

# Gender and Custom in the South Pacific

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## I. INTRODUCTION

I am a feminist of mixed ancestry (Chinese, English/Irish, Fijian, Samoan, African), and I have a background in national, regional and global activism in the anti-nuclear/peace/independence, labour and women's movements, and in the movement for democracy, constitutionalism and human rights in Fiji. I am no expert on matters of custom. My academic training was in political science and I taught political studies for 17 years at the University of the South Pacific.

I was invited to contribute to the symposium because I produced a paper on gender, custom and human rights for the New Zealand Law Commission's project on Custom and Human Rights in the Pacific,<sup>1</sup> based on a reading of recent literature. One of the aims of this symposium, Tūhonohono: Custom and the State, is to join with Pacific scholars to advance the understanding of custom law and its contribution to state legal systems, and to learn from Pacific experience in the use of customary institutions and processes for the resolution of disputes. I hope some of what I have to say will be useful.

A primary goal of the New Zealand Law Commission's custom and human rights project was to try to find ways of narrowing the present divide between custom and human rights, by identifying their common values. This starting point interested me because I read the project as being about finding or identifying the common humanist values in Pacific custom and human rights. I like to think that there are universal values in humanity and that they lie at the core of all cultures. In our present troubled times marked, on the one hand, by the so-called "war on terror" and the multitude of sins including resource plundering perpetrated in the name of that cause, and on the other, by the homogenising effects of neoliberalism, not least in asserting market values to the exclusion of all else, I believe we would be well served to identify and affirm the universal, humanist values in all cultures, and to have them inform our laws, policies and practice, in the interests of advancing our common humanity, while defending our different ways of living.

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<sup>1</sup> See New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17; Wellington, 2006).

I want to say from the outset that I hold a somewhat critical perspective on custom, and this has been informed by both witnessing and reading about how custom plays out in Pacific states, where it is alive and well, governing many aspects of people's daily lives, and often strongly contested. There are many things in Pacific Island custom and culture that are precious and that I have elsewhere written in strong defence of – not least, the core values that lie at the heart of our cultures. Pacific Island states have also largely retained systems of customary land ownership through which a majority of Pacific Island people have been able to pursue subsistence or semi-subsistence livelihoods – they may not quite be living in “subsistence affluence” but they have effectively been shielded from dispossession, poverty and want. Pressure to change customary ownership systems, or at least to free up land for more productive investment and give security of tenure to investors, could drastically change present realities – in some places they already have, to economic and social detriment. I am a strong defender of customary systems of land tenure, and of the option of subsistence and semi-subsistence livelihoods, although I am also a critic of both the disproportionate allocation of rent monies to customary leaders and the parastatal organisation set up to administer lands in Fiji and the deliberate mobilisation of landowners by that institution to deny land lease renewals to Indo-Fijians. The case illustrates how a custom-based institution can be manipulated for narrow political ends, with inhumane and unjust consequences.

In this paper, which largely draws on that produced for the Law Commission, I discuss gender and custom in the Pacific, specifically the value and standing accorded women under regimes of custom, from the broader perspective of advancing universal humanist values. As I see it, Pacific Island societies ascribe value to a range of meaningful “intangibles” – relationships, a sense of community, social responsibility for the wider group, respectful behaviour, sharing and reciprocity, leisure or investment of time in strengthening social relationships, including through celebration and practices of redistributing wealth. Not all of these values are necessarily practised today but they exist as ideals and, what is more, are congruent with evolving more equitable gender relations, giving women equal voice and standing, opportunities and rights.

## II. SOME PRELIMINARY COMMENTS ON SOURCES, FRAMES OF ANALYSIS AND INTERPRETATIONS OF CUSTOM

Social scientists tend to analyse societies from either of two broad theoretical perspectives. The functionalist perspective sees all parts of a society – its social structures, beliefs and values, rules and practices – as essentially concerned with holding society together and maintaining stability and equilibrium. All

elements function to serve the interests of the whole. The conflict model, on the other hand, looks at a society in terms of who holds power and how, with a focus on mechanisms of domination and control. The underlying idea is that society consists of competing groups in constant conflict because wealth and power are unequally distributed. In the competition for power a dominant group emerges and comes to control a disproportionate share of wealth and social status. This group exercises control over all other aspects of the social structure to ensure that society functions to serve its interests.

Both analytical frameworks informed early anthropological and other scholarly work in the Pacific and each read gender systems differently, or not at all. For instance, the conflict perspective would link the monopolisation of power and social status by male elders in an agricultural society dependent on women's labour with mechanisms of control over women's productive and reproductive capacities, and the beliefs and values that provide ideological support for them. Functionalists would rationalise the gender division of labour and women's exclusion from certain arenas in society in terms of biological differences and security considerations. More recently, post-modernist and post-structuralist approaches to studying Pacific cultures have produced new interpretations or revisions of some of what was earlier "known".

The primary or original source of information on custom in Pacific Island societies is oral traditions. Most Pacific Island communities underwent such significant transformation following contact with Europeans that it is difficult today to discern what we might call "traditions", in the sense of long-established values and practices, from what are variously subscribed to, practised or cited as "custom" today. For one thing, much oral history was

lost in the major demographic crises that followed European contact,<sup>2</sup> which were so severe they left many communities unable to reproduce themselves. Moreover, custom beliefs and practices were often so denigrated by Christian missions in some communities that they were abandoned in part or in whole, as “heathenism” or “the work of the devil”.<sup>3</sup> Where custom survived it was often in a significantly modified form. Thus, much of what passes for custom today is an amalgam of old and new ideas, values and practices, demonstrating that custom is neither immutable nor static, but rather adaptive and dynamic. It also needs to be acknowledged that oral traditions are continually interpreted, reflecting changing realities and power relations in society. Embedded within these customary forms are the interests of stakeholders and this is of particular significance when considering gender and custom.

