LAW FOR PACIFIC WOMEN

A LEGAL RIGHTS HANDBOOK

P. IMRANA JALAL

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Fiji Women's Rights Movement
Suva, Fiji

USP Library Cataloguing-in-publication data

Jalal, Patricia Imrana

Law for Pacific women: a legal rights handbook / P. Imrana Jalal. - Suva, Fiji : Fiji Women's Rights Movement, 1998.

xxi, 674 p. : ill. 25 cm.

Bibliography : p.

ISBN 982-9000-00-1

1. Women - Legal status, laws, etc. - Oceania 2. Women's rights - Oceania I. Fiji Women's Rights Movement II. Title

KCV145.W65J24 346.0134'0995

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Illustrations © Salote Malo

Printed by Watson Ferguson, Brisbane

First published in 1998 by
Fiji Women's Rights Movement,
GPO Box 14194, Suva, Fiji
Tel: + 679 313 156
Fax: + 679 313 466

This publication was jointly funded by British Aid through the Pacific Regional Human Rights Education Resource Team (RRRT) and The Asia Foundation.

Further information about this book, and about the RRRT, can be found on the World Wide Web at http: www.rrrt.org.fj

This is for Kalāni, Anga'aefonu, Paulini, Siffat, Zariah, Farah, Rana, Katylee and other little girls I am privileged to know through your wonderful mothers. May you grow up in a Pacific that is more enlightened! This is also for my dear friend Dr. Shireen Lateef, who sent me on a voyage from which there was no return; and for the intrepid members of the Fiji Women's Rights Movement.

ABOUT THE AUTHOR

Human rights activist, lawyer, researcher, feminist, wife, mother: these are the roles of Patricia Imrana Jalal, author of *Law for Pacific Women*. Imrana is a Fiji citizen, currently working as an educator in the Pacific Regional Human Rights Educational Resources Team, based in Suva, Fiji,and funded by British Aid. She holds both the LLB and LLM (Honours) from Auckland University, as well as an MA (Women's Studies) from Sydney University. She has specialised in women's rights and family law, and has over 12 years experience in court work as a barrister and solicitor, Public Legal Adviser and partner in the law firm of Jamnadas, Jalal and Associates in Fiji. Imrana is active in the Fiji Women's Rights Movement, and writes a weekly current affairs column for the *Fiji Times*. During 1992 and 1993, under Asia Foundation sponsorship, she visited Cook Islands, Kiribati, Nauru, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa to collect data regarding the legal situation of women and has subsequently worked as a human rights educator in these and other countries throughout the world. She is married to lawyer Dilip Jamnadas and has two children.

FOREWORD

The quest for gender equality is now widely accepted as an essential part of human development. It is based on the principles of equity and fairness: that neither male nor female ought to be denied achievement of their full potential by social and cultural norms that prescribe gender roles. From a practical point of view, no society can afford to underulitise its human resources in such a manner.

Crucial to this objective is the role of the law, which defines the rights of women but seldom assures them full and equal benefits with men. All the countries in this book have instruments of governance that make high-minded pledges about securing the rights of individuals (i.e. children, men and women). The reality, as this work demonstrates, is somewhat different. Whether it is the law relating to corroboration in rape cases or evidentiary rules in matrimonial disputes; or the entrenched and (often) discriminatory attitudes from the bench; or the application of customary law and practices or howsoever, they all serve to underscore the inferior status of women. A shared common law heritage and the largely patriarchal nature of Pacific societies have also played their part.

The value of this text lies in its perspective and its potential for empowering women. It proceeds from the premise that perfect knowledge casts out fear and liberates. Ms Jalal is open and proud of her biases: she is writing, as a woman, for those (whether they are teachers, students or paralegals) who are concerned to improve the legal rights of women. There is no pretence at impartiality, which is for judges and tribunals rather than a passionate advocate of the cause. In a wider sense this book is meant for the disadvantaged, oppressed and excluded women throughout the Pacific, and beyond, in the belief that this worthy initiative will aid their deliverance. There are also insights for those who consider gender equality the domain of trendy intellectuals. For example, the concept of women as property continues to survive in the reluctance of law enforcement authorities to combat domestic violence more actively. The excuse that it is a private matter is little more than a licence for men to beat their partners, underpinned by a tacit acceptance of their right to do so! The law is replete with many such assumptions and these are conscientiously documented and discussed.

While understanding legal rights and having access to the courts represent significant advances, often more needs to be done to change the basic structures of society. The author draws upon her own considerable experience as an activist and understanding of the theoretical basis for the

subordinate position of women. In this regard, it is important that women develop strategies that encompass the stalls of learning their rights, organising into groups and challenging the status quo. In order to embark on the exhilarating journey of self discovery, women have to be first made aware of their legal rights and alerted to those factors that are barriers to gender equality. Thus equipped, women are better able to form alliances with other women and interest groups to reform the law whether through parliament or the courts. International treaties such as the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW) provide added and welcome support in the struggle.

Women of the South Pacific will welcome this reference book, which is written in as simple a language as the subject will allow, and relates their own experiences in what will become a seminal work. It carefully discusses all aspects of the law as it affects the rights of women in both the criminal and civil jurisdictions. Therein lies its appeal, whether as a source for those analysing the relationship between women and the law; an aid to teaching and training, or as a handy reference for women seeking information about their legal rights. And should only one woman be empowered by this book, it will have fulfilled the promise it holds out, as well as the hopes of all those who seek the improvement of women's legal status as part of the continuing search for complete and meaningful gender equality.

Joni Madraiwiwi
Suva, October 1997

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ACKNOWLEDGEMENTS

People often ask me what drives me; what makes me do the things I do, in reference to women's rights anyway. I tell them that some people are driven by money, some by love and some by religion. My strength derives mainly from my anger; anger at the injustice that is caused to women in the Pacific, because they are women.

When I was a lawyer in the Attorney General's Office in the Government of Fiji (seconded as a legal aid lawyer to Social Welfare) I applied for a USA Fulbright scholarship. I won the scholarship and a place at the prestigious Stanford University, USA to read a Masters degree in Women's Studies, focusing on women, law and development. The idea was that I would then travel the Pacific Islands, collecting data for a handbook on Pacific women and the law. The Government of Fiji refused me leave with pay to take up the scholarship; I was told that women's issues were not a priority. The privilege of study leave had been extended to all my colleagues except one other person and myself, and I needed my salary, as the scholarship would not cover all the costs of studying at an Ivy League college. I knew with certainty then that this book was meant to be. I have watched with some satisfaction as the Government of Fiji has been forced by the women of Fiji and the aid agencies to alter its policies and take women's issues seriously. I believe vehemently in the old saying that the best revenge is to succeed.

It was only because of the commitment and passion for human rights of Julio (Andy) Andrews of the Asia Foundation (TAF) that I was able to take up studies at the University of Sydney after resigning from the Fiji Government in July 1991. A grant from TAF (and waitressing at an Indian restaurant in Oxford Street) enabled me to study for the rest of 1991. In 1992 I was fortunate to win two scholarships: the Georgina Sweet Fellowship from the Australian Federation of University Women-Queensland Fellowships Inc and the Audrey Jorss Fellowship from the Australian Federation of University Women (National). These generous scholarships enabled me to say goodbye to waiting tables and to take up my studies with a vengeance. I thank the Fiji Association of Women Graduates for putting its full weight behind my application for the Australian scholarships.

I shall be eternally grateful to the Asia Foundation, the Australian Federation of University Women - Queensland Fellowships Inc. and the Australian Federation of University Women (National) for their generosity and support for my studies in Australia. Upon my return to Fiji, the Asia Foundation funded my travels in the Pacific to collect the data for this book.

In addition, British Aid gave me a generous grant that enabled me to write it full time at home (with my two babies, born one year apart). Each organisation believed in me and in the cause that drives me. In this regard I would like to especially mention Kim Stanford-Smith of British Aid and Julio (Andy) Andrews of the Asia Foundation, remarkable men and outstanding human beings, whose passion for, and commitment to, the human rights of women have been constant sources of inspiration for me. I am privileged to know them.

My time in Australia studying the academic aspects of women's studies and feminism was influenced in part by Lynne Spender, who taught me so much of what I know about women and the law; I thank her for her insightful comments in regard to this book and for her influence in the shaping of my feminism. I am indebted to Avendra Singh and Sharlene Solomon, for providing me with a home and the support of family in Sydney. To the women lecturers and students of the Women's Studies Centre, University of Sydney, and to both Justice Mary Gaudron and Justice Elizabeth Evatt who gave me some of their valuable time: may you shape the destinies of future generations of Australian women.

I thank the following for their hard work in reading the first or second drafts of this book and for their frank and invaluable comments: Janice Sosefo (who died in 1997 at the age of 20); Adrienne O'Flaherty; Antoinette Sloan; Barbara Payne; Cema Bolabola ; Diane Goodwillie; Ratu Joni Madraiwiwi; Kim Stanford-Smith: Koila Costello; Nazhat Shameen; Nina Seru; Philip Ells; Praveen Sharma; Salote Kaimacuata; Salote Malo; Sharan Lateef; Suzanne Jarbazkowska; Suzette Corr; Vani Dulaki and Dr. Wadan Narsey. Many others read parts of the book and made important contributions. I thank them too.

The most difficult part of my research was the period spent collecting data by travelling from one Pacific Island country to another in 1992 and 1993, a period that included the entire duration of my first pregnancy. Listed below are those who helped generously by giving their time and assistance to provide me with legislation, judgments and interviews both inside and outside the countries mentioned, from 1992 to 1997.

Fiji (this list will never do justice to those who have assisted me over the years in my research and in the struggle for women's rights!): the present and former staff of the Fiji Women's Rights Movement and the Fiji Women's Crisis Centre, and my friends Annette Sachs Robertson; Asha Pillai Whiteside; Dr.'Atu Emberson-Bain; Graham Everett Leung; Florence Fenton; Jon Apted; Ratu Joni Madraiwiwi; Kalesi Tikoduadua; Leonard Chan: Lila Prakash; Lynda Miller; Dr. Shireen Lateef and Sufi Dean and Sam. In addition, I thank the Colonial War Memorial Consultant Obstetrician and Gynaecologist, Dr. Wame Baravilala, for checking affiliation data and providing survey data results, and Magistrate Eroni Sauvakacolo and the current Chief Registrar and former Resident Magistrate of the Domestic Court, Mr. Moti Rai, for sharing with me their valuable records and court experience.

Cook Islands: Inspector Piho Rua and the Cook Islands Police; Brett Gibson; Fred Goodwin; Jane Tauvera; Janet Maki; Jimmy Maiva; Kopu

Browne; Lyndsay Francis; Matilda Uhrle; Mike Mitchell; Nga Tea; Ngapoko Short; Nikau Tangaroa; Paul Lynch; Poppy Apera; Tai Nicholas; Takiora Ingram; Tamarua Teariki and Tirangi Bartlett.

Kiribati: AMAK; the former Chief Justice Faqir Mohammed; Chief Justice R. Lussick, Magistrate Bitiare; the then People's Lawyer Nanda Wijesekera; the current People's Lawyer David Lambourne; the Police Commissioner and his staff; the Social Welfare Office; Aroita Williams; Jenny Hardy; Kokiake Koae; Nanimatang Karoua; Pelise Boka; Rose Boya; Smith Kleis; Tekerei Russel and Tiantaake Beero.

Nauru: the then Chief Magistrate Helu Mocelutu; Mere Pulea and Pamela Scriven.

Solomon Islands: Chief Justice J. Muria; the former Chief Magistrate Kim Stanford-Smith; the Police Commissioner and his office staff; the Social Welfare Office and the Solomon Islands Develoment Trust; Afu Billy; Alice Pollard; Alice Puia; Andrew Radcliffe; Annie Homelo; Beata Jio; Doreen Sam; Esther Ferah; Evelyn Atu; Floyd Smith; Jennifer Corrin Care; Joses Tuhanuku; Mailin Bird Samuels; Mary Louise O'Callaghan and Timoci Kaimanu.

Tonga: The Assistant Police Commissioner Eleni 'Aho; Chief Inspector Lautoa Faletoa; the then Chief Justice Gordon Ward, Meg and Paddy Ward; Chief Police Magistrate Siausi Fifita; Alisi Taumoepeau; David Lea'amanu; 'Iunisi Fuka; Kololiana Naufahu; Lata Soakai; Linda Folaumoetui; Salamo Fulivai; Seini Vakasuiola; Siosaia Aleamotua; and Taniela Foletau.

Tuvalu: Attorney-General Feleti Teo; former People's Lawyers Alan Marsh, Graham Rounce, Paul Barber and Philip Ells; the Resident Magistrate, Funafuti, and Laagi Etoma; Meleta Fa'alo; Naama Latasi; Ruby Bruce; Saaga Malua; Saililo Enele; Tau Finikaso and Teuleala Manuella.

Vanuatu: the former Chief Justice Charles Vaudin D'Imecourt; Justice Vincent Lunabeck; the Public Solicitor's Office; the Vanuatu Women's Centre, and Delphine Rolenas; Elizabeth Mermer; Grace Molisa; Heather Lini Leo; Jon Baxter-Wright; John Malcolm; Joyce Wu; Merrin Mason; Merilyn Tahi; Merilyn Temakaon; Steven Bani and Susann Botham-Barlow.

Western Samoa: the Attorney-General's Library staff; Inspector Falaifa; the Maintenance Officer; Sergeant Annie Laumea and Superintendent Penitito Alaia; Aiga Poasa; Anne Lindsay; Feiseia Lei Sam; Fiame Naome Mataafa; Foisaga Etuate Shon; Galumalemana Nettina; Helen Aikman; Lalotoa Mulitalo; Levaula Kamu; Maiava Peteru; Maria Goretti Philips; Michelle Meredith; Noumea Simi; Peggy Fairbairn Dunlop; Peta Siulepa; Ruby Drake and Tualla T Lili.

This book would not have been possible without the dedication of the editorial team, who worked mostly outside normal hours, and under stressful conditions. I pay tribute to the commitment of the designer and production manager Roslyn Sharp, and of copy and structural editor Bess Flores, who in her own way had as much to do with the writing of this book as I did. I thank also Bess's husband Teheitauatetua Joseph Flores for the support he has given her in this project.

I am also indebted to the Pacific Regional Human Rights Educational Resources Team office staff for their support, especially to Kelera Elder, Jo Bryant and Vere Bakani; to Maria Sloan who spent hours producing my first awkward draft, Makalesi Cakacaka and Sandra Edge for wordprocessing and layout, Judith Titoko, Robyn McDowell, and Lusi Ravuvu for proofreading, Joan Yee and Helen Penridge for the index, Donita Simmons for the bibliography and Salote Malo for her wonderful graphics. In addition, Barbara Hau'ofa and Dr. Myriam Dornoy-Vurobaravu made editorial comments and University of the South Pacific Law School students Juliet Bhagwan, Ropate Green, Vandhana Lal and Ilsaad Razak gave up some of their scarce free time to check citations. The University of the South Pacific, largely through the Director of University Extension, the Coordinator of Continuing Education and the University Library, contributed both formally and informally to the production of the book.

I pay tribute also to some special men, who, each in his own way has supported me in getting this book completed: Andy Andrews; Ratu Joni Madraiwiwi; Kim Stanford-Smith; Rory Gibson; my father Saiyed Abdul Jalal; and my husband Dilip Jamnadas. They have shown me the heights to which men can soar. I thank also those special women, mother, sisters and friends: my mother Rosemary Jalal, and my sisters Joycelyn Nazhat, Carolyn Ariza and Fareen Riha, for their love, support and friendship through the years.

Finally, I pay tribute to the judges, magistrates and judicial officials who administer the law. Some may not agree with my comments and opinions, and to them, I say that I mean the court no disrespect. I accept that we are all products of human society, and we carry with us the baggage of thousands of years of socialisation. It will be a long and difficult task to unlearn that socialisation, but it needs to be done so that the human rights of women are given the respect they deserve. Courts and the legal system must play their part in bringing about substantive equality for women.

Imrana Jalal
Suva, Fiji

LIST OF ABBREVIATIONS

& =	and [in endnotes and tables]
AG	Attorney-General [in cases]
Anor	Another [in cases]
Art.	Article, law that is part of a constitution
C	the complainant [in stories]
Cap.	chapter of a law
Cook Is.	Cook Islands [in tables]
CR	the co-respondent [in stories]
D	the defendant or daughter [in stories
DPP	Director of Public Prosecutions [in cases]
ed/eds	editor/s, edited by
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
F	the father [in stories]
H	the husband [in stories]
ILO	International Labour Organisation
IPS	Institute of Pacific Studies
M	the mother [in stories]
Ors	Others [in cases]
PP	Public Prosecutor [in cases]
Pr	Press
R	Rex or Regina [in cases; the King or the Queen]
Rep	the Republic [in cases]
S	the son [in stories]
s. or ss.	section or sections of a chapter in a law
Sol. Is, Solomon Is	Solomon Islands
SPC	South Pacific Commission
TAF	The Asia Foundation
Univ	University
UK	United Kingdom
USA	United States of America
USP	The University of the South Pacific
v	versus, against [in cases]
W	the wife [in stories]
W. Samoa	Western Samoa [in tables]

Abbreviations of official law journal or report titles

AC	Appeal Cases, Law Reports UK
ALJ	Australian Law Journal
ALJR	Australian Law Journal Reports
ALR	Australian Law Reports
All ER	All England Law Reports, UK
Ch	Law Reports, Chancery Division, UK
CLR	Commonwealth Law Reports, Australia
Cr App R	Criminal Appeal Reports, UK
CRIM LR	Criminal Law Review, UK
DLR	Dominion Law Reports, Canada
EOC	Equal Opportunities Cases
ER	English Reports
Family LR	Family Law Reports, UK
Family LR NSW	Family Law Reports, New South Wales
FLC	Australian Family Law Cases
FLR	Fiji Law Reports
GILR	Gilbert Islands Law Reports
HKLR	Hong Kong Law Reports
KB	Kings Bench, Law Reports UK
Kiribati LR	Kiribati Law Reports
LRC	Law Reports of the Commonwealth
Nauru LR	Nauru Law Reports
NSWLR	New South Wales Law Reports
Qd R	Queensland Reports
SA	South Africa Law Reports
SASR	South Australian State Reports
SILR	Solomon Islands Law Reports
SPLR	South Pacific Law Reports
Sw & Tr	Swabey and Tristram's Probate and Divorce
TLR	Times Law Reports
Tonga LR	Tonga or Tongan Law Reports [title varies]
VanL R	Vanuatu Law Reports
WALR	Western Australia Law Reports
WLR	Weekly Law Reports
WSILR	Western Samoa Law Reports

INTRODUCTION

Do Pacific women need a book about Pacific women and the law? Is it true that the formal legal system barely touches the lives of most Pacific Island women and so they do not need to understand it?

For isolated people, the answer to the second question may be "Yes." However, in Solomon Islands, for example, rural women have access to Local Courts that have legal power to hear and rule on minor civil and criminal cases as well as on matters concerning custom, and may decide to fine or imprison offenders. Local Courts are therefore administering the legislated law as well as applying unwritten customary law.

When the formal legal system and custom law exist together, the two systems often conflict with each other. For example, the formal law states that when parents divorce and a court must decide with whom their children must live, the court should consider the best interests of the children, not the wishes of the parents. The unwritten custom law however might say that the children should always go to the father. In this case, custom directly conflicts with the formal legislation. Later in this book we will see how confusing such conflict can be, both for those who administer the law and for those at the receiving end. How the law is applied depends on who makes the decision.

The formal law can play a powerful role in ensuring that women continue to face discrimination. In many ways, it represents and symbolises the people who hold political power in any given community. Existing laws support social structures based on rule by men who belong to a particular class and race. By supporting these structures, the law makes it acceptable, even legal, to keep women socially and economically inferior.

It is important to challenge the formal legal system in order to understand the political interests that the law represents. As more and more Pacific women learn about the law, move to the urban centres and become more assertive, it will become less correct to say that the formal law has little relevance. On the contrary, the law can help women to improve their status by demanding their human rights.

What does this book aim to do?

This book is based on the conviction that human rights are for all humans equally, both men and women, without distinction. Over fifty years ago, the nations of the world agreed on human rights standards in the United Nations

Charter (1945). They followed this by the Universal Declaration of Human Rights (1948); the Universal Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, both in 1966. Discrimination against women continued, and in 1979 the United Nations agreed on the necessity for a special Convention on the Elimination of all forms of Discrimination against Women. By 1997, many nations had signed this Convention but we cannot say that women now have all the rights due to all members of the human race. This book emphasises that women's rights are human rights, and that to deny women's legal rights to equality is to deny that they are human beings. Its aims are set out below.

Immediate aims

- To provide information about existing laws from which women may benefit.
- To make the content and structures of the law more generally accessible, in non-legal language.
- To help begin the process of legal literacy for Pacific women.

Medium-term aims

- To help women gain a critical understanding of how the law operates, and how it combines with other political, legal, social, cultural and economic forces.
- To help women and men to gain a critical understanding of the limits and disadvantages of the law, so that they can mobilise to change the laws and the wider structures that disadvantage women.

Long term aim

- To help Pacific women gain their human rights.

Ultimate aim

- To help create a just society.

For whom is this book intended?

The book has been written chiefly for human and legal rights teachers, students and paralegals. We hope also that community workers and activists will use it as a source of information. We hope too that it will be useful to all women who want to look critically at the law, to understand how it can be an instrument of women's oppression, and to take some informed action. Finally we hope that it will be used by lawyers who are human rights activists

or are interested in human rights; by lawyers and judicial officials who are not familiar with family law or who see family law as just another branch of the law; and by government policy planners and legislators engaged in law reform.

What countries does this book cover?

Funds and time limited the project to the fully independent countries within the University of the South Pacific area; the book aims to present a detailed and comprehensive study of the laws affecting women in Fiji, with some analysis of how they affect women in the other countries listed below.

- Cook Islands (legally semi-autonomous)
- Kiribati
- Nauru
- Solomon Islands
- Tonga
- Tuvalu
- Vanuatu
- Western Samoa

We make only passing reference to Niue and Tokelau. Papua New Guinea was outside the geographical scope of the study, and is not covered at all; the chief reason is that women lawyers and activists of Papua New Guinea have themselves analysed their situation. Outsiders cannot hope to capture the freshness of their knowledge, the depth of their understanding, and their unique ability to study how their legal systems operate from day to day.

We give examples of cases from all countries within our area, and sometimes from other countries whose courts are based on the United Kingdom's legal system: the United Kingdom itself, Australia, Botswana, Canada, Hong Kong, Jamaica, Namibia, New Zealand, Zimbabwe and the United States of America. We do this for the following reasons and purposes.

- Under the doctrine of precedent, as we will explain more fully later, Pacific Island courts may apply principles established by cases from countries that have similar laws, or that have inherited a similar legal system from the United Kingdom, whose courts of law are very highly respected.
- Also under the doctrine of precedent, local courts are generally obliged to follow the principles laid down in a United Kingdom case, if the local courts themselves have no written judgments on a particular subject.
- Where there are no local written judgments to illustrate the law or practice in operation, overseas judgments have been provided so that women can see how the same or similar laws have been applied elsewhere.

Overseas judgments are provided also to show that if the same law or practice has been applied positively rather than negatively in a different country under a different judge, women might use the law to argue that better interpretation is possible.

How was the information gathered?

The research involved travel to each listed Pacific Island country to assess the position of women in the legislation, and how their status is affected by the interpretation and enforcement of the legislation, as well as by the social beliefs and attitudes of those upholding and influencing the law. The following techniques were used.

- Searching the written laws in statutes or Acts of Parliament (the legislature or law-making body) to identify legislation relating to women's legal status.
- Searching law libraries and court records for written common law judgments from the lower courts (Magistrates' Courts) and the higher courts (High or Supreme Courts).
- Observing what happened in the law courts, and comparing this with personal observations made during twelve years court experience in Fiji.
- Searching local newspapers for accounts of women's experiences with the legal system.
- Talking to Government prosecutors and lawyers and private practice lawyers who work in the law courts; to court officials to obtain their views on the laws affecting women and their attitudes towards women who use the legal system; to police officials about enforcement of the laws affecting women; to women at the receiving end of the law; and to women's non-governmental organisations about laws and social customs.

Problems encountered in case law research

Lack of written judgments

There are almost no written judgments from lower courts that recognise and apply customary law. A lower court magistrate must record the decision but is not obliged to record the reasons for the decision, so it is difficult to establish magisterial attitudes from court files. Generally, "women's cases" receive little priority; except for rape cases, there are few records. This is an important point, because most women visit only the lower courts. It was therefore necessary to talk to magistrates, lawyers, court officials and women themselves.

Poorly organised records

Most countries publish the legislation as it is passed, but few countries regularly publish bound volumes of updated legislation, or regularly maintain unpublished bound volumes or files in which amendments are routinely recorded or attached to the principal legislation. Lawyers have great difficulty finding legislation, and lay people have even greater difficulties.

Case records also are poorly organised. Fiji, Kiribati, Nauru, Solomon Islands, Tonga, Vanuatu and Western Samoa publish volumes of case reports, but these appear irregularly. Judges may or may not have files of written judgments that lawyers may use. Some lawyers, too, keep records that they pass around to each other, but in general, few judgments are kept in bound volumes or in files where lawyers (or anyone else for that matter) may refer to them.

Inaccurate memories

Without written records, magistrates and others forget what actually happened. They may say what the law in theory obliged them to do, rather than what they did do. The magistrates' statements often differed greatly from those made by observers or by the women about whom the decisions were made.

Financial and cultural difficulties

Few women have the economic resources to fight legal battles in the lower courts, and then to appeal to the higher courts if decisions go against them. As well, some ethnic groups rarely challenge a decision by appealing to the higher courts. For example, indigenous Fijian women rarely appeal to such courts, so there are very few judgments or court cases involving indigenous Fijian women litigants. There are more judgments involving Indo-Fijian women, who are more inclined to use the law.

We hope that identifying these problems will point to ways in which they might be solved. For example, if women had more access to money, they would be better able to go to court, so there would be more judgments involving women. And if court records were better organised, everyone concerned would have better access. Better access should lead to better informed judgments.

How comprehensive and up-to-date is the information?

The information on all countries listed aims to be comprehensive enough to provide a good starting point for national training on legal literacy. It also provides sufficient information for lawyers to study more closely their legal systems and the status of women within it. The research project officially ended in July 1993, but we did not complete until late 1997 the collating of

information and the writing, editing, design and production of this book. If, during this time, we found new judgments, laws or policies that changed the legal status of women, we have included references to these, but have made no attempt at systematic and detailed analysis of such changes.

Is this book objective and neutral?

Judicial objectivity and neutrality are presented as virtues of which the legal fraternity (which means brotherhood!) should always be proud. But when neutrality and objectivity are used to deny the basic human rights of any group of people, they are not virtues for lawyers or anyone else. Judicial neutrality is neutral only when the disputants are similarly situated, and generally women and men coming before the law are not similarly situated. For many years the law has been both openly and subtly biased against women; if this book is seen as biased towards women, we do not apologise for that. Men and women who believe in the essential humanity of women will not feel threatened; they will treat this book as one more contribution to the challenges that face us all.

Is this book written in legal language?

Many legal and perhaps unfamiliar terms must be used; the book contains a glossary of the most common terms and, in general, we have aimed at a first year University standard of English. A good general dictionary and a legal dictionary will be helpful, and should be available in all University of the South Pacific Library Centre Libraries of our region

What kinds of law does this book cover?

This book does not cover all the laws, or the types of law, that affect all citizens. It treats only those laws that affect the status of women. For example, we do not cover contract law, or the law of landlords and tenants, since these apply to all citizens, both men and women. Specifically we will look at the types of law that affect the human rights of women: those that discriminate against women; or disadvantage women in their application or effect; or have a powerful influence on women's lives; or affect their overall status.

Why does this book cover the history of the law?

The law is not very responsive to change. Once a social belief about women becomes reflected in the legislation or the common law, it is very difficult to get rid of even when there has been a great deal of social change. This may be because the the majority of our magistrates, judges and legislators have been men; there has been little change in the attitudes that influence interpretations; and the current law has inherited discriminatory principles.

Where there have been gains, women of our generation owe an enormous debt to the generations of women who struggled to make those gains. These women fought for the right to vote; the right to work outside the home; the right to earn wages similar to men's wages; the right to gain custody of their children; and for many other things. Every small gain has a wealth of history behind it, of great personal suffering, family tragedy and personal sacrifice. It is easy for modern women to assume that the rights they have were always theirs. This is not true; these rights should never be taken for granted.

We have therefore provided some of the historical background necessary to understand why laws exist; to understand why particular judgements are made; and to realise why the struggle to bring about a legal system based on any concept of formal, substantive real equality will be a long and difficult one.

How is the book organised?

In the beginning of the book, you find publication details, dedication, list of abbreviations, acknowledgements and a foreword as well as this introduction and the contents pages that guide you to the book's 15 chapters. You may not need to read the whole book, but you do need to read Chapters 1 and 15 as well as any others that you choose.

Each chapter contains tables and discussions of the relevant legislation, as well as short fictional stories and reports of true cases that illustrate how the legislation is applied. References to these are provided by endnotes[1] so that you can find the original legislation or case. Illustrations are also provided; many of these aim to provoke group discussions and have been used in teaching legal literacy.

Chapter 1 begins by asking "What is the law?" Here we describe the nature and operations of the law and its basic concepts of legislation, jurisdiction, common law and precedent. Then we see how the law works in practice before moving to the question "How does the law affect women?" and thus to an outline of one of the book's basic themes: how and why the law discriminates against women. Chapters 2 and 3 deal with the constitution and land laws in relation to women. Chapters 4, 5 and 6 focus on criminal law. Chapters 7 to 12 concern marriage, separation, divorce, maintenance and the custody of children. Then in Chapter 13, we turn to women and work and in Chapter 14, we look at women who work as lawyers, and women who receive legal aid. Chapter 15 deals with strategies for using the law to improve the status of women.

The book ends with a section that provides further details for people who want to study a topic more deeply. The section contains the endnotes for each chapter, the glossary, the bibliography of the main published sources to which we have referred, indexes to the topics, cases and legislation discussed.

1

The law and women's lives

WHAT THIS CHAPTER IS ABOUT

We will begin this book by discussing Pacific legal systems and their effects on the lives of women. We will ask: What is the law? And how does the law work? Then we will see how patriarchal ideas about women cause the law to discriminate against women. This will lead us to examine different ideas about equality, and their practical applications to legislation and decisions. In the final section, we will discuss their relationship to feminist values, and the ways in which we can work towards achieving equality.

WHAT IS THE LAW?

When we say that we want to help women understand and use the law, what do we mean by law? Many people throughout the centuries have argued about what law is. In this book, we will use the argument put forward by the anthropologists and lawyers who are known as legal pluralists because they believe that there are many kinds of law.

> The legal pluralists say that "the law" consists of the rules of a group or institution or set of people ... [The group will usually agree that these rules should be obeyed or enforced if they are not obeyed] ... Our societies have multiple sources of law ... The major source is the State [which] at least in theory, has the authority to step in to assist or invalidate the rules of any other group ...[1]

The law, then, is not just our printed laws; it is not just our courts and police. In one form or another, it is made, enforced or changed by the people who live in our society. So in learning and teaching about the law, and in using the law, we keep in mind its three aspects:[2]

- The content of the law.
- The structures of the law.
- The context in which the law operates.

Figure 1.1 shows some of the ways in which content, structure and context are related to each other. A useful exercise would be to start at any one point (say cultural attitudes) and to trace the ways in which these affect and are affected by all the other points.

Some basic concepts

Later we will return to a more detailed discussion of the three aspects of law. Before doing this, however, we need to make sure that we understand some words and concepts introduced in Figure 1.1, as well as others that we will use frequently. We will first list these and then discuss them in turn.

- Customary and formal law
- Legislation and the legislature
- Common law
- Jurisdiction
- Precedence and precedent.

Customary and formal law

Pacific Islands in our region have two legal systems operating at the same time — the formal, legal system inherited from their colonisers, and the customary laws inherited from their ancestors. In this book we will refer to the Western legal system as "formal". Customary laws and practices will be referred to as "custom law" or "customary law".

By custom law or customary law, we mean the rules and dispute-resolution proceedings of clans, lineages and traditional villages.[3] Customary law is often applied in matters such as land rights, fishing rights, inheritance, marriage, divorce, child custody, conflict resolution, punishments and *tabus*. A formal court of law might request evidence that a particular principle is valid custom law, since it may have been described in books, but it is very rarely written in the form of legislation. The Constitutions of most Pacific Island states specify the extent to which the formal legal system recognises custom laws.[4]

Many Pacific Islands have custom courts where matters are discussed, and sometimes decided, before courts in the formal legal system hear about them. In some countries, magistrates' courts may apply the unwritten customary law as well as the formal law, though only up to a certain level.

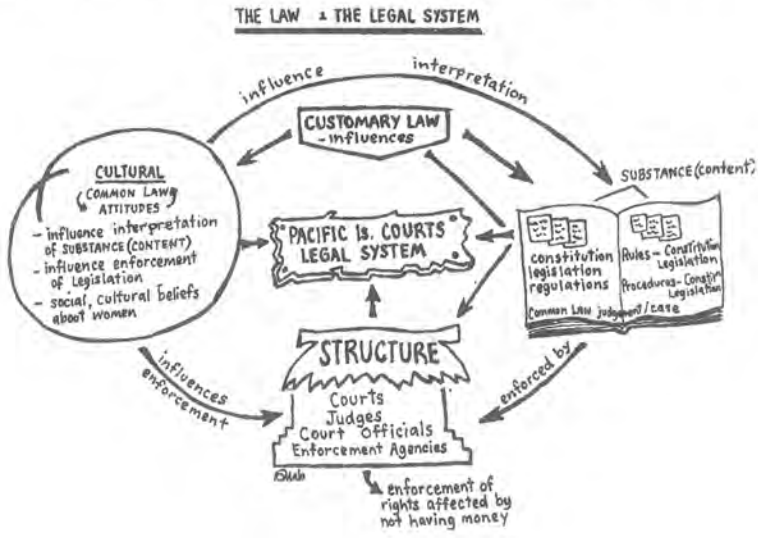


Figure 1.1 The law and the legal systems

In Solomon Islands, these are called Local Courts. The Island Courts of Kiribati, Tuvalu and Vanuatu and the village *fono* (council) in Western Samoa have similar powers.

What is the difference between customary law and formal law? Many writers use formal law or the formal legal system to mean the written laws made by governments, interpreted in the courts of law, and enforced by police and government agencies. We will use these terms in that sense, but we do not overlook the fact that some customary courts may be very formal indeed. The difference, however, is not so much one of formality or informality. The formal legal system and customary systems are based on different principles.

Customary law is based on two basic principles:[5] that the good of the community should take priority over the rights of individuals, and that decisions should be made through negotiation and consensus. These differ greatly from the basic principles of the formal legal system.

- The rights of individuals are very important.
- The rights of the community are balanced against the rights of the individual.
- Decisions are made through argument and confrontation; the best argument wins.
- The doctrine of precedent is applied.
- A person who is not satisfied with a decision may appeal to a higher court.

Do women fare better under the formal legal system than they do under customary law? In some ways, yes. In customary courts, the decisions are usually negotiated by village elders and chiefs. These are usually men of traditional authority; they share and shape community cultural and social beliefs about the place of women in the community. If the decision-makers believe that a woman's role is to bear and rear children and to serve men, they are unlikely to consider the rights of women as individuals.

In the battlefields of the formal courts, someone must win and someone must lose. In a case opposing a man and a woman, the woman is more likely to lose. However, formal courts are obliged to respect constitutional rights,[6] and most governments pay at least lip service to international treaties on human rights. Women may use all these principles — if they know how, and if they have the financial and human resources.

So can women have access to the formal courts? How do they know which court should consider a case? The problem is that there is no clear distinction between what may be considered by custom courts and what may be considered by Magistrates' or Island Courts. Summing up a 1995 appeal against banishment from a Samoan village, Sir Robin Cooke stated that "the punishment of offences is a matter for the criminal courts."[7] But what actually happens depends both on the social context and the local structures. These influence a woman's access to formal and higher courts,

as well as the extent of her knowledge that such courts exist and that she can use them. Legal literacy and human rights projects aim to provide such knowledge.[8]

Legislation and legislature

By legislation, we mean the written Constitution, laws, statutes, ordinances, decrees, proclamations, rules, regulations and any amendments to these. Such laws are usually printed, and from time to time collected and published. Examples are *The Laws of Fiji*, *The Laws of Tonga*, and the acts and ordinances contained in a country's official gazette or supplement to the gazette.

The legislature is the body that makes the legislation. In independent Pacific Islands, the legislature is the Parliament. Before independence, the legislature was usually called a Legislative Council, or something similar.

The common law

The phrase "the common law" may mean different things in different contexts. When we use it, we mean the law as it has been interpreted and developed by generations of judges who have considered both the legislation and actual cases in the present and former British Commonwealth countries.

Let's take the example of a case in the Supreme Court of Vanuatu. The lawyers on both sides are trying to influence the decisions of the judges. To support their arguments, they may carry into court a set of *The Laws of Vanuatu* (the legislation) and some examples from the common law. These examples might include any or all of those listed below:

- Judgments given in the higher courts of the United Kingdom, perhaps taken from sources like the *Law Reports* or the *All England Law Reports*.
- Judgments given in the Supreme Court of Vanuatu, perhaps taken from the *Vanuatu Law Reports*.
- Judgments given in the higher courts in other present or former Commonwealth countries, like Australia, New Zealand and Fiji. Sources might include the *Commonwealth Law Reports* or *Fiji Law Reports*.

The judges will look both at the legislation and the common law cases and will make a decision based on both of these. In future, that decision may itself become part of the common law. Common law may eventually become part of written legislation, but until it does, it exists only in reports of law cases. It is, therefore, often called case law or judge-made law.

Jurisdiction

One of the first things a court must do is to decide whether it has jurisdiction to hear a case. If the court thinks that it does not have jurisdiction, it will refuse to hear a case. We will often discuss "women's cases" that courts have refused to hear, because they think that the case is outside their jurisdiction.

The word jurisdiction has two meanings. It may mean the power of a court, judge or magistrate to hear a case, and to make decisions about it. Or it may mean the district or country in which a court can make decisions. Figure 1.2 provides examples of courts, court officers and their jurisdictions in Western Samoa and in Kiribati.

As we see in Figure 1.2, the Magistrates' Courts of Kiribati have the jurisdiction to hear land disputes, and appeals about these may go up to the Registrar. In Western Samoa, although it is not shown here, land disputes not settled in the *fono* go to the Lands and Titles Court and appeals go to the higher courts. To take another example, in all Pacific Island states, a Magistrates' Court may (has the jurisdiction or power to) hear domestic violence cases, and these cases may be referred to higher courts. However, no court in, for example, Western Samoa may hear cases of domestic violence committed in Kiribati or any other country, nor may a court in Kiribati or any other country hear cases of domestic violence committed in Western Samoa.

Figure 1.2 shows also that, at the lower levels, some court officials have legal training and some do not. Officials are often confused about whether they have jurisdiction or not. The confusion may arise because the law is not clear, or because the official does not know the law. Before a woman goes to court, therefore, she should get reliable advice about the jurisdiction of that court.

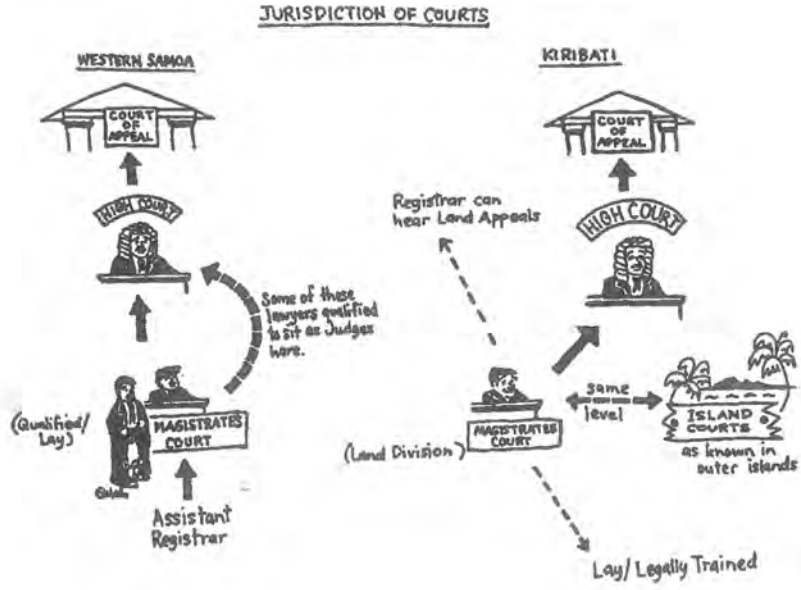


Figure 1.2 Jurisdiction of courts

Precedence and precedent

Precedence means the order in which people or things are ranked for various purposes. For example, kava is presented at some custom ceremonies in strict order of precedence; the person most important in that particular ceremony is first to receive the kava.

In law, the constitution of a country has precedence over the country's other legislation, as well as over its common law and customary law. Courts of law have their own orders of precedence. In any country, the higher the court, the more power it has over the decisions of lower courts. Some Pacific Islands accept also the highest courts of the United Kingdom as having precedence over their own high courts.

Decisions by higher courts always have precedence over those of lower courts. This precedence has the practical consequences set out below.

- When a magistrate makes a decision, the person who lost may take the case to a higher court; if the higher court judge decides that the magistrate was wrong, the judge's decision overrules the decision of the magistrate.
- Judges and magistrates of lower courts have to take into account the judgments of higher court; a magistrate faced with a particular situation must apply the same principles applied in a similar situation by the higher courts.

The word precedent is very important in the formal legal system. In non-legal language, a precedent is created when the fact that something that has already been done is used to justify doing the same thing again. In legal language, a precedent is a previous decision or judgment that a judge must use, or may use, as a guiding principle in deciding what should be done in the case before the court. Here is a non-legal example:

Child to mother: Can I ... (do something or have something?)

Mother to child: No.

Child to mother: But you let me before.

Mother to child: Well ...

Child to mother: And Grandfather said I could.

Here the child appeals both to precedent ("You let me before.") and to precedence. (Grandfather is often a higher authority than Mother is.) Similar things happen in common law: a precedent is established by reference to decisions in earlier similar cases. This deeply ingrained principle is sometimes called the doctrine of precedent.

In applying the principle, we find a distinction between cases whose decisions are binding and **must** be followed, and cases whose decisions are persuasive and **may** be followed. Cases that are binding are those that have been heard in the higher courts of the country, or in the United Kingdom if there are no relevant local cases. Relevant judgments from other common law countries are of persuasive authority. This means that the judge or magistrate does not have to follow the judgment but should very seriously consider whether or not to do so, and should give reasons for not doing so.

The same principles apply to courts throughout our region, unless they can show that the judgment conflicts with local legislation or custom.

For Fiji courts and other courts of the region, cases from the Judicial Committee of the Privy Council or the House of Lords in Britain are of highly persuasive authority. The House of Lords is the final court of appeal for the United Kingdom. The Privy Council is a court similar in level to the House of Lords. It sits to hear cases on appeal from other Commonwealth countries outside the United Kingdom, and consists of judges from the House of Lords and eminent senior judges from other Commonwealth countries.

So the doctrine of precedent places the following obligations on courts of our region:

- To comply with the legislation of the country.
- To follow relevant case law of the higher courts of the country.
- If there are no such relevant cases, to follow case law, and therefore the common law of the United Kingdom, unless the United Kingdom case is inconsistent with the legislation of the country. Courts of our region may also look for guidance in case law of other common law countries within the region and in Canada, Australia and New Zealand where similar legislation or common law principles exist.

The doctrine of precedent can be very useful to women. Precedent can be binding where there are no local cases applicable, and it can be used to persuade a local judge or magistrate to apply a good overseas judgment.

THE COMPONENTS OF LAW: CONTENT; STRUCTURES; CONTEXT[9]

We have just discussed some very important words and ideas, but perhaps they will not really make sense until you see them at work. Taken together they mean that the law is not just what is written in the legislation of the country or written and said in courts. To illustrate this, we will look again at Figure 1.1 and our earlier statement that the legal system has three aspects, as set out below.[10]

- The substance (content) of the law: the legislation, the common law and customary law, as well as legal practices, procedures and rules.
- The structures of the law: the courts, court administration and law enforcement agencies.
- The context and cultures 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.

The Constitution or constitutional documents are made by the legislature, the post-independence parliament. Western Samoa for example has a Constitution, whereas Cook Islands has constitutional laws that are part of its ordinary laws. No law is valid if it is inconsistent with the Constitution or conflicts with it. The Constitution takes precedence over other laws, statutes, the common law or legal practices.

The legislation and subsidiary legislation are also made by the legislature, whether post-independence parliament or pre-independence legislative council of the colonial Government. For most Pacific Islands in our area, these were the laws of the British colonial legislature. (Tonga was never a colony. Vanuatu was subject to both British and French law. Western Samoa was under German rule before being administered by New Zealand.)

The exact status of customary law varies from country to country but in general customary rules and dispute-resolution procedures are recognised as sources where these are applicable and consistent with the Constitution and the legislation.[11] Other recognised sources include the common law in force in Britain when the country became a colony, unless the common law is inconsistent with local laws. Case law judgments from each country within the common law, and cases from the United Kingdom and other common law jurisdictions like Australia, New Zealand and Canada are also recognised unless these are inconsistent with local case law.

Why do countries in our region have similar laws?

There are striking similarities between the legal systems of the countries covered by this study. Similarities exist not only in the actual legislation but also in the treatment of women in the legal system. We will see this both in the interpretation of the legislation through the common law, and in the enforcement of the legislation.

One reason for these similarities is that all the countries have inherited their legislation and common law from Britain. The inheritance may have been direct, when these countries were British colonies, or indirect from former British colonies like Australia or New Zealand. Another reason is that, both before and after independence, the judges and magistrates administering and adjudicating the courts of law came from Britain or from former British colonies. The current interpretation of the law reflects their common British heritage.

Table 1.1 shows countries in which the legislation is very similar, and in which British common law principles are applied in the courts.

Despite the similarities between British and Pacific Island law, an important difference is that the United Kingdom has in many cases changed its legislation to reflect the changing roles of women. Pacific Island countries, on the other hand, still retain much of the old legislation, some of which had no relation to the social systems on which it was imposed.

Table 1.1 Pacific Islands with similar legislation

Country	Comments
Fiji, Kiribati, Tuvalu, Solomon Islands	All have significant legislative similarities. Tuvalu and Kiribati have almost exactly the same legislation, because the United Kingdom provided most of the people who drafted the legislation. In the courts, British, Australian and New Zealand judges or local judges and magistrates trained in common law jurisdictions apply common law principles.
Cook Islands Western Samoa	Cook Islands and Western Samoa reflect the adoption of British laws via New Zealand. Most judicial officers are from New Zealand, so common law principles are again applied.
Vanuatu	Vanuatu was previously jointly governed by England and France, but its legislation is more British than French and several judges since independence have been recruited from Britain.
Nauru	Legislation is mostly modelled on Australian (and therefore British) legislation. Some legislation adopts old Australian legislation by incorporation. Again, in the courts, British, Australian and New Zealand judges or local judges and magistrates trained in common law jurisdictions apply common law principles.
Tonga	The Constitution differs from other Pacific Island Constitutions, but other legislation closely follows the British. Lawyers are recruited from Great Britain and New Zealand.

The structures of formal law

By structures we mean the courts, court administration and law enforcement agencies. We have already referred to the different ranks of court, and we have seen that the common law decisions of a higher court must take precedence over the decisions of a lower court. Anyone who is not happy with a decision of a lower court may appeal to a higher court, seeking a different decision. In some countries the Chief Magistrate will hear an appeal from the Island or Local Court before it proceeds to the next level of court. Some countries limit the jurisdiction of the Island or Local Court to minor formal matters.

At the High or Supreme Court level, the judges are legally trained. Legally trained magistrates and judges have usually qualified in a common law country such as the United Kingdom, New Zealand or Australia. They therefore bring to the law a perspective that is rooted firmly in the English

common law with all its assumptions about women. At the local or island court levels those who administer the law are mostly justices of the peace, who are not required to have any formal legal training. The Magistrates' Courts may operate at different levels. The Chief Magistrate and magistrates in Senior Magistrates' Courts have formal legal training, but this is not required for magistrates of ordinary Magistrates' Courts. Sometimes, therefore, a Chief Magistrate or a judge will overturn a decision made by a magistrate from a lower court.

Magistrates and justices in the Pacific are usually men; women are very rare. Most justices at the local and island court level come from the upper levels of the social hierarchy. The law is therefore mostly administered in a way that is in keeping with the interests of the dominant group.

The context of formal law: the story of Maria and Tui

Those who administer the law come from cultures in which men have more power than women do. Legal systems, whether based on customary law or the formal law, do not treat women well. Few women can afford the costs of justice in the higher courts, or come from cultures where they are encouraged to do so.

STORY *Maria and Tui*[12]

Maria and Tui are married and have several children. Tui has always been violent, but Maria stays with him until she can bear it no more. Then she leaves their home, which is in Tui's name, and takes her children to live in her sister's rented house. Tui keeps calling her on the telephone and abusing her. He harasses her at work and her employer threatens to dismiss her because of the disturbance.

The legislation says that Maria must wait six weeks before applying for maintenance. It may take three months to get the maintenance summons served, and another three months to get a permanent court order for maintenance. A Domestic Court magistrate makes an non-molestation order, meaning that Tui must leave his wife alone. Tui disobeys the order; he continues to harass Maria at home and at work. The police do not arrest Tui. They simply warn him.

Maria goes back to court, but her case comes before a different magistrate, who believes that the Domestic Court has no power to imprison Tui for breach of the order. He tells Maria that only the High Court can imprison Tui; Maria has to go to the High Court and take out a writ for contempt of court.

Legal proceedings in the High Court require a lawyer and are very expensive. Legal aid is, in principle, available only to those who are unemployed, or in other limited circumstances. High Court proceedings are too time-consuming to justify the time of the one legal aid lawyer for family law in Fiji. Maria cannot afford a lawyer, so she cannot get the order enforced. Tui continues to harass Maria at work. She loses her job. She has no money and no protection.

Comment Here we see the three components of the law at work: content, structure and context.

- The legislation gave Maria the right to be protected from violence. However, in Fiji, a non-molestation order is based on the common law inherited from United Kingdom case law.
- The first court gave Maria the non-molestation order, after several months delay because of the slowness of the system. The police, who are part of the legal structure, did not fulfil their role of law enforcement officers. The second court told Maria that this court had no jurisdiction to enforce the order. She would have to apply in the High Court.
- The police were unwilling to force Tui to obey the order. Their attitudes were formed by the society in which they lived; they believed that the law should not interfere with a man's rights over his wife. Economic status is also part of the context. Maria's poverty reduced her ability to use the legal system to obtain her rights.

This story is based on many real cases. It shows how necessary it is to analyse each component of the law. It shows that the law in its wider sense is not only the written law, but includes interpretation, practices, attitudes and the enforcement of the legislation.

THE LAW AND WOMEN'S LIVES

In many ways, the attitudes of judicial officers and law enforcement officers matter more than the legislation itself. Nonsexist legislation will remove the most obvious forms of discrimination, but it cannot make people want to put nonsexist laws into practice. Even good laws are meaningless if they are not enforced by the courts, judges, magistrates and police who are part of the structures and context of the law.

We will now, therefore, examine how the system works to discriminate against women. We will first look generally at how our societies give men control over women. Then we will identify particular types of discrimination, and particular theories of equality. After this, we will discuss feminism, the struggle for women's rights.

Law and patriarchy

In this section, we will discuss one of the central themes of this book: how men dominate the lives of women, and why the law enables men to do this. To understand why the law is the way it is, we must understand what patriarchy is.

What is patriarchy?

The word patriarchy basically means "the power of the fathers". We use it to mean a system in which men determine what part women (and young people as well) shall or shall not play in society.[13] Patriarchy results in men having power over women, and using the law to keep their power; in various common law and other countries, the law has been used to deny women political power by denying them the right to vote.

Patriarchy may serve the interests of the dominant class in any society. Women from the economically advantaged classes, or from the ruling class, may have power, but this is usually because they are daughters or wives of the rulers or because there are no men to inherit chiefly titles. Such women may have rank, wealth and power but the system remains patriarchal. Even where land rights are traced through women, patriarchy is still the dominant political structure; it is entirely possible for patriarchy to exist in a matrilineal society. The central question to ask is: Who has the most power in this particular community?

Patriarchy may work through race if one race has power and control over other races. Men and women of the dominant race have power and control over both men and women of the other races. In colonial times, British men had power over British women as well as over Pacific Island men and women. British women were not equal to British men but the women supported the patriarchal system because it gave them power over their servants. Even now, some who benefit from patriarchy may not want the system to change; those who traditionally hold power want to keep that power. In this way, such women are co-opted by the patriarchal system, and reinforce the system.

Patriarchy has been successful because it is supported by the law, class, race, politics and money. The law is not neutral. It supports patriarchal control of women's lives by choosing when to intervene. It sees the public world as a legitimate area of legal intervention, and makes rules and regulations covering the public world and its conflicts. However, the law rarely intervenes in the private world, the world of the family where a man's home is his castle. This distinction has direct results on the situation of women, as the following examples will show.

- Until early this century, women were not allowed to vote or stand for election to Parliament; that was the public world of men and power.
- Work in the home and subsistence work are considered not real work or at least of no economic value. Paid work outside the home or village is given economic and legal value.
- A husband assaults his wife in his private home and the law may or may not treat it as a crime. The same man assaults another person in the public road; the law will always treat this as a crime.
- The law may refuse to intervene in marital rape, incest and child sexual abuse because these take place in the home, in the private world.

As we progress through this book, we will find numerous examples of how the patriarchal distinction between public and private life has been reinforced by the law. The distinction has an enormous influence on how society views the position of women.

Discrimination and equality in the law

Any society may include powerful women holding powerful positions; whenever women complain about their lack of power, the existence of these powerful women is used to argue that women do have equality. If a successful woman says that she has never met any sex discrimination, this statement may be used to show there is no discrimination. Many women are successful, but this does not mean that women are not discriminated against, or do not suffer economic and social disadvantages. The real question to ask about such women is: Does their presence improve the situation of women as a group?

Many people argue that the law does not discriminate against women. Certainly, many laws have been changed in their written form so that they seem gender-neutral, seeming to treat men and women equally. However the legislation may have bad effects on women because women are not socially and economically equal to men. The law is produced by social, economic and political forces. It does not of itself make women unequal, but it does influence their situation. Patriarchal interpretations of written and unwritten laws combine with local social, cultural and political forces to keep the status of women inferior to that of men.

The law serves the interests of the most powerful members of any given community. At any given time, the most powerful groups are generally men of the wealthy and landowning classes. Members of this group are always the best represented in legislative and judicial bodies. Few will seek to change legislation or to adopt legal practices that will take away their power. The law functions as a means of control by granting or preventing access to goods, land, money and political power. It may do this through legislation and policies that benefit one group, or through selective application, interpretation or enforcement of laws and policies.[14]

Procedural laws and the common law are largely controlled by magistrates, judges and judicial officials, often with biased attitudes that produce judgments biased against women. In case law, judicial officials may use judicial discretion in many situations. Yet many examples show that these powers are rarely exercised in favour of women.

Laws shape society's attitude towards women. Society regards women as inferior to men. The law reflects this attitude and thereby worsens the situation because society regards the law as an institution that is always just. We cannot analyse the impact of the law on women without seeing it in its social, economic, political and cultural context. If women were not economically, politically and socially disadvantaged, the law would not have such a severe impact on them. Therefore the law makes the situation worse than it already is, particularly for poor women.

Discrimination means treating people in different ways, depending on their sex, race, religion, political opinions, creed, sexual preference and so on. We may discriminate against a particular group of people, just as we may discriminate in favour of that particular group of people. Here we are concerned with sex discrimination. This is often called gender discrimination because it focuses on whether a person is male or female.

Discrimination takes many forms, both direct and indirect.[15, 16] 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 means that something happens to a woman because she is a woman and not because she is an individual. The discrimination may be based on a particular characteristic applying generally to women (for example, being able to have babies) or it may be based on a particular characteristic that people may think women have (for example, being "emotional"). Direct legal discrimination may be obvious in the legislation or legal practices specifically permitting certain rights to men but not to women.

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 indirectly discriminates against women, because the courts and law agencies that apply, interpret or enforce the written laws do not consider the 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 go and find a father who has not paid maintenance for his children. They may prefer to keep it handy in case "something important comes up".

Indirect discrimination occurs also when 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. The law may also be indirectly discriminatory where it fails to correct discrimination. Here discrimination occurs not because the law does something, or does it badly, but because it omits to correct something.

We should examine our laws and practices to identify direct and indirect discrimination. This is the first step in the long road towards affirmative action laws, policies and gender-sensitive training necessary to correct the problems caused by discrimination.

Approaches to defining equality and discrimination

Discrimination happens because people are not equal; it makes people less equal. But what is equality? The problem is that even women activists cannot agree on the answer. In working against discrimination in the law, we will deal with many suggestions for courses of action. These suggestions may be consciously or unconsciously based on any of the following four different approaches to standards of equality.[17]

- Strict equality
- Biological differences
- Everything different
- Anti-subordination

We will first briefly define the four approaches then examine each of these approaches in more detail. 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 we must allow 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, women and men 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.

- There is no way of comparing what is strict identical treatment in situations that happen to women but not to men — for example, pregnancy.
- The approach ignores the serious 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

Here 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

Here 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 our society, and so may be the hardest to apply.

How do courts use these approaches?

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.[18] 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 (sometimes called CEDAW or the United Nations Women's Convention).

Whatever equality standard is used, the aim must be to get rid of discrimination. Any strategy to improve women's rights must take into account the role of the law. If the legislation makes discrimination against women illegal, it will not prevent discrimination, but it will give people the possibility of a legal solution. Legislation cannot stop individuals from thinking that women are inferior, but it can discourage them from acting on that belief.

THE LAW AND FEMINISM

Feminism is "an awareness of women's oppression and exploitation in society, at work and within the family, and conscious action by women and men to change this situation".[19] It is a process of self-discovery. It does not define women in relation to or against marriage. It is inclusive and cooperative rather than competitive. It builds relationships between older and younger women. It gives women a forum to speak and discuss problems that affect women directly. It liberates; by liberating women, men and the whole of society are also liberated. It discourages women from accepting the stereotypes of the patriarchal system.[20]

For many years, women all over the world have struggled to obtain basic human rights.

- Their right to vote and be elected to the legislature.
- Their right not to be sexually harassed, abused or raped.

- Their right not to be beaten.
- Their right to own land and property generally.
- Their right to own money.
- Their right to work and get equal pay for equal work.
- Their right to adequate maternity leave and pay.
- Their children's right to be protected from violence and sexual abuse.

These are the classic goals of feminism. However many people work tirelessly to achieve the goals but say "I am not a feminist". Why? Partly, perhaps, because the popular picture of a feminist is that of a woman who hates men; is a lesbian; cannot get a man; is bossy, shrill and strident; burns brassieres; believes that wearing make-up or removing body hair is anti-woman; is reacting against her middle-class background; and encourages other women to leave their husbands and children.

And where does this picture come from? Ever since women began campaigning for the right to vote and their other human rights, they have stirred up powerful reactions from people who are comfortable with the way things are. Sometimes the reactions have been violent, but ridicule is in some ways an even more powerful weapon. Ridicule is easy to spread through the media — especially if you own the media. It works quietly and thus influences people who do not even know that they are being influenced. They just know that they do not want to be called feminists.

But feminism is not hating men; it is hating sexism and inequality. Feminists are of all shapes, races and sizes and believe in a wide range of political philosophies. A feminist is any woman or man who recognises the existence of sexism, male domination and patriarchy and who takes action against it.

Can Pacific women be feminists?

