5.

³⁰⁴ Section 2(d), Education Act 2001.

³⁰⁵ UNIFEM Pacific 2007, x.

³⁰⁶ *Ibid.*

³⁰⁷ Compulsory Education Regulations 1997 made pursuant to the Education Act Cap 262 (Fiji); Education Act Cap 30 (Kiribati); Education Act 1991(RMI); Samoa - up to 14 years old Compulsory Education Act 1992; Education Act 1978 (Tuvalu) up to 15 years; Education Act 2001 (Vanuatu) up to 14 years.

particular, guarantees free elementary education for all throughout the country, and has established student loans for all young men and women to undertake higher education.³⁰⁸ Palau also offers free and compulsory education for grades one through to twelve.³⁰⁹

Gender, employment and the law

The economic and social costs of gender discrimination in employment are significant. Gender discrimination frustrates women's participation in employment, reduces their productivity, diverts resources and has an overall impact on their empowerment. Legal or other impediments to female employment raise labour costs and lower international competitiveness, preventing women from entering the market at competitive wages.³¹⁰ Global marketing forces and local tax regimes also wield significant influence over women's access to paid work. For example, in Fiji, in 2002, 39 per cent of women above 15 were employed in non-agriculture wage employment, compared to 79 per cent of men.³¹¹ Table 18 shows selected data on women's representation in non-agricultural wage employment in PICTs. In 2006, the percentage of women earning wages, was reduced to thirty-seven per cent due to the closure of several large, multinational, garment factories in the tax-free zones, when their tax exemption periods expired.

Table 18. Selected data on women's representation in non-agricultural wage employment	
Tuvalu	44% (2002)
Samoa	43% (2005)
Niue	43% (2001)
Palau	40% (2004)
Cook Islands	39% (2006)
Kiribati	37% (2000)
Fiji Islands	37 % (2008)
Tonga	36% (1996)
Marshall Islands	36% (1999)
Papua New Guinea	35% (2006)
Micronesia, Federated States of	34% (1994)
Vanuatu	33% (2000)
Tokelau	33% (2001)
Solomon Islands	30% (1999)
Source: ADB, UNESCAP, UNDP 2006 for PNG, Cook Is; Department for Statistics 2000 for Vanuatu; Narsey, 2008 for Fiji; CEDAW Committee, 2005 for Samoa; SPC 2004 for other PICTs.	

Women having autonomy over their lives is the key to their economic participation,³¹² and economic participation gives them more autonomy over their lives. Both are mutually reinforcing principles. However, despite more females enrolling in school and getting an education, as indicated previously, they are still entering the paid work force at lower numbers (see Table 19).

³⁰⁸ UNIFEM Pacific 2006, 24.

³⁰⁹ Constitution of Palau, Second Constitutional Convention 19. CP No. 2-275.

³¹⁰ UNESCAP 2007, 104.

³¹¹ Nairube 2002.

³¹² UNESCAP 2007, 104.

Table 19. Fiji. Major employment status, activity or category-preliminary results of the employment & unemployment survey 2004-05

Major Employment Status, Activity or Category			
Employment Status	Female	Male	Total
A- Wage earner	39444	107148	107148
B- Salary earner	18303	30581	48884
C- Employer	617	2647	3263
D- Self-Employed	23105	68782	91887
E- Family worker	19547	18517	38064
F- Community worker	1730	505	2235
H- Retired/ pensioner	4951	7984	12936
I- Handicapped	1816	1878	3694
J- Other reason for inactive	7808	5301	13109
K- Not looking for work	730	1364	2094
L- FT Household Duties	120651	1642	122292
M- NAS/Underage	37452	42042	79493
N- Full-time student	113821	119080	232901
T-Unemployed/NAS/ of school age	2680	2344	5025
U- Unemployed/ Looking for work	4883	6545	11429
V- Unemployed/ Stopped looking	2244	1810	4054
Total	399781	418170	817952

Source: Fiji Islands Bureau of Statistics, 2007.

The significance of unpaid household work

The overwhelming numbers of non-student females in Fiji are doing unpaid household duties. Recent research estimates the value of unpaid household work at almost FJD480 million, a figure greater than the income created by sugar or tourism, the two largest industries. Women were unable to pursue professional development or other income-generating opportunities because they shouldered an unequal burden of household work. Although the employment of women has done more to encourage global growth than capital investment increases and productivity improvements, the vast majority of women are engaged in low-paying or unpaid work. The report points to some positive signals of change over the past 25 years. In some industries, income disparities between men and women have been reversed for women with certificate and diploma level education.³¹³

The UNESCAP Economic and Social Survey³¹⁴ indicates that in the Asia-Pacific region women's participation in the labour force, whether formal or informal – and thus their role in the economy – is constrained by many obstacles: lack of proper education, discrimination in wages and promotions, cultural attitudes, harassment at work and difficulties in reconciling domestic commitments, including childcare.³¹⁵ Even when women participate actively in the labour market they may not have decent jobs. The informal sector, characterised by its low wages and limited opportunities for up-skilling, provides employment to the majority of women. The inferior skills required in the informal sector go well with the low educational achievements of many women, making the informal sector the largest employer of women in the Asia-Pacific region.³¹⁶

³¹³ Narsey 2008.

³¹⁴ UNESCAP 2007, 108.

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

Features of women's employment in the Pacific Islands

Pacific Island women make up roughly one-third of the formal, paid workforce, with the majority being in the informal and semi subsistence sectors; and only 10-20 per cent of women hold managerial positions. Women also make up the majority of the unemployed.³¹⁷ For example in Fiji, 81,469 women earn a cash income compared to 209,158 men,³¹⁸ the majority of them in the informal unlegislated sector. Although there are significant disparities between Polynesia and Melanesia, the vast majority of Pacific Island women work in home gardens, which grow produce for subsistence purposes. Most working-age women are denied modern employment opportunities that provide reasonable incomes.³¹⁹ Despite women's unpaid work not being given legal recognition or an economic value,³²⁰ their work in home gardens has enabled food supplies to keep up with growing populations, highlighting that women's contribution to the economy and food security is critical. Land shortages will make this capacity to provide food increasingly problematic.³²¹

Although the data in Tuvalu reveals a high percentage of women employed at 44 per cent, the majority of workers are employed by the government, due to the virtual non-existence of a private sector. In some countries, like Samoa, the picture is more promising. Women are increasingly entering the labour force, comprising 43 per cent of the formal wage economy. They dominate in manufacturing, as well as in the teaching and nursing professions. Female civil servants are guaranteed eight weeks of paid maternity leave, and a further six months' leave without pay, but the private sector is not equally benefitting. In the private sector such benefits are determined by private arrangements between employer and employee. Women have also benefited from credit and training programmes, as the majority of loans approved for business enterprises and commercial activities were granted to women.³²²

The patterns of women's employment vary from one Pacific Island country to another, but there are some common features:³²³

- Ø Most countries do not consider women as economically active unless they work for money.
- Ø Where women work for money they earn generally less than men.
- Ø Women working for money concentrate in 'female' occupations like nursing, teaching, clerical and the service industries.
- Ø Work in subsistence agriculture and fishing is recognised but usually only indirectly. This work contributes significantly to food security in all countries.
- Ø Some women are obtaining access to income by becoming self-employed. These women are not counted in statistics but they are making significant contributions to the family income and to the economy.
- Ø There are few trade unions in 'women's industries' and this ultimately contributes to women's powerlessness in paid labour.
- Ø Because of their powerlessness, women get few promotion opportunities and may suffer sexual harassment as well.

³¹⁷ SPC 2004.

³¹⁸ Fiji Islands Bureau of Statistics, Category: Labour Supply, Date: 04/04/07.

³¹⁹ Hughes and Sodhi 2008, 15.

³²⁰ Jalal 1998, Chapter 11.

³²¹ Hughes and Sodhi 2008, 15.

³²² CEDAW Committee 2005.

³²³ Jalal 1998, 506.

Legal impediments and omissions in employment

If gender discrimination, whether legislative, interpretive or by omission in employment, is a key impediment to women's unequal voice, lack of power, and economic development in the region, what role has the law played in reinforcing that discrimination; or can the law play a role in removing those impediments and altering the outcome of women's participation rates in paid employment?

The Pacific Island region has very little legislative protection for all workers in general, let alone women. The existing legislation is largely inadequate and not properly enforced. The main form of gender discrimination is that of discrimination by omission because the work typically done by women is not covered by legislation. Article 11 of CEDAW requires States Parties to eliminate gender discrimination in the area of employment and to pass laws that protect the employment rights of women in labour legislation.

Fiji's human rights legislation³²⁴ contains specific grounds of unlawful discrimination found at section 38 of the Constitution, in the areas of employment, professional accreditation, training, the provision of goods, services or facilities, public access, land, housing or other accommodation and education. No other PICT has similar legislation.

Legal restrictions on the type of work that women do

A number of countries in the region restrict women's employment choices, banning them from night work, and from certain industries such as working in mines³²⁵ and, in Samoa and Papua New Guinea, women are also prohibited from undertaking manual work.³²⁶ Although the Fiji Ministry for Employment still has the discretion to impose limitations on the types of work that women do, it removed the limitations from the legislation some years ago, in response to lobbying from women's organisations.³²⁷

Women's work choices are not legally restricted in Palau, the Federated States of Micronesia, and in the Marshall Islands. However it should be noted that none of these countries has yet put in place legislative mechanisms to protect the employment and labour rights of workers other than in the Public Service.³²⁸ Protectionist policies that attempt to limit women's choices of employment, although seemingly well meaning, limit women's choices to earn an income as they choose and to have independence and control over their lives.

Protection from dismissal, maternity rights and child care

In most PICTs (except the Marshall Islands and the Federated States of Micronesia)³²⁹ legal protection from dismissal ends upon the completion of the approved maternity leave period, leaving women in vulnerable positions. This means that if they do not return to work when

³²⁴ Section 17, Fiji Human Rights Commission Act 1999.

³²⁵ Sections 98, 99 Employment Act 1978 (PNG); sections 77 & 79 Employment Act Cap 30 (Kiribati); section 33 Labour & Employment Act 1972 (Samoa); section 42 Labour Act Cap 73 1960 (Solomon Is); section 77-79 Employment Act Cap 48 1966 (Tuvalu).

³²⁶ Sections 98, 99 Employment Act 1978 (PNG); section 33 Labour & Employment Act 1972 (Samoa).

³²⁷ Employment Amendment Act 1996, 10 June 1996.

³²⁸ UNIFEM Pacific 2007.

³²⁹ UNIFEM Pacific 2007, xi

maternity leave expires it will be assumed that they are dismissed. It is noteworthy, that in ratifying CEDAW, the Federated States of Micronesia reserved on pay equity and maternity leave with pay,³³⁰ indicating by reservation that it was not yet prepared to improve women's rights in the workplace.

No PICT has specific health protections for pregnant workers. Most provide for paid maternity leave in varying degrees to female civil servants, by legislation or policy, but not to women working in the private sector. Women in the private sector have to rely on private arrangements, union negotiated maternity leave, or the generosity of employers. However, none of the nine countries examined by the CEDAW legislative indicators study, meet the standards of 14 weeks paid maternity leave recommended by CEDAW and the International Labour Organisation (the ILO recommends a period of 14 weeks maternity leave and CEDAW recommends that it be paid).³³¹

Many countries provide breastfeeding mothers with thirty minute breaks twice daily by law except the Marshall Islands, the Federated States of Micronesia and Samoa. No PICT has state funded childcare facilities. The Marshall Islands does not provide for paid maternity leave nor does it provide for protection against dismissal during pregnancy or for unpaid leave taken for maternity reasons. It is left to negotiation with employer.³³²

Equal conditions of work

Men and women generally enjoy the same conditions of work in the formal unionised work sector. However, since the majority of work that women do is in the informal sector, they are not covered by legislation at all. For example domestic work, casual work, part time work, outwork and other forms of informal work are not covered by any legislation, and in fact, are specifically excluded from protection in most PICTs. In much of the region women are engaged in home gardens.³³³ Papua New Guinea has a curious provision that states that if a woman is the 'breadwinner', she is entitled to the same rights as men in the public service.³³⁴

The majority of PICTs do not have equal pay legislation. However, Papua New Guinea legislation states that if an employer fails to pay a female employee the same wages for work of the same kind at the same level it is an offence.³³⁵ Samoa, Kiribati and Vanuatu³³⁶ provide for some degree of equal pay legislation. Palau passed a minimum wage law in 1998 but the large numbers of foreign workers (6,000) are not covered.³³⁷

Protection from sexual harassment

Harassment at work is a major impediment to women's participation in the formal and informal workforce and is largely unreported because it is difficult to prove, and there is no specific legal protection.

³³⁰ *Ibid.*

³³¹ *Ibid.*

³³² *Ibid.*

³³³ Hughes and Sodhi, 2008

³³⁴ Public Service General Order 20 63-71, UNIFEM Pacific 2006, 283.

³³⁵ Section 97, Employment Act 1978.

³³⁶ Samoa Labour & Employment Act 1972 s19; Kiribati Labour Act, Cap 73 1960 s30; Vanuatu Employment Act Cap 160 1983 s8(1); UNIFEM Pacific 2006 344.