Most of the literature addressing the intersection of gender and custom in Pacific societies is ethnographic or anthropological. The published works of anthropologists are often the only accessible sources of documented knowledge on customs and culture as they were practised and lived in times past, and are actively drawn on by Pacific Island people in some contexts to define or authenticate custom.<sup>4</sup> Missionary and other early accounts are continuously mined by contemporary scholars seeking to interpret or reinterpret the past. Summarising what is now known about the traditional

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2 Bronwyn Douglas “Christian Citizens: Women and Negotiations of Modernity in Vanuatu” (2002) 14(1) *The Contemporary Pacific* 1 at 7 refers to the devastating depopulation in Aneityum “obliterat[ing] much indigenous practice and disrupt[ing] the transmission of *kastom* knowledge”. Aneityum’s population in 1830 was estimated to be between 4,600 and 5,800. By 1941 it had fallen to 186 (B Douglas “Traditional Individuals? Gendered Negotiations of Identity, Christianity and Citizenship in Vanuatu”, 1998, *State, Society and Governance in Melanesia Discussion Paper 98/6*, Research School of Pacific and Asian Studies, Australian National University, Canberra, at 9). D Denoon (“Land, Labour and Independent Development” in D Denoon, ed, *The Cambridge History of the Pacific Islanders*, Cambridge University Press, Melbourne, 1997 at 244) writes that “colonial administrators were not fantasising when they feared extinction. He records the 70 per cent decrease in the Chamorro population of the Marianas in the late 17th century, the estimated 90 per cent reduction in the Australian Aboriginal population by the 1930s, the “demographic collapse” of the Hawaiian population, the decimation of many islands in Solomon Islands, the New Hebrides (which lost in total about half its population, with Aneityum driven close to extinction) during the years of “resource raiding and the labour trade”, similar decimation of the Kanak population, the halving of almost all Polynesian populations, and the risk of “near extinction” suffered by Micronesian societies.

3 Douglas, above n 2 at 7.

4 Joan Clayton Larcom (“The invention of convention”, 1982, 13(4) *Mankind* 330) records that the Mewun in Malekula, Vanuatu, by 1982 had come to accept “anthropological knowledge as arbiter of their authentic past”, and that the work of anthropologists was increasingly employed in post-colonial Vanuatu to define *kastom* as tradition, and to support land claims and court cases.

gender division of labour in Pacific Island societies, Linnekin<sup>5</sup> commented that the descriptions were “only as sound as the sources on which they are based” and that male Western bias in early ethnohistorical accounts meant women and their activities were often ignored. Hence, the significance of women’s manufacture of valuables for ceremonial exchange in Polynesian cultures was poorly appreciated, or ignored, by missionaries, administrators and male anthropologists alike until Weiner undertook work in the Trobriand Islands.<sup>6</sup> Similar inattention was paid to women’s “unique and important roles in their own politics and ceremonies” in Melanesia.<sup>7</sup> New analyses of bride wealth practices in Melanesia have validly challenged earlier interpretations as well as the very term “bride price”, conferred by outsiders, for misrepresenting the forms and meanings of reciprocal exchanges associated with marriage as they were traditionally practised, and for contributing thereby to distorting both its contemporary practice and the meaning ascribed to it, to the detriment of women.<sup>8</sup>

Women’s scholarship has contributed significantly to contemporary understandings of gender and custom, recording and analysing aspects of culture which were previously unknown because no one had “asked the right questions”.<sup>9</sup> Apart from the extensive work undertaken by women anthropologists, the corpus of theoretical and empirical knowledge on custom and gender has been enriched by the scholarship of women lawyers associated with the University of the South Pacific Law School, two of whom (Jennifer Corrin Care and Miranda Forsyth) participated in the Tūhonohono symposium, and by the work of gender and development specialists.

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5 Jocelyn Linnekin “Gender Division of Labour” in Donald Denoon (ed) *The Cambridge History of the Pacific Islanders* (Cambridge University Press, Melbourne, 1997) 105.

6 Annette Weiner *Women of Value, Men of Renown* (University of Texas Press, Austin, 1983).

7 Jean Zorn “Women, Custom and International Law in the Pacific” Occasional Paper No 5, City University of New York, n.d. at 12. (The paper was first presented on 29 September 1999 to the Faculty of the University of the South Pacific School of Law, Vanuatu).

8 Interview with Lissant Bolton. Bob Makin “Lissant Bolton on women in trade in Vanuatu” (27 Nov 2005) *The Independent*.

9 Citing the work of Gilbert Herdt (“Sexual Reproduction, Social Control, and Gender Hierarchy in Sambia Culture” in BD Miller, ed, *Sex and Gender Hierarchy*, Cambridge University Press, Cambridge, 1993, at 193), Zorn (above n 7) points out that until “the right questions were asked” – after “several generations” of ethnography in Papua New Guinea – anthropology had also missed recording ritualised homosexuality in the highlands as a “vital part of the relations between older and younger men in Melanesia”.

### III. GENDER AND CUSTOM – WHAT IS KNOWN ABOUT WHAT WAS, AND WHAT HAS CHANGED

From Jocelyn Linnekin's summary of what is known about the traditional gender division of labour in Pacific Island societies it is evident that men and women supplied different products, were spatially allocated different work areas (interior/coast, swampy/dry land, reef/ocean), grew different crops, and amassed and contributed different goods in ceremonial exchanges.<sup>10</sup> She suggests that complementarity "in economics, cultural symbolism and ritual status" may be the "one feature common to the gender division of labour in Pacific societies".<sup>11</sup> In the supposedly more "egalitarian" Melanesian cultures,<sup>12</sup> social ordering by gender appears to have been central to complex social relations of trade and exchange,<sup>13</sup> male dominance "more explicit and more extreme", and the gender order underpinned by ritual prohibitions associated with ideas about female powers and pollution.<sup>14</sup> In Polynesian societies, where status has been ascribed by birth and social organisation determined as much by rank as by gender and age, Polynesian women "were the equals of men in genealogical status and social rank" and often wielded "formidable personal and political authority as kinswomen and chieftainesses".<sup>15</sup> The matrilineal societies of Island Melanesia exhibited some distinctive differences, notably in respect to inheritance of land, which passed through women to men, and the gender division of labour in agriculture, which appeared more flexible. Micronesian societies defied generalisation, presenting a diverse range of organisational forms, "from stratified chiefdoms to localised extended-family organisations", and traditions of ceremonial exchange involved both men and women.<sup>16</sup>

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10 Linnekin, above n 5 at 105-113.

11 Ibid, at 112.

12 In contrast to Polynesian societies, based on inherited chiefly leadership, Melanesian societies have long been labelled "egalitarian", on the basis that any male, supposedly, can achieve "Big Man" status. When considered from a gender perspective, however, the label is inappropriate.

13 In most of the New Guinea Highlands, women produce goods for men's ceremonial exchange and men exercise control over the products of women's labour (Linnekin, above n 5, at 107-108).

14 Ibid, at 105. Polynesian cultures also associated women in some way with taboos and sacred spiritual power. Meredith Filihia ("Men are from Maama, Women are from Pulotu: Female Status in Tongan Society", 2001, 110(4) JPS 377 at 386), for instance, locates the origins of women's privileged status in Tongan cosmogonic myth, specifically the myth that women originated from Pulotu, the Tongan afterworld and source of chiefly things and power, making them *eiki* (superior in rank) to men. Tongan women hold higher rank as sisters, being *eiki* to their brothers, but as wives they are "subject to the authority of their husbands", and the mother's side of the family is *tu'a* (inferior) to the father's side.