In the Pacific the stereotype feminist picture often links with the argument that feminism is a Western concept; it does not belong to third world cultures; and it has no relevance to third world women. This argument is often advanced by people who profit from the existing system. The same people do not question the Western origins of Christianity; the modern system of government; the capitalist nature of Pacific economies or development policies, and the many other fruits of modernisation and westernisation.

On the other hand, the potential conflict between custom and feminism is a very real concern for many Pacific women.[21] But if, as Pacific women, we do not examine our cultures, we cannot strengthen them. Cultures do not stay still. They develop in many directions because they must develop or die. If a custom discriminates against women or denies human rights, we should point this out and try to develop it in a more healthy way. To work for healthy change is not an act of destruction; it is an act of love.

The struggle to achieve equality for women has been going on for a very long time in most parts of the developing world. For many third world

women the process of liberation began with the struggle for independence from colonial powers. Pacific women have always been active in antinuclear movements, and in independence movements, because independence and the nuclear threat are not separate issues, they are both part of the struggle against the colonial inheritance that is part of patriarchy.

The term "feminism" may be Western, but the concept is not. It is insulting nonsense to say that only women from the former colonial powers can work for freedom. Let us rather say:

> I am a Pacific Island feminist. For me, this means challenging patriarchy in its many forms. But I love my husband and I love my family. I do not see my freedom as being separate from their freedom. I accept that the men in my community form part of patriarchy and as long as they recognise this, together we will face the challenges ahead. Together we need to struggle against the many forms of oppression that affect our daily lives. If our men love us, they will give up some of the power that they take for granted. The changes in the end will make us both, women and men, better persons.

What do feminists believe?

Feminism meant one thing early this century to the women who struggled for the right to vote. What it means today may be different, and may depend on where women are, geographically, politically, economically and socially. For Western women, the issue currently might be obtaining equal or comparable pay. Women of the developing world might want to challenge development policies that have both immediate and far-reaching consequences on their lives.

Because women differ from one another, they have various views of feminism.[22] Sometimes the ways of thinking about feminism are closely related to ways of thinking about equality. For example, liberal feminists believe that female subordination has occurred because of customary and legal restrictions on women's access to the public world; if these restrictions are removed and women are given the same opportunities as men, they will soon be equal with men. This closely resembles the strict identical treatment approach to equality.

Marxist feminists link the issues of gender and class. They believe that oppression occurs mainly because of capitalism, where the wealth of a society and the means of production are in the hands of a few. Therefore women cannot be liberated or equal unless the society becomes Marxist. Radical feminists argue that the patriarchal system as a whole must be overturned. It is not enough to change the laws or political structures; there must also be a social revolution within the church and family. Patriarchy is so essentially bad that there is no point in saving bits and pieces of it.

All partly explain why and how women are subordinated, but no theory can offer a total explanation. The different schools of feminism have all contributed to the strength of the global women's movement. Third world women acknowledge the truth of the different ways of thinking about

feminism, although most reject being slotted into any one of these. Many have felt that none of these theories take into account the effects of development policies, colonialism and liberation struggles, the third world debt crisis, religion, race and ethnicity on their lives. Some are oppressed not only by their gender. They are struggling at the same time for democracy or against colonial domination, for example in New Caledonia. Many consider the attainment of democracy a precondition for the struggle for equality. Third world feminists are helping Western feminists to take into account these different factors. The struggle must be waged on all fronts as part of the greater struggle that includes the struggle for human rights, democracy, justice and equality.

There is no correct kind of feminism. Instead, there are various ways of thinking about feminism, just as there are various ways of thinking about equality. Feminism is now an all-encompassing philosophy that takes into consideration the many other forces that influence women's lives. It is concerned with fundamental issues such as those listed below.

- Democracy: how can we ensure that both women and men have the right to have a say in the destiny of their countries?
- Race and ethnicity: how can we ensure that the needs and priorities of smaller racial and ethnic groups are not dominated by the gender struggle of women of the dominant race or ethnic group?
- Colonialism: for feminists (for example in New Caledonia or French Polynesia) to what extent are women's rights part of the human rights struggle against colonialism?
- Class: is there one law for the rich and powerful, and another for the poor?
- Religion: in their origins, religious ideals and feminist ideals concern the relationship of individual humans and their God. If there is a conflict in modern day practice, how can it be resolved?
- Development policies: what are the immediate and probable long-term goals and effects of policies aimed at development? And how do they affect women?

Although the concerns and priorities of different groups of women differ, there are more similarities than differences. All over the world, women work in different ways against the same enemy in its many different forms: patriarchy, injustice and inequality.

Can feminists help to improve the law?

Feminism has the potential to make the walls of patriarchy slowly crumble, brick by brick. Similarly feminist legal thought or intervention has the potential to change the discriminatory effects of the law, patriarchy's biggest supporter.

However, feminist lawyers and feminists who challenge the law are torn between two opposing viewpoints. Some think that the law is so biased against women, so deeply rooted in patriarchy, that it will always resist feminist change. It is therefore as pointless to challenge the system as it is to participate in it. (But those who fail to challenge the law are making the system legitimate, they are upholding the very system that they believe to be so bad.)

Others agree that the law is flawed, it does discriminate against women directly and indirectly and does legitimise inequality. However, it would be impossible to replace. Society is stuck with an established legal system. Despite its faults, feminist lawyers have to work within it to help individual interests. (But they must never forget the shortcomings of the system, nor their part in making it legitimate and therefore acceptable.)

Thus feminist lawyers are torn between upholding the law and working against it. Most realise the practical difficulties of doing anything except working within it to change it from inside, yet most believe that the law is internally flawed. Eleanor Condo has expressed the contradictions faced by feminist lawyers and activists:

> The feminist lawyer must recognise that the struggle within the legal system using the processes of the law has built-in-contradictions ... The feminist lawyer must recognise ... that while feminist litigation has its uses in present times, the ultimate goal of feminism is to destroy patriarchal structures (the legal system included) and with this in mind, she must never be co-opted into the system. The non-lawyer activists have a significant role in this process — not only to prevent ... co-option ... but to wage, in arenas other than the legal system, the struggle of women that will influence the struggle within the legal system - and eventually redefine the realities, the terms, the rules of the women's struggle in the legal realm.[23]

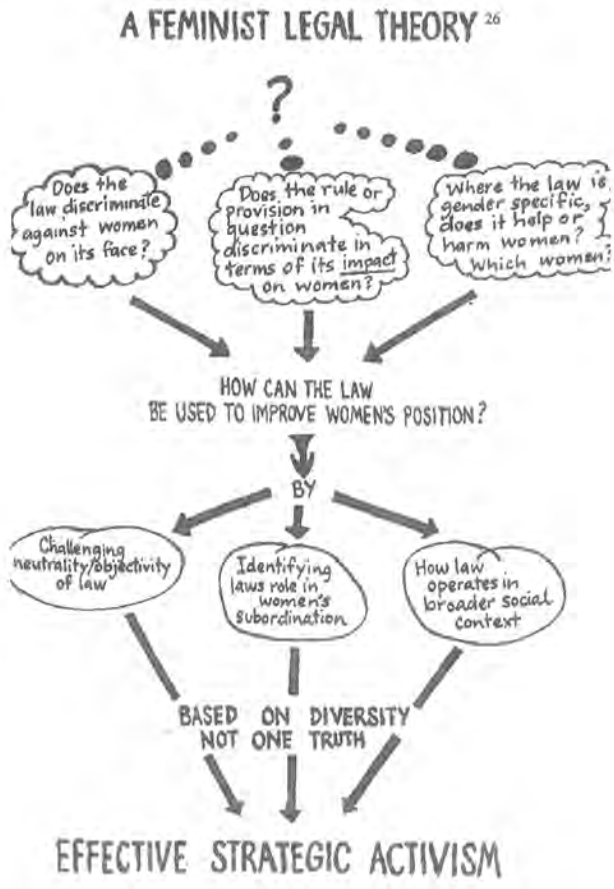
CONCLUSION

So, what, as feminist lawyers and activists have we learnt about the law? These are the things that we should understand.[24]

- We should not assume that just because something is part of the law, it is just or fair for all or for women.
- We should not assume that the law is neutral and impartial. The law serves the interests of the most powerful members of any given community: those who have money and power, who control the major institutions of society, the economy, the judiciary, the legislature and the executive. Social and economic inequalities cannot be removed by legislation.

- We should not assume that because a law is apparently gender-neutral, it affects women and men in the same way. The question must always be asked: What will be the effect of that decision on that woman? Or on women as a group?
- We should not assume that sex discrimination and affirmative action legislation will solve particular features of gender inequality. Legislation has a major role to play in the overall achievement of an equal society, but its real effectiveness depends on other forces that are beyond the scope of the legislation itself.

Feminist lawyers and activists accept that the law has shortcomings. It has an oppressive function but it has also the potential to have an empowering function, to help women gain some independence. Lawyers and activists cannot change the law and society overnight. But they can help individual women, especially poor women, to gain some rights. They can give women information about the law and how to use the law both to gain individual rights and to bring about change.[25]



> ... Knowledge of the law, and of its patriarchal base, brings women to feminism. Knowledge of the law's treatment of women builds anger at injustice, and through that anger a feminist consciousness is born. For this reason alone, a challenge to the legal system cannot be ignored. In the end, if the law is a servant of patriarchy, to challenge the law means that there is an indirect attack on the master. It may not be possible to use the master's tools to bring down the master's house but it may be possible to use the master's tools to make cracks in the walls of patriarchy.

Pacific women cannot allow themselves the luxury of ignorance of the law.

2

Constitutional status, citizenship and customary law

WHAT THIS CHAPTER IS ABOUT

In this chapter, we will see how a country's constitution affects its citizens and residents. We will begin by defining what a constitution is and what it does. Then we will look specifically at how Pacific Island constitutions deal with discrimination.

Discrimination means treating people in different ways, depending on their sex, race, religion, political opinions, creed, sexual preference and so on. It is possible to discriminate against a particular group of people, and it is possible to discriminate in favour of a particular group of people. In this chapter, we will focus on constitutions that discriminate against women and on constitutions that discriminate in favour of women. We will look very closely at the problem of citizenship rights for foreign spouses and for children born overseas.

We will see that the constitutions of most Pacific Islands are based on patriarchal societies and provide for inheritance that is patrilineal, passing from father to son. We have already seen in Chapter 1 that patriarchy dominates much of customary law in the Pacific. In this chapter, we will see how a written constitution may contradict itself, or combine with customary law to discriminate against women.

WHAT IS A CONSTITUTION?

The constitution of a country is the supreme law of that country; it has a higher status than do ordinary acts, statutes or laws of the legislature, and is more difficult to change than these. All fully independent Pacific Island countries covered in this book have written constitutions. (The Cook Islands *Constitution Act 1975* resembles an ordinary statute.)

The constitution provides for a framework by which the country is governed. It outlines who is responsible for the different functions of government. Below is an example of a typical framework.

- The **parliament** or other elected body, often called "the legislature" because it makes the legislation of the country.
- The **judiciary**, consisting of the courts that interpret the legislation and develop the common law.
- The **executive**, consisting of the civil servants in charge of the day-to-day running of the government.

The constitution contains statements about the rights of individuals and how those rights are to be protected and practised. It usually says that the rights of individuals are to be "balanced" against the rights of others, or to be in the "public interest". The constitution is supposed to protect the rights

and freedom of individuals, and to provide a guide for appropriate lawful behaviour. It states who may exercise power for the people of that country. If government officers use powers not given to them, or go beyond the powers given to them, they act *ultra vires*, and their actions are therefore illegal.

The constitution overrides all other laws and no ordinary law must be inconsistent, or conflict, with it. Any law, statute or common law that does this is null or void or ineffective; in other words, it is unlawful.

Anti-discrimination provisions in Pacific Island constitutions

The constitutions of all Pacific Island states have general provisions granting all citizens equality before the law. All citizens are entitled to certain general basic rights, regardless of their religion, race, sex, place of origin, political opinions, colour, religion or creed and so on. These general provisions do not, however, guarantee protection against sexual discrimination between men and women unless the country's definition of discrimination specifically includes sexual discrimination.

Table 2.1 shows the countries whose constitutions forbid the making of laws that discriminate against any person on specified grounds. It shows also those countries whose constitutions specifically make sexual discrimination unlawful.

Table 2.1 Countries with anti-discrimination provisions

General constitutional provisions	Specific provisions against sexual discrimination
Cook Islands 1975 (s. 64)	Cook Islands 1975 (s. 64)
Fiji 1990 (Art. 16)	Fiji 1990 (Art. 16)
Kiribati 1979 (Art. 15)	none
Nauru 1968 (Art. 3)	none
Solomon Islands 1978 (Art. 15)	Solomon Is. 1978 (Art. 15 [4])
Tonga 1875 (Art. 4)	none
Tuvalu 1978 (Art. 27)	none
Vanuatu 1980 (Art. 5)	Vanuatu (Art 5.k; *Penal Code* s. 150)
Western Samoa 1960 (Art. 15)	Western Samoa 1960 (Art. 15[2])

So in Nauru, Kiribati, Tonga and Tuvalu, it appears to be lawful to discriminate against women because they are women. In Tuvalu, it is not an oversight that Article 27 of the Tuvalu Constitution defines discrimination, but does not forbid sexual discrimination. It is a deliberate omission, because the definition does forbid discrimination on the grounds of race or religion. Similarly, in Kiribati, Section 15 of the Constitution defines discrimination, but "one class of discrimination which is notably missing ... is sexual discrimination".[1]

The 1970 Constitution of Fiji did not include discrimination on the grounds of sex. The definition of discrimination specifically excluded sex.

Discriminatory laws and active discrimination against women were not unconstitutional. Thus before 1990 it was possible to pass laws that discriminated against women and there was no legal protection against active discrimination. Fiji's *Employment Act*[2] gives one example of such discrimination. Until June 1996, this Act prohibited women and young people from working at night except in certain essential industries. In May 1996, the Fiji Parliament passed a bill amending the *Employment Act*. This was passed by Senate on 10 June 1996; women and young people may work between the hours of 8:00 p.m. and 6:00 a.m. if the Minister of Labour is satisfied with the conditions offered.

One of the reasons for the amendment may have been that the 1990 Fiji Constitution included sexual discrimination in its revised definition of discrimination. Article 16 states:

> (1) Subject to the provisions of this Constitution
> [a] no law shall make any provision that is discriminatory either of itself or in its effect; and
> [b] no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
>
> (2) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, sex, place of origin, political opinions, colour, religion or creed, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

By adding "sex" to the list, this revision made it unconstitutional to discriminate against women; all Fiji laws that do discriminate against women are outdated. Provisions specifically making sexual discrimination illegal should mean that any legislation or practice that discriminates against women is illegal. They should also mean that the legislature may not pass legislation that discriminates against women. For this reason, in December 1995, Adi Finau Tabakaucoro blocked the passage in the Senate of a bill amending the *Banaban Settlement Act*.[3]

In practice, however, some constitutions that forbid sexual discrimination also have, within the same constitution, laws that do discriminate against women. Fiji, for example, should amend all laws now inconsistent with the Fiji Constitution. It has amended the employment laws, but as we shall see later in this chapter, the constitutions of Fiji and several other countries have specific provisions on citizenship and hereditary rights that contravene or contradict the general provisions. These countries are unlikely to amend their constitutions unless they are pressured to do so.[4]

The *Report of the Fiji Constitution Review Committee*,[5] released on Tuesday, 10 September 1996, is the result of wide consultations and heavy pressure from many different interest groups. The final decisions had not been taken

when this book was being revised, so we will use an example of constitutional change from Tonga. Until 1990, Article 28 of the Constitution of Tonga read as follows:

> 28. Every male Tongan who has arrived at the age of twenty-one years, can read and write and is not disabled by the twenty-third clause of this Constitution shall be liable to serve on juries ...

This meant that Tongan women were not permitted to serve on juries. The 1990 amendment[6] removed the word "male" and, in that respect, removed discrimination against women.

In Vanuatu, the *Penal Code* makes unlawful discrimination a criminal offence.

> 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.[7]

There are no recorded judgments of prosecutions under this section, although in 1995 and early 1996, there were some interesting rulings on discriminatory aspects of customary law.[8] The Solomon Islands Constitution also makes sexual discrimination illegal. We have found one judgment on the issue.

CASE *DPP v Noel Bowie, (1988) Solomon Islands*[9]

Facts A man challenged Section 155 of the Solomon Islands *Penal Code*, which prohibited acts of "gross indecency" between "male persons". He claimed that Section 155 discriminated against him as a man, and breached the Constitution's Article 15, which prohibited sexual discrimination. He was acquitted in the Principal Magistrate's Court, but the Director of Public Prosecutions appealed against the decision.

Issues Was s. 155 of the *Penal Code* inconsistent with Article 15 of the Constitution? If it was, did the inconsistency make the whole section void?

Decision The High Court agreed that s. 155 was inconsistent with the Constitution, but said that the intention of the Legislature had been to make "acts of gross indecency" a crime. The word "male" could be removed without interfering with this intention. The *Penal Code (Amendment) Act 1990* replaced "male" by "any person".

Comment If a constitution forbids sexual discrimination, the courts are theoretically obliged to decide that a discriminatory law contained in a statute or a legal practice is void and will no longer have any legal effect. Courts will not do this without challenge.

DISCRIMINATORY LAWS

As we saw in Chapter 1, laws and practices may be indirectly or directly discriminatory. If laws and practices are apparently gender-neutral, their effects may be indirectly discriminatory. Openly discriminatory laws and practices aim directly at producing discriminatory effects. In this section, we deal first with indirect discrimination, and then with direct discrimination.

Indirect discrimination: freedom of speech and access to political power

The 1990 Fiji Constitution contains provisions that indirectly discriminate against women. Article 13 guarantees all Fiji citizens the right to freedom of speech. However, Article 13 (2)(d) aims to limit this basic right by protecting the dignity and esteem of institutions and values of the Fijian people, in particular the *Bose Levu Vakaturaga (BLV)*, or Great Council of Chiefs. This limitation affects all citizens who may wish to challenge traditional laws and practices, but it weighs more heavily on commoner women, who traditionally are not supposed to speak out anyway.

The *Bose Levu Vakaturaga* had some 51 chiefly members in 1996. Of these, five were women. As Article 31 states that the *BLV* appoints the President, Fiji's chances of having a woman President of chiefly rank are slim indeed; the chances of having as President an ethnic Fijian commoner of either sex are much smaller; and the chances of having anyone not an ethnic Fijian are practically nonexistent. There may be few people who would want to be President; more would want to be in the Senate, but are indirectly excluded from doing so by the Constitution's Article 55, which sets out how appointments are to be made.

- There are thirty members.
- The President alone appoints nine, without limitation on race, class or gender.
- The *BLV* in consultation with the President appoints twenty ethnic Fijians.
- The Rotuma Council in consultation with the President appoints one Rotuman.

This provision discriminates indirectly against ethnic Fijian commoners of either sex, as well as against people who are not ethnic Fijians. In 1996, there were three ethnic Fijian women senators, all chiefs, and all appointed by the *BLV*.

Finally, the constitutional provisions governing selection of candidates for the House of Representatives appear gender-neutral, but the system of provincial representation works against women because men dominate the Provincial Councils. In both the Senate and the House of Representatives, as in all indirect discrimination, we have the chicken-and-egg situation:

without change of attitude, there is little effective change in constitutional and affirmative action legislation. Without change in legislation, there is little change in attitude.

Direct discrimination: inheritance and citizenship

In patrilineal societies, rights are inherited through the father's line. In matrilineal societies, rights are inherited through the mother's line. Some Pacific groups are matrilineal but most Pacific Island constitutions legally recognise only patrilineal rights. Kiribati, Nauru and Cook Islands citizens inherit rights through either parent, but notable among those that recognise only patrilineal rights are Tonga and Fiji, who thus breach Article 2(a) of CEDAW, the United Nations Women's Convention. The Tongan Constitution (Art. 107) and the *Land Act* dictate that males are preferred to females. Females may inherit only if there are no males, so most Tongan women are excluded from rights to inherit land.

The Fiji Native Lands and Fisheries Commission acknowledged in 1991:

> There are different customs for different provinces of Fiji governing the rules concerning the rights of a person to choose to be a member of either his mother's or his father's unit.[10]

However, the 1990 Fiji Constitution recognises only patrilineal rights. Article 156 of the Constitution of Fiji states that a person shall be regarded as a Fijian only if that person's father is a Fijian. A legitimate child inherits rights through its father, not its mother. If a child is illegitimate, the child may claim citizenship and other rights through the mother.

In Fiji all indigenous Fijians are entitled to registration in the *Vola ni Kawa Bula*. Registration entitles them to the rights listed below.

- To claim rights in Fijian native land.
- To obtain profits from native leases.
- To stand for election as an indigenous Fijian.
- To obtain Fijian scholarship privileges, and other affirmative action benefits.

In order to register, a person must be able to prove that his or her father is a Fijian. The children of a father who is entitled to registration are also entitled, even if their mother is not. But if a father cannot be registered in the *Vola ni Kawa Bula*, his legitimate children cannot be registered either, even if their mother is an indigenous Fijian who is registered. The following story shows what could happen.

STORY *Joanna, John, Esei and Louisa*[11]

Joanna is an indigenous Fijian woman married to John, a mixed-race man born in Fiji of mixed-race parents who were also born in Fiji. Joanna and John are Fiji citizens by birth, and so are their children. But their children

are not eligible for registration in the *Vola ni Kawa Bula*, and therefore not eligible for the special scholarships and other privileges.

Joanna's brother Esei is registered in the *Vola ni Kawa Bula*. His wife Louisa is mixed-race, but their children are eligible for registration in the *Vola ni Kawa Bula*, and enjoy the associated privileges. John and Louisa have a brief secret affair. Louisa has a baby who is also eligible for registration in the *Vola ni Kawa Bula* because Louisa is married to Esei and therefore Esei is regarded as the father of all children born during their marriage. So we have two closely related families whose children, through no fault or virtue of their own, are treated quite differently by the Constitution.

The relevant section of the Constitution breaches the fundamental human rights granted in Articles 4 and 16 of the same Constitution. These together say that all persons are equal before the law and that no person can be discriminated against on the ground of sex. To discriminate against the children of Fijian women in favour of the children of Fijian men is to discriminate illegally against Fijian women.

In 1994, the Court of Appeal[12] ruled that a person born of an indigenous Fijian mother and a non-indigenous Fijian father could be registered in the *Vola ni Kawa Bula*. Nevertheless, this decision is not necessarily a landmark for women's rights in Fiji. Registration depends mostly on acceptance by the clan and *mataqali*, who decide whether an applicant satisfies the conditions listed below.

- The relatives in the clan in which the person is claiming membership must be willing to accept the person as one of their own.
- The person must have performed the necessary customs to the satisfaction of the mother's clan and the Native Lands Commission.
- The members of the *mataqali* must agree that the person may be a member of the clan.

The Constitutions of Fiji and Tonga need to be amended so that the children are legally eligible to be registered in the particular ethnic group of either parent.

Foreign husbands

The right to citizenship includes the right to reside in the country of citizenship. A person's citizenship cannot be taken away, and no country in the Pacific forces a woman automatically to lose her citizenship if she marries a foreign man. However, most Pacific Island states will not allow any person holding a foreign passport to have citizenship. This applies to men and to women, but weighs heavily on women, who are traditionally expected to live where their husbands want to live, and therefore may want or need to take up the citizenship of their husbands.

The Fiji Constitution and *Citizenship Act* allow foreign women married to Fiji men to apply for Fiji citizenship by registration upon marriage. As well as being eligible for citizenship, foreign women married to Fiji men

may live in Fiji without needing to apply for a visa. They are exempted from the requirements for a visa under the *Immigration Act*, Section 7(3). In effect, foreign women married to Fiji men get a residence visa enabling them to stay in Fiji. Such women must apply for a work permit if they want to work, but this is generally granted.

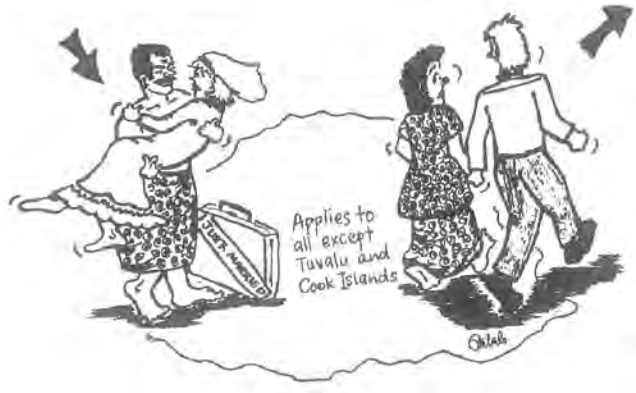
However, foreign men married to Fiji women are not eligible to apply for Fiji citizenship by registration. Further, to stay in Fiji, they need either a tourist visa or a visa tied to a work permit. They are treated just like any other expatriate applying for residence and work permits in Fiji. To satisfy the requirements for a work permit, they must find a job and prove that in this particular job, they are not competing with Fiji citizens. They may also, like other expatriates, apply for residence if they have overseas savings on which to support their families, or can invest, or start a business, in Fiji. But all these require money (about $200,000 for an investment visa). The legislation thus discriminates against poor men and women.

Finally foreign husbands may apply for citizenship by naturalisation. This means that they, like all other applicants, must fulfil the requirements of Article 27 of the Constitution. They must have lived in Fiji for five years, continuously or over a range of years.

So how does this law affect Fiji women?

- Foreign women gain rights in Fiji by marrying Fiji men.
- Fiji women lose rights by marrying foreign men.
- Fiji women married to foreign men usually have to leave Fiji because their husbands have great difficulty staying. In effect, Fiji women lose the most important aspect of their citizenship: the right to live in their country of nationality.

What is the situation in other Pacific Island countries? Table 2.2 shows countries that discriminate against women by denying their foreign husbands automatic residence or citizenship rights. Such legislation is a clear example of direct discrimination, and a breach of women's human rights, as set out in Article 9 of the United Nations Women's Convention. If her husband



Different rules for foreign wives and foreign husbands

cannot stay in her country, a woman must choose whether to leave her country or leave her husband. Broken marriages, single parents and custody disputes are often the result.

Only Cook Islands and Tuvalu treat both male and female nationals equally regarding citizenship rights for their foreign spouses. Tuvalu[13] does not require a Tuvalu woman to lose any of her rights upon marriage to an alien. Both men and women are given equal rights so that their spouses can remain in their country.

All Cook Islanders are New Zealand citizens and may freely move in and out of New Zealand. Neither males nor females married to Cook Islanders obtain any special residency or citizenship privileges by marrying a Cook Islander.[14] In this respect, the law does not discriminate against female Cook Islanders. Marriage to a Cook Islander may be a factor when applications for work permits or residence are being considered, but it does not confer any special right of citizenship. It may however be a breach of human rights law because it denies an important aspect of citizenship.

There is in Fiji (and in other countries) a way to allow foreign husbands the right to remain in the country without having to change the Constitution. Under the *Immigration Act* [15] the Minister of Immigration has wide powers to designate classes of persons who may enter Fiji without a permit.

> 7.(3) The Minister may, in his discretion, by order specify that any person or class of persons may be exempted from the requirement of obtaining any permit under this Act, upon such conditions as the Minister may determine.

Under this provision, foreign wives of Fiji men may enter and reside without a permit if they do not want to obtain citizenship. It should be open also to foreign husbands of Fiji women. Obviously, we need a policy to ensure that foreigners do not become a burden on the community. A new policy should make it easier for the foreign husband of a Fiji woman to obtain a residence permit if he can support himself, or if his wife can support him, or if he can find work in Fiji. If he finds paid work, there should be a presumption in favour of a work permit. This would enable foreign husbands to fulfil the requirements of Article 27.

As we will see at the end of this chapter, African women have challenged similar discriminatory provisions in their own constitutions, and have won their cases, thus creating precedents for other common law countries. Such actions could be useful in the short term, but the fundamental discrimination will remain unless the legislation is amended. The constitution and legislation must be amended to allow foreign husbands rights of citizenship and residency. The amendment would, for example in Fiji's Constitution, state that "any person married to a citizen of Fiji" may be registered as a citizen of Fiji.[16]

Table 2.2 Countries that discriminate against foreign husbands

Country	Reference in Constitution, etc.
Fiji	Art. 26 [2] (a); *Fiji Citizenship Act* s. 6.
Kiribati	Art. 22, 26
Nauru	Art. 74
Solomon Islands	Art. 20
Tonga	*Nationality Act* Cap. 59, ss. 2, 4, 9
Vanuatu	*Citizenship Act* Cap. 112 s. 10
Western Samoa	*Citizenship Act* s. 7

Table 2.3 Does this country discriminate against children born overseas?

Country	Yes	No
Cook Islands		*
Fiji	*	
Kiribati	*	
Nauru		*
Solomon Islands		*
Tonga	*	
Tuvalu		*
Vanuatu		*
Western Samoa		*

Children born overseas[17]

In some Pacific Island countries, if a woman married to a foreigner gives birth overseas, her child is denied citizenship rights in its mother's country.

Table 2.3 shows that in Fiji, Kiribati and Tonga if a woman married to a foreigner gives birth overseas, her child is denied citizenship rights in its mother's country. In Cook Islands a child born overseas of a Cook Island parent can claim rights to land through descent regardless of the child's citizenship; the child has the right to enter the Cook Islands as a Cook Islander. Article 72 of the Nauru Constitution gives children born of male and female citizens the same rights of citizenship, but says nothing about children of Nauruans born overseas. No other legislation appears to mention the issue so it is possible to assume that Nauruan law is fair to both men and women in this respect. On the other hand, Article 25 of the Fiji Constitution states:

> A person born outside of Fiji after the 6th of October 1987 shall become a citizen of Fiji at the date of his birth if at the time of his birth his father is a citizen of Fiji.

A legitimate child born overseas to a Fiji woman and a foreign man has no automatic citizenship rights but may claim citizenship through the grandparent who is a Fijian citizen. Illegitimate children may inherit certain rights through their mothers. An illegitimate child born in Fiji or abroad is automatically entitled to Fijian citizenship.[18] This exception does not, however, remove the discrimination against Fiji women, since a child born legitimately or illegitimately overseas to a foreign woman and a Fiji man automatically has full rights of Fijian citizenship.[19]

STORY *Mere, Harry, Jone and Jean*[20]

Mere and Jone are Fijians, brother and sister, registered in the *Vola ni Kawa Bula*. Mere marries Harry, an Australian. Harry wants to live with Mere in Fiji and become a Fiji citizen. He applies to the Immigration Department, which says that he is not eligible for Fijian citizenship. Further, he can live and work in Fiji only if he can get a job that no one else in Fiji can do. He is unable to get a job. His tourist visa expires and he has to leave. Mere has to give up her excellent job in the bank and go to Australia with him.

Mere's brother Jone visits Mere in Australia, where he marries Jean. They live in Australia, and have three children. Eventually they go to live in Fiji. Jean gets automatic residence status and their three children are registered in the *Vola ni Kawa Bula*.

Mere and Harry have three children, who are Australian citizens because they were born in Australia. Harry and Mere divorce and Mere has custody of the children. She wants to return to Fiji with the children but they cannot automatically enter Fiji. The children's father Harry is not Fijian so they are not Fijian. They cannot apply for citizenship through Mere, who is Fijian: they must apply through Mere's parents. Before they become Fijian citizens through Mere's parents, they must give up Australian citizenship. Here again, two closely related families receive different treatment under discriminatory citizenship laws.

Direct discrimination: affirmative action laws

So far we have discussed laws that harm women by directly discriminating against them. But it is also possible to have laws that benefit women by directly discriminating in their favour. Some constitutions have specific provisions allowing the legislature to make laws to benefit disadvantaged groups — for example, for people who have traditionally been denied access to resources or who fall behind in education and development. These provisions are called affirmative action laws. They appear in the Constitutions of three countries in our area.

In Chapter 1, we discussed various approaches to equality and to deciding whether or not a law, practice or action is discriminatory. There are also different approaches to affirmative action, and some disagreement on the extent to which affirmative action is desirable.[21]

Table 2.4 Countries with affirmative action laws

Country	Article in Constitution
Fiji	Art. 18
Vanuatu	Art. 5 [1] (k)
Western Samoa	Art. 15 [3] (b)

STORY *The University of the South Pacific's Women's Charter*[22]

The September 1996 University of the South Pacific Senate meeting gave an interesting example of opposition to affirmative action, and of the compromises that may be necessary. The Senate was discussing the proposed adoption of a women's charter. This included a statement that the University should take "affirmative action" relating to the employment and promotion of women staff. The basic argument against the statement was that it conflicted with the University Charter, which forbids sex discrimination. After much discussion, the word "affirmative" was replaced by "appropriate", and the Senate accepted the charter.

A skilful compromise need not weaken affirmative action; by accepting the women's charter, the University has committed itself to actions that are "appropriate" to the purposes of the women's charter.

Human rights and anti-discrimination arguments, and especially the argument that discriminating in favour of women is discriminating against men, can be used against any proposal for affirmative action. As we saw in Chapter 1, this is one of the reasons why the "strict identical" approach can disadvantage women, and why the "anti-subordination" approach sets out to show that affirmative action is needed to remove the disadvantages.

CUSTOMARY LAW AND FORMAL LAW[23]

Again in Chapter 1, we saw that most Pacific Island countries recognise and apply some form of customary law. In some countries, the formal legal system recognises and applies customary law where it is appropriate. In others, special custom law courts may be set up to administer customary laws. Table 2.5 lists the countries, and the appropriate Article of the Constitution or the particular act providing for customary law to apply.

We have not listed Tonga, whose situation is unusual in our region. Its nineteenth century lawmakers combined English law and Protestant religious beliefs with those aspects of customary law that were useful to the ruling classes. These then became the written law, which may be changed but is more powerful than custom.[24]

Table 2.5 Countries that legally recognise customary law

Country	Article or Act
Cook Islands	*Cook Islands Act* s. 422
Fiji	Art. 100
Kiribati	*Magistrates Courts Act* 42(2); *Laws of Kiribati Act 1989* s. 5; *Medical and Dental Practitioners (Amendment) Act 1981* s. 37
Nauru	*Customs and Adopted Laws Act 1971* s. 3
Niue	*Niue Act 1966* s. 296; *Niue Amendment Act* No. 2, 1968 NZ
Solomon Islands	Art. 75, 76; *Islanders Marriage Act* Cap. 4; *Islanders Divorce Act* Cap. 48; *Wills, Probate and Administration Act 1987; Local Courts Act* Cap. 46
Tuvalu	Art. 4[3] and Art. 29(4)(b); *Laws of Tuvalu Act 1987*
Vanuatu	Art. 45, 49, 72, 93
Western Samoa	Art. 100, 101, 103, 111; *Samoan Status Act 1963; Lands and Titles Act 1981; Village Fono Act 1990*

Other Pacific Island countries may go further in recognising customary law but they face the problems of dealing with matters that have not been written down and defined. Courts that apply customary law have few guidelines on how customary law is meant to be applied or how it relates to the legislation and common law. In such courts, few officials are trained in formal law. Expert witnesses are called to provide evidence on the particular customs of the community and the adjudicators decide on the correct custom to apply. Women are very rarely called as experts, although they are considered the carriers and sustainers of custom from one generation to the next.

In customary courts, customary law is automatically applied. In the formal courts of law, a person appearing before the court might argue that, in a particular situation, customary law should apply in his or her favour. The adjudicators then must decide whether it is an appropriate situation in which to apply customary law, keeping in mind that customary law is always subject to the constitution.[25]

Applications affecting women

Customary laws and practices related to agriculture, fishing, food, medicine and nutrition appear to be based on sound observation and understanding of community needs and the needs of a fragile environment. However, customary law resembles formal law in that both are imperfect, and neither treats women very well. In this section, we will examine specific instances of how the applications of customary law affect women. We will begin with

the Melanesian countries (Solomon Islands and Vanuatu) and then look at Fiji, Nauru, Tuvalu and Western Samoa.

In Solomon Islands, most laws directly relating to custom[26] deal with marriage, divorce, property and the jurisdiction of courts in such matters. They therefore directly affect women and show the importance of custom in Solomon Islands life, where custom laws rank higher than the common law and the local courts have jurisdiction to apply customary law.[27]

The Vanuatu Constitution has several provisions relating to custom. Section 7 states that one of the "fundamental duties" of every person is to bring children up to respect Vanuatu "culture and customs". Articles 71-79 deal with the custom ownership of land and say that the rules of custom shall apply to all land. Article 45 encourages courts to decide matters "wherever possible in conformity with custom" and Section 3(1) of the 1983 *Island Courts Act* requires each such court to have at least "three justices knowledgeable in custom". One of these must be "a custom chief" from the region covered by the court. Most urban centres have at least two tiers of courts. More women are using the formal system and the formal law, and avoiding custom courts because they think that they will not get justice there. The *Komiti Agensem Vaelens Agensem Woman (KAVAW)* was formed not only to combat violence in Vanuatu, but also to help and encourage women to use the formal law system.

These two countries share with New Caledonia and Papua New Guinea the Melanesian marriage custom of bride price. In this custom, a man's family gives gifts to the family of the woman whom he marries. The gifts now may include money, cloth and clothes as well as custom valuables, and may involve housing and feeding the wife's family during the ceremonies, and paying their transport costs if they come from another area. In general, bride price represents the recognition of the social and economic value of women. It is also a way of compensating the woman's family for the loss of her work and of connecting the two families, especially as the children of that union are regarded as belonging to the father's clan. In later chapters, we will see cases in which women who have married under custom have difficulty in obtaining a share of matrimonial property and in obtaining custody of children. Under the formal legal system, custody decisions are made on the principle of "the best interests of the children".[28] This often directly conflicts with the customary practices.

The bride price custom has both good and bad aspects. In Solomon Islands it is considered as a token of appreciation. In Vanuatu it is considered as compensation to the family for the loss of the bride's labour. Others feel it helps bring wealth into the family and enhances the status of the girl child. For instance, the birth of girls will be a cause of joy, not the dismay felt by poor families who expect to have to provide dowries for their daughters.

Those against the practice argue that the effects of bride price include valuing women in material terms, their virginity, chastity or sexual purity, capacity to reproduce, educational qualifications and labour. Bride price may be affected and devalued by things outside the woman's control. If bride price encourages competition between women and applies only to women,

not to men, that should alert women to the discriminatory nature of the practice. Finally, the practice means that women are treated as a commodity with a price tag.

Placing a material value on human beings is a violation of human rights, and a breach of Article 5(a) of the United Nations Women's Convention. The same argument of course may be applied to the custom of providing dowries or paying to get a daughter "married and off our hands". This custom is still common in Indo-Fijian families, and was common in the United Kingdom, where many eighteenth and nineteenth century novels tell stories of dowries increased to attract husbands for unattractive daughters. Dowries are the opposite of bride prices, but the idea of a price tag is common to both.

Article 100 of the Fiji Constitution recognises customary law except where the law is repugnant to, or against the general principles of, humanity. In practice, the application of customary law may conflict with human rights. One disturbing feature is the power of the Fiji Native Lands and Fisheries Commission to decide whether a matter involves custom or tradition. This decision is considered final and may not be challenged in a court of law. If, therefore, the Native Lands and Fisheries Commission makes a customary law decision that discriminates against women, women may not challenge the decision in a formal court of law.

Formal courts appear to accept and apply customary law when it favours the interests of men. There are few examples of customary law used in favour of women. We see this in decisions on whether or not to accept *bulubulu*, the practice whereby a family apologises for the behaviour of a relative who has harmed someone and dishonoured the family. The underlying intent is to preserve good relations between the families despite the wrong done to the injured family. If a man fathers an illegitimate child, his family may present *bulubulu* to the child's mother's family. In this way, the father's family apologises to the mother's family and recognises the child's parentage. In an affiliation case, an offer of *bulubulu* could provide the required proof of paternity. However, courts often do not accept *bulubulu* as proof of paternity. They have argued that unless the alleged father participates in the *bulubulu*, he cannot be taken to have approved of it, and therefore does not recognise the child as his.

On the other hand, commentators suggest that *bulubulu* traditionally could not be applied in rape cases. *I-bulubulu* was not meant as an excuse for bad conduct, and therefore should not affect criminal proceedings. Acceptance by the victim's family should not prevent an offender from being punished.[29] However, if a family accepts *bulubulu* for rape, the rapist often successfully uses the acceptance to reduce his sentence. This is another example of how formal courts may misinterpret custom to the advantage of a male offender.

The Fiji Government intends to set up traditional Fijian courts to administer customary law. According to the proposed legislation, the custom courts will affect only indigenous Fijian men and women. Persons from other

races will continue to have access to the formal legal system. As in other third world countries, minor criminal matters and the area of personal law will come under these custom courts. Women's organisations have expressed grave fears for indigenous Fijian women; in their experience, custom, village, island or traditional courts have usually worked against women. They maintain that the proposed Fijian courts system will reinforce traditional attitudes and values that will further oppress women. Their specific objections to customary courts in Fiji include those listed below.[30]

- Tradition, culture and custom are largely unwritten and are defined by men, not women. It is therefore highly possible that patriarchal and arbitrary interpretations of custom, potentially dangerous for women, will be adopted in such courts.
- Customary law is neither uniform nor agreed upon by all provinces. There is no way of predicting legal or illegal action.
- People who lack social, economic and political power (women, commoners and the poor) are unable to ensure that the proposed Fijian court system will interpret customs and traditions in ways that are neutral or beneficial to them.
- There is no clear distinction between the responsibilities of custom and formal law courts. Women in rural areas often discover too late that a case heard by a custom court should have been heard by a formal court.
- The proposal to include domestic cases for determination by custom courts may be dangerous for women if the customs themselves are not based on equitable principles of justice.

All 1968 United Kingdom laws were adopted as part of Nauruan law. They apply to Nauru if they are not repugnant to, or inconsistent with, Nauruan law. The *Nauruan Community Ordinance 1956-1962* defines persons who make up the Nauruan community. This includes the rules on the admission of persons to be Nauruan and the circumstances in which persons cease to be Nauruan. It gives rights of citizenship to other Pacific Islanders and to foreign women married to Nauruans accepted as Nauruans by Nauru custom. The *Custom and Adopted Laws Act 1971*, Section 3, says that every court dealing with land, wills and succession must recognise Nauru custom unless it involves taking property without consent of owners, and taking children without the consent of the parents.

The Tuvalu Constitution specifies that rights can be exercised only according to Tuvalu culture. The *Laws of Tuvalu Act* defines Tuvalu customary law and focuses on such matters as land and fishing rights, legitimacy and adoption of children, divorce and community responsibilities. In disputes over the custody of children, customary law favours fathers despite the fact that the custody legislation gives parents equal rights over children. Tuvalu customary law holds that once children reach two years of age the father has a better right of custody than the mother has. By customary law, men

also control women's freedom of movement, despite constitutional safeguards.

In Article 111 of the Western Samoa Constitution, the word "law" includes custom or usage that has acquired "the force of law". English common law and equity are included as part of the law of Western Samoa, if they do not conflict with Western Samoa custom. The courts can apply custom and local law provided it is not repugnant to natural justice, equality and good conscience.

Customary practices and law are known as *fa'a samoa*. The *Samoan Status Act 1963* defines what being Samoan means: a person who is a citizen and has Samoan blood. The Act also governs who can hold a *matai* title. It gives the *matai* enormous powers, including control over the use of land. The issue of titles is very controversial not only because the title brings with it enormous prestige, but also because it is intimately tied up with ownership and control of land. Further, only *matai* are eligible to be elected to the legislature. Until recently they were also the only citizens who could vote. Now commoners may also vote but they may not stand for election. Most *matai* are men, although there is no law preventing women from seeking a title. Thus, because custom is interpreted by men, not women, the legislature has very few women in it.

The Supreme Court has had some opportunities to consider the conflict between *fa'a samoa*, common law and constitutional law. The following case does not directly involve women, but it is described here because it may help women deal with any *fa'a samoa* tradition that may work against women's interests.[31]

CASE *Tariu Tuivaiti v F. Sila and Ors (1980) Western Samoa*[32]

Facts Tuivaiti returned to Western Samoa after some years and set up a business. He did not follow local religious practices. As well, he did not allow the village elders special concessions, like riding free of charge on his buses. The *fono* thought that his defiance was against *fa'a samoa*. They banished him and his family from the village, allowed his home to be burnt to the ground and placed a ban on his business. Tuivaiti sued them for damages for trespass, assault, conspiracy, intimidation and negligence.

Issue Tuivaiti argued that his constitutional rights had been violated. The four *matai* defendants said that since *fa'a samoa* was the law before the Constitution or the common law, it provided a defence of privilege and justification or paramount law.

Decision On 17 December 1980, the Supreme Court ruled that the Constitution was paramount despite its recognition of custom law, and Tuivaiti won his case.

Evaluating customary law

When Pacific Island countries gained their independence, they moved very quickly to make their traditions and customary law part of the formal law system. Many countries did this by officially recognising customary law in

their constitutions and related statutes. However, they usually recognised customary law without really defining or understanding precisely what they meant by customary law. Did they mean the oral traditions and customs existing at the time of independence? Or did they mean a complex mixture of customs, ancient and imported religious and colonial law?

They gave little thought to what these customs meant for women. However, women today have mixed feelings about the value of customary law, and may feel disloyal in criticising customs and traditions that are part of our lives. But customs do not remain static; they will change in one direction or another, with or without the help of women. We therefore provide a list of questions that may help in discussions of the future development of customary law.

- Who defines customary law? Who interprets it?
- Are women ever asked to interpret customary law? Are they ever called as witnesses to give evidence on custom?
- What is our experience of the application of customary law in the customary law courts?
- Will the customary laws that benefit women be applied?
- What are the effects of the law?
- Are the same rules applied to men?
- Do the negative aspects of the law outweigh the positive effects?
- Are those who benefit from the existing system likely to agree to change it?

CONCLUSION

In this chapter, we have defined what a constitution is and what it does, focusing specifically on how Pacific Island constitutions deal with discrimination between women and men. We have found that most of these constitutions say that it is illegal to treat people in different ways, depending on their sex, race, religion and so on. However, this has not stopped governments from passing laws and accepting practices that discriminate against women, particularly in questions of citizenship and land rights. This is because most Pacific Islands have patrilineal constitutions, created by people who are the products of patriarchal societies. These people have brought the same attitudes to customary law, and have created a legal system that is fundamentally biased against women.

What can be done?

It is very difficult to change a written constitution. In all countries in this study (except Cook Islands) the constitution has a higher status than do ordinary laws. Consequently, an ordinary law may be amended by a simple majority of votes in the legislature. Amending the constitution requires a larger majority. For example, a simple majority is 51% or just more than half the number of votes. But any change to the constitution might require the number of votes to be two-thirds or three-quarters of the number of votes in the legislature. Further, in some countries like Fiji where there is a bicameral legislature (a legislative assembly consisting of an upper and a lower house), a qualified vote is required in both houses to amend the Constitution. This is very difficult to do unless large numbers of politicians have the political will to change things.

We will discuss strategies more fully in our final chapter. One strategy is to ensure that politicians do have the will to remove the discriminatory provisions of our constitutions, or to introduce affirmative action legislation. To do this, Pacific women and human rights activists must become more politically aware, stand for election to the legislature, and campaign and vote for candidates who support human rights.

Changes to Jamaican citizenship laws give an example.[33] The Government of Jamaica had ratified the United Nations Women's Convention, with reservations on Article 9 since its Constitution denied citizenship rights to children born overseas of Jamaican women and foreign men unless the children were illegitimate. Intense lobbying by women's NGOs caused the legislature to change the Constitution, which now gives these Jamaican children the same rights of citizenship, whether they are legitimate or illegitimate and whether they claim through their father or their mother.

Another strategy is that of the test case. In Fiji, for example, women's organisations with *locus standi* could take a test case up to the High Court, seeking a ruling that under Article 113 of the Constitution, a discriminatory law or practice is against the Constitution. If the High Court says that the law or practice is unconstitutional, the law or practice must be changed. This has not yet been tried in the Pacific, but since 1990 there have been several cases in common law countries with similar legislation. Unity Dow of Botswana was a pioneer in this area.

CASE *Unity Dow v the Attorney-General (Botswana)*[34]

Facts Unity Dow sued her Government saying that the nationality law of Botswana discriminated against women married to foreigners. Under the *Nationality Act 1984*, the children of Botswana men married to foreigners were automatically entitled to Botswana citizenship, whereas the children of Botswana women married to foreigners were not.

Issue Unity Dow argued that the *Nationality Act* was against the Constitution of Botswana, which granted men and women equal rights. She said that the Act treated Botswana men and women differently, and was therefore unconstitutional and invalid.

Decision The High Court ruled that the *Nationality Act* was discriminatory, because the Constitution prohibited sex discrimination. The Court also cited the United Nations Convention on the Elimination of Discrimination Against Women as a guide for countries to follow. It said: "The time that women were treated as chattels or were there to obey the whims and wishes of males is long past, and it would be offensive to ... the spirit of the Constitution to find that it [would] permit discrimination on the grounds of sex".

Since Dow's victory, women in Zimbabwe also have been successful. We describe and comment on two such cases because of their general interest, and possible value as precedents.

CASE *Rattigan and Ors v Chief Immigration Officer and Ors (Zimbabwe)*[35]

Facts Three Zimbabwe citizens (Devagi Rattigan, Marchelle Butler-Rees and Edith Caules) were married to foreign husbands. The couples all wanted to establish their permanent matrimonial homes in Zimbabwe. Each husband had applied to Immigration authorities for permits to work or live in Zimbabwe but had been denied on the ground that he had no skills that were scarce there.

The three women applicants brought a case against the Immigration authorities, the Minister of Home Affairs and the Attorney-General. The applicants argued that by denying their foreign husbands the right to permanent residence in Zimbabwe, the Immigration authorities had limited their constitutional rights as citizens to freedom of movement — if the husbands could not live in Zimbabwe, the women would be forced to leave if they wanted to live with their husbands. The respondents replied that the women still had freedom to move in and out of Zimbabwe. They could choose whether to live in Zimbabwe without their husbands, or to go and live where their husbands did have citizenship.

Issue By refusing to allow the foreign husbands to live in Zimbabwe, did the Immigration authorities and other respondents limit the female citizens' constitutional rights to freedom of movement?

Decision In the Supreme Court of Zimbabwe, Chief Justice Gubbay said, in effect, that a basic part of marriage was that husband and wife lived together. "It was unrealistic to maintain that the authorities could keep the husbands out of Zimbabwe and yet not interfere with the applicants' freedom of movement". The Zimbabwe Constitution contained two sections relevant to a citizen's freedom of movement. Section 11 set out the "sum total of an individual's rights and freedoms", and Section 22 protected the individual's right to freedom of movement. These sections, taken together and given "a generous and purposive interpretation" made it clear that to prevent the foreign husbands from living with their wives was to "undermine and devalue" the wives' constitutional right to freedom of movement "as a member of a family unit". He therefore allowed the application. The Court issued a declaration saying that the actions by the Immigration authorities were unconstitutional because they had limited the applicants' right to freedom of movement.

CASE *Salem v Chief Immigration Officer and Anor, (Zimbabwe)*[36]

Facts Patricia Ann Salem was a Zimbabwe citizen and had her home in Zimbabwe. She married a foreigner in April 1994. Both wished to reside permanently in Zimbabwe. In June 1994, her husband applied to the Chief Immigration Officer for a residence permit. In August, an Immigration Officer told him to leave Zimbabwe pending a decision on his permit.

Patricia Salem applied to the Supreme Court for a ruling that her own constitutional right to freedom of movement should cover also her foreign husband's right to work in Zimbabwe. She said that she was pregnant and should give birth in March 1995. She would have to give up her own job and would need her husband's support. If he was forced to leave, she would have to leave with him, and thus forgo her constitutional right to freedom of movement. The respondents, the Chief Immigration Officer and an Immigration Officer, did not oppose her application.

Issues Would the applicant's freedom of movement be limited if her husband was denied residence or a work permit? How should the word "reside" be interpreted?

Decision Chief Justice Gubbay said that the case of *Rattigan and Ors v Chief Immigration Officer and Ors* had already established the principle that "a female citizen of Zimbabwe, married to a foreign national, was entitled ... under s. 22(1) of the Constitution to reside permanently with her husband in any part of Zimbabwe". This section required "a generous and purposive interpretation". A narrow interpretation of the word "reside" would "diminish the right to freedom of movement guaranteed to female citizens". It would discriminate between poor women, who needed their husbands' financial support, and richer women who had their own means. Denying a foreign husband the right to live in Zimbabwe and to support his family would endanger his citizen wife's "unqualified right to continue residing in this country as a member of a family unit".

The Supreme Court allowed Salem's application. It declared that the Immigration authorities had infringed Salem's constitutional rights to freedom of movement. As well, because the Court had made a similar declaration in the *Rattigan* case, the Chief Justice would formally direct the Immigration authorities "to ensure that such rights were given effect". The Court therefore ordered the Chief Immigration Officer to give Salem's husband written authority to "remain in Zimbabwe on the same standing as any other alien who was a permanent resident". Further, he was to have the same rights as other permanent residents "including the right to engage in employment or other gainful activity in any part of Zimbabwe".

Comment In these two cases, we see the value of precedent. The *Rattigan* case had the *Dow* and other cases as precedent. The *Salem* case relied heavily on the *Rattigan* case. Further, the *Rattigan* case had declared that the practices of the Immigration authorities had breached the constitutional rights of the applicants. In spite of this, the Immigration authorities continued their practices, so the Chief Justice used his powers to direct them "to ensure that such rights were given effect".

What else can we learn from these cases? The Immigration authorities appear to have been very unwilling to grant residence and work permits to foreign husbands, even to the extent of ignoring the *Rattigan* case declaration. The applicants in the *Rattigan* and *Salem* cases may have been lucky to have a Chief Justice who was determined to uphold constitutional rights and to keep family units together. Legislation cannot change discriminatory attitudes, but courts can stop discriminatory practices — even, as in these cases, where the discrimination is indirect.

Another interesting point is that in the *Rattigan* case, three families got together in a class action to fight for their rights, thus sharing expenses and providing mutual support. Class actions could be useful in our region, where many women, in effect, lose their constitutional freedom of movement by marrying foreign husbands. By providing examples of legal precedents and useful strategies, this book aims to help women to gain the knowledge and power necessary to challenge laws and practices, and to work towards changing constitutions based on patriarchal attitudes.

Author's note: At the time of going to press the Fiji Parliament passed the *Constitution Amendment Act 1997* removing the discrimination referred to earlier in this chapter in relation to Fiji women's foreign husbands and children born overseas. This significant advance was primarily the work of the lobby group, the Women's Coalition for Women's Citizenship Rights (WCFCR), a coalition of women's NGOs spearheaded and organised by the Fiji Women's Rights Movement. Other areas of sex discrimination remain in the Fiji Constitution. The comments in the chapter remain applicable to other countries. The new law will come into effect in July 1998.

3

Land rights

WHAT THIS CHAPTER IS ABOUT

In Chapter 2, we saw how and why patriarchal and patrilineal systems influence women's citizenship rights. One of the basic features of such systems is that they aim to ensure that property rights remain with men. The present chapter deals with the ways in which land may be owned; the ways in which access to land is governed; and the ways in which ownership and access to land affect both indigenous and non-indigenous women in the Pacific.

LAND OWNERSHIP AND ACCESS

We will begin by discussing the three basic ways in which land may be owned: by custom; by the State; and by freehold.

Types of ownership: State; freehold; custom[1]

State (crown) land belongs to the Government, which may sell or lease it or give it away. The division of land into freehold land and crown land is derived from Western ideas of land ownership. It is governed by the land law contained in the legislation and common law. In Tonga, all land is crown land; elsewhere in the Pacific, most land is custom land although, especially in Fiji, there are large areas of both freehold and crown land.

Freehold land is owned by individuals or groups of individuals, who may sell it or lease it or leave it to their heirs, or give it away. Complete ownership, control and management rests with the owner, who can do as he or she wishes with the land. Having a freehold interest in land means that the interest lasts indefinitely. Freehold land may pass from owner to owner or from generation to generation until the owner dies without leaving an heir.

In our region, freehold is the only land available for purchase by citizens who are not indigenous; people who are not citizens may require special political consent. Fiji, with about 10%, and Western Samoa with about 4%[2] are the only countries with any significant amount of freehold land, and even in these countries, freehold land may be very expensive.

Custom land is owned by groups of indigenous people. An individual may have rights to the use of a piece of land, but, at least theoretically, cannot sell it. Custom land may not be permanently sold or transferred to non-indigenous people in the same way that freehold land can be. It may however, be leased to individuals for a specified short or long period. Custom land is governed by customary law, which is mainly unwritten, and consists of complicated rules of inheritance and traditional practices. Decisions about

land use must be made by many individuals or by a body entrusted with the control and management of the land, such as the Native Land Trust Board in Fiji. Although this aspect of land ownership protects the rights of native owners as a group, it may restrict land development and the access of women to land.

Access to land

Access to crown and freehold land is possible not only through sale, gift or inheritance, but also through leasehold and life estates or life interests. A life estate or interest allows a specified person, called the beneficiary, or grantee, to use the land until death. When that person dies, the land returns to its lawful owner. For example, many widows are left a life estate in their deceased husband's land; they may use the land but cannot sell it or give or leave it to anyone, because the land is not legally theirs — when they die, it reverts to other beneficiaries, usually the children or the father's family.

Custom, crown and freehold land may be leased. (Leaseholds are very common in Fiji, and are very important in the sugar industry, where customary owners lease their land to cane-growers.) A leasehold interest in land means that the owner allows a lessee or tenant full use of the land, amounting to temporary ownership, for a specified period — for example, from a week to 30 years, or even 99 years for some crown lands. The owner may allow the lessee to sell or transfer the interest to another lessee, but when the lease expires, the leasehold interest reverts to the owner.

The poverty cycle

Although women may purchase freehold land or acquire leases, they lack the economic, social and political ability to do so. They find it difficult to borrow money from commercial banks because they either do not have secure employment or because they earn considerably less than men, and therefore banks do not regard women as being able to pay back loans. Some lending organisations will not lend money to a woman to buy a house unless she has a male guarantor — someone who will take legal responsibility for paying back the loan if she does not pay it.

The Fiji Government-financed Housing Authority has housing policies that effectively prevent women from being land and home owners. In order to be eligible for assistance, one has to be formally employed in the cash sector and earn a certain minimum income.[3] Since only 30% of the paid labour force consists of women, and women have a higher rate of unemployment than men, these policies do not allow women to acquire land. Domestic workers, a significant portion of informal labour, are excluded from Housing Authority loans regardless of income.

In 1984, 72% of all Fijian households had male heads. Men are also the majority of tenants. The Housing Authority and commercial banks have a policy of not insisting that both spouses' names are on legal titles to property unless the woman is in paid employment and is contributing directly to the loan payments. This policy fails to recognise women's unpaid work in the home, or in the subsistence sector, and prevents women from jointly owning homes with their husbands. Further, as we will see in Chapter 11, most countries in our region do not grant women automatic legal rights to matrimonial property following a divorce, thus again limiting women's legal rights to acquire land.

There is no legislation preventing women from owning freehold or leasehold land or from renting property. In the final analysis, women suffer from a form of indirect discrimination in land rights. With little political power and little access to money, they have limited rights over land.

Non-indigenous women's access to land

Non-indigenous women, like non-indigenous men, have access to land through purchasing freehold land and leasing native land. Leases have a limited life and are vulnerable to the political climate. As far as custom land is concerned, if a non-indigenous woman marries an indigenous man, she has practically no matrimonial property rights to her husband's custom land. Her children, however, may acquire land rights through their father.

Within our region, Indo-Fijians are the largest ethnic group affected by lack of land rights. Indo-Fijian men who do not own freehold land have access to 30 year leases of native land. Indo-Fijian women are rarely leaseholders. Women from other non-indigenous racial groups are similarly disadvantaged, not only by the legal system, but also by their socioeconomic position within the family and community.

INDIGENOUS WOMEN'S RIGHTS TO LAND

In all Pacific Island countries except Tonga, land legislation does not directly discriminate against indigenous women. Indigenous women have, in theory, as much right to control and manage custom land as men do. However, 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. As we will see, these rights rest largely with men.