³³⁷ USA, Bureau of Democracy, Human Rights, and Labor, 2006.

Sexual harassment of women in the workplace is significant

In a survey commissioned by the Fiji Women's Rights Movement, a staggering one in three women interviewed (thirty-three per cent) claimed to have been sexually harassed in the workplace during their working life (see Table 20). Sexual harassment of women in the workplace is significant, widespread, varied in nature, and are predominantly multiple. Overall, the data reveals that the incidence of sexual harassment cuts across all workplace types and affects women from various socio-demographic groups. However some socio-demographic and workplace factors are associated with significantly lower levels of current harassment. Those women least at risk are those who are ethnic Indian-Fijian, 45+ years old, in Nadi (a town in Fiji), in a company/organisation with less than 20 employees, with a female at the head, in an upper white collar occupation group, and in the civil service, education or medical sectors.³³⁸

Table 20. Sexual harassment in the workplace: Fiji Islands	
Women who had been harassed in a workplace during their working life	33%
Women who had been sexually harassed in a workplace within the past 12 months	20%
Women who claimed that sexual harassment was still happening	14%
Women who had been harassed 'countless times'	20%
Women who did not report because it was pointless	77%
Women who had been verbally sexually harassed	69%
Women who had been gesturally sexually harassed	47%
Women who had been physically sexually harassed	41%
Women who had have been graphically sexually harassed	26%
Women who had been emotionally sexually harassed	25%
Women who had been sexually assaulted or raped	4%
Women who had been subjected to indecent exposure	4%
Women who had been strip searched	1%
Source: Fiji Women's Rights Movement, 2002.	

Specific legal protection from sexual harassment is absent in most PICTs although some countries recognise blatant forms of sexual harassment which involve outrageous indecent behaviour such as deliberate exposure of genital organs in criminal legislation. Criminal remedies are not adequate to address the range of unwanted behaviour that women experience in the workplace.³³⁹

Human rights legislation in Fiji makes sexual harassment a civil offence by providing that '...sexual harassment, for the purposes of this section, constitutes harassment by reason of a prohibited ground of discrimination'. No other PICT has specific civil laws against sexual harassment, although Papua New Guinea's code applying only to government civil servants, provides that dismissal may result from an act of sexual harassment.³⁴⁰

³³⁸ Fiji Women's Rights Movement 200 (sample size 550).

³³⁹ UNIFEM Pacific 2007.

³⁴⁰ Public Service General Order 15.59.20.73 cited in UNIFEM Pacific 2006, 284.

Sexual harassment lawsuits are virtually unheard of in the Pacific region. However in a recent case in Tuvalu, an unfair dismissal case, filed on the basis of an unrecognised offence of sexual harassment was dealt with as a matter of common law (see Box 31).

Box 31. Challenging sexual harassment in Tuvalu - *Katea v Niutao Kaupule & Satupa*³⁴¹

There is no criminal or civil law offence for sexual harassment in Tuvalu so the plaintiff (K) sought damages for the tort of sexual assault and breach of her constitutional rights against the defendants (NK and S). The Niutao Kaupule (NK) is a traditional local island council. K was appointed as a clerk for the NK and her superior was the second defendant (S). In 2001, S began sexually harassing K and continued to the extent that S approached K at home asking her for sexual intercourse. In 2002, K was allowed Christmas leave only after she consented to have sexual intercourse with S upon her return. After her leave she told S that there was no possible way she would agree. In 2003, after she had taken two days off to look after her sick daughter, K received a letter of dismissal from S for lack of competence. The defendants filed a joint statement of defence denying all the allegations of sexual harassment, but admitted to improper procedure in the termination of K’s employment. The court held that there was enough evidence to prove the sexual assault and that the defendants were liable for unfair dismissal. The tort protected individuals not only from physical harm, but also from any interference with his or her person that was offensive to a person with a reasonable sense of honour and dignity. Consequently, both NK and S were liable for assault and for unlawful dismissal.

Sex discrimination legislation needed

Most countries in the region do not have specific sex or gender discrimination legislation in the area of employment, apart from general constitutional safeguards against sex discrimination in some PICTs as mentioned previously (see Table 21). However, Fiji does prohibit unfair discrimination on the grounds of sex, sexual orientation and disability in the area of employment in its Human Rights Commission Act,³⁴² but not in its employment legislation; Papua New Guinea on the grounds of sex only,³⁴³ and the Federated States of Micronesia makes sex discrimination in employment unlawful in the public service, but not in the private sector.³⁴⁴

Table 21. Selected employment laws affecting women’s status							
	Temporary Special Measures for the Advancement of Women in Employment	Legal Restrictions on work	Specific protection from dismissal for pregnancy	Paid Maternity leave in legislation	Equal pay legislation or pay equity provisions	Anti-discrimination provisions in employment legislation	Specific sexual harassment protection legislation
Fiji	s. 44, Constitution. Special measures for the advancement	No but Minister can designate under s.65 of Employment Amendment	Yes. s.79 Employment Act, Cap. 92.	Yes .12 weeks paid maternity leave provided for in s.74 Employment	No	Yes. S, 38, Constitution of Fiji; s.17, Human Right Commission Act 1999	s.17, Human Right Commission Act 1999 provides partial but

³⁴¹ [2006] TVHC 1, 16 October 2006

³⁴² Section 17(1) 1999.

³⁴³ Section 97(a) Employment Act 1978.

³⁴⁴ FSM Code Title 52, Cap 1 Sub cap I 1997 section 116.

	of women are permitted but there is no such scheme.	Act 1996.		Act, Cap. 92.			limited protection against sexual harassment in the workplace.
Cook Islands	No	Under s.51 of the Industrial and Labour Ordinance women may not be employed using machinery unless certain conditions are met. Applies only to women.	No	No	No	No	No
Kiribati	No	Under ss.77-19, Employment Act Cap.30, women may not be employed at night, in mines except where specifically declared by the Minister.	Yes, under s.81 Employment Act Cap.30	Yes. 12 weeks under s.80 Employment Act Cap.30 but in the civil service paid maternity leave is limited to 2 children only.	No	No	No
Marshall Islands	No	No restrictions.	No	No	No	No	No
Micronesia, Federated States of	No. Equal opportunity provisions in , Title 52, Cap 1, sub cap 1, 1997 do not specifically provide for affirmative action for women.	No restrictions.	No	No	FSM has placed a reservation on pay equity provision of CEDAW. Only the Pohnpei State Code , Title 19, Cap 3, 2006 has state legislation stating that no employer shall discriminate in wages between men & women.	Yes. FSM Code, Title 52, Cap 1, subcap 1, 1997, Title 52, Cap 1, subcap 1, 1997	No
Papua New Guinea	No.	Yes. Under ss.98-99 of the Employment Act 1978 Cap.30, women may not be employed at night, in heavy labour	Yes. S.100(b) Employment Act 1978.	Yes but paid leave for 12 weeks only for female civil servants under Public Service General Order 14. S.100(b) of the Employment	Yes. Under the Employment 1978 s97 - no employer shall discriminate in wages between men & women.	Yes, the Employment Act, 1978, s.97(a) forbids discrimination on the grounds of sex.	Only protection for female civil service workers under the Public Service General Orders 15.59 but this does not apply to

		or in mines.		Act 1978 allows for unpaid maternity leave for the private sector under conditions.			the private sector.
Samoa	No	Yes. Under ss. 33(1) & 33(2) of the Labour & Employment Act 1972 women may generally not be employed at night or in manual work unsuited to their physical capacity.	No	Yes but paid leave for 8 weeks only for female civil servants under Public Service Act 2004, General Orders. No guaranteed maternity leave for the private sector.	Yes, s.19 of the Labour & Employment Act 1972.	No	Yes but only to civil servants under s. 19 (c) of the Public Service Act 2004.
Solomon Is	No	Under ss.39-41 Labour Act, Cap 73, women may not be employed at night or in mines except where specifically declared by the Minister	Yes under s.43 Labour Act, Cap 73.	Under s.42 Labour Act, Cap 73 there is limited paid maternity leave for 12 weeks at 25% of the salary	Yes under s.30, Labour Act, Cap 73.	No	No
Tuvalu	No	Under ss. 77-79 of the Employment Act, Cap 84 , women may not be employed at night or in mines.	Yes under s.81 of the Employment Act, Cap 84.	Under s.80 of the Employment Act, Cap 84 there is limited paid maternity leave for 12 weeks at 25% of the salary.	No	No	No
Tonga	No	No	In 1991 ³⁴⁵ a Tongan Government report stated that in the civil service an unmarried pregnant woman must resign. Unable to verify current position.	Only female civil servants are covered under the Civil Service Regulations 1987. 30 days maternity leave and up to 42 days on medical leave with full pay and 48 days on half pay.	No	No	No
Vanuatu (the employment legislation is	No	Under s.35 of the Employment Act, Cap 160,	Yes under s.37 of the Employment Act, Cap 160.	Under the Public Service Act there is paid maternity	Yes under s.8 of the Employment Act Cap 160	No	No

³⁴⁵ Tongan Government Report: The Status of Women in Tonga. Country overview paper for the South Pacific Regional Seminar on CEDAW (SPS/CEDAW/1991. WP4) cited in Jalal, 1998, 513.

the in process of being reformed and the maternity leave provisions are likely to be amended)		women may not be employed at night except in certain limited conditions.		leave for female civil servants under regulations. Section 36 of Employment Act Cap 160 grants 12 weeks of paid maternity leave but at ½ pay for part of that time.	there is a legal guarantee of equal remuneration.		
Nauru: There is no labour law governing the relationship between employer and employee. However, the Public Service Act, until recently, prevented women from working in the civil service after marriage.							
Palau: There is little labour legislation in Palau. The Protection of Resident Workers Act (PNC Title 30) was passed to protect citizens from the influx of migrant workers and to provide non-resident migrant workers with some protection.							
Niue: There is no labour legislation.							
Tokelau: There is only one group of salaried workers in Tokelau, civil servants. The Tokelau Amendment Act 1967 (NZ) cover this category of worker and none of the provisions protecting the rights of workers appear to discriminate against women.							
Tonga: There is no specific labour legislation governing the relationship between employer and employee.							
Source: Original table developed by author. Jalal, 1998; Ntummy, 1993; UNIFEM Pacific, 2007; UNIFEM Pacific 2008.							

Chapter 6: Family law and gender

This chapter analyses women's situation within the family: do the laws allow them to marry, separate, divorce with dignity and gain custody of their children and a fair entitlement to financial support and matrimonial property thereby enhancing their prospects for reconstructing their lives after marital breakdown? Or do the laws and social forces combine to weaken their status or to make them sink deeper into poverty?

There is no perfect legislation in the arena of human relationships. However gender equality based family law can do much to diminish the worst impacts of women sinking into poverty, or deeper poverty following separation or divorce. Anecdotal evidence, supported by NGO reports³⁴⁶ throughout the Pacific, suggests that the largest numbers of the new poor consist of separated, divorced or single women with children. Arguably, the laws on the family (closely linked to domestic violence laws) affect the largest numbers of women and children in the region. At the time of the passing of the new law in Fiji 2003, there were FJD 8 million in arrears of court ordered un-enforced maintenance owed women and children.³⁴⁷

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

Article 16 of CEDAW obliges States Parties to remove discrimination against women in family law including; marriage, separation, divorce, child custody, property division, paternity and inheritance. Currently almost all PICTs, with the exception of Fiji, are in violation of Article 16.

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.³⁴⁸ Most PICTs, except for Kiribati, allow marriage for ages ranging from between 14 to 16 for females with parental consent, and 16 to 18 for males, including the Micronesian states of Kosrae, Chuuk and Pohnpei.³⁴⁹ Niue

³⁴⁶ As told to the writer 2005-8.

³⁴⁷ As told to Commissioner Imrana Jalal then of the Fiji Law Reform Commission by court officials, October 2003.

³⁴⁸ Under the CRC Art 1 a person under 18 is a child. CEDAW, General Recommendation 21

³⁴⁹ UNIFEM Pacific 2007, 57.

allows marriage with parental consent for females who are 15 and males who are 18.³⁵⁰ The Micronesian state of Chuuk has minimal legislation in the area of marriage, therefore there is no technical legal prohibition on child marriage.³⁵¹

Only Kiribati has the required age of 18 for both males and female consistent with CRC principles.³⁵² 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 Papua New Guinea is far away from the formal courts, this presents serious problems for protecting the rights of young females. Marrying without parental consent is possible after at least one, or in some cases, both, have reached the age of 21. In Niue marrying without parental consent is possible when the male is 21, and female, 19.³⁵³ In some PICTs permission must be sought from both parents to marry at certain ages,³⁵⁴ in others, one of the parents,³⁵⁵ and in some, the father's consent is prioritised over that of the mother.³⁵⁶ Where the legislation prioritises the consent of the father it has the effect of reinforcing stereotypes, about men as breadwinners and heads of household.³⁵⁷

Custom and religious marriage

Most PICTs do not recognise customary, polygamous or religious marriages which have not been formally registered or conducted in compliance with marriage legislation. The formal legislation in most countries forbids multiple forms of marriage, historically accepted in most parts of the Pacific, until the widespread acceptance of Christianity. However, custom marriages are recognised in Palau's Code,³⁵⁸ in the Federated States of Micronesia states of Chuuk and Pohnpei,³⁵⁹ and in many parts of Melanesia. Some 27 per cent of Fijian Muslims also enter into *nikah* without ever legalising their marriages.³⁶⁰ Unfortunately, because the formal law does not recognise religious marriage in Fiji, a woman who participates in such a marriage does not have the normal protection of the law.³⁶¹

De facto marriages

De facto marriages, in which a man and a woman live together in a domestic relationship as husband and wife, are different from customary marriages. 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, including, the payment of bride price, the giving of other gifts, feasting and the like. Melanesian countries recognise customary marriages as valid marriages.³⁶² However, no PICT formally recognises *de facto*

³⁵⁰ Section 525, Niue Act 1966.