15 Linnekin, above n 5 at 105.

16 Ibid, at 106.

Christian missionaries in Melanesia have been “stigmatised” as the “destroyers of culture”,<sup>17</sup> but Christianity has been so thoroughly embraced throughout the Pacific that today it is most often equated or conflated with culture. This has been a double-edged sword for women. On the one hand, Christian ideas and values such as the equality of all in the sight of God, and respect for all humankind, have provided a strong foundation for women’s human rights claims. On the other hand, biblical texts that teach that wives should “submit to [their] husbands as to the Lord” (Ephesians 5:22-23) not only helped create a new asymmetry in gender relations based on male domination/female submission, they are regularly cited by conservative males to justify gender inequality as divinely ordained.<sup>18</sup>

The “civilising” mission of Christianity had profoundly transforming effects on gender relations. Aside from their very positive impacts, including stamping out brutal practices such as widow-strangling and various forms of mutilation, and bringing literacy and education to women, the teachings of Christian missions had the general effect of domesticating women. Cooking, domestic cleaning, child care and responsibility for family/household well-being were made women’s exclusive remit as the missions remade women as primarily wives and mothers. Many of the missions trained women to work as domestics in European households.

In Polynesia, the influence of Christian missions resulted in elevating women’s status as wives, correspondingly diminishing their customary higher standing as sisters.<sup>19</sup> In matrilineal cultures in Melanesia, women lost powers that they had had in their ancestral culture.<sup>20</sup> Through its imposition of the norms of monogamous marriage and the “patriarchal family”, its valorisation of “legitimacy”, and its teachings on sexual morality, Christianity is said to

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17 Ann Chowning *An Introduction to the Peoples and Cultures of Melanesia* (2nd ed, Cummings Publishing Company, Sydney, 1977) at 85.

18 Roslyn Tor and Anthea Toka *Gender Kastom and Domestic Violence Report: Research on the Historical Trend, Extent and Impact of Domestic Violence in Vanuatu* (with support from the Vanuatu Government and CUSO, Port Vila, Vanuatu, 2004).

19 Penelope Schoeffel “The Origins and Development of Women’s Associations in Western Samoa 1830-1977” (1977) III *Journal of Pacific Studies* 1. ‘Atu ‘o Hakaatapu Emberson-Bain *Women in Tonga* (Country Briefing Paper, Asian Development Bank, Office of Pacific Operations & Social Development Division of the Office of Environment and Social Development, Manila, 1998). By contrast, Filihia (above n 14 at 386) attributes women’s loss of standing as wives to mythology – by being brought from Puluotu to Maama (this world) by Maui to be the wives of Kohai, Koau and Momo (the first three men “who sprang from the worm and were the first Tu’i Tonga rulers”), the women “demonstrated a submissiveness to their husbands”, although they still pass on their rank to their children.

20 Margaret Jolly citing the view of Grace Mera Molisa: M Jolly “Beyond the Horizon? Nationalism, Feminisms, and Globalisation in the Pacific” (2005) 52(1) *Ethnohistory* 137 at 158.

have brought to an end the sexual freedom previously enjoyed by unmarried, separated and widowed women of the non-chiefly class in Polynesian cultures.<sup>21</sup> Christian norms in regard to gender, sexuality and reproduction deprived women of much of their earlier freedom and autonomy in relation to these matters.

In other ways, Christianity negatively affected women's status. The introduction of surnames (the name of a father or husband) and "Christian" names, for instance, is said to have deprived ni-Vanuatu women of the multiple identities and names they earlier attained through cultural grading ceremonies that gave them "traditional rights to rank, authority and autonomy".<sup>22</sup> By forcing men and their wives and children to live together in Melanesia, missionaries not only changed customary residential arrangements under which men occupied "men's houses" and lived separately from their wives and children.<sup>23</sup> They may also have inadvertently created the conditions under which domestic violence was able to flourish, giving rise to the impression that it was "customary" for men to beat their wives.<sup>24</sup>

On the positive side, Christianity is credited with according women recognition as *ariki* (chiefs) and as landowners in the Cook Islands.<sup>25</sup> This had a further beneficial effect especially for women in Rarotonga when, following annexation of the Cook Islands by New Zealand, a Land Court was established to regulate land tenure, and practices which were not typical in custom such as female inheritance and matrilineal inheritance were accepted as a norm, laying the basis for equal inheritance rights.<sup>26</sup> Women in Rarotonga subsequently played a major role in the Land Court's development and interpretation of what is custom, by undertaking "methodical research" into kinship connections and "attend[ing] Land Court sessions to assert and defend their land interests".<sup>27</sup>

More recent analyses of women's experience with early Christian missions in Aneityum suggest that ni-Vanuatu women were not passive receivers of "The Word" but "creative appropriators of Christianity", exercising agency by seeking out what the missions had to offer and attending schools and services

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21 Emberson-Bain, above n 19, at 66.

22 Tor and Toka, above n 18, at 37.

23 Zorn, above n 7, at 13.

24 Ibid.

25 Commissioned paper on Customary Law in the Cook Islands.

26 Ibid.

27 Imrana P Jalal *Law for Pacific Women: A Legal Rights Handbook* (Fiji Women's Rights Movement, Suva, Fiji, 1998) at 67.

“in the face of violent opposition from their husbands”.<sup>28</sup> More recently, some of the churches have produced passionate advocates for women’s equality, and their theological writings reflect strong association with the women’s movement.<sup>29</sup> Women remain absent from authority positions in most churches today, however, and their continuing confinement to subordinate or auxiliary roles reflects Christianity’s gendered legacy.

In contrast to Christianity which is widely venerated in the Pacific and accepted as an intrinsic part of Pacific Island peoples’ cultural identity, colonialism is equated with foreign domination and exploitation.<sup>30</sup> Yet, generally speaking, men increased their power and status vis-à-vis women under colonialism. Through both wage labour and cash-cropping, men became income-earners and benefited from new technology, while women were left with the burden of subsistence food production, in addition to domestic and family responsibilities, neither of which were remunerated or held much social esteem. For their own political ends, colonial administrations modified and institutionalised chiefly systems, where they existed, and created them where there were none.<sup>31</sup> The very idea of chiefs in Vanuatu is considered to be a colonial creation, and one which has had significant implications for gender relations since chieftdom was given status as a male preserve.<sup>32</sup>

Among other things, colonialism impacted on gender relations in property. A land registration system introduced by the British in the Gilbert Islands (Kiribati) altered customary landholding by vesting individual title in the most senior male in the kin group (*unimane*), thereby locking in patrilineal inheritance.<sup>33</sup> While the traditional system was apparently not without gender

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28 Bronwyn Douglas (above n 2, at 3) argues that ni-Vanuatu women welcomed instruction in the domestic arts from missionary wives, not least for the “pleasure in sociability with other females beyond the immediate family” and were thus “active participants, for their own reasons, in the missionary project”.