In patrilineal societies, land is passed on from generation to generation through the male line. Land control and management are in male hands. 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. Most Pacific Island societies are currently patrilineal, but some trace rights to land through the female line, although not necessarily from mother to daughter. These are called matrilineal societies, but even in a matrilineal society, women do not necessarily control or manage the land, and thereby have real power. Some women have *usufruct* rights over land; they have the right to use it, but do not control or manage it. In some societies, control is held by the woman's brothers or uncles on the mother's side.

All this means that, 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. We will therefore discuss in more detail how the system affects women in the countries of this survey. We will first consider the situation in Polynesia (excluding Cook Islands), Micronesia and Melanesia, and will end with Cook Islands, where women seem to have more legal rights to land than they do in other countries of our region.

Polynesia (excluding Cook Islands): Fiji, Tonga, Tuvalu, Western Samoa

In Fiji, 82.5% of land is native land communally owned by indigenous Fijians. About 10% is freehold land and another 7.5% is crown land.[4] Native land is held in trust for indigenous Fijians by the Native Land Trust Board. Other races, including Indo-Fijians, make up slightly less than 50% of the total population but have limited access to native land through leasehold.

Land rights are entrenched in the Constitution. The 1990 Fiji Constitution (Article 100) states that customary law is part of the law of Fiji unless Parliament provides otherwise. The law favours males, because custom provides that chiefly titles are held through the male line, even though a very few women do hold them. If a titled woman dies, her right is given to her closest male relative on her father's side. Generally, chiefly titles are inherited, as with land, through the male line and the Constitution reinforces this discrimination by formally recognising customary law.

The land is governed by customary law that has been partly codified in legislation. However, most of the rules governing native land are interpreted by the Native Lands and Fisheries Commission, which generally adopts patriarchal interpretations of custom. Historically, with the support of the colonial government, the Commission strengthened patrilineal transfers of land by formalising a patrilineal and patriarchal system of land management and control. Despite the fact that some areas in Fiji were matrilineal, the colonial government dealt mostly with men and accepted and supported a male perspective that reflected the government's own cultural values.

The Constitution and *Native Lands Act* define ownership of native land primarily in terms of patrilineal descent. Women did, however, upon the introduction of statutory law, become registered owners of native land based on their birthright as members of their *mataqali*, a landowning unit consisting of members of a clan. Although the legislation is apparently gender-neutral and not discriminatory, because it purports to make women and men equal within the *mataqali*, women effectively have little control over land as land rights are determined according to customary law.

The legislation provides that land is held mainly by the *mataqali*. Under this system women cannot pass on their rights to land. When a woman from one *mataqali* marries a man from another *mataqali*, her children have only *vasu* rights (rights inherited through the mother) to her land. Her children do not have legal rights to land that she owns communally with other members of her *mataqali*. However they do have rights over their father's land in his *mataqali*. A child may therefore sell the lease of his father's land, but may not sell the lease of his mother's land.

Men therefore have full control and management over the land; women can use it but not control it. Under custom, women never have rights to home sites. This right belongs to their fathers or brothers. Women generally did not and do not give evidence as expert witnesses on customary law concerning land claims of native owned lands. The *Native Lands Act* and the Native Lands and Fisheries Commission determine rights to land by using customs and traditions largely defined by men.

To change land legislation would require a three-quarters vote at three levels of lawmaking: the House of Representatives, the Senate and the Great Council of Chiefs. The Great Council of Chiefs consists of the landed hereditary chiefs, most of whom are men. The legislative process is weighted against women, as men make the decisions at all levels.

Both the Tongan Constitution and the *Land Act* ensure that land in Tonga is vested in the Crown and is the property of the Crown[5] (effectively the King, who owns all land in Tonga.) Only Tongan citizens may "own" land. Leases of up to 99 years may be granted to individuals. The legislation establishes male primogeniture and male privilege; the eldest male of the male line is preferred over other males and women. Women are in practice excluded from owning leased land unless there is no eligible living male.

The *Land Act* established a separate Land Court. The Land Court is presided over by a Judge from the Supreme Court who sits with an assessor,

an expert on Tongan custom. Supreme Court judges have always been expatriates. Appeals from the Land Court go to the King in Privy Council. The Privy Council consists of the King, the Cabinet Ministers, and two Governors. The Chief Justice of the Supreme Court attends to advise but does not participate in making decisions.

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 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. The widow of an estate holder does not have an automatic right to live on her husband's land. Article 107 of the Constitution indicates those who are eligible to inherit land:

> 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 Tongan Constitution and *Land Act* give the widow of a tax or town allotment holder a right to succeed to the allotment until she dies, or remarries or "fornicates".[6,7] This means that, for the rest of her life, a widow must be sexually faithful to her dead husband or risk losing her home.

The following case study shows how a widow attempted unsuccessfully to subdivide the life estate under which she had rights until her death.

CASE *Tu'inukuafe v Minister for Lands and Loketi Tu'inukuafe [widow] (1967) Tonga*[8]

Facts The male heirs to the deceased owner's land attempted by a court action to stop his widow from subdividing her life estate for her grandsons.

Decision The court said that to allow the widow to subdivide would be contrary to the Constitution. It said that the legal term "holder" does not include a widow since the Constitution provided for male primogeniture and only a life estate for the widow.

Some case studies show judgments where Tongan women have attempted either to gain access to land, or to protect their limited rights to land when they have been accused of adultery.[9]

CASE *Vaea v Elenoa Pale (1927) Tonga*

Facts A noble tried to evict a widow from an allotment. His grounds were that, by committing adultery, the widow had lost her life interest in her deceased husband's property.

Decision The Land Court said that the widow had been in "undisputed possession" of the property for over 10 years even though people knew that during most of that time she was committing adultery. By "undisputed

possession" the Court meant that nobody else had challenged the widow's right to the land. The Court denied the noble's action on the ground that his interest in the property was based on suspicious and flimsy legal grounds. The widow's possession of the land was therefore protected for her lifetime.

Comment In this case, the widow was protected only by the weakness of the noble's claim. Had the case been taken by someone with a stronger claim the Court might have been obliged to terminate the widow's right.

CASE *Lavaka v Mele Pahulu (1927) Tonga*

Facts A noble was the legal holder of an allotment on which a widow had the right to live until her death. He attempted to evict the widow on the grounds that she had committed adultery.

Decision The Land Court denied the noble's claim on the ground that the adultery must be strictly proven. The noble had failed to prove the adultery. In any case, the Court said, the time lapse of 10 years barred the claim from proceeding.

Comment The widow's interest in the land was protected by the Court's use of Western principles of law. Although the Land Court is required to apply Tongan customary law when deciding land matters, it was prepared to interpret the rules from a Western perspective in order to do justice. It did this by requiring a strict burden of proof of adultery and by barring the claim because of the lapse of time. This case shows also that interpretations of the law by judges with nonsexist attitudes can do much to improve women's status in the law.

There is further evidence that Land Courts in Tonga have tried to interpret the laws to grant women some common law rights to use or retain land.[10]

CASE *Leger v Laki Niu (1989) Tonga*

Facts Through a will made in accordance with Tongan custom and land law, a man had left a life interest to his widow and thereafter to his son in the event of her death or remarriage. The widow and son disputed the title of the property.

Issue The argument before the Land Court was whether the widow was entitled at least to have the property registered in her name until her death or remarriage.

Decision The Land Court said she could have the property in her name. When she died or remarried, it had to be legally registered in the son's name.

CASE *Havea (Noble) Tu'iha'ateiho v Leafa Tu'iha'ateiho [widow] (1973) Tonga*

Facts The plaintiff, a noble, was the brother-in-law of the defendant, his brother's widow. The noble was the legal heir and owner of his dead brother's property. As the widow of an estate holder, the defendant did not have a life interest in the 33 acre property, but she was still living on it and had made many improvements to it. The improvements had increased the value of the land. The noble tried to get a court order to evict the widow.

Decision The Land Court said that under Tongan custom, a brother was obliged to support his brother's widow. The Court would therefore not grant

the eviction order sought. The noble appealed to the Privy Council. Eventually the parties agreed before the Privy Council that the widow was entitled to a life interest in 3 acres, presumably where the house was located. The noble got the remaining 30 acre coconut plantation.

Comment This decision attempts to do some justice, but its effect was that the widow's hard work and financial contribution to improving the property was not compensated. In addition the livelihood that she made from the other 30 acres would no longer be available to her.

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.[11]

The Tongan land laws do not recognise social change and are a means of controlling women's sexuality. Tongan men may have sexual relationships outside marriage without affecting their land rights. Tongan women may lose their limited rights to land if they are found guilty of adultery or fornication. Nearly all Tongan women know about the land laws even if they know little about the other laws affecting their lives. As women have little access to land, they have limited means to obtain loans, and need the consent of husbands, fathers, brothers and sons to borrow money.

As Tuvalu has a population of 8,500 and a total land area of only 26 square kilometres, land is a complex and divisive issue, especially in the capital, Funafuti. All land is native land and is governed by native custom and title. All titles or documents showing ownership are listed and catalogued in the Native Lands Commission Register. Each island has a Land Court consisting of lay magistrates who are not lawyers. They apply customary rules in disputes over land. Decisions of the Land Courts are upheld on appeal unless there is a mistake, or unless decisions of the Land Courts do not give a fair result according to custom.

Land in Tuvalu is either *kaitasi* land leased from the Government, or individual ownership land. The latter is very rare. *Kaitasi* land is land used by the whole family, even by those who are married; it is available only to indigenous Tuvalu nationals. Although it has been suggested that men and women have equal rights to *kaitasi* land, the titular (registered or legal) owner of the land is almost always a man, usually the father or eldest brother. The title holder must theoretically have the consent of all who have *usufruct* rights before he can make any decision about the land. However, in practice, he can transfer or mortgage it without their consent.

The *Tuvalu Land Code*[12] reflects customary law by stating that in the distribution of an estate where the legal owner has died without leaving a will, the share of the eldest son shall be larger than the combined shares of the other sons. The shares of the sons exceed those of the daughters. If there are no sons, the share of the eldest daughter exceeds those of the younger daughters. The usual reason for not giving land to women is that they marry anyway and have rights to use their husband's land. The one exception is

on Vaitupu Island, where a land owner may distribute the land however he wishes, except that all the children must be provided for.

If a man has a wife who has lived with him for more than three years, and there are no children, he must make provision for her as long as she lives after his death. When she dies, the land will return to the husband's family.[13] If a person who dies has no children or brothers and sisters, the land will go to those most closely related to him through his father.

In order for a will to be valid and enforceable by law, it must be registered in the Land Court. There are many wills in which the testator has attempted to provide for everyone in the family, but generally men control and manage land, and women have only *usufruct* rights. However, an owner who leaves a will may dispose of his estate in any way he likes. Women do receive some land over which they have complete control and management, often through their fathers' wills. They can do whatever they wish with this land. In one case,[14] the Land Court heard all the parties from one family who could not agree on how the land was to be shared. The Court found sufficient reasons to give the eldest daughter a larger share than all her brothers. The decision was not challenged, but this is a rare case and does not reflect women's rights to land in general in Tuvalu.

In Western Samoa, 80% of land is custom land and cannot be sold or passed on to non-indigenous Samoans.[15] All custom land is treated according to Samoan custom. A limited amount is freehold, mainly through German settlers in colonial times, and is treated accordingly, but with few exceptions, only resident citizens may own freehold land. Women and men appear to have the same rights to own freehold land.

The social unit of Samoa is the *aiga* or extended family, which is controlled by at least one *matai* or chief by choice and consensus of the family.[16] Many court cases in Western Samoa are over the installation of *matai*, who control and direct the use of land and family assets, and may lease out custom land to others. Actual legal control and management of all land are vested only in *matai* and most men and women have only *usufruct* rights. Even if a Samoan claims an interest in any custom land, he may get only a lease or license.

The powerful Land and Titles Court adjudicates on all disputed titles and thereby on land rights. *Matai* titles are very contentious and vigorously fought over. Women do appear as litigants, but only rarely. Lawyers are not allowed to appear as Judges in this Court. Judges of the Land and Titles Court, appointed for their knowledge of custom, are also all *matai*.

The rank of the women in the village is largely determined by the rank of the *matai* titles of the men, and the division by sex extends to all levels of the social organisation. Customarily, the Western Samoan woman does not work the land and has no access to land other than the *aiga* land of her family or the use of the land held by her husband's *aiga*. In 1926 there was one woman *matai*. In 1993 there were 1488 women in a total of 24,181 *matai*, so some progress has been made. However, women's access to land is still limited both by sex and by social class.[17] Land ownership, management and control in Western Samoa are therefore generally weighted against women.

Micronesia: Kiribati, Nauru

Land rights in Kiribati vary from island to island. Basically, testators can do what they wish with their land, but Government policy is not to encourage the division of land between all family members, since this means that the portions get smaller from generation to generation. The direct consequence of the policy is that a greater portion of land is given to older sons. Inheritances from the fathers go to sons and inheritances from mothers go to daughters. As women have smaller pieces of land than men do, their daughters' inheritances get even smaller and smaller.

The legislation, the *Gilbert and Phoenix Islands Code (1977)*, covers native land rights in 18 of the islands of Kiribati. In Marakei, even where there are no sons and a man dies intestate, a woman is still not allowed a share of property.[18] Equal sharing of property is found in Makin and Butaritari, but in other islands, the eldest male children have priority. This means that the eldest son's share will always be bigger than that of the younger sons, and the sons' shares will always be bigger than the daughters' shares.

The *Land Code*[19] states that a parent may not take back a dowry or gift of land granted to a daughter on her marriage, unless it is proved that the daughter has been guilty of neglecting her parents. A dowry may also be taken back if there is not enough land for the support of other children born to the parent after the gift was made. However, women have some rights to land if they are left landless after having cared for their aging parents. If the woman dies without children, the land returns to the donor family.

According to custom, members of the family who do not have title to the property must be allowed to use the land to grow produce; however, usually the elder brother's name is on the title and only he can collect rent and sell the produce. His sisters, like his younger brothers, may ask him for the privilege of sharing the produce or the profits from the sale of produce. A consequence of this dependence is that women do not grow food or crops, because they do not have unrestricted access to land. A further consequences is that i-Kiribati children do not eat enough green leafy vegetables, and therefore suffer from night-blindness.[20] Men were traditionally sailors and fishermen, not land users. There is very little agriculture in Kiribati, as the land and soil is mainly coral, and not good for growing crops. Many i-Kiribati say that if more women controlled land use, there would be a greater likelihood of agriculture in Kiribati.

The overall reality is that women depend on men for access to land. Although sisters have a traditional right to demand access to land, the decision whether to observe this right is totally discretionary: brothers do not have to agree. Analysis of court cases show that some women do take cases to court, with mixed success, but, in general, case law confirms male ownership, control and management of land in Kiribati.

CASE *Aroito v Karo (1978) Kiribati*[21]

The court held that there were rights for women to use land but that this right could not be expanded further into any legal interest. Women could not make overall decisions about the management of the land, nor could they determine who should inherit the land.

CASE *Tekaai v Tekaai (1978) Kiribati*[22]

A widow was granted a life interest in her husband's land. She could use the land during her lifetime, but could not sell or mortgage it.

CASE *Taake Rimon and Ors (1979) Kiribati*[23]

In this case, the father left an extremely unequal and large share of his land to the sons. The court was willing to change the terms of the will to enable some distribution to the daughters.

CASE *Taouea v Temate and Tebanana (1979) Kiribati*[24]

This case considered the inheritance of land where there was no will and where custom appeared to be silent. A woman land owner had died, and on appeal from the Land Court, the High Court held that the land should descend generally in the family, not on the female side alone, even though the dead woman had inherited the land from her mother's side.

The *Lands Act 1976* governs land law in Nauru. There may be no alienation of land to non-Nauruans: only Nauruans may own land. All transfers of land require the consent of the President. In land matters, there appears to be no legal discrimination against women. Generally owners are free to leave land to whom they please. Families may get together and agree to change the distribution of property but unless everyone agrees, the court will not accept the changes. Even if a will does not satisfy the formal requirements for validity under the formal law, the court will accept a will that is acceptable according to Nauruan customary law.[25] In one case, the court allowed a daughter adopted according to Nauruan custom to inherit when her adopted mother died without leaving a will.[26]

Widows are protected under the legislation[27] providing for distribution in cases where there is no will. The widow is entitled to all the deceased husband's personal chattels and a sum of $10,000. If there are no children, the widow is entitled to all chattels and two-thirds of the balance of the estate, including land. If there are children, the widow takes one-third, and the children share the rest.

Supreme Court cases between 1969 and 1989 show that about equal numbers of women and men brought legal actions to challenge land distribution. Women have not been shy in using the courts to assert their interests, especially in challenging their rights to inheritance of land in wills and on intestacy.

Melanesia: Solomon Islands, Vanuatu

Solomon Islands land is owned through custom[28] and mostly passed on through patrilineal descent. Matrilineal societies exist in Guadalcanal, Nggela, Savo, Ysabel, Shortlands and some parts of the Western Provinces.[29] Ownership passes through the maternal line, but real control and management of land is with brothers and other men of the clan.

Women can be influential in matrilineal societies, but their land rights are being eroded by the cash economy. They stress the need to know more about their land rights because commercial pressure is taking land away from them. This is demonstrated by the logging in Ysabel, over which women seem to have little control. In one Ysabel case reported by Solomon Islands women, a woman's brothers and male cousins sold her land, without telling her, to another male Solomon Islander. The Office of the Public Solicitor states that, although Solomon Islanders are challenging the logging companies, there are no women litigants even from matrilineal areas.

Appeals in land disputes go from the Local Courts to the Customary Land Appeals Court. An amendment to the Local Courts legislation now makes customary settlement a precondition to filing a dispute before the Local Court. All seven members of the Customary Land Appeals Court are men. The Clerk, who is a member of the Court, is a trained magistrate, but lawyers are not permitted to appear on behalf of parties.[30] Customs are based on strong patriarchal notions, so the situation is not very helpful for women, who traditionally hesitate to assert their rights and rarely take matters to the Land Court or the Customary Land Appeals Court without someone to speak on their behalf. This effectively undermines any land rights that women might enjoy. Individual women who obtain land rights succeed in spite of the system not because of it.

In Vanuatu only indigenous citizens are able to own land permanently. The Constitution states that customary law and custom owners form the basis of ownership in land. The National Council of Chiefs must be consulted on all land matters and land law.[31] Women in urban areas are able to obtain leases with their husbands or as individuals. In 1982, out of 100 applicants for housing, 7 applicants were women acting alone; the majority were joint applications by husbands and wives.

Vanuatu has two systems of land ownership. In patrilineal systems, rights to land pass from father to son and, in some special cases when there are no male heirs, from father to daughters. In matrilineal systems, land rights pass through women. Women have some rights and a certain amount of power and influence over such land but these rights are secondary to those of men.

Patrilineal systems and matrilineal systems may coexist on the same island, as in Efate,[32] but patrilineal ownership is more common. Sons are made familiar with the land that they will inherit, and take control when the father dies. If there are no sons, men adopt boys from other clans. On rare occasions — as in Ambae — women inherit and then pass land on to their sons. In patrilineal societies, women's rights to land are unstable.

Women may have *usufruct* rights to their parents' land until they marry. A married woman has rights in her husband's village, but if the husband dies, she has to give up these rights, including rights to the crops grown on that land, as in Lambubu on Malekula. In Tanna, a girl may use her father's land but men will openly say that women have no rights to use land at all. Women are important, however, for linking families for security of land.

Women in matrilineal communities may in theory have rights in their mothers' land, before and after marriage, but their maternal uncles, or their brothers (rather than their husbands) usually control and manage these rights. There are rare instances where individual widows maintain control of a husband's land, and may leave the property to whomever they wish.

The only permitted sales of custom land are those approved by local custom.[33] The legislation does not provide for registration of custom transactions, so there is little protection for any purchaser. This affects women more than it affects men, since brothers often sell land without consulting their sisters. Registration of land rights for women who have some custom rights would ensure some protection.

Land disputes in Vanuatu may lead to fights and even death. Some of the main causes include matrilineal inheritance, and females claiming land, particularly if there is no male heir to inherit the property and if there is no will transferring the rights of the property to the female member of the family.[34] Disputes involving custom land are referred to the *nakamal*, an unofficial village court, composed of a land committee and chiefs, or their representatives, knowledgeable in land matters. Customary law principles are applied. Even in matrilineal societies, the *nakamal* regards women as the source of land rights rather than as the exercisers of land rights. There are rarely women in land committees or as chiefly representatives. An unsettled dispute goes to the Island Court.

The Island Courts were established by the *Islands Courts Act 1983*. There is a right of appeal to the Supreme Court from the Island Court whose decision is final. The Clerk to Efate Island Court said in 1993 that women rarely go to court in land matters although they are affected by these cases.[35] A deposit fee of 20,000 *vatu* is required to file an application for a dispute to be heard. Most women do not have access to such amounts of money, and this partly explains why there have been few judgments involving women fighting for land in the courts.

In 1995, an expatriate judge used the Constitution in a landmark decision to improve Vanuatu women's rights to land. It was not a test case but it will have far-reaching consequences.

CASE *John Noel and Ors v Obed Toto (1995) Vanuatu*[36]

Facts 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, the first from Hog Harbour and a *de facto* wife from Kolo. He had four children by Wife 1 and seven children by Wife 2. His eldest child by Wife 1 was a daughter, Julie Crero. His eldest son,

Obed Toto, was his second child by Wife 1. Julie Crero's first child was John Noel, the nephew of Obed.

The Champagne Beach land had a long history of ownership disputes in custom and formal courts. It was important because the visits of the tourist vessel *MV Fairstar* brought income. In 1985[37], Obed Toto and Philip Pasvu had been declared custom owners, with Toto controlling most land; he received two thirds of the income from tourism, and Pasvu received one third. John Noel, his mother and members of Crero Toto's family brought the 1985 case against Obed Toto, claiming a legal share of the income and saying, as well, that under custom, Obed was supposed to share it with all Crero Toto's descendants.

Custom evidence had established that Crero's eldest son Obed, 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. Therefore their children (including John Noel, Julie's son) had no rights either.

Issue Article 5 of the Vanuatu Constitution grants equal rights to men and women. Article 72 says that "the rules of custom shall form the basis of ownership and use of land". If there is conflict between customary law and the Constitution, which law should prevail?

Decision Customary law is the basis of land ownership in Vanuatu but it is subject to the Constitution and cannot be applied if it discriminates against women. Under Article 5 of the Vanuatu Constitution, men and women have equal rights. This is a fundamental principle, which overrides any law or custom contrary to it. Further, a decision giving more rights to men than to women would be contrary to the United Nations Women's Convention, which the Vanuatu Parliament had recently adopted.

Therefore, Obed Toto'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.

Comment The principle established by this decision is that, in Vanuatu, the Constitution takes precedence over customary law if the two systems conflict. In the *Noel v Toto* case, the equal rights provisions of Article 5 of the Constitution overrode the claim that, according to customary law and therefore Article 72 of the Constitution, women lose their inherited land rights on marriage. Ni-Vanuatu women may refer to this decision in negotiating land and other rights, including more speaking rights in customary courts. The decision can also be used in the formal courts of any common law country as a precedent to overturn discriminatory common law decisions in formal courts, and to bring test cases against other discriminatory customary laws.

Cook Islands

The *Cook Islands Act 1975*[38] provides that title to customary land shall be determined according to the ancient custom and usage of the native Cook Islanders. Thus land is used and passed from generation to generation according to customary law.

Cook Islands women seem to be in a better position regarding legal rights to land than are most women in our region. One of the few advantages of colonisation was that, in 1902, the process begun by the missionaries was confirmed by the legislation. A Land Court was established, and enabled women to succeed to traditional titles previously denied to them. The *ariki* have included many women; in 1993, five of the six *ariki* in Rarotonga were women. Succession to titles also brought with it the right to inherit land associated with those titles.[39]

Inheritance of land is more or less equal between men and women and is affected more by social class than by sex. Two-thirds of both male and females have no succession to land or any land rights at all, although they have *usufruct* or family rights. About 18% of both sexes are landowners by succession and 11% to 12% have sole or joint occupation rights. In leases, however, men hold almost two-thirds of the total.[40]

Although the rights of women to land have not changed by legislation (except through incorporation as *ariki*) the improvement in women's rights to land has come about through the Land Court's development and interpretation of what is meant by native custom.[41] Cook Islands women have influenced the development of this interpretation by doing methodical research and appearing in the Land Court to ask for positive interpretations of custom in favour of women. This happens for the reasons listed below.

- Women attend clan meetings about land rights.
- Women tend to dominate because they are better informed, having put more effort into researching kinship connections.
- Women are more able to attend Land Court sessions to assert and defend their land interests because the Court is more receptive.
- It is an indication of wider social change in men's and women's roles that have occurred in the community.

Men still benefit in practical terms from the system of land ownership. However, other Pacific Island women may learn from the strategies used by Cook Islands women. The key to improvement is knowledge of rights.

CONCLUSION

Most Pacific Island countries have special constitutionally recognised land courts that adjudicate arguments over land. These land courts usually have male judges and women rarely give evidence as expert witnesses despite being regarded as primary caretakers of tradition.

Village courts are for most women the courts of first access. These courts are almost exclusively male and the customs upon which disputes over land are based are generally those of male privilege. The law has a major role to play in protecting and guarding the interests of this group of primarily upper-class men.

In most countries in our region, the legislatures consist primarily of the members of the privileged social class. A good example is Western Samoa where only *matai* can be members of the legislature. Another example is Tonga, where the majority of the members of the legislature are nobles appointed by the King, and control the management of the land. The current interpretation of customary law gives control 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. Usually, neither indigenous nor non-indigenous women have the money to challenge decisions by taking cases to the formal land courts or on appeal to the higher courts of law. Except in Cook Islands, Nauru and Kiribati, women rarely take legal action; the complicated legal processes and the expenses of taking cases operate against women and the poor.

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 own or have access to land they have no means of acquiring money or obtaining real economic power.

There is a very close connection between power, land and wealth. Land means power. A starting point in gaining power would be to search for more positive interpretations of customary law and to use Land Courts to get legal recognition of these interpretations, as Cook Islands and Nauru women have done. A further strategy must include a struggle for a more just political solution to the problem of the distribution of land. This could include, in Solomon Islands and Vanuatu, a system of registration of customary land so that custom sales of land may be recorded. Finally, the United Nations Women's Convention obliges all states that are parties to the Convention to abolish customs resulting in discrimination against women. This obligation can be used by pressure groups and in test cases involving custom.

4

Sexual offences against women and children

WHAT THIS CHAPTER IS ABOUT

In previous chapters we considered the constitutional and land rights of women. In the next two chapters we will discuss the right of women and children to be free from sexual assault and violence of all kinds. This chapter focuses on sexual offences against women and children.

Sexual offences are criminal offences. If anyone goes to the police and accuses someone of having committed a sexual offence, the police investigate the accusation. If they arrest and charge the person accused, he appears in court and is prosecuted by Government officers acting on behalf of the complainant, the person who made the accusation. Usually, a defence lawyer acts on behalf of the accused.

The prosecution tries to prove that the accused is guilty of the offence for which he is charged. To do this, the prosecution must show that the accused did commit the specific offence and that the complainant did not consent to it or that, for various reasons, her consent could not be used as defence. The defence may argue that the accused did not commit the specific offence, or that the complainant consented, or that he believed that she consented and, if necessary, that he believed that she could legally consent. Unless other people actually saw the offence being committed, we have a situation that opposes the word of the complainant and the word of the accused. The case often hinges on whether the complainant's accusation can be corroborated by independent evidence.

This chapter will therefore discuss the process, and the questions it raises. We begin with brief definitions of most types of sexual offences of which an accused may be charged: rape, indecent assault, incest, defilement, and child sexual abuse. Then, in the section on rape myths and the history of rape, we will see how public attitudes towards sex and women have influenced our laws and the ways in which they are interpreted. This will lead us to focus on the legislation itself and how it is applied to sexual offences against women and children throughout the region.[1] We will see that sexual offences are under-reported and that convicted offenders tend to receive relatively light sentences. In particular, child abuse offenders are often given sentences that do not reflect the seriousness of the crime.

Why is this? We trace again the influence of public attitudes on court and police practices, and on the issues of consent and corroboration around which sexual offence cases revolve. What can be done? In the final section of this chapter, we discuss these and other areas that need reform, and how we can work towards reform. We will begin with some common sense definitions of rape and other sexual offences.

Rape	Sexual connection forced on a person
Marital rape	Sexual connection forced on a married woman by her husband
Indecent assault	Any unwelcome touching of a private part of a person's body

Incest	Any sexual contact between close relatives
Defilement	Sexual relations with a person under the age of consent
Child sexual abuse	Any sexual contact with a person under the age of consent

The first three definitions focus on the idea that any person may at any time find sexual contact unwelcome, and has the right to refuse it. The last three focus on the idea that there are some people who are too closely related, or too young, for any kind of sexual contact, regardless of whether they refuse it or consent to it. Basically then, we have two types of sexual offences: those in which consent is the chief factor, both for the prosecution and the defence; and those in which consent cannot be used as a defence.

These are not of course the legal definitions. When we discuss the legal definitions and the resulting laws and practices, we will see that although the basic ideas are there, the distinctions have become clouded. In our next section we will discuss why and how the clouds of confusion have arisen.

RAPE MYTHS AND THE HISTORY OF THE LAW OF RAPE

We used the word "person" in our definitions, because any man, woman, boy or girl may suffer unwelcome sexual advances from any other man, woman, boy or girl. However, the legislation in our region restricts rape to an act by a man against a woman and in this chapter we use the term in that sense.

Rape happens when a man forces a woman to have sexual relations with him against her will. It is done not for pure sexual satisfaction but to hurt, humiliate and degrade a woman, to make her feel bad. Rape is an act of violence, aggression and hostility. It is a constant threat and reminder that men are physically stronger and have greater social, financial and political power than women do.[2]

Rape is widespread and vastly under-reported throughout the world. In some countries, women live in constant fear of being attacked again. The situation is worse in small communities, where the rapist and rape survivor may live in the same village. The rape survivor's situation becomes unbearable when the rapist goes free because of the prejudices and inefficiencies of the legal system.

In some communities, young girls may not even know that they have the right to refuse unwanted sexual advances or that rape is a criminal offence. In one country of our region, the complainant said during a trial that she did not know that it was against the law for a man to force himself on a woman, and an accused said that he had the "constitutional right to have sex with whomever I want".[3]

Rape is complicated by cultural attitudes that are really excuses for rapists. One argument is that women are sexual animals and need a certain amount of violence to become sexually aroused. In Fiji, for example, men say that they don't rape; they use "force-line", which means a mixture of persuasion and force. These men make themselves believe that women really do want sex, but refuse because they are shy or are culturally socialised to say no.

In Western Samoa there is a practice of *moetotolo* where the man creeps into the communal *fale* at night and seduces or rapes a woman. If the rapist is taken to court, the court may believe that if a woman was being raped, someone would have taken action to stop it. However, if others in the *fale* 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 myths

Violence against women, according to the 1993 Vienna Declaration on Human Rights, is a violation of human rights. Rape laws are based on many misplaced beliefs about the roles and sexual behaviour of both men and women. These beliefs are commonly called rape myths. They are reflected in legal rules and legal procedures concerning rape; they may be obvious or they may be hidden, even to those who accept them. They strongly influence the judge, jury, prosecutors, lawyers, investigating officers, witnesses and others whose attitudes are relevant to the case. We discuss them here because they have become part of the interpretation of the legislation and common law. The trial process and the legal rules of evidence are to a large extent based on these myths. Their influence on the interpretation and application of the law has meant that women have been unwilling to report rape and unable to secure a conviction if they do report it.

In Table 4.1 we have divided rape myths into three groups: general myths; myths about men; and myths about women. The myths reflect society's views on how women should behave. The myths are visible in the way women are treated by law enforcement agencies, in the length of sentences given to rapists, in various legal rules and procedures and in the way rape trials are conducted in court. Two Fiji cases provide examples of how the myths are reflected in judicial reasoning. In the first case, the woman was raped with a piece of cassava. Under Fiji law, this is indecent assault, not rape.

> ... This is an exceptional case. I can understand the offence of rape, for which perhaps a sentence of 18 months imprisonment is adequate. But ... the accused has brutally assaulted the woman with a cassava. It is an inhuman and dastardly act which deserves severe punishment. I can understand the accused having the human temptation because ... his wife was living away from him. But I cannot understand how a normal human being could have done such a thing as indecently assaulting a woman with a cassava.[5]

Table 4.1 Rape myths

GENERAL MYTHS	
Myth	Rape occurs only when a man's penis forcibly enters a woman's vagina; no other form of forced sexual entry is rape.
REALITY	Rape is not always penile-vaginal. Forced sexual entry may be by a penis into an anus, mouth or ear or by bottles, sticks and other objects. Men or women can be raped.
Myth	Rape is always accompanied by violence; therefore there should always be visible injuries.
REALITY	Women often submit because they are afraid of being hurt or killed. The legal definition of rape recognises this. Rapists use threats to stop the woman from struggling and thereby suffering injuries that could help corroborate her story.
Myth	There is no such thing as rape within marriage.
REALITY	Married women of all cultures suffer forced sexual intercourse. Any woman, married or single, has the right to say no to sexual intercourse.
MYTHS ABOUT MEN	
Myth	Men have strong sexual urges that they cannot control. Rape is the product of such urges; the violence is incidental.
REALITY	Many case reports show that the rapist planned the rape in advance. Rape is an act of violence. Rapists are not driven primarily by sexual urges but by aggression and the desire to dominate and humiliate the rape survivor or women in general.
Myth	Men cannot stop themselves once they get to a certain point of arousal.
REALITY	Men are not so weak that they have to rape because they cannot stop once they start. If a man can stop in mid-act if someone interrupts him, why should he not stop when a woman says no?
Myth	Men rape because they are sexually frustrated, often because their wives refuse sexual intercourse.
REALITY	Men who rape say that they get little sexual satisfaction out of it. Most do not even have an orgasm or release semen. Men rape because they are angry, not because they are sexually frustrated.
Myth	Men would not rape if prostitutes were legal and available.
REALITY	Most rapists have sexual relationships with wives, girlfriends, casuals or prostitutes.

Table 4.1 Rape myths (cont.)

Myth	Rapists are sick or crazy.
REALITY	There is no typical rapist. Rapists exist in all races at all levels of society.
Myth	Most rapists are strangers to the victim.
REALITY	Up to 80% of rapists know their victims in some way. Many rapes are committed by men who know their victims well, or are related to them or live close to them.
MYTHS ABOUT WOMEN	
Myth	"Nice" girls do not get raped. Women who get raped are usually "loose" women who go into places like bars and nightclubs.
REALITY	There is no typical rape victim. The media tend to report sensational rapes that fit and strengthen the "loose woman" myth. By blaming the rape survivor, the myth removes the responsibility from the rapist.
Myth	Women provoke rape; they ask for it by their behaviour and dress.
REALITY	This myth is another version of the "nice girl and loose woman" myth. Many women, as well as men, think that dress and behaviour provoke rape. But if this is true, why are little children or old women raped? Again, by blaming the survivor, the myth removes responsibility from the rapist.
Myth	Women enjoy being raped.
REALITY	Some women may enjoy violent and other forms of kinky sex, but kinky sex between consenting adults is not rape. No evidence suggests that women who have been raped enjoyed it, nor that women need to be forced so that they can enjoy sex.
Myth	Women lie about being raped, because they get found out or are pregnant or are looking for money or revenge.
REALITY	Our double standards still allow men a free sexual life but do not give a woman the same freedom. Occasionally therefore a woman may lie about being raped, and sometimes a woman is accused of lying, but has made a genuine mistake about who the rapist really was. The law should not be based on myths that are occasionally true. Legal processes are designed to get the truth out; police seek evidence so that the prosecutor can make a case in court. A statement by the Victoria Police Complaints Authority shows that in over 93% of rape reports received in 1988, the police had evidence that the accusation was probably true.[4]

From this statement, we may identify some of the court's assumptions.

- A sentence of 18 months imprisonment is sufficient penalty for rape.
- Rape with a penis is less violent and less criminal than is rape with anything else.
- Rape is a reasonable alternative to sexual intercourse. (But rape is a criminal offence; sexual intercourse between consenting adult men and women is not a criminal offence.)
- The law should take into account that men cannot control their sexual drives.

In the next case, the magistrate justified giving the rapists a light sentence by saying that the victim's behaviour was partly to blame.

> The complainant was in a drinking party and got herself drunk ... the complainant smoked marijuana ... making her condition even worse ... She was taken advantage of in a situation which could have been avoided if she was sober ... The court must emphasise the need for women to behave in ... a manner acceptable to the occasion ... the victim was the author of her own vulnerability. [Her] behaviour on this occasion leaves me to take a lenient attitude in sentencing the accused.[6]

His argument seems to be based on these ideas.

- If a woman gets drunk, her consent may be assumed or is irrelevant (women who are so silly or naughty as to get drunk are the sexual property of all men).
- The woman seemed available and the rapists could hardly be blamed (because men have uncontrollable sexual urges).
- The rapists acted illegally (but the court must understand their situation and not punish them harshly).

History of the law of rape

From these and other cases in our region, we see how little the law has changed in the last 200 years. Many common law rules and judicial attitudes remain part of the existing law of rape and its application. Legal history shows that if women did not accept the roles set by the law, they sacrificed the right to the protection of the law. "Good" women got the sympathy of the court, but women who were thought to be "loose" or "bad" were treated harshly. The courts were more likely to believe a "good" woman's complaint that she had been raped than they were to believe a similar complaint by a "bad" woman.[7]

Successful prosecution of rape did not depend on whether a woman had consented or not. It depended on whether she had behaved as the property of her husband or father, or as the property of all men. A woman who acted too freely (for example, by drinking in public with men) became common property, and her consent was either assumed or irrelevant. This meant that

a woman's character could be used as evidence against her; as the following cases show, courts have allowed this since 1817.[8]

CASES The 1817 case of *R v Clarke* established a precedent by permitting cross-examination of the victim about her sexual behaviour. If the woman had not been a virgin or sexually pure before the rape she was unlikely to succeed in getting a conviction. In 1824, in the *Anne Keystone* case, three men had raped the complainant in front of 100 men. On hearing that she had spent the afternoon drinking with some of the male onlookers, the prosecutor stopped the trial. In the case of *R v Morley (1837)* the court refused to convict two rapists because the rape survivor had been "criminally" connected with men since she was 14. In *R v Derby (1844)* two men were acquitted of rape because the complainant was a "dubious and suspicious character," and had a sister who was "a very loose character indeed".

Before the United Kingdom *Matrimonial Causes Act 1857* became law, a husband could bring a common law action for compensation against his wife's seducer, adulterer or rapist, even if the wife had previously left him. As the following two cases[9] show, it did not matter whether the wife had consented to sexual relations or had been raped: the husband's honour had been injured and he was entitled to compensation in the form of money. These decisions emphasised the idea that a married woman was the property of her husband.

CASE *Macfadzen v Olivant (1805) United Kingdom*

Facts, decision and comment A husband sued his wife's rapist. The court gave the husband compensation, on the ground that the wife was now "less qualified to perform the duties of the marriage state". The husband was compensated for the loss of his wife's sexual services; because she had been raped, she could no longer provide her husband with satisfying sexual intercourse.

CASE *Cox v Kean (1825) United Kingdom*

Facts, issue and comment A husband sued his wife's rapist. The court said that if the rapist could prove that the husband had condoned or sanctioned his wife's behaviour, the rapist would be entitled to a decision in his favour; damages would be reduced if the wife had been a loose woman before the "liaison" (the rape.) The court did not distinguish between being raped and having an affair; it looked at the issue from the husband's perspective. His honour and loss were at stake, not his wife's.

The *Matrimonial Causes Act 1857* replaced the common law action by a statutory claim for damages. Section 33 of the Act allowed a husband control over his wife, and damages were based on the value of the wife's moral character. The interpretation of this law again appeared to divide women into two categories: the good woman who may have the bad luck to be assaulted, and the bad woman whose behaviour leads men astray.

Legal history shows also that if a woman sought her own sexual pleasure or if she was sexually "used" by another man, she became damaged property because her exchange value was threatened. The justice system punished rape only if it affected a man's property rights. The ideas influencing the law defined rape in terms of chastity and unchastity, sexual purity and impurity. The rapist would be punished only if he raped a pure woman. The distinction between rape and seduction was unimportant as the woman was damaged property in either case. In *Derbyshire v Derbyshire (1890)*[10] the court very clearly revealed its attitude towards women:

> Now, remember, there is a particular distinction between the value of different wives ... If she has led a loose life before marriage, her value is not the same as that of a virtuous woman ... If a man's wife ... walks the street, the husband is not entitled to come here and recover damages against any man who goes and consorts with that woman.

Nineteenth Century law strengthened its control over women's bodies by refusing to protect wives from marital rape. Giving husbands protection against prosecution for rape is as ancient as the original definition of criminal rape. The idea that a husband could be prosecuted for rape was unthinkable: the law was developed to "protect his interests, not those of the wife".[11] The idea of marriage in the law was that the husband and wife became one in law. Therefore it stands to reason that a wife cannot prosecute her husband for rape because she would be prosecuting herself. As we will see in our discussions of marital rape legislation, this principle was used in the United Kingdom and other common law jurisdictions until 1991.

Another idea that influenced the development of the law on rape was the suggestion by medical doctors and psychiatrists that women secretly wanted to be raped, imagined being raped and encouraged and enjoyed violence during sexual intercourse.[12] These views affected the credibility of rape survivors by strengthening the belief that women say no and mean yes, as we will see later in the chilling story of *DPP v Morgan*.[13]

Such ideas about women were defined in the early 19th century and have remained legal precedents in most common law countries for 150 years. In some former British colonies, like Australia, rape legislation has been somewhat modified. In other former colonies, such as Fiji and most other Pacific Islands, rape laws have changed very little: the law of rape still requires strict corroboration; questioning of the victim's past sexual experience is permissible and evidence of her moral character may be used for or against her. Case studies and court records reveal that many offenders go free or have their sentences reduced because of evidence about the victim's sexual and moral behaviour.

Current laws on rape punish inappropriate sexual behaviour in less obvious ways. In the United Kingdom and Australia, for instance, questions about the victim's past sexual experience are not allowed, and the strict requirements for corroboration are no longer enforced. However, gaps between statute law

and the actual court trial show the survival of the belief that, as Lord Hales remarked, rape is an accusation easily made and hard to defend.[14]

These ideas fit so neatly into general attitudes about women that the rules of evidence and procedure have survived. A judge still has the right to allow the accused's lawyer to ask questions about the complainant's credibility. There is, furthermore, nothing to prevent a judge from expressing his opinion to the jury. In a 1972 Queensland case[15] the complainant drank alcohol in a remote area with a group of men, including the offender. This was seen as grounds for reducing the punishment. In 1979 in South Australia, the Chief Justice said:

> The danger of fabrication in sexual cases is greater than in other cases precisely because the allegations are sexual ... Sex is prone to excite the imagination and the emotions, thereby creating a danger of false accusation resulting from hysterical or vindictive motives ... a person who has engaged in sexual conduct may be tempted to protect his or her own reputation or position by alleging that he or she has been subject to force.[16]

Here the judge made his comments in gender-neutral terms, implying that his words applied to both male and female. However, it is usually women who are raped, so the implications are obvious. The law may restrict certain specific questions but it cannot force a judge to interpret the law in a particular way where there is room for interpretation. As late as 1982 in the United Kingdom, the judge in a rape case stated:

> It was the height of imprudence for any girl to hitchhike alone at night ... she is in a true sense "asking for it".[17]

Rape myths have survived the rise of feminism and remain well established in the law. Rape is the only crime that requires a victim to resist or to be injured. The trial process, sometimes by the rules of evidence and sometimes by unofficial rules or procedures, still relies on the principle that proper defence is impossible without an attack on the sexual character of the survivor. The myths continue to make rape charges more difficult to prove than are most other criminal charges.

SEXUAL OFFENCES AGAINST WOMEN; LEGAL DEFINITIONS AND LEGISLATION

In our introductory section, we gave some common sense definitions of rape, indecent assault, incest, defilement and child sexual abuse. In this section we will concentrate on the legal definitions and legislation covering rape, indecent assault and incest. Here we focus on women above the age of consent; we will discuss defilement in our section on child sexual abuse.

Table 4.2 Legislation covering sexual offences of all kinds

Country	Legislation
Cook Islands	*Crimes Act 1969* Part 7 ss. 140-157
Fiji	*Penal Code* Cap. 16 ss. 149-183
Kiribati	*Penal Code* Cap. 67 ss. 128-134
Nauru	*Criminal Code of Queensland 1899*
Solomon Islands	*Penal Code* Part 16 ss. 128-161
Tonga	*Criminal Offences Act* Part 9 ss. 118-142
Tuvalu	*Penal Code* ss. 128-134
Vanuatu	*Penal Code* Part 2 ss. 90-98
Western Samoa	*Crimes Act* Part 6 ss. 46-58 (The *Crimes Amendment Act 1969* replaced ss. 42-58 of the *Crimes Ordinance 1961*)

Examination of the definitions and legislation covering sexual offences shows that they are similar, but not necessarily identical, in all the countries of our region. We will therefore base our discussions on the Fiji definitions and legislation, noting important differences where they arise.

Rape

Section 149 of Fiji's *Penal Code* defines rape thus:

> 149. Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.

This means that any person who has sexual intercourse with a female without her consent or agreement is guilty of rape. The important words are "without her consent". If a woman submits out of fear of injury or for her life, the act to which she submits is still rape. However, in Cook Islands legislation[18] and in the common law, further conditions apply.

- Rape is only penile and vaginal; the sexual contact has to be by a man's penis going into a woman's vagina. It does not include anal or oral rape, or rape with a bottle or other objects.
- Rape can be committed only by a man because a penis is required.
- Rape is complete once the penis enters the vagina. Complete penetration does not have to occur, and there does not have to be any release of semen.

The legislation usually states the maximum length of sentence that can be given. In all countries, the maximum sentence for rape is life imprisonment. For attempted rape, it is seven years imprisonment. The

legislation regards rape as a felony, an extremely serious crime like murder and manslaughter, which also attract maximum sentences of life imprisonment. The Chief Justice issues sentencing guidelines for minimum sentences. Thus a Chief Justice may recommend that the minimum sentence to be given for rape should be not less than five years. As the maximum sentence is life imprisonment (commonly regarded as 14 years), a court should not imprison a rapist for less than five years or for more than 14 years.

Marital rape

Marital rape is not seen as a crime in our region; if a man is legally married to the woman he rapes, he may not be found guilty of rape. In Cook Islands, under Section 141 (3) of the *Crimes Act*, a husband cannot be charged with the rape of his wife unless the following conditions applied at the time of the rape:

- The parties were legally divorced and had not had sexual relations by consent since the divorce; or
- if the parties were legally separated.

Tonga and Western Samoa have similar legislation[19] making marital rape illegal only if consent has been withdrawn through the process of law. But what does legal separation mean? Most countries no longer have a formal legal separation procedure. Once husband and wife are living apart, this is regarded as legal separation; they do not need to apply to court for official separation unless they dispute maintenance or custody. Further, in countries that still have fault as a basis of divorce or maintenance, it sometimes takes many years to obtain any legal order of separation, maintenance or divorce. Wives then have no protection against marital rape while they are obtaining a legal order of separation, custody or maintenance.

The "no rape in marriage" rule was developed in the common law and based on the principles laid down in *R v Clarence (1888)*.[20] Once a man marries a woman he may always assume her consent to sexual intercourse so a husband cannot be guilty of raping his wife.

> The sexual communion between [husband and wife] is by virtue of the irrevocable privilege conferred once for all on the husband at the time of the marriage, and not at all by virtue of a consent given upon each act of communion, as is the case between unmarried persons.

Over 100 years later, a Solomon Islands case shows how, by refusing to protect wives from rape by their husbands, the law reinforced the idea that married women are the property of their husbands.

CASE *R v Gwagwango and Taedola (1991) Solomon Islands*[21]

Both the accused raped the woman but only one was charged with rape. The complainant's husband was charged, not with rape, but with helping the

other accused to do so. The question was whether the woman had consented because her husband had threatened her. The court ruled that she fully consented without threat: it believed that the woman was having an affair with the other man, and the issue was one of credibility.

Until 1991, the position in the United Kingdom was the same. In 1991, the House of Lords[22] ruled that the principle that husbands cannot be prosecuted for marital rape can no longer be used in formal law. Now, therefore, through the doctrine of precedent, all Pacific Island countries must allow a husband to be prosecuted for raping his wife.

Indecent assault

The maximum sentence for indecent assault ranges within our region from two to seven years. Fiji's *Penal Code* gives the following definition of indecent assault.

> 154.(1) Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony, and is liable to imprisonment for five years, with or without corporal punishment.

Indecent assault is sexual assault that falls outside the technical definition of rape. So, if an accused has raped a woman in the anus, or with anything except a penis, he is charged with indecent assault. Forced *fellatio* (stimulating the male genitals with the mouth) and *cunnilingus* (stimulating the female genitals with the mouth) would also be charged as indecent assault.

Confusion between rape and indecent assault

Indecent assault is considered to be less serious than rape because, by definition, rape is by penis. However, there are inconsistencies in criminal charges, with little distinction between rape, unlawful carnal knowledge, indecent assault and incest. The offences appear to be interchangeable, with a tendency to file charges for which a conviction is easier to obtain or one to which the accused is most likely to plead guilty. In a Solomon Islands case,[23] the records show that two men had raped the same woman; one was found guilty of indecent assault and the other of rape. In the following Fiji case, the charge was reduced from attempted rape to indecent assault.

CASE *Mavui Meliniobua v R (1982) Fiji*[24]

> **Facts and decision** The accused rapist assaulted a woman with his fingers. He was convicted of attempted rape. On appeal the charges were reduced to indecent assault and the prison sentence was reduced from two years to 12 months. The court found that the act could not be rape, because the accused had not assaulted the woman with his penis.
>
> **Comment** The common law limits rape to sexual assault with a penis. The legal definition is viewed from the point of view of the rapist and not the

rape survivor. Except for the possibility of pregnancy and sexually transmitted diseases it makes little difference to a woman whether the rapist violated her body with fingers or penis.

Within our region, the definition of rape is too narrow. As a starting point, the legislation could use the New South Wales definition of sexual intercourse.[25]

Sexual intercourse means:

(a) sexual connection occasioned by the penetration of the vagina of any person or anus of any person by
  (i) any part of the body, or
  (ii) an object manipulated by another person, except where the penetration is carried out for proper medical purposes;

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person;

(c) *cunnilingus*; or

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

Under this definition, rape would be sexual intercourse without consent. Indecent assault would be confined to forms of unwanted sexual contact that do not involve sexual intercourse.

Incest

Incest involves sexual relations between relatives. Both men and adult women can be charged with incest. Many people do not seem to know that incest is a crime. In South Australia, some fifty years ago, a woman asked a lawyer to help her charge her husband and their daughter with adultery. She had never heard of incest. In French Polynesia, also about fifty years ago, a father unsuccessfully pleaded that, just as he expected to have the first bananas from his new plantation, he expected also to be the first man to have his daughter.[26]

Incest is included in the sexual offences legislation for all countries in our region. In Fiji, where special permission is required from the Director of Public Prosecution to prosecute a person for incest, the *Penal Code* defines it thus:

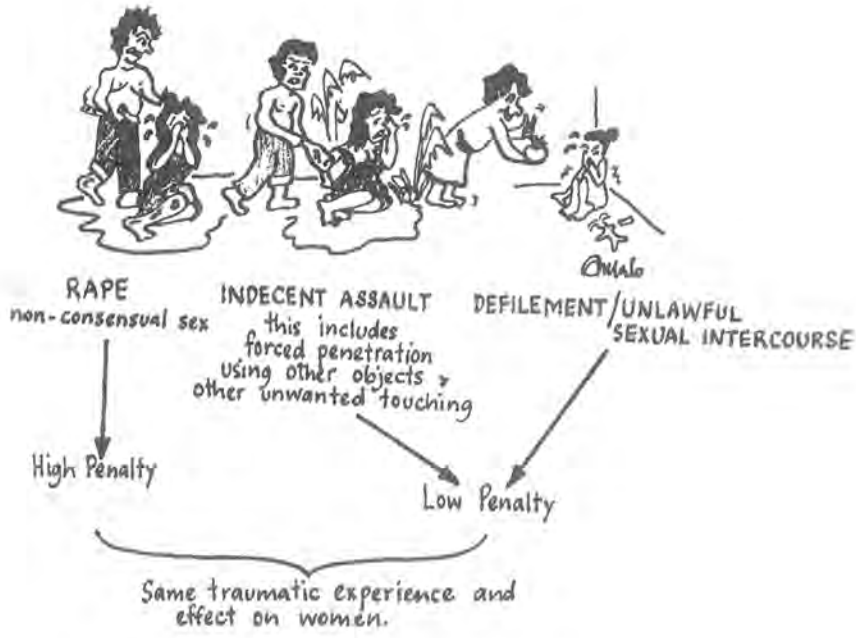
178. Any male person who has carnal knowledge of a female person, who is to his knowledge his granddaughter, daughter, sister or mother, is guilty of a felony, and is liable to imprisonment for seven years.

A male will be found guilty of incest if it is proved that he had sexual intercourse with any female relative listed above. If the victim is under 13 the offender is liable to life imprisonment. If a female of over 16 consents to sexual relations with a male relative, the penalty for both is a maximum of

seven years imprisonment. In Tuvalu and Kiribati, the age is 15 years rather than 16. In Cook Islands, Tonga and Vanuatu the penalty is 10 years imprisonment.

Cook Islands, Vanuatu and Western Samoa have a special offence concerning a female under the age of 20 and under care or protection. Consent is not a defence. If she is sexually abused by the man in whose care she is, this is charged as a separate offence. Section 96 of the Vanuatu *Penal Code* makes it illegal for a man to have sexual intercourse with, for example, a stepdaughter or foster daughter under the age of 20. The Cook Islands' maximum penalty is 10 years imprisonment.

Just as there is confusion between rape and indecent assault, so also is there confusion between incest, rape, indecent assault and defilement. It is legally possible also for the court to charge someone with rape and then find him guilty of a lesser offence (such as incest, indecent assault or defilement) with which he had not been charged. This confusion becomes obvious when we look at the reporting and sentencing of sexual offences.



SEXUAL OFFENCES AGAINST WOMEN: INCIDENCE, REPORTING AND SENTENCING

Incidence and reporting

It is generally believed that as few as 10% of rape cases are reported.[27] Women tend not to have confidence in getting help from government agencies such as police, social welfare or courts or other official agencies. In our region in 1996, professional nongovernmental counselling services existed in Cook Islands, Fiji and Vanuatu, and were being established in Solomon Islands and Western Samoa. Cook Islands Crisis Centre members told us in 1993 that the police are very unhelpful and that most of their clients come only after they have tried the police and failed to get realistic assistance. The Fiji Women's Crisis Centre has consistently found that the vast majority of their clients do not go to the police or to prosecution; English and American surveys of rape crisis centres show that, of every four women who seek help at a centre, only one reports the rape also to the police.[28]

Table 4.3 attempts to give an overall picture of the reporting of sexual offences in Fiji, Kiribati, Solomon Islands, Tonga, Vanuatu and Western Samoa for the years 1987 to 1993. It has been compiled from several sources.[29]

As we look at the table, we should remember that we are dealing only with cases reported to the police, and that a reported charge for any one offence may be dropped or sentenced as another offence. We should remember also that police and court records are not necessarily accurate or easily available. For example, Western Samoa has a higher population than Vanuatu, but Vanuatu's rates for all offences are consistently much higher than those of Western Samoa, except in 1989 and 1993, where the Samoa rape and incest figures may be inaccurate.

In Vanuatu, also, some figures may be doubtful; a police spokesman is reported to have told a 1993 newspaper[30] that the number of sexual offences increased by 100% since 1987, when 50 sexual offences were reported. A figure over of 100 annually was given, but this is not reflected in the Vanuatu Police statistics from which Table 4.3 was compiled. So what appears to be a high or low incidence of sexual offences, or of any particular offence, in any particular country may be due to a combination of factors.

Whatever the exact figures, the Public Prosecutor of Vanuatu has said that there are too many cases of rape and incest for a country of the size of Vanuatu; in one month in early 1993 he personally prosecuted four rape cases in Port Vila.[31] The internal records of the Public Solicitor's Office show that much of its time is absorbed by defending men charged with sexual offences.

In Solomon Islands, as elsewhere, sexual violence against women is drastically under-reported. Reports indicate that police give low priority to investigation of sexual violence against women.[32] The Public Solicitor's Office, the only legal aid available in Solomon Islands, says that 8.6% of its criminal cases involve sexual crimes of violence against women. Its chief involvement in sexual offence cases is to defend those accused of rape.

Table 4.3 Sexual offences reported to police, 1987-1993

Rapes and attempted rapes

Country	Pop'n 1992	1987	1988	1989	1990	1991	1992	1993	Total
Fiji	752,700	80	102	71	98	82	77	77	587
Kiribati	76,000	29	30	na	na	na	na	na	59
Sol. Is.	337,000	37	40	30	35	na	na	na	142
Tonga	97,400	8	6	5	11	13	na	na	43
Vanuatu	156,500	17	18	29	30	46	na	na	140
W. Samoa.	163,000	5	na	99	10	5	2	15	136

Incest

Country	Pop'n 1992	1987	1988	1989	1990	1991	1992	1993	Total
Fiji	752,700	4	4	1	6	4	2	na	21
Vanuatu	156,500	na	9	13	15	24	na	na	61
W. Samoa	163,000	2	na	3	1	2	9	35	52

Indecent assaults or acts

Country	Pop'n 1992	1987	1988	1989	1990	1991	1992	1993	Total
Fiji	752,700	60	48	65	53	81	51	68	426
Sol. Is.	337,000	97	96	142	168	na	na	na	503
Vanuatu	156,500	24	12	11	22	21	na	na	90
W. Samoa	163,000	9	na	13	6	17	13	15	73

Defilement, unlawful carnal knowledge, unlawful sexual intercourse

Country	Pop'n 1992	1987	1988	1989	1990	1991	1992	1993	Total
Fiji	752,700								
Girl <13		7	3	6	12	11	2	4	45
Girl 13–16		40	46	75	64	42	53	73	395
Vanuatu	156,000	14	18	25	22	36	na	na	115
W. Samoa	163,000	2	na	2	2	4	5	9	24

Fiji: Rape and indecent assault figures to 10 July, 1993; incest figures for 1993 not available; incest of young children is included under defilement, although many defilements are really both incest and rape. **Kiribati:** figures for 1987 and 1988 only. **Solomon Islands:** Rape and indecent assault figures for 1987 to 1990. **Tonga:** Rape figures 1987 to 1991; incest 1987 and 1988. **Vanuatu:** Rape and indecent assault figures for 1987 to 1991; incest and unlawful sexual intercourse 1988 to 1991. **Western Samoa:** Figures for 1987 and 1989 to 1993; figures as supplied by the Western Samoa *Police National Statistical Crime Report 1981-1993* include 99 rape reports in 1989 and 35 incest reports in 1993.

We did not include Cook Islands, Nauru and Tuvalu in the table, as we do not have report statistics over a range of years. One report[33] indicates that Cook Islands has a higher incidence of reported rape than New Zealand does. According to 1988 New Zealand Justice Department figures based only on reported rapes, 2.9 cases of rape occurred each year per 10,000 persons in New Zealand, whereas, in Cook Islands, there were 3.9 cases. *Punanga Tauturu* statistics show that they received, between February and December 1992, reports of 5 rapes and 2 attempted rapes. However, Cook Islands Police Force records show that few sexual offences are actually prosecuted.