³⁵¹ UNIFEM Pacific 2007, 57.

³⁵² Even Palau is 16 for females and 18 for males. Ntuny 1993, 587.

³⁵³ Section 526, Niue Act 1966.

³⁵⁴ Kiribati, Papua New Guinea and Vanuatu.

³⁵⁵ Marshall Islands, most of the Federated States of Micronesia and Samoa.

³⁵⁶ Fiji, Solomon Islands and Tuvalu.

³⁵⁷ UNIFEM Pacific 2006, xiii.

³⁵⁸ Title 21 of Palau's Code - marriages in custom are valid; Also see Ntuny, 1993, 587.

³⁵⁹ UNIFEM Pacific 2006, 57.

³⁶⁰ Women Living Under Muslim Law (WLUML) 1996-7.

³⁶¹ Jalal 1998, Chapter 7.

³⁶² *Ibid.*

marriage. The consequence of this is that many women find themselves without a home, matrimonial property and financial support at the end of a *de facto* marriage. Legal recognition of custom marriages or *de facto* marriages is important because a number of legal rights, for both women and children, flow from that recognition.

Divorce

If parties have been married in custom, their divorce must also take place according to custom, except in the states of Yap and Pohnpei, in the Federated States of Micronesia.³⁶³ If that marriage has been registered, the divorce under the formal system must also take place. The existence of both formal and customary systems of law may put women at a disadvantage because a man may marry a woman in custom and then marry another under the formal system. There are no rules preventing this. The effects of religious or custom divorce on Pacific women need more research both at local and national level.

There are many unnecessary anachronistic, technical and burdensome rules that mar the laws on divorce and have a disproportionate impact on women.³⁶⁴ However of all the strict rules, the burden of fault-based divorce has the most disproportionate impact on women.

Most PICTs have a fault-based, undignified divorce system, including all the states of the Federated States of Micronesia, which requires the party alleging divorce to blame the breakdown of marriage on one party, and then prove it, with objective evidence. The divorce grounds shared by many countries include adultery, desertion for a required number of years, willful refusal to consummate the marriage, habitual cruelty, rape, sodomy and bestiality by the husband, habitual drunkardness, a criminal conviction accompanied by leaving a wife without financial support for a specified number of years, imprisonment for a specified number of years, attempt to kill or commit grievous bodily harm on the petitioner (the spouse seeking the divorce), insanity if accompanied by institutionalisation of a spouse for a specified number of years (2-4) and the presumption of death.

Some countries also allow divorce on the anachronistic ground of failing to comply with an order of restitution of conjugal rights either through the common law³⁶⁵ or through legislation as in Papua New Guinea.³⁶⁶

The PNG legislation states that a divorce may be granted:

(k) that the other party to the marriage has, for a period of not less than one year immediately preceding the date of the petition, failed to comply with a decree of restitution of conjugal rights made under this Act;

This marital remedy allows the spouse being deserted to seek a court order requiring the deserting spouse to return to the marital home. In the event of failure to comply with the order the requesting spouse may obtain a divorce. Such grounds can be a license for continued domestic violence.

³⁶³ UNIFEM Pacific 2006, 57.

³⁶⁴ For a full discussion see Jalal 1998, Chapters 7-12.

³⁶⁵ Jalal 1998 in Kiribati, Tonga, Solomon Islands and Tuvalu by common law.

³⁶⁶ For example section 17 Matrimonial Causes Act 1963 (PNG).

Some countries have grounds that are specific only to that country or a few, such as divorce being available on the grounds of a spouse having an incurable disease in Tonga; venereal disease, epilepsy, duress or mistake in Kiribati; murder conviction or judicial separation by agreement in Cooks Islands; leprosy of one spouse in Palau³⁶⁷, Federated States of Micronesia and the Marshall Islands; and personal indignities that make life burdensome and intolerable in Palau.³⁶⁸

There are only a few PICTs that have gender specific divorce grounds including a wife's drunkardness and neglect of domestic duties in Samoa and Niue³⁶⁹ and the wife being artificially inseminated by the sperm of another man in Cook Islands and Niue.³⁷⁰

All of the fault-based grounds require the hiring of lawyers, court cases to be filed and witnesses to be brought to court to provide supporting evidence. Although most grounds are gender-neutral they place enormous burdens on women, particularly poor and rural women, who have little access to the courts or women who wish to escape from domestic violence. The burden of fault-based divorce further humiliates not only women, but men as well, allowing them little opportunity to escape unhappy marriages with some measure of dignity and privacy. The requirements which place battered women in the invidious position of having to wait three to five years before becoming eligible to divorce, because of the difficulties of providing 'objective evidence' to prove domestic violence, is tantamount to a further sentence of wife-beating. In Tokelau, the scope of cruelty extends uniquely to cruelty committed also against the child of the applicant.³⁷¹

In all countries with a fault-based system there is a duty on the court to promote reconciliation and forgiveness by the injured spouse. This can include the restoration of marital rights and might prevent a divorce from taking place.³⁷² The duty to promote reconciliation also neglects to take into account possible power disparities between the spouses, the significant financial, customary, family and community pressure that may be placed on a woman and the possible existence of violence against the wife.

The only PICTs with divorce regimes that are commonly regarded as having some semblance of no-fault grounds are: separation for one year in Fiji, non-compatibility in Kiribati and 'unreasonable behaviour' in Tonga. The countries that provide longer periods of separation are not really 'no fault' countries because the onerous burden of proof in fault based grounds is similar to requiring longer periods of separation before a spouse becomes eligible for divorce. Most countries, except Fiji, are therefore non-compliant with Article 16 of CEDAW which requires no fault divorce regimes to bring about substantive equality.

Custody and guardianship of children

In theory there is formal legal equality between men and women in obtaining custody and guardianship of children following separation or divorce. The legislation in most PICTs is based on the paramount principle that the best interests of the child should be the basis of a

³⁶⁷ Ntummy 1993, 587.

³⁶⁸ *Ibid.*

³⁶⁹ Section 534, Niue Act 1966.

³⁷⁰ *Ibid.*

³⁷¹ Tokelau Divorce Regulation 3

³⁷² Jalal 1998; UNIFEM Pacific 2006.

custody decision regarding children. This principle complies with standards of gender equality, although the language of ‘custody’ is anachronistic and inappropriate from a children’s rights perspective. Children are not the property of their parents, but human beings with their own inherent rights to dignity, equality and respect.³⁷³ In the Marshall Islands, the Federated States of Micronesia and Solomon Islands however, the language is differently styled, to reflect the broad language of justice, reasonableness and the ‘best interests of all’, the dominant message being that of ‘all’ as opposed to the best interests of the child. The latter language is more capable of being misinterpreted and affected by gender discriminatory attitudes about women’s roles and responsibilities by judicial officials and those who administer traditional courts, because it gives courts a greater degree of judicial discretion.³⁷⁴

It is widely believed that women get custody of their children. This is not accurate in many PICTs.³⁷⁵ Many factors operate in concert to affect women’s equal capacity to be given custody. If parents negotiate an agreement it is more likely that mothers get custody by consensus; but if there is a dispute, which ends up in litigation in court, fathers have a significantly better chance of getting custody. This is because men are generally better financially situated than women, and the ‘best interests principle’ can be interpreted in light of this, implying better home conditions, financial advantage for the children and so on. Women suffer distinct disadvantages primarily due to their lack of financial independence, land rights and access to shelter, equal right to matrimonial property and limited capacity to enforce maintenance awards.

In summary, women’s lack of legal and economic rights in other areas affects their capacity to obtain custody of their children. Adequate financial support is critical to enable women to care for their children. In addition, if women commit adultery, judicial attitudes are often that ‘immoral’ women are not capable of being good mothers. The same behaviour by men, rarely affects their capacity to obtain custody.³⁷⁶

Effect of custom law on custody and the payment of bride price in Melanesia

In Melanesia the custom of bride price practice may affect a woman’s right to obtain custody of her children. It is a widely held customary belief that the payment of bride price by the husband’s family to the wife’s family secures the right to custody of the children following separation of the parents, as well as all right to common matrimonial property. This custom is generally respected in the vast majority of cases that never reach the courts, seriously disadvantaging women. However in the few cases that have reached the formal courts of law, there have been some attempts to mitigate this custom practice using the best interests of the child principle.³⁷⁷ In Kiribati and the Federated States of Micronesia also, the legislation specifically allows custom law to be applied in cases affecting the right to custody of children.³⁷⁸

³⁷³ Convention on the Rights of the Child.

³⁷⁴ Jalal 1998, 291 (for children born within marriage) and 465 (for children born outside marriage). Tokelau custody and divorce dealt with by Tokelau Divorce Regulations 1987; Palau – Title 21 of the Palau National Code; FSM – FSM Code Title 6, Cap 16; Niue – Niue Act 1966, section. 515 to 579 Niue Amendment Act 1968 of NZ.

³⁷⁵ Jalal, 1998. See Chapter 9.

³⁷⁶ *Ibid.*

³⁷⁷ *Sasago v Beliga*, Solomon Islands, 1987, [1987] SILR 91.

³⁷⁸ Laws of Kiribati Act 1989 Schedule 4 (a) – (l); FSM Code (1982), section 1614.

Natural children born outside marriage – affiliation and paternity law

There are several elements of the laws affecting affiliation and paternity that create injustice for unmarried women and their children.³⁷⁹ For children born outside legal or custom marriage that is recognised by the courts, affiliation or paternity cases have to be filed to establish fatherhood in order to obtain maintenance (financial support) for the children.

Gender discriminatory evidence rules in establishing paternity

Evidential burdens are extremely difficult to satisfy. Corroborative evidence is required either through legislation or common law to prove fatherhood. In most countries, there is no legislation requiring alleged fathers to submit to compulsory blood tests for blood or DNA testing. The courts do not allow assumptions about liability to be made, when a man accused of fathering a child refuses to submit to a blood test.

In Solomon Islands and Vanuatu, a magistrate may refuse to accept an application for maintenance if the mother's morals are questionable or 'during the normal period of conception the mother was of notorious loose behaviour'.³⁸⁰ In addition, unmarried women claiming maintenance may be subjected to questioning about their sexual conduct with men other than the alleged father, in trials somewhat similar to the questioning of rape complainants during sexual assault trials. Affiliation cases are replete with false assumptions about women's sexual behavior. Trials often proceed on the unstated belief, by not only the judge, but also the court officials and the lawyers, that unmarried women with children are promiscuous and out to get money from innocent men.³⁸¹

Custody of natural children

In disputes over the custody of natural children under the British common law, there appears to be a bias in favour of the mother in Nauru, Solomon Islands, Tonga and Vanuatu, and until recently, in Fiji as well. In Fiji until the passing of the Family Law Act 2003, the High Court ruled twice, in *Subhaigam v Rakoso & Permalamma*³⁸² and *Ravula v Evanson*³⁸³ that although the common law appeared biased against the fathers of natural children in custody and access disputes, its hands were tied until such time that the legislature saw fit to improve the rights of men by amending existing common law.³⁸⁴

These cases are arguably clear cases of bias against men but at that time the laws in Fiji were heavily weighted against women, and this law was regarded by women's groups as one of the few laws in their favour, and not to be amended until all forms of legal discrimination were removed against women.

Tuvalu and Kiribati have the most restrictive and direct gender discriminatory laws regarding custody over such children. The legislation in both requires that natural children be given to

³⁷⁹ Jalal 1998, Chapter 12, 450-497.

³⁸⁰ Section 4(a), 6(5) Maintenance of Children Act Cap. 46 (Vanuatu).

³⁸¹ Author's personal knowledge from conducting years of trials in Fiji and observing court cases in other countries.

³⁸² Civil Appeal 1/1987.

³⁸³ Civil Appeal no 13/1992.