29 Keiti Ann Kanongata’a “Pacific Women and Theology” (1995) 13 *Pacific Journal of Theology* 17.

30 In Fiji, at least among indigenous Fijians, colonialism tends to be viewed more benevolently because of both the Deed of Cession (understood to have been an agreement between Fijian chiefs and Britain), and the “protectionist” policy followed by the colonial government in relation to Fijian land and way of life.

31 According to Forsyth, “chiefs” in Vanuatu were a Presbyterian Church creation, adopted and modified by the Condominium government to “establish individuals throughout the archipelago who could represent and act for their communities in dealings with outsiders” (cited in Commissioned Paper on Vanuatu). Despite being an “introduced phenomenon”, Forsyth says, the chiefly structure today has become “so far entrenched in *kastom* as to have become its very cornerstone” (Miranda Forsyth “Beyond Case Law: *Kastom* and Courts in Vanuatu” 2004 35 *VUWLR* 427 at 430).

32 Interview with Lissant Bolton, above n 8.

33 Emberson-Bain, above n 19 at 27.

discriminatory features, codification removed the flexibility that once existed in customary land transfer practices, including the practice of gifting land in special circumstances.<sup>34</sup> The system of individual title has reportedly so fragmented holdings that today many are too small even for subsistence production. Boundary disputes are common and land litigation by disinherited sisters or girl cousins frequent.<sup>35</sup> In other places too, land ownership was individualised and patrilineal succession to land institutionalised.<sup>36</sup> The combination of mission and colonial experience in the Cook Islands appears to stand alone for having enabled women to benefit from codification of land customs and a Land Court.<sup>37</sup>

#### IV. DISCOURSES ON GENDER, CUSTOM AND HUMAN RIGHTS IN THE PACIFIC

Post-independence discourses on gender, custom and human rights in the region have tended to reflect two divergent views – on the one hand, a view of custom as male-determined and as wielded by men in positions of authority to keep women in subordination; on the other hand, a view of custom as authoritative and of women’s rights advocates as alienated from their own societies and corrupted by Western thinking and values. An associated argument in the second perspective is that in certain Pacific cultures there is no discrimination against women.

The writings of the late Grace Mera Molisa, a widely respected women’s leader and poet, from Vanuatu, best illustrate the first position. Mera Molisa’s celebrated poem “Custom” sharply censures those who “inadvertently” misappropriate, misapply, bastardise, murder and conveniently recall “custom” to “intimidate women, the timid, the ignorant, the weak”.<sup>38</sup> It is important to note, as Jolly does, that Mera Molisa was not critical of *kastom* per se – as chair of the Vanuatu Cultural Centre board she had been “vigorous in her support of indigenous values and arts” and had reportedly worked closely with the head

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34 Ibid, at 46.

35 Ibid.

36 For example, Ponape, as indicated in the Commissioned Paper on the Federated States of Micronesia.

37 Jalal, above n 27, at 67.

38 Grace Mera Molisa “Custom”, in *Blackstone* (Mana, Suva, 1983).

of the *Malvatumauri* at the time, Chief Willie Bongmatur of Ambrym.<sup>39</sup> She was, rather, critical of how custom is employed by those with power in the modern state of Vanuatu, against those who are powerless.<sup>40</sup>

The second position, an excusatory or justificatory argument in favour of the status quo, is often verbally expressed in meetings, or via the public media, usually by conservative males opposed to the very idea of women seeking equality with men, or in reaction to a particular action or statement from women.<sup>41</sup> Statements made by some Pacific leaders at the 1991 South Pacific Forum while discussing the Report of a Seminar on the *Convention of the Elimination of All Forms of Discrimination against Women* (CEDAW) held in Rarotonga in May 1991 illustrate this perspective. The leaders alluded to the imposition of Western values, asserted biblical teachings on the position of women, and contended that there was no discrimination against women in their countries.<sup>42</sup>

Conservative viewpoints are also shared by women – Adi Finau Tabakauoro of Fiji reportedly walked out of the Rarotonga Seminar in protest at the imposition of [foreign] values “by Western participants”.<sup>43</sup> Commenting on this conservative perspective in the 1991 Seminar, Mera Molisa suggested that it mostly emanated from women of rank who enjoy higher status by virtue of their rank, while ordinary women in those societies suffered discrimination.<sup>44</sup> Like the argument that democracy is a “foreign flower”<sup>45</sup> the argument that

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39 Jolly, above n 20, at 147.

40 A later collection of Mera Molisa’s poems titled *Colonised People* is dedicated to the women of Vanuatu whom Mera Molisa saw as still colonised in independent Vanuatu as they are not free, or independent, or self-determining, and do not enjoy “the fruits of the struggle”. The poem’s message, “that independence had failed to address the oppressive situation of women” underlined Mera Molisa’s role as “community conscience and mouthpiece” (Selina Tusitala Marsh “Ancient Banyans, Flying Foxes and White Ginger: The Poetry of Pacific Island Women” in Alison Jones et al, eds, *Bittersweet: Indigenous Women in the Pacific* University of Otago Press, Dunedin, 2000, 137 at 155). See Jolly (above n 20) for further analysis of Mera Molisa’s work.

41 Another example is Government Minister Barak Sope’s statement reported by *Vanua’aku Viewpoints* on 21 November 1997 that “according to the custom of his home island ... men could not be criticised by women”. The statement was made in response to strong criticisms of his activities by Vanuatu’s (female) Ombudsman (Bronwyn Douglas, above n 2, at 7).

42 Grace Molisa Mera *Colonised People: Poems* (Blackstone, Port Vila, 1987); Zorn, above n 7, at 6.

43 Zorn, *ibid.*

44 Jolly, above n 20, at 150.

45 The “foreign flower debate”, triggered by a letter to the *Fiji Times* from Adi Finau Tabakauoro in defence of the first military coup in Fiji on 14 May 1987, is discussed in Stephanie Lawson *Tradition versus Democracy in the South Pacific: Fiji, Tonga and Western Samoa* (Cambridge University Press, Cambridge and New York, 1996).

women's equality is a Western notion is selective in its renunciation of Western influence. Rarely, if ever, is Christianity, for instance, challenged for its Western origins.