Table 4.4 Cook Islands: number of rapes prosecuted

1983	1984	1985	1986	1987	1988	1989	1990
3	12	3	1	2	5	5	1

Throughout our region there may be a trend towards increased reporting. In Fiji, compared with 1992, rape reports in 1993 increased by 35%. By July 1993, 77 rapes had been reported to the Suva Central Police Station. Of these 57 were investigated to the stage of charges being filed. 92 rapes and attempted rapes were reported between January and September 1994; by 31 October 1994, an overall annual increase of 66% was estimated.[34]

Sentencing

Once an accused person has been found guilty of committing a sexual offence, he should be sentenced to a term of imprisonment. Only the court can decide the length of a prison sentence. The legislation might state the maximum length of a sentence, but it does not normally state a minimum length. Judges and magistrates have considerable discretion in deciding for how long a sex offender should be imprisoned.

In the case of *R v Civatabua and Kacilala (1986)*[35] the Fiji Court of Appeal stated thus the purpose of sentencing a rapist:

> First of all, to mark the gravity of the offence; second to emphasise public disapproval; third to serve as a warning to others. Fourth, to punish the offender, and last, but by no means least, to protect women.

Sometimes the Chief Justice, as head of the courts, issues written guidelines recommending minimum sentences for serious offences and common crimes. Guidelines may be issued during a judgment, or as an internal memorandum to all judicial officials. They have force similar to the common law and are generally followed but may be interpreted in different ways and it is quite easy to find reasons for giving sentences differing from those recommended. The guidelines do not have the same force as legislation and in the end, the court has sole discretion to decide.

Throughout our region, courts use the following criteria to establish sentence length:

- The age of the rape survivor
- Whether or not the rapist is a first time offender
- The age of the offender
- The offender's status in society
- The consequences of imprisonment for the offender's family
- Whether or not traditional apologies and/or compensation have been offered and accepted
- Whether or not the offender has pleaded guilty, thereby saving the court's time and Government expense
- Did the woman "ask for it?"
- Is she a "good" woman or a "loose" woman?

These criteria do not include the effect of the rape on the victim. In some countries, courts now ask for victim impact reports, prepared by counsellors, psychologists and experts. The courts use this assessment when considering the sentence. The worse the impact of the rape on the victim, the greater the punishment. This practice is unknown in courts in our region but is common in the United Kingdom. In 1995, a father was sentenced for repeated indecent assaults on his young daughter. During his appeal, there was argument about whether the Lord Chief Justice could take into account a report on the long-term psychological damage suffered by the child. The Lord Chief Justice said that he should take the impact report into account, and increased the sentence.[36]

The following accounts show how the courts operate in establishing sentences. We begin with a detailed study of how sentencing guidelines affect practices in Fiji. In 1988, the Fiji Court of Appeal noted in *Vakamocea v The State*[37] that the crime of rape was all too prevalent. In response to intense lobbying and publicity by the Fiji Women's Rights Movement and the Women's Crisis Centre, the Chief Justice issued new *Rape Sentencing Guidelines* that all magistrates and judges were obliged to follow.[38] These guidelines clearly stated that the starting point for rape sentencing was five years in a contested case; longer sentences could be given, depending on the circumstances of the case. Furthermore, a sentence of less than two years should never be imposed. A two year sentence was acceptable only if the accused pleaded guilty. The guidelines further stated that under no circumstances was a noncustodial sentence to be given: a rapist must therefore get a prison sentence that he must serve.

The underlying intention seemed to be that rape sentences should be generally increased, and that alternative punishments such as fines or suspended sentences were not acceptable. Newspaper reports for the period between January 1988 and November 1990 show sentences varying from binding-over to 10 years in prison. The most common length was for two and three years, and Magistrates' Courts tended to be much more lenient

than the High Court. The guidelines did, however, provide a basis for appeals to higher courts.

The Chief Justice revised his sentencing guidelines for "the more common-type offences" but did not include rape and other sexual offences.[39] In 1990 he circulated new *Rape Sentencing Guidelines*. These said that, in rare circumstances, a prison sentence was not necessary. He thus made noncustodial sentences again possible.

> Experience since then [1988] tends to suggest that the above statement [the 1988 custodial rule] may have been put too high and as a result may place an undesirable fetter on the discretion of magistrates when sentencing for rape. It is now recognised that there may be situations, albeit very exceptional and rare when a noncustodial sentence may, having regard to all the circumstances of the case, justly commend itself to the Court. You are requested therefore to treat the last paragraph of *Circular Memorandum* No.1 of 1988 as revoked.[40]

From 1991 to 1993,[41] sentences tended to become more lenient. In a 1991 gang rape by three men, the Chief Magistrate bound over all three for the sum of $200 each with $200 sureties; none would serve a prison sentence unless he committed rape again. In September 1993, the Chief Magistrate placed a convicted rapist on probation and gave him a $200 fine; again, the rapist would not serve a prison sentence unless he repeated the offence. In December 1993 a man was sentenced to five years imprisonment for the rape of a 10 year old girl. In the same month, eight men who gang-raped a 19 year old girl were each imprisoned for five years by the Magistrate's Court. In both cases, the rapists had elected trial in the Magistrate's Court which cannot give a sentence of more than five years. (The Magistrate's Court could have sent them all up to the High Court for stiffer sentences, but it did not.)

In 1994, the Court of Appeal again drew attention to the frequency of rape, and created ground-breaking precedent by stating that the starting point for rape was seven years imprisonment.[42]

> While it is undoubted that the gravity of rape cases will differ widely depending on all the circumstances, we think the time has come for this Court to give a clear guidance to the courts in Fiji generally on this matter. We consider that in any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognised by the courts that ... rape has become altogether too frequent and that the sentences imposed ... must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.

This statement means that, for a rape where there is no serious injury, the starting point for sentencing is seven years. If there has been serious injury, the court must increase the penalty. A court must have very good reasons for awarding a sentence of less than seven years, since the Court of Appeal is higher and more authoritative than the High Court. Its guidelines have

the same force as the common law and overrule any earlier guidelines, including those issued in 1988 and 1990. During 1995 and 1996, rape sentence lengths did seem to increase, but the precedent has not been strictly followed.

In Kiribati, Nauru and Tuvalu, sentences range from two to five years. Two Kiribati cases [43] illustrate the sentencing patterns. In a 1978 appeal from the Magistrate's Court to the High Court, the Chief Justice reduced a sentence of three years for rape to 18 months, with the last nine months suspended, apparently because a previous intimacy between the rapist and the victim had not been taken into account when the Magistrate had sentenced the offender. In 1991, a father raped his 16 year old daughter and got 30 months prison.

The accused in a 1983 Nauru case had admitted attempted rape.[44] The Chief Justice described in great detail the harm done to the victim and the other serious circumstances of the attempt. However, saying that the accused was only 21 and that although he had previous convictions for other crimes, it was his first conviction for a sexual offence, the Chief Justice sentenced him to 30 months imprisonment. In 1985, also in Nauru, an accused had previous convictions for rape. He admitted the rape, and the victim refused to go through the ordeal of giving evidence. Although the court could have taken judicial notice of the known consequences of rape, it said that it could not observe the victim in order to assess the harm and so it would sentence the rapist to three years.[45]

A study of Tuvalu court records in 1993 revealed little consistency in sentencing: the rapist of a 12 year old girl was given a sentence of 30 months but an attempted rape attracted 4.5 years. Other countries show more extremes. Tongan rape sentences range from one to nine years, with five to nine years being more common. One man accused of having helped another to commit rape was given 10 years. Indecent assault sentences range from one to four years.[46]

Solomon Islands prison sentences range from nine months to five years, with one 1989 example of eight years.[47] The most common sentence is for two years. In 1988 two men were convicted of rape, and sentenced to 3.5 years and four years respectively. The rape was witnessed by another woman who tried to stop the men, but they threatened her. The Court of Appeal said that the rape was an aggravated crime because the two rapists had acted together, but did not increase the sentences. A 1991 rape was corroborated by bruises. The complainant said that, towards the end of the rape, she felt sick and dizzy. The court said that the end of her account was "less convincing", and gave the accused a four year sentence for indecent assault.

Vanuatu rapists are usually convicted on guilty pleas, and are given sentences from five to 12 years.[48] Attempted rapes generally incur three year sentences. Indecent acts usually incur fines of between 10,000 and 16,000 *vatu* but some get up to three years imprisonment (especially if the offence was in fact rape). In 1993, the accused in a gang rape were each sentenced to five years prison, and a man convicted of raping his daughter got a 15 year

sentence. Incest-rapes tend to incur heavier sentences in appeal cases, in which there are three judges.

Although some more recent sentences seem long, the practice in Vanuatu is to release prisoners after two or three years. The President and Minister in charge of prisons use very liberally their wide powers to "release on licence".[49] In December 1991, all prisoners were released in an amnesty. One man had just been imprisoned for incest with his eight year old daughter. Shortly after his release, he committed the same offence. He was re-imprisoned for eight years.

Between 1984 and 1988, Cook Islands rape sentences ranged from six months to 6.5 years, with one unusual 10 year sentence in 1984.[50] Penalties in 1992 and later were significantly longer, influenced by lobbying from the newly established Women's Crisis Centre, *Punanga Tauturu Inc.*, and by the presence of Mr. Justice Dillon as Chief Justice.[51] Cook Islands is a major tourist destination, and, in early 1992, there were arguments about whether the rape of a tourist should attract a stricter penalty. Mr Justice Dillon ruled that it should not affect the length of the sentence. A rape case would be treated in a similar manner regardless of the ethnicity or nationality of the rapist and the rape survivor.[52] However, traditional attitudes are still current. In 1993, a man indecently assaulted a female tourist while giving her a traditional Cook Island massage. After a jury trial, the court acquitted the man, saying that women who go to men for massages should expect such things.[53]

In Western Samoa, sentencing is lenient and there is a tendency to side with the accused. Figures and data from the Attorney-General's Department and other sources show that, between 1990 and 1995, over one half of sexual offence sentences were for one year or less, including fines or probation. More than two-thirds were for two years or less. On the other hand, during the same period, Western Samoa recorded perhaps the highest sexual offence sentence in the region: 16 years for the rape of a child of two.[54]

SEXUAL OFFENCES AGAINST CHILDREN (CHILD SEX ABUSE)

This exceptional sentence leads us to consider sexual offences against children. Table 4.5 is based on the Western Samoa data mentioned above; it shows that such offences accounted for 27 of the 41 sexual offence convictions in 1993, and includes nine cases of offences on children aged between two and eleven.

Table 4.5 Western Samoa: sexual offence convictions and age of victims 1993

Offence	No. of convictions	Age of victim		
		16+	12–15	2–11
Rape	12	5	5	2
Indecent assault	10	3	-	7
Incest	8	6	2	-
Unlawful carnal knowledge	11	-	11	-
TOTAL	**41**	**14**	**18**	**9**

This is not just a regional problem. Crime figures in England show that, of all age groups, girls between 10 and 15, and then young women between 16 and 24 are most at risk of both rape and indecent assault. Children younger than 10 are more at risk of being indecently assaulted, but less at risk of being raped, than are women of 25 and over. The report emphasises, however, that "all offences against young people, especially female, are seriously under-reported because of manipulated fear and guilt".[55]

"Manipulated fear and guilt" allow an adult to use his or her power over a child, or take advantage of the child's trust and respect, to sexually abuse the child. Child sexual abuse does not just mean having sexual intercourse with a child. An abuser may involve a child in any of these examples of sexual activity.

- Touching genitals
- Masturbation
- Oral sex
- Penetrating the vagina or anus with the finger, penis or any other object
- Showing the adult's genitals
- Making sexual comments

In 85% of child sexual abuse cases, the victim already knows the offender, but it is generally agreed that child sexual abuse is not often reported by children or their families. An Australian study shows that in approximately 50% of cases, the offender is the child's father. The next most likely offender is an uncle, then brother, then stepfather and grandfather. Sexual crimes against children are usually committed against girls (90% of victims are female) and 97% of the offenders are men. United States research has shown that 38% of all women are sexually abused by an adult male before they are 18 years old. One United Kingdom study shows that one child in 10 is sexually assaulted by someone he or she knows and trusts.[56]

Fiji studies suggest that the majority of child abuse cases do not reach the police. No law requires a medical practitioner or welfare officer to report child abuse to the police and the Fiji Women's Crisis Centre believes that

only 10% of child abuse is reported. Of 53 child abuse cases seen by the Crisis Centre from 1985 to 1992, one half were of sexual abuse. Most child abuse offenders were family members; in such cases the Department of Social Welfare removes the child from the family and places it under official care, in the custody of the Director of Social Welfare. The number of children in official care has doubled since 1987. According to the Office of the Director of Public Prosecutions, reports of defilement crimes showed an increase of 77% from 1992 to 1993. The cases prosecuted are only "the tip of the iceberg".[57]

Child sexual abuse is not confined to any ethnic group or social class. University of the South Pacific students come from a wide range of relatively privileged communities all over our region. A 1994 study of sexual abuse discussed the problem with 91 students: during childhood and adolescence, 48% had suffered mild sexual abuse such as being touched and fondled, and 31% reported "being used sexually".[58]

Legislation

Under criminal law, child sexual abuse can be prosecuted under any of the offences listed.

- Rape
- Indecent assault
- Unlawful carnal knowledge
- Unlawful sexual intercourse
- Incest

The legal definitions of child rape, indecent assault and incest are the same as those for corresponding offences against adults. However, the definitions are complicated and confused by a specific charge, variously known as defilement, unlawful carnal knowledge of a minor, unlawful sexual intercourse with a minor, or statutory rape. In general, we will call it defilement.

Defilement (statutory rape, unlawful carnal knowledge, unlawful sexual intercourse)

Defilement occurs when a person has sexual intercourse with a girl under the age of consent. The legislation (listed in Table 4.2) is very similar throughout our region, although there are differences in the specified age. For Fiji, the age of consent is 16, and there are special provisions for girls under 13. Vanuatu and Western Samoa regard the age of consent as 15 and the special provisions are for girls under 12. The special provisions arise because the legislators foresaw two different situations.

- A girl is physically, emotionally, mentally and sexually so immature that sexual intercourse will harm her. (The girl is assumed to be younger than 12 or 13.)

- A girl is physically ready and willing for sexual intercourse but is not mature enough to deal with the consequences of sexual relationships. Sexual intercourse may not necessarily harm her, and she may appear older than she is. She cannot make an informed decision, and so her consent cannot be taken seriously, but she should take some responsibility for her actions. (The girl is assumed to be over 12 or 13 but younger than 15 or 16.)

This distinction is clear in Fiji. The legislation regards defilement of a girl under 13 more severely than defilement of a girl between 13 and 16, hence the longer prison sentences. In most countries of our region, a person who defiles a girl under 13 is liable to a maximum, and rarely given, sentence of life imprisonment, with or without corporal punishment.

For a child under 13 years, the *Penal Code* states:

s. 155 (1) Any person who unlawfully and carnally knows any girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for life, with or without corporal punishment.

(2) Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years is guilty of a misdemeanour and is liable to imprisonment for five years, with or without corporal punishment.

(3) It is no defence to a charge for unlawful carnal knowledge of a girl under the age of thirteen years to prove that she consented to the act.

For girls between 13 and 16, the legislators took into account the very common sexual activity between, for example, teenagers under the age of 16 or a teenage girl and a boy in his late teens or early 20s. There may also be some conflict between traditional values and Western and Christian values. Amongst Indo-Fijians, until recently, a girl was considered marriageable at 12 years, and in Tonga and Samoa some people think it unreasonable to prosecute a young man for "defiling" his consenting girlfriend. However, Fiji's *Penal Code* says that the girl's consent cannot be used as a defence, unless the consenting girl is between 13 and 16, and the offender can show that he had reasonable cause to believe that she was over 16. In that case, he could be acquitted.

s. 156 (1) Any person who

(a) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years; or...

Provided that it shall be a sufficient defence to any charge under paragraph (a) if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years.

(b) ... [not quoted; refers to "defilement of idiots or imbeciles"]
is guilty of a misdemeanour and is liable to imprisonment for five years, with or without corporal punishment.

(2) No prosecution shall be commenced of an offence under paragraph (a) of subsection (1) more than twelve months after the commission of the offence.

(3) It is no defence to any charge under paragraph (a) of subsection (1) to prove that the girl consented to the act.

Confusion between rape and defilement

We have seen that there may be good reasons for maintaining a separate offence of defilement where more mature girls are concerned. But, we may ask, why do we need a separate offence of defilement for girls who are physically, emotionally, mentally and sexually so immature that sexual intercourse will harm them? Consent is no defence. The sentences for rape and for defilement of immature girls are similar. Why cannot the charges of rape or incest or indecent assault be used instead?

One explanation is that rape and the other cases revolve around whether the complainant can prove beyond reasonable doubt that she did not consent. As we will see in case studies of child sexual abuse, the strict requirements for corroboration often mean that there must be evidence of injuries. If there are no obvious injuries, it is sometimes easier for the prosecution to obtain a conviction for defilement, in which consent cannot be used as a defence. This should not mean that consent is irrelevant. The circumstances of the consent (if any) and the maturity of the victim are very relevant indeed.

Although the intention behind the legislation may be clear, the legislation itself is not clear. It focuses on the age of the complainant, and does not define the circumstances in which consent may, and may not, be accepted as a mitigating factor. Because of this, courts and police sometimes accept consent as a defence and sometimes treat it as completely irrelevant. Two Solomon Islands cases[59] illustrate this point: a man who had defiled a consenting girl between the age of 13 and 15 was charged with rape. Another was jailed two years for defiling his 12 year old granddaughter, who, he said, had consented.

Further confusion arises because the legislation stresses the complainant's physical appearance. Section 156(3) of the Fiji *Penal Code* does not allow an accused to claim that the complainant consented, but Section 156 (1) (a) allows the court to inspect her to see whether the accused could reasonably have believed that she was over 16. If the accused says that he believed that the girl was 16 or over, and the court thinks that she looks 16 or over, the accused can use the girl's appearance and/or behaviour as a defence. But does that make her consent irrelevant? In the following case, the answer seems to be yes.

CASE *State v Seremaia Amato and Ors (1994) Fiji*[60]

Facts and decision A girl of 15 was gang-raped by six men. The court accepted in evidence that she clearly did not consent. The men were charged with defilement, not rape, and said that they thought she was over 16. The magistrate had the girl brought before the court so that he could judge whether it was reasonable to believe that she was over 16. Because he thought the victim looked "hefty for someone her age," he let the rapists go free. However, the Director of Public Prosecutions later took up the case; in 1996, under a charge of rape, it was pending in the High Court.

Comment A charge of defilement should be an alternative only where a girl between 13 and 16 did consent. Here the court had accepted evidence that the girl did not consent. If she had consented, the magistrate might legitimately have considered whether it was reasonable for the offenders to believe that she was over 16. But because she did not consent, the court should not even have considered the question. Further, when magistrates are allowed to inspect victims, questions of attitudes and body image also arise. In this case, one influence was the view that the girl shouldn't have been where she was anyway. Another influence may have been the magistrate's attitudes about what a girl should look like, since he came from a country where even mature women tend to be small. Does a girl have to be short, thin and weak to get her attacker convicted?

Incidence and sentencing

In England, girls of between 10 and 15 are most at risk of sexual abuse. Is this true also of Pacific Island girls? The few statistics we have (for example those in Table 4.5) suggest that girls of under 16 are seriously at risk; there appears to be a very high rate of offences against girls under 13.

In convictions for child sexual abuse, the sentences are similar to those for rape. Most concern girls, and the light sentences demonstrate how lightly the law views their abuse. Many offenders receive a suspended sentence; the offender may not have to serve a prison sentence unless, within a specified period, he commits another offence that carries a penalty of imprisonment.

We have already mentioned the sentence of 16 years imprisonment given in Western Samoa for the rape of a child of two. In general, however, sexual offences against under-aged girls tend to attract sentences of less than one year, mainly for indecent assault and unlawful carnal knowledge. In 1992, a *Samoa Times*[61] article stated that charges of rape of girls below 16 continue to be reduced to indecent assault and unlawful carnal knowledge. The less serious charges may be easier to prove, but they favour the accused because the courts give shorter prison sentences.

In Fiji, reports of defilement of girls under 16 years of age account for about a third of all cases reported annually.[62] From 1987 to 1993, the police received reports of 438 cases; 45 involved children under the age of 13. In 1994, 70 cases of child sexual abuse were reported to the Department of Social Welfare, not the police; in 1995, the Department received 90 reports.

The following Fiji case, and the Solomon Islands guidelines, show remarkable ignorance of the circumstances and consequences of child sexual abuse.

CASE *R v Sogobulu (1984) Fiji*[63]

The accused pleaded guilty to a charge of raping a four year old child. The High Court sentenced him to eight years. He appealed against the length of his sentence on the ground that he had a past good record of overseas army service. Three judges dismissed the appeal, but made their ignorance of the effects of rape quite obvious by appearing to condone the fact that the Chief Justice had taken into account the soldier's record and "the fact that no serious physical injury had been caused to the child."

CASE *Mulele v DPP and Poini v DPP (1985/1986) Solomon Islands*[64]

Mulele, 26, defiled a 12 year old. He was given 30 months imprisonment. Poini, 40, defiled his 13 year old stepdaughter and made her pregnant. He was sentenced to four years imprisonment. Saying that the difference in sentences were due to the age differences between Mulele and Poini, the Court of Appeal gave guidelines on what should be considered in sentencing child sexual abuse cases. Here we summarise and comment on the guidelines.

- What were the differences in the ages of the abuser and the child? (The bigger the difference, the more serious the offence.)
- Did the abuser take advantage of a position of trust?

- Did the abuse result in pregnancy? (If the girl did not get pregnant, why should this benefit the abuser?)
- Was the girl of good or bad character? (Why? Willing or not, consent is not a defence in defilement.)

As we look at practices in the countries of our region, we will see further examples of judgments and sentences that seem to result from a mixture of poorly drafted legislation, muddled thinking and plain prejudice. Some particular Fiji sentences deserve special mention.[65]

CASE 1988: A man was jailed for two years for raping a 10 year old girl. On the same day, a man was jailed for two years for breaking into an office and stealing $15.46.

CASE 1979: A Solomon Islander living in Fiji raped a 13 year old European girl. The High Court, possibly influenced by the girl's ethnic origin, sentenced him to an unusually high 10 years prison. He appealed to the Fiji Court of Appeal arguing that Solomon Islands sentences were considerably lower than in Fiji; in Solomon Islands the highest sentence for rape was four years, with the average being two years; his sentence therefore was "manifestly excessive". His sentence was reduced to seven years imprisonment. This extraordinary decision accepts the equally extraordinary argument that rape by a Solomon Islander is not as serious as rape by a Fijian.

CASE 1993: After a highly publicised trial, a head teacher was convicted of indecently assaulting a nine year old student. The magistrate awarded a sentence of one year imprisonment but suspended the sentence for two years. This effectively allowed the teacher to go free, after having sexually abused a child for whose safety and wellbeing he was professionally and morally responsible.

Cook Islands case reports[66] show a similar pattern of light inconsistent sentencing, with much use of probation, good behaviour bonds or suspended sentences instead of prison sentences. In 1984, a man who raped a seven year old child was given 18 months imprisonment. In 1985, a man got two years probation for an indecent act on a girl under 10. In 1986, five men were each given 18 months imprisonment and probation of six months community service for raping a girl under 16. In 1988, a man was given a sentence of four years for defiling a girl under 16. In 1993, a girl of 12 was raped and suffered attempted gang rape by her brother and seven others. The brother was sentenced to two years imprisonment for incest. Of the others, two were charged with attempting to commit an indecent act and given 18 months imprisonment and 18 months probation; five were each given nine months imprisonment and two years probation.

Incest charges seem common in Kiribati, where the average sentence is approximately two years for an incest/rape. Incest involving adults, or parties closer in age, receives light sentences. A very senior police officer was charged with eight counts of rape of his three daughters aged between nine and 15. All evidence was corroborated medically and by the mother,

and was consistently given. The mother withdrew the charges out of fear of having no income if the father was imprisoned. The case angered the community but the mother and girls could not be forced to testify against the father.[67]

In Tuvalu, a man was sentenced to four years imprisonment for incest with his half-sister. The court said that the girl was willing. On appeal, it said further that it would be different if the incest had occurred between father and daughter, and reduced the sentence to 15 months imprisonment.[68]

Tonga appears to have a better sentencing record for child abusers. Unlawful carnal knowledge of a girl between 12 and 16 is almost always assumed to be consensual, a boyfriend-girlfriend relationship. However, two offenders in separate cases were charged with unlawful carnal knowledge of girls under the age of 12 years. They were both sentenced to 15 years imprisonment. A man who attempted to rape a girl under 12 was imprisoned for five years.[69]

In Solomon Islands,[70] child sexual abuse is a major problem. Many child rape cases fail for lack of corroboration. Sentences range from nine months to five years, with two year sentences being more common. In 1990, a father who had committed incest with his daughter during several years was sentenced to five years imprisonment. At 16 the daughter had given birth to a child. The court said that despite the affection between the parties (implying the daughter's consent) there was a large gap in age between the father and his daughter, and that incest was illegal anyway. The court did not try to analyse whether it was possible to say that the daughter had given her informed consent to her father in a relationship where there was an obvious difference in power. In 1991 a grandfather was charged with defiling his 12 year old granddaughter. He gave her clothes and money and said she had agreed to sexual intercourse. Although consent is not a defence, it seems to have been taken into account; the grandfather got a two year sentence. In a case involving the rape of a daughter, the court acknowledged that the act was rape, but the father was charged with incest, and received a sentence of eight years imprisonment.

In Vanuatu, 1992 and 1993 sentences for unlawful sexual intercourse with girls of under 15 years of age ranged from three months to eight years, depending on the age gap between the offender and the victim. Some judgments contain recommendations by the judge that the girl's family be paid customary compensation. As usual, many cases of rape were reduced to unlawful sexual intercourse, and the sentences were reduced accordingly. A charge of unlawful sexual intercourse with an 11 year old girl resulted in two years imprisonment. An accused charged with attempted rape and indecent assault of a seven year old girl pleaded guilty to the offences; he was imprisoned for two months and fined 40000 *vatu*. Another charged with rape and unlawful sexual intercourse with a stepdaughter under his care got six years imprisonment. Other child abusers were charged with either rape or unlawful sexual intercourse and were given penalties ranging from six months to three years imprisonment.[71]

The Public Prosecutor has said "Incest is surprisingly common," and a newspaper reported an increase of 100% in sexual offences during six years.[72] The Public Prosecutor's files reveal cases where girls have been raped after having refused sexual intercourse with family members; the rapists were charged with assault and indecent assault rather than incest or rape.[73] A grandfather raped his 12 year old granddaughter, but was charged with unlawful sexual intercourse. He was convicted and sentenced to eight years in prison. The Appeal Court reduced his sentence to five years, saying that he might die in prison.[74] One father raped his young daughter many times between 1985 and 1990. The first rape had caused severe internal injury and the girl was terrified of him. When his wife finally left him, he went to the Public Solicitor's Office to seek custody of his daughter. This led to the father's prosecution; he was sentenced to eight years imprisonment.

In 1992 a man charged with having attempted incest with his sister received a bind-over order. In 1993 a father who had committed incest with his daughter got 15 years imprisonment. Another who had sexually abused his 12 year old daughter was imprisoned for five years because the case had been settled by custom: his chiefs were paid one pig, one kava root and three mats.

During the 1992 trial of a man charged with unlawful sexual intercourse with a girl under care, the court emphasised that in order for a recent complaint of sexual assault to come within the exception to the hearsay rule, the complaint must be made at the first opportunity and be spontaneous. The court reaffirmed the corroboration rule, especially in relation to children's sexual complaints. It said that injuries are always good corroboration.[75]

How many scarred children does it take to change laws and practices? In 1996, the United Kingdom National Commission of Inquiry into the Prevention of Child Abuse reported that at least one million children in Britain are abused every year. Many are victims of sexual abuse but few tell anyone about it. The United Kingdom spends more than $2.25 billion a year in treating victims of child abuse.[76] Our region is not alone in its problems, but it may take a survey like that of the National Commission to prove to our governments that child abuse is costing them money.

SPECIFIC ISSUES: COURT POWERS AND PRACTICES

We have seen that sexual offences against women and girls are under-reported and under-sentenced. Now we will see why and how that happens; in effect, the victims of sexual offences are on trial from the moment they report the offence. We will begin by discussing what happens before the case is heard: the jurisdiction of the courts; bail; reconciliation, including

customary practices; special facilities and *in camera* trials. Then we will discuss in detail the issues of consent, "honest belief" in consent and the need for the complainant to corroborate her claims.

The jurisdiction of the courts

As we have already seen, jurisdiction is "the right, power and authority to administer justice by hearing and determining controversies".[77] For example, most Magistrates' Courts have limited powers of jurisdiction, and these powers are outlined in the legislation. Lower courts everywhere are supposed to deal with criminal matters that are not very serious. Their jurisdiction is limited by the type of offence, and the corresponding severity of sentences. In Fiji, the criminal jurisdiction of a Magistrate's Court is limited to certain types of offences: it may not imprison an offender for more than five years.

Magistrates' Courts should not have the jurisdiction to hear rape cases, because rape is a felony, a serious crime, classed in the same category as are murder and manslaughter; the penalty may be life imprisonment. In most common law countries, rape trials have to be conducted in the High Court. However, Fiji, Vanuatu and Kiribati[78] have made rape an electable offence. They permit a rape offender to decide whether he wants to be tried in the Magistrate's Court before a magistrate, who may have little legal training, or in the High Court before a judge. The power to choose trial in a Magistrate's Court gives the male accused rapist enormous advantages over the female rape survivor. We list some of these advantages.

- Many magistrates are not legally trained, and have little understanding of complex legal principles. Experience suggests that Magistrates' Courts do not treat rape cases as seriously as they should, although they do sometimes send cases to the High Court for sentencing.
- In a Magistrate's Court, the accused is prosecuted by police officers with little legal training, and no assessors are required, but the accused may be defended by legal counsel. The rape survivor, on the other hand, is indirectly represented by an untrained prosecutor. The rapist's defence may therefore be more convincing.
- Five years is the maximum sentence that can be imposed in a Magistrate's Court. A rapist may choose trial in a Magistrate's Court because he knows that he is guilty but that he will not get more than five years unless the Magistrate sends the case to the High Court.

These particular advantages could be removed by taking away the accused's power of election, and requiring sexual offences to be heard in the High Court and not in Magistrates' Courts. Rape survivors have enough disadvantages without adding others that are technically illegal.

Most other countries in our region require an accused rapist to be tried and sentenced in the High or Supreme Court, not in a lower court (unless a rape charge is reduced to indecent assault, which a Magistrate's Court may

hear.) The major advantages of having rape cases heard in the High Court are that they are prosecuted by legally trained Public Prosecutors; a group of three or more assessors may sit to decide the guilt of the accused; a legally trained judge will decide the case, and may impose a prison sentence of more than five years.

The banishment case of *Taamale and Taamale v the Attorney-General*[9] is relevant here. Referring both to the kinds of cases that might be dealt with under custom (in this case by the village *fono*) and to the constitutional issues raised, the President of the Supreme Court said.

> As the Chief Justice mentions murder and rape as possible grounds for banishment, it is necessary to say that the punishment of offences is a matter for the criminal courts. Serious crime is properly dealt with by the Supreme Court ... The accused has constitutional rights ... including the right to counsel.

In practice, however, custom, island, village or informal courts often hear rape cases, because formal courts are far away or because the cases involve matters of custom, compensation or bride price. In custom courts, the rapist must pay compensation to the rape survivor's family or to the chiefs. There may be no further punishment, unless the rape survivor or her family insist on taking the matter to the higher court, but they often do not, because of community pressures, lack of money and lack of knowledge of women's rights and constitutional rights generally. If they do, cases like that of *Taamale and Taamale v the Attorney-General* could be very useful.

Bail

After being charged with an offence, an accused can ask to be granted bail. Bail is a privilege and not a right; the accused may ask for bail, but will not automatically get it. If a court believes that the accused will not harass the complainant or potential witnesses, and will appear in court at the proper time, it may grant bail. Currently, Magistrates' Courts and higher courts usually grant bail to accused rapists, but there are good reasons why they should not.

- Both the accused and the rape survivor often live in the same small community.
- The accused will have opportunities to harass or injure the survivor and potential witnesses.
- The survivor's family and friends will have opportunities to harass or injure the accused.
- The rape survivor may be pressured into customary reconciliation, which may influence the outcome of the court case.
- When the interests of the accused are considered more important than the interests of the victim, granting bail discriminates against the victim in favour of the rapist.

Reconciliation

Many rape cases are not heard. One of the most common reasons is the practice of reconciliation, which occurs when the complainant and the accused person agree that the case will not proceed further. After reconciliation, the rape survivor or her family may withdraw the charges. If the charges proceed, the rapist may be convicted, usually by an admission of guilt, and may be given a suspended or much reduced prison sentence.

Legally, not all types or crime can be reconciled; reconciliation is limited to minor offences like criminal trespass; common assault; assault occasioning bodily harm and other malicious injury. We quote the *Criminal Procedure Code* (Fiji) Cap. 21, which outlines situations where reconciliation may be possible:

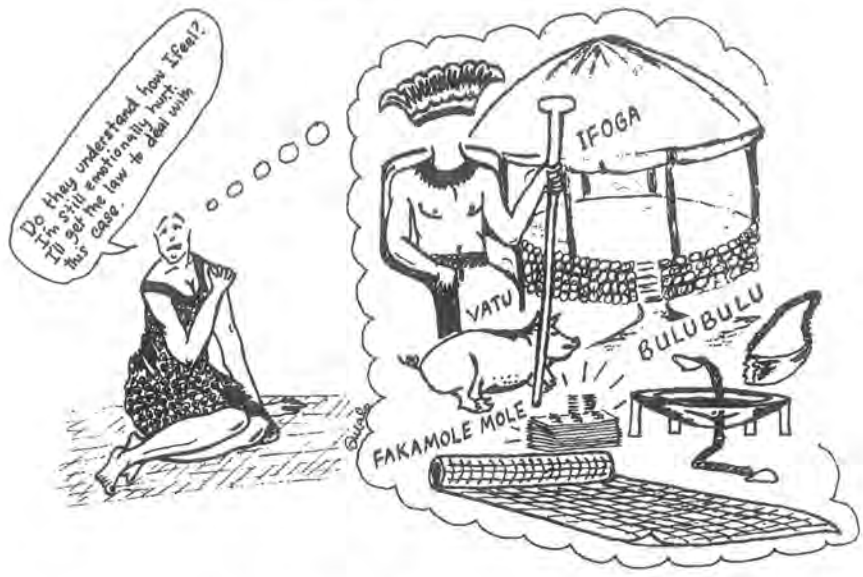
> 163. In the case of any charge or charges brought under any of the provisions of subsection (1) of section 197 or of section 244 or of section 245 or of subsection (1) of section 324 of the Penal Code, the court may, in such cases which are substantially of a personal or private nature and which are not aggravated in degree, promote reconciliation and encourage and facilitate the settlement in an amicable way of the proceedings, on terms of payment of compensation or on other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.

No legislation in our region lists rape or any other sexual offence as reconcilable; rape is classed as a felony, in the same category as murder, manslaughter and armed robbery, and, like these, can incur a maximum penalty of life imprisonment. We do not know of any case of reconciliation for robbery, murder or manslaughter, even when the victim or the victim's family has accepted an apology from the offender. Regardless of the legislation, courts and police treat rape as the only felony that is reconcilable. Why?

Customary practices

Some may justify treating rape as a reconcilable offence by saying that reconciliation is a customary practice, and is acceptable because customary practices are recognised by the Constitutions of Pacific Island nations. Much reconciliation takes place through customary practices such as *bulubulu* in Fiji, *ifoga* in Western Samoa and *fakamolemole* in Tonga.

Such practices exist throughout our region. In Cook Islands, the practice seems to have little effect on sentences; customary forgiveness is sought but the courts do not regard the practice as justifying a reduction in sentence. In Tonga, the *Criminal Offences Act* (Cap. 18 s. 25) allows for compensation to be paid as well as the penalty or instead of the penalty. In rape, traditional forgiveness cannot interfere with the criminal prosecution, but can affect sentencing. For example, if the rapist's family pays the girl's family $500, this could be accepted as partial compensation.



Sometimes, as in Tonga,[80] if the rapist and victim are unmarried, their ages are similar, and they are not strangers, they are made to marry each other. Marriages for similar reasons are common in the region, but it is shameful that a rape survivor should be made to marry the man who raped her, even if the rapist has sought her family's forgiveness, and even if she will avoid the public shame of going to court. A forced marriage is a denial of human rights.

In Solomon Islands[81] traditional compensation paid to the rape survivor's family will often stop a rape case from going to the High Court. If the case does go to the High Court, the compensation will be accepted as part of the punishment. The result will be a lighter sentence. In Vanuatu in 1991, the Malekula Magistrate's Court accepted withdrawal of criminal charges in an attempted rape because the offender had obeyed a compensation order by the custom court.[82] Many women say that women are a custom commodity, used to obtain money; the rapist or his family receive customary punishment or make payments, not to the survivor, but to the chief of her village. When charges are not withdrawn, customary reconciliation influences the prison sentence.

CASE *Public Prosecutor v Tabisal (1991) Vanuatu*

Facts and decision The accused had pleaded guilty to rape of a girl of nine. He paid, to the chiefs, a customary settlement of three pigs and six mats, valuing about 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 age but gave the accused a three year sentence because he was a first offender and had made a customary settlement.

In the Western Samoan *ifoga*, the family of the offender seeks the forgiveness of the complainant's family. The *ifoga* is supervised by the village council *fono*. The courts regard compensation offered by the offender's family in *ifoga* as an official fine, because it is ordered by the *fono*. Evidence of *ifoga* is often offered in mitigation and reduces sentences. *Ifoga* is constitutionally recognised, and is accepted by courts in domestic violence and sexual offences including rape and child abuse. The Police Prosecution Office formally charges the offender, despite *ifoga*, unless the girl's family insists that they do not want the offender charged. The complainant rarely has the opportunity to be heard, and the family decides whether the atonement is sufficient. A rape case may therefore not proceed beyond the *fono;* if it does, a rapist who has participated in *ifoga* may receive a lighter or suspended sentence.

The importance of *ifoga* has been highlighted in many cases. We take some examples from 1988 to 1993.[83]

CASE *(1988) Western Samoa*

Land had been offered in atonement for rape, and the court noted: "Although the victim suffers grievous personal hurt and anguish, the family shares the outrage. An *ifoga* is a public expression of sorrow and apology to the family as well as to the victim, and in this sense transcends mere compensation."

CASE *(1992) Western Samoa*

Facts and decision This case involved the gang rape of a 15 year old girl by seven men. The charges were reduced to unlawful carnal knowledge because the girl was under 16. An *ifoga* was performed, supervised by the village *fono*. The main offender's family was fined two cartons of tinned fish. Another's family was fined $100 and five mats. The formal courts recognised the *ifoga* and fine as a form of punishment, and reduced the prison sentences accordingly. Six defendants were imprisoned for periods ranging from three to 11 months; one got probation for one year. The Acting Chief Justice said that the boys' families would suffer shame as well as the girl's family.

CASE *Attorney-General v Fereti (1993) Western Samoa*

Facts and decision A man raped his *de facto* wife's 12 year old daughter. The charge was reduced to unlawful carnal knowledge and he was sentenced to 12 months prison and 12 months probation. When the Attorney-General appealed, asking for a higher sentence, evidence showed that the man had performed *ifoga*, which the girl's family had accepted. In addition, the *fono* had ordered him to pay it 10 sows. He could not afford 10 sows so he paid the *fono* one beast. The Court of Appeal increased his prison sentence to two years, saying that under Section 8 of the *Village Fono Act 1990*, customary compensation and apology must be taken into account.

In 1995 there were, however, signs of change. We have already referred to the case of *Taamale and Taamale v the Attorney-General* in which the President of the Supreme Court stated that criminal acts should be dealt with in superior criminal courts. In the next case, the President of the Supreme Court

upheld the Attorney-General's appeal against a lenient sentence for an attempt to commit *fellatio* on a three year old girl. The President said:[84]

> The respondent [a 17 year old of "low mentality"] received a sympathetic probation report ... An apology by his parents had been accepted by the victim's family and his family was heavily fined by the village council ... estimated at $5000. The offence carries a maximum penalty of seven years imprisonment ... The Chief Justice took into account mitigating circumstances [including] the formal apology and the fine. [He] concluded that a term of imprisonment should not be imposed ... The Attorney-General contended ... that the Judge had placed too much weight on the fact that the respondent's family had been severely punished by the village council ... It was certainly appropriate [but] the fact that such a substantial fine was levied must not deflect the Court's attention from the seriousness of the offence: it was an act of outrageous indecency committed on a defenceless little girl.
>
> There was a clear need for the Court to impose a sentence that would not only punish the respondent and mark the community's abhorrence ... it must also serve as a strong deterrent ... The appeal must be allowed and a prison term imposed ... Ordinarily it should be well in excess of 12 months. However we must have regard to the mitigating factors ... and to the substantial fine ... We also respect the Judge's wish to show mercy to this young man ... We conclude that a term of nine months would be appropriate.

So, in Samoa, the *fono* and the *ifoga* still carry a great deal of weight but courts should not ignore other factors such as the seriousness of the offence and the need to deter future offenders. In Vanuatu, an expatriate judge said in 1993 that "custom settlement in rape cases had no place in the courts,"[85] while in Fiji the Solicitor-General said that *bulubulu* should never take the place of formal legal punishment.[86]

> Traditional means of reconciliation should not influence the sentencing of rapists ... I do not accept that the *taukei* culture and traditions permit the use of the *i bulubulu* tradition as a means for a criminal to conveniently escape the fruit of his deeds ... The courts, police and all other law enforcement personnel dealing with rape, must not accept the pleading of traditional values and customs as a substitute for criminal sanctions.

This means that *bulubulu* is a traditional means of reconciliation. It is a customary requirement for the welfare of the community, so that the community can carry on in peace. It is not for the benefit of the individual offender. It should not be a substitute for punishment, nor lessen the punishment in the formal legal system.

Women's organisations in Fiji have strongly condemned the use of customary reconciliation practices to reduce sentences. Their campaigns have been successful in some courts, but others still treat traditional reconciliation as a substitute for punishment. The first of the following two cases shows an attempt to balance these opposing points of view; in the second, the Nausori Magistrate's Court came down firmly against reconciliation in rape cases.

CASE *State v Naitikarua and Viliva Nagano (1994) Fiji*[87]

The court gave sentences of six and seven years to two rapists, saying: "There appears to have been reconciliation between the victim's family and those of the two accused persons through Fijian customs and tradition, but that has no legal force except that the court could recognise it as a mitigating factor and nothing more. Having said that, I cannot, however, ignore the importance of reconciliation in any case within any community as it serves as a vehicle for diffusing tension, ill-feelings and want of retaliation."

CASE *Nausori Magistrate's Court 1994, Fiji*[88]

The Nausori Magistrate's Court brushed aside traditional reconciliation as appropriate punishment in a gang rape. It jailed four men for five years saying that rape was not reconcilable and that traditional reconciliation did not carry any weight in a court of law.

In general, the reconciliation problem arises from misunderstanding and misapplication of formal and customary law. It cannot be solved unless judicial and police officials are trained to analyse and understand gender issues and how they interact with the law. Chief Justices could play a major role by monitoring more closely what is happening in the courts.

Constitutions give every person the right to the full protection of the law. If traditional practices of reconciliation influence whether or not adequate punishment is given to the offender, they can deny the human rights of the victim. Further, any state that fails to address the problem is breaching Article 2(f) of the United Nations Women's Convention. Judges in Samoa and Vanuatu in 1995 referred to the potential conflict between customary law and human rights.[89] It would be interesting to see whether an action could be brought under the Constitution if a rapist goes free on the grounds of traditional reconciliation.

Lack of special facilities and right to *in camera* trials

Despite the special features of rape and sexual abuse, no hospitals and police stations in our region have special facilities for reporting them. No medical or police rape squads exist to assist victims, collect evidence and protect the rape survivor's privacy. In a child abuse case, the child must make her complaint at the nearest police station. She is taken to the charge room where there are no special procedures for taking a child's statement, and no officers trained to take children's evidence or to deal with child abuse.[90] This partly explains the lack of reporting of rape and the limited success in obtaining rape convictions, regardless of the age of the victim.

In Tuvalu, rape trials are held in the open, in the *maneapa* where parliament sits, court is conducted and all social activities take place. The *maneapa* has no walls, and the entire community may be present. In Fiji and elsewhere in our region, whether sexual offence cases are heard in the Magistrates' Courts or High Courts, the hearings tend to be conducted in public. The reasoning is that "justice must be seen to be done" and that the public have a right to

know what occurs in the courts of law. This means that the courtroom is open to anyone. The rape survivor has no privacy.

The prosecuting officer may request that the trial be conducted *in camera* but the magistrate or judge has the right to agree or disagree. For instance, Section 141 of the Tonga *Evidence Act* states that all sexual offence hearings may be held *in camera*. This means that the victim has no automatic right to an *in camera* trial; she must ask for it, and depend on the sensitivity of the magistrate or judge.

Justice must be seen to be done, but the interests of justice are not served when attitudes weigh against the victim. A rape survivor might be more willing to report and prosecute the rape if there were more guarantee of privacy through a closed court. The nature of small island communities and the particular features of rape make it necessary for a rape survivor to have the automatic right to have a trial *in camera* if she wishes to protect her privacy and reputation. In these particular circumstances, the right of the individual must outweigh the right of the public to know. This principle has already been established by the general prohibition against publishing the names of sexual offence victims; it should be extended to trial procedures.

Child sex abuse trials

In all sexual offence trials, the complainant usually must appear in court, face the offender, and give evidence against him. This involves vigorous questioning by the accused's lawyer, in the presence of the accused, in a formal court room. The process is difficult enough for an adult, but may be impossible for a child, and in Fiji, the Director of Public Prosecutions has stated that past prosecutions for child molestation and rape have succeeded only if there were eye-witnesses, or if the accused confessed and pleaded guilty.

In 1993[91] for the first time in Fiji, after lengthy submissions from the Director of Public Prosecutions, the court granted a nine year old girl the right to give evidence behind a screen. (The accused's lawyer argued that this "Western" practice was misplaced in Fiji, which had a "different perspective", but did not say what he meant by that.) The grant was however only discretionary; it does not guarantee future victims the right to a screen.

In November 1996, UNICEF presented a courtroom screen to Fiji's Director of Public Prosecutions. The screen may be lent to magistrates and judges who request it, but they are not yet obliged to use it.[92] New Zealand has amended its *Evidence Act 1908* to allow a child to give evidence by video-tape, through closed circuit television or from behind a screen. Such amendments could provide a model for our region.

SPECIFIC ISSUES: CONSENT

In our discussions of the jurisdiction of the courts, bail, reconciliation and the lack of special facilities, we have seen some of the obstacles that a woman or child must face, in and out of court. In the next sections, we will focus on even more serious obstacles: consent, corroboration and credibility.

The issue of consent is the most important aspect of a trial involving the rape of an adult. If an accused can show that the complainant consented to sexual intercourse, he cannot be found guilty of rape, so that the most common defence in a rape trial is to say that the complainant did consent. The common law makes it the responsibility of the prosecution to prove that the accused raped the complainant; it is the responsibility of the defence to show that consent was given. In practice, however, rape is the only crime in which, effectively, the onus of proof appears to shift to the victim. The prosecution must prove two things beyond reasonable doubt: first, that the rape survivor did not consent to sexual intercourse; and second, that the accused did not believe that she had consented.

But what do the courts regard as consent to sexual intercourse? If the woman says no, do the courts try to find out why the accused did not accept the refusal? Is consent taken for granted? The following four cases show common law attitudes to consent in Western Samoa, Solomon Islands and Fiji between 1978 and 1991.[93]

CASE *R v Alfred Saolo and Ors (1978) Western Samoa*

Facts and decision Seven men were charged with rape. At first they held the girl in the air by her arms and legs. She allegedly did not struggle but constantly cried about the pain in her back, and begged to be allowed to lie on the ground. They allowed her to lie down, but two of the accused held her arms and legs; two sat on her chest. One admitted hitting her in the chest and another pleaded guilty to the rape.

The defence lawyers argued that because the girl asked to be allowed to lie on the ground, she had consented to sexual intercourse. In his corroboration warning, the judge said that the jury should not take one accused person's admission of rape too seriously, as an accused might be trying to get a lighter sentence. He told the jury that if they honestly believed that the girl had consented, this belief would be sufficient to acquit the accused. However, the accused who pleaded guilty had given a graphic description of the rape. This convinced the court. The first accused was sentenced to four years imprisonment and the others to between five and eight years imprisonment.

Comment The judge appeared to consider seriously the defence argument that the girl's request to be allowed to lie down was consent to sexual intercourse. He gave little consideration to the blows, nor to the difficulty of struggling when one is held down and sat on.

CASE *R v Simon Bani (1983) Solomon Islands*

Facts and decision Bani was accused of rape. The defence argued that he and the complainant had been lovers, and therefore there could be no rape. The

judge said that he saw the complainant smile at the accused while she was being questioned. He said it was a crucial question whether the two had a relationship before the alleged rape, and noted the four months delay in reporting the rape. He said that the rape was not reported until the failure of both families' attempt to get the two married: this implied a preexisting relationship. All these matters taken together were regarded as consent to sexual intercourse. The court acquitted the accused.

Comment The court was influenced by circumstantial evidence of past consent. It did not consider that the attempt to get the parties married may have been to reduce the shame of rape in a small community, nor that a smile may have many causes, including fear and embarrassment. Further, two people may have a mutually consenting sexual relationship, but that is no guarantee that they will both want sexual intercourse with each other at the same time, or forever.

CASE *R v Jesse Whippy (1983) Fiji*

Facts and decision Three men raped the complainant and left her lying unconscious. A fourth man arrived and raped her while she was still unconscious. All were convicted of rape, but the fourth appealed from the Magistrate's Court to the High Court against the conviction. The Chief Justice said that the complainant had no energy left to resist, but that the fourth man had thought that he had stumbled upon a sexual orgy and that the girl was probably consenting. The Chief Justice did not dismiss the conviction against the fourth accused, but reduced the sentence from 30 months to 18 months.

Comment Courts go to extraordinary lengths to protect the rights of rapists. Unfortunately, they do not give similar privileges to the victims.

A man comes across an unconscious woman. He does not worry that she is unconscious. He does not ask her what she wants. The court accepts that he honestly assumes the woman's consent. But suppose a video deck is lying in an empty room; nobody is around. A man sees it and takes it. Obviously he does not ask its consent. Would the court have accepted the argument that he honestly assumed that he could have the deck because nobody said he couldn't?

This case shows what the court and the common law think of consent. The court accepted that the accused had assumed that the woman would have consented if he had asked her, so he did not ask her. By accepting this argument, the court accepts that consent may be taken for granted. But the legislation is clear: consent must not be assumed; it must be specifically given.

CASE *DPP v Volau, Usakilakeba and Baleijamani (1991) Fiji*

Facts and issue: Three men were charged with rape, and had pleaded guilty. An eye-witness said that the first accused "got hold of the complainant and dragged her to the side of the road". Despite this, the Magistrate's Court accepted hearsay evidence that the woman had consented to at least one man: police officers and a social welfare officer said that one of the accused had a love-bite on his neck. The welfare officer, who had not seen the love-bite, said in evidence that the complainant "must have enjoyed it since she gave J a love-bite on his neck". There was no medical evidence whether there was a mark on the accused's neck; whether the mark (if there was one) matched the teeth of the complainant; and if it did, how it was made.

Decision The Chief Magistrate found the three accused guilty. However he did not imprison them but fined them $200 each and bound them over for two years. The case went on appeal to the High Court where the Judge sent the case back to the Magistrate's Court for retrial.

Comment The rapists had pleaded guilty of rape. If the Magistrate found that the love-bite was evidence that the complainant had consented, he should have found the accused not guilty and acquitted them. If he found them guilty, he should have sentenced them to up to five years in prison, or sent them to the High Court for a longer sentence. The Magistrate's Court went outside the rules of evidence to accept uncorroborated evidence that the complainant did consent.

Honest belief in consent

In *R v Jesse Whippy*, we see the second element of consent to sexual intercourse: to find the accused guilty of rape, the prosecution must prove that the accused knew that there was no consent. The first three men were convicted because the woman had not consented, and they knew it. The fourth had his sentence reduced because although the woman had not consented, he thought she had consented, or that she would have consented if he had bothered to ask.

The general common law rule is outlined in *DPP v Morgan*, which is still the leading authority except in countries that have changed it by legislation. The case focuses on the issue of consent, but shows also that not all rapists are crazy or vagrants. The rapists in this case were middle-class friends and colleagues of a senior officer of the British Army.

CASE *DPP v Morgan (1976) United Kingdom*[94]

Facts Captain Morgan and his friends raped Mrs. Morgan during a drinking party at Morgan's house. Morgan had encouraged his friends to have sexual intercourse with his wife, telling them to ignore her protests, as these showed that she was enjoying it. Despite the wife's strong protests and pleas, Morgan and his friends raped her. The friends were convicted of rape, but Morgan was not convicted because, according to United Kingdom common law at the time, a husband could not be found guilty of raping his wife.

In their appeal to the House of Lords from the Court of Appeal, the accused argued that they had "honestly believed" that Mrs. Morgan was consenting and that they therefore should not have been convicted for rape. The *mens rea* required in a successful prosecution for rape was the knowledge or belief that the woman was not consenting. In their case, this was missing as they honestly assumed she was consenting. Their belief, they said, might have been unreasonable (since she begged them to stop) but it was honest.

Issue and decision: Does the accused's belief in consent have to be only an honest belief? Or does it have to be an honest but reasonable belief? The House of Lords held that provided the accused had an honest belief that the victim was consenting, it did not matter if the belief was not reasonable.

Comment Alcohol may have clouded the rapists' brains and made it difficult for them to take the woman's protests seriously. The law, too, has great difficulty in listening to a woman's point of view in rape cases; the "women say no and mean yes" myth persists. *DPP v Morgan* established the horrifying

principle that if a rapist is able to show honest belief in the victim's consent, he will not be found guilty of rape: no matter how ridiculous or unreasonable the belief, the accused is entitled to be acquitted as long as his belief is honest. *DPP v Morgan* is still the leading authority on the mental element in rape in the United Kingdom and most of the common law world. Because it was a decision made by the House of Lords it is of very persuasive authority. Other courts in the common law world would have to have very convincing reasons not to follow it.

We saw that in the case *R v Alfred Saolo and Ors*, the judge told the jury that honest belief in the girl's consent was sufficient to acquit the accused. The judge did not ask the jury to consider whether the belief was honest and reasonable, just whether it was honest. The rule allowing honest, even if unreasonable, belief in consent is still established law in most countries in our region. In 1982, however, Fiji passed legislation to the effect that the belief must be honest and reasonable. Tonga also has inserted a "reasonable" element into the "honest belief in consent" rule.[95]

CASE *DPP v Apimeleki Madratabua (1982) Fiji*[96]

Decision In this case the Fiji Court of Appeal confirmed the meaning of Section 10 of the *Penal Code*. It ruled that the belief in consent must not only be honest; it must also be reasonable. However the Court made some further comments during the summing up, when the Judge said: "Remember the case against each accused is to be considered separately. Only if you are sure of the accused's guilt will you give an opinion to that effect. You are men of the world. You must use your common sense and experience of your fellow men in arriving at your decisions".

Comment The summing-up at the end of a trial can be crucial in influencing the jury or assessors, and it is mostly here that court assumptions and prejudices come out. Telling "men of the world" to use their "common sense and experience" is almost the same as telling them to use rape myths to establish whether a belief is reasonable. The judge's advice should have been that the jury or assessors must apply the facts of the case and make an objective decision about the reasonableness of the accused's behaviour. The jury must divorce itself from its attitudes to sexual behaviour and make a judgment on the legal issues alone. It should consider not whether the woman is respectable, but whether the accused was reasonable to assume her consent.

All the rules of evidence including corroboration and the admission of past sexual experience are geared towards the issue of consent. The issue of consent is heavily burdened by all types of prejudices about women.

- If the woman submitted to the rapist out of fear, she consented.
- If the woman knew the rapist, she consented.
- If the woman was not a virgin, she consented.
- If she was not a virgin or not chaste, she cannot be believed.
- If she is married to the rapist, she must consent.

The rule that the accused has to have only an honest belief in consent is subjective and favours the accused. It discriminates against rape survivors and makes a rape charge difficult to prove. The rule that the accused has to have an honest and reasonable belief in consent is a more objective test. Forcing the court to ask what a reasonable man would do is more just. The relevant question is: "What took place between this man and this woman on this occasion?"

SPECIFIC ISSUES: CORROBORATION AND CREDIBILITY

What is corroboration?

The common law regards the persons listed below as being naturally unreliable witnesses. Their statements about sexual offences must be corroborated, backed up by independent evidence that links the accused to the crime.[97]

- Children of tender age
- Women complainants in sexual matters
- Accomplices who give evidence for the prosecution.

Why should women and children be placed in the same category as accomplices? There is no evidence to suggest that women and children lie more about sexual matters than men do. To find the answer, we have only to look at the blind sexual prejudice of the 1977 Nauru judge's warning that women and children make false accusations "for all sorts of reasons and sometimes for no reason at all".[98]

The common law rule says that corroboration is not essential in a rape trial. The judge or magistrate may decide whether or not to seek corroboration and may make a finding based on the complainant's credibility. In practice, however, a judge or magistrate is expected to warn himself, or the assessors or jury, that it is dangerous to convict the accused on the uncorroborated evidence of the complainant; without independent evidence, the accused should not be convicted. The warning directs the court not to accept the rape survivor's evidence if that is the only evidence. Rather than directing the court to keep an open mind, the warning questions the survivor's credibility and thereby places her at a disadvantage.

The classic case defining corroboration is *R v Baskerville (1916) United Kingdom*.[99]

> ... Evidence ... in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some

> material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute ... The nature of the corroboration will necessarily vary according to the particular circumstances of the offence ... It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as that corroboration except to say that corroborative evidence is evidence which shows or tends to show that the story of [the witness] that the accused committed the crime is true, not merely that the crime has been committed; but that it was committed by the accused.

Testimony from the complainant herself is not corroboration. However, as a matter of law, a complainant's injuries may corroborate her evidence.[100] A raped woman must provide independent proof through injury, medical evidence or an eye-witness. So if a woman submits out of fear of injury and is not physically injured, or if she at first struggles and then submits out of weakness, she cannot provide corroboration of the fact of rape and is unlikely to obtain a rape conviction.

Criminal law is based on the principle that it is better to let a guilty person go free than to imprison an innocent person. This noble principle keeps our prisons from filling up with men convicted of sexual offences and domestic violence, but gives more rights to rapists than to their victims.

Corroboration in adult cases

The following cases will show that, in our region all countries (except Cook Islands and more recently Tonga) require corroboration of rape. The cases date from 1976 to 1992.[101]

CASE *R v Mohammed Kasim (1976) Fiji*

Issues and decision The main issue was whether the complainant's distress, and what she said to a witness immediately following the rape, could be admitted as corroborative evidence. The defence argued that what the complainant had said to the witness was hearsay and could not be admitted as evidence. The court made the traditional warning about corroboration: "It is possible that a complainant may simulate distress in support of a false accusation. Females who like publicity have been known to falsely accuse males of indecency and rape; such accusations have also been based on malice and a desire for revenge. Distress evidence should be examined carefully."

The High Court judge said that there was ample evidence that the rape was corroborated, and accepted that a rape had occurred. He then made much of the fact that the complainant had said that she had been a virgin, but that medical evidence was that she was not. Attention was given also to medical evidence showing the difficulty of proving penetration when no sperm had been emitted. The High Court reduced the sentence given in the Magistrate's Court, saying that it was excessive, but did not say why the sentence was excessive.

Comment Although the judge had accepted that the complainant had been raped, he cast doubts on her credibility and moral character and reduced the sentence. The warning itself immediately raises doubts about the rape survivor; it is the setting against which all the evidence is weighed, examined and assessed; it suggests that women tend to lie about sexual matters, while men do not. How can any jury or court not be prejudiced against a complainant when the starting point for discussion is suspicion and mistrust?