³⁸⁴ Jalal, 1998, 460.

their fathers, if paternity is accepted, on reaching the age of two.³⁸⁵ This is supposedly to ensure the right of the children to the father's land. The legislation is thus a double-edged sword. On the one hand it allows natural children to claim rights to their father's land but on the other hand women give up the right to care for their children. If however women had equal rights to land in Kiribati and Tuvalu, losing custody of children would not be an issue.³⁸⁶

In Palau,³⁸⁷ the Marshall Islands and the Federated States of Micronesia there appears to be a dearth of legislation covering the rights of natural children. The Micronesian legislation appears to give an unmarried mother the right to apply for a paternity order and financial support, but provides no other legislative guidelines leaving it to the court to exercise a wide degree of discretion.³⁸⁸ In the Marshall Islands, the legislation is silent about children born to unmarried mothers.³⁸⁹

Financial support and matrimonial property rights

Financial support for women and children after separation or divorce

A significant factor affecting women's capacity to survive separation, divorce and domestic violence, and to prevent sinking into poverty (or deeper poverty and sometimes prostitution if they are poor women), is the law affecting maintenance and matrimonial property in the Pacific. The specific problems stem from limiting those who are eligible for maintenance, the conditions upon which maintenance is awarded, the enforcement of maintenance orders when payment is not made and the legal basis for the distribution of matrimonial property. The majority of PICTs are not in compliance with Article 16 of CEDAW, except for Fiji, which has a new, fair and just legislative regime for maintenance and property. However, enforcement of maintenance is still a problem in Fiji due to the inadequate resources given to the new Family Division of the Magistrates' Court.³⁹⁰

The majority of PICTs have marital legislation providing for the payment of financial support or maintenance following separation or divorce for both the spouse and the children of the marriage. Some provide specifically for spousal and child maintenance³⁹¹ whilst others state that any person can apply for maintenance against any other person based on customary and legal obligations.³⁹² For example, the liberal provisions in the law of Niue allow any person in the family to apply for maintenance.³⁹³

Countries such as Fiji, Solomon Islands, Papua New Guinea, Vanuatu, Tonga and Nauru allow only married persons to apply for maintenance, thus discriminating on the basis of marital status. However, it is arguable whether a court, in a country that allows any person to apply against any other person, would consider the obligation to support a *de facto* wife a

³⁸⁵ Native Lands Act, Cap. 22 (Tuvalu); Native Lands Act Cap. 61 1957 and section 65(2) Magistrates Court Act Cap. 52 1978 (Kiribati).

³⁸⁶ Jalal 1998, 462.

³⁸⁷ Ntummy 1993, 587.

³⁸⁸ UNIFEM Pacific 2007, FSM Code [Title 6, Cap 17, Sub cap 3] s 1751;

³⁸⁹ UNIFEM Pacific 2007, 260.

³⁹⁰ Personal knowledge of the author

³⁹¹ Fiji, Solomon Islands.

³⁹² Tuvalu, Kiribati, Cooks Islands, Samoa.

³⁹³ Sections 548-579 Niue Act 1966.

customary obligation. Likely, women all over the Pacific whose marriages are not legally recognised, suffer a similar fate regardless of the legislation.

The basis for awarding maintenance

Equality standards require that maintenance awards should be based on need, the financial commitments of both parents, their respective capacities to earn and the needs of the children. Comprehensive guidelines are specifically stated in Fiji's Family Law Act.³⁹⁴ Owing to the fact that no other PICT provides guidelines for the amount of maintenance to be calculated, most courts award grossly inadequate amounts of maintenance, rarely based on reason. The lack of adequate guidelines in the legislation causes great economic injustice to women, and their children.

The moral conduct of the parties ought not to be relevant to payment. Notwithstanding, some countries require the proving of fault on the part of their spouse (most commonly the husband) to obtain spousal support. Countries with a fault-based spousal maintenance regime include Solomon Islands, Vanuatu, and to a lesser extent Tonga. The Marshall Islands and the Federated States of Micronesia, by allowing a broad discretionary basis for maintenance to be awarded, open the door for conduct to be considered. If a wife has committed adultery she is unlikely to obtain spousal support from her husband or if she has been receiving maintenance it will cease upon proof of 'adultery'. Spousal support is thus tied to sexual fidelity even after separation and divorce in Nauru, Tonga, Solomon Islands and Vanuatu either in the legislation or under the common law or by practice. In Nauru the legislation also disqualifies a wife who is a 'drunk' from receiving maintenance.³⁹⁵

Vanuatu, and to a lesser extent Palau, have the most restrictive and difficult maintenance regimes. Vanuatu requires a woman and children who have been deserted by the husband/father to first secure a criminal conviction for desertion against him and then to use that criminal conviction to obtain a maintenance order in the civil courts.³⁹⁶ Palau's law decrees that the spouse at fault has to pay financial support for the children until they reach eighteen years of age.³⁹⁷ Both countries place onerous financial burdens on women, especially poor women, by making financial support for women and children dependant on proving fault, given the difficult evidential burdens.

Enforcement of financial orders

A significant problem in all PICTs is enforcing maintenance awards, partially because there is a historic reluctance to imprison for non-payment of maintenance. At one time in Fiji, prior to the passing of the new family law, 50 per cent of maintenance awards were not paid nor enforced, a further 35 per cent of orders were enforcement intermittently and only 15 per cent of fathers paid maintenance regularly under maintenance orders.³⁹⁸ This is not uncommon throughout the region as inadequate human and financial resources are committed to enforcement systems. There has been no research done to determine the effect of the new maintenance regime in Fiji. Samoa has a reasonable maintenance framework. The legislation provides for the appointment of a special maintenance officer to recover arrears, and allows a

³⁹⁴ Section 157.

³⁹⁵ Section 5 (6) Maintenance of Wives & Children Ordinance 1959-1967.

³⁹⁶ *Niurrie v Niurrie*, Vanuatu, Supreme Court Civil Appeal 7/1996.

³⁹⁷ Palau National Code 1985, Title 21, Ntummy 1993, 587.

³⁹⁸ Personal knowledge of the author as told to her by court officials in 2003.

maintenance order to be a charge on real or personal property. A receiver can be appointed to execute the charge to enforce maintenance. The charging order gives women an equitable charge over their husband's property to enforce maintenance in case of default and his chattels, land and goods can be sold to pay off arrears.

Matrimonial property rights

The economic rights of women are affected by their limited land rights, unjust matrimonial property laws, the unwillingness of the courts to award appropriate amounts of maintenance and the lack of resources allocated to the enforcement of it. In the Marshall Islands, the Federated States of Micronesia and Palau, complex customary inheritance laws govern the ownership of land. For example, Palau has no legislation for dealing with personal property, and all land is governed by custom or the common law of United States as applied by the courts. Disputes over ownership of traditional Palauan money are settled by custom.³⁹⁹ As stated earlier, Tongan laws are defined by the constitution and are both patriarchal and patrilineal.

Existing matrimonial property rights

Some countries have broad legislation stating that principles of justice and equity apply in matrimonial property distribution, whilst others rely on the common law constructive trust principle as in Vanuatu. Generally both legal regimes are based on financial contributions. For example in the Marshall Islands and the Federated States of Micronesia, property division upon divorce, like maintenance, is determined on the basis of 'justice' and 'the best interests of all'.⁴⁰⁰ The interpretation of such broad provisions is generally taken to mean, that distribution of property will be based on actual financial contribution to the accumulation of family finances and property. This presents the single most important legal impediment to women claiming a fair share of matrimonial property, namely that women's unpaid work and non-financial contribution is not legally recognised as contribution deserving of the right to share in property following divorce.

Tongan legislation allows for a lump sum to be paid to either party. Although this is more relevant to the question of maintenance, it has been used to make settlements of matrimonial property under the constructive trust principle.⁴⁰¹

No country apart from Fiji clearly states in its legislation that women are entitled to an equal share of property after divorce based on principles of equality (see Boxes 32 and 33). The main principle upon which distribution is based is financial contribution, thus disempowering the vast majority of women who are engaged in the informal economy, agriculture and fishing.

Society and custom decree that once women marry, they accept the responsibility of doing 'women's work'. In the Pacific, most women are engaged in unpaid labour, or in home gardens. However unpaid work or non-financial contribution is generally not regarded as the basis of entitlement. In General Recommendation 21, the CEDAW Committee states that the division of marital property should include recognition of non-financial contributions during a marriage such as, raising children, caring for elderly relatives, and discharging household duties.

³⁹⁹ Ntomy 1993, 588.

⁴⁰⁰ UNIFEM Pacific 2006.

⁴⁰¹ Section 15 Divorce Act Cap.29 (Tonga); Divorce Amendment Act 1988 (Tonga) No 39/1988.

Box 32. Making Unpaid domestic responsibilities and non-Financial contribution count – Fiji’s Family Law Act 2003

In late 2008, a Fiji court ruled on the issue of a homemakers’ contribution under the new law. In *Khan v Nisha*⁴⁰² the court took into account the assessment under the relevant provisions of the contributions made by the parties in their respective capacities – as ‘breadwinner’ or ‘principal breadwinner’ and ‘homemaker’ or ‘principal homemaker’ (together with financial contributions) over a period of some 37 years of marriage. The Court gave the wife what appeared to be almost half of the marital assets. This is a landmark ruling in Fiji, and for the Pacific in general, demonstrating the potential benefits of sound legislation.

Box 33. Gender equality in Fiji – the Family Law Act 2003⁴⁰³

Only in Fiji has there been a concerted attempt to change family law. The resulting law, the Family Law Act 2003, which is based on the no-fault principle of divorce, utilises a non-adversarial counseling system and a specialist Family Division of the Court which prioritises children’s needs and parental support. It removes all forms of formal legal and financial discrimination against women and grants them rights to enforceable custody and financial support for them and their children. It legitimates and requires recognition and implementation of the major human rights United Nation conventions affecting family law, especially CEDAW and the CRC.⁴⁰⁴ From early results it appears that the new Act will substantially reduce the costly use of lawyers and Legal Aid.⁴⁰⁵

Initial research, based on a one-year study of the new law in operation⁴⁰⁶, indicates that family law litigation had been reduced by about 90 per cent. Most disputes, (especially those regarding children), at Suva Court, were settled by counselors and conciliators, on average, after three sessions with trained counselors. These results have not been published, as the officials need to do a more stringent follow-up survey. The problems with the implementation of the new law are:

- Most of the positive results are from Suva, the capital city with the largest population, and the only center with a dedicated family court.
- There are insufficient resources to implement the Act properly outside Suva.
- Only Suva has a good complement of court counselors to settle disputes without litigation.
- The magistrates and lawyers are still caught up in the former ‘blaming’ culture of the old legislation, especially the older lawyers who cannot get their heads around solving problems without fighting, for instance over children. These are the ones who complain constantly, with nostalgia, for the old law. The new lawyers, however, have embraced the new law and are doing well in it; and
- More training is needed for judicial officers who resist legislative changes that impact on prevailing social attitudes.⁴⁰⁷

Conclusion on unjust family law

⁴⁰² Family Magistrates Court Appeal No. 06/Suv/0021. Suva High Court.

⁴⁰³ Jalal, 2008, former Commissioner for Family Law Reform.

⁴⁰⁴ Section 26 (e).

⁴⁰⁵ Pulea 2006.

⁴⁰⁶ Pulea 2006.

⁴⁰⁷ *Ibid.*

The rules that apply to cover mainstream law (contract, tort, commercial) are basically the same rules used in family law. The legal system, as it exists in most Pacific Island countries, is inappropriate for family cases. The fault-based divorce process hurts all parties. Most grounds of divorce are framed in gender-neutral language but women find it more difficult to escape unhappy marriages than men do, because of the burdens of proof, social pressure, waiting long periods to qualify for legitimate divorce and limited access to funds, advice and legal representation (see Table 22).

Table 22: Selected Family Legislation and Common Law affecting women's rights to equality in family law.							
FAMILY LAW	Equal inheritance laws in the legislation?	Age of marriage with parental consent	Maintenance /Financial Support for spouse and children?	Divorce based on equality and no fault principle?	Equal matrimonial property rights secured by legislation and recognition of women's non-financial contribution?	Child Custody legislation based on best interests of the child?	Recognition of De facto marriages?
Cook Islands	No, governed mainly by unwritten customary law.	Males 16 Females 16 s. 17(1) Marriage Act 1973.	Yes. Cook Island Act 1915. Equal right under ss. 548-549, 564 to child support. Spousal support until remarriage of wife, s537(1). Spouse must prove fault to get maintenance for herself.	No. Divorce is fault based, ss. 523 (B) , 528, 531, Cook Islands Act 1915	Yes. Equal right to share property after divorce, recognizing unpaid domestic contribution under s.11, Matrimonial Property Act 1976.	No. There is no specific legislation covering this principle. Court's discretion. Applies to both legitimate and illegitimate children.	No but courts in NZ have given common law recognition to de facto relationships and generally the CI follows the common law of NZ
FSM (only the State of Yap has no State legislation. So Federal legislation applies in the absence of State legislation)	No, governed mainly by unwritten customary law. Some areas are matrilineal.	Federal law silent. Custom marriage is recognised. There is no mention of age. Chuuk State Code states that if a female is under 18 she must have consent of her parents under s.1021(1)Title 23, Cap 2, 2001.	Yes for children under ss. 1622 of the FSM Code, Title 6, Cap 16, Subcap 2 1997 Similar position in the various States. Pohnpei appears to allow for spousal support also under s.3.102 of the State Code,	No. Divorce is fault based, ss. 1626 (1) –(9) of the FSM Code, Title 6, Cap 16, Subcap 2 1997. Same for Chuuk, Kosrae, Pohnpei, under State codes. Federal legislation applies in Yap.	There are no specific equal rights to property after divorce. Land laws are generally governed primarily by custom. No recognition of women's non-financial contribution. Same for Chuuk,	No, s. 1622 of the FSM Code, Title 6, Cap 16, Subcap 2 1997 states that the best interests of all will be considered. Similar position in various States.	No for all States.