The argument that men and women in Pacific Island societies have been "equal but different" and played complementary roles appears to be enjoying a revival, especially among women scholars working on Vanuatu.<sup>46</sup> It is also claimed that complementarity of gender roles in Samoa allows women to assert influence within family decision-making processes, including in the bestowment of titles and the resolution of conflicts.<sup>47</sup> Insofar as they are closely linked to struggles for gender equality such perspectives are strategically valuable, not least in providing a way of engaging with, interrogating, and remaking custom "from the inside". But romanticisation of pre-European Pacific societies poses a significant challenge to critical analysis. Merylyn Tahī, Coordinator of the Vanuatu Women's Centre which works on violence against women, makes a clarifying distinction between women having standing and respect in custom, and women having rights under the constitution.<sup>48</sup> Bolton records that Vanuatu women's organisations had by the 1990s moved away from a commitment to *kastom*, developing a discourse on rights instead.<sup>49</sup>

Pacific women who write or speak out on custom and culture appear to be comfortable with the idea of culture and custom adapting to incorporate and reflect human rights norms. In some respects it appears to be mostly males who express a static or fixed view of custom and resistance to the concept and language of rights (with the exception of indigenous rights, to which conservative Fijian men fully subscribe), and women who mostly agitate for custom, and the thinking of men who interpret and mediate custom, to change.<sup>50</sup> The words of Bougainville women's leader, Helen Hakena, who called on custom leaders in 2005 to bring their thinking and practice into line with the values of both their matrilineal society and human rights norms, is illustrative:<sup>51</sup>

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46 Zorn (above n 7); Douglas (above n 2); Bolton in Makin (above n 8).

47 Commissioned paper on Samoa.

48 According to Tahī, "some people say women always had rights in custom, e.g. chiefly women had recognition and were *respected*". But she said she was talking about "*rights* under the constitution. Women are controlled in custom in relation to who they marry, and in respect of their reproductive rights or rights over their children. And men argue that they have the right to control women. So there are no real rights enjoyed by women" (28 Feb 2006; Pers comm).

49 Lissant Bolton *Unfolding the Moon: Enacting Women's Kastom in Vanuatu* (University of Hawaii Press, Honolulu, 2003).

50 See contributions by participants at the first Pacific Women's Conference in Vanessa Griffen *Women Speak Out! A Report of the Pacific Women's Conference. October 27 – November 2, 1975* (1975) New Zealand Electronic Text Centre <[www.nzetc.org/tm/scholarly/name-140009.html](http://www.nzetc.org/tm/scholarly/name-140009.html)>.

51 See femLINKpacific: Media Initiatives for Women, bulletin, 9 September 2005.

The culture here still looks down on women even when it's a matrilineal society. We are still struggling to be heard and accepted or included in decision-making processes. We urge the chiefs and men to attend workshops on human rights or other courses facilitated by churches as well as to familiarise themselves with international conventions like CEDAW which PNG has ratified. Bougainville is still an integral part of PNG, so CEDAW also applies to the ABG [Autonomous Bougainville Government].

Despite several Pacific Island leaders arguing in 1991 that gender equality was “antithetical to customs, traditions and religious beliefs of their countries” or that it already existed,<sup>52</sup> by 2005 all but four Pacific Island Forum states (Kiribati, Nauru, Solomon Islands and Tonga) had become signatories to, or had ratified, CEDAW.<sup>53</sup> Nevertheless, at the level of the community, tensions between custom and women’s human rights remain and are given expression from time to time in the pronouncements of chiefs or in the judgments of village or custom courts.

Custom courts have come in for a lot of criticism from women scholars and activists. Jalal has argued that families fare better under the formal legal system than under customary law, largely because custom court decisions are “usually negotiated by [male] village elders and chiefs” who “share and shape community cultural and social beliefs about the place of women in the community”.<sup>54</sup> However, she also states that even in a family law case in the formal courts “the woman is ... more likely to lose”.<sup>55</sup> And, where the formal legal system takes account of customary law, as they are instructed to do by several Pacific Island constitutions, rulings in favour of custom and against the rights and interests of women do often ensue.<sup>56</sup> According to Jalal, because customary laws are usually not written down and expert witnesses

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52 Zorn, above n 7.

53 Report on behalf of the Pacific Islands Forum Group to the 50th session of the CSW, 1 March 2006 by HE Mr Robert G Aisi, Permanent Rep of PNG to the UN.

54 Imrana P Jalal “Ethnic and Cultural Issues in Determining Family Disputes in Pacific Island Courts” (paper presented at the 17th LAWASIA Biennial Conference, Triennial New Zealand Law Conference, Christchurch, 4-8 October 2001) at 4. Kenneth Brown and Jennifer Corrin Care (“Putting Asunder: Divorce and Financial Relief in Solomon Islands” 1995 5(1) OUCJLJ 85) make the points that dispute resolution fora in the Solomon Islands are “constituted by chiefs who are invariably male”, that women “often have no right to speak during the process except through a male representative”, and that the Local Courts have been “manned almost exclusively by male justices”.

55 Ibid.

56 HA Amankwah (“Human Rights, Customary Law and Traditional Practices in Melanesia: A Legal Paradigm of Peaceful Co-existence or Conflict?”, School of Law, James Cook University, n.d.) cites two cases (*O’Sonis v Truk* in FSM in 1988 and *Minister for Provincial Government v Guadalcanal Provincial Assembly in the Solomon Islands High Court* in 1977) where the formal courts ruled against women by finding, respectively, that only males could be the head of the family and only males could be “traditional chiefs”.

called to testify to a specific custom of a particular community are “almost never” women, what is usually applied is customary law “as perceived by [male] village elders and chiefs”.<sup>57</sup>

In her Epilogue to a collection of papers on restorative justice in the Pacific Islands, Jolly records that “many Pacific women” had “highlighted the deficiencies of *both* the criminal justice system and of village courts ... in dealing with those cases which most graphically embody conflicts between men and women – rape and domestic violence”. She referred to “disturbing recent evidence from across the region” of the failures of *both* systems to deal with such conflicts “in a way which delivers both peace and justice”, citing a study of domestic violence in Port Vila by Merrin Mason, based on cases brought to the Vanuatu Women’s Centre, and a paper by Sarah Garap on how village courts handled cases involving wrongs against women in the Simbu Province of Papua New Guinea.<sup>58</sup>

Based on research on cases handled by three village courts in the National Capital District (NCD), Goddard sought to overturn the idea that village courts in Papua New Guinea were treating women less than fairly. He argued that village courts were an important recourse for women “with limited avenues for seeking justice and recompense” and that women were using them to good

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57 Ibid.