CASE *R v Bauro (1977) Kiribati*

Facts Injuries to the complainant's vagina had caused considerable bleeding. Because of these injuries, the Magistrate believed the girl and found the accused guilty of rape. He did not warn himself against the danger of an uncorroborated conviction for rape. The accused appealed against conviction because the warning was not given.

Issues and decision Was the lack of a corroboration warning crucial to the case? Were the vaginal injuries corroboration? The High Court appeared to suggest that the heavy bleeding was due to loss of the complainant's virginity rather than from injuries caused by the rape, and that she had cried rape because she had been found out. The Chief Justice said: "Corroboration is not required by law but is always looked for in practice, and while an accused person may be convicted without corroboration, the court ... should ... warn itself of the dangers of so convicting ... in many cases...there is only the evidence of the complainant and the accused, either or both of whom could be lying". The Chief Justice chose to believe the accused, and acquitted him on the ground that no corroboration warning had been given.

Comment It is unfortunate that medical evidence was not given, since bleeding caused by breaking of the hymen is not normally heavy. It is not necessary for a magistrate to find corroboration, if he believes the complainant, so it was flawed reasoning on the part of the High Court to find the accused not guilty. Again, the law appeared to favour the accused at the expense of the victim.

CASE *R v Iererua (1978) Kiribati*

The court said that corroboration was not always required in law, but in practice it was always looked for. It said that the evidence of both the complainant and the accused rapist were equally believable, but because there was no corroboration the accused was acquitted.

CASE *Public Prosecutor's files, 1985, Vanuatu*

Facts and decision The court accepted evidence that the complainant struggled at first but then lay quietly. The court said that although the girl might have been unwilling at first, afterwards it could not have been rape because there was no evidence of further resistance. There was therefore no corroboration. The accused was acquitted.

Comment The court ignored the legal definition of rape, which includes situations where women submit out of fear. As well, the court sent out the message that a man may force a woman to have sexual intercourse with him because once she gives up struggling, rape is not rape. This is another example

of how little judicial officials understand the nature of rape and the consuming fear of death or injury that forces many women to stop struggling.

CASE *R v Kolapitu (1989) Solomon Islands*

The only corroborative evidence in a rape case was that of a small child who had witnessed the complainant's distress. The court found the complainant a believable witness, but dismissed the charge of rape because there was no legal corroboration.

CASE *R v Maetarau (1990) Solomon Islands*

Facts A woman breast-feeding her baby was raped in her home; she said she did not scream because the rapist covered her mouth. The doctor gave evidence that her bleeding was due to forced sexual intercourse. The defence argued that the bleeding was due to childbirth injuries, even though the doctor was adamant that the injury was recent and could not have been caused by the birth of her baby two months earlier. A witness gave evidence of the complainant's distress immediately after the rape.

Decision Despite the medical evidence and witness, the court said that there was no corroboration. It nevertheless believed the complainant and sentenced the rapist to five years imprisonment.

CASE *R v Mezer (1990) Solomon Islands*

Facts A 16 year old girl was raped on the beach. After the rape she washed herself in the sea. She told a friend about the rape as soon as she returned to the village. The defence argued that the girl had consented.

Decision and comment The court said that the evidence was uncorroborated. However it found the girl a credible witness. It warned of the danger of convicting without corroboration, but convicted the accused for rape. The Chief Justice essentially said that if the victim were a believable witness, he would convict for rape even without corroboration.

CASE *Public Prosecutor v Pakoa (1992) Vanuatu*

The Chief Justice restated all the discriminatory common law principles operating against women: "In sexual offences, women can easily falsely accuse men. That is why it is important to find corroboration otherwise it would be highly dangerous to convict. I can still convict without corroboration if I believe the complainant but it is dangerous to do so".

Note that in three of the four more recent cases, the court gave itself the corroboration warning, but was convinced by the complainant's evidence and convicted the rapist. Whether or not a case is conducted without discrimination depends more on the personality and character of the judge than on the legislation, again highlighting the need for gender-sensitivity training for judges.

Cook Islands and Tonga

As we have already said, Cook Islands and Tonga stand out from the rest of the countries in our study: they do not seek corroboration as a matter of routine. Cook Islands has done this by legislation. The *Cook Islands Evidence Amendment Act (1986-87)* removed the requirement that the evidence of a rape or sexual crime survivor must be supported by corroboration in order to get a conviction.

In Tonga, as we will see in the *Tangi* case, the Chief Justice ruled through a common law interpretation that corroboration of rape was not required. In both countries, the removal of the requirement also meant that questions about the survivor's sexual history could and should be discouraged. We will come back to this in our section on credibility, but for the moment will concentrate on a case that has created an precedent not only for Tonga, but also for other Pacific Island countries.

CASE *R v Tangi (1992) Tonga*[102]

Facts and issue During the trial, the accused's lawyer asked the complainant whether she had "enjoyed it when the accused licked [her] vagina". The woman said that it was painful, that she did not enjoy it, nor was she aroused. The defence made much of the fact that the woman eventually stopped struggling, implying that she stopped because she was enjoying the act and was therefore consenting. The defence attempted to ask questions about the complainant's previous sexual experience, but the Chief Justice would not allow them. The defence also alleged that there was no corroboration. The Chief Justice had to decide whether the United Kingdom common law requirement for corroboration was necessary in Tongan law.

Decision The Chief Justice commented that Section 11 of the *Evidence Act* makes it possible for evidence of recent complaint to be admissible, although it is not by itself corroboration. He said that the omission in Section 11 of the word "corroboration" was deliberate, and should not simply be filled in by United Kingdom law. He ruled that Tongan law does not require corroboration, so it is not necessary to give the typical United Kingdom warning. He said also that there has to be an honest and reasonable ground for the accused to believe consent. The jury returned a unanimous verdict of guilty.

Comment Compare this judgment with that of the 1985 Vanuatu case, in which the woman had stopped struggling. Note also the care with which the Chief Justice examined the legislation, and found that the word "corroboration" had been deliberately left out. This has established a precedent whereby a Tongan court must not warn itself or the jury of the dangers of convicting without corroboration.

Corroboration in child sexual abuse cases

It is important to realise that the rules about corroboration, hearsay and delay in reporting apply equally to children's evidence.[103] The corroboration warning is exactly the same for rape. If this evidence is unsworn, it must be

corroborated. If the evidence is sworn the corroboration warning must be given.

The law is that if a child is competent to give evidence, she must give sworn evidence. Sworn evidence is evidence taken under a religious oath; to give sworn evidence, a child must be accepted as able to swear to tell the truth, and to understand what it means to take an oath. The child, like other witnesses giving sworn evidence, is subject to cross-examination: the accused's lawyers can ask her questions trying to show that she is lying or is unreliable for other reasons. If a child is thought incapable of understanding the meaning of an oath, she may give unsworn evidence. She will not be subjected to cross-examination by the accused's lawyers but because of this her evidence is regarded as being less reliable.

The requirements of proof of child sex abuse are exactly the same as those for rape except that in child sex abuse cases, consent is not (or should not be) allowed as defence. As in rape, the law on defilement is influenced by myths about children. Children's evidence, like women's evidence, is regarded as basically unreliable even though studies indicate that children rarely lie about sexual matters. One such study has shown that even when children withdraw their allegations, their original story was usually true.[104] Yet the law is based on the idea that children normally lie about such matters and that offenders should be protected against their accusations.

The essential reliability of children's evidence appears to have been recognised in the 1995 United Kingdom case of *R v Hampshire*.[105] It is no longer necessary for the court to establish that the child understands the special duty of telling the truth in a criminal trial.

To 1996, no court in our region had followed this precedent. As we will see in the following cases, most courts insist on corroboration, even though they need not do so if they are satisfied by the child's evidence. The following cases date from 1961 to 1995, and come from Vanuatu, Nauru, Kiribati, Solomon Islands and Western Samoa.[106]

CASE *Condominium v Kalotuk (1961) Vanuatu*

A man charged with indecently assaulting a girl of 13 was tried before an English and a French judge. The English judge said: "It is notorious that in offences involving a sex element the evidence of the complaining female is extremely unreliable. [There was no corroboration] The only evidence came from the girl herself and was elicited with extreme difficulty".

The judge concluded that the marks on the girl's wrists did corroborate her story that the accused grabbed her by the wrists and pulled her into the bush. This, however, was corroboration of common assault, not of indecent assault. The charge was reduced to common assault and the accused was sentenced to two months prison.

CASE *Republic v Agir (1975) Nauru*

Facts and decision This case involved the rape of a girl of 15, a relative of the accused's wife, and living in the same household. A witness gave evidence of

the complainant's distress after the rape. The medical evidence indicated no bruising of the vagina, but excessive bleeding in the upper part of the vagina.

The judge concluded that there was no evidence of forcible entry, and that the bleeding was possibly due to excessively deep penetration. He ruled that there was no evidence that the girl did not consent. Her distress did not necessarily amount to corroboration, since although distress may sometimes be adequate corroboration, it is not corroboration where there is other reasonable evidence of reasons for distress. In this case, he said, the girl's distress was due not to rape but to pain.

The accused was acquitted of rape but convicted of defilement. Sentencing the accused, the judge said that because the girl was related to the accused's wife, and lived in the same household, the offence was serious. He gave the accused four months imprisonment.

Comment: The judge chose to ignore the corroboration of a witness. Apparently without further medical evidence, he accepted the lack of bruising as evidence of consent, and the girl's pain and bleeding as evidence of penetration, not rape. The question that he should have asked was whether the girl had consented, not whether there was evidence that she had not consented. The distinction is very important: it was the defence's responsibility to show that the girl consented.

CASE *Republic v Katatia (1977) Nauru*

Facts The accused was charged with raping and detaining a 12 year old girl. The girl said she had gone to his room with an older sister and a male relative. The adults were drinking beer. When the others left the room, the accused raped the girl, and refused to let her leave the room or her sister to re-enter it. The police arrived and the accused ran away. The girl was distressed and said that she had been raped, but was not medically examined. The accused said that he had kept her in the room because her sister refused to pay for the beer. In his corroboration warning, Chief Justice Donne stated: "Experience shows that women and girls, for all sorts of reasons and sometimes for no reason at all, tell a false story which is very easy to fabricate but extremely difficult to refute".

Issue and decision Were the complainant's distress and complaint of rape immediately following the incident adequate corroboration? The Supreme Court said that recent complaint did not constitute corroboration but that sometimes the distressed condition of the complainant might. In this case it did not: there was no medical evidence and although in some circumstances it was still possible to convict, these circumstances should be rare. This case did not fall within that rare category. The accused was acquitted of rape but convicted of indecent assault.

Comment In the corroboration warning, made under the full authority of the law, we see the extension of the Lord Hales myth: women and girls cry rape not only from shame or revenge, but also "for no reason at all". If men of learning, men who are meant to apply the law in a logical and consistent manner, can make such comments, what hope is there that less privileged men will accept that women have a right to refuse?

CASE *R v Tonana (1978) Kiribati*

This case involved the defilement (really rape) of a girl of 11. The High Court stated that corroboration was required of a child's unsworn evidence, in practice although not in law. The accused was charged with indecent assault, rather than defilement or rape, and was sentenced to six months prison.

CASE *R v Alfred Saolo and Ors (1978) Western Samoa*

We have already examined this gang rape of a girl of 15. Chief Justice Nicholson said that it was: "... unsafe and dangerous to accept the evidence of the complainant in sexual charges without corroboration. There is nothing to stop you convicting without corroboration but you are warned. The reason is that rape is a comparatively easy thing to charge but difficult to prove".

CASE *R v Iroi (1991) Solomon Islands*

The High Court expressed concern about convicting without corroboration but nevertheless convicted the accused because of the complainant's credibility. The Court said that the 12 year old girl was willing but because sexual intercourse with an underage girl was illegal, it convicted the offender. It gave him nine months imprisonment.

CASE *Newspaper case report 1992 Western Samoa*

A man picked up his 14 year old sister-in-law from school and raped her. Counsel for the defence said that the story was "as old as Adam and Eve". The defendant was a "mere mortal" provoked by a "precocious" young woman. He was convicted of rape and got four years imprisonment.

CASE *Police v Gese Kuki (1994) Western Samoa*

Facts A young man was charged with unlawful carnal knowledge of a girl between 12 and 15. The girl, aged 14 at the time, said that he had covered his face and got into her bed, saying that he was a friend, but that she had recognised him and had resisted at first. When her brother woke up, he saw a naked man jump out of his sister's bed. The girl bathed before going to the doctor, who found no evidence of sperm or forced intercourse. The young man denied having been with the girl.

Issue and decision: The Supreme Court had to decide whether the accused did have intercourse with the complainant, and, if he had, whether she was between 12 and 15 at the time. The court accepted the girl's mother's evidence of age. This left the girl's uncorroborated evidence that she recognised the accused and that he did have intercourse with her. The judge reminded himself of the corroboration warning, but said that as long as the warning was kept in mind, there was "nothing to prevent a court from convicting on uncorroborated evidence". The accused had already lied to the police, and his evidence was "unreliable". The judge found the girl's evidence satisfactory beyond reasonable doubt and accepted it.

CASE *R v Geoffrey Basiota (1995) Solomon Islands*

Facts: The accused was charged with raping a girl of 11. The prosecution brought four witnesses to show that the assault had all the elements required by the legal definition of rape. A doctor gave evidence that the girl had been "frightened and depressed," bleeding, with "multiple injuries"; her internal injuries were consistent with penile rape. The effect of these was "most severe and devastating". The accused denied the charge, saying that he had only tried to "stimulate her with his fingers". The defence argued that the girl could not tell the difference between fingers and penis because she lacked previous sexual experience.

Issues and decision Could the charge of rape be proved beyond reasonable doubt? And could the court convict on the evidence of a girl of 11? The Chief Justice stated as a principle that "generally it is true to say that if no force was used there would be no need for resistance, and if no resistance then it is reasonable to conclude that there was consent. In this case, the evidence ... of force is ... overwhelming". He said that he would carefully consider the corroboration warning but that if he was "completely satisfied and sure" that the complainant's evidence was true, he could convict on that evidence alone. The girl "was there, and she saw and felt what the accused was doing to her ... Considering her age and inexperience in court drama she had been firm in her evidence in court. I believe her account and I totally reject the accused's story". The Chief Justice analysed the prosecution's corroborating evidence, which he found "beyond challenge by the defence" but stated clearly that he was convicting the accused of rape on the girl's evidence alone.

These more recent cases may show a tendency to listen to the person who "saw and felt what the accused was doing to her". But the *Basioto* case in particular raises other important points: that even in child rape cases, the proof must be "beyond reasonable doubt", and that, in effect, only physical injuries can remove reasonable doubt.

The law is based on the principle that the accused person's rights require more protection than the child victim's rights. This principle is again influenced by myths, especially the myth that men are victims of the promiscuous and immoral behaviour of children. Psychologists, however, say[107] that when children behave in such ways, they are usually copying adult behaviour or looking for affection, attention, food or shelter. Children submit to adults out of affection, fear or dependence: the issue of consent should not be considered. The law should not focus on the child's behaviour in order to excuse the adult's behaviour.

Hearsay evidence and recent complaints

The rule against hearsay evidence means that persons may not say in evidence what some other person saw or heard or told them. They may say in evidence only what they themselves saw and heard:

> If you wish to prove that a fact is true, you can call A to state [from] his own knowledge or observation, that the fact is true, but you cannot call B to state that A told him that the fact is true.[108]

The hearsay evidence rule is especially important in sexual offences, which rarely have eye-witnesses. It applies not only to sexual complaints by women and children, but also to all types of cases. In this sense, it is not as discriminatory as the corroboration rule is. However, by increasing to the burden of rape survivors, it in effect does discriminate against women.

An exception to the rule against hearsay is that spontaneous statements by participants or observers may be admitted into evidence. Statements that are automatic, or instinctive, or candid, or made in the heat of the moment immediately after the event may be related in court as evidence by the person who heard the spontaneous statement, since the common law belief is that such statements are less likely to be invented.

Another exception to the general rule against hearsay evidence is that of voluntary and fresh complaint. Evidence may be given by the complainant and by any person to whom the complaint was made, of a complaint made voluntarily and at the first opportunity.

CASE *R v Wilbourne (1917) United Kingdom*[109]

Facts A said that the accused raped her while she was in hospital. A told her sister, G, within 30 minutes of the rape; G encouraged her to tell their mother. A told her mother within one hour of the rape and her mother saw A's distress.

Issue and decision Could the mother's evidence about what A said to her and what she saw of A's distress be admitted into evidence? The court decided that A's statements to her mother were made with G's encouragement, not voluntarily, but because A made them within one hour of the rape, they were a fresh complaint and the mother's evidence was admissible.

Courts are as suspicious of fresh complaints as they are of normal evidence; we have seen an example of this in the Fiji case *R v Mohammed Kasim*, which involved the admission of evidence made to a witness immediately following the rape. The judge said that a complainant might pretend to be upset because she wants publicity or revenge, or to get out of an embarrassing situation. Nearly 20 years later in another Fiji case, *Bir v State (1992)*[110] the Supreme Court did acknowledge that "fresh" statements to a third person about being raped may be given as evidence despite the hearsay rule. The judge said:

> Recent complaint in a sexual case does not offend the hearsay rule governing self-corroborative evidence.

So a woman who makes a complaint immediately may have some hope of being believed. There appears to be a common law practice that if rape is not reported immediately, the delay may affect the outcome of the case. In order for a rape prosecution to succeed, the rape survivor must either report it immediately to the police or have told another credible person about it immediately following the assault. The rule is an extension of the recent complaint theory that a statement given immediately after the rape is more likely to be true than one made some time after.

The practice is common throughout our region; it is based on the ancient theory that a woman would make a real fuss about rape if it had really happened. One contributing factor, little recognised in our region, is the "rape trauma syndrome," a form of severe shock in which the rape survivor speaks and behaves so calmly about the rape that people may not believe her.[111] In addition, many women do not know their legal rights and are often too ashamed to report rape because of the resulting social stigma and gossip. It is not surprising that women need counselling before deciding whether to report the rape and to face the stigma and the discrimination, inconsistencies and inefficiencies of the legal system.

The practical effect of the rule is that a rape survivor who makes a report more than 24 hours after the rape may lose all or some of her credibility. The law assumes that if a woman is raped, she will report it immediately. The accused's counsel is allowed to suggest that a delay was because the rape did not happen at all; the woman had other reasons for bringing the charge.

We need legislation to prevent defence lawyers, or judges in their summing-up, from suggesting that a delay in reporting rape affects the credibility of the rape survivor.

Credibility and the admission of past sexual experience

Credibility is an important issue in any trial; the emphasis is on whether the person giving evidence is honest and believable. If a person giving evidence is shown to be generally honest, that person's evidence will be accepted as credible. Honesty is determined by such things as whether the person has committed a criminal offence, or is in the habit of telling lies.

Credibility particularly affects the issue of consent and honest belief in consent. In rape and sexual assault trials (unlike other criminal trials) the common law has developed an unofficial practice of assuming that if the rape survivor was not a virgin or chaste before the rape, she cannot be telling the truth. In all countries of our region, except Tonga and Cook Islands, evidence of the rape survivor's past sexual history can affect her credibility to the extent that she is not believed, the prosecution does not succeed and the rapist is acquitted. If he is sentenced, her past sexual history may reduce the severity of the sentence.

An accused may have previously been convicted of criminal offences such as rape and other sexual offences, but his previous convictions cannot be allowed into evidence unless and until he is convicted. A previous conviction will affect only the length of sentence. However, the law allows a rape survivor's past sexual experience to be raised in court as evidence against her credibility. Here we have a discriminatory practice that says, in effect, that because the rapist's past sexual history is criminal, it may not be used against him. On the other hand, because the rape survivor's past sexual history is not criminal, it may be used against her.

Here are some examples.[112] In 1988, in the High Court of Fiji, two rapists were given suspended sentences because the girl had lived what the judge

considered to be "a loose form of existence". In a 1989 Solomon Islands case, a girl of 12 was defiled by four men after having previously been raped. The evidence in the defilement charges showed that the girl was apparently willing. The court said that it was the first incident that led to her "corrupt behaviour" and took that into account: although she was now promiscuous, the law would protect her from herself if necessary. As recently as November 1994, the Chief Justice of Fiji implied that a rape survivor could not have been seriously hurt by rape at knife-point because "the girl, only 17 at the time ... had known different men sexually before the incident".

A study of case law in our region suggests that in sexual offences, the trial process still relies on the principle that good defence is impossible without an attack on the sexual character of the victim. If a woman has led a "loose" life, her word does not have the same credibility as that of a "virtuous" woman. The feeling seems to be that the less sexually active the woman, the more she deserves the protection of the law. A woman's past sexual experience is given as evidence against her to show that she has already consented at least once to the act of sex, and is therefore likely to have consented again.

The admission of the rape survivor's past sexual history is possible only in sexual offences; it is influenced more by morality than by justice, and is based on the idea that promiscuous women lie. But if a sexually active woman reports that her handbag has been stolen, why is the defence not allowed to say: "She is sexually active, therefore we cannot believe her?"

Some state counsel in Fiji argue that since 1982, through the precedent of the United Kingdom case *R v Viola*[113] the common law does not allow defence lawyers to ask the rape survivor about her past sexual history. However, the practice continues because the common law is open to many interpretations, and the Fiji legislation does not forbid it. Judges in all common law countries have discretion to prohibit certain questions from being asked by the offender's lawyer. Attitudes are significant in determining and influencing the lot of women in the law. If the trial is conducted by a judge who understands gender issues, a woman has a better chance of being believed, and the trial is more likely to be conducted fairly.

Legislation in Cook Islands and Tonga

The *Cook Islands Evidence Amendment Act (1986-87)* not only removed the requirement that the evidence of a rape or sexual crime survivor must be supported by corroboration in order to get a conviction. As we see below, it stated firmly also that the past sexual history of the survivor is not admissible in evidence.

> No evidence shall be given and no question shall be put to a witness in a rape case relating to:
> (a) the sexual experience of the complainant with any person other than the accused; or
> (b) the reputation of the complainant in sexual matters, except by leave of the judge.

This means that the complainant may not be asked about her previous sexual experience with other partners, unless the judge specifically allows such questions. Cook Islands prosecutors [114] say that any attempt by defence counsel to bring the complainant's sexual conduct into the trial is strictly disapproved unless it has a bearing on the accused's behaviour towards the complainant. In spite of these rules, defendants are still acquitted, showing that it is possible to provide a solid defence without the corroboration warning and without irrelevant and offensive questions.

Chapter 15 of Tonga's *Evidence Act* contains similar rules about the questioning of a victim's past sexual experience. Its Section 33 states that unless the judge gives special leave, the complainant may not be asked about her sexual experience with anybody but the accused. Leave can be requested only in the absence of the jury; if the defence lawyers ask to be allowed to ask questions about the complainant's sexual behaviour, the jury must go out of the court while the issue is being argued, so that they are not prejudiced. The judge cannot grant leave to allow this type of questioning unless he is satisfied that it would be unfair to the accused not to do so. In the 1992 *R v Tangi* case, which we discussed in the corroboration section, the defence lawyers tried to ask the complainant about her previous sexual experience, but the Chief Justice stopped them. In both Cook Islands and Tonga, then, whether or not women are asked these questions depends ultimately on the judge's attitudes towards sexual behaviour.

CIVIL ACTIONS FOR SEXUAL ASSAULT

So far we have focused on criminal actions brought by the State against a person for an offence under the criminal legislation. In a criminal prosecution, the State controls the legal proceedings through its prosecution lawyers. The complainant has little control over the criminal legal process.

Civil actions are different. These are cases about civil wrongs, and do not involve the State; they are brought by one person against another. The person bringing the action is called the plaintiff and the person defending the action is called the defendant. The remedies may include damages or an injunction.

In common law, one civil wrong is "trespass to the person", a physical assault by one person against another. In 1988, United Kingdom newspapers reported the first successful civil action for damages for rape. A woman who had been raped by her physiotherapist brought a civil law court case against him on the basis that he had committed a "trespass to the person". The civil court awarded her very substantial compensation.[115]

One of the reasons for the success of this civil action was that the standard of proof is much easier to achieve. A criminal action requires proof beyond reasonable doubt; the prosecution must be able to present a case that no

reasonable person could doubt. A civil action requires proof on the balance of probabilities; it allows the court to decide whether or not all the evidence, taken together, amounts to a case that a reasonable person could accept as more probable than not. This is not as hard to do as it is to prove something beyond reasonable doubt.

Civil actions may be based on a range of civil wrongs. In the following Canadian case, a woman sued the police for negligence.[116]

CASE *Jane Doe v Police Board of Commissioners (Metropolitan Toronto 1989) Canada*

Facts The plaintiff was raped by a serial rapist. Victims of serial rapists usually have something in common, and the police are often able to build up a profile of the rapist and his potential victims. In this case, the police had considerable information about the serial rapist. They knew that the plaintiff's race, place of living and marital status made her a likely victim. However, they chose not to warn her because this might spoil their chances of arresting the rapist.

Issues and decision There were two issues. One was whether the possibility of the rape of the plaintiff was foreseeable, and could have been avoided had the police warned her. The other was whether the police owed a duty of care to warn the plaintiff. The court decided that the police in these particular circumstances did owe a duty to the plaintiff to warn her that she was a potential victim. The police had breached their duty of care and were liable to the plaintiff for compensatory damages.

No rape survivor in our region has brought a civil action against a rapist although courts in Solomon Islands, Vanuatu and Western Samoa have ordered payment of customary compensation to the rape survivor's family or chiefs under customary law. However, we know of one case where a woman won a case of vicarious liability against the Cook Islands Government.

CASE *Rolls v Attorney-General (1989) Cook Islands*[117]

The plaintiff successfully brought a civil action against the State for damages in a case in which an escaped prisoner attempted to rape her. She based her case on the common law vicarious liability principle that the State is responsible for the actions of prisoners under its care, and must protect the public from them. She was awarded $15000 for "injuries and loss".

So why do more women not bring civil actions? Let us compare the advantages and disadvantages of civil action.

Advantages

- Civil actions require proof that the balance of probabilities was that the act was committed. Criminal actions require proof beyond reasonable doubt. The nature of sexual assaults makes proof beyond reasonable doubt hard to obtain.

- The rape survivor is active in the court case, rather than being just a witness, as she is in a criminal action.
- She can choose her own lawyer.

Disadvantages

- The rape survivor has to find and pay for her own lawyer and court costs.
- If she wins her case and the rapist has no money to pay damages, he may go to prison but she will not get her costs back.
- Few women have the time, money and other resources to bring civil actions.
- Women do not know their human and legal rights.

An obvious reason for not bringing civil actions is that most women cannot afford to do so. There is, however, another more basic reason. How many women and children know that they can bring a civil action against a rapist? Or against the State for allowing prisoners to escape and to rape or bash people? How many police know? Legal literacy and human rights programmes will aim at reaching people who need to know more about the law.

CONCLUSION: AREAS NEEDING REFORM

All states that are parties to the United Nations Women's Convention are required by its Article 2(f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women. So far most countries in our region are in breach of Article 2(f). As well, states that have signed the Convention on the Rights of the Child, as Fiji did in August 1996, have an obligation to protect children against all kinds of abuse.

In this chapter we have identified the areas that particularly need reform. We will list them and then summarise our recommendations for action.

- Legislative definitions of sexual offences
- Legislation on corroboration
- Legislation on defilement
- Reporting sexual offences
- Charging and sentencing offenders
- Social attitudes

Legislative definitions of sexual offences

All sexual offences require new definitions that reflect the real experiences of men and women. If Pacific Island courts adopted or used the New South Wales definition of sexual intercourse, they would have fewer problems in dealing with sexual assault cases. Rape would be sexual intercourse without the person's consent. Indecent assault would be confined to forms of unwanted sexual contact that do not involve sexual intercourse.

Legislation on corroboration

Only sexual offences and paternity suits require (in practice if not in law) independent corroboration of all allegations. This is discrimination against women and children, since in most cases, only they can be complainants. The corroboration rule is an excellent example of how myths are formalised into legal rules and procedures.

The power of the myths is demonstrated by the fact that the corroboration rule has remained in the legislation in most countries of our region. We have seen in our corroboration case reports that magistrates and judges already have the power not to require corroboration, but that most continue to insist on it. This emphasises the significance of judicial attitudes in determining the status of women in the law, and shows again how little these attitudes have changed in 200 years

The corroboration rule is a common law practice, and should be removed by legislation, because the courts are reluctant to dispense with it. Reform should follow that of Cook Islands and Tonga, where no corroboration of a complainant's evidence is necessary to ensure conviction, and the judge is no longer permitted to make the corroboration warning.

Legislation on defilement

Defilement legislation also needs revising to remove the confusion between rape, incest, indecent assault and defilement. The offence of defilement must be maintained, but it should apply only when a girl between 13 and 16 freely consents to sexual relations with someone who is not a close relative or guardian. Defilement charges should not be permitted to cover up offences that are really rape, incest or indecent assault of girls under the age of consent.

Reporting sexual offences

Despite the particular features of rape and sexual abuse, our region lacks hospitals and police stations with special facilities for reporting them. There are no medical or police rape squads to assist victims, collect evidence and protect the survivor's privacy. This partly explains the lack of reporting of rape and the limited success in obtaining rape convictions.

Some countries, like Australia, have sexual offence squads consisting of police officers, medical personnel and counsellors. They are trained to counsel survivors; to collect medical evidence relevant to the trial; to help survivors cope with their lives; and to protect their privacy. Such squads improve both the rate of reporting of sexual offences and the chances of conviction. During 1996, the Fiji Police Force began to establish a Sexual Offences Unit at the Central Police Station; their efforts, and similar efforts, should be encouraged.

Charging and sentencing offenders

From our discussions on charging and sentencing, we may draw conclusions that apply throughout our region.

- Prosecution policy is to reduce rape charges to less serious charges, such as indecent assault or defilement; these are easier to prove and offenders are more likely to plead guilty to charges that attract shorter sentences.
- The average sentence for sexual offences against women and girls of all ages is less than four years.
- Most convictions are for offences against girls under the age of consent; many are for offences against girls of less than 12.
- For offences against girls under the age of consent, including girls of less than 12, sentences tend to be for two years or less.
- Our girls (and even our very young girls) are in great need of protection against sexual assault.
- Rape is the only felony in which proof of reconciliation may be used to reduce sentences.
- Rape is the only felony that requires a victim to risk injury in order to be able to provide proof of physical resistance against force.

Social attitudes

Rape sentences are social indicators of attitudes towards women and to the seriousness of the felony of rape. They reveal that courts value property more highly than they do women and children.

Some attempts have been made to amend the laws so that they become fairer to survivors, and some cases show that within the common law, lawyers and judges also attempt to do so. These efforts are indications of gradual change, but we must build upon them by challenging, in the courtroom and in daily life, all the assumptions that make up the rape myths; this implies massive efforts not only in legal literacy but also in public education. There is little point in trying to reform the law if society continues to view women and children as essentially stupid and evil.

5

Criminal assault against women in the home

WHAT THIS CHAPTER IS ABOUT

In Chapter 4, we surveyed one form of criminal offence: sexual offences against women and girls. We found that sexual offences are widespread but under-reported, under-prosecuted and under-sentenced. In Chapter 5 we find the same things about another form of criminal offence: wife-beating. We find that the similarities have similar causes, linked both to the status of women and to outdated legislation and practices.

DOMESTIC VIOLENCE IS CRIMINAL ASSAULT

Traditionally, the home has been an area in which the law did not interfere. As late as 1919, an English judge stated:

> Each home is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted.[1]

It is therefore important to deliberately remove the crime of wife-beating from its domestic link. This is why we have called this chapter "Criminal assault against women in the home"[2] rather than the more usual "domestic violence". Using the term "domestic violence" makes the violence seem somehow not criminal, or less criminal than other types of violence. However, domestic violence is a criminal assault despite the fact that it is committed in the home, and we should get used to calling it what it really is. The law enforcement agencies will then perhaps respond to it as a criminal assault.

We often hear, in our region as elsewhere, that women are as much to blame as men, that women provoke or cause the beatings, or that women beat men. Women sometimes do beat men, but the level and frequency of violence that men inflict on women is far greater than any kind of violence that women inflict on men. In over 95% of domestic assaults in the Pacific region, the husband is the aggressor.[3] (When we use the terms husband or wife here, we include *de facto* husbands and wives.)

Yes, women can be violent to men. But their violence to men is a quite different matter to men's violence to women. Violence happens to women because they are women. Women hit their male partners in desperation, frustration, often in self-defence and usually only once.[4] On the other hand, men hit women for trivial reasons, like not having a meal ready, for dressing in a certain way or for answering back. Men are usually physically stronger than women and can do more damage. They can walk out of a bad relationship more easily than women can, because men are generally in a better economic and social position and can cut their ties more easily.

To assess how the law on criminal assault affects women, we must look at the economic and social situation of women, as well as at their legal position, because discriminatory laws would not affect them so badly if they were economically better off. We will discuss this more closely later.

Criminal assault against women can consist of anything from a slap to serious injuries. At a more complicated level, the violence can be psychological or mental violence with constant verbal abuse. The effects of criminal assault against women in the home are listed below.[5]

- It causes pain, misery and humiliation.
- It produces trauma in children.
- It perpetuates a cycle of violence, passed from generation to generation through the children of violent men.
- It causes the battered woman syndrome, making women feel that they have no power over their own lives.
- It increases the likelihood of alcoholism and mental illness among women.
- It makes battered women twelve times more likely to attempt suicide than are women who have not been battered.
- It directly prevents women from having a normal life and from participating in the development process.
- It is a breach of basic human rights.

The irrelevance of the legislation to women, and the lack of enforcement of the legislation, worsen social and cultural attitudes encouraging women to remain in violent marriages. Violence is used to support social control of women, and thus to secure male dominance, control and power and female subordination within the family.[6]

Wife-beating continues because the law does not actively disapprove of it. Women therefore do not seek legal solutions; they are often physically and economically powerless and see no alternative but to remain in violent marriages, whatever the consequences. The following case stories show how the law on wife-beating is influenced by society attitudes. They are from Fiji, Solomon Islands and Tonga.[7]

STORY *Fiji (1992)*

W had four children and was a domestic worker. H beat her, often so badly that she could not go to her paid work. Whenever H beat W, he would make excuses: he was angry; he was not in control of his emotions; he would never do it again. Eventually W charged H for common assault after he broke her nose, and H appeared in the Magistrate's Court. He pleaded guilty to assault and the Magistrate bound him over for one year: if H beat W again within the space of a year he would be imprisoned. H and W reconciled and there were no beatings for one year.

Two days after the order expired, H beat W again. He was charged again. W pleaded with the Magistrate to put H in prison for one week, but the Magistrate bound him over for another year. H did the same thing again: he

waited for the order to expire before he hit W, proving that he was able to control himself, at least until the threat of prison had gone. This time W did not reconcile with H. She is now working in a garment factory and cannot afford to send her children to school. W thinks that if H had been sent to prison once, and had got some counselling, he might have learnt his lesson.

STORY *Solomon Islands (1993)*

This is W's own story:

H's cruelty began almost immediately after we got married. He was very quiet and I was more outgoing. He couldn't bear to see me talking to others. If we went to a social I wasn't allowed to dance. He would take pleasure in beating me in front of other people, but not in front of the children because he was a good father. The police seemed not to be able to help me.

After 5 years of beatings, H tried to kill us both by repeatedly running the car into a tree in front of a busy wharf. I was so humiliated and jumped out of the car. If I hadn't jumped out of the car I would have died.

Our house was on freehold land and I had brought money into the family, but I did not claim a share because I did not know that I could. I just took some furnishings and left. I had left many times previously but each time I was persuaded to go back because I had nowhere else to go anyway. There was no way I could afford a house in Honiara. But I left finally after the wharf incident.

I applied for a scholarship overseas because I was so ashamed and I just wanted to go away for a while. H would not allow the children to go with me. I went ahead and the Public Solicitor fought for me to take the children away. H kidnapped and hid them. Finally after many months, the Social Welfare managed to escort the children to the airport. The Social Welfare Officer had to have a police escort because of the danger to her life. My case was rare, I think, because Solomon Islands men leave women, not the other way around.

I came back after my studies but I still can't afford to live by myself. I now live with my *de facto* husband. H has open access to the children. I have never claimed maintenance because I was scared that he would claim custody. But I will apply for maintenance for the children, now that you have convinced me that is his responsibility to the children. I'm now working for a non-governmental organisation, and we're planning a workshop on Rape and Criminal Assault in the Home. I am committed to women's issues because of what I went through. Many Solomon Islands women suffer the way I did.

STORY *Tonga (1993)*

When W and H married, they went overseas. In the first six months of their marriage, H beat her nine times. At first, she blamed herself for not being a good wife, but finally she went to the police, who were very helpful. H was charged, but disappeared when he was out on bail pending imprisonment for 36 days. Later W discovered that he had gone back to Tonga. Her story continues.

I came back to Tonga to my family and under religious pressure we reconciled. That reconciliation almost cost me my life. H started again with the occasional slap. I did nothing about these, but eventually he stunned

me with an electric stun gun so I went to the police. The police went to find H and actually had the cheek to bring him to me to force a reconciliation. I couldn't believe it. I wanted to divorce him but couldn't find an appropriate ground. Now you tell me that there is an unreasonable behaviour ground but nobody told me that before. I pressed the police for a prosecution, but H told me "You're in Tonga now. You'll never get me."

I met another man who was good and kind, and we started a relationship quite openly. Everyone talked about my improper behaviour but never about my husband assaulting me or about the stun gun. I kept pushing for the police to prosecute but nothing was done. I was really scared. One night H broke into my hotel room and attacked me with a cane knife. I have three scars on my upper thighs of 10 to 12 inches in length, and two on my head and on my forehead. I have no more feeling in my left knee, can no longer play any sport and I can no longer sit Tongan style on the floor.

I was in hospital for two weeks and it was not until the matron interceded that the police agreed to give me police protection, because H got into the hospital and acted as if nothing had happened. The police charged him not with attempted murder, but with inflicting grievous bodily harm; he was let out on bail. The case for grievous bodily harm finally went to trial three months later, but only because I went and begged a High Court Judge. If H had been prosecuted the first time for the stun gun matter, I feel this would not have happened, because he used to say to me that we were in Tonga and the police would never do anything to him here.

When the case went to trial, I was thankful it was a *palangi* judge because a Tongan judge might not have imprisoned H. The High Court gave him five years prison, reduced to four years on appeal. He is allowed to do supervised community work outside. I continued to harass the police about the stun gun matter and H was finally prosecuted for common assault and was fined $200. He was given time to pay, despite the fact that he gets $800 a month rent for his property.

The police feel sorry for H because he was a wronged husband, because I had the guts to leave him when he beat me. Tongan society victimised me, saying that it served me right. The only support I got was from some of the women in my family, very quietly, not openly. I feel incredibly strong after this ordeal and feel I could cope with anything including society's disapproval. I have a good job and earn my own money, but what will happen when H is let out?

Common features of criminal assault in the home

These stories help us identify and list some common features of criminal assault in the home.

- The legislation, legal conventions and judicial, police and community attitudes are significant in determining the extent to which women may be beaten.
- Domestic assault is not recognised as a crime, except in Cook Islands: the words themselves suggest that the violence is not really criminal.
- Police and court officials are unsympathetic to women whose husbands beat them, and usually do not encourage legal solutions.

- The victim is responsible for laying and pursuing charges.
- There is a consistent focus on reconciliation, whatever the circumstances.
- Courts accept customary practices of reconciliation, and so do not punish the offender or reduce the punishment.
- Non-molestation orders are difficult to enforce, although the law says that an offender who breaches the order must be arrested and imprisoned.
- Magistrates rarely give sentences that reflect the seriousness of the crime.
- Criminal assaults in the home are recidivist crimes. However, courts tend to give bind-over orders which do not work.
- Police and judicial officials do not seem to realise that if a man beats his wife time and time again, he may be chronically violent, and should be stopped by any constructive means for his own good, and for the good of his community as well as his wife's.

Later we will consider these features separately; first, however, we look at the extent of the problem in our region.

HOW WIDESPREAD IS CRIMINAL ASSAULT IN THE HOME?

> British Crime survey data show that the proportion of [reported] domestic assaults against women ... increased from one in five in 1981 to one in two in 1987. However a survey of 1000 men and women in North London ... found that only 22% of women experiencing domestic violence ... had reported it to the police.[8]

As the criminal legislation in our region does not separate nonsexual violence against women from other types of violence, statistics are grouped under the general categories of common assault, and assault occasioning actual or grievous bodily harm. Without reliable statistics, it is difficult to say exactly how many women are beaten by their husbands. Social research, informal contact and anecdotal evidence suggests that, in all Pacific Islands, as in the United Kingdom and elsewhere, such violence is widespread but rarely reported to police.

Fiji

Fiji police say that violence against women in the home is the most common form of assault. In 1983, pressure from the Women's Crisis Centre resulted in the collection of separate statistics for criminal assault against women in

the home. In that year, 183 assaults on wives were reported to police in the Southern Division, which covers Suva. However, these figures may not show what really happens; in 1991, 245 women reported criminal assault to the Centre, but only 10% of these women reported also to the police.[9]

Table 5.1 Fiji: reported criminal assaults on wives, 1988-1992

1988	1989	1990	1991	1992
123	175	212	245	248

The number of women seeking assistance for the first time at the Fiji Women's Crisis Centre in Suva has increased tenfold since it opened. In 1993, 1300 women sought the assistance of the Centre, 43% because of criminal assault in the home. Police statistics for 1993 show that 348 domestic disputes between husband and wife were reported to the Police Station. Of these, 72% involved assault occasioning actual bodily harm and almost all of the remainder involved common assault, throwing objects or acting with intent to cause grievous harm. Husband-wife disputes accounted for 295 (84.7%) of all disputes reported to the police.[10]

Five hundred divorce cases were filed by the Office of the Public Legal Adviser in 1988; approximately 20% were filed on the basis of persistent cruelty. Over half involved domestic violence although divorce was not filed on this ground, because persistent cruelty is very difficult to prove and most women wait out the required five year separation period.[11]

Wife-beating can result in death, especially by suicide which is common among Indo-Fijian women. In 1991, after five years of mental and physical violence, an Indo-Fijian woman attempted to burn herself and her two children. The two children died but she lived to face manslaughter charges.[12]

Attitudes towards women who are beaten, and the acceptance of criminal assault in the home, are typified in February 1994 by a press conference comment by Fiji's Prime Minister to this effect: "If you relax at home on Sunday by kicking the wife around, then do it". Despite the Prime Minister's hasty apologies and his defence that the remarks were a joke aimed at a particular journalist, this attitude is shared by many men and accepted by many women.

Cook Islands, Tonga, Western Samoa

In Cook Islands, an intergovernmental agency reported, in 1989, low levels of criminal assault against women in the home.[13] However, from early 1989 to late August 1991, 316 females were hospitalised as a result of violence of all kinds. In 1992, newspaper reports of statements by a senior police inspector showed that criminal offences against women had increased to an alarming average of 10 cases a week.[14, 15]

Statistics from *Punanga Tauturu*, the Cook Islands women's crisis centre, show that from February to December 1992, the Centre received reports of 63 physical assaults on women in the home. According to the Centre, women see police as unhelpful and the law as "hopeless" in preventing further violence. In 1995, in Rarotonga alone, 40 people were charged with assaulting females.[16] This is a ratio of one person charged for every 200 people in Rarotonga, and must be a serious cause of tension.

In Tonga, official records have no separate category for domestic violence, so violence against women is grouped with other general crimes of assault. Police records for 1991 show that women committed 34 of the 390 common assaults. This gender-blind justice has no category for crimes against women, but is able to identify crimes committed by women against men. The same records note an association between increases in alcohol consumption and in rape, indecent assault, other criminal assault and marital breakdown.[17]

Traditionally women in Tonga enjoyed some indirect power through the *fahu* relationship of sister to brother. This requires that even though a brother may beat his own wife, he should defend his sister against a husband who beats her. However, Tongan women and researchers now say that criminal assault against women is common and increasing; and that it is more common among the elite and educated people than in poorer households.[18]

Western Samoa does not keep separate statistics for criminal assault in the home. Violence against women in the home is very common, but until the formation of the women's rights organisation *Mapusaga O'Aiga*, it was talked about very quietly, and was publicly known only when the violence was severe enough to put the woman in hospital. In March 1996, *Mapusaga O'Aiga* published a report[19] that sent shock waves through the community; it covered 257 women in 4 villages on Savai'i, and produced the following statistics.

- 72% said that they personally had never been beaten by their husbands.
- 54% said that in their own villages they knew or knew of women who were beaten.
- 28% said that they personally had been beaten by their husbands.

Replying to questions about why husbands beat wives, the women gave reasons summarised as follows.

- The wife disobeys the husband.
- There are sexual problems between husband and wife.
- The husband gets drunk.
- The husband is jealous.
- Husband and wife are uneducated.
- Husband and wife lack fellowship with God.
- Husband and wife do not communicate well with each other.

Violence of all kinds appears to be an accepted form of punishment. Many Samoan women say that the combination of adultery and domestic violence is the main cause of marriage breakdown.

Kiribati, Tuvalu

Despite evidence that wife-beating is very prevalent in Kiribati, there are very few cases where charges are laid. Usually the woman herself does not report the violence. Reports tend to be made by neighbours or other family members concerned for her safety.[20] Unlike the Samoan women in the *Mapusaga O'Aiga* survey, i-Kiribati women seem inclined to put more blame on the beaten wife than on her husband.[21]

- She loves her husband too much or too little.
- She wants equality or independence.
- She doesn't provide well for the family.
- She wasn't a virgin when she married.
- She drinks alcohol.
- She dresses up and shows off.
- She refuses to have sex with her husband.
- She wastes money.

Many women in Kiribati, however, feel a need for women themselves to change such attitudes, and to realise that criminal assault is a violation of their human rights. Again, the formation of a National Council for Women *(Aia Maea Ainen Kiribati, AMAK)* enabled women to get together and discuss problems such as police attitudes to wife-beating. Some police officers in Kiribati do not see it as a crime; some place the blame on women; and most agree that police response tends to be passive.[22] According to *AMAK*, police do not take domestic violence seriously unless it causes serious injury.

Tuvalu women rarely go to the police or courts for help; they rely on the family to deal with the problem. In the years 1990 to 1992, there was not one prosecution for criminal assault in the home. However, discussions with Tuvalu women in 1993 showed that wife-beating is becoming more serious; the women described it as a "silent crime".

STORY *An abused wife's story, Tuvalu*

In 1992, an abused wife rang the police. The police arrested the husband, a highly placed Government official. He was taken into custody but another Government official bailed him out. The woman decided not to prosecute her husband. She said that she had only wanted to scare him so that he would not beat her again. Five months later, he had not beaten her again.

Solomon Islands, Vanuatu

Criminal assault against women in the home is widespread in Solomon Islands, but when the National Council of Women attempted to do something about this, many women's organisations, particularly church-based ones, interpreted their action as trying to break up marriages. Most Solomon Islanders seem to believe that bride price payment gives husbands the right to use violence to correct and control their wives. Triggers of violence include such things as alcohol; sexual jealousy; additional bride price demands; alleged failure to perform wifely duties, and financial pressures.[23]

In 1993 the Public Solicitor's Office reported a "disturbing trend" of women seeking injunctions against their husbands to prevent violence.[24] Office files indicate that half of family cases involve varying degrees of violence as do the countless cases where divorce is filed on the ground of cruelty. Women list violence as a priority and some workshops have been held on the subject. Adultery and violence appear to be the main causes of separation and High Court judgments provide some evidence of this.

As elsewhere, police records do not distinguish between domestic assault and other forms of criminal assault. These statistics are included in the general category of common assault. Nevertheless, Public Solicitor's Office files testify to the intensity of the problem and rural women speak of it as being important in their lives. The extent of the problem is confirmed by a 1995 community survey[25] directed specifically at wife-beating. A sample of 1000 Solomon Islands men and women gave these results.

51.2% of rural women had been beaten by their husbands.

59.9% of urban women had been beaten by their husbands.

69% of the beatings were inflicted while children were present.

To put it crudely, more than half of Solomon Islands women get bashed, in front of children, who thereby learn that being bashed is something that women have to put up with. However, these statistics come from a professional survey focusing on violence. As with sexual assaults, until we have reliable surveys and statistics throughout our region we will not be able to say that any particular country is any worse or any better than any other country. What appears to be a higher incidence may be due to higher reporting or more detailed and reliable statistics.

In Vanuatu, a police report indicates that urban women are six to 10 times more likely to have suffered criminal assault against them than are rural women.[26] To what is this due? Is wife-beating more common in towns? And if it is, why? Is it because women in towns are more likely to complain to the police, have more legal avenues accessible to them and because of the presence of women's organisations, are more likely to know their rights?

In 1985, the Vanuatu National Council of Women supported their proposed family law bill by court records showing that, from 1984 to 1991, a significant number of assault prosecutions were of wife-beaters. The lowest percentage recorded was 11% in 1982, but in other years it reached 75% and

over.[27] More recently, *KAVAW (Komiti Agensem Vaelens Agensem Woman)* used police records to compile the more detailed statistics shown in Table 5.2.[28]

Table 5.2 Crimes against women reported to police stations, mainly in Port Vila Police Headquarters 1987-1991

Type of Crime	Year				
	1987	1988	1989	1990	1991
Rape	17	18	29	30	46
Incest	na	9	13	15	24
Indecent assault	24	12	11	22	21
Unlawful sexual intercourse	14	18	25	22	36
Other assault	454	493	495	530	578
TOTAL	**509**	**550**	**573**	**619**	**705**

In 1992, physical or mental cruelty against women was involved in 72 of the 78 complaints that *KAVAW* received in the areas of violence, rape, custody and maintenance problems, and kidnapping children. In the same year, 278 cases in the Efate Island Court in 1992 involved charges for being drunk and disorderly, or intentional assault. These included many domestic assaults not registered separately. The Public Prosecutor's lecture on family violence stated that of 76 intentional assault cases prosecuted in the Vila Magistrate's Court, 64% resulted from women reporting criminal assault by their partners.[29]

But are they taken seriously? Attitudes by officials are perhaps best summed up by one police officer who said that the explanation for domestic violence in Vanuatu is sex or money. "The woman gets jealous when her husband does not have sex with her and there is a fight."[30] This oversimplified explanation of a complex issue is typical amongst law enforcement officers.

MYTHS ABOUT CRIMINAL ASSAULT IN THE HOME

Legislation, legal conventions and judicial, police and community attitudes are significant in determining the extent to which women may be beaten. As in sexual matters, we are all influenced by beliefs about women's role within the family. Some of our beliefs are based on myths, and in Table 5.3[31] we divide these myths into three groups: general myths; myths about men; and myths about women.

Table 5.3 Myths about criminal assault in the home

GENERAL MYTHS	
Myth	Domestic violence does not happen often.
REALITY	One in three wives is likely to suffer domestic violence at some time in her marriage.
Myth	Marriage is private and what happens in that relationship is no-one else's business.
REALITY	Assault is a crime, and society as a whole is responsible for criminal behaviour. Marriage is a private contract but freedom from assault is a basic human right. By breaking the law, the abuser loses the right to privacy.
Myth	Violence happens only among poor people.
REALITY	Domestic violence in low income groups may be more visible and more dramatic, but Pacific experience supports global studies showing battering of wives of all levels of society in different cultures.
MYTHS ABOUT MEN	
Myth	Alcohol causes domestic violence.
REALITY	In about 50% of cases, the offender is sober at the time. Some men have less control over themselves when they are drunk, but they know that when they start drinking. They can choose not to drink because they know they become violent when they do. Drunkenness is not an acceptable legal defence for criminal assault.
Myth	Men cannot control their violence.
REALITY	Less than half the men who batter their wives assault people outside the home.
MYTHS ABOUT WOMEN	
Myth	Women provoke domestic violence by nagging or other annoying behaviour.
REALITY	There is no excuse for violence; no-one deserves to be bashed. If spouses do not like each other's behaviour, they should discuss it together. A man may be nagged and annoyed by his boss, but he had better not attack his boss, because the boss has the power to punish him. At home, men have this power and women are blamed for being victims.

Myth Women provoke men's anger and abuse.

REALITY In San Francisco, a man killed his ex-wife and then killed himself and his three-year-old daughter by jumping off the Golden Gate Bridge. The local newspapers published articles on the need for a suicide rail.[32] Media tend to treat each murder as an isolated incident. Articles use vague phrases like "marital problems" or "domestic disputes" implying that both parties are responsible for the violence, but the same articles often reveal a pattern of violence by the man against the woman. This misleading coverage maintains the myths about women provoking men's anger and abuse. You can see them in headlines like 18 YEAR OLD KILLED BECAUSE SHE DATED OTHER MAN. Our study of more than 1,000 such newspaper articles identified only one headline that exactly summarised the story: WIFE-BEATER CONVICTED OF MURDER.

Myth If a woman does not like being beaten she can always leave.

REALITY Our legal, economic and social systems are weighted against women. In our next section, we will discuss why women do not leave violent husbands.

WHY DOESN'T SHE LEAVE HIM?

This section focuses on women who are killed, or who kill, because they have stayed too long in a violent relationship. But why do they stay? We have divided the reasons into three main groups: economic; legal; and psychological.

The battered woman syndrome

All these reasons combine to trap the woman into the "battered woman" cycle. The battered woman syndrome has a cycle, consisting of the battering itself; the loving contradiction; and the tension building up again towards another battering.

In the battering phase, a woman gets so badly beaten that she feels helpless, powerless and almost paralysed, but thinks that no-one will believe her. The battering creates traumatic bonding, a bond that exists between the powerful and the powerless: captors and hostages, prisoners and guards, battered children and their parents, battered wives and their husbands. The powerless one depends on the powerful one, and believes that the powerful one is right.

Table 5.4 Why a woman stays in a violent relationship

She has economic problems.	
	I have no money.
	I haven't got the skills to get a good job
	Where can I go? Where can I take the children? Where would we live?
	What about the children's future?
She foresees problems in dealing with the law.	
	What if the court won't issue a non-molestation order?
	What if the police won't enforce it?
	What if I lose the children in a custody case?
	What if the court doesn't order enough maintenance?
	What will the court or police do if he doesn't pay it?
She has psychological and social problems.	
	What will he do to me and the children?
	Will my family be ashamed of me?
	Will my family and his family say it's my fault?
	I don't want to break up the family.
	I love him.
	I'm no good.

Once the battering is over, the abuser often feels sorry. He begs for forgiveness and the woman feels worthwhile. She needs to believe him, to boost her self-esteem. The woman thinks that the violence happens only now and then, or that it will not happen again and that the good times are so good. This phase is called "loving contradiction".

But this phase does not last. It is followed by a tension-building phase, in which the woman and her partner may feel angry, guilty and frustrated. The woman feels the lack of family and social support, the stigma attached to being divorced or a single mother. She may feel ugly and worthless. If she threatens to leave, she may be told to get out, she'll "soon come crawling back". There may be other forms of blackmail, all very effective on women: "If you leave, everyone will say your sisters are no good like you. They'll never find husbands. I'll tell about your abortion. You're a rotten mother, I'll take the kids and you'll never see them again."

So both take out their tensions on each other and on other people, including their children. One or the other, or both, may nag or sulk or yell or drink. But these and other outward signs of mutual tension give no relief. Tension builds until something triggers the battering, and the cycle starts again.

Women who are killed

Throughout the world, surveys have shown that "women are more at risk of being killed by their partners than are men".[33] This certainly seems true in Fiji, where 40 % of all murders committed between 1992 and September 1995 were "domestic-related", and 26 out of 35 murder victims were female.[34]

Sentences of five years (or less) for wife-murder are not uncommon.[35] In 1994 in Vanuatu, a man killed his wife with a single blow to the head. He paid custom penalties, pleaded guilty and was given five years in prison. In 1993, in Fiji, of three men who had beaten their wives to death, two got five years and one was given 18 months. Another man woke up one night to find his wife's hands around his neck. He did not just remove her hands or even punch her in self-defence. He hit her with a cane knife and then hung her by her sari from the rafters until she died. The court said that the wife had provoked the man, and jailed him for five years. A Kiribati case confirms that, if husbands can show that they were provoked, courts may treat them more gently.

CASE *Rep v Beretia Barati (1995) Kiribati*[36]

The accused had beaten his wife until she admitted adultery, and had killed her by stabbing her neck and stomach. He said that he had killed her because she had run away from him three times, and had admitted adultery. The judge found that "the accused was deprived of the power of self-control by such extreme provocation". Under Section 197 of the Kiribati *Penal Code*, the charge was reduced from murder to manslaughter.

Why she doesn't leave him

Women who kill

Women too suffer extreme provocation, and are often not helped by their own families, who believe that women must accept their situations. Such women may commit murder and suicide. A mother in Fiji burnt her two daughters to death, and was prevented from committing suicide. Her husband had severely assaulted her for years, even when she was pregnant. On the occasion that triggered the burning, the husband had forced his wife and daughters to watch him have sexual intercourse with another woman. Her story to the court, corroborated by other evidence, was one of constant violence and misery; she was convicted of manslaughter. Extreme domestic violence is suspected to have caused a woman to hack her baby to death and then hang herself. Another baby drowned when her mother jumped with her into the river after a domestic dispute.[37]

If we compare these cases with the following case from Canada, we will better understand why women stay with men who abuse them, and why a victim of constant criminal assault in the home may eventually be driven to kill herself, her children, or the man who beats her.

CASE *R v Angelique Lavalle (1990) Canada*[38]

Facts Angelique had been battered by her *de facto* husband for about four years. During this time, she had hospital treatment for bruises, a fractured nose, contusions and black eyes, but had lied about these, saying, for instance, that she had fallen off a horse. Eventually Angelique shot her husband after an argument in which he physically abused her, and said that she had better kill him or he would kill her. A psychiatrist was called to give evidence about Angelique's state of mind when she killed her husband.

Issue and decision Whether the evidence of the psychiatrist was admissible in court: could the court hear and take account of this evidence? The Supreme Court of Canada did accept the psychiatric evidence, and acquitted Angelique, saying that she was legally justified in killing her husband in self-defence.

Comment In this landmark decision, Canadian judges agreed that generally women and men do not have equal chances in a domestic dispute. They accepted that what might be self-defence in a fight between men may not be the same in a fight between a man and a woman bound together in an intimate relationship. This case is important for four reasons.

- Canada's highest court accepted that a woman had a legitimate right to defend herself, even if she was not in immediate danger.
- The Court accepted that there were understandable reasons why women do not leave men who beat them.
- The Court accepted expert testimony that the battered woman syndrome makes women powerless to leave or to defend themselves.
- The Court's decision is of highly persuasive authority and may be used as precedent in other common law countries.

LEGISLATION ON CRIMINAL ASSAULT IN THE HOME

We have discussed the myths surrounding wife-abuse, and have seen why abused women stay in violent situations or sometimes seek violent solutions. Now we will trace the development of the laws that form, and were formed by, the myths.

History

In the common law a few centuries ago, a husband was allowed to beat his wife, provided that he did it with a stick no bigger than his thumb. Even in the 18th century, people were beginning to criticise that rule, yet the law has kept remnants of it.

The main principle influencing the law on criminal assault in the home was the idea that when a man and woman marry, they become one:

> ... by marriage, the Husband and Wife are one person in law, that is the very being or legal existence of the Wife is suspended during marriage, or at least incorporated or consolidated into that of her Husband; under whose wing, protection and care she performs everything.[39]

This meant that on marriage a woman's being melted into that of her husband. They became one in the law and that one was the husband. Thus a wife could not bring an action against her husband for brutality or if she did the law would not punish him. After all, how could she prosecute herself? The legal effect of marriage made a wife her husband's property. It was therefore unthinkable that she could charge her husband for beating her.