		Kosrae & Pohnpei 18 for males, 16 for girls. Consent required if female under 18.	Title 51, Cap 3, 2006		Kosrae. Pohnpei and Yap.		
Fiji	No, governed mainly by unwritten customary law.	Males 18, females 16 under s.12 of Marriage Act, Cap 50 1969.	Yes for both. Ss. 88-21 for children based on a variety of equitable guidelines and s.157 for spouse.	Yes under s.30(1) of the Family Law Act 2003 divorce may be granted on the basis of the irretrievable breakdown of marriage, after one year's separation.	Yes. Equal right to share property after divorce, recognizing unpaid domestic contribution and non-financial contribution under ss. 162-165 of the Family Law Act 2003.	Yes under s.66(4) of the Family Law Act 2003 the court must regard the best interests of the child as of paramount consideration in all matters.	No but it is unlawful to discriminate on the grounds of marital status under s.38 of the Constitution so there is indirect recognition of de facto relationships.
Kiribati	No. Gilbert and Phoenix Land Code 1957, Cap 61 specifically prefers male inheritance over females.	18 for both under the Marriage Amendment Act 2000.	Yes. Under s. 3 of the Maintenance (Miscellaneous Provisions) Act, Cap 53, 1921 the court may order maintenance to be paid to anyone in the family where there is a legal or customary obligation. Spouse must prove fault to get maintenance for herself.	No, fault based divorce regime under s.4, Native Divorce Act 1948, Cap 60. However there is a progressive no-fault 'incompatibility' ground contained within the fault-based regime.	No. No legislation. Governed by common law. No recognition of women's non-financial contribution	Yes, under s.3 of the Custody of Children Act 1974, Cap 21. However if the child is illegitimate there is a legislative bias towards the father, s.65 (2) Native Land Act Cap 61 1957.	No
Nauru	No but some parts of Nauru are matrilineal	Births, Deaths & marriages ordinance,	Under ss.17, 31, 41 Matrimonial Causes Act 1973	Partially because, section 8, Matrimonial	No. There are no specific equal rights to property	Partial under ss.9, 25(2), 31 Guardianship of	No.

		s.23(e)(i)(ii). There appears to be no age limit just says if under 16 or 18 need parents permission.	the Family Court may order maintenance for the spouse and children. It is partially based on fault because, a wife who is a drunk or adulterous is disentitled to maintenance. (Maintenance of Wives & Children Ordinance 1959-1967, s 5(6))	Causes Act 1973, makes the sole ground of divorce irretrievable breakdown. However, a slight bias towards fault remains because of the need of subsequent proof in ss.9-10.	after divorce. Land laws are generally governed primarily by custom. No recognition of women's non-financial contribution	Children Act 1975) the children's wishes are taken into consideration as well. Under s.25 there is a progressive provision that allows the child a separate legal representative, paid for by the State.	
Niue	No.	15 for females and 18 for males under s.525 Niue Act 1966	Under the Niue Act 1966 ss.543, 547 the spouses may both receive maintenance as well as for the children under ss. 554-555.	No. Fault based regime and two gender biased grounds - including a wife's drunkardness and neglect of domestic duties. S.534 Niue Act 1966	There are no specific equal rights to property after divorce. Land laws are generally governed primarily by custom.	No. Under s.544 Niue Act 1966 custody is based on discretionary principles as the court thinks fit.	No
RMI	No, governed mainly by unwritten customary law many of which are matrilineal and favour women.	Male 18, female 16 under s428(a) of Births, Deaths and Marriages Registration Act 1988.	Yes for children and spouses under s.110 of the Domestic Relations Act 1988.	No. Fault based divorce regime under s.115 (1) of Domestic Relations Act 1988.	There are no specific equal rights to property after divorce. Land laws are generally governed primarily by custom. No recognition of women's non-	No, s. 110 of the Domestic Relations Act 1988 states that the best interests of all will be considered.	No

					financial contribution.		
PNG	No, governed mainly by unwritten customary law.	18 Males and 16 females under s.7, Marriage Act 1963 but customary marriage is exempt from minimum age protection by s.6.	Yes for children and spouses under ss. 73 & 76 of the Matrimonial Causes Act 1963 under certain conditions.	No. Fault based divorce regime under s.17 of the Matrimonial Causes Act 1963.	No. There are no specific equal rights to property after divorce just general principles of division under s.75, Matrimonial Causes Act 1963 which does not specifically recognise women's unpaid work or non-financial domestic contribution.	Yes. The best interests of the child is of paramount consideration under s.74 of the Matrimonial Causes Act 1963.	No
Samoa	No, governed mainly by unwritten customary law.	16 for females and 18 for males under s.9, Marriage Act 1961.	Yes. Under ss 25, Marriage & Affiliation Act 1967; s.24, Divorce & Matrimonial Causes Act 1961, the court may order maintenance but on broad discretionary terms so there is no right.	No. Fault based regime and two gender biased grounds - including a wife's drunkardness and neglect of domestic duties under s.7 of the Divorce & Matrimonial Causes Act 1961	No. The distribution of property is discretionary. No legislative basis. Mainly constructive trust principles based on financial contribution and mutual intent. No recognition of women's non-financial contribution.	No. s.24 Divorce & Matrimonial Causes Act 1961 custody is based on discretionary principles	No
Solomon Is	No, governed mainly by unwritten customary law.	15 years for both under Islanders Marriage Act Cap171, 1945.	Under ss.13, 17 of the Affiliation, Separation and	No. Fault based regime under s.5, Islanders Divorce Act,	No. No. The distribution of property is discretionary.	No. Under broad principles as appears just. s.21, Islanders	No

	Some areas are matrilineal.		Maintenance Act, Cap1, 1971 the Court may order maintenance for the spouse and children. A wife who is adulterous is disentitled to maintenance. Spouse must prove fault to get maintenance for herself.	Cap 170, 1960.	Mainly constructive trust principles. No recognition of women's non-financial contribution.	Divorce Act, Cap 170, 1960.	
Tokelau	No, governed mainly by unwritten customary law.	Females 16 Males 18 Reg 6 of Marriage Regulations 1986	Maintenance can be paid as an ancillary order to a spouse and children. Tokelau Divorce Regulations 1987 Reg 13. No grounds are stated.	No. Fault based regime. Regulation 3, Divorce Regulations 1987.	No. The distribution of property is discretionary. However Reg 13 states that property orders may be made without outlining the basis of distribution.	No. As the Administrator thinks fit under Tokelau Divorce Regulations Reg 13. No grounds are stated.	No
Tonga	The Constitution of Tonga specifically excludes women from owing land unless the last male heir dies. Section 107, Constitution of Tonga.	15 for both Regulations 2 (1) (a) & (b) of the Solemnisation of Marriage Regulations Cap. 42 B	Yes under s.2 of Maintenance of Deserted Wives Act Cap 31, the court may order custody of the children and maintenance for the wife and children upon proof of desertion. Under s.3 if she	No. The legislation is fault based under s.3 of the Divorce Act Cap 29. However there is a progressive no-fault "unreasonable behaviour" ground contained within the fault-	No. The distribution of property is discretionary. No recognition of women's non-financial contribution. However under the Divorce Act s18 the court may order a lump sum	No. Section 19 of the Divorce Act Cap.29 & s.2 of Maintenance of Deserted Wives Act Cap 31, grant the power to award custody of children but there is no requirement that it ought to be	No

			commits adultery she may not receive maintenance or will lose it. Also payable under s.18 of the Divorce Act Cap 29. Spouse must prove fault to get maintenance for herself.	based regime.	settlement based on discretion.	based on the best interests of the child.	
Tuvalu	No, governed mainly by unwritten customary law. They also favour the first born male and men over women. Tuvalu Lands Code 1962, Native Lads Act 1956.	16 for both. Section 5 of the Marriage Act. Cap.29, 1968.	Yes to both spouse and children under broad principles of reasonableness according to Tuvaluan customs under ss.10, 13 of the Matrimonial Proceedings Act, Cap, 21, 1985. Spouse must prove fault to get maintenance for herself.	Partially fault based. Although ss 8-9 of the Matrimonial Proceedings Act, Cap, 21, 1985, makes the sole ground of divorce irretrievable breakdown the slight bias towards fault remains because of the need of proof.	No. The distribution of property is discretionary as it is based on broad principles of necessity and must be in accordance with Tuvaluan custom under ss,10, 13 of the Matrimonial Proceedings Act, Cap, 21, 1985. No recognition of women's non-financial contribution.	Yes, the welfare of the child is the paramount consideration, s3(3) of the Custody of Children Act, Cap.20, 1974. However if the child is illegitimate there is a legislative bias towards the father, s20, Native Land Act Cap 22, 1957.	No
Vanuatu	No, governed mainly by unwritten customary law. A few parts are matrilineal.	16, for females and 18 for males under s.2, Control of Marriage Act, Cap.45, 1966	Yes to both spouse and children but only upon the securing of criminal conviction for desertion,	No. Fault based regime under s.2, Matrimonial Causes Act, Cap 192, 1986.	No. The distribution of property is discretionary. No legislative basis. Mainly constructive trust principles of	No. Under broad principles as appears just. Matrimonial Causes Act, Cap 192, 1986 ss.14 (2).	No

			<p>making Vanuatu's legislation the most restrictive and difficult for women in the region.</p> <p>Maintenance of Family Act Cap 42, ss 1 (a), 2; also under the Matrimonial Causes Act, Cap 192, 1986 ss.14, 15.</p> <p>See also <i>Nuirrie v Nuirrie</i> (Supreme Court Civil Appeal 7/1996)</p>		<p>financial contribution and mutual intent.</p> <p>No recognition of women's non-financial contribution.</p>		
<p>Source: Jalal, 1998; Ntuny, 1993; UNIFEM Pacific and UNDP, 2007. Original table developed by author.</p>							

Chapter 7: Moving forward

There have been very few substantive legislative changes despite the actions of women's rights movements calling for it beginning in the late 1980s, except for in Fiji and Papua New Guinea; and more recently in Vanuatu. In Fiji and Vanuatu those changes have been driven largely by the women's movement in those countries, which have remained tenacious and committed to feminist ideals, as the basis of legal activism. They have been able to mobilize politically, and utilize key trust relationships, developed in and outside government, to mentor and guide champions within Parliament. Positive legal changes in the Pacific have arisen mainly by way of litigation with new legal precedents being established in the courts, as a result of the advocacy of feminist and human rights lawyers, rather than through legislative change.⁴⁰⁸ Although this is far from ideal, as precedents can be reversed by superior courts, it is legal activism in the courts, and not legislative change, which has borne the greatest success in improving legal protections for woman and girls.

Changing all the laws that affect women, without concomitant changes in other areas, is not sufficient to advance women's rights to justice in every sphere. An integrated approach is critical as advancement in one area promotes advancement in another. Any strategy to overcome their systemic disadvantage must be multi-sectoral and across disciplines otherwise amendments to existing legislation run the risk of further oppressing women. If for example, all legislation was amended to bring about equal rights for women, granting them formal legal equality, but the women from the outer islands have no access to the courts, nor the finances to employ lawyers to represent them what good are new laws to them? However, given the appropriate milieu, the law can play a catalytic role in improving women's status and enabling women as a group to equally enjoy the benefits of human development.

There is an unequivocal link between the law and human development, particularly women's human development. The combined impact of the laws, written and unwritten, formal and customary, case law, and legal practices and rules have a significant impact on Pacific Island women, and through them, on the lives of their children and families. Their legal status in formal and customary law in the Pacific, in every area: constitutional and politico-legal, gender-based violence law, education and employment, family law and land rights, has a combined disproportionate influence on human development. Changed, improved, enforceable laws combined with adequate resources to properly resource them; and gender and human rights training for law agency officials, can make an overall, critical difference to the lives of women, and therefore to human development.

Substance, structure and culture of the law and the strategies to address them

The approaches recommended in this chapter do not address any particular area of law, but rather all areas of law. Some countries may determine that employment, family or gender-based violence laws might be the first step because of their closer links to poverty. Other countries may consider that constitutional issues need to be addressed first, because any form of discrimination, including economic gender injustice, can be then challenged on the grounds that they violate constitutional standards of equality. For example, it is more strategic for Kiribati NGOs to work on changing the constitutional definition of discrimination to include sex and gender discrimination because it is an obstacle to changes

⁴⁰⁸ Jalal and Madraiwiwi 2005.

in every sector. The choice of which laws or policies are targeted are often determined by national priorities or key political entry points that opportunistically present themselves.

Notwithstanding the choices, an in-depth analysis is required, otherwise there is the risk that the measures adopted either increase gender injustice or fail to be effective because, for example, resources or training were not properly considered. This will involve understanding the exact nature of the discrimination and choosing the correct strategy to address it.⁴⁰⁹ There are three basic elements of the law that might inform the analysis, with each element requiring different approaches or a combination of approaches:

- a. The **substance** (content) of the law: the legislation, the common law and customary law, as well as legal practices, procedures and rules.
- b. The **structures** of the law: the courts, court administration and law enforcement agencies.
- c. The **context and culture** in which the law operates: the social conditions, economic conditions and attitudes of judges, magistrates, lawyers, court officials, police and agencies and of people in the community as a whole.