58 Merrin Mason “Domestic Violence in Vanuata” in S Dinnen and A Ley (eds) *Reflections on Violence in Melanesia* (Hawkins Press/Asia Pacific Press, Annandale, NSW, Australia, 2000); Sarah Garap “Kup Women for Peace: Women Taking Action to Build Peace and Influence Community Decision-Making” *State Society and Governance in Melanesia Discussion Paper 2004/4* (Research School of Pacific and Asian Studies, Australian National University, Canberra, 2004). Based on Mason’s study, Jolly said the justice system and the police in Vanuatu were failing to properly deal with wife battery as a criminal matter, while custom chiefs were likewise stressing “reconciliation and the harmony of the community at the expense of the wronged woman”. Jolly cites Garap reporting that village courts were intimidating to women, disciplined women and not men in adultery cases, blamed the victim in sexual violence and rape cases, and compensated the male relatives of rape victims rather than the woman (M Jolly “Epilogue – some thoughts on restorative justice and gender” in S Dinnen, A Jowitt and T Newton Cain, eds, *A Kind of Mending: Restorative Justice in the Pacific Islands*, Pandanus Books, RSPAS, ANU, Canberra, 2003, 265 at 272).

effect.<sup>59</sup> Goddard's monitoring and gender analysis of 271 cases before the three NCD village courts confirm statistically that women use village courts, perhaps more often than men (more cases in his sample were brought by women), and have been "reasonably successful disputants" in village courts. However, while some of the cases in his sample concerned intra-family or marital problems which may or may not have included domestic violence, none of them appeared to relate to sexual abuse or rape, or to concern other offences (e.g. adultery) for which village courts have gained notoriety for discriminatorily penalising or shaming women.<sup>60</sup> His research does not, however, invalidate the analyses of other (mainly women) researchers and activists whose highlighting of "worst practice" cases of gender discrimination put village courts on notice.

Most of the critics of custom courts are not opposed to custom per se, or to the existence of custom courts. Respect for traditions and customary ways of Pacific Island people is expressly stated by several contributors to the debates on gender, custom and human rights. At the same time, the idea of custom as absolute, or eternally fixed and unchanging, is rejected. The promotion of customs and a justice system which encourage mutual respect between men and women is a bottom line. Zorn's suggestion (in respect of wife-beating) that it needs to be asked whether a practice is "so integral to the custom of a society that it has to be retained" is a useful one, and her judgment that where a practice like wife-beating is considered to be part of traditional culture "it may be necessary to criticise tradition in order to change contemporary behaviour", appropriate.<sup>61</sup> In the 21st century, zero tolerance of violence against women must also be a bottom line.

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59 Goddard usefully summarises research and analysis on the subject since 1979, including a 1990 Judges Report on the judicial system in PNG, and newspaper stories on incidents of unfair jailings of women by village courts between 1989 and 1991, for failing to pay fines. He also offers an alternative explanation for the pattern of harsh imprisonment of women by village courts, by drawing attention to both the poor literacy of magistrates and the *Tokpisin* version of the *Village Court Handbook* which includes an unclear note on the optional jail term for non-payment of fines (Michael Goddard "Women in Papua New Guinea's Village Courts" *State, Society and Governance in Melanesia Discussion Paper* 2004/3, Research School of Pacific and Asian Studies, The Australian National University, Canberra, 2004). His argument that the fault lay with village court magistrates' "rigid application of the law" rather than of custom might have been strengthened had he shown evidence of men being similarly subjected to harsh treatment.

60 Twenty-nine of the 50 cases brought against men in one of the courts were for drunkenness, excessive noise and obscene language.

61 Zorn, above n 7, at 293-294.

Jalal's counter-posing of customary law as based on "two apparent principles – the good of the community takes priority over the rights of the individual, and decisions are made through negotiation and consensus"<sup>62</sup> and the formal legal system as one which "emphasises the rights of individuals, makes decisions on the basis of argument and confrontation wherein "the best argument wins", applies the doctrine of precedent, and allows appeal against a judgement to a higher court"<sup>63</sup> is not helpful for the purposes of the present project. The assumptions made about each system also warrant unpacking. The "good of the community" argument raises questions about "who decides", and "by what criteria". Customary processes of negotiation and consensus in reality often prevent "free and frank discussion where the contribution of each participant enjoys equal weight",<sup>64</sup> raising related questions about who are involved in such consultations, and whether decisions are made after thorough consideration of the issues and interests involved. The suggestion that the "best argument" wins in the formal legal system downplays the principles of law on which arguments and judgments rest, as well as the proactive, "law-making" role of the courts, having regard to international conventions, as well as to considerations of justice.

Jalal's example of Cook Island women using Land Courts to their advantage by doing thorough research, attending its sessions, and effectively asserting and defending their land interests may be a case of the best argument winning. But she also counts among the factors that contributed to their success the court's receptiveness, which she considered an "indicator of the wider social change in men's and women's roles that had occurred in the community".<sup>65</sup> This highlights the important role of broader social processes in the creation, acceptance and institutionalisation of new norms. It also perhaps resonates with what Sailau Su'aali'i-Sauni (this volume) has said of ambiguities (or what we might consider flexibilities) in custom. I am encouraged by the Privy Council's landmark decision on 11 August 2006, in approving a proposal from Tonga's Minister of Lands, Survey, Natural Resources and Environment, to "explore possible avenues for amendments to the country's land laws to allow women, in cases where there is no direct male heir, to inherit registered allotments". The intention of the proposed amendment is to allow a daughter to inherit her father's allotment where there is no brother as direct heir, and to pass on her rights to her first male descendant.<sup>66</sup>

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62 Zorn cited in Jalal, above n 54, at 4.