Under colonial law, the idea influencing local law on criminal assault in the home was that what went on in the family was an area in which the law should not intervene. This of course is a recurring theme in all legal aspects of women's lives. The concept of the sanctity of the family and the sexual division of labour (men at work, women at home) also protects society from examining what is going on inside the family. The law has, with great success, kept a strict distinction between the public and the private. This doctrine of separate spheres is recognised by the law.

The public world was (and still is to a large extent) the world of men, power and decision-making. The public world was a legitimate area of legal intervention. The private world was that of the family and women. The law would not intervene in the family, as a man's home was his castle. An action that was criminal in public was not criminal at home.

What were the direct consequences for women and children? If they were abused, the law would not intervene because the abuse happened in a private domain, that of the family. This idea is partly responsible for the law not punishing offenders for domestic violence, child abuse and marital rape. Throughout our region, the most common response by police and other agencies is that they will not interfere or prosecute an offender because "it's

a domestic matter". On the one hand, this helps offenders to avoid punishment, but on the other hand, it harms them by reducing the chances of their getting counselling that might help them and their families.

In order to see how offenders are protected, we will look at three old English cases[40] upon which our laws are based. The cases show how ideas about women influence the law on criminal assault in the home. They show also that there is very little difference in the judicial attitudes of 200 years ago and judicial attitudes today. Although we have inherited mainly British systems of justice, the ideas influencing such systems tied in neatly with Pacific Island ideas of women's status.

CASE *Clobury (1630) United Kingdom*

Facts and decision The wife complained that her husband spat in her face, whirled her about, called her a "damned whore", and boxed her ears. The court granted her maintenance and costs against him. The husband appealed, saying that he had a right to chastise his wife for a reasonable cause. The court noted that a spit in the face was a civil wrong for which damages were payable but ruled that the husband should not be punished as his actions were justified.

CASE *R v Lister (1795) United Kingdom*

Decision The court said that a husband had no right to beat his wife, but did have a right to scold her and confine her to his house: "Lord Kenyon CJ declared and all the rest agreed that where the wife will make an undue use of her liberty either by squandering any of her husband's estate or going into lewd company, it is lawful for the husband in order to preserve his honour and estate to lay such a wife under restraint."

CASE *Re Cochrane (1840) United Kingdom*

Decision The judge said that a husband has "by law, power and dominion over his wife" including the right to keep her by force "within the bounds of duty" and the right to beat her, but "not in a cruel manner".

Comments on each case In *Clobury*, the message from the common law was that some criminal actions were not criminal if done against a wife. The *Lister* case gave a husband the right to imprison his wife in their home and to stop her from going anywhere without his permission. *Re Cochrane* gave a husband the right to beat his wife gently.

Present day legislation

Basically the law saw women as inferior to men and gave men power to beat women to keep them in their proper place. This legal attitude was adopted in Pacific colonies, and strengthened the already strong position of men.

Under current legislation, it is illegal to assault anyone. In *R v Jackson (1890) United Kingdom*[41] the common law finally stated that a husband had no legal right to beat his wife. Thus, in legislation and in common law, it is

now just as illegal for a husband to assault his wife as it is for him to assault a stranger. That is the law *de jure*, but in practice law enforcers still make distinctions. The police will usually prosecute a man who beats up a stranger, but they often do not prosecute a man who beats up his wife, or they give light punishment to convicted offenders. Notions about women as property still appear in the lack of enforcement of assault laws, and in the extreme standard of abuse required before a woman is entitled to separation, maintenance or divorce on the grounds of cruelty.

Of all countries in our study, only Cook Islands has specific legislation against criminal assault against women in the home. In other countries, a wife-beater cannot be charged under any gender-specific legislation. He can be charged under general assault laws that are nonspecific and cover all types of assaults. In Fiji, for example, the nature of the criminal charge depends on the seriousness of the injury caused.[42]

> 244. Any person who unlawfully assaults another is guilty of a misdemeanour, and, if the assault is not committed in circumstances for which a greater punishment is provided in this code, is liable to imprisonment for one year.
>
> 245. Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour, and is liable to imprisonment for five years, with or without corporal punishment.

These provisions mean that a person who assaults (hits, slaps, punches, beats, kicks or touches) another person may be found guilty of common assault and be imprisoned up to one year. Common assault also includes the threat of assault, so a husband who raises his fist to his wife and threatens to punch her has already committed a legal assault.

Offences range from common assault to attempted murder. In common assault there does not have to be any bodily injury. In the offence of assault causing bodily harm, there does have to be actual physical harm or injury, and the penalty may be five years imprisonment with or without corporal punishment. These offences are not gender-specific; they apply to any person who tries to harm another person.

In Nauru, criminal offences are charged under 1899 Queensland laws, and the *Police Offences Ordinance 1967*. In Tuvalu and Kiribati, common assault attracts a maximum penalty of six months imprisonment; assaults causing grievous bodily harm have a possible punishment of up to five years imprisonment. In Western Samoa, the maximum penalty for common assault is imprisonment for one year; it is seven years for assault causing grievous bodily harm. In Solomon Islands, common assault attracts imprisonment for up to one year. The penalty for assault causing grievous bodily harm is imprisonment for life.[43]

Tongan legislation makes common assault attract a fine of $100, or imprisonment up to one year. Other penalties are similar to those of Vanuatu, whose legislation forbids anyone to commit intentional assault on the body of another person.[44] Imprisonment penalties are as follows.

- If there is no physical harm, imprisonment up to 3 months.
- If injury or damage is temporary: 1 year.
- If injury or damage is permanent: 5 years.
- If injury or damage causes death: 10 years.

Cook Islands

Unlike other countries in our study, and perhaps reflecting New Zealand influence, Cook Islands has a specific legislative offence governing assault on a woman by a man. Section 214 of the *Crimes Act 1969* states that any person who assaults a child, or any man who assaults a woman, can be imprisoned for up to two years. Penalties for other types of assault are set out in Sections 208, 209 and 213. This special offence provides an interesting comparison with other types of assault.

Table 5.5 Assaults and sentence length, Cook Islands

Charge	Sentence length
Common assault	1 year
Assault on a child, or by a man on a woman	2 years
Assault with intent to injure	3 years
Cruelty to a child	5 years
Wounding with intent	7 years
Injuring with intent	10 years

In Cook Islands legislation, therefore, wife-beating is considered more serious than common assault but less serious than cruelty to a child or than intentionally wounding or injuring anyone. In practice, assaults on women rarely attract custodial sentences.

Should criminal assault against women be made a specific offence?

Making criminal assault against women a special gender-specific offence can be a positive thing. The existence of Section 214 shows that Cook Islands, in theory, takes seriously the issue of violence against women: violence against women is not grouped with common assault, which always attracts low sentences. The legislation therefore recognises that criminal assault against women is a specific offence deserving special treatment. However, in cases of intentional wounding or injury, seven to 10 year sentences are often avoided by bringing charges under Section 214, which provides penalties of up to two years imprisonment.[45]

This practice illustrates the chief argument against making domestic violence a special offence: law enforcement officials may use it as a soft option. Leaving it as a general criminal offence has greater potential of helping

women, provided that the general laws are enforced. However, criminal assault against women in the home is a particular type of crime. It is a crime committed by a man who supposedly loves the woman that he beats. It is violence between intimates. Therefore it cannot be dealt with in the same way as a brawl outside a nightclub. It needs special recognition so that it may be treated more seriously and with new solutions.

COURT AND POLICE POWERS AND PRACTICES

Jurisdiction of the courts

All countries in this study have High Courts and Magistrates' Courts; some have Local or Island Courts as well, but in all countries, most criminal assaults against women in the home are heard in lower courts. There are two main reasons for this.

- In most countries, common assault is a relatively minor offence. Since minor offences come under the authority of the lower courts, Magistrates, Island and Local Courts have jurisdiction over criminal assaults against women.
- The lower courts have authority to punish offenders by sentences ranging from fines to five years imprisonment. Criminal assault against women has less serious penalties and therefore automatically falls into the jurisdiction of such courts.

The results are similar to those produced by allowing lower courts to have jurisdiction over sexual crimes. We will list these below.

- Magistrates tend to emphasise reconciliation without punishment.
- Untrained police prosecutors represent the victim, but trained lawyers may represent offenders, so the chances of conviction are lower.
- Magistrates usually have no legal training, and come from the local elite.
- The lower courts have authority to imprison for short periods only.

Some jurisdictions in Canada have created specialist courts to deal with wife-beaters. Such courts have a special counselling unit to work with husbands and wives who wish to reconcile. The husband must first accept responsibility for his criminal behaviour and suffer the appropriate punishment. Reconciliation cannot proceed without acceptance of responsibility. The judge has special training on criminal assault against women, and the same judge sees the same recidivist.[46] An offender cannot promise one judge not to hit his wife again, and later see a different judge who knows nothing about his history.

Specialist courts may not be possible in our region. However, it may be possible to find aid funds to train small numbers of judges and magistrates to deal with cases of criminal assault against women. Such training, backed up by using specialist counsellors from NGOs like Women's Crisis Centres, could go a long way to coping with this gigantic problem. Trained judges and magistrates could come from ordinary courts and operate in ordinary courts, but relevant cases could be passed to them for hearing.

Police and judicial attitudes

CASE *Harris v Republic (1976) Nauru*[47]

Under Section 5 of the *Police Offences Ordinance 1967*, a man was charged with offensive behaviour to his wife. His defence was that he could not be charged, since the person offended was his wife. The Supreme Court ruled that his behaviour was still offensive: the fact that it was directed at his wife was no defence, since a wife is not expected to tolerate abuse and insults that other reasonable people would not tolerate.

Such rulings are rare, even when cases are taken to court. The courts tend to the view that it takes two to make an argument and that both parties are at fault if there is a history of violence. They do not see the problem of domestic violence as a problem in itself, one that occurs because of social attitudes towards women and because of a fundamental inequality of power between men and women. This view influences court attitudes towards prosecution, bail and sentencing.

The police do not accept that it is important to take seriously a woman's complaints about criminal assault. Women who report such assaults to the police are encouraged not to make a police statement and are told that unless they are going to take their partners to court, the police will not take a statement. Women do not realise that they have the right to demand that their statement be taken down and that the case may be withdrawn later at any stage. It is important for women to demand that their statements be taken down at the police station.

- If a statement is made, the police are obliged to investigate the matter and to prosecute if a criminal offence has taken place.
- Divorce or maintenance cases filed on the grounds of persistent cruelty often require a police report as evidence. The assumption is that if the cruelty was serious, there would have been at least one police complaint.
- A statement helps women obtain a non-molestation order or injunction if this is ever needed.
- A statement helps improve statistical and written records of the seriousness of criminal assault against women in the particular country and throughout the Pacific.

In common law countries, a person who has been arrested has the right to be released on bail by the police or a judicial officer.[48] Sometimes the accused will be required to deposit bail money or to provide the court with other security to ensure that he will turn up in court on the day of trial. The problem with bail is that the released offender may harass the woman, persuade her not to press charges, threaten her, beat her, or offer traditional reconciliation to her family. Other countries have tried to modify bail laws by making conditions, for example that the offender does not approach the woman, and does not drink alcohol. If he does either of these, he will be immediately taken into custody and his bail will be revoked. In New Zealand, the prosecutor must tell the judge if the offender is likely to break the conditions of bail. If he has broken bail before, he will not be granted bail again and will remain in prison until the trial finishes.

Each case of criminal assault against women in the home has to be judged on its own merits. In some cases, all that an abuser needs may be a "talking to" by a police or magistrate or judge. In other cases, arresting a man may be enough. Others may need prosecution and imprisonment, which does not mean that reconciliation cannot take place. Finally, in some cases of chronic violence, no amount of reconciliation, punishment or rehabilitation may work and the State must find other solutions.

Each situation may have to be handled differently and creatively, depending on the wishes of the woman. It must always be her choice whether she wishes to stay with her partner. It is not possible to deal appropriately with each case unless the police and judicial officials understand exactly what they are dealing with. To do this, officials need gender-sensitive training. They must be taught to assess and understand the particular context within which the criminal assault occurs.

The police policy of nonintervention

The police force is the only State agency that is almost everywhere, even on remote islands with no major towns. It is also the only agency that is available 24 hours a day, and has resources and power to do something about helping abused women.

The legislation requires the police to prevent crime and to arrest those who commit crimes. The current police response to criminal assault against women is that these matters are "domestic" and women should not report an assault to the police or have the offender prosecuted. This is an unofficial practice, influenced by police attitudes.

STORY *The neighbour who tried to help*[49]

A woman was often beaten by her husband. A neighbour rang the police but they told her not to interfere. She eventually got the police to temporarily stop the husband by reporting that the woman was disturbing the peace, but this worsened the situation so much that the neighbour stopped laying complaints.

It's a domestic matter

The police place greater value on the privacy of the family and on the rights of the husband than on the rights of the woman. Most police are influenced by their own cultural attitudes, and believe that the woman probably provoked the violence anyway. If there is the slightest chance that the matter will not be prosecuted or will not result in a conviction the police quickly lose interest.

Police practice in our region is that, as soon as they arrive, they try to calm the parties down and negotiate a settlement or reconciliation, and then to refer the parties to a village elder or to a church if no settlement is obtained. Arrest rarely occurs unless the offender assaults the police.

STORY *You can hit your wife but not the police*[50]

A Western Samoa woman, W, says that her son called the police to come and stop her husband, H, from beating her. Three police came eventually, and found her half-conscious on the floor. They helped her stand up but H kept punching her. The police kept trying to stop H by talking to him, but did not arrest and charge him until he punched one of them. H was charged with assaulting a police officer but the charges were dropped because he sought the officer's forgiveness. W has left H many times but she always goes back because she has no money, and he is never charged. She says that when her son is old enough, he will protect her by punching his father. This is not a good lesson for a child.

Kiribati police often claim that they have no power to enter the offender's home even where the assault is occurring in the presence of the police.[51] Some police officers genuinely believe they have no powers to enter and arrest without a warrant. In any case, the police are reluctant to interfere if they think that a man has a right to punish his wife. During a police seminar on domestic violence in Kiribati, police officers said that domestic violence is "an acceptable practice according to custom", and, reflecting broader views, that it was "a private matter, and not an issue for the police".[52]

Kiribati police attitudes illustrate two common problems: police powers of entry and police powers of arrest. Most common law jurisdictions restrict the power of the police to enter into a private home. This limitation is meant to protect all citizens from interference by State agencies who may abuse their powers. It may also however be used to avoid responsibility. For example, in most Pacific Island countries, the police do have legal power to enter without a warrant if they have a reasonable belief that a crime is being committed or is about to be committed. However, if police do not believe and accept that criminal assault against women is a crime, they may not see any need to enter a house where a woman is being beaten.

In most common law countries, unless police have a warrant to arrest someone, their powers of arrest are limited to urgent cases. Usually, unless there is danger of a further breach of the peace, the police are encouraged not to arrest without a warrant. The common law is that a policeman may enter premises if he has a reasonable belief that a crime is being committed there, and may arrest an offender to prevent a crime being committed.

In Fiji, a combination of two sections of the *Criminal Procedure Code*[53] permits an officer to enter without a warrant and to arrest an offender who is beating his wife.

> **14.** (1) If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into or is within any place, the person residing in or being in charge of such place shall, on demand of such person acting as aforesaid or such police officer, allow him free ingress thereto and afford all reasonable facilities for a search therein.
>
> (2) If ingress to such place cannot be obtained under subsection (1), it shall be lawful in any case for a person acting under a warrant, and, in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity to escape, for a police officer, to enter such place and search therein, and, in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, or otherwise effect entry into such house or place, if after notification of his authority and purpose and demand of admittance duly made, he cannot otherwise obtain admittance.

And

21. Any police officer may, without an order from a magistrate and without a warrant, arrest

    (a) any person whom he suspects upon reasonable grounds of having committed a cognizable offence;

    (b) any person who commits any offence in his presence ...

Section 14 gives a police officer the power to break into and enter premises where the person to be arrested is believed to be inside. Section 21 allows arrest where someone is committing an offence that the legislation recognises as a criminal offence or if an offence is being committed in front of an officer. The provisions in the *Criminal Procedure Code* give clear powers to police officers to enter premises where a woman is being beaten and to arrest the offender. Similar provisions exist in the penal and criminal procedure codes of all Pacific Island countries.

A woman may invite the police to enter the house by showing in some way that she wants the police to enter. She may do this by telephoning or by calling aloud for help; this would be implied permission to enter a private dwelling. Every police officer has a constitutional duty to give everyone the protection of the law. To deny a woman protection from violence is to breach her constitutional and human rights, but police officers still argue that they have no power to enter and arrest without a warrant. If they did immediately arrest the wife-beater, they would provide immediate protection for the abused woman, and decide an important question of policy for the police: that wife-beating is a criminal act.

Studies have shown that a brush with the law may have a sobering effect on men who beat their wives. An American Police Foundation study found that "it is clear that the recidivism measure is lowest when police make arrests".[54] This means that men are more likely to stop beating their wives after having been arrested once. Arrest sends the important message that violent behaviour is unacceptable. This works for the majority of men.

How the police in any country respond to a cry for help is critical in influencing the position of women within the law. If the police respond with sympathy and understanding, the woman's chances of healing will be improved, and she will be better able to take her place in society.[55] So let us now look at some ways in which police are encouraged to take positive action to stop criminal assault against women in the home.

STORY *The Domestic Abuse Intervention Project (DAIP), USA*[56]

When the police arrive at a domestic violence scene they must make an arrest if there is any visible sign of assault, whether or not the victim wants to press charges. If a compulsory arrest policy is properly enforced, a wealthy citizen is as likely to be arrested as is anyone else. Legislation gives the police immunity; the police do not have to fear being sued for false arrest if the wife-beater eventually goes free.

The police are trained to view domestic cases as crimes and to follow consistent procedures. The police at the scene of the crime must separate the parties before taking down information, so that the man does not threaten the woman while she is giving information. They must file a written report, and advise the victim of shelter services or crisis centres.

Prosecutors and judges have also been trained to take the crime seriously. Prosecutors are discouraged from throwing out the charges, or from plea-bargaining assault charges down to less serious crimes. Judges are given recommended sentencing policies: 30 to 60 days for a first offence, along with mandatory counselling. Stiffer penalties are required for repeat offenders.

The DAIP works with a women's NGO to ensure that all victims get help in obtaining protection orders, information on the legal system and shelter when needed. After two years, 81% of the women affected by the project were living free from violence, some with the men who had beaten them. The altered responses of the police, combined with counselling, taught wife-beaters a valuable lesson: that wife-beating is criminal, and that they will be on the fringes of human society if they continue to act in that way.

In late 1995 and early 1996, in response to lobbying by the Women's Crisis Centre and the Fiji Women's Rights Movement, the Fiji Police Force introduced its No Drop policy, which requires police officers not to drop charges against violent men. In four cases (two involving policemen) the offenders had beaten their wives, but the wives had forgiven them. One offender received a prison sentence, and the others were bound over or acquitted. The Commissioner for Police reported that, although more cases were tried, the courts "let wife-bashers go free".[57]

One Pacific Island police officer has said: "Police officers are as violent in domestic disputes as others, probably more so".[58] Throughout the Pacific, village and urban women tell stories of local policemen who beat their wives. If a woman knows that her local policeman beats his own wife, how can she ask him for help? This is why it is so important that the police receive proper training on gender issues, as well as clear instructions on their duties and powers. How the police are taught depends not only on wider community attitudes but also on the strength and lobbying of women's groups. If women have a strong voice and are ready to demand their human rights, the police will have no choice but to improve law enforcement. In countries where sexual discrimination is illegal, women may use the Constitution to demand rights.[59]

Here are some examples of women forcing the police to take criminal assault against women in the home more seriously. Can Pacific women do this?

CASE *Bruno v Codd (The New York City Police Department & Family Court) 1974 USA*[60]

Facts The *New York Family Court Act* 1962 gave the Family Court wide powers to issue injunctions to women whose husbands had been violent against them. In New York City, 12 battered women sued the Police Commissioner, the Family Court and others for failing to provide them with protection against

their husbands. The maximum penalty for breaching the order was six months imprisonment, but it was rarely imposed. Police routinely refused to arrest the husband unless the wife secured a Family Court Order; however, the Family Court usually refused to issue such orders, and if it did issue orders, the police refused to enforce them. The women said that this was discrimination against them as women and they wanted a declaration on their rights, based on the legislation.

They submitted 70 affidavits from battered women who claimed that it was an unofficial police policy not to arrest husbands for wife-beating. The women claimed that the Family Court refused to help them get protective orders unless they had been seriously injured. The lower courts said that the women's claim was not a recognisable action in law. The case went finally to New York State's highest court, the Manhattan Supreme Court Appellate Division.

Issue Were the Police and Family Court and others negligent by failing to do its duty to protect women? Did the unofficial policy of non-arrest and failure to take corrective measures against wife-beaters discriminate against women?

Results The Manhattan Supreme Court refused to dismiss the law suit against the Police Commissioner, saying that the women had established a *prima facie* case. By this time, however, the Police Department had entered into a voluntary arrangement with the women to treat wife abuse in the same manner as any other assault. It agreed, among other things, to encourage arrest, to remain at the scene of the attack long enough to stop the violence and to get medical treatment for the abused woman if necessary. The case did not continue.

CASE *Scott v Hart USA*[61]

Facts Four women sued on behalf of a group of women in Oakland. They argued that when they telephoned the Oakland Police Department for help and protection against physical abuse, they received either no response or one that was inadequate. This, they argued, discriminated on the basis of sex; it encouraged violence and was based on assumptions that what a man does in his home is not the State's business. They said the police response assumed that a man had the legal right to punish his wife.

Result As in the first case, the Police Department settled out of court. It guaranteed that criminal assault against women would be treated like any other criminal behaviour and the police discretion not to arrest would be stopped; police would make efforts to arrest an offender.

This case also proved to be effective in putting pressure on agencies to change their policies. Training programmes were introduced for police. Large sums were given to provide shelter for battered women. A Battered Women's Resource Card, explaining the legal rights of battered women and resources available to battered women, was designed for police to carry and use to inform women at risk.

Although neither case ended with a court judgment defining women's rights in this area, both were empowering experiences for the women who were involved. They took matters into their own hands, acting as a group in a class action. In these cases, the fact that the legal proceedings were class actions rather than individual actions helped the women's cause, because

the police had to contend with large groups of angry and organised women. The cases give other pointers to women wanting to win their rights. These women hired lawyers sympathetic to their point of view. They raised funds for legal expenses and got the police to agree to a more positive response. They created a situation where the police had no choice but to agree.

Within our own region, individual women have pursued cases at great personal cost and have triumphed in spite of the system.

CASE *The State v Noa Nadruku (1994) Fiji*[62]

Facts and decision A Fiji rugby player punched a woman. The police were most reluctant to prosecute the offender, and tried to get the complainant to withdraw her action. Enormous pressure was put on her because of the accused's fame. The complainant used the media to her advantage, and finally forced the police prosecution to prosecute Nadruku. He was found guilty.

Comment The complainant's persistence had important results. The fine was trivial but Nadruku now has a police record. If he punches a woman again, the court should punish him more severely because he has previously committed a similar assault. This is another important reason why women should prosecute men who beat them. Prosecution forces the police to take the issue seriously. If the beater is found guilty once, and the wife reconciles with him, but is beaten, she can show that she has already given the abuser a chance to stop.

The focus on reconciliation not prosecution

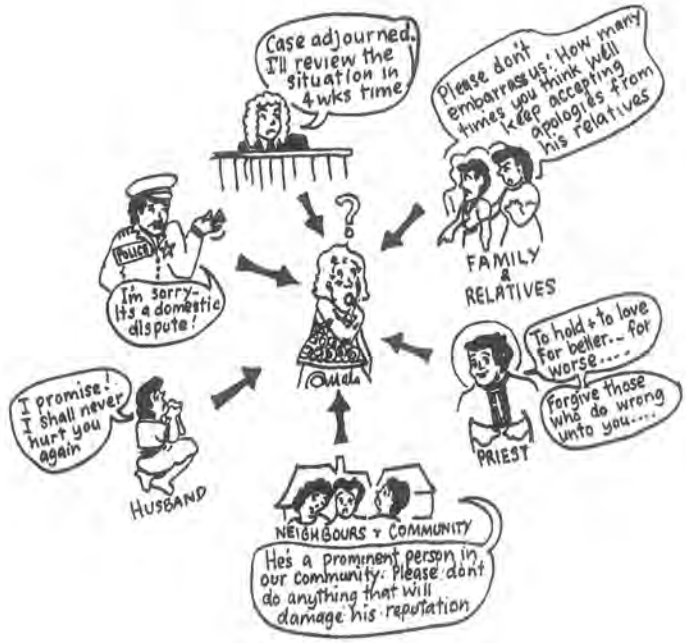
In our region, another feature of the law on criminal assault against women in the home is the consistent focus on reconciliation, no matter how serious the violence. Numerous cases reveal the enormous pressure put on women to reconcile with their husbands. This happens both at the scene of the crime and at the police station. It happens also when women attend court for the first time to hear the charges, and during the trial. Even the prosecutor may believe that women should not bring their "domestic problems" to court. Such strong opposition makes it rare for a woman to proceed, and partly explains why 64% of criminal charges in Suva are dropped at the courtroom stage.[63] Women are bullied and harassed by the magistrate, prosecutor and the defence counsel in court to withdraw all criminal charges. Some examples of such pressure are given below.

- It was only a little smack, aren't you overreacting?
- See how sorry your husband is, he will never beat you again.
- If your husband goes to prison who will provide for the children?
- Do you want your children's father to have a criminal record?

In Fiji, Section 163 of the *Criminal Procedure Code* requires the promotion of reconciliation. Common assault and assault causing actual bodily harm are both offences for which the legislation specifically permits reconciliation. As both the legislation and cultural and social beliefs of law officials encourage the legal system to push for reconciliation, wife-beaters rarely face any form of real punishment.

Kiribati police encourage reconciliation because they say that the day after the beating, the woman reporting the offence "always" withdraws the complaint. No records are kept of the number of complaints. In Cook Islands, charges of criminal assault against women rarely reach court. When they do, they are often withdrawn because of reconciliation. Solomon Islands Local Courts adjudicate criminal assault against women because common assault falls within their jurisdiction, as do bride price and compensation. Local Courts, which are the first and only courts for most women, are presided over by village elders, few of whom have legal training. Social Welfare Officers say that criminal assaults against women are considered a custom issue. The women are usually told to sort it out with their husbands; they reconcile and accept their lot in life.

Such emphasis on reconciliation without punishment does not promote genuine reconciliation. On the contrary, its message is that wife-beating is acceptable. The law enforcement agencies will simply lecture the abusive husband and send him home to his wife. Instead of treating wife-beating as a normal part of marriage, those who administer the law should identify, and focus on, the long-term needs of battered wives. They should start by realising that battered women are individuals whose needs are not the same. Some wives do not want reconciliation with their husbands. The legislation does not allow courts or police to push reconciliation or counselling if the woman rejects it. If the abuser is found guilty, he must be imprisoned to reflect the seriousness of the crime.



It's easier to reconcile

Some wives do want to reconcile with husbands who beat them often. Most women in this situation stay because they do not have enough money to live apart from their husbands. Nevertheless they may choose to reconcile after counselling. Women activists must respect this choice; the idea is to assist reconciliation but to stop the violence. The offender must be punished with a term of imprisonment, to show him that what he has done is actually a criminal offence. Reconciliation cannot take place unless he has been punished. A chronic beater must undertake counselling with agencies where both he and his wife come with equal power before a counsellor trained in gender issues. The conditions of settlement are recorded in court as part of the judgment so that if he beats his wife again and she does not wish to reconcile again, the settlement can be used to obtain a non-molestation order, maintenance, custody of their children or a divorce if necessary.

Other women may want to give their husbands another chance. Very rarely, a beaten wife has economic and/or social power similar to that of her husband. If she wishes to reconcile, prosecution and/or imprisonment perhaps should not be an option. We stress that these decisions should not be taken without feminist counselling and informed legal advice. The conditions of settlement reached with the assistance of a trained counsellor should be recorded in a properly drafted agreement, for future use if necessary.

Customary practices of reconciliation

All Pacific cultures have customary practices of reconciliation meant to heal the breach between families for the good of the community. They are not meant to excuse the offender's behaviour or to lessen punishment.

Many Pacific Island communities see calling the police or reporting the violence to the police station as trying to bring about marital breakdown. Most formal courts of law recognise traditional methods of reconciliation. Courts will often adjourn cases repeatedly in the hope that traditional reconciliation will take away the need for legal solutions. Although in theory trying to achieve reconciliation may be admirable, in practice women get a raw deal. Reconciliation usually occurs without the consent of the woman, and can cause her serious problems such as those listed below.

- A wife-beater may not be punished with imprisonment, or may receive a short sentence.
- The wife may not be able to apply for maintenance or divorce because both may depend on proving cruelty.
- Reconciliation may stop a domestic or family court from giving a non-molestation order in order to protect the victim from further violence.

In Fiji, if the offender and victim are indigenous Fijians, courts may give the offender a suspended sentence, or not give him a custodial sentence if the wife's family has accepted *bulubulu*. The victim herself has little say in the matter. In this way the law effectively gives authority to wife-beaters to continue beating their wives, and the court sanctions violence against women.

In rural areas of Western Samoa, if a man assaults his wife, the *matai* or village mayor or pastor will assist in reconciliation. Cases rarely go to court, possibly because the community would disapprove. A town woman is more likely to seek police help but she is thereafter more likely to take out a maintenance case than a criminal case. If other members of the village see the assault, there might be a public discussion at the *fono*, but the status of the husband influences how the problem is dealt with. If a woman can no longer endure the assaults, she will go to her family's clan, and eventually the husband will go and get her back. However, going back may put her in a worse position, as both her own family and her husband's family may disapprove of her action.

In Solomon Islands criminal assault against women in the home is accepted as normal, and legitimised by the bride price. Men maintain that payment of the bride price results in ownership of women, and thus allows wife-beating. Custom courts apply these principles; men escape criminal punishment. Even if a woman applies to a Magistrate's Court for maintenance on the ground of cruelty, she will get little relief.[64]

The custom of paying compensation to the woman's family, and giving her the right to stay with her family until compensation is paid may protect women from violence.[65] But we might also argue that the practice may help individual women escape violence temporarily but it does nothing about improving women's overall status.

Women in Vanuatu put up with violence, again partly because of the belief that bride price gives men the right to beat their wives. Women's organisations argue also that the chiefly system tends to operate against women because the custom is applied and controlled by male chiefs who try to persuade them to go back to violent situations.[66]

Most domestic assault cases are heard in the seven Island Courts. In the Efate Island Court, the three justices who sit and hear matters are local village chiefs nominated by the Chief Justice. No lawyers are present.[67] This presents difficulties for women, as they are taught from childhood never to insist on their own way and always to be respectful to men, especially to elders. The husband's story may get a better hearing.

In some countries, customary practices used to help women but few positive practices remain. Kiribati elders say that in pre-colonial times there were very strict ways of dealing with domestic violence. The elder male heads of the family ensured that the assaulter was punished severely; a man who was called before the *maneaba* was so ashamed that he never beat his wife again. Nowadays, few are prepared to interfere in "domestic disputes".

What can women do about their problems with customary reconciliation practices? They could do research to trace the historical source of the custom in question, to see if there are more positive interpretations. Are there older respected women who might have examples of how a particular custom was interpreted differently? Would such women give evidence on this?

All discriminatory practices are unlawful in countries whose constitution makes sexual discrimination unlawful. Therefore, in most countries of our

region, women could challenge a discriminatory practice as unconstitutional. This applies to all customary and formal law practices, not just to assaults against women. In previous chapters, we gave the example of *Tuivaiti*, who won his case that certain aspects of *fa'a samoa* were unconstitutional. More recently, the Supreme Court of Vanuatu in *John Noel v Obed Toto* stated that customary law is subject to the Vanuatu Constitution and cannot be applied if it discriminates against women.[68]

Who is responsible for prosecuting?

In criminal charges, the complainant has the responsibility to press charges and to push for the accused to be prosecuted. It is therefore the beaten wife's responsibility to make a statement about the assault and to initiate the prosecution. The prosecution cannot proceed without the complainant's cooperation: she is the primary accuser. In all Pacific Islands of our study, this is part of the normal criminal process and procedures, and presents particular difficulties for women.

- They fear more abuse from their husbands if they proceed with charges.
- They are vulnerable to pressure to withdraw charges.
- They fear the economic consequences of losing their husbands.
- They are at a psychological disadvantage.

Police say that trying to prosecute wife-beaters is a waste of time. The prosecution lays charges and the case begins to go through the criminal process, but the complainant withdraws the charges. However, international studies indicate that there is no greater withdrawal of charges by battered wives than by victims of any other crime.[69] When charges are withdrawn, there are many possible reasons.

- The husband has sought forgiveness, whether genuinely or by using emotional blackmail and threats of loss of income.
- The wife genuinely believes her husband and wants to reconcile with him; she just wants the beating to stop.
- Both parties sincerely believe it will not happen again.
- The husband has told the wife that if she proceeds with criminal charges there will be no chance of reconciliation.
- The responsibility of choosing whether or not to prosecute places enormous psychological strain on the wife, who is recovering from the trauma of being beaten.
- The wife's social and economic circumstances give her no option but to withdraw charges.
- Family, police and the community are putting pressure on the wife to withdraw charges.

The problem is further complicated by the fact that in most common law countries, a wife may not be compelled or forced to give evidence against her husband. (In Anchorage, Alaska, however, a woman who refuses to testify against her husband may be fined or jailed.)[70]

Withdrawing criminal charges or not prosecuting will not ensure that the abuse will stop. Some argue that, if the abused wife wants the relationship to continue, mediation with a counsellor is a better alternative to criminal prosecution. However, criminal charges do serve to force the abuser to deal with the fact that his behaviour is criminal and therefore unacceptable.

If the responsibility to prosecute were put entirely on the prosecution, the wife would not have to decide, and could feel safer. Her husband and the community could not blame her for the decision, and reconciliation after punishment would be made easier. Some American cities have devised a legal policy, called victimless prosecution, to get around the fact that many battered women are too frightened to press charges, or are in hiding and unavailable for court appearances.

First used extensively in San Diego, victimless prosecution allows a case to be prosecuted on evidence from emergency telephone service tapes, photographs and physical evidence taken from the scene of the assault, medical records, witnesses' reports and the "excited utterances" of victims, heard by police or other witnesses during or shortly after an attack. Excited utterances are the American equivalent of the recent complaint evidence that may be used as corroboration in a sexual offence trial. In wife-beating, the reasoning is the same:

> If the officer described the victim as so agitated she can hardly speak, then she's considered too upset to have made up a story.[71]

Trials are designed to bring out the truth; the offender has the right to defence and it is up to the court to decide the rights and wrongs of a case. The victimless prosecution policy, the Fiji No Drop policy, and the Domestic Abuse Intervention Project show that it is possible to work towards a fair and legal solution to criminal assault against women.

SENTENCING

In previous sections, we discussed the prevalence of wife-abuse and the reasons why it is so widespread and uncorrected by our laws and practices. This section will give further evidence of our chicken-egg situation by focusing on sentencing practices in different cases and countries of our region.

Sentencing in "domestic" offences is even lighter than sentencing in sex offences. The "domestic" offender is more rarely imprisoned. The lengths of imprisonment possible in a Magistrate's Court or other court of first

instance range from three months to five years. The most common penalties are listed below.

- The court orders a suspended sentence.
- The court orders the offender to pay a fine of up to $100.
- The court binds the offender over for one year.

Cook Islands, Tonga, Tuvalu, Western Samoa

In Cook Islands, despite the high level of criminal assault against women in the home, fewer than 20 cases get to court in any year. Convicted offenders are usually fined, rarely or never imprisoned.[72] In Tonga, the most common penalty in such cases is a fine of $250. During three years in Tuvalu, there was only one prosecution: a man who beat his wife very badly, and severely injured his child as well, was fined and sentenced to less than a year in prison. It is doubtful whether anything would have been done if the child had not been injured.[73]

Occasional press reports in Western Samoa[74] suggest that criminal assault in the home is very rarely taken to court. The penalty is most commonly a warning or a suspended sentence. One wife-beater got a two year suspended sentence. A drunk man tried to stab his wife at the airport because she got angry with him for drinking too much alcohol too quickly, but there was no report of prosecution or punishment.

Fiji, Vanuatu

Fiji sentences range from fines and bind-over orders to 18 months imprisonment.[75] In 1986, a man was jailed for six months after having been convicted on four separate occasions of wife-beating. In 1989, after hearing evidence from four prosecution witnesses, a magistrate gave a wife-basher a $100 good behaviour bond for a year. On the same day, a man was jailed for 18 months for stealing items worth approximately $500. More recently the Nausori Court jailed a man for 12 months; he had repeatedly punched his wife, causing her to lose an eye.

As we have seen in our studies of sexual assault sentences, magistrates and judges have wide powers of discretion in sentencing. Positive judicial attitudes can soften the bad effects of the law on battered women. On the other hand, as in sexual offence cases, magistrates and judges may say one thing and do another. Case studies show that lectures using strong words like "horrifying" or "inexcusable" often precede sentences far below the maximum for the offence.

For example, in 1993, a Fiji magistrate said: "Marriage does not give license to men to beat their wives nor does it bind women in slavery". Having made this admirable statement, the same magistrate gave suspended sentences to three wife-bashers, one of whom had beaten his wife unconscious but who said that he saw nothing wrong with doing that. In another incident, a magistrate said that the Suva Courts needed to toughen

up on women-bashers. He then gave a nine month prison sentence, (suspended for a year) to a man who had severely damaged his wife's face.

In *State v Croker* (1993), a man had beaten his *de facto* wife to death. The High Court sentenced him to 18 months imprisonment. In 1996 a man was imprisoned for 15 months for beating his wife, breaking glass on her head, and hitting her with a wooden box.[76] We have already seen that 40% of all murders committed in Fiji between 1992 and September 1995 were "domestic-related", and that 26 of the 35 murder victims were female.[77] On the other hand, intervention and imprisonment can mean reconciliation and a life without violence.

STORY *H and W (1993-1996) Fiji*[78]

H and W lived together on and off for 19 years. H often beat W who did not prosecute him until he injured her badly. With the assistance of the Women's Crisis Centre, W remained firm that she wanted to prosecute H. She resolutely refused to reconcile and drop charges despite being pressured by the police and the court, and despite being completely financially dependent on H. When convicted, H was sentenced to 9 months imprisonment. He served 6 months, came out of prison and, 10 months later, reconciled with W. He did not hit her again, although they have now separated for reasons other than violence.

STORY *Intentional assault, attempted rape, attempted murder, attempt to kill the unborn child (1994) Vanuatu*[79]

A husband was charged with intentional assault, attempted rape, attempted murder, and with "attempt to kill the unborn child". He had been trying to force his *de facto* wife to have an abortion. Only the assault charges proceeded to court; the others were withdrawn. The husband pleaded guilty and was sentenced to two years imprisonment, suspended because the husband and wife reconciled.

In Vanuatu, most husbands are fined between 2000-5000 *vatu* and are bound over to keep the peace. Justices in Island Courts are allowed to imprison for up to 6 months for assault but they rarely do. In 1993, in a case heard in the Supreme Court, a man pleaded guilty to intentional assault against his girlfriend, whom he had kicked until she fell to the ground. He then beat her violently with a post, causing her permanent harm. He was sentenced to three years imprisonment. Another man assaulted his wife with a "small knife". He was sentenced to 18 months imprisonment, suspended for three years, and 15,000 *vatu* compensation. He did not serve one day in prison.

More recent cases[80] confirm the sentencing pattern. In 1994, a man beat his wife and broke her leg so badly that she would limp for the rest of her life. In a letter from hospital, the wife said that her husband had been good to her since she had been in hospital. He got a suspended sentence. The Santo Magistrate's Court put a husband on a good behaviour bond for three years. His punches had permanently damaged his wife's face. The court

said the offence was "unacceptable and unforgivable" but that it would not imprison him because he was sorry for what he had done, it was a first offence, and he was the primary provider for the children.

Bind-over orders and suspended sentences effectively excuse the offender from punishment unless he repeats the offence. Domestic assault is a recidivist crime but this appears to have little effect; magistrates continue to be lenient. The lack of appropriate punishment is an indication of the lack of seriousness with which courts view criminal assault against women. Unless judges and magistrates get training on gender issues, this problem will remain.

CIVIL ACTIONS

The available civil remedies or solutions are fairly limited. Unlike criminal cases, where the State is in charge of the matter, civil actions require the woman herself to take action about the violence. What civil actions can she take? We will first list, and then discuss, her basic choices.

- Separating without legal action.
- Separating and taking out a maintenance order and/or custody case or divorce.
- Applying for an injunction or non-molestation order.
- Suing for damages or compensation for trespass to the person.

Separation, maintenance and divorce

In the legislation of all countries of our region, physical cruelty is, directly or indirectly, a ground for separation, maintenance and divorce. We deal in separate chapters with separation, maintenance and divorce and so will look only briefly at them now.

Some women wish to finish the violent relationship once and for all. They do not wish to apply for maintenance for themselves or their children because they wish to cut all ties with the beater. Many Pacific Island communities disapprove of divorce and may shun the woman who has applied for divorce. If women choose simple separation, they do not have to prove cruelty. All they have to do legally is leave, but this can mean economic hardship and long custody, access and maintenance battles.

If the laws recognise custom marriages, the marriage may be terminated in custom. However, many magistrates do not regard violence against women as a ground for custom divorce. Custom law is largely unwritten; it may be difficult to find a male expert witness willing to give evidence that custom may permit a woman to obtain a divorce for violence.

Countries with a fault-based divorce system require a woman to prove persistent and habitual cruelty as a ground of divorce. This requires witnesses willing to testify, which can be very difficult both in traditional societies and in mind-your-own-business towns. Many women have to wait out the long separation period because they cannot prove cruelty. Others stay in violent marriages.

Throughout the Pacific, however, it seems quite common for a woman to use maintenance laws as a form of punishment for criminal assault in the home. Instead of having their husbands prosecuted in criminal law, women begin a maintenance case and then withdraw it if the husband promises to stop the beatings. In Fiji, for instance, a woman will ask the magistrate to postpone the case, as a threat hanging over her husband's head, until she is satisfied that he is genuinely trying to reform. This is a unique Pacific-way method of getting husbands to reform. It may be helpful in situations where the violence is low-level and the man has a healthy respect for the law, but it may not be a solution for chronic violence.

Non-molestation orders

There is a common law remedy, enabling a married woman to apply to a court for an injunction restraining her husband from beating her, going near her, telephoning her or making other trouble for her. This is a particular type of restraining order called a non-molestation order. However, the wife cannot ask for the order as her right; granting an order is done at the court's discretion, and the court decides whether or not to do it. In Fiji, single women and *de facto* wives do not have the right even to apply for the order.

In most countries of our region, a beaten woman has to leave home before applying for the order; she has to find somewhere else to live. Granting an order is a sign that the court recognises the problem, but the court should be able to require the husband to leave, and to come back only on probation. Further, the order is usually available only if the woman is also applying for maintenance or divorce. It is therefore an ancillary remedy, depending on another court action. This is most unfair, as women are forced to take a court case out against their husbands for maintenance, divorce or custody, as well as applying for an injunction.

Sometimes, as we will see in our case studies, the husband breaches the order, and, in Solomon Islands, a breach of the order requires immediate imprisonment. In some countries, an injunction is ordered along with a pledge of money. If the order is breached, the court keeps the money. Theoretically, in the common law, a husband who breaches the order should be arrested and imprisoned. In some countries, it is compulsory to arrest any person who commits a domestic assault once an order has been breached. The law compels the police to take an abuser into custody at a scene of violence for a first violation of a restraining order, and there is a mandatory prison sentence after that for subsequent arrests.

In other jurisdictions, if a husband breaches a non-molestation order, he is immediately arrested and placed in prison. In New Zealand, breaches of such orders carry a mandatory 24 hour prison sentence. Only then is the offender given the opportunity to come to court to explain why he did not obey the order.

In our region however, arrest for breaching an order depends largely on the attitudes of the judges and the police. What usually happens is that when a husband breaches the order, his wife files a summons asking that he appear in court. Then the court asks him why he breached the order; it will usually warn him and perhaps threaten him with prison. Rarely is a husband put in prison immediately for a breach of a non-molestation order.

The magistrate may make an order for non-molestation but he cannot enforce the order as it has to go to the High Court and a writ of contempt must be sought. This can only be done if the wife applies to the High Court for an order of committal for contempt of court.[81] If the High Court makes the order, the husband will go to prison for having disobeyed the court.

Again, this remedy is futile, because the High Court takes time and is expensive. Indeed, a disturbing feature of the common law on non-molestation is that harassment leading to assault is a criminal action, but the remedy provided by family law is a civil one and the penalty is civil rather than criminal. This in effect protects the offender from the criminal process, and places the enforcement burden on women, who usually do not have the money, time, education and support to go through the processes.

So for a non-molestation order to be effective, a magistrate must be able to enforce an order immediately by ordering imprisonment if the order is breached. Police are unwilling to arrest for breaches of non-molestation orders unless there is a clear judicial order. Court orders must contain clear directions for immediate imprisonment for failure to obey a non-molestation order. This can be done by attaching an "arrest without warrant" order to the non-molestation order.

Now that we have outlined the general position, we will see how the system works in Pacific Islands that use the common law regarding injunctions. Then we will turn to Solomon Islands and Cook Islands, which have passed specific legislation on injunctions. In Fiji, injunctions are available through the common law. The following case illustrates the problems.

CASE *Gokal v Gokal (1980) Fiji*[82]

Facts W applied for an interim injunction (including a non-molestation order) from the High Court. The Court granted her an order that did not allow H to go near their matrimonial home, nor enter it, nor to try to have her forced out of the house. He was also ordered not to molest W in any manner or to attempt to sell the matrimonial home.

The order was for six weeks, because the case was going to full trial regarding divorce, custody, maintenance and matrimonial property settlement. W tried to enter the home with two police who had copies of the

injunction. H's six private guards, in front of the police, threw W off the premises. W applied to the High Court to have H found guilty of contempt of court. H "humbly apologised" in an affidavit saying that, if he had unwittingly breached the order, he was sorry.

Decision The Chief Justice said that both parties were basically credible witnesses and the truth was evenly balanced. He accepted the apology from the "god-fearing" husband for breaching the order and excused him of all wrongdoing. He dismissed the wife's application.

Comment Whether or not the parties were credible was not the issue. The point is that the High Court had given the initial non-molestation order. The husband had disobeyed the order, with violence and in front of the police, but the wife was turned out of the house. In a society with very little respect for the rights of women, the Court should have set an example. Cases like these send a signal that it is acceptable for men to breach non-molestation orders without suffering the normal consequences of breaking the law.

Tonga has no legislative provision for non-molestation orders. Presumably the remedy is available to Tongan women through United Kingdom common law, which still applies generally. We know of no examples of applications in the lower courts or in the High Court.

In Tuvalu, arrest and imprisonment are possible through the common law, but the legislation contains no real power to exclude a husband from the house, and we do not know of any application for a non-molestation order. In Vanuatu a restraining order is available in the common law, and under a combination of provisions in different pieces of legislation.[83] A restraining order is available to all women and to men as well. (A man may ask for an injunction to prevent his wife from attacking his mistress.) When a woman asks for an injunction against her husband, the judge usually gives him only a strong lecture.

Western Samoa legislation makes it a criminal offence for a man to molest or harass his wife after a divorce. The punishment is a fine of $100 or three months imprisonment. However, Western Samoa has no legislative provision for a non-molestation order. This can be obtained through the common law as ancillary to a substantial matter: there has to be some serious legal issue at stake before the court will hear an application for a non-molestation order. If, therefore, a woman is seeking the court's protection against violence and nothing else, a court will not accept her application; she must also apply for maintenance or custody or divorce. Western Samoa women do not seem to know about these provisions.

Cook Islands and Solomon Islands

Until 1994, Cook Island lawyers used any relevant common law right, such as a court order to the husband not to "disturb the peace", or Section 539 of the *Cook Islands Act 1915*. This says that, if after a divorce the husband harasses or attempts to molest the wife or trespasses on her property, he may be fined up to $40 or be imprisoned for three months. Apparently in response to a growing need for protection against violent spouses, the *Cook Islands*

Amendment Act 1994 contains a new **Part XVIIA: Separation, occupation and non-molestation orders**. We will discuss this, and cases related to it, in Chapter 7.

Solomon Islands also has specific legislation regarding injunctions. The legislation is gender-neutral; men or women can apply for it. It is known as *Amendment 13/92 to The Affiliation, Separation and Maintenance Act 1971*, and is a radical and progressive piece of legislation that created a lot of controversy. In the end, it was passed because hardly anyone attended parliament on the day it was voted; it was pushed through by a former Chief Magistrate and other concerned organisations.

Section 17 of the legislation replaces the old, ineffective, long-winded and expensive civil procedure method of enforcement. Here are its most important features.

- **Section 17B** legislates for an injunction against a person who is violent or is threatening violence against the applicant and/or child. The court must be satisfied that the person has been violent or is capable of being violent or has been violent to some other person. The court may order a person to leave the matrimonial home, and may order that the person is not allowed to enter the matrimonial home. If necessary, the court can force the respondent to allow the applicant to enter the matrimonial home.
- **Section 17B(4)** allows the order to be made *ex parte*; the court can make the order without the respondent being served with a summons to appear in court. The court can also make it a condition that the respondent is not allowed to get another person to harass or threaten the applicant. Unfortunately the legislation applies only to persons married by formal law or by custom (s. 17B(1)). It does not include single people and *de facto* spouses.
- **Section 17C** obliges the court to give priority to applications for non-molestation orders. Section 17C says also that although the respondent may be barred from entering the matrimonial home, his legal rights to title of the matrimonial home are not affected. He may be stopped from living in the house, but if he owns it he does not lose ownership.
- **Section 17D** gives wider powers of arrest if the non-molestation order has been breached and is likely to be breached again. If an order of arrest is attached to the non-molestation order, police can arrest the abuser without warrant for violence, or for having entered the matrimonial home. If there is no arrest order, the applicant can apply for a warrant with the usual safeguards.

However, we may push for progressive legislation but we cannot enforce commitment to it. Either women do not know about the legislation, or the police and judicial officials are still unresponsive. Non-molestation orders are poorly enforced. According to Solomon Islands police sources[84] there had been no training on the new legislation, and only one imprisonment arising out of a breach of a non-molestation order under the legislation. In Solomon Islands, as elsewhere, non-molestation orders have limited usefulness, for the following reasons.

- Where legislation exists, relatively few people know about it or understand it. Even the common law provisions do not appear to be widely understood.
- Injunctions work only if the law agency officials are sympathetic and understanding. If a magistrate or policeman thinks that it is not right for women to demand such orders or that it is right for men to beat women, he will not enforce a non-molestation order.
- The burden of enforcement is placed on women, who usually do not have the time, education or money to pay legal, court and lawyer's expenses.
- Harassment leading to assault is a criminal action, but the remedy provided by family law is a civil one and the penalty is civil rather than criminal. This in effect protects the offender from the criminal process.

However, despite its current limitations, granting such an order, complete with the power to arrest without a warrant, does let a threatening or violent husband know that his behaviour is unacceptable. A change of attitudes towards non-molestation orders necessitates a change of attitude towards women in general and requires an understanding of all the issues affecting criminal assault against women in the home.

Civil damages

A person who has assaulted another person may be sued for common law civil damages. An assault or battery is a "trespass to the person" making the assaulter or abuser liable for damages. Case law shows that it is technically possible to take action for trespass to the person without proving actual injury. All that you have to do is to prove that the defendant did assault you. Then the burden of proof is on the defendant, who has to show why he should not be held responsible.[85]

This common law remedy could be used by single women and *de facto* wives, but is difficult for married women. When married women outside our region have tried to use it, they have been prevented because of spousal immunity, which prevents spouses from suing each other. As far as we know, no such case has arisen in Pacific Island courts, so it remains to be seen whether they would allow a wife to sue her husband for damages for trespass to the person. But we do know that any such private civil law action would require large sums of money for lawyers and court costs.

WHAT KIND OF JUSTICE?

When battered women are asked what kinds of justice they want, their approaches range from wanting real reconciliation to wanting to see their abusers severely punished. The range of approaches reflects one of the enduring debates amongst those involved with criminal assault against women in the home: whether or not the law is appropriate, or even relevant, in dealing with the management of criminal assault. Does the law really help women at all? There are different views, all worth considering when we are formulating strategies for action and adapting them to suit local needs.[86]

We will begin by stating the views in their extreme form, and then look at each in detail. One view is that criminal law ranges from being almost useless to totally inappropriate, because it is based on crime and punishment. The other view is that assaulting anyone is a crime; a person who commits a crime is a criminal and should be treated like a criminal.

Those who are against the use of criminal law may advance the following arguments.

- Criminal law punishes the offender for the past. It is not concerned with the future, for example with teaching the wife-beater to control his aggression, or with helping his wife.
- The criminal justice system relies on the efficiency of judges, magistrates, police and prosecutors. History and experience show that these people do not understand the seriousness of violence against women and the gender bias within the system, or do not want to stop it.
- If the wife abuser is acquitted there is no guarantee of protection for the wife. Even if he is found guilty, his punishment is likely to be light. This type of punishment will not stop an abuser from doing the same thing again.
- Any imprisonment or fine is likely to punish the wife and family as well; it will mean payment from the joint family finances, or loss of income through the husband's loss of employment if he is imprisoned.
- In some traditional societies, if the abuser is punished or imprisoned, there is always the possibility that the abuser's family will seek payback. Punishment may destroy the family unit.
- Therefore only rehabilitation and not punishment will reduce domestic violence. Current imprisonment programmes do not provide rehabilitation. Rehabilitation programmes in the past have been highly successful in leading to a decline in repeat offences.

The other view is that domestic assault takes place in the home, but it is still a crime, the wife-beater is a criminal and should therefore be treated no differently from other criminals. Here are the arguments for this view.

- The pro-rehabilitation, mediation and discussion approach combines with the current inadequacies of the neutral criminal justice system in seeking to re-establish the family at the cost of the woman.
- Very few developing countries have the financial and other means to provide proper rehabilitation. Until they do, imprisonment to protect the woman and to punish the offender is still the safest course.
- There are few refuges in which a woman and her children may find protection. Taking legal action can give the woman some protection and a sense of empowerment: she is taking control of her life.
- The symbolic power of the law is important. Keeping domestic violence as a criminal matter means arrest, prosecution and conviction with punishment. This gives the clear message from society that the actions of an abusing husband are criminal.
- The risk of repeated offending is reduced by mandatory arrest and prosecution, if the impressive criminal procedures at the scene of the crime, at the police station and in the court are properly carried out with concern for the woman as the central issue.
- The criminal justice system, despite all its inadequacies, does not condone or sanction violence against women; it places full blame on the abuser; it avoids further victimisation and helps create a general climate in which all kinds of violence are wrong.

The pro-arrest policy is slowly emerging throughout the Commonwealth as the best method for policy makers, police chiefs and women's activists.

CONCLUSION

Criminal assault against women in the home, and sexual crimes against women, bring sharply into conflict the rights of the victim and the rights of the accused. The criminal justice system is based on the theory that the accused is innocent until proved guilty, entitled by the due process of the law to protection against arbitrary arrest and abuse of power.

When, therefore, women say that in gender-based crimes the law should give more consideration to the rights of the victim, the usual reply is that the law cannot abandon the honoured principle that the accused is innocent until proved guilty. It is, however, possible to remove specifically gender-based and discriminatory aspects of the law without abandoning the principle, and Article 2f of the United Nations Women's Convention requires all signatories to do so. This may be done by legislative, common law and policy measures, including those listed.

- Defining criminal assault against women in the home as a specific crime.
- Providing assistance to victims.
- Separating protection orders from criminal proceedings.
- Making arrest and prosecution mandatory.
- Drawing up specific procedures for handling cases.
- Providing mandatory counselling for the abuser.
- Evaluating customary practices.
- Collecting reliable data for planners and lobbyists.

The legal system must try to see what the victim needs; it should not push her into a reconciliation that might endanger her life. Effective laws rely on the commitment of police and judicial officials, and these people largely determine the success of new laws and strategies for coping with criminal assault in the home.

The police should have wide powers of entry into a home where they believe that an assault is taking place. They should have to arrest the offender. They should be protected against being sued for false arrest or illegal entry into private premises. And they should have wide powers to enforce non-molestation orders.

They should have wide powers of prosecution so that the first response is to prosecute. The responsibility of prosecution should be taken out of the hands of the complainant, who should become a witness. The charges would proceed with or without her agreement, with evidence provided by witnesses and through her written statements, and by her state when she first complained about the beatings.

Police need clear statements of their powers and duties. They need training in such things as anger management, to help them understand their own attitudes and use of power. They need also gender-sensitivity training so that they understand the particular context of criminal assault in the home. These powers, skills and knowledge become very significant in small communities. The police are often placed in the uncomfortable position of having to arrest relatives, friends, clansmen, village elders and members of their own tribes. Their position would be less difficult if everyone understood that the law required them to arrest wife-beaters.

But the police force and the judiciary reflect a particular community's attitude towards violence. Thus, if a community sees domestic violence as not really a crime, the police share the attitude and encourage women to put up with violence. If the community sees domestic violence as a criminal assault, this will be reflected in prosecution policies and officers will be trained to intervene and arrest offenders. The emphasis will be on prosecution, punishment, rehabilitation and reconciliation if realistically possible. This implies an understanding of how gender relates to the law, as well as a commitment at all levels to make the law work for women.

6

Women as criminal defendants

WHAT THIS CHAPTER IS ABOUT

We have so far considered the position of women who are victims of crime; those who are raped, and those who are assaulted by their husbands. What happens when women are accused of committing crimes against others? In Chapter 5, we saw that battering may drive women to kill their husbands, their children or themselves. We will now look at other crimes that women commit because they are women: abortion, infanticide and prostitution.

ABORTION

What is abortion?

Abortion happens when a pregnancy is ended before the foetus is able to survive outside its mother's womb. When an abortion happens naturally, it is called a spontaneous abortion or a miscarriage. Here we are concerned with induced abortions, those that are deliberately caused by drugs and other substances, instruments or other objects and methods. We include also therapeutic abortion, an abortion induced to preserve the mental or physical health of the mother.

Whether or not abortion should be legal or illegal is an extremely controversial subject in the Pacific Islands as everywhere, even though abortion is, and always has been, common throughout the Pacific.[1]

There are basically two sides in the abortion debate. The "anti-choice" movement is anti-abortion, believing that abortion is murder. People who are "pro-choice" might not themselves choose to have an abortion, but they support the right of a woman to do so. Even women activists are hotly divided on the issue. Pacific women's NGOs have tended to keep out of debates about abortion, because they do not want to cause divisions amongst their members.

Throughout the world, for every eight pregnant women who die, one woman dies because of an unsafe abortion.[2] The vast majority of these abortions are secret; they are often called backstreet abortions, but in our region are more likely to be bush abortions. As about 200,000 women die every year from illegal abortions,[3] one of the strongest arguments in favour of making abortion legal is that women will always seek abortion, legal or not; legal abortions save women's lives.

From religious and legal viewpoints, abortion was not always controversial.[4] Historically, the Christian Church did not always disapprove of abortion. The Roman Catholic Church, for instance, through Pope Innocent III (1198-1216), ruled that abortion was "not irregular" if performed within the first eighty days of conception of a girl, and within forty days of

conception of a boy. The reason for this distinction is not clear, although it may have something to do with the argument about how long it takes a foetus to become a human being. Why forty days for a boy and eighty days for a girl? And how, in any case, could people in the thirteenth century know the sex of a foetus before it was delivered or aborted?

In 1588, Pope Sixtus made induced abortion a sin, but in 1591 Pope Gregory XIV again allowed it up to 40 days from conception. From the late nineteenth century, the Roman Catholic Church has strongly opposed abortion and most forms of contraception. In the United Kingdom, abortion was legal until the nineteenth century, and all British colonies adopting both Western legal systems and Christianity adopted the United Kingdom legislation banning abortion. Induced abortion is still illegal in all countries of our region.