If the problem is one of the substance or content of the law then the strategy that ought to be adopted is a legislative strategy of changing the offending legislation. A litigation strategy or a test case to obtain a new precedent or interpretation of existing law may also affect the substance of the law. If the problem is one of structure, for example, a lack of access to courts or inadequate resources to properly enforce laws, then the problem might be addressed by providing access or better human and financial resources. If the problem is the attitudes of justice officials, then gender training may be required to make the law effective. In some cases a combination of all three strategies may be required (see Table 23).

Table 23. Strategies to address legal discrimination		
Element of the Law	Type of direct and/or indirect legal discrimination against women	Strategy to address gender injustice (e.g. legislative, litigation, specialised gender training)
Substance	Legislation is discriminatory	Amend legislation – legislative strategy. Narrow the limits of judicial discretion if possible.
Substance	Interpretation is discriminatory	Test case for new positive interpretation. New legislation if litigation fails.
Substance	Discrimination by omission	New legislation.
Substance	Custom law is discriminatory	Test case for new positive interpretation. Amend legislation. Narrow the limits of judicial discretion if possible.
Substance, structure	Lack of access; Incapacity to enforce law/rights due to lack of financial means.	Provide legal aid; free legal representation.
Structural	No access to courts	Provide courts or innovative methods of court access e.g. obtaining court orders by telephone or authorised trained persons to administer aspects of the law in remote areas.
Structure	Incapacity to enforce law owing	Increase resources, ensure funds properly

⁴⁰⁹ Jalal 1998, 9-12.

	to lack of resources	utilised. Budgetary strategy.
Culture	Discriminatory interpretation of good fair, legislation	Gender training for justice agency officials for positive interpretations. Test cases – litigation strategy for positive interpretations. Possibly also class action.
Culture	Custom law interpretation discrimination	Test cases – litigation strategy for positive interpretations. Possibly also class action Legislative strategy and/or gender training for judicial officials.
Culture	Unwillingness to enforce good legislation	Gender training. Persuasive dialogue. Test case to sue government agency for negligence or failing to act – damages/compensation Seeking a declarative order from a court as to the failure to act. Shame the law agency using media.
Source: author		

Litigation strategies

In many instances where lawyers have been trained to submit human rights arguments, rather than purely technical legal ones, there have been innovative and creative interpretations of the law. A test case litigation strategy might be an initial approach to obtain more positive interpretations of existing law to obtain a new precedent. There is no history of public interest litigation or class actions in the Pacific but there are no legal impediments to adopting such approaches. However, new precedents are vulnerable to being reversed by superior courts and a legislative strategy might be necessary to secure more sustainable laws. This happened in Kiribati, when the prosecutors failed to outlaw the discriminatory corroboration rule in the law of evidence through a litigation strategy. It necessitated a legislative approach eventuating in the passing of the Evidence Amendment Act 2003. Litigation strategies require gender and human rights training for lawyers and judicial officials; and funds for legal expenses to pay for either *pro bono* lawyers and/or active NGOs willing to mobilise around the issues (see Box 34), as did ni-Vanuatu NGOs in several court actions (see Table 24).

Box 34. Legal aid in the Pacific

Law measures designed to protect have often not been accompanied by measures designed to empower and many women have neither the knowledge nor the means to bring their cases to court. There is limited usefulness in creating new legislation if women do not have the financial means to enforce those laws due to legal expenses. Some PICTs have legal aid services ranging from rudimentary to formalised. Without exception all are inadequately resourced, both in terms of human and financial resources. This is a critical issue which needs to be addressed through legislation establishing comprehensive legal aid services, and human and financial resources to make it effective.

Source: author

Table 24. Pacific Countries and Territories with National Legal Aid Offices

Fiji	Yes, Legal Aid Commission
Kiribati	Yes, Peoples' Lawyers Office
Tuvalu	Yes, Peoples' Lawyers Office
Solomon Islands	Yes Public Solicitors Office
Vanuatu	Yes Public Solicitors Office
PNG	Yes Public Solicitor's Office
Source: author	

Legislative strategies

When years of litigation strategies failed to produce positive interpretations of existing family law, comprehensive and substantive forced approaches to change the law and the attitudes that shaped them is necessary. Even if attitudes resist change, the legislation may force outward behavioral change. Comprehensive, all-encompassing legislation should be designed not only to protect and enforce, but also to empower. Legislative strategies require the expertise of lawyers who are also gender or human rights specialists fully aware of the multiple forms of discrimination faced by women, and the local, textured conditions of women's lives. The first step would be to conduct gender analyses of existing law; second, to draft legislation in conjunction with technical drafting experts; third to lobby and campaign for the proposed law. The final step is ensuring that sufficient resources are allocated to make the law effective. A critical step is gender training for all those involved in implementing the new law.

Changing legislation is a long-term process. The Fiji Family Law Act took over 13 years from the conception of the campaign, to the passing of the new law. Great tenacity and a combination of political and people skills are necessary, as well as strategic partnerships between various stakeholders, in civil society and government. Although achieving legislative change can be long-winded it can be fast-tracked given the right combination of political and economic opportunities and skills, as well as a propitious convergence of circumstances.

Legislative reform is critical to achieve gender justice in the region. These should be combined with the strategies suggested in Table 23. The following key policy and legislative changes shown in Table 25 are needed.

Table 25. Key legislative and legal policy changes recommended

Constitutional Change	<p>Constitutions to be amended to ensure the right to substantive equality in the Bill of Rights of the Constitution. It is critical that women's rights to equality are secured in the Constitution itself and not only in other subordinate legislation so that it is difficult to change it.</p> <p>Constitutions be amended to state that where there is a conflict between women's rights to equality and custom, the former should prevail. For example the draft proposed in the proposed Solomon Island Draft Constitution would rule out any ambiguity:</p> <p style="text-align: center;"><i>Where there is a conflict between customary laws or practices and women's right to equality under this Constitution or any other law,</i></p>
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	<p style="text-align: center;"><i>women's right to equality shall prevail.</i>⁴¹⁰</p> <p>Constitutions to be amended to make human rights in the constitution specifically apply to the private sector as well as the public sector, without ambiguity, for example, 'This Bill of Rights applies equally to all citizens including the public and private sector' or words to that effect.</p> <p>Constitutions and legislation to be amended to remove citizenship discrimination against women and their children and to make it unlawful to provide an exception on the grounds of custom.</p> <p>Constitutions to be amended to clearly and unequivocally provide for temporary special measures to promote the advancement of disadvantaged groups including, and specifically, women. A good starting point could be electoral quotas in national legislatures for women. All countries need to pass specific legislation such as Fiji's <i>Social Justice Act</i> but specifically targeting women, as well as other marginalized groups.</p> <p>All Constitutions need amendments to make it explicit that international human rights law shall apply to domestic law where relevant. The Fiji example is a good starting point.</p> <p>Legal anti-discriminations provisions are inadequate in all countries to protect women from discrimination on the grounds of gender and all need strengthening to varying degrees. For example, only in Fiji are indirect forms of discrimination explicitly recognised and protected, yet the vast forms of discrimination experienced by women fall into this category. Constitutions need to be amended include both direct and indirect forms of discrimination.</p> <p>Constitutions to be amended to include all forms of discrimination, including 'indirect', sex or gender discrimination. There are clear gaps in the definitions of discrimination in all PICT constitutions as well as non-compliance with Articles 1 and 2 of CEDAW. They need to be amended, if relevant, to specifically include sex, gender, origin, marital or birth status, sexual orientation, disability and health status to cover the myriad forms of direct and indirect discrimination faced by women, and other disadvantaged groups in the Pacific Islands. Without such amendments, it is impossible to challenge discrimination against women whether in law, policy or practice on constitutional grounds</p> <p>All PICTs need national human rights mechanisms or a regional human rights mechanism for the protection of rights outside the court system.</p>
<p>Political Participation</p>	<p>Recommendation for protective legislation for NGOs. A vibrant and politically aware civil society is critical as to whether gender justice is achieved and whether women can mobilize politically. Thus advocacy groups with good, fair, legislation to protect them from victimisation, both inside government and outside it, is necessary.</p> <p>The findings on electoral systems and electoral quotas have significant implications for any policy developed to increase the numbers of women in legislatures. The introduction of minimum quotas by legislation, rather than by policy, is essential to achieving substantive equality in this area.</p>

⁴¹⁰ 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.

	<p>Temporary special measures in the form of electoral quotas or reserved seats for women are critical to increasing the numbers of women in Parliament and to accelerating <i>de facto</i> equality. A good starting point is 10% of reserved seats for women. These measures can be temporary for a specified number of elections.</p> <p>More internal democratization of political parties which, may include more internal quotas and affirmative action for women within party structures, needs to be encouraged.</p>
<p>Criminal Law/Violence Against Women</p>	<p>Comprehensive stand-alone legislation or separate all encompassing integrated legislation is needed to cover all forms of violence against women as recommended by UN DAW,⁴¹¹ rather than piecemeal and band-aid amendments to existing legislation or even legislation addressing single forms of violence, such as domestic violence. Such legislation would cover not only substantive criminal laws but also evidence and civil law approaches on VAW. It would remove all forms of evidentiary discrimination against women such as the corroboration warning and the questioning of a complainant's past sexual history. This integrated approach is less problematic from a practical perspective; can also include empowering provisions as well as new structural approaches rather than simple protection and punishment approaches.</p> <p>Amendments to sexual assault law must include, but is not limited to the following:</p> <ol style="list-style-type: none"> 1. The grading of sexual assault to reflect degrees of harm including penetration of all orifices; 2. Expanding the definition of assault to include all forms of sexual assault including assault with an object; 3. Removing the corroboration warning; 4. The removal of the need to demonstrate proof of resistance on the part of the complainant to indicate lack of consent; 5. The forbidding of questions of the complainant's past sexual history with men other than the accused by the accused person's lawyer; 6. Allowing the prosecution of marital rape, that is, removing marital immunity and making spouses competent and compellable witnesses; 7. Forbidding the use of ceremonies of forgiveness like the <i>i-bulubulu</i>, to influence prosecution, the trial and sentencing; and 8. The recognition of sexual harassment as a civil offence within the workplace. <p>Specialist units need to be set up within the police force in all countries to deal with VAW. It is likely that a combination of policies and special units will enhance rates of detection and conviction.</p> <p>Amendments to domestic violence law must include but is not limited to the following:</p> <ol style="list-style-type: none"> 1. Making domestic violence both a specific criminal offence punishable by imprisonment; and a civil offence attracting protection orders; 2. Making prosecution mandatory; 3. Making all forms of marriage legally recognised so that any person in a domestic relationship of some sort is entitled to a protection order; 4. Granting authority to trained 'authorised persons' in remote villages to give special temporary protection orders to women who are being

⁴¹¹ Jalal 2008.

	<p>beaten;</p> <ol style="list-style-type: none"> 5. Making it illegal to use culture, custom or the payment of bride price as a defence to a prosecution or the granting of protection orders; 6. Allowing for court orders and hearing dates to be obtained by telephone or fax; 7. Removing various legal impediments which prevent successful prosecution. The Police must have extensive powers to arrest without a warrant. They ought to be able to investigate an offence and charge on the basis of a specific domestic violence offence. <p>As a matter of policy courts should order a minimum 24 hour jail sentence to mitigate the breadwinner argument, or imprison at night only.</p> <p>If it is not possible to amend criminal law it might be more strategic to lobby for legislative protection against domestic violence in family law rather than criminal law, as a first measure. The underlying logic is that because the burden of proof in establishing criminal guilt is much more difficult to establish i.e. beyond reasonable doubt, providing a legislative basis for it in the new family legislation, with its lesser “ balance of probabilities” burden of proof, the courts are more likely to grant a protective injunction.</p> <p>The provisions of non-molestation orders have limited usefulness if relatively few people know about it or understand it. Injunctions work only if the law agency officials are sympathetic and understanding and are properly trained to implement new progressive laws. It is necessary for the police and magistrates to change their attitudes towards non-molestation orders and to strictly enforce the law. Law enforcement and the enhancement of legislation and policies will only be achieved with substantial determination by government to provide resources to educate agencies and greatly increase awareness of issues surrounding domestic violence.</p> <p>In the area of the law on abortion, medical policy and actual approaches on the ground, there is a clear gap in information and research is needed in this area for all Pacific countries.</p> <p>Decriminalising of abortion, accompanied by the provision of safe terminations at public hospitals and clinics. Although highly controversial in the Pacific Islands, access to safe abortion is a critical element of women’s access to reproductive health, and therefore their overall health and development.</p> <p>Adultery, witchcraft or sorcery should be removed as a criminal or civil offence. It is selectively enforced against women.</p>
Land Law	<p>Legislation that explicitly discriminates against women needs amendment, for example, the discrimination in the Tongan Constitution needs to be removed to enable equal inheritance laws.</p> <p>Changing laws and structures to increase women’s access to land as well as file test cases are needed. A possible strategy for a more just political solution to the problem of the distribution of land could include a system of registration of customary land so custom sales of land may be recorded.</p> <p>Constitutions and other land legislation need provisions such as:</p> <p>“Patrilineal and matrilineal customs shall be equally recognized”;</p> <p>“None of the custom laws, traditions, systems and institutions referred to</p>