63 Ibid.

64 Lawson, above n 45, at 166.

65 Jalal, above n 27, at 67.

66 See <http://lyris.spc.int/read/messages?id=49330> (Accessed 7 November 2011)

An innovative project by the Vanuatu Cultural Centre which is encouraging women to provide “new perspectives on their custom”<sup>67</sup> provides an inspirational model for “unfixing” culture and building new social agreements on bottom-line societal values. A bottom-up project which engages the Centre’s volunteer women fieldworkers annually in a workshop to discuss various *kastom* research topics, the project entails the recovery or reclamation of *kastom* as well as a conscious effort to insert women into what has until recently been a male-dominated discourse on *kastom*. The project offers a unique opportunity for women to rehabilitate *kastom* in a gender-just way. Yet the process is not without tension and struggle. Anthropologist Lissant Bolton, who assists with the workshop each year, explains that separate workshops for women are important “because if you were doing it with men and women there would for certain be a constant tension from certain men about women getting above themselves”.<sup>68</sup> The fieldworkers work each year in their own communities promoting new *kastom* ideas and practices and are already having significant impact. Many of them are being recognised for their leadership and given roles as assistants to chiefs, although “some places are more amenable” to allowing space for women’s leadership than others.<sup>69</sup>

## V. SOME EXAMPLES OF TENSIONS BETWEEN GENDER AND CUSTOM

Despite these encouraging changes, many tensions remain and although I do not wish to end on a negative note, I do want to share some examples in order to illustrate some of the very real problems which women have been experiencing with custom.

### A. Political representation and leadership

Customary restrictions on women’s participation and representation in “traditional” decision-making councils appear to be widespread across the region. Resistance to women’s representation in national parliaments is also widespread and custom has often been invoked to deny women political equality, as the following examples indicate.

In Vanuatu’s first national elections, a council of chiefs in Northern Efate tried to bar women from standing for election on the grounds that it infringed *kastom*. In 1997, a government minister (who subsequently became Prime Minister) demanded the repeal of the Ombudsman Act, saying it contradicted “traditional practices in Vanuatu” by allowing its female incumbent to criticise male leaders. He said on his island “men could not be criticised by women”.

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67 Interview with Lissant Bolton in Makin, above n 8.

68 Ibid.

69 Ibid.

More recently Vanuatu's Council of Chiefs, the Malvatumauri, expressed the view that the election of women chiefs in the north of Vanuatu was a "distortion of custom". A former Head of State was also quoted in 2004 saying that according to Vanuatu custom women were not to enter into politics or decision-making bodies. Citing the Bible, he suggested that these places of leadership were divinely ordained only for men.<sup>70</sup>

In Papua New Guinea male domination of political parties and bullying of female members of parliament discourage women from seeking electoral office. In recent national elections, male supporters of sitting male members of parliament in at least one province effectively hijacked polling booths, disenfranchising voters and intimidating women voters in particular. Women candidates interviewed for a documentary film on those elections spoke of being threatened with harm to their families if they did not withdraw from the contest.

The Solomon Islands' Provincial Government Act of 1996 was found by both the High Court and an Appeal Court to discriminate against women by reserving 50 per cent of the seats for the appointees of chiefs and elders (since only males can be "traditional chiefs") *but not to be in conflict with the Constitution*, which sanctioned "traditional chiefs" playing a role in government at the provincial level.<sup>71</sup>

In the Marshall Islands, a matrilineal society, a bill tabled in the parliament, the Nitijela, in 2006 proposed to ban women from holding chiefly titles, and their associated rights to land.<sup>72</sup>

### *B. Violence against women*

While violence against women may not be a cultural norm in Pacific Island societies, custom may be blamed for tolerating it.<sup>73</sup> Moreover, sanctions against wife-beating that reportedly existed in the past have mostly been abandoned.

In Samoa, although domestic violence offenders are reportedly punished by the Village Fono, this only tends to happen in cases where the violence is considered extreme. More worrying is the reported practice by Village Fonos of preventing police from interfering in domestic violence cases "unless there [is] a strong complaint from the victim, which village customs strongly discouraged".<sup>74</sup>

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70 *Vanuatu Daily Post* article, 23 April 2004, cited in Tor and Toka, above n 18.

71 Commissioned paper on Solomon Islands.

72 *Pacific Beat*, 9 February 2006.

73 US Department of State Country Reports on Human Rights Practices 2004 – Samoa.

74 *Ibid.*

In Vanuatu, a draft Family Protection Bill, which has been in the pipeline since 1998, is likely to be supported only if the traditional roles and responsibilities of chiefs in *Kastom Kots* are recognised in the bill and its implementation.<sup>75</sup>

In Tonga, although violence against women is on the increase (450 complaints were recorded in 1996), the issue is shrouded in silence because of shame, and cases involving nobles or others of high social rank escape police investigation and prosecution.<sup>76</sup>

West Papuan women's rights' groups reportedly see custom law as providing little protection for women victims of domestic violence, and customary processes involving compensation payments between families as unsuited to dealing with situations of violence within the family.

In Bougainville, in 2005, custom chiefs imposed a ban on women wearing shorts, supposedly to "help reduce rape and sexual violence", and began fining those who breached the ban \$50 or sentencing them to community work. By imposing a dress code and making it a punishable offence for women to wear shorts, the decision not only infringed women's right to freedom of dress, it implicitly excused male sexual offenders by holding women responsible for their criminal actions.

The Committee on Economic, Social and Cultural Rights (CESCR) of the United Nations raised concern in its response to Solomon Islands' 2001 report about women's inferior status and subjection to patriarchy despite the tradition of matrilineality, and the prevalence of gender-based domestic violence which is not always addressed by competent authorities.

### *C. Marriage and divorce*

In custom courts in both Solomon Islands and Vanuatu, adultery is an offence for both men and women, but in practice only women tend to be fined and made to present mats and other valuables to chiefs.<sup>77</sup>

Irrespective of how it was practised and what it meant traditionally, the institution of "bride price" as it has come to be practised in modern times has severely negative consequences for women. The very term "bride price", conferred by outsiders, has encouraged the commodification of women and the exercise of absolute proprietorship by husbands over wives. Escalation

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75 Commissioned paper on Vanuatu.

76 Emberson-Bain, above n 19, at 41; although this number had apparently dropped to 113 reported cases in 2000, it had risen to 404 in 2009. The 2000-2009 figures were revealed by the Tongan Police Commander in May 2010 – see <http://www.rnzi.com/pages/news.php?op=read&id=53609>.

77 Ibid.

in the amount of wealth expected (or demanded) by the bride's family makes it extremely difficult if not impossible for women to escape from a violent marriage. And, as arranged marriages are most often the result of family to family consultations and agreements, the rights of women and girls as individuals are subordinated to the wishes of the group – the bride has “little or no say on the person she marries”, and is under enormous pressure to comply with the family's wishes and decision.<sup>78</sup>

The practice of giving a woman as part of compensation payments to settle an inter-tribal dispute involving the death of a tribesman was found by the Papua New Guinea Supreme Court in 1997 to be a “bad custom” and not what the framers of the constitution of modern day Papua New Guinea had in mind in maintaining and promoting good traditional customs.<sup>79</sup>

Over the last 10 years, the Supreme Court in PNG has ruled against a number of Village Court decisions that were found to violate women's rights. The custom of murdering or mutilating an adulteress was ruled contrary to the general principles of humanity by the PNG Supreme Court in 1985; the imprisonment of a woman by a Village Court in 1991 for failing to pay a fine for adultery was found to infringe Section 55 of the Constitution relating to equality and denigrate “the woman's humanness”; customary prohibitions on widows consorting with other men were ruled “discriminatory” and “not in keeping with the dignity of mankind” by the Supreme Court in 1993; and the custom of allowing a man to live with a woman without paying bride price, to assess whether she would make a good housewife and was fertile, was ruled “repugnant to the general principles of humanity” in 1994.<sup>80</sup>

#### *D. Inheritance and custody*

Because custody rights are often closely tied to inheritance rights, Tuvalu women are doubly disadvantaged under gender-discriminatory customary land tenure arrangements – being deprived of land rights and consequentially of the right of custody, ironically in what might be claimed as the “best interests of the child”.

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78 Alice Aruheeta Pollard “Bride Price and Christianity” (paper presented at the Women, Christians, Citizens: Being Female in Melanesia Today Workshop, 11-13 November 1998, Australian National University, Canberra <[http://rspas.anu.edu.au/papers/melanesia/conference\\_papers/1998/participants.htm](http://rspas.anu.edu.au/papers/melanesia/conference_papers/1998/participants.htm)>). Anne Marie Tupuola “Learning Sexuality: Young Samoan Women” in A Jones, P Herda and TM Suaalii (eds) *Bittersweet: Indigenous Women in the Pacific* (University of Otago Press, Dunedin).

79 Injia J in Re Willangal (1997) PNGNC, cited in Commissioned Paper on PNG.

80 Commissioned paper on PNG.

When men die intestate in Kiribati, gender-discriminatory provisions in the Land Code favour the eldest male, or all males, before the eldest daughter and all other females but the reported frequency with which such decisions are contested in courts by disinherited sisters and girl cousins suggests that such provisions in the law are neither accepted without question as custom, nor regarded as fair and just.<sup>81</sup>

Tonga's explicitly gender-discriminatory land laws may be amended. A landmark decision of the Privy Council on 11 August 2006 approved a proposal from Tonga's Minister of Lands, Survey, Natural Resources and Environment, to "explore possible avenues for amendments to the country's land laws to allow women, in cases where there is no direct male heir, to inherit registered allotments". The intention of the proposed amendment is to allow a daughter to inherit her father's allotment where there is no brother as direct heir, and to pass on her rights to her first male descendant.

In Melanesian marriages involving so-called bride price, children are considered to belong to the father's side once bride price is paid and even custody cases that come before the formal court tend to take this aspect of customary law into account and award custody to the father.<sup>82</sup>

### *E. Protection under the Law*

In the Federated States of Micronesia (FSM) it was reported that "cultural resistance to litigation and incarceration" had allowed serious cases of sexual and other assault (and even murder) to go untried, and that "suspects were routinely released indefinitely".<sup>83</sup>

In Kiribati, Tonga, Samoa and Fiji, customary practices of seeking and receiving forgiveness for a wrongdoing through symbolic presentations and the offer of a formal apology by the offender's family to the family of the victim are important mechanisms for restoring relationships within small communities. Its use in cases of criminal violation, especially rape and other forms of sexual abuse of women by men, is highly suspect however. It can result in pressure being put on the woman victim to drop criminal charges, or be taken into consideration by the court, resulting in a reduced sentence

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81 'Atu Emberson-Bain (*Women in Development – Kiribati*, Country Briefing Paper, Office of Pacific Operations and Social Development Division, Asian Development Bank, Manila, at 28) notes the high proportion of land litigation cases brought by disinherited sisters and girl cousins.

82 Jalal, above n 54, at 15.

83 US Department of State Country Report on Human Rights Practices 2005 – Federated States of Micronesia, cited in Commissioned paper on FSM, State Government <[www.state.gov/g/drl/rls/hrrpt/2004/41651.htm](http://www.state.gov/g/drl/rls/hrrpt/2004/41651.htm)>.

for the convicted offender, thereby denying the victim full protection under the law. In a similar way, holding informal community courts and imposing custom punishment can work to the offender's advantage and deprive victims of justice.

In situations of inter-tribal or inter-ethnic violence, customary ceremonies and dispute-resolution processes are particularly inappropriate for addressing crimes of sexual violence perpetrated against women during the conflict. Such ceremonies and processes are often concerned more with purging feelings of hatred and revenge, appeasing the spirits of war and of those killed, and promoting reconciliation through the sacrifice of pigs, participation in a feast, and ritual washing of weapons, than with delivering justice to female victims of rape.<sup>84</sup>

The practice, resorted to in some places, of requiring a rapist to marry his victim, supposedly to confer respectability on both parties and retrospectively "legitimise" the non-consensual sex, provides the worst example of gender injustice under custom law. Concern about one such reported case in Vanuatu was raised by the Convention on the Rights of the Child (CRC) Committee.

In rape trials involving indigenous offenders in Australia, specious arguments have been advanced by defence lawyers, and accepted by magistrates and judges, that rape does not constitute a serious offence under Aboriginal customary law and that a man had the right to enjoy sexual relations with a "promised wife" under the age of 16.<sup>85</sup> Such arguments have been strongly repudiated by Aboriginal women, including lawyers, who have criticised the court's leniency towards male offenders, and asserted that under custom Aboriginal women are treated with respect, crimes of sexual assault are treated with great severity, and that only since the introduction of sexism through colonisation have Aboriginal women come to be treated as inferior.<sup>86</sup>

## VI. CONCLUDING COMMENTS

The ratification of both the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women by a majority of Pacific Island States indicates official recognition of rights of both children and women, and obliges Pacific Island governments which have ratified these conventions to bring their laws and policies into conformity with these conventions. There is a high level of awareness in the

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84 Commissioned paper on West Papua.

85 Commissioned paper on Australia.

86 Larissa Behrendt "What Price a Bill of Rights?", Opinion piece *National Indigenous Times* (nd) <[www.nit.com.au/opinion/story.aspx?id=6383](http://www.nit.com.au/opinion/story.aspx?id=6383)>.

Pacific Island states of CEDAW and CRC and nongovernmental organisations in several countries have collaborated in compiling shadow reports to submit to the CEDAW Committee. While a rights-based framework might appear to be diametrically opposed to custom, I would argue that it is not necessarily opposed to the core values that lie at the base of custom. The challenge lies in identifying and strategically using these in the ongoing project of building more cohesive, caring societies, based on common values of humanism.