Legislation

The criminal legislation making abortion illegal appears to be aimed on the one hand at the person who conducts the abortion, and on the other hand at the woman who permits the abortion to be done to her or who does it to herself.

In Fiji, the *Penal Code* governs the law on abortion.[5] It applies to abortions produced by modern or traditional medical practices. Section 172 applies to the doctors and others who actually do the abortion. It means that a person who does the abortion or tries to do an abortion using poisons or instruments or objects of any kind may be found guilty of a criminal offence and can be given life imprisonment. He or she can be imprisoned for 14 years.

> 172. Any person who with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or noxious thing, or uses any force of any kind, or uses any other means whatsoever, is guilty of a felony, and is liable to imprisonment for fourteen years.

Abortion? or infanticide?

Section 173 applies to the pregnant woman who permits the abortion to be done to her or attempts to do it herself. A pregnant woman who uses poison or instruments or objects on herself is guilty of a criminal offence and may be given seven years imprisonment.

> 173. Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatsoever, or permits any such things or means to be administered or used to her, is guilty of a felony, and is liable to imprisonment for seven years.

Even doctors and theologians cannot agree on when a foetus becomes a human being. In Fiji, 27 weeks is regarded as the age of viability, the age at which a foetus could survive outside the womb. Section 207 of Fiji's *Penal Code* attempts to define when a foetus becomes a human being, and is therefore a person who may be murdered.

> 207. A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, whether it has independent circulation or not, and whether the navel string is severed or not.

This seems to imply that if the foetus was dead before it left its mother's body, it was not a person. Therefore even if the death had resulted from an abortion, the abortion might be illegal, but could not be regarded as murder. Is this what the drafters of the legislation intended to say?

When is abortion lawful?[6]

Abortion is a criminal offence, but there are some situations in which the court will accept an adequate defence to a charge of abortion. Courts in Fiji, Cook Islands, Kiribati, Nauru, Solomon Islands, Tuvalu, Vanuatu and Western Samoa (but apparently not in Tonga) will allow abortion under certain conditions, established through specific legislative provisions or through the common law.

In Fiji, Cook Islands, Nauru, Solomon Islands, Vanuatu and Western Samoa, legal abortion is available if it can be proved that the abortion is necessary to save the mother's life. So a doctor charged with illegal abortion can use the defence that the abortion was done to save the mother's life. It may not result in a criminal prosecution, and if it does, it will be good defence to a charge of illegal abortion. However, saving a mother's life means different things in different countries. In some Pacific Islands, an abortion can be done only if the physical health of the mother is in danger. The common law in other countries is that therapeutic abortions can be done if the physical or the mental health of the mother is in danger.

The legislation in Fiji[7] permits abortion to preserve the mother's life.

> 234. A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.

This means that the person deciding to carry out a therapeutic abortion may take many circumstances into consideration. The precise circumstances are not stated. For example, abortion seems to be available fairly simply in Fiji in cases where a pregnancy arises out of rape or incest, although there is no specific legislation covering this. However, in the Fiji case of *R v Emberson (1976)*[8] the Chief Justice did provide an outline of the grounds for lawful and unlawful abortion.

> If a doctor honestly believes that a pregnancy should be terminated because to fail to do so would threaten the physical or mental health of his patient and, holding that opinion, he uses an instrument to terminate the pregnancy, he has not committed an offence. This is so even if the doctor's opinion was wrong, so long as he forms the opinion in good faith; and in arriving at his opinion the doctor is entitled to take into account the social circumstances of the patient. That is not to say that a doctor is entitled to terminate a pregnancy solely because of adverse or economic conditions, but that he may take them into account together with all other relevant circumstances pertaining to the patient in arriving at a genuine opinion as to whether continuation of the pregnancy poses a threat to her health.
>
> A qualified doctor is fully entitled to carry out what has been referred to in this trial as a therapeutic abortion, that is ,to terminate a pregnancy which in his medical opinion constitutes a threat to the patient's physical or mental health. The law is not so inhumane as to prohibit it, nor is the law so arrogant as to disregard the professional opinion of a doctor honestly arrived at. The termination of pregnancy only becomes unlawful, the abortion only becomes criminal, if the doctor does not form an opinion at all or forms his opinion dishonestly, and on that the prosecution must satisfy you [the assessors] beyond all reasonable doubt.
>
> Under the law in Fiji it is illegal to terminate a pregnancy solely because of the risk of a deformed baby being born. It is sometimes called an eugenic abortion, and under the law as it stands it is not permitted, unless the doctor comes to the conclusion from his consultations with his patient that the risk of a deformed baby being born constitutes a threat to the patient's physical or mental health. If a doctor did form that opinion in good faith and terminated the pregnancy on that ground he would not have committed an offence, even if his opinion was wrong.

If we summarise this, we see that a doctor is required to act in good faith (honestly and reasonably) and should use the following criteria in each case.

- The physical and mental health of the pregnant woman: can this woman physically or psychologically go through with this pregnancy?
- Her social and economic circumstances: if this woman has a child what will it do to her life? Can she afford to raise the child?
- Whether the foetus is normal: if the foetus is deformed, can this women physically and psychologically cope?

The court said that no circumstance by itself was enough, and that the doctor had to take all circumstances into consideration together. It ruled that if a doctor did an abortion in good faith honestly believing that the mother's health was in danger, the abortion was legal, and was covered by the exceptions to the law against abortion. In 1976, therefore, the case of *R v Emberson* set a precedent through the common law, and made the law more flexible in permitting a lawful abortion.

In another Fiji case, *State v Mudaliar (1992)*,[9] the court did not analyse the law, but referred to the practice of treating the woman as an accomplice under Section 21 of the *Penal Code*. Current practice is that if a woman gives evidence on behalf of the State, she herself will be immune, protected from prosecution. The reasoning behind the immunity is that one must strike at the "mischief" (the act of abortion) that the legislation seeks to cure. This is why most prosecutions are aimed at the person who practised the abortion, but not the woman who sought the illegal abortion. She is required to give evidence against the practitioner and will not cooperate unless she is given immunity.

In a 1993 case, a Fiji High Court acquitted the doctor concerned.[10] The judge said that the laws were outdated; they laid down penalties for unlawful abortion, without saying when an abortion became unlawful. The judge made some interesting comments implying that the law discriminated against poor women. He said too that if a doctor "honestly believed that a pregnancy should be terminated because failing to do so would threaten the physical or mental health of his patient, he had not committed an offence". The question of what was good faith in carrying out the abortion was a matter for the courts to decide. Although this case failed to give women automatic rights to safe and accessible abortion, it shows that courts are willing to extend the exceptions along more flexible lines.

CASE *The State v Indar Wati (1993) Fiji*[11]

Facts Under s. 172 of the *Penal Code*, a woman was charged with procuring an abortion on a young, unmarried woman, who testified that she was poor and that, if she had been forced to have the baby, she would have been shunned by her Indo-Fijian family and would never have been able to marry. The defendant was not paid for the abortion but did it out of friendship because the young woman was desperate.

Decision and comment The court gave the defendant a suspended sentence. It appeared to take into consideration the fact that the young woman would otherwise have suffered the social stigma of being an unmarried mother in a community that did not accept pregnancy outside marriage.

Cook Islands, Nauru, Vanuatu and Western Samoa seem to interpret abortion laws quite liberally. In Nauru in 1976, five legal abortions were recorded.[12] In 1977, in Western Samoa, 195 abortions were carried out, but the figures do not distinguish between therapeutic and other abortions. In 1990, 17 legal abortions were carried out in Rarotonga Hospital.[13] As New

Zealand law strongly influences Cook Islands laws, it is highly likely that any case involving abortion would include consideration of the mental and physical health of the mother. In 1992, the Vanuatu Public Prosecutor dealt with four abortion-related offences. In two cases, the prosecution decided not to proceed. In another, a husband had beaten his pregnant wife so badly that she aborted; he was given three years imprisonment.[14]

Kiribati, Tuvalu and Tonga take a less liberal attitude. In Tuvalu and Kiribati, legal sources say that a legal abortion will be conducted only if it is necessary to preserve the physical health of the mother. Tonga seems to allow no exceptions to the law; legal and medical sources appear to believe that no doctor or hospital would perform an abortion in any circumstances.

Medical policy and practice

We have seen that the law may allow doctors to perform abortions in some circumstances. But how do doctors and hospitals interpret these circumstances?

According to a report on the 1993 Fiji Annual Medical Conference,[15] 62% of doctors responding to a survey were generally against abortion but most of these said they might change their minds in individual cases. The doctors who agreed with legalising abortion (38%) said they would carry out such an operation up to the twelfth week of pregnancy. However, in 1994, the Fiji College of General Practitioners issued a policy statement showing that *Medical Therapeutic Termination of Pregnancy (MTOP)* could be carried out up to 27 weeks; the termination must be done in "good faith" and that continuing the pregnancy would involve serious risks to the health of the woman.[16]

Government hospitals in Fiji require the opinions of three doctors before a legal abortion can be done. These doctors must agree that the abortion has to be done for the mother's health. If the woman is married, Government hospital authorities will get the husband's agreement first. This is not required by law; it is a matter of policy, to protect the hospital against a court action claiming that the husband did not know about, or did not want, the abortion. Doctors in private practice do not appear to be bound by these requirements, but it still seems more difficult in Fiji to get a hospital abortion than in any country in our region except Tonga.

Table 6.1 Abortion penalties in the region

Country	Penalties
Tonga	A person who attempts to procure a miscarriage is liable to 7 years prison. The aborted woman is liable to 3 years prison, compared to 7 years in Fiji.
Tuvalu, Kiribati, Solomon Islands	The penalty is life imprisonment. The law is otherwise similar to that of Fiji.
Cook Islands, Western Samoa	A person who causes the death "of any child who has not become a human being" is liable to 7 years prison. The aborted woman is liable to 3 years.
Vanuatu	"No person shall, when a woman is about to be delivered of a child prevent the child from being born alive." The penalty is life imprisonment. The penalty for a woman who "intentionally procures her own miscarriage" is 2 years prison.
Nauru	The legislation prohibits abortion but its interpretation seems quite liberal in practice.

Table 6.2 Legal abortion in the region

Completely illegal	Illegal unless the mother's physical health is in danger	Illegal unless the mother's physical or mental health is in danger
Tonga	Kiribati Tuvalu	Fiji Cook Islands Nauru Solomon Islands Vanuatu Western Samoa

INFANTICIDE

What is infanticide?

We have just discussed legislation, policy and practices regarding abortion that intentionally ends a pregnancy before the foetus can survive outside its mother's womb. Once an infant can survive outside its mother's womb, it is always regarded as a person. Therefore, killing such a child is considered as murder. However, in certain circumstances, killing a child may be regarded as infanticide. Generally, the word means killing an infant, but legally it means that a mother kills her infant while suffering from physical and mental depression following the infant's birth. This is an illness, often called postnatal depression or postpartum depression; it is recognised as being due partly to the physical changes in the mother's body, and partly to the strains that additional responsibilities place on the mother.

Legislation

The Fiji *Penal Code*[17] defines infanticide as follows:

> 205. Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child ... notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of a felony, to wit, infanticide, and may for such offence be dealt with and punished as if she had been guilty of manslaughter of the child.

So if a woman kills her child of 12 months or less, the court may decide that the killing was due to postnatal depression, and may find her not guilty of murder but guilty of the lesser crime of manslaughter, which in this case is called infanticide. The maximum penalty for manslaughter (and therefore infanticide) is the same as that for murder: life imprisonment.

The legislation is similar in Tuvalu , Kiribati, Cook Islands, Western Samoa, Solomon Islands and Tonga.[18] The only variation is that, in Cook Islands, the maximum age of the child is 10 years, not one year as in other countries. The maximum term of imprisonment is three years but if the jury thinks that the mother was suffering from postnatal depression, she may be acquitted.

In Vanuatu, infanticide is not a specified crime. A woman who kills her baby would therefore presumably be charged with murder. Prosecutors say they would not charge in a matter involving postnatal depression, but women should not have to depend on the views of a particular prosecutor. The legislation should include a charge of infanticide as an option to charges of murder and manslaughter.

Incidence and sentencing of infanticide

In our region, small but significant numbers of infanticide cases are reported. In Fiji[19] infanticide seems more common among indigenous Fijians than among other ethnic groups, and is usually linked to great economic and social pressures, the shame of extramarital pregnancy, and lack of support from partners and families. Fiji recorded 14 cases between 1982 and 1993, an average of just over one per year, but this may not reflect the true picture. On the one hand, a mother or family may manage to conceal a pregnancy and the birth and death of an unwanted infant; on the other hand, a mother who kills her baby is usually charged with murder. To reduce the charge to infanticide, a court must be convinced that the mother was suffering from a postnatal disorder. If they are not convinced, they would find the mother guilty of murder, and the case would be counted as murder in statistics. We have already studied some of these cases in Chapter 5.

Thus it is not possible to assess how many women actually commit infanticide. However, of five cases prosecuted in the High Court of Fiji since 1988, only one of the accused was actually imprisoned; the others were given suspended and/or probation sentences. All were poor, all lacked family support and some were also battered wives.[20] In *The State v Mala Wati (1993)*[21] 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, and was the sole support of her seven children. She had been:

> ... bathing her baby ... inside her squatter dwelling. The baby was hungry. The accused, due to her financial predicament, found it difficult to feed her baby regularly. The baby was crying and writhing in hunger. The accused had no food to feed the baby. In anger she lost control of herself and strangled her child until he was dead.

In this case, the court accepted that the woman had committed the act because of postnatal depression, and because of the distressing circumstances of her life. The woman pleaded guilty to infanticide, and received a suspended prison sentence. A Solomon Islands case also shows understanding of the stresses that drive women to commit infanticide.

CASE *R v Salome Irabaako (1991) Solomon Islands*[22]

> A young woman gave birth alone. She said that she had given birth standing up, that the baby had fallen and died from head injuries. She had buried the baby in a bag. The medical evidence said that the baby's death was due to deliberate injuries. The High Court accepted that she must have been mentally disturbed to injure her baby and gave her 12 months imprisonment, including six months suspension.

Cook Islands records show one recorded infanticide case, in 1980; the woman was released on probation. In 1993, Kiribati recorded a case in which a woman who killed her child was imprisoned for manslaughter. Tonga police reports reveal that from 1987 to 1991, there were three cases of

concealment of births and one of infanticide; there were no records of prison sentences and lawyers say that judicial attitudes towards infanticide are reasonably lenient. In 1992, in two separate cases, the Vanuatu Public Prosecutor chose not to charge the women with murder because it was obvious that both were suffering from postnatal depression. In Western Samoa, in 1983, a male jury decided that a woman who had killed her baby was guilty of murder. Later the same year, in a similar situation, another jury found a woman guilty of infanticide, although she had been charged with murder.[23] Also in Western Samoa, a 1992 account of infanticide showed that an unmarried girl had abandoned her new baby because she was afraid of her family.[24]

Throughout the region, courts may recognise clinical postnatal depression as a cause of infanticide. When they do recognise this, sentencing may be quite lenient. However, in practice, the woman must be able to prove through the expert opinion of a psychiatrist that she did not really understand the consequences of her act at the time she committed it. If there is no clear evidence that the woman was suffering from postnatal depression, and if there is clear evidence that the woman had intended to kill her child, or if the child is over 12 months old, the prosecution has no legal grounds on which to reduce the charge from murder to infanticide. It cannot officially take into account the woman's social and economic situation. This again weighs more heavily on women without medical advice and family support.[25]

PROSTITUTION

What is prostitution?

Prostitution is the act or practice of participating in sexual relations for money or other goods. A prostitute is therefore a person who has sexual relations for money, clothes, alcohol, drugs and other gifts, although only prostitution that earns money is illegal. Both men and women may be prostitutes, but in this section we will focus on women.

Why do women become prostitutes? A Fijian researcher has stated that some Fijian women are under such pressure to survive that they take up prostitution for food and clothing for themselves and their families. That they do this out of pure necessity reveals "the increasing economic pressures to survive in a social system which can no longer exclusively sustain them."[26]

Currently women make up less than 30% of the paid labour in our region, and employed women work at the bottom of the employment and economic ladder. When they resort to prostitution in order to survive, prostitution laws punish them for not being able to get and keep a wellpaid job.

Legislation and sentencing

Historically,[27] the British legal system punished prostitutes very severely. Promiscuous women were often committed to "madhouses" and some were burned as witches.

Major nineteenth century beliefs were that women were sexually passive, and did not want to share actively in the sexual act. A woman's primary function was motherhood, so being a prostitute, or even enjoying sexual intercourse, was a type of sickness. If a woman did not fit into the roles that the law and society thought appropriate, she was punished. If a mother had a sexual relationship outside marriage, she lost custody of her children. If a "loose" woman was raped, her rapist was not convicted. A prostitute was harassed, prosecuted and imprisoned.

The legal system was (and still is) the mechanism through which society punished the expression of sexuality outside marriage, regardless of the economic circumstances of the offender. As we may see in custody cases and sexual assault trials, nineteenth century ideas and practices differ little from the notions of appropriate female behaviour today.

Throughout our region, prostitution is a criminal offence, the penalties for which range from fines to imprisonment. Cook Islands, Fiji, Kiribati, Solomon Islands, Tonga, Tuvalu and Western Samoa have similar and gender-neutral legislation. In Vanuatu, however, only persons who secure the prostitution of another person can be charged with a criminal offence; the maximum penalty is five years imprisonment.

The Fiji legislation applies to the persons listed below:

- The prostitute who loiters or solicits in public places for the purposes of prostitution.
- The pimp (male) or madam (female) who organises the prostitute and who earns money from the prostitute's work.
- Any male person who assists a prostitute to ply her trade.
- Any person who keeps a brothel or who allows prostitution to be carried out on his or her premises.[28]

The most notable aspect of the legislation is that prostitutes can be charged, taken to court, imprisoned or fined for prostitution but their clients are not committing a criminal offence (unless the prostitute is under the age of consent, or an "unnatural act" is committed.) In our region, there is little prostitution obviously organised by pimps and madams. There are male and female prostitutes, but most are women, and in both cases their clients are usually men. Despite the gender-neutrality of the legislation, it indirectly discriminates against women.

Within our region, however, few prostitutes have been formally charged with prostitution. In Fiji up to 1996, prostitutes tended to appear in court on charges of theft from clients, and there has been perhaps a silent acceptance of prostitution as a necessary evil.

STORY *She took off with all my money*[29]

An overseas participant at a workshop received his allowance for hotel and living expenses for two weeks. He went into Suva, got drunk, picked up a girl and took her back to his hotel. When he awoke, the girl had disappeared with all his money. The workshop participants reacted in different ways to his story. The men were sorry for him, but the women thought that it was his own fault; if he picked up a prostitute, he should expect her to make her living as best she could. Nobody appeared to be worried about the legality of prostitution.

Prostitution: whose crime?

CONCLUSION

In our discussions of women and the three crimes of abortion, infanticide and prostitution, we have found several anomalies within the law.

The law is influenced by religious beliefs and social attitudes towards mothers and children. Laws making abortion illegal and difficult to obtain are really laws discriminating against poor women because rich women will always be able to pay for a competent abortion. Poor women have to resort to amateur abortions that endanger their lives.

Abortion and infanticide happen because women have little control over their own fertility and because of the social and economic conditions of their lives. Both abortion and infanticide are criminal offences, but the law and society seem more sympathetic to a woman who kills her living child than to a woman who aborts her unborn foetus. Here is an obvious contradiction.

In prostitution laws, also, we find a lack of logic. The law sees prostitution as a necessary evil: men need the service, but society disapproves of it, so it can exist only if the women who provide it are punished. Hypocritical double standards discriminate against women, and again weigh most heavily on poor women.

So what can be done? As far as abortion is concerned, doctors in most Pacific Island countries do have wide discretion to conduct abortions, although government doctors in Fiji are more restricted than most. However, there are no regulations requiring doctors to counsel the patient or to provide adequate aftercare, or, for that matter, to help her with family planning. A code of ethics is needed to give doctors clearer guidelines, including the extent to which their advice and actions should take into consideration the patient's social and economic situation.

There is a similar need to take into account the social and economic situation of the woman who kills her living child. In Fiji, the Office of the Director of Public Prosecutions has recommended that a new defence of "diminished responsibility" should be introduced into the infanticide legislation. By taking social stresses into account, the proposed changes accommodate all concerns and better reflect the realities of women's lives.

7

Marriage and separation

WHAT THIS CHAPTER IS ABOUT

In the first three chapters we discussed the general situation of women in the law, their rights as women and as human beings; we included constitutional rights and the basic question of rights to land. In Chapters Four to Six, we focused on criminal law: the rights of women who are sexually or otherwise criminally assaulted or who commit gender-specific crimes. Chapters 7 to 12 will deal with women and marriage, so we will begin by a general discussion of marriage and separation.

WHAT IS MARRIAGE?

In Fiji, the current legislative definition of a legal marriage is "the voluntary union of one man to one woman to the exclusion of all others."[1]

This definition applies in other Pacific Islands. Except in Vanuatu custom marriages, no man may have more than one wife at a time, and neither law nor custom permits a woman to have more than one husband at a time.

History of marriage in the law

By using the word "union," the definition suggests that man and wife are one, and this has been the common law view. In the words of the famous jurist, Sir William Blackstone:

> The husband and wife are one person in law ... By marriage the very being or legal existence of a woman is suspended, or at least it is incorporated or consolidated into that of the husband, under whose wing, protection and cover she performs everything ...[2]

Once a woman married, she immediately stopped being an individual because her person was blended into that of her husband. She left the protection of her father and came under the protection, care and control of her husband. We list below the consequences of this legal principle.[3]

- A wife could not hold property in her own name.
- A husband was responsible for all contracts and debts entered into by his wife.
- If husband and wife separated, the husband had absolute rights to custody of the children, and continued to control his wife's financial and property matters.
- A wife could not sue anyone or be sued by anyone in her own right: she was a non-person in the law.

- A husband had to sue or be sued on behalf of his wife if she committed a civil wrong or if someone committed a wrong against her.
- A husband and wife could not sue each other in civil law.
- A husband and wife could not be forced to give evidence against each other, because this would be self-incrimination.
- A husband could sue another man for having sexual relations with his wife, but the wife could not sue her husband's sexual partner.
- A husband could not be charged with the rape of his wife.

This is how an American folk-song expressed it:

> Oh, hard is the fortune of all womankind.
> She's always commanded, she's always confined,
> Controlled by her parents until she's a wife,
> Then a slave to her husband for the rest of her life.[4]

The principle was illustrated in the United Kingdom by the practice of women giving up their family name, and taking the family name of their husband. Women are not required by law to take their husband's name, nor are children required to take their father's name. Taking a husband's name is a Western practice that did not exist among Pacific Islanders or Indo-Fijians, and many Western women have abandoned it.

Another practice that emphasised the importance of marriage, and the need for a family to find someone to support its daughters, was that under colonial British legislation, one person could sue another for breach of promise to marry. It was available both to men and to women, but was used mostly by fathers acting on behalf of daughters to get compensation if a man had agreed to marry and then changed his mind. This provision no longer exists in Pacific Island legislation.

Pacific Island legislation has more or less abandoned the one person principle, but remnants of it are still reflected in the common law. One example of this survival is that before the passing of the United Kingdom *Matrimonial Causes Act 1857*[5] a husband could bring an action for damages against his wife's seducer, adulterer or rapist, even if the wife had previously deserted him. The wife had no such rights but, as we have seen in Chapter 4, some Pacific Islands make it still possible for a husband to sue someone for the loss of a wife's consortium. Further examples are listed below.

- The cycle of dependency on men continues through laws preventing easy access of women to maintenance and property.
- In some Pacific Islands, a husband may not be charged with the rape of his wife although United Kingdom courts in 1991 accepted that he could be.[6]
- Spouses may legally be ordered back into a relationship that has broken down. (Later in this chapter we explain the process called the restitution of conjugal rights.)

In the 1860s, Frances Power Cobbe[7] described marriage as an expression of male power and privilege that effectively made theft and violence acceptable. Marriage made theft acceptable, because the law gave all the wife's property to her husband, without guaranteeing that he would support her in return. It made violence acceptable, because it ignored or condoned wife-abuse by refusing to question the husband's absolute authority. How far have we progressed in more than 100 years?

Legality of marriages

In Fiji and in most other countries of our region, a marriage is valid only if it is performed voluntarily between one person and another person of the opposite sex. No force must used to make a person marry, and all countries forbid a man to have more than one wife at a time, although Melanesian custom permits polygamy.

Fiji legally recognises only one form of marriage. The marriage must be solemnised in a defined procedure in the presence of witnesses and a marriage officer authorised by the State. It must then be recorded in the *Register of Marriages*. Similarly, Cook Islands, Kiribati, Nauru, Tonga, Tuvalu and Western Samoa recognise only marriages conducted in a manner prescribed by legislation. We will discuss later the legality of religious and custom marriages, which these countries do not generally recognise.

Minimum legal age and consent to marriage

In most countries, people must reach a certain age before the law assumes that they are old enough to understand what they are doing by consenting to marriage. Below this age, they cannot marry, even if their parents want them to. The minimum legal age for marriage in Fiji is 16 for females and 18 for males, but they cannot marry unless their parents or guardians agree. Both males and females need this permission until they reach 21.

As Table 7.1 shows, Cook Islands, Fiji, Vanuatu and Western Samoa set different minimum legal ages for boys and girls to marry with parental consent. The discriminatory legislation in these countries seems to be based on the view that boys need more protection in this matter than girls do, and are less well prepared to take responsibility in marriage. A minimum legal age of 18 for both boys and girls might raise the age of consent to marriage above the age of consent to sexual intercourse, but it would give them some protection from arranged or forced marriages. Such marriages are very common among Indo-Fijian women, and exist also in other traditional societies in the Pacific.

Cook Islands, Nauru, Vanuatu and Western Samoa set different minimum legal ages of consent for girls and boys to marry without parental approval. The minimum legal age for girls is usually lower than the age for boys. If parents do not give their consent to marriage, the young people may make written application to a Magistrate's Court, seeking permission to marry,

provided that they can show that parental approval is being unreasonably withheld.[8] In Fiji, this may happen only when the boy and girl are under 21 but over 18 and 16 respectively. The Magistrate's Court will notify the parent to attend the Court and to explain the reason for the refusal. All parties have a right to speak. If the Court believes that the parent does not have a reasonable ground for refusing, the Court itself may consent to the marriage.

CASE *R v Registrar General: ex parte Abdul Hamid (1985) Fiji*[9]

Facts A Hindu girl and a Muslim boy under 21 sought to marry without the consent of the boy's father. The couple obtained the consent of the Magistrate's Court on the ground that their parents were unreasonably withholding consent. Because of the Court's administrative mistake, the father did not receive notice of the hearing and therefore was not present to state his objections. The Registrar of Marriages married the couple, but the father sued the Registrar, saying the marriage was invalid without parental consent.

Issue The question for the High Court was whether the father had a right to be heard before the Magistrate's Court decided to give consent to marry under s. 13 of the *Marriage Act*.

Decision The case went from the High Court to the Court of Appeal, which said that the father was entitled to be heard and to make his objections. As the father had not been heard, the Magistrate's consent was not proper. However, the lack of notice was a mistake, not a deliberate act, and the fact that the proper procedures had not been followed did not make the marriage illegal.

Table 7.1 Minimum legal age

	With parental consent		Without parental consent	
Country	male	female	male	female
Cook Islands	18	15	21	19
Fiji	18	16	21	21
Vanuatu	18	16	21	21
Western Samoa	18	16	21	19
Kiribati	16	16	21	21
Nauru	16	16	18	16
Tuvalu	16	16	21	21
Solomon Islands	15	15	18(21)*	18(21)*
Tonga	15	15	18	18

* A Solomon Islands national and an alien need written consent to marry if one party is under 21.

When is a marriage not lawful?

Some situations may nullify a marriage, make it invalid or unlawful from the beginning. This state of being invalid is called a nullity of marriage. It is quite different from a divorce, which may happen when a lawful marriage

comes to an end; when a court declares a nullity of marriage, this generally means that the marriage was invalid from the beginning. Table 7.2 sets out these situations.

It is unlawful to use violence, threats, coercion or blackmail to force anyone to marry. Forced or coerced marriages are very common if women have little power to choose their own marriage partners.[10] They occur frequently among Indo-Fijians but are rarely challenged in court because many girls do not know that forced marriage is unlawful, or are unwilling to pay the price of being shunned and isolated from their families.[11] Two cases illustrate this.

Table 7.2 Situations that may nullify a marriage

Situation	Comment
Lack of proper consent	We have dealt with this above.
Mistake or insanity	If someone marries the wrong person by mistake, or at the time of the marriage was not mentally capable of deciding to marry, the marriage may be nullified.
Not following proper procedures	If anyone deliberately did not follow the proper procedures, a marriage may be declared invalid. However, if procedures were not followed because of a mistake or ignorance, the marriage would be lawful.
The parties are too closely related	Immediate blood relatives (father, mother, daughter, son, sister, brother) are not allowed to marry each other. Different cultures may have different views about other relationships.
Bigamy	Unless the law recognises customary polygamous marriage, bigamy is a crime and automatically cancels the later marriage.
Incapacity to consummate	This means that one spouse is incapable of having sexual intercourse with the other. It is difficult to prove, and often ends in divorce rather than in nullity proceedings.
Undue influence and duress	If a person has been forced to marry against his or her will, the marriage may be declared invalid.

CASE *Hirani v Hirani (1982) United Kingdom*[12]

Facts A Hindu girl was told by her parents to break off her relationship with a Muslim boy. The parents, on whom she totally depended, arranged a marriage with a Hindu boy whom she had never seen. They said in effect that she had to marry their choice, or leave the family. The daughter married the boy chosen by her parents, lived with him for six weeks, then left him for the Muslim boy. She applied to have her marriage declared null and void.

Issue When the girl married, was she so influenced by her parents that she was not acting of her own free will?

Decision The Court of Appeal said that the girl was afraid of her parents. It said that this was "as clear a case as one could want of the overbearing of the will of the petitioner and thus invalidating or vitiating her consent". The Court ruled that she had been forced to marry by threat of isolation and loss of financial and parental support; her marriage was invalid and therefore a nullity.

CASE *Nisha v Aziz (1981) Fiji*[13]

Facts Nisha was a doctor of medicine. Her marriage was arranged by the families concerned. After the legal marriage, Nisha refused to go through with the religious ceremony. She applied for a dissolution and nullity of marriage on the grounds that she was forced to marry by fraud and duress, with threats of assault. She said she was consumed with fear that if she did not marry the man whom her parents chose, they would have nothing more to do with her. Her husband said that the fault was Nisha's because she had refused the religious marriage. The marriage should therefore be dissolved on his application, not hers.

Issue This case concerned the consent provision of Section 6 of the *Matrimonial Causes Act*. The court said that if Nisha's consent was obtained by duress, if she was "overborne by genuine or reasonably held fear of immediate danger to life and limb" the marriage would be invalid for lack of real consent. Were her parents' threats sufficient to overbear her free will?

Decision The court said that as Nisha was economically independent, she could have chosen not to marry. Furthermore, her father had threatened to assault her, but he did not, so she was not in immediate danger. Therefore her application to nullify the marriage failed.

Comment The court decided that Nisha did not have to consent to the marriage as she was financially independent of her family. This case demonstrates that the objectivity and neutrality of the law may have disastrous consequences for women because it does not make decisions by looking at the circumstances of women's lives. The definition of "immediate danger to life and limb" excludes everything except the threat of immediate physical harm. The court did not appreciate what the threat of being cut off from family and shunned by the community can mean to an Indo-Fijian woman; fear of this could have made Nisha incapable of making a free decision.

In both cases, the women had the legal knowledge and support to apply for a declaration of nullity of marriage. Many Indo-Fijian women either do not know that this is possible, or are afraid to try. Instead, they leave their husbands and then wait for five years separation to apply for a divorce.

We should remember that if a marriage is declared invalid, it never existed in law. Divorce therefore can be preferable to a declaration of nullity. Whether the relationship was long or short, women have to suffer the shame and other social consequences of having been illegally married; often they are regarded as fair game or unsuitable for a respectable marriage. If the relationship has lasted a long time, the decree of nullity has the following effects.[14]

- The children may be regarded as illegitimate.
- The woman may lose the legal rights of marriage, including the right to claim maintenance and the right to claim property from a husband.

Clearly, therefore, women do not make lightly a decision to seek a decree of nullity.

Are religious, custom and de facto marriages lawful?

Cook Islands, Fiji, Kiribati, Nauru, Tonga, Tuvalu and Western Samoa do not legally recognise custom marriages, common law or *de facto* marriages, polygamous marriages or religious marriages that are not registered. In these countries, it is therefore quite common for the same two people to marry each other in up to three different ceremonies: civil, custom and religious. In Western Samoa, however, in 1953, the High Court decided that a customary marriage was legitimate. The decision was confirmed in New Zealand in 1961.[15]

Indo-Fijians call legally registered marriages "court marriages" to distinguish them from religious ceremonies. Most communities have religious ceremonies of marriage as well as to the legal ceremony that must be conducted by a certified marriage officer. In practice, many religious leaders are also certified marriage officers and may conduct both legal and religious ceremonies.

Muslim Indo-Fijians often have the *nikah* (the Muslim marriage contract and ceremony) without legalising the marriage. This might happen if a second marriage is taking place and one of the parties is still legally married to another person. Unfortunately, because the formal law does not recognise religious marriages, a woman who participates in *nikah* does not have the normal protection of the law: if, for example, she is deserted, she may not claim maintenance.

In *de facto* marriages, the parties simply live together without any religious, legal or customary ceremony. This practice is widespread but is not recognised as a legal marriage; we will consider it in a separate chapter. In this section, we will focus on custom marriages.

In a custom marriage, there is usually some form of customary ceremony or ritual. There may be no legal requirements but there are customary practices that must be followed before the community will accept that the parties are married. Both Solomon Islands and Vanuatu legally recognise

custom marriages as valid. These countries provide for registration of custom marriages but both legally recognise custom marriages even if there is no registration.[16]

Women who have had a custom marriage and then seek maintenance upon separation will get an order if they can prove an appropriate legal ground. Unfortunately, neither country sets out the requirements for a custom marriage to be valid. The legislation merely requires the marriage to be performed in a place and manner conforming to local custom.

CASE *Balou v Kakosi (1984) Solomon Islands*[17]

A woman who had been married under custom applied for maintenance. The husband said that he did not have to support her as he had not married her legally. He said the legislation stated that only "married women" could apply for maintenance. The High Court ruled that customary marriage was recognised as lawful by the formal legal system. Therefore the provisions of the *Affiliation, Separation and Maintenance Act 1971* applied also to parties married in custom and the woman was entitled to maintenance under the Act. Her custom marriage was therefore legally recognised.

A man and a woman married to each other under both custom and civil law may get a custom divorce, but they are still legally married to each other. They will need to get a divorce under civil law as well. Similarly, if they get a civil law divorce, they may need also a custom divorce. One of the dangers of having two separate systems of marriage is that there is no legislation preventing a person from marrying one person under one system and then marrying a different person under another system. There have been cases in Vanuatu where a person married in custom has also contracted a civil marriage with another person, thereby legally marrying two different persons under two systems.[18] This can create complex family problems and enormous difficulties, especially for poor women who need to prove lawful marriage in order to obtain maintenance.

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, including, as we will see in later chapters, the right to claim maintenance and matrimonial property. If the formal marriage laws do not recognise unregistered marriages, the wives and children of that relationship are not entitled to the protection of the legislation.

Consortium and the matrimonial home

Consortium means living together as husband and wife with all rights, duties and events arising from that relationship.[19] Until the 1980s, in both Britain and New South Wales, consortium was a right given by the law to the husband only. Consortium included "housework and child care" as well as the wife's "love, affection ... and sexual services"; a husband could sue a person responsible for causing him to lose these things. Under the current

common law, each spouse now owes consortium to the other. Therefore a husband has now no common law right to do the things that he legally used to be able to do.

- He cannot prevent his wife from leaving the matrimonial home.
- He cannot kidnap his wife and keep her locked away.
- He cannot demand that his wife cook, clean and do housework for him unless he is prepared to do the same for her.
- He cannot demand that his wife have sexual intercourse with him.

The common law says that neither husband nor wife has absolute rights. Both must act reasonably, for example in the mutual right to choose the matrimonial home. Often, however, husband and wife cannot agree on where they want to live, especially in communities where after marriage the husband and wife are expected to live with the family. The situation arises also where husband and wife come from different ethnic backgrounds, and in countries where foreign husbands do not have residence rights and cannot work. In all cases, the pressures may result in maintenance or divorce actions.

What does the law say about where the parties should live once they are married?

CASE *Sharifa Begum v Amjad Hussein (1989) Fiji*[20]

Facts W was living with H and his family. She was very unhappy but her husband refused to live in a separate house with her. The real problem, defined by the Magistrate's Court, was "the presence of the mother-in-law in the matrimonial home". W left the house and filed for maintenance on the grounds of constructive desertion, persistent cruelty or a husband's wilful neglect to maintain his wife.

Issue To obtain maintenance, W had to prove that H was at fault and that was why she had to leave the matrimonial home. But H's only fault was that he refused to live separately from his mother. The question for the court was whether the husband or the wife had a right to choose where they should live, because that would determine whether desertion had occurred.

Decision The Magistrate's Court said that neither a husband nor a wife should dictate where the parties should live. However, it denied W maintenance on the grounds that it was unreasonable for her not to live in the matrimonial home with H and his mother. If H wished to stay with his family, and W chose to leave, she would not get maintenance.

Comment The decision by the Magistrate's Court effectively reinforces a husband's right to choose the matrimonial home. However, in the similar English case of *Munro v Munro*[21] the court held that it was unreasonable for a husband to insist that he and his wife should live with his mother. In Fiji, the Magistrate's Court was no doubt influenced by cultural considerations; the Indo-Fijian community expects a wife to live with her husband's family. If W had appealed to a higher court, she might have succeeded in proving desertion, as the following case shows.

CASE *Raj Mati v Amika Prasad (1959) Fiji*[22]

Facts W had left H because she was unhappy with her in-laws. She said she would return to him if he agreed to live away from his parents. She sought a maintenance order against H on the grounds of desertion and wilful neglect to maintain. The magistrate said that W was unreasonable in expecting H not to live with his parents and she therefore could not prove desertion. W appealed against the magistrate's decision.

Decision The Court of Appeal said that it was unreasonable to assume that because a wife had agreed to live with her in-laws, she could not change her mind. It was not unreasonable for her to wish to set up an independent home. The case was sent back to the lower court for rehearing with this in mind.

Despite the ruling of the higher courts, lower courts still have problems dealing with the issue of desertion in this context. The higher courts of the United Kingdom have been slightly more flexible. The common law in the United Kingdom is that generally the husband has the last word on choosing the matrimonial home since he is the breadwinner[23] but this is not always the case; the wife can have the final say if she is the main breadwinner.[24] The emphasis on who is the main wage earner is unfortunate, as men usually earn more money, and work is still divided according to gender. This means that as long as men do paid work outside the home and women do unpaid work inside the home, a husband will choose the matrimonial home.

Ultimately, as we have seen, courts will apply the reasonableness test: what would reasonable people be likely to do? Again, any particular court's view of reasonable behaviour will be influenced by personal and local attitudes. However, countries that have signed the United Nations Women's Convention are obliged by its Article 15(4) to give men and women the same legal rights relating to the movement of persons and the choice of residence and domicile. Therefore, in countries like Fiji and Vanuatu, a woman in a case like that of *Sharifa Begum v Amjad Hussein* above may now argue that a court decision has breached Article 15(4).

SEPARATION

When we marry, most of us do not think about separation (although in a civil marriage under French law, the registrar reads aloud to the couple the entire civil code relating to marriage, separation and divorce before they sign the register). Experience teaches us that married couples often do separate, and in this section we will discuss how separation affects the rights of married women.

By separation, we mean that husband and wife no longer share a life together. To be legally separated, they must live apart from each other, usually not under the same roof. A court order or decree is not necessary, and many

people do not seek one. However, as we will see, a court order or decree provides some protection.

Separation with a court order: Fiji and Cook Islands

It is possible in Fiji to obtain a formal decree of judicial separation under Section 39 of the *Matrimonial Causes Act*. This is no longer necessary in order to obtain maintenance or a divorce, because when women apply for and obtain an order of custody or maintenance, physical separation is enough to form legal separation. This should mean that they live separate lives, but is usually restricted to mean that they no longer live under the same roof. The provision regarding the one roof principle is contained in the *Maintenance and Affiliation Act*.

> s. 6 No order made under the provisions of this Act shall be enforceable and no liability shall accrue under any such order whilst the spouse in favour of whom the order was made resides with the spouse against whom the order was made and any such order shall cease to have effect if for a period of nine months after it was made the spouses continue to reside together. Any such order shall also cease to have effect when the spouses having lived apart after such order has been made resume cohabitation.[25]

This provision means that a custody or maintenance order may not be made if the parties are still living together under one roof. If an order has been made, once the parties have lived together for nine months, the order will terminate. Problems arise when the parties are more or less separated: for example, they do not share the same bed or have sexual intercourse, but are still living in the same house.

The legislation assumes that if a husband and wife are living in the same house, the husband financially maintains his wife and family. But the assumption is wrong, and can cause much difficulty, particularly for women who cannot leave or who do not want to break up the family. It also means that the period during which husband and wife have lived separate lives cannot be counted in the separation period for divorce.

We will discuss this in more detail in Chapter 8, where we will see that under certain conditions, a court will accept that although the parties are living under the same roof, they are effectively living separately and apart in different households. Some courts have also accepted maintenance applications in such circumstances, under the ground of "wilful refusal to maintain". However, legislation should specifically permit wives and children a clear right to claim maintenance if the husbands are not maintaining them, regardless of where they live.

In 1994, Cook Islands legislation tried to deal with some of the problems arising from separation. Section 523A of the *Cook Islands Amendment Act 1994* makes provisions for separation orders, non-molestation orders and orders regarding exclusive occupancy of the matrimonial home. Either the husband or the wife can apply to the High Court for any or all of these orders. The

Court will grant an order if it believes "that there is such a state of disharmony between the parties ... that it is unreasonable to require them to continue". To come to this conclusion, the High Court must have evidence that there is no chance of reconciliation; this is often provided by a history of alcohol abuse, adultery and/or criminal assault.

Once a Separation Order is issued, if the parties do reconcile at any time, they may apply to the High Court to have it cancelled. On the other hand, because the Separation Order requires that the parties do not live together as husband and wife, if they do cohabit continuously for three months, the order expires whether they want it to or not. If the Separation Order remains in force for two years, an applicant can use it as grounds for divorce. Provisions in the same legislation for non-molestation and occupancy orders would be useful in helping poor and abused families out of intolerable domestic situations, and would affect custody and maintenance claims.

As we will see in future chapters, most countries in our region have very confusing and piecemeal legislation regarding separation, divorce, maintenance, custody and matrimonial property. The *Cook Islands Amendment Act 1994* takes a step towards making the legislation easier to understand and use.

Some discriminatory legal practices

We have just looked at what happens, in theory at least, when a husband and wife separate, and one party applies for a court order. In practice, there are other barriers to separation, and we will first list, and then discuss, some of these.

- The promotion of reconciliation
- Periods of cohabitation
- Restitution of conjugal rights

The promotion of reconciliation

All Pacific courts are required either by legislation or common law to actively promote reconciliation when parties separate, if reconciliation is appropriate in the circumstances.[26] There are no compulsory counselling services attached to the court, and no legislation requiring couples to go to counselling, so the warring parties are expected to solve their own problems.

If within 14 days (using the Fiji example) the parties wish to proceed with litigation, the court is obliged to follow their wishes. However, as a matter of judicial practice, enormous pressure is put on women to reconcile. Courts will often adjourn or postpone maintenance applications for up to three months, hoping that the delay will force reconciliation. When husbands protest about paying interim maintenance while reconciliation is being sought, the court's attitude is that ordering maintenance will hinder the chances of reconciliation. There is little opportunity to recall the matter within that period if reconciliation does not occur. The result is often that the

husband gives nothing to his family. If the wife has no other income, she must reconcile with him, or see her children go hungry, or get money in any way she can.

Magistrates generally do not understand that the legislation provides for short adjournments in order to ensure that the marriage is truly at an end. The aim is not to force one party into reconciliation. A battered wife who returns to her husband may be sentencing herself to death or to a lifetime of violence. Magistrates therefore must make interim awards of maintenance while reconciliation is being sought so that women and children are not left destitute. If a husband truly wishes to reconcile, payments of maintenance should show how sincerely he cares for his family, and how much he wants reconciliation.

We have already seen how the emphasis on reconciliation affects cases of criminal assault. Once again, the social beliefs of magistrates influence the ways in which they interpret reconciliation requirements. In separation and maintenance, as in divorce, the duty to promote reconciliation is influenced by the attitude that a woman's place is with her husband, no matter what the circumstances.

Periods of cohabitation

In some countries, after parties separate, cohabitation of more than three months for the purposes of reconciliation will break up the period of separation, and thus affect the waiting periods for divorce.[27] So if parties separate, reconcile, live together for more than three months and again separate, the initial separation will not be counted in totalling the required period of two years of desertion or five years separation for obtaining a divorce.

STORY *Cohabitation*

H and W separate, and live apart for a year. Then they get back together, and stay together for four months. But they are not happy, so they separate again. W seeks legal advice on whether to wait two years and divorce H for desertion, or wait five years and get a divorce for separation. She thinks that she can count the year in which they lived apart, but her lawyer tells her that the waiting period starts on the day they separated for the second time. As far as the court is concerned, the first separation does not count.

The legislation is gender-neutral, and affects both parties, especially if one or both want to remarry. It particularly affects women for whom remarriage would provide economic security and social support. Waiting out further periods of two years of desertion or five years separation postpones their chances of doing this. We will look at this problem again in Chapter 8.

Restitution of conjugal rights

Fiji, Kiribati, Solomon Islands, Tonga and Tuvalu[28] still allow a party to sue for an order of "restitution of conjugal rights" either through legislation or the common law. Under this law, a husband can sue his wife for an order in court to return to the matrimonial home; a court can order a woman to return to her husband and allow him to have normal marital rights over her.

The remedy of restitution of conjugal rights is provided by legislation and is an extension of the right to consortium. The legislation is written in gender-neutral terms, and in theory, it is a remedy available to both men and women. Theoretically, a legal action can also be brought for damages if the person does not obey the court order. So if a wife does not return home, as ordered by the court, her husband can apply for a divorce, on the grounds that the wife has refused to obey the order of restitution of conjugal rights. The next story provides a step-by-step example.

STORY *Restitution of Conjugal Rights*

1. W, the wife left because H, her husband treated her badly.
2. W did not apply for maintenance to formalise legal separation.
3. H applied for an order of restitution of conjugal rights, and the court ordered W to return to the marital home.
4. W did not return; she therefore breached the order.
5. H applied for, and got, a divorce on the grounds of W's failure to obey the order. W was at fault, so she did not get any maintenance.

W was deprived of certain rights because she did not establish that H's behaviour was at fault in the first place. There are two things that she could have done. First, she could have applied for maintenance at Step 2. Alternatively, when her husband applied for a divorce (Step 5) she could have replied by suing him for divorce as well. The important thing to remember is that women need to get legal advice before leaving their husbands, or as soon as they can after they leave.

Again, however, although both parties may sue each other, men are in a better position. Men are more likely to be able to afford lawyers and are more likely to force an unwilling spouse to return to the matrimonial home. Biases in legal interpretation are also more likely to ensure that a husband succeeds in a case for restitution of conjugal rights. Being legally forced to continue an unhappy relationship is a clear denial of human rights. As well, the provision is dangerous for battered women. Allowing court action for restitution of conjugal rights continues legal principles that the colonial powers brought to the Pacific, and have since discarded. Why should we be stuck with them?

Private separation agreements

So far we have discussed what happens when couples separate, and one applies for a court order of some kind. However, neither party is obliged to do this, and many do not go to court nor make any formal arrangement at all; they just hope that things will get better.

Sometimes the husband and wife may decide to enter into written agreements regarding maintenance, custody, divorce or property settlement. They do not have to go to court to do this, and sometimes they have specific reasons for not wanting to do so. Perhaps the wife cannot go to court to obtain maintenance because she does not have enough evidence to prove that her husband is at fault. Perhaps one party wants to prevent the other from going to court, and will include a clause in the agreement to that effect.

Problems often arise where a woman agrees to sign written agreements and then finds that she has been treated unfairly, because she did not know her rights, or because she did not consult an independent lawyer to look after her rights. There is no legislation governing the rights of wives who sign matrimonial separation agreements. What does the common law say?

CASE *Pilcher v Pilcher (1972) Fiji*[29]

Facts H and W signed an agreement for separation and custody; the agreement favoured H, and included a provision that W would not apply for maintenance. It also included a provision attempting to prevent the court from interfering. When W applied for maintenance, H said that the court could take no action because both parties had agreed to oust the power of the courts.

Decision The Supreme Court said that parties could not oust the jurisdiction of the court: it was not possible for a separation agreement to remove the court's power to look at the family's situation. Further, it was contrary to public policy to oust the court, especially in regard to the welfare of the children. W could apply for maintenance.

Comment W took a great risk in signing an agreement like this. The Supreme Court was prepared to look carefully at the agreement in case it denied the children the rights that were due to them, and found that it did. However, the decision does not necessarily mean that courts will overturn or vary what has been stated in the agreement.

The law is that the court may look at the agreement, not that it will exercise its power to change the rights of the parties. In fact, the common law is that parties have the freedom to enter into contract. Women are assumed to be capable of freely entering into contract as individuals. The courts will not interfere in a written agreement unless there are really compelling reasons to do so (for example, if there was clear fraud or if one party was totally denied all rights.) This seems to be so even if the wife was not given a fair and equitable share of matrimonial property. The outcome of specific cases would depend on the degree of the denial of financial and property rights to the wife. Two cases illustrate this principle.

CASE *Edgar v Edgar (1980) United Kingdom*[30]

Facts W entered into an agreement whereby she accepted property worth about £100,000 from H, a very wealthy man. She had independent legal advice. She agreed not to seek any further lump sum or property from H, even if she later decided to seek a divorce. Three years later she petitioned for divorce,

claimed a substantial capital sum, and at the first level of the court case, was awarded a lump sum of £760,000.

Issue H argued that W was not entitled to claim anything else as she had signed an agreement that she would accept £100,000 and no more.

Decision The Court of Appeal held that W had shown insufficient grounds to justify going back on the original agreement: there was no unfairness in her acceptance of the first sum of money. She knew what she was doing in signing the agreement, had independent advice about it, and therefore could not argue that the agreement was unfair. The Court said that it did not matter that H had all the money and was negotiating from a position of strength. On the facts he had not abused his greater bargaining power. She had sought proper professional advice but had chosen to ignore it.

This case may be compared with another in which the court was prepared to go behind the written agreement and overturn it.

CASE *Sutton v Sutton (1984) United Kingdom*[31]

Facts W signed an agreement in which the home was to be transferred to her. The agreement was not made part of the Court Order on divorce, and attempted to exclude the court. H then refused to transfer the house.

Decision The agreement to transfer the former matrimonial home was held to be ineffective, because it deprived W of her right to apply to the court for a fairer property adjustment order. If W no longer had such a right (for example because she had remarried) the court might have allowed the agreement to take effect. In the present case, the court said it had the right to overturn the agreement, and would give W a larger settlement.

In a Solomon Islands case, the High Court implied that the court could look at a separation agreement, but would not interfere if the wife seemed to have signed it with full understanding.

CASE *Gavin v Gavin (1990) Solomon Islands*[32]

Facts H and W separated and signed a separation agreement. Clause 1 of the agreement said that W was allowed to live as if she were unmarried. Clause 4 said that H would pay W and their child half his salary as long as she did not cohabit with, or remarry, or receive support from another man. If she did, maintenance would be immediately cut. The agreement said nothing about H having a sexual relationship with another woman. When W began a sexual relationship with another man, H cut half the maintenance, saying that she had breached Clause 4. W tried to enforce the agreement. H said that Clause 1 was against public policy and therefore the whole contract was invalid. He was therefore not obliged to pay maintenance under the agreement.

Decision The High Court said that Solomon Islands public policy was to protect the sanctity of marriage but that separations do occur, and maintenance could not be cut without the agreement of both parties. Maintenance could not be cut from the time W started having a sexual relationship, because Clause 1 did anticipate that she might. It might be cut from the time that W began to

live with the other man, but W did not admit that this had happened. The Court then left it to H to negotiate a new amount, thereby in effect saying that the substance of the agreement was valid.

Comment This case is interesting also because under common law, once a woman commits adultery, her maintenance is automatically cut off, even if the former husband has remarried. So this clause actually overruled the common law. (Some countries, like Fiji, have included the adultery rule in their legislation. We will discuss this further in later chapters.)

The Office of the Public Legal Adviser in Suva sees many cases where women have signed agreements because they are told by their husbands, and their husbands' lawyers, that if they go to court they will not get as much, and might get nothing. A woman must seek independent advice before signing any documents on separation, since her husband and his lawyer want to protect their interests, not hers.

The common law position, as interpreted in our region, seems unfair to women, most of whom do not have the bargaining power to negotiate good agreements. They usually agree to small settlements because they are scared that if they go to court, they will get nothing. If recent British common law were held to apply locally, the position of women who have signed separation agreements would be as follows:[33]

- Spouses may enter into private separation agreements about their children and financial affairs.
- If the agreement is unfair and creates undue hardship, the court may change the agreement. (The court would probably act if children were affected, but would be less likely to do so if the agreement merely affected the rights of the wife.)
- An agreement may be attacked on the grounds that the wife signed it because of fraud, duress, undue influence or misrepresentation under the ordinary law of contract. She could argue that she did not know what she was doing, or that she was forced to sign by threats or blackmail. ("If you sign this, I will give you custody of the children. If you don't, I will take them away and you will never see them again.")
- Even if an agreement not to go to court has been signed, one spouse cannot stop the other from going to court. (Our courts will not hear an application if the woman has signed an agreement, unless fraud is proved.)

British cases state that the jurisdiction of the courts to oversee a separation agreement cannot be excluded. In our region, Magistrates' Courts in practice do not overrule agreements, usually because they lack knowledge of recent case developments in the common law.

CONCLUSION

Throughout this chapter we have found a common theme: that marriage and separation laws are rooted in patriarchal and patrilineal systems, and the legislation and common law reinforce men's control of property. Women are part of that property.

Pacific Island countries have inherited the legal systems of their former colonial masters. These systems have been grafted onto traditional systems to reinforce the power of the privileged classes, who thereby have two sources of strength. In some former colonial states, human rights activists have forced the legal systems to change some of their most openly discriminatory legislation and common law practices. Pacific activists need to work together for change in our region.

8

Divorce

WHAT THIS CHAPTER IS ABOUT

In Chapter 7, we discussed marriage and separation: what makes a marriage legal, and the grounds on which a marriage may be annulled. We looked at some of the causes of conflict in marriage, and saw how these might lead to separation. We then discussed separation and some of the problems that separated women face.

The belief that a woman should remain married to her husband can bind a woman to a dangerous man. Remaining in a violent marriage puts the wife and the children of that marriage at serious physical, emotional and psychological risk. Children who grow up in a violent home may grow up to be violent adults; from any point of view, early action that helps children not to become violent is better than imprisoning them later when they become violent. Dealing with the causes of crime costs society less than dealing with the results of crime.

Parents are often encouraged to stay together "for the sake of the children". Parents who are no longer emotionally attached to each other can still maintain a marriage. However, such situations are rare. If the parents know that their marriage has come to an end, but stay together for the sake of the children, living together can be more damaging for children than divorce would be.

Chapter 8 focuses on divorce. This chapter is not meant to suggest that divorce is the easy solution to an unhappy marriage. Obviously, seeking reconciliation and compromise should always the first step and may solve the problems. However, it is useless to try to force a couple to stay in a marriage from which one or both are determined to escape.

In Chapter 8, we will examine the reasons that can be given for divorce, and the legal barriers facing people who want to divorce. We will see how frequent divorce is in our region, and we will suggest that a great deal of pain and expense could be avoided by adopting a new Family Court system that concentrates on reaching fair agreements and does not require one member of the couple to prove that the other has behaved badly.

We will not cover religion and divorce in detail, because the wide range of Christian and non-Christian religions and sects make it difficult to identify any common requirement for the recognition of divorce. The question of custom divorce is also complex. If parties have been married in custom, their divorce must also take place according to custom. If that marriage has been registered, a divorce under the formal system must also take place. In Vanuatu when two persons have been married only according to custom, the marriage can be dissolved only in custom but the annulment and dissolution must be registered.[1] In Solomon Islands, different legislation covers divorce for indigenous and non-indigenous residents. The *Islanders Divorce Act*[2] provides for divorce among people of Solomon Islands descent. Unregistered custom marriages need legally to undergo only custom divorce. Registered custom marriages need to undergo formal divorce in the High

Court. The United Kingdom *Matrimonial Causes Act* (now discarded in the United Kingdom) covers non-islander residents.

Custom divorce occurs independently from civil divorce. There is no way of gathering statistics for customary divorces despite the fact that, in Vanuatu, custom marriages and custom divorces must be registered. No legislation prevents a person from marrying or divorcing one person in custom and another under the formal system. The effects of religious and custom divorce on Pacific women need more research.

THE HISTORY OF DIVORCE LAW

In this section, and throughout the chapter, we will use many technical terms such as adultery; affidavit; collusion; connivance; co-respondent; cross-petition; decree; dissolution; divorce; fault and no fault; matrimonial offence; person cited; petition; petitioner and respondent. We have explained these and other essential terms in the glossary.

A divorce, or dissolution of marriage, is a legal declaration or notice that a legal marriage has come to an end. When the court grants a divorce, the divorced couple no longer owe each other the legal duties of spouses. The legal divorce has very little to do with the emotional divorce, the cutting of the emotional ties between the husband and wife.

The legal divorce usually comes well before the emotional divorce. The emotional divorce lasts longer and can be more difficult unless the parties are prepared to forgive, no matter who was supposed to be responsible for the initial break-up. The emotional divorce will take even longer if the parties have children or problems of custody, access, maintenance and matrimonial property, or if they use litigation or court cases and legal battles to settle disputes. The best way is to use mediation, negotiating solutions and compromise, helped by sensible counsellors and lawyers.

Divorce laws are based on an adversarial and antagonistic process of proving matrimonial offence and fighting about each aspect of a marriage break-up. The legislation may not have been intended to do this, but that is how it works. Lawyers are the only people who really gain anything; whenever the parties go to court, the lawyers get richer. However, litigation might be the only answer in any of the following basic situations, or combination of situations.

- One party is being unreasonable or unfair.
- One party is vulnerable and needs help.
- A solution through mediation has completely failed.

Whatever way it happens, divorce is a painful and emotionally disturbing process. Despite this, in our region, the legislation and the common law still make divorce extremely difficult to obtain. The difficulties weigh particularly on women who have to face both economic and legal discrimination. As we have found in previous chapters, the history of divorce in British law explains some of the reasons for such difficulties.

Until 1857, a legal divorce was impossible if the marriage had been consummated. The belief was that to allow divorce would cause the decay of family life in general: not allowing divorce would prevent a husband and wife from leaving each other. But husbands and wives did separate, and remained married to each other until death, even if they had *de facto* marriages and illegitimate children.

The ban on divorce was supported by Christian laws based on the principle that Christian marriage was for life. The only way in which a divorce could occur was through an Act of Parliament, presented for discussion and voting by a member of Parliament. Then the whole legislative assembly would vote for or against the divorce.

The whole affair was open to public discussion in a parliament dominated by men, so the person who petitioned had to be blameless, or at least not to have any enemies who would bring faults to light. Adultery was considered the most monstrous of crimes in marriage, and was originally the only ground upon which divorce could be obtained.[3] If both partners wanted a divorce, they sometimes agreed that one party could be caught in a situation that looked like adultery. (This is an example of collusion or connivance.) Sometimes one party would make up false evidence if the other party did not want a divorce.

The legislative method of obtaining a divorce put divorce out of the reach of ordinary people; it was available only to rich and privileged people (usually men) with the money and connections to sponsor a private divorce bill through Parliament. Wide criticism of the method eventually resulted in the passing of the *Matrimonial Causes Act 1857*. This Act took divorce proceedings out of parliament and into the courts of law, but it still focused on proving that one partner was at fault. It did not accept that both spouses might want a divorce, and it would not allow divorce if the court suspected collusion. Divorce could only occur where a blameless spouse could prove the other spouse's adultery.[4]

Why is adultery a criminal offence?

Fault-based divorce may be a relic of the past, but it has survived almost intact in our region. Some countries, for example, classify adultery as a criminal offence or at least an offence against the institution of marriage, deserving punishment. This idea already existed in customary law, but was reinforced by the introduction of English common law and legislation.

We find the idea, for example, in Western Samoa,[5] where any married person may be prosecuted and fined for adultery. In Tonga,[6] however, the legislation appears to make only a man criminally liable, since the legislation says that any person who commits adultery, or fornication with an unmarried woman, is guilty of a criminal offence. He can be fined $40 and in default of payment 10 months imprisonment. Further, under the *Criminal Offences Act*,[7] anybody who provokes or encourages a married woman to desert her husband may be fined up to $500 or, in default of payment, one year in prison. In 1991, the Tonga police received reports of 4 cases of enticing a married woman to desert her husband.[8]

In Solomon Islands custom courts, women are fined for adultery. In theory, adulterers of either sex have to offer mats and other valuable items to the chiefs, but in practice only women and their families are required to do this. Until 1986, Vanuatu made adultery an offence under the *Penal Code 1981*,[9] as

well as being an offence under custom law. From 1981 to 1985, police received reports of 108 cases of adultery.[10] Nine were convicted.

Clearly it is not appropriate for adultery to be a criminal offence, although some women think that it should be, to help preserve their marriages. The following extract[11] sums up the problems of adultery as a criminal offence.

> It is intended in the new Fijian regulations (Regulation 17 of the *Fijian Affairs (Criminal Offences Code)* to criminalise adultery ... to make adultery a criminal offence. The penalty will be a maximum fine of $150 or maximum imprisonment ... of six months. Under the proposed legislation, only a married man found to be having a sexual relationship with a woman not his wife, or a man found to be having a sexual relationship with a married woman may be punished. Neither married women nor single women ... will suffer any punishment under these laws. According to the legislation only an innocent husband or wife can make a complaint against the "guilty" party.
>
> There are several highly problematic features of the proposed legislation concerning moral, racial, procedural and evidential matters. Let's take the moral issue first. Is it right that society should seek to regulate and punish the sexual behaviour of consenting adults? Are these matters not of a moral and religious nature, justifiable perhaps before a divine body, but surely not before a very human and fallible magistrate? Have we not evolved into a just and humane society, one in which human frailties are understood, sometimes forgiven and worked out within the dynamics of human emotions and relationships?
>
> Apart from making only men criminally responsible for the act of adultery, which raises the question of discrimination against men and is therefore a human rights violation, an insidious aspect of the legislation is that ... it assumes that women are not legally responsible for their sexual behaviour, but men are! The long-term implications are that ... women are seen as legal imbeciles incapable of being responsible for their own actions.
>
> The racial implications are that although the legislation is seemingly applicable only to "Fijian" persons, non-Fijians committing adultery with Fijians will be subsumed under these laws. Is it right that non-Fijians should be subjected to this jurisdiction?
>
> Procedurally, and in terms of the evidential burden, the problems are almost insurmountable for the proposed Provincial Courts. Any lawyer practising family law will know how difficult it is to prove adultery in order to obtain a divorce or maintenance. The burden of proof in civil matters is "on the balance of probabilities" ... A person alleging adultery has to prove "on the balance of probabilities" that her or his spouse is committing adultery. This is difficult because of the nature of sexual matters. [In] the vast majority of divorces or maintenance cases in which adultery is alleged ... one party admits that adultery has occurred without fighting it and divorce is granted or maintenance is ordered.
>
> In criminal matters, the burden of proof is "beyond reasonable doubt". This is a burden even more difficult to discharge. Who is going to admit adultery if it means a term of imprisonment? Will an admission of liability for adultery in the Domestic Court in order for a divorce to take place, or in order for women and children to be given maintenance, be admissible as evidence against a man in a criminal trial in the Provincial Court? Will a husband and father admit adultery in the Domestic Court if it means that he can be imprisoned in the Provincial Courts? He might be willing to admit adultery because he wants a divorce or

because he loves his children and wants to pay maintenance but will he be willing to admit adultery for a fine or imprisonment? The implications for women and children who rely on the goodwill of men in admitting adultery so that they can receive maintenance are far-reaching.

This new legislation just has not been given enough thought. A concerned group of women from ... women's organisations in Fiji, representing a wide range of racial, cultural and economic groups have got together to express their concerns about the legislation. They have called for an inquiry into the setting up of the Courts and the new legislation. If the Provincial Courts are going to be established then let it happen after the legislation is translated into the Fijian language, when all the implications are understood and after consultation with the people. One hopes that their voices are being heard in the spirit of goodwill and cooperation that is intended.

Damages for adultery

In many countries, it is still possible for a petitioner to sue the co-respondent for damages for adultery, in a civil case. In Fiji the legislation allows a maximum of $400,[12] and the section relating to damages in general reads:

> s. 31 (a) A party to a marriage, whether husband or wife, may, in a petition for a decree of dissolution of the marriage on the ground that the other party to the marriage has committed adultery with a person, or on grounds including that ground, claim damages from that person on the ground that person has committed adultery with the other party to the marriage and, subject to this section, the court may award damages accordingly.[13]

The legislative right to damages exists in Fiji, Solomon Islands, Tonga and Vanuatu. In some countries, the right of action is available to husbands only, and in other countries to both husbands and wives. In Solomon Islands[14] a husband who has paid bride price may claim custom compensation from the co-respondent, the wife, the wife's family and other individuals.

Solomon Islands legislation openly discriminates against women. Legislation is gender-neutral in Fiji, Tonga and Vanuatu. In Tonga and Vanuatu[15] the petitioner may claim damages in court from any person who has committed adultery with the respondent. The court may imprison the co-respondent for nonpayment. In Fiji, as late as 1976, the Supreme Court ordered a male co-respondent to pay the petitioner husband damages of $200 for adultery with the petitioner's wife.[16] Two 1990 Tonga cases showed the persistence of the idea that a wife is her husband's property.

CASE *'Afa v Tali and Sika (1990) Tonga*[17]

Facts and issue The Supreme Court had to consider the question of damages for adultery. H obtained a decree of divorce on the ground of adultery by W. He claimed $1000, the maximum allowable in damages under the *Divorce Act* Cap. 29.

Decision The Supreme Court dismissed the claim but granted custody of the children to H. It made the point that, under Section 13 of the *Divorce Act*, a 1988 amendment had increased the amount, showing that the Tongan

parliament fully intended to allow such claims to continue. Despite disapproving of such claims, the judge said that loss should be assessed on the basis of the actual value of the wife in terms of money and companionship, and of compensation for injury to feelings, honour and family life. We sum up his views.

"Damages for adultery should be awarded only if the co-respondent had seduced or enticed the respondent away from the petitioner. This had been proved on the balance of probabilities, but H could not prove that the co-respondent was responsible for beginning the chain of events leading to adultery. Damages for adultery should be compensation to the petitioner for the loss of his wife, not to punish the co-respondent. Therefore, if damages were awarded, they should in this case be only $250, because W had been previously unfaithful and was not a good mother."

Comment The Supreme Court said in effect that, as W was already "damaged goods", she was not worth much, so the husband should not have expected the maximum damage payment. And this legislation is supposed to be gender-neutral!

In theory, women may sue for damages, but the process is used most against women because more men can afford the costs in time and money. So the legislation for damages for adultery may be gender-neutral, but women rarely sue. When they do sue, we rarely hear comments implying that the adulterous husband is damaged goods. We do hear about the lack of virtue of the woman with whom he committed adultery, and her role as temptress.

CASE *Lamatau v Mau and Sika (1991) Tonga*[18]

Facts and decision W sought divorce on the ground of adultery by H and CR, the co-respondent, and claimed damages of $1000. H and CR admitted the adultery. H was ordered to pay $50 per month maintenance under s. 15B of the *Divorce Act*. CR was ordered to pay $300 damages, because although H was partly responsible, CR had deliberately set out to break up the marriage; she was "the initiator of the adultery".

Comment The Supreme Court did not try to assess H's value as a husband, still less how much this might have declined as a result of his behaviour. Instead, it seems to have punished CR for having seduced him. Compare this case with those of *'Afa v Tali and Sika (1990)* above, and of *Banja v Waiwo (1996)*.[19] In that case, the Supreme Court of Vanuatu said that if damages were to be awarded, they should be awarded as compensation, and not as punishment. However, whether damages are awarded as compensation or punishment, it is humiliating to assess a person's value in terms of money. The practice has historical roots in the idea that marriage gives a husband the right to his wife's faithfulness even if she has no right to expect the same from him.

Such practices breach Articles 15(1) and 16(1) of the United Nations Women's Convention. Countries that have signed this Convention are required to eliminate discrimination against women in all matters relating to marriage and family relations. This will need both legislative changes and changes in common law practices.

COURT POWERS AND PROCEDURES

In this section, we will discuss the powers and procedure of courts dealing with divorce in our region. These are remarkably similar, because the region inherited its present divorce laws from the colonising powers, even though these powers may have discarded them. Two countries, for example, require the presence of a representative of the State. Tonga legislation requires that the Attorney-General or his representative shall attend all divorce proceedings.[20] It is not clear from the legislation what the legal grounds of intervention might be. Fiji allows the Attorney-General or his representative to take part in any matrimonial proceeding from a divorce matter to a custody dispute. Usually the Attorney-General's Department does not intervene, but in *Lakhan v Director of Social Welfare and Ors (1993)*[21] it used the provision to appoint a special lawyer to represent a child's separate interests.

Broader similarities include the region-wide practice of accepting marriage and divorce documents from other common law countries. Thus a person married in one common law country may petition for a divorce while living in another, provided that the proper practices are observed.

Requirement for a formal petition

All countries in our region require a formal petition for divorce. When a petitioner applies for divorce, the divorce petition has to be typed in a prescribed legal form like the example provided in Figure 8.1. Then it must be served on the respondent. If the petition is based on adultery, it must be served also on the co-respondent, in person.

The petition has to be served a set number of days (10 clear days in Fiji) before the date on the summons. This is the date that the court sets for the respondent and petitioner to appear in court. If these requirements are not fulfilled, the divorce will not proceed.

The jurisdiction of the court

Court hearings regarding divorce and ancillary matters are usually heard in closed courts, but some smaller jurisdictions do not have the resources to do this. In Fiji and Nauru, divorces are heard in lower courts such as the Magistrates' Courts. Vanuatu Magistrates' Courts may hear divorce and custody cases in which the parties have already agreed on all matters. If the parties want to contest the case, it must be heard in the Supreme Court.[22] In other countries, divorces are heard in the High Courts or other superior courts only.

IN THE FIRST CLASS MAGISTRATE'S COURT
AT SUVA IN FIJI MATRIMONIAL CAUSE
No ** of 1994

BETWEEN : **LOIS KENT**
of Navua in Fiji, Domestic Duties
PETITIONER

A N D : **CLARK KENT**
of Suva in Fiji, Technician
RESPONDENT

A N D : **KATTY LORREN**
of Suva in Fiji, Secretary
CO-RESPONDENT

The Magistrate's Court, Suva

I, **LOIS KENT** of Navua in Fiji, hereby petition the court for a dissolution of marriage against the Respondent **CLARK KENT** whose address is at Davuilevu, Nausori in Fiji, on the grounds of adultery.

1. ON the 11th day of March 1972 I was lawfully married to the Respondent at Suva in Fiji, I being then a spinster and the Respondent a bachelor.
2. THE Respondent and I cohabited at Suva in Fiji until 1985 when I moved out of the matrimonial home.
3. BOTH the Respondent and I are domiciled in Fiji.
4. THERE are children of our marriage now living namely :
   Jimmy Kent who was born on the 20th day of May 1980 at the Maternity Hospital in Suva, Fiji.
   Zain Kent who was born on the 22nd of January 1985 at the Navua Maternity Hospital, Fiji.
5. THERE have been no previous Court proceedings with reference to our marriage or to the children of the marriage.
6. THE fact relied on as constituting the grounds specified above is that the Respondent committed adultery with the abovenamed co-respondent **KATTY LOREN** and continues to do so.
7. THE arrangements proposed by me concerning the welfare of the children of the marriage is that I be granted custody of **JIMMY KENT** and **ZAIN KENT** with reasonable access to the Respondent.
8. I have not condoned or connived at the ground specified above and am not guilty of collusion in presenting this petition.

8. I THEREFORE PRAY:-

1. That the marriage be dissolved.
2. That I be granted custody of the children of the marriage namely **JIMMY KENT** and **ZAIN KENT** with reasonable access to the Respondent.
3. The Respondent be made to pay maintenance for the care and maintenance of our children.
4. That the Court order a distribution of matrimonial property under s. 86 of the Matrimonial Causes Act.
5. That the Respondent be ordered to pay the costs of this action; and
6. Any such other relief as this Honourable Court deems just.

D A T E D and filed this day of 1994

.....
APPLICANT/PETITIONER

This Petition is filed by Messrs Nameless and Nameless, Solicitors for the Petitioner, whose address for service is at 19th Floor, Noname Building, Suva, Fiji

Figure 8.1 *Sample divorce petition, using invented names*

Both systems have advantages and disadvantages, set out as follows:

Lower courts

Advantages

- More accessible and less expensive than higher courts.
- Parties do not always need lawyers.

Disadvantages

- Magistrates often do not understand, or know how to apply the complicated legislation and the common law on divorce.
- Magistrates do not have the power to deal with property matters if the property value is over a certain level.

Higher courts

Advantages

- A qualified judge hears the case and is more able to find evidence to satisfy the high levels of proof.
- Ancillary matters like matrimonial property applications can be heard at the same time, as most lower courts do not have the power to deal with properties valued above a certain worth.

Disadvantages

- Many people do not live near a higher court, and must spend time and money in getting there.
- Parties usually need lawyers to represent and advise them; this, too, is expensive.

These problems could be partly solved if magistrates were able to grant divorces on no fault grounds. This would make legislation and procedures simpler and more sensible; magistrates trained in specialist family court matters could be given full jurisdiction over divorce and connected matters.

The standard of proof

The common law requires a high standard of proof of fault in civil cases: it requires proof "on the balance of probabilities". This is not as high as the "beyond reasonable doubt" standard for criminal cases, but it is still extremely difficult because witnesses are rarely available to give clear evidence about sexual and other private family matters.

All countries in our region have adopted the civil burden of proof, either by the common law, or by legislation. The Fiji provision is set out below. Tonga and Vanuatu have similar provisions.[23]

> (2) Where a provision of this Act requires the court to be satisfied of the existence of any ground of fact or as to any other matter, it is sufficient if the Court is reasonably satisfied of the existence of that ground or fact or as to that other matter.

The legislation is clear. It means that the petitioner has only to enable the court to be reasonably satisfied that the claim is true. However, although the legislation specifies "reasonable" satisfaction, a study of case law in our region will clearly show that local courts have not been able to decide what standard of proof is necessary. The courts swing between saying that the petitioner needs to prove the truth of the claims on the civil standard of proof of the balance of probabilities (reasonable satisfaction) and saying that the claim must be proved "beyond reasonable doubt", as in criminal cases.

The divorce case of *Bhagmati v Ishri Prasad (1974) Fiji*[24] shows how confused things may become. In a matter concerning the level of proof required, the court said that the standard of proof in civil proceedings was too low for divorce cases, but that the standard of proof for criminal cases was too high. Therefore, the court said, something in between was appropriate. But this is not what the legislation says. It clearly requires only the civil burden of a reasonable degree of proof. By wrongly interpreting the legislation, local common law has added a new and confusing standard, thus making divorce even more difficult.

What happens when a divorce is granted? *Decree nisi* and *decree absolute*

Most countries require the divorced couple to wait a specified time after the hearing of the divorce for the actual divorce decree. For the waiting period, they have a *decree nisi*, a court order showing that a divorce has been granted but that it has not become absolute and final, and neither party can remarry until it does. The final divorce will take place when the *decree absolute* is issued.

The purpose of having a waiting period between the *decree nisi* and the *decree absolute* is to allow one or both parties to make objections to the divorce, and force them to settle outstanding matters such as custody, maintenance and property. If these matters are not settled, the *decree absolute* may not be issued. In all countries the most significant matter that could delay the *decree absolute* is the welfare of the children. If these matters are not settled (for example, a custody dispute is still proceeding), the court will not grant the *decree absolute*. If all related matters have been settled, and if a special application (called "leave") has been made, the court might agree to a shorter waiting period. In most countries there is a compulsory three month period between the issuing of the *decree nisi* and the *decree absolute*. In Tonga, the period is six weeks.

THE GROUNDS OF DIVORCE

One of the most important things to understand about divorce legislation is that it conflicts with itself. On the one hand, it seems to have been passed to permit divorce, but on the other hand, it seems to be designed specifically to prevent divorce. Applicants face enormous obstacles, not only in the content of the law but also procedurally and technically.

In the legislation of most Pacific Island countries, divorce seems to be available both to men and to women on equal terms, except in a few specific provisions. Generally the legislation is gender-neutral; it appears to affect both men and women similarly. In reality, however, divorce laws have a significantly more discriminatory and disadvantageous effect on women than on men. This is because of the social, cultural, political and economic disabilities of women and the discriminatory interpretation and enforcement of the legislation.

All countries in our region — except to some extent Nauru and Tuvalu — have a fault-based system of divorce. Fault-based divorce laws are based on proving that one of the parties has committed a matrimonial offence. In order to get a divorce, the petitioner must prove that the respondent has been guilty of committing an act forbidden by matrimonial law, or guilty of not doing something essential under matrimonial law. These acts are called the grounds for divorce.

Grounds available in Fiji and elsewhere in the region

In Table 8.1, we list the grounds and show the countries in which the grounds are valid, the relevant legislation, and if appropriate, the number of years involved. Fiji, for example, accepts 14 grounds and these are listed in the order in which they appear in the *Matrimonial Causes Act*. These are relatively often accepted in our other countries, whereas the remaining grounds are not accepted in Fiji, and are not widely accepted in our other countries.

We shall now look at these grounds one by one, beginning with those that are available in Fiji and elsewhere in our region. We will take our examples from the Fiji *Matrimonial Causes Act*, since in other countries the legislation is similar. If, in other countries, the substance or the effect of the legislation is different, we will say so.

Table 8.1 All grounds available in the region

Grounds for divorce	Fiji *Matrimonial Causes Act* Cap 51 s. 14 Cap. 192	Solomon Islands *Islanders Divorce Act* Cap. 48 s. 5	Tuvalu *Matrimonial Proceedings Act* Cap. 21 ss. 8-9	Kiribati *Matrimonial & Divorce Act* Cap. 60 s. 4	Western Samoa *Divorce and Matrimonial Causes Ordinance 1961* s. 7	Cook Islands *Matrimonial Proceedings Act 1963 (NZ)* s. 2b	Vanuatu *Matrimonial Causes Act* Cap. ss. 4-5	Tonga *Divorce Act*, Cap. 29 Amendment 39/88 s. 3	Nauru *Matrimonial Causes Act 1973* s. 8
Adultery	yes	yes		yes	yes	yes (3)	yes	yes	
Desertion for (x) years - simple, constructive	yes (2)	yes (3)		yes (3)	yes (3)	yes (2)	yes (3)	yes (2)	
Wilful refusal to consummate	yes			yes		yes		yes	
Habitual cruelty	yes	yes		yes	yes	yes	yes		
Rape, sodomy or bestiality	yes	yes		yes	yes	yes	yes		
Habitual drunkenness (x) years & neglect of family	yes (2)				yes (3)	yes (2)			
Criminal convictions, prison sentence & leaving wife without support for (x) years	yes (5)				yes	yes	yes		

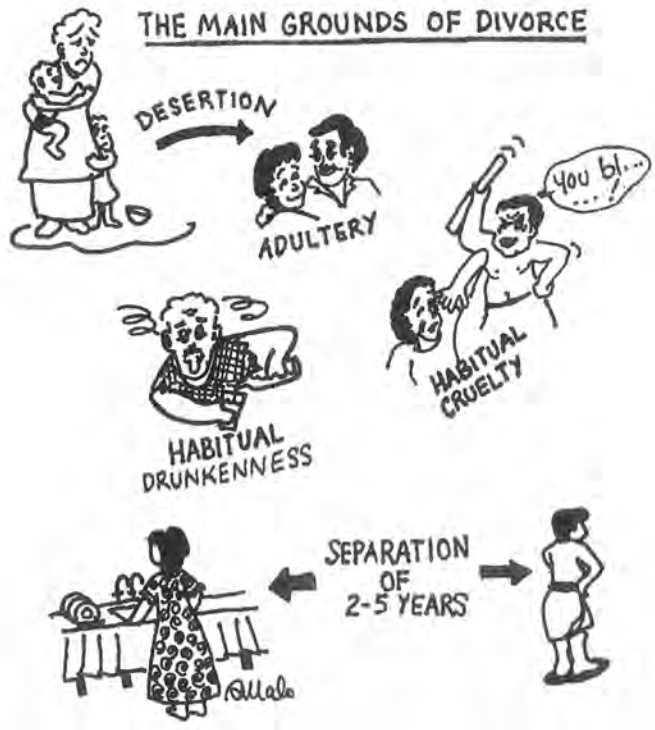
	Fiji	Solomon Islands	Tuvalu	Kiribati	Western Samoa	Cook Islands	Vanuatu	Tonga	Nauru
Imprisonment for (x) years	yes (3)				yes (7)	yes			
Attempt to kill or commit grievous bodily harm on petitioner	yes				yes	yes			
Failure to pay maintenance for (x) years under order or agreement	yes (2)								
Failure to comply with restitution of conjugal rights for (x) years	yes (1)								
Insanity & institutional-isation (x) years	yes (5)	yes (5)		yes (5)	yes (3)	yes (10)	yes (5)	yes (5)	
Separation (x) years	yes (5)				yes (5)	yes (4)		yes (2)	
Presumption of death	yes				yes		yes		
Irretrievable breakdown (no fault) (x years)			yes					yes unreasonable behaviour	yes

	Fiji	Solomon Islands	Tuvalu	Kiribati	Western Samoa	Cook Islands	Vanuatu	Tonga	Nauru
Incompatibility (no fault) (x years)				yes		yes (2) by agreement			
Wife's drunkenness & neglect of domestic duties					yes				
Wife artificially inseminated with the sperm of another man						yes			
Incurable disease								yes	
Venereal disease				yes					
Epilepsy (x years)				yes (3)					
Duress/mistake				yes					
Murder conviction						yes			
Another spouse still living								yes	
Judicial separation by agreement					yes (3)				

Adultery; desertion; wilful refusal to consummate

Adultery is an act in which a married person has sexual intercourse with a person who is not his or her spouse. A married person's sexual relationships before marriage are not regarded as adultery. The law does not distinguish between long and short sexual relationships; adultery occurs whenever the respondent has a sexual relationship outside marriage. It affects the petitioner also; a petitioner who has committed adultery during the marriage may have difficulties in divorcing her spouse for adultery. The petitioner must admit, in the divorce application, that she also has committed adultery, and must ask the court not to hold it against her. If she can show that the respondent's behaviour brought about the adultery, the petitioner may proceed.

Adultery as a ground of divorce is available throughout our region except in Tuvalu and Nauru, and is usually the first ground cited. All require the petitioner to name the co-respondent in the petition unless special leave is sought from the court. Sometimes the petitioner has proof of adultery but does not know the name of the co-respondent. In this case, the petitioner may ask the court's permission not to name the co-respondent and the case will proceed regardless. (In Fiji, such permission is not often given.)



If both the respondent and co-respondent admit adultery, the court will select a date on which the petitioner filing for divorce has to provide formal proof of the allegation. If the petitioner can bring at least one witness who can say that the respondent and the co-respondent have had a sexual relationship, the divorce is granted automatically. Sometimes the respondent and co-respondent do not turn up at the court hearing. When this happens, the case goes on without them, and the petitioner is usually given a divorce after having provided formal proof. However, if the respondent denies adultery, a full court hearing will take place with lawyers and witnesses.

The petitioner must prove that the other party, the respondent, committed adultery with the co-respondent. It is not enough for the petitioner to claim that her husband has committed adultery; the allegation has to be corroborated. Proof is usually provided by bringing independent witnesses such as relatives or friends who can say in court that they have seen the respondent with another woman in a situation in which people would assume that the respondent is having an affair with that woman. The situation must be one that does not have a natural and believable explanation. It is not enough to prove that the respondent has been seen with another woman in town, in a restaurant or other public place or in a car. This is regarded as only "mere association" or "mere opportunity to commit adultery". There has to be actual evidence that the respondent has had sexual intercourse, or has had more than the mere opportunity to have sexual intercourse, with the co-respondent. The evidence must relate directly to this claim.

Let us imagine three different situations. In each, the petitioning wife is W, the respondent husband is H, the witness is X and the co-respondent is CR.

- X says that she saw H and CR driving around together in a car and eating together at a restaurant; she says they "looked very friendly".
- X says she saw H and CR checking into a hotel as Mr. and Mrs. H.
- X and other witnesses say that H and CR are, or have been, openly living together in a *de facto* relationship.

The first claim would be insufficient, since H and CR could reply that they certainly had driven and eaten together, because they were friends who had something to discuss. The second might also need independent proof (for example from hotel records and staff), because H and CR might say that X made a mistake, or that they had been in the same hotel by chance. The third would be supported by the fact that H and CR did not try to hide their adultery; it was common knowledge.

What kinds of evidence have the courts accepted as proof of adultery?

CASE *Frow v Frow (1961) Fiji*[25]

Facts W sought a decree of dissolution of marriage on the grounds of adultery by H with CR, the co-respondent. H did not contest the allegation, but CR did. The court's findings were that H had associated with CR during the alleged time of adultery. CR had a key to H's flat. H had the opportunity and

the wish to commit adultery with CR. The content of a letter written by H to W made it logical to assume that H had committed adultery with CR.

However, CR denied that adultery had ever taken place, but admitted in evidence that she and H had lain naked on a bed together for about half an hour. During that time she had permitted him to make love to her. She agreed that H had an erection but denied even partial vaginal penetration or sexual intercourse. Medical evidence established that CR was still *virgo intacta* (a virgin because her hymen was not broken.)

Decision The judge said that CR's evidence and the circumstances under which CR and H associated would make it logical to say that adultery had taken place. Nevertheless, CR was a believable witness and the court believed her claim that she and H had not had actual sexual intercourse. The court held that W had not proved the alleged adultery to the standard of proof required. As adultery had not been proved, the petition was dismissed. W did not obtain her divorce.

Comment This case suggests that actual vaginal penetration with the penis has to take place before adultery can be proved: other activities may be "making love" but are not adultery. The judgment shows the court's very male perspective: adultery, like rape, requires penetration of the vagina by the penis. According to this definition, if the respondent and co-respondent engage in *cunnilingus* or *fellatio*, adultery will not be proved. The case demonstrates not only the absurdity of the common law interpretation of adultery, but also the difficulty of proving adultery.

CASE *Bhagmati v Prasad (1974) Fiji*[26]

Facts The petitioner H accused W of committing adultery between their legal marriage and the Hindu religious ceremony of marriage. He said that the child born to W was not his. W said that she and H secretly had sexual intercourse before the Hindu ceremony, even though Hindu custom forbids this. W said that family pressure in the presence of H and his doctor forced her to say she had committed adultery but she had not.

Doctors gave conflicting medical evidence about the dates of conception. One doctor said that the child must have been conceived before the Hindu ceremony, and before H and W had sexual intercourse for the first time. The other said the child was premature, and could easily be H's child.

Decision The Court of Appeal said it believed on the evidence that W's confessions of adultery were voluntary and not forced. As the confessions were not made with a view to reconciliation, they were not privileged and could be admitted in court. It was unnecessary for W's confessions to be independently supported by other evidence because the surrounding circumstances showed that the confessions were voluntary and true. Therefore W's adultery was proved.

Comments If, therefore, a spouse confesses to adultery, hoping that the confession may lead to reconciliation, the confession may not be used to obtain a divorce later on. However, a wife's "confession" may be accepted even though there is no independent evidence from another source. This case might be compared to that of *Jamisha Ali v Hasiman Nisha*.[27] Here the Court of Appeal said that the wife's admission was not enough to prove adultery. The wife said that she was forced to admit adultery, and there was no independent

evidence to prove the husband's allegation. The two cases show inconsistencies of approach to the question of admissions of adultery by a spouse.

CASE *Pohahau v Tauelangi (1985) Tonga*[28]

Facts H and W married in 1976 and had one child. H left home in 1983, and W obtained a maintenance order against him on the ground of his desertion. H then filed a divorce petition on the ground of W's adultery. He said that he and another witness had seen W and CR "kissing and talking". His father had seen W and CR together in her home, and CR admitted adultery with W. W denied these allegations and the charge of adultery; she asked how H could claim that she had committed a matrimonial offence when H himself was guilty of both the offence of desertion, and the offence of adultery. However, H was granted the divorce; W appealed.

Issues Who was a more truthful and believable witness: H or W? If H himself was at fault through desertion and adultery, could he be granted a divorce against W?

Decision and comment The Supreme Court said that H had been guilty of the matrimonial offences of desertion and adultery, but that he had committed adultery after W had. The proper burden of proof in a divorce case was the civil burden, and that as the lower court had found H more credible than W, it had granted him the divorce on the ground of W's adultery. The Supreme Court therefore rejected W's appeal, seeming to regard W's offence of adultery more seriously than H's two offences of desertion and adultery combined.

In communities that place great emphasis on a woman's sexual virtue, an admission, or even an allegation, of adultery may have far-reaching consequences. A married woman who has committed adultery has to admit this to a court if she wants to divorce her husband for adultery. A married woman suspected of adultery may be rejected by her husband and by her community. An unmarried woman named as co-respondent may find that her chances of a good marriage are greatly reduced.

Adultery by men does not have the same consequences. Sexual activity outside marriage may be admired in men but is harshly condemned in their female partners. (The Indo-Fijian community is one community, but by no means the only one, where these double standards exist.) Such standards affect the ability of mothers to gain custody of their children, as we will see in Chapter 9. This may happen even where adultery is not proven. In addition, if a woman is proved guilty of adultery, regardless of whether the adultery was committed before or after separation, she is automatically denied maintenance. Therefore, as the cases above show, whether or not the allegation of adultery is true, women will usually vigorously deny it.

From a human rights perspective, the whole idea of proving adultery is offensive. Very few people want to have intimate details of their sexual relationships discussed in public. Most people find it shameful to appear in court as petitioner, respondent or co-respondent and to admit or deny or to try to prove adultery in front of strangers, relatives and members of the

community. People should be able to end their marriages without having their private lives and non-criminal sexual behaviour brought into a court of law as if they were criminals for wanting to divorce.

Like adultery, desertion is a ground accepted throughout our region, except in Nauru and Tuvalu. Fiji legislation states that divorce is available to the petitioner if

> (b) ... since the marriage, the other party to the marriage has without just cause or excuse, wilfully deserted the petitioner for a period of not less than two years.[29]

Desertion as a ground of divorce is available where the respondent has after marriage wilfully deserted the petitioner for a certain period of time. Desertion is based on the dismissal by one party of all the obligations of the marriage.[30] The respondent must intend to live apart from the petitioner; in effect, a deserting husband must say to himself: "I am going to leave my wife for good, and I will no longer carry out my legal duties to her as a spouse". The required period of desertion is two years in Fiji and Tonga, and three years in Cook Islands, Kiribati, Solomon Islands, Vanuatu and Western Samoa. Like adultery, desertion requires proof, often through failure to maintain.

STORY *Failure to maintain may be proof of desertion*

H is working in another town. He promised to send money home to W and does so for several months. Then he stops sending the money but he does not explain why he stopped. If, without reasonable explanation, a husband does not maintain his family when he is obliged to do so, this may be regarded as technical desertion. So W applies for a divorce on the ground of desertion.

Desertion cannot be accidental or unintentional. Husband and wife may have to live apart for a long time because of study, work, military service, imprisonment, or illness. Both may have known in advance that they would be apart for a long time, but they accept this as a part of their situation and outside their control. Such cases do not count as deliberate desertion.

CASE *P v P (1957) Western Samoa*[31]

Facts After their marriage, H and W lived with W's parents. Later, W's father sent W to New Zealand and sent H back to his own family. H did not want to go, and his letters to W showed continuing affection. W applied for divorce on the ground of desertion. She said also that H was a violent drunkard. H's defence was that he did not want to leave; the marriage failed because W's father continually interfered.

Issue When H left his in-laws' home, was this wilful desertion, or was he forced to leave?

Decision H was in effect forced to leave, and had not intended to desert W, so this did not constitute wilful desertion, and W could not be granted a divorce on that ground.

This raises questions of proof of intention as well as of the period of separation. In order to prove desertion, certain facts must be proved.

- The petitioner and respondent must be physically separated for the period of time stated in the legislation. Very rarely, the court may accept that the parties are separated even they are still living under the same roof. Generally, however, the parties must live in separate houses.
- One party must intend permanent separation, never to live with the other again.
- The other party does not want permanent separation, but wants to live with the spouse again.
- The petitioner claiming desertion must not have given the respondent a reason for leaving; or
- The petitioner must be able to show that the respondent's behaviour forced her or him to desert the respondent.

The last two requirements deal with two different kinds of desertion: simple desertion and constructive desertion. Simple desertion happens when the respondent simply deserts the petitioner for no reason that is legally justifiable — if for example a husband walks out for reasons of his own, and not because of any fault of his wife. If the wife wants a divorce, she as petitioner must be able to prove that she is not at fault, has not given him reason to leave and is blameless as far as the law is concerned. She has to show that the respondent husband has left the matrimonial home because, for example, he was bored, wanted freedom to go with other women or did not want family responsibilities.

In order to prove simple desertion, independent witnesses must give evidence of actual physical separation and desertion, showing that the spouses are no longer cohabiting and that the respondent has left the matrimonial home. The only defence to simple desertion is for the respondent to prove that the petitioner is at fault: the petitioner's behaviour forced the respondent to leave. (Actions like these are called cross-petitions.) Now we will look at a story that meets all the requirements for a petition for simple desertion, and does not involve any cross-petition.

STORY *A simple case of simple desertion*

H has a wife who does everything that a good wife is supposed to do. H goes on a business trip to Timbuktu and doesn't come back. W writes to H many times at his last known address in Timbuktu, but doesn't hear from him for more than two years. Then she gets a letter from him. He says that he is sorry, she has always been a good wife and he is quite fond of her but he is making lots of money and a new life and is not coming back. W writes back (and keeps a copy of her letter) begging H to send for her and the children. Months later, W gets a letter from H's lawyer, saying that H will not communicate directly with W again. However, H has arranged to put all his local assets in W's name and to maintain their children until they

have finished their studies. H's lawyer sends copies of this letter to W's parents and parents-in-law and everyone agrees that divorce is the best solution. By this time, more than three years have passed, so anywhere in our region, W can file for a divorce for desertion.

Constructive desertion is rarely simple. The petitioner is the one who leaves, not the one who is left. The petitioner must show that the respondent made life so difficult that the petitioner was forced into desertion. In this case, the blame for the desertion is put on the respondent. To prove constructive desertion, the petitioner must produce evidence that the respondent's expulsive (unbearable and unfair) behaviour forced the petitioner to leave the matrimonial home. It does not matter that the respondent did not mean to force the petitioner to leave.[32]

Particularly in the case of constructive desertion, the behaviour complained of must justify the desertion. The petitioner must leave the respondent for grave and real reasons, not minor faults or arguments. For example, if the respondent swore at, or said something cruel to, the petitioner, this may not be enough to amount to desertion. However, a single act of physical cruelty could justify desertion, although it would not provide a ground for divorce for cruelty: the petitioner could leave and apply for divorce on the grounds of constructive desertion after two years.

The following story shows the requirements for a petition for constructive desertion.

STORY *I had to run away from him*

Every payday H drinks most of his pay and beats his wife. W tries going to the police but they say "Just keep out of his way, he'll calm down". H gets more and more violent. One night, he comes home very angry. He smashes things, beats W and starts on the children. W grabs the children and they run to a neighbour. H throws pots and pans and all her clothes outside into the mud and runs after W, yelling threats and filthy words. But the noise wakes the neighbours, who call the police. The police arrest H and charge him with disturbing the peace. W's neighbour takes W and the children to the doctor.

The next day, H comes to see W and says he is very sorry; it was not her fault, he had a bad day at work so he went for a drink and then got into a fight and was thrown out of the bar. Please come back, he says; he won't hit her or the children again. W says that she has had enough, that H always finds reasons for hitting her: there isn't any food when he comes home; she nags him because she can't buy any food; she answers back; she sulks; the children cry when they see him. No, it's too dangerous for her and the children to live with him again; she has no choice but to leave the matrimonial home. If necessary, she will apply for a restraining order, and maintenance and custody.

W physically leaves H but his behaviour forced her to leave, so he is the deserter. W and the children find somewhere to live. After two years, with evidence supplied by her neighbours, her doctor and the police, W divorces H on the grounds of constructive desertion. W might have applied for divorce

right away, on the grounds of habitual cruelty, but cruelty is the most difficult ground to prove. So with her evidence of H's "expulsive behaviour," she prefers to wait for two years, and then apply on the basis of this final act of constructive desertion.

The following unusual case raises other questions about constructive desertion and reconciliation.

CASE *Vankat v Sarojini (1977) Fiji*[33]

Facts H, the petitioner, had deliberately made the respondent W mistakenly believe that he was committing adultery. W left the matrimonial home but when she found out the truth, she tried to return to H, genuinely wanting reconciliation. H refused to take her back and applied for a divorce on the grounds of two years desertion.

Decision The Court of Appeal said that although initially W may not have had real reason to leave, when she discovered her mistake she genuinely wanted to reconcile. H refused to reconcile. H therefore could not prove her desertion. The court referred to the case of *Alka Ben v Jogia*[34] where the Fiji High Court said that if Spouse A deserts Spouse B and then wants to reconcile, but Spouse B refuses, then Spouse B might become the "deserter," the spouse at fault. H's application for divorce on the ground of desertion was not granted.

Comment This decision might affect the right of battered women to apply for divorce if they do not want to forgive their husbands. Does the decision imply that a battered wife loses the right to apply for divorce if she does not accept her husband's apology? Does this ruling extend to all matrimonial offences?

There is a trap, which applies both to simple and to constructive desertion. The period of desertion must be continuous and unbroken: two years in Fiji and Tonga and three in other countries. If husband and wife reconcile and cohabit for more than three months, the continuous desertion period no longer exists. So if things go wrong, the wife will have to start all over again, accumulating two (or three) years in total. We will come back to this requirement later in the chapter.

Another trap is that in most situations, husband and wife must be physically separated, because legal separation is a prerequisite of desertion. Courts have generally taken this to mean that the parties must be actually living in separate homes for the total period of desertion. They assume that if the respondent is at fault, but the petitioner continues to live in the same home, the petitioner condones the respondent's behaviour. This may in turn operate as a bar to obtaining a divorce.

In most countries the separate roofs issue is a common law requirement but the Nauru legislation[35] actually says that the parties have to be living in separate households in order for them to be regarded as separated. The general rule therefore is that the parties must be living under separate roofs. Courts in our region tend to interpret this aspect of desertion restrictively, with far-reaching consequences for both parties. The rule is particularly hard

on women who remain in the matrimonial home because they have nowhere else to go.

As the following case shows, United Kingdom courts may be flexible about the act of desertion and separation. United Kingdom courts have held that "desertion is not the withdrawal from a place of, but from a state of things".[36] They believe that husband and wife may physically live under the same roof, but live separately and apart from each other. This is important, because the English common law can be used locally as precedent to persuade local courts to adopt more flexible interpretations.

CASE *Hopes v Hopes (1949) United Kingdom*[37]

Remarks by the judge: The matrimonial offences of cruelty and adultery can, of course, be committed by the guilty party (and be not condoned by the innocent party) while they are living under the same roof, but can the matrimonial offence of desertion be committed? One of the essential elements of desertion is the fact of separation. Can that exist while the parties are living under one roof? My answer is yes.

The husband who shuts himself up in one or two rooms of his house ceases to having anything to do with his wife, is living separately and apart from her as effectively as if they were separated by the outer door of a flat. They may meet on the stairs or in the passageway, but so they might if they each had separate flats in one building. If that separation is brought about by his fault, why is that not desertion? He has forsaken ... his wife as effectively as if he had gone into lodgings. The converse is equally true. If the wife ceases to have anything to do with, or for, the husband ... why is not that desertion? She has forsaken ... him as effectively as if she had gone to live with her relatives.

It is most important to draw a clear line between desertion, which is a ground for divorce, and gross neglect or chronic discord, which is not. That line is drawn at the point where the parties are living separately and apart. In cases where they are living under the same roof, that point is reached when they cease to be one household and become two households, or, in other words, when they are no longer residing ... or cohabiting with one another.

But do the rules laid down in *Hopes v Hopes* apply to the next cases?

CASE *Le Brocq v Le Brocq (1964) United Kingdom*[38]

Facts and decision W locked H out of the matrimonial bedroom. They did not speak to each other except when they absolutely had to. However, W continued to cook for H, who gave her money every week for groceries. H applied for divorce on the ground of desertion but the court said that he could not prove the fact of desertion. There was separation of bedrooms, separation of hearts, no conversation, "but one household was carried on".

Comment The wife was still cooking for her husband, who was still giving her money. This was all that was left of the marriage, but the court took it to mean that the parties had not separated.

CASE *Ram Shankar v Lila Wati (1989) Fiji*[39]

We will discuss this case in more detail under the ground of habitual cruelty. H accused W of not cooking and cleaning for him and of refusing sexual intercourse with him. He said that, despite this, they had been living apart but under the same roof for 12 years. The court accepted that although the parties were living under the same roof, they had not had sexual intercourse for 12 years and that W had not cooked and cleaned for H. The court implied, without directly saying so, that separate households had been maintained, but H got his divorce on the ground of W's habitual mental cruelty, not on the grounds of desertion.

Comments Despite its somewhat unusual circumstances, the case might be used as precedent in a petition for divorce due to desertion.

The proof required, then, is of separation of households, not a separation of houses. Therefore it is possible for a husband and wife to be separated or in desertion, even if they are living under the same roof. In British cases, the courts have looked at various activities in order to establish whether or not the parties are maintaining separate households. In the following list of questions, a "yes" answer to the first would certainly rule out separation or desertion, and so might a "yes" answer to two or more of the others.

- Do the couple share the same matrimonial bedroom and/or have sexual intercourse?
- Do they share any domestic or family duties?
- Do they share a living room?
- Do they cook or eat together?
- Do they go on family outings together?
- Do they go to Church together?
- Are they seen elsewhere in public together?

Now we will turn to wilful refusal to consummate, which is available as a ground of divorce in Fiji, Cook Islands, Kiribati and Tonga, but not elsewhere in our region. To consummate a marriage, husband and wife must have sexual intercourse with each other once after their marriage. Under this ground, the petitioner must prove that the respondent has consistently refused to have sexual intercourse with him or her ever since their legal marriage.

The legislation in Fiji reads:

> (c) ... that the other party to the marriage has wilfully and persistently refused to consummate the marriage.[40]

This situation often occurs in arranged marriages, especially, perhaps, in the Indo-Fijian community. It may happen because the bride or groom wants to marry someone else, or not to marry at all, but has been forced into the marriage. Another reason could be that bride and groom have not actually seen each other before the marriage; when they do, they may not like each other and one or both may refuse to go further.

The ground, however, is not non-consummation, which this suggests that neither party wants to consummate their marriage. Our divorce laws do not allow husband and wife to collude or connive with each other to get a divorce. It must be wilful refusal by one party to consummate the marriage. The refusal may be literal or symbolic. Literally, one party may say something like "No, I will not have sexual intercourse with you," or scream or run away if approached. Symbolically, a party may refuse to participate in the religious marriage that usually takes place after the legal marriage. Another form of symbolic refusal is the refusal of the husband to take the wife to his home, as is the custom amongst Indo-Fijians.

A marriage can be consummated only once. Once the couple has had sexual intercourse together for the first time after the legal marriage, the marriage has been consummated and the ground of wilful refusal to consummate no longer exists, even if one party refuses to have sexual intercourse again. To prove wilful refusal to consummate, witnesses have to give evidence that one party has refused to consummate the marriage. Because divorce law is based on the concept that one person is to blame when a marriage breaks up, the petitioner has to prove that he or she is willing to consummate the marriage but that the respondent is unwilling. The petitioner must also prove that he or she has insisted on sexual relations with the respondent, but without success. Two Fiji cases show how legal principles may force husband and wife to humiliate each other in order to escape from marriage.

CASE *Patel v Ben (1980) Fiji*[41]

Facts H and W had participated in the civil marriage. The religious marriage was to have taken place, but was continually delayed by W's refusals to go with H to his home or to take part in the religious marriage. W's family supported W in her refusal. H sued for divorce on the ground of wilful refusal to consummate. He said that by not going through with the religious marriage, W was saying that she did not want to have sexual intercourse with him. W did not appear at the court case, and did not defend the divorce.

Issue Was the continued delay of the religious marriage a wilful refusal to consummate the marriage and therefore ground for divorce?

Decision The court said that this type of situation might sometimes be wilful refusal to consummate the marriage, but in the present case it was not. The court noted that, two days after the civil ceremony, W and her family seemed to have changed their minds about the marriage, and that H had improperly tried to have sexual intercourse with W before the religious ceremony. H's application for divorce was denied.

Comments What the court was saying was that it would have been improper for W to consent to sexual intercourse with H before the religious ceremony. If she had refused after the religious ceremony, this would have amounted to wilful refusal to consummate. The judgment did not take into consideration the fact that W had since shown no interest in H; her family did nothing to arrange the religious ceremony; she had not attended the hearing; she did not hire a lawyer to represent her interests; she had not defended the divorce

application. Obviously, therefore, W did not wish to consummate the marriage. Here we have two adults who show clearly that they do not wish to remain married to each other, and yet the court, through its restrictive interpretation of the legislation, prevents the divorce.

CASE *Pahalad v Kumar (1980) Fiji*[42]

Circumstances and issues
The facts and issues of this case were similar to the case of *Patel v Ben*, except that the wife was the petitioner. She applied for divorce because H refused to go through with the religious ceremony.

Decision The court refused to accept that H's refusal to participate in the religious marriage was a wilful refusal to consummate. It therefore refused W's application for divorce on this ground.

Comment A bride or groom might feel that a civil marriage is something that can be got out of, but that a religious marriage is a solemn and binding commitment in sight of God and the community. Once the civil marriage is over, the religious marriage may suddenly become the final step that one party cannot take. Here, H's refusal to go through the religious marriage was effectively a rejection of W. The court again did not accept the principle that wilful refusal to consummate may be symbolic as well as literal.

Now let us look at another very similar case from the United Kingdom.

CASE *Kuar v Singh (1972) United Kingdom*[43]

Facts Two Sikh families arranged a marriage between H, the son of one family, and W, daughter of the other. Both knew that under Sikh religious practice, a religious ceremony is necessary before the parties are considered fully married; it is the man's duty to organise the marriage. A civil marriage took place but not the religious ceremony, because H refused to make the necessary arrangements. W applied for a divorce.

Issue Was H's refusal to arrange a Sikh wedding ceremony wilful refusal to consummate the marriage and therefore ground for divorce?

Decision The court ruled on appeal that H's refusal to arrange the Sikh wedding ceremony fell into the category of wilful refusal to consummate the marriage. The court recognised Sikh custom, accepting that by refusing to arrange the religious ceremony, H was essentially refusing to have sexual intercourse with the bride whom he had married in the civil ceremony. W was therefore entitled to a divorce on this ground.

Comment This judgment was made in 1972, so the precedent was established before the Fiji cases, and could have been applied in Fiji.

Habitual cruelty; rape, sodomy or bestiality; habitual drunkenness and intoxication

In Chapter 5, we discussed criminal assault against women in the home. This section deals with violence as a ground for divorce. For divorce purposes, cruelty may be defined as "conduct ... of such a character as to

have caused danger to life, limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger".[44]

Habitual cruelty is recognised as a ground for divorce in all countries of our study except Nauru, Tonga and Tuvalu. The Solomon Islands position is complicated by having different legislation for Solomon Islanders and for others. The latter are covered by the United Kingdom *Matrimonial Causes Act*, which requires habitual cruelty. The *Islanders Divorce Act*, on the other hand, requires "simple cruelty" but in practice courts look for evidence that the cruelty is habitual.

> However ... in all questions of cruelty ... the whole matrimonial relationship must be considered. That rule is of special value when the cruelty consists not of violent acts, but of injuries, reproaches, complaints, accusations or taunts. In determining what constitutes cruelty, regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status.[45]

Despite this, because a divorce application may not be made until after three years of legal marriage, the legislation may condemn a newly married woman to three years of legally approved violence before she becomes eligible to apply for divorce. So the legislation and the English and local common law together provide the criteria listed below.

- There must be proof of real injury to health, or of a reasonable fear that the cruelty will cause harm. The wife therefore must show that she has been physically injured or has a reasonable fear of being injured.
- The cruelty need not be deliberate. In proving cruelty against her husband, a wife does not have to prove that he intended to hurt or to be cruel to her.
- The cruelty must be habitual; it must be regular, systematic and constant. Occasional slaps, punches or kicks, or even occasionally all of these at once, do not qualify as habitual cruelty. One such act might be sufficient to allow the petitioner to leave the respondent and apply for a divorce in two or three years on the ground of constructive desertion, but it is not enough for a divorce on the ground of habitual cruelty.
- The cruelty is not necessarily physical violence. Taunting and mental or psychological cruelty are also accepted as cruelty in English common law.

Because cruelty must be habitual, legal and cultural obstacles make it the most difficult ground to prove. The most common obstacle for Pacific women is that local courts interpret the legislation very narrowly. The following cases give some examples of such interpretations, and also perhaps of some attitude changes over the years.

CASE *Malti Vati Singh v Satyendra Prasad (1980) Fiji*[46]

This case provided much evidence of the husband's habitual physical cruelty. The court said that in order to satisfy the requirements, there must be "real injury to the health of the complainant or reasonable apprehension of such injury". A common sense interpretation of the legislation is that the court itself cannot feel the petitioner's fear, so it should take the petitioner's feelings into account; it should apply subjective tests. However the court insists on objective tests: proof that the petitioner has already been physically hurt, and that she has reasonable fear of being hurt in future.

CASE *Hahe v Melzear (1982) Solomon Islands*[47]

Facts and decision W petitioned for divorce on the ground of simple cruelty under the *Islanders Divorce Act ;* the cruelty was apparently frequent, but H admitted only three occasions. The Act does not require evidence of habitual cruelty but the court's comments show that it looked for such evidence. The admission and proof of one occasion of cruelty led the court to believe that W was probably telling the truth, although it considered whether to deny her the divorce because she should have pleaded her own adultery. However, the court chose not to hold that against her and gave her the divorce on the ground of cruelty.

CASE *Alka Ben v Jogia (1985) Fiji*[48]

Facts, decision and comment. The application for divorce was made on the ground of desertion, rather than cruelty, but it was proved and accepted that the wife had been injured. However, the court said that the injuries did not amount to habitual cruelty. During the case, the husband's lawyer said that the cruelty did not amount to habitual cruelty, but "was the normal wear and tear of some marriages". If lawyers (who often become legislators) believe that some violence is normal in marriages and that women should accept this, it will take a long time to change attitudes and laws.

CASE *Valenti v Valenti (1985) Solomon Islands*[49]

Facts, issue and decision H and W were expatriates. W petitioned for a divorce for habitual cruelty under the *Matrimonial Causes Act*. H had punched and kicked W on three occasion: did this constitute habitual cruelty? The High Court held that habitual cruelty must not be trivial, minor or unimportant, and must have caused injury to health or apprehension of injury. The Court said that, in W's case, the "sum total of cruelty" did not satisfy the law, as a whole, to enable a divorce.

Comment W had satisfied the court that she had suffered cruelty, but it was not the kind of cruelty that, according to the court, the legislation required. So, according to the local common law, there are different degrees of cruelty: some provide a ground for divorce, but others (like being punched and kicked on only three occasions) are more or less normal, and the wife has to put up with them. This case again shows the essential difference between male and female perceptions of violence committed against women in the home. If you punch and kick anyone, in the street or in your home, you commit the offence of criminal assault. So why did not the court ask: "If punching and

kicking anyone is illegal, why is punching and kicking a wife not a basis for divorce?"

CASE *Tefenoli v Tefenoli and Another (1990) Solomon Islands*[50]

Facts and decision W sued H for divorce on the grounds of adultery and cruelty. H accepted that he had struck W in an argument in which he had accused W of having an affair. He argued, however, that because W had stayed with him for a week after he beat her, she had condoned his cruelty, and therefore could not present it as a ground of divorce. The High Court rejected H's argument, and granted W the divorce on the ground of H's adultery, not of his cruelty. It denied H access to the children, because of his behaviour and cruelty. About the cruelty, the judge said: "As to the cruelty, I accept that the respondent struck the petitioner, but I am not satisfied that he did not have sufficient reason, and that prevents it amounting to cruelty".

Comment The decision in the end favoured W; the judge was attempting to be fair in trying to find a ground that the common law regarded as sufficient to justify divorce. However, the statement seems to suggest that there are certain instances where cruelty is justified: if a husband has sufficient reasons to hit his wife, this does not amount to legal cruelty, even though, according to criminal legislation, any assault is illegal. There are other important questions. If the High Court accepted that H was too habitually violent to have access to his children, why did it not accept his cruelty against W?

CASE *Bui v Makasi (1992) Solomon Islands*[51]

Facts W and H married and lived together for 13 years, during which they had four children. W left H, saying that when H was angry he would keep his anger bottled up for a long time and would refuse to talk to her. Then he would get drunk, return home and assault her. Once, when she was pregnant, H chased her out of the house at night. Another time when H was drunk, he took a knife into their bedroom. Another time, H lifted their eldest child up by the ears and dropped him; H said that he had done it to discipline the child. When W petitioned for divorce on the ground of cruelty, H's lawyer denied cruelty and said that W had not been injured; she agreed, but pointed out that the assaults were painful. The court suggested that W had condoned H's behaviour, but she said: "I gave him opportunity to change but there was none so I walked out".

Decision The court believed W, and said that her explanations were reasonable and understandable, but that H was evasive. The judge stated: "I accept the petitioner may have been distressed about the actions of the respondent ... However, it would not be sufficient unless it can be shown that it has injured her health as well ... There is no evidence of that ... Most of the allegations of cruelty were committed when the respondent was under the influence of alcohol ... I am satisfied ... that the petitioner left the respondent as a result of much fear and apprehension ... If there was indeed as claimed by the respondent no physical violence, I am still satisfied that the threat of it or the belief by the petitioner of its likelihood, was sufficiently real to cause [her] distraughtness, fear and apprehension."

Comment The court therefore accepted that the fear and likelihood of violence was enough to get a divorce. This case shows the possibilities of the current legislation. In order to make just decisions, the judge must first be willing to interpret the legislation as it was intended, taking into consideration the fear of harm as well as actual harm. The impact of the law on women depends not only on legislation but also on judicial reasoning and interpretation.

CASE *Sesebo v Lalago (1994) Solomon Islands*[52]

Facts W applied for a divorce for simple cruelty under the *Islanders Divorce Act*. H admitted having hit W on several occasions, sometimes in front of the children, but he claimed that these assaults were not cruel. W agreed that the assaults had not injured her, but said they were still cruel. The court accepted that the assaults had happened but said they were insufficient proof of cruelty, because the required standard of proof was "higher than the civil burden".

Comment This statement is wrong in fact; the burden of proof in divorce is the civil burden, no lower but no higher, either. As well, H had admitted assaulting W and assaulting anyone is a crime. Through whose eyes did the court see cruelty?

Although the legislation itself does not demand proof of actual injury, practice does demand it. Courts assume that if the injuries were really serious, the petitioner would have made both medical and police reports. Police statements provide documentary evidence that the husband has beaten the wife even if the allegations are not ultimately proved in a criminal court. However, as we have seen in Chapter 5, women have great difficulty in getting the police and the courts to take domestic violence seriously; it is therefore hard to obtain a conviction for such cases. Even if a husband is violent towards the children, or towards other people, such violence is not enough. The legislation demands that cruelty must be proved against the spouse. In fact, in order to prove cruelty, the police and courts want the kind of evidence listed below.

- Physical injuries supported by medical reports by a credible doctor. The medical reports should be detailed, stating that the wife had sustained physical injuries and/or was visibly emotionally upset by the violence.
- Criminal convictions of assault following a complaint by the wife.
- Police reports: an actual statement made by the wife and recorded by a police officer.
- Eyewitness accounts, accounts by a person or people who actually saw the cruelty.
- Personal accounts from people who saw and heard the wife after the violence and can say that her behaviour showed that she was probably telling the truth.

Independent witnesses, the people who provide eye-witness and personal accounts, are usually relatives. This may sometimes lead to suspicion that they are telling lies, but in general it does not work against the woman. In

fact, relatives are the most likely to know that a woman is being beaten, and they are more likely than neighbours would be to agree to go into court on the woman's behalf. Witnesses can give primary and direct evidence if they actually see and hear the cruelty. They can give indirect evidence of the consequences of the cruelty. In certain circumstances, the court will accept the evidence of a credible witness who says that he or she did not see the actual beating, but did see the petitioner's injuries immediately after the beating, and saw how upset and distressed the petitioner was.

If a woman does not have witnesses to provide such evidence, proof becomes very difficult. Because of the difficulties of proof and of having to obtain police and medical reports, women must say to the police that they actually intend to prosecute their violent husbands. Police then must record a statement and file a prosecution if the investigation reveals that an assault has taken place.

Specifically, a battered wife's statement to the police may have the following results.

- The court may issue a non-molestation order.
- The woman may get some protection because the husband fears prosecution.
- The statement may help to prove a divorce based on cruelty. If the wife can escape a violent marriage, and does not need to keep going to the police for protection, this will save both the police and the court the trouble of criminal prosecutions.

Women do not realise that they have a constitutional right to make the complaint. Police do not have the right to refuse to take a statement. They have an obligation and duty to do so, but police officers often do not realise this, nor do they realise that what may seem to be an ordinary domestic squabble may result in murder. In Fiji, of all murders between 1992 and September 1995, 40% were identified as domestic-related; 26 of the victims were women and 16 were children; and 30 of the 35 persons convicted of murder were men.[53] How much of this suffering and violence might have been prevented by early sensible police action and by sensible divorce laws?

Particularly in countries where divorce is heard in the lower courts, decisions such in *Bui v Makasi* are rare. Courts continue to regard habitual cruelty as being physical cruelty only, and often do not use mental cruelty as a ground for divorce unless it occurs together with physical cruelty. This is despite the fact that there are many ways of being cruel, ranging from violent assault to verbal abuse and harassment.

Some cases have succeeded on the basis of physical cruelty as the main ground, with the mental ground as a supporting factor. Those that succeed on the basis of mental cruelty alone are usually uncontested, although in one contested case, a husband applied for a divorce on the grounds of his wife's habitual mental cruelty.

CASE *Ram Shankar v Lila Wati (1989) Fiji*[54]

Facts H said that he and W had been living apart, but under the same roof, for 12 years. He accused W of having affairs and boasting about them; of excessive drinking; of not cooking and cleaning for him; and of refusing sexual intercourse. He said that W's behaviour had caused him severe mental agony and that he had been clinically diagnosed as having mental depression. A St. Giles Hospital doctor agreed that H was depressed, but said that the hospital had