	<p>shall be applied to unfairly discriminate against women; ” “Women are entitled to participate equitably in the planning and decision making processes regarding land.”</p>
<p>Health, Education & Employment Law</p>	<p>All PICTS need to explicitly recognise the right to health care and specifically access to reproductive health care, and to non-discrimination on the grounds of health status in their constitutions.</p> <p>That legislation specifically and explicitly recognises the right to education, the right to equal access to education and compulsory education up to a specified age for both boys and girls. In order to fully comply with CEDAW, legislation requiring the adoption and implementation of special measures for the advancement of women in education is also necessary. This would legitimate the allocation of larger numbers of scholarships for girls, for example, to narrow the gender gap. As well, a legislative prohibition on the expulsion of pregnant students to ensure that girls are not discriminated against is required.</p> <p>In order to comply with gender equality principles and CEDAW, PICTs must have laws which are implemented and enforced, covering sex discrimination at work, temporary special measures to promote their advancement in the labour force; ensuring that women’s work is not excluded from legislation ; ensuring that there are no legal restrictions on the type of women's work; equal access in recruitment, minimum wage guidelines; different kinds of leave with pay; health and safety legislation protecting workers from danger in the workplace; compensation for injuries; provision for training and promotion; promotion opportunities, and improved maternity provisions. The public sector should be a model for the private sector.⁴¹²</p> <p>Temporary Special Measures for Women in Employment. Women in the region have not achieved substantive equality in employment. Special measures are required to enable them to do so. No country in the region has passed legislation to provide for quotas for women in the public service or for special advancement in training or promotions notwithstanding that some countries have affirmative action provisions in the Constitution will allow for this.</p>
<p>Family Law</p>	<p>Comprehensive changes to family law are critical to address legal and financial discrimination faced by women. Although there should be a social educational focus on achieving gender equality in the family where gender discrimination often has its provenance, so that efforts spill over to society at large, comprehensive changes to family law are critical to address legal and financial discrimination faced by women. The biggest legal handicap is the lack of specialized legislation and a lack of specialized courts. All PICTs apart from Fiji, need new legislation and courts where families in the process of breaking up are treated like human beings undergoing an emotionally disturbing process. New laws should include protection from violence orders, a minimum age of marriage as 18 for both males and females, financial support for all parties without having to prove fault after separation and divorce, no-fault divorce grounds, equal rights to share in matrimonial property and family finances; and specific adoption of CEDAW and CRC as guiding principles in the legislation itself. The lee ways of judicial discretion should be as limited as possible to narrow the possibility of interpreting new</p>

⁴¹² UNESCAP 2007 103.

	<p>legislation in further discriminatory ways.</p> <p>Family law legislation should contain a specific provision requiring the application of CEDAW and CRC to family law, 'A court exercising jurisdiction ...must...have regard to ....(e) the Convention on the Rights of the Child (1989) and the Convention on the Elimination of All Forms of Discrimination against Women (1979)'.⁴¹³</p>
Research & Other	<p>The real picture of CEDAW compliance can only be measured by the collection of case law, numerical data/statistics and other forms of empirical evidence to assess compliance with CEDAW.⁴¹⁴ There is a significant gap in research and data in this area.</p> <p>Training of all stakeholders who implement new legislation is critical.</p> <p>Research is needed to devise an economic formula for assessing the economic costs of not amending laws affecting gender justice, as has been done with violence against women.</p>
Source: author	

Cultural and attitudinal strategies: training justice officials and legislators

Orienting and training of all stakeholders in the legal machinery is critical as well as updating training material to reflect changing realities. Cultural and attitudinal changes about gender and the law are required, whether it is a legislative, litigation or other approach that is preferred. When new precedents have been created it has been the result of training of justice officials, including lawyers. The stakeholder groups include women themselves, the media, community groups, members of the legislature, lawyers, judges, magistrates, government officials, police and justice agencies (both formal and customary); all need gender and human rights training, to pass new legislation, reduce resistance to new laws and to adopt positive interpretations of law. It is important to use the media to accelerate cultural and attitudinal change (see Box 35 for an example).

Working with legislators is a critical component of getting good legislation passed. In both Fiji and Vanuatu, women's organisations worked closely with Members of Parliament, building important trust relationships and encouraging the championship of the proposed legislation by them. In both cases, workshops were held with members of Parliamentary subcommittees who were more closely involved with the proposed legislation or whom NGOs considered to be potential powerful supporters.

Box 35. Combining effective strategies to get new gender justice legislation -The Family Law Act 2003 (Fiji) by Imrana Jalal, Pacific Regional Rights Resource Team (RRRT) and former Commissioner of Family Law

How can good laws be passed? The passing of the Family Law Act 2003 (Fiji) is a fine example of effectiveness of women's strategic partnerships in getting equality laws passed. The previous family law was outdated, irrelevant, not properly enforced and discriminated against women and children, legally and financially. What combination of circumstances can

⁴¹³ Section 26 (e) Family Law Act 2003 (Fiji)

⁴¹⁴ The Secretariat of the Pacific Community (SPC) has embarked on such a project.

lead to human/women's rights policy or legislation?⁴¹⁵ There has to be a fortuitous convergence of circumstances (multiple forces at play simultaneously), some, not all, of which must occur together at any given time:

Civil society roles

- § NGOs must themselves be educated about the issues;
- § Education of all major stakeholders on the need for reform, especially major opinion shapers;
- § A credible lobby group and/or civil society that is allowed to function. They have the political space to mobilise and advocate for change. A protected Bill of Rights is an important component of this factor. In Fiji's case, RRRT partner, the Fiji Women's Rights Movement was the lead NGO supporting the passing of the Act;
- § Public mass media campaigns and a responsive media – the media must be educated about the proposed law;
- § A strong NGO movement which understands how government and governance functions and knows how to work within the system, both nationally and internationally;
- § Working with all political parties to gather support for the proposed legislation. This may involve group seminars or one-to-one meetings;
- § Sound economic analysis on the economic costs of not passing new legislation; and
- § Good technical support as that provided by RRRT to both government and NGOs.

Responsibilities of the state

- § An existing democracy with guaranteed free speech because this means that citizens are allowed to challenge existing policies, law and practices; a constitution that guarantees equal rights;
- § A government that is willing or is required to act within principles of good governance and to work with NGOs;
- § An active and strong women's ministry/department working from within government RRRT's Government partners included the Attorney General's Office, the Fiji Law Reform Commission and the Ministry of Women;
- § A law that requires the application of human rights conventions must if relevant. Fiji is fortunate to have such a provision in the 1997 Constitution at s.43(2);
- § The ratification of CEDAW and CRC which is a basis of justification for the change. For compliance reasons all domestic law must be consistent with the conventions; and
- § Reporting on CEDAW and CRC, a requirement of ratification. This provides a strategic opportunity to use the international accountability mechanism to push for domestic change. In Fiji's case the UN CEDAW Committee highlighted the need for the Bill to be passed in its *Concluding Comments* after hearing the NGO Report. This enabled the women's ministry and FWRM to help put the Bill back on the legislative agenda.

The challenges to participation of disadvantaged groups

- § Education of groups unfamiliar with the law;
- § Cultural obstacles to change based on discriminatory stereotypes about women's roles;
- § Responding to criticism of forces against the change (i.e. the proposed law) with a strategic media campaign based on persuasive dialogue and engagement;
- § Activists working at provincial, village and community level providing education on the proposed law and lobbying for support;

⁴¹⁵ P Imrana Jalal, based on a presentation given at the SPC 9th Triennial Conference of Pacific Women, Nadi, Fiji, in August 2004.

- § Statewide consultations on the new law are essential for participation, ownership and good governance; and
- § A conducive political climate. In the post-conflict situation in Fiji, people become more aware of their rights. The political upheavals brought out many problems to the forefront – for example, the increasing poverty caused by the lack of enforcement of maintenance orders for women and children;

Entry points for groups to influence

- § A credible lobbyist/agent of change who may be the ‘face of change’, who the public and stakeholders relate to. S/he must be knowledgeable, have good people skills and is able to talk to anyone, everyone and relate to them on the issue. The lobbyist must be respected by politicians and the public alike. This may be a formally appointed commissioner for law reform or one employed, for example, by the NGOs;
- § A powerful minister or other Member of Parliament can be an important ally and champion for the change. They may be an opinion shaper or champion within cabinet or parliament who other MPs respect;
- § Important strategic partnerships – in this case the partnership existed between government (the Attorney General’s Office, Parliamentary Office, Department of Women, Fiji Law Reform Commission) and civil society (FWRM and other NGOs) with RRRT providing technical and expert support to both government and NGOs. RRRT brokered and nurtured the extremely important government and NGO relationship that ultimately led to the passing of the Bill with unanimous support of all parties in Parliament. The latter was an historic and unprecedented event in Fiji’s legislative history.

Economic strategies

An important political message to opinion shapers who determine whether good legislation is passed ought to include the economic costs of not passing legislation, and to clearly show the link between the necessary changes and core development goals. This can be a powerful determinant in compelling legislative change and was used in getting the Family Law Act 2003 passed in Fiji. Politicians and government officials often resist change for gender justice on the basis that the new law will be too costly to implement. If, for example in Fiji, it can be demonstrated that not passing new gender-based violence legislation will continue to cost the economy FJD300 million in direct costs annually,⁴¹⁶ this might be a sufficient economic incentive for legislative change.⁴¹⁷

Ratification and reporting of CEDAW and other core human rights conventions

This strategy provides a further layer of accountability and compels countries to update their laws and implement new measures, and then report on them to a global body. The reporting process of ‘saving face’ and avoiding embarrassment enforces compliance. All PICTs need amendments to legislation and their constitutions to make it explicit that international human rights law shall apply to domestic law. The Fiji example is a good starting point.

⁴¹⁶ Nairube, *ibid.*

⁴¹⁷ Author’s view.

Temporary special measures through legislation

Temporary special measures through constitutional and legislative changes are critical to accelerate equality in all areas but particularly in the areas of quotas for political equality in national legislatures and other decision making bodies; as well as in education, employment, shelter and housing and access to credit facilities. Laws are necessary to affect such affirmative action and too much reliance should not be placed only on policy changes and goodwill.

More internal democratisation of political parties, which may include more internal quotas and affirmative action for women within party structures, need to be encouraged.⁴¹⁸ However, it is critical that legislation is passed to provide for electoral quotas and some Pacific countries already have general legal provisions that would allow this. If left to the voluntary goodwill of political parties, the results may not be the same. Attention must also be paid to the findings that proportional representation is a better electoral system for bringing women into the political mainstream.

Women in the region have not achieved substantive equality in employment. Special measures are required to enable them to do so. No country in the region has passed legislation to provide for quotas for women in the public service or for special advancement in training or promotions notwithstanding that some countries have affirmative action laws will allow for this.

Box 36. The tyranny of smallness – the challenges for political participation and women’s rights defenders in small Pacific Island countries⁴¹⁹

One of the difficulties for women’s rights activists in challenging gender injustice is the relative smallness of PICT societies. Unlike many parts of Africa and Asia defenders do not face immediate everyday threats to their physical security, except for during the coups d’état in Fiji and Solomon Islands; and the crisis in Tonga. However they face social isolation, alienation, hostility and structural and financial obstacles in doing human rights work. The small size of Island populations makes it socially difficult for activists to take an unpopular position against the State or the status quo or chiefs in villages or settlements. Often they are related to or belong to the same clans or are *wantok* to women’s rights violators. Openly taking a different position is seen as going against the culture or a betrayal of one’s culture. Social exclusion can often result. In bigger countries advocates have enough social networks to ease the loss of familial or social ties. When a defender in Tonga mobilised her women’s group to fight against the new law which limited free speech she was ostracised by a social group very important to her. But there some advantages and opportunities to working in island communities too. The small populations offer protection and assistance to defenders as well. Human rights defenders are highly visible and well known. It would be almost impossible for example to arrest a defender and for it not to be known and for the community or family not to do something about it. Personal links also open doors for defenders in lobbying. Similarly It would be unthinkable for a government minister to refuse to see a defender who is his or her *wantok* (clan member).

⁴¹⁸ UNIFEM 2008(a), 32.

⁴¹⁹ Jalal, 2004.

Building the capacity of women's NGOs

In many PICTs civil society organisations (CSOs), particularly women's NGOs, have been the driving force behind human rights conventions being ratified and progressive legislation being passed and implemented. New legislation is critical to protect the rights of women's NGOs to mobilise around legal issues. In Fiji an NGO that was perceived by government to be lobbying against government policies was deregistered.⁴²⁰ Funders and development agencies should support NGO mobilisation for gender justice.

Conclusion

Some of these measures would benefit greatly from primary research to fill the gaps, cover all PICT legislation, record un-codified customary law, carefully examine case law and how the laws impact on women, and update the existing information. However many laws do not require further research to justify amendment, as they are, on the face of it, blatantly discriminatory against women, and there is ample justification for their amendment. For example the inclusion of sex and gender in the prohibited grounds of discrimination need only for those words to be included. It is also necessary to develop a set of gender indicators to measure *de facto* reality, that is, to adequately and accurately reflect the situation on the ground. Changing all the laws that have an effect on women, without corresponding changes in other areas influencing the effectiveness of the new laws, is not sufficient to advance women's overall rights to gender justice. An integrated approach is critical as advancement in one area promotes advancement in another. Any strategy to overcome their systemic disadvantage must be multi-sectoral and across disciplines otherwise amendments to existing laws run the risk of further oppressing women. Specifically, political leadership and commitment will go a long way towards correcting overall discrimination against women.

Key Messages

Main message

Governments and NGOs across the Pacific Islands can together, in strategic partnerships, deal with the problem of improving women's overall gender justice by passing comprehensive progressive legislation, changing discriminatory laws, policies and practices in all areas affecting women; and ensuring the effectiveness of new legislation with adequate resources and training of all stakeholders. The approach must be an integrated one across all sectors because new legislation by itself is not enough.

Secondary messages

- Poor women bear a disproportionate burden of discriminatory laws. They have special needs, which must be addressed within any proposal for reform.
- Constitutions need to be changed to protect women, making all forms of discrimination against them illegal.
- Legislation must provide for temporary special measures of affirmative action for women in the areas of electoral quotas, education and employment.

⁴²⁰ In 2001-2. Citizen's Constitutional Forum, Suva, Fiji

- The building of the capacity of women's rights NGOs must be encouraged as it is key to overall change for women.
- Litigation and test cases are an effective way of obtaining creative and progressive interpretations of law.

Glossary⁴²¹

A, B, C etc

Abbreviations used to indicate actual persons in case studies to protect privacy and save space.

Abortion

The premature termination of pregnancy and the expulsion of an embryo or a fetus from the womb.

Accession

If a country wishes to become a state party to a convention that has already entered into force, it can accede to the treaty. Accession has the same legal effect as ratification.

Affirmative action (also known as temporary special measures)

Affirmative action policies recognise the inequality between certain groups in society and try to fix this by providing more resources to help the disadvantaged group “catch up” and gain real equality. It is a form of positive discrimination.

Also a policy or a program that seeks to redress past discrimination through active measures (e.g. quotas) to ensure equal opportunity in areas such as education and employment. Article 4 of CEDAW mandates the adoption of temporary special measures to accelerate de facto equality.

Api kolo

Town allotment of land in Tonga.

Api'uta

Tax allotment of land in Tonga

Bangalore Principles

The *Bangalore Principles on the Judicial Application of International Human Rights Law* formulated at a high level colloquium of Commonwealth judges in 1988, state that if legislation is ambiguous, it is consistent with the function of a judge in a common law system to resolve the ambiguity by reference to international human rights principles.

Bill of Rights

A bill of rights is the name given to the chapter, usually in the constitution, that protects the fundamental rights, principles and freedoms of the people of the country as human beings (for example, the right to vote, the right to free speech, the right to education).

i-bulubulu, bulubulu, ifoga

Traditional ceremonies in the Pacific islands asking for forgiveness for wrong doing.

Committee

UN treaty committees, or bodies, comprise groups of independent “experts” nominated and elected by states parties to the convention, or treaty. Committees meet regularly to hear state

⁴²¹ The glossary is taken from a number of sources and added to: including Jalal, 1998; Jalal 2005; UNIFEM Pacific 2007; UNIFEM Pacific 2008.

reports and look at the progress made by countries in meeting their obligations under the convention.

Common law

Historically, a body of unwritten law derived from the traditional laws of England based on case law precedents and judicial interpretation rather than legislation.

Complainant

Generally, a person who lodges a complaint with a court or other decision maker. In criminal proceedings it is a person, not necessarily the victim, who begins a prosecution by laying a complaint.

Concluding comments

Concluding comments are the findings or summing up of the state report by the relevant committee.

Constitution

A constitution is the supreme source of the law and provides the framework for other laws of the land. It sets out how the government is structured and operates, the executive and legislative powers of the state, the judiciary and the public service, and addresses issues of state finance, land and citizenship.

Constructive dialogue

The process by which a UN committee and government delegations engage in friendly, open discussions about the content of the reports.

Corroboration

In criminal proceedings, corroboration is independent evidence that connects the accused person to the crime. In the common law judges are typically required to advise the jury that it is dangerous to convict the accused on uncorroborated evidence for sexual offences and paternity.

Convention

A convention is a legally binding treaty or agreement based on international standards agreed upon between two or more states. Conventions are a source of international law, and can become part of local law once a country has ratified them.

Custody

Custody refers to the daily care and control of a child. It typically encompasses the rights and duties related to the upbringing of children. These rights include the power to make decisions about a child's education, religion and property as well as a personal power of physical control. The corresponding duties include providing the child with food, clothing, shelter, education and other necessities of life.

Custom

A practice in society or a rule of conduct established by long use, which binds those under it. In order for a custom to constitute a valid law, it must date back to time immemorial, and be certain and obligatory. It may run counter to the common law but cannot contravene existing statute law unless validated by the constitution. A custom can be general, particular or local.

De facto

As it applies to personal relationships, it describes an association which resembles a marriage, but which has not been formalized through a ceremony of marriage. It can include both heterosexual and same sex relationships. A person sued in a civil proceeding or accused in a criminal proceeding.

De jure

Latin term meaning ‘according to the law’ and in contrast to *de facto* which means ‘in fact’.

Discrimination

Discrimination in general terms is the act of making prejudicial distinctions among individuals or groups by taking irrelevant matters into consideration resulting in unequal treatment. It is treating a person or persons less favourably; distinguishing, excluding, restricting, or preferring another on the prohibited basis of a certain or several features or attributes that the person or persons’ possess. The definition of discrimination contained in Article 1 of CEDAW explicitly states that discrimination against women means any ‘distinction, exclusion or restriction’ made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Direct discrimination

Direct discrimination results from less favourable treatment in comparison with a real or hypothetical comparator from the mainstream group in the same or similar circumstances on a prohibited ground.

Domicile

A person’s fixed, principal and permanent home to which that person intends to return and remain even if they are currently residing elsewhere.

Equal pay

Equal pay requires that workers are paid at the same rate of pay for doing the same job irrespective of sex.

Fa’a Samoa

The customs and traditions of Samoa.

Formal equality

Formal equality is the requirement that legal rules should apply in the same way to all members of the community regardless of sex, race, sexuality or any other characteristic.

Fono

Village council in Samoa

General observations / comments

These are general observations or comments made by UN committees on issues not covered in the official state party report. These observations are usually sourced from other reports, such as the NGO parallel report. The observations may be asked in a question or comment.

Indirect discrimination

Indirect discrimination results where there is a requirement that appears to be neutral and fair, but which actually impacts disproportionately on one individual or group as compared with another (and the requirement or condition is not reasonable in the circumstances).

Infanticide

Infanticide is a criminal offence by which a mother causes the death of her child as a result of post natal depression. It is an alternate offence to murder or manslaughter, with a reduced sentence.

Initial report

This is the first report that countries are required to prepare and submit. The initial report is due one or two years after ratification or accession, depending on the convention.

iroijlaplap

Paramount chiefs of the RMI.

Kustom

The Melanesian way of referring to custom.

Maintenance

The provision of the means of existence or financial support for a minor or adult.

Maneaba

Kiribati meeting house or council, also name for Parliament.

Mandatory prosecution

Obligatory prosecution of an accused in a criminal proceeding (i.e. where police discretion to prosecute or not prosecute is removed).

Matai

The chiefs and nobles in Samoa

Mataqali

Land owning unit, clan grouping in Fiji.

Maternity leave

The period of leave that a woman is entitled to from her employer before and after childbirth. Article 11(2)(e) of CEDAW requires States Parties to introduce maternity leave with pay or with comparable social benefits. The International Labour Organisation recommends a minimum of 14 weeks maternity leave in both the private and public sectors.

Matrilineal

The practice of tracing title and inheritance through the maternal line.

Minimum quota system

Quotas that require women constitute a certain number or percentage of the members of a body, whether it is a candidate list, a parliamentary assembly, a committee, or a government.

Moetolo or moetotolo

The practice of creeping into a house and sexually assaulting a woman whilst others sleep or pretend to sleep.

Nakamal

A meeting place where custom matters are discussed in Vanuatu, sometimes also a place to drink *kava*.

Nikah

Religious ceremony of marriage in Islam. In the Pacific region not legally recognised unless legally registered.

No-fault divorce

A no-fault divorce is the dissolution of a marriage, upon petition to the court by either party, without the requirement that the petitioner show fault on the part of the other party. Either party may request, and receive, the dissolution of the marriage, despite the objections of the other party.

Non-governmental organisations (NGOs)

NGOs are non-profit organisations dedicated to a particular cause or issue – for example, women’s rights. They are independent of any government. NGOs are sometimes referred to as civil society organisations (CSOs), which is a broader term that includes a wider range of interest and community groups (for example, the Fiji Law Society, other professional societies and church groups).

Optional protocol

An optional protocol is an additional treaty that usually allows the opportunity to address other subject specific sections related to the main treaty that were not covered in the original treaty. Though there are exceptions to the rule, optional protocols need to be ratified separately and are usually open only to states parties that accepted the terms of the main treaty. Optional protocols usually allow an individual complaints procedure.

Parallel reports

Parallel reports to UN committees are written by non-governmental organisations to serve as an alternative or additional source of information to state reports.

Party

One of the participants in a legal proceeding who has an interest in the outcome. Parties include the plaintiff (person filing suit), defendant (person sued or charged with a crime), petitioner (files a petition asking for a court ruling) or respondent (usually in opposition to a petition or an appeal).

Patrilineal

The practice of tracing title and inheritance through the paternal line.

Pay equity

Pay equity refers to a situation in which work which is different in nature but requires comparable similar skills, experience and qualifications and is carried out in comparably similar circumstances, attracts the same rate of pay.

Plaintiff

A person or entity who initiates legal proceedings against another in a civil dispute.

Periodic reports

Periodic reports are usually made every four or five years after the initial report, or whenever the relevant UN committee so requires. These report on the progress made in removing obstacles to equality made since the last report.

Polygamy

Marriage to more than one spouse at the same time or multiple marriages.

Precedent

A prior reported judgment of a court which establishes the legal rule (authority) for future cases on similar facts or the same legal question. It is also a legal principle or rule created by one or more decisions of a higher court. These rules provide a point of reference or authority for judges deciding similar issues in later cases. Lower courts are bound to apply these rules when faced with similar legal issues.

Prior sexual conduct

The common law rule where the prior sexual conduct of a victim with either the accused or with other men is relied upon to establish that the victim consented to the sexual act in question.

Proof of resistance

Proof of resistance is a common law rule which requires sexual assault victims to establish that they physically resisted the perpetrator and is used to determine consent.

Public law

The body of law dealing with the rights, powers, obligations and responsibilities of the government including public officers and the governed (the public). It is composed of criminal, international, environmental, administrative and constitutional law.

Ratification, ratified

To have ratified a treaty or convention means a state has officially committed to comply with the obligations under that treaty or convention. When a state ratifies a convention, it is said to be a "party" to it, and is called a state party.

Reservations

A reservation is a formal statement made by a state claiming it is not willing to be bound by a particular article or section of a particular convention. Reservations can be made when the state signs, ratifies or accedes to a convention or treaty.

Respondent

A person or entity required to answer a petition for a court order. It is also a party to court proceedings against whom relief is claimed by an applicant, complainant or an appellant. It is analogous to the term defendant, which is used in many jurisdictions.

Restitution of conjugal rights

A court order which directs a person to resume sexual relations with a spouse.

Restraining order/Non molestation order

An order from a court directing one person not to do something, such as make contact with another person, enter the family home etc. It tells one person to stop harassing or harming another. Restraining orders are typically issued in cases in which spousal abuse or stalking is feared or has occurred in an attempt to ensure the victim's safety.

Signatory

Many countries first sign a convention to show their support and commitment to it. Becoming a signatory means a country is obliged to stop acting in a way that would defeat the object and purpose of the convention. However, signing a convention does not mean the state is legally bound by any obligations. When these countries decide to become states parties they do so through ratification.

State party, states parties

A state party is the legal name for a country that has either ratified or acceded to a convention.

State report

States parties to conventions are required to submit regular reports on the legislative, judicial and administrative measures they have implemented as part of their obligations under the convention.

Statute

A law made by parliament.

Substantive equality

Substantive equality refers to real or actual equality. Whereas formal equality merely requires the equal application of rules, substantive equality requires equality of access, equal opportunity and crucially, equality of results.

Succession

Succession is the acceptance of the legal obligations previously instated during a previous government's rule. This should not be confused with changes in administration, but instead usually applies to states that make the decision to maintain the obligations of another state that ratified a treaty on their behalf before they gained independence.

Tofia

Hereditary land estate in Tonga

Trafficking of women

Global Alliance Against Trafficking in Women defines trafficking as all acts involved in the recruitment or transportation of a woman, within or across national borders, for work or services, by means of violence or threat of violence, debt bondage, deception or other coercion.

Treaty

Treaty is the generic name given to all instruments binding under international law. Treaties may be made between: states; international organisations with treaty making capacity and states or; international organisations with treaty making capacity. Conventions, agreements

Wantok aiga, mataqali

Belonging to the same clan or group in Melanesia, Samoa and Fiji respectively.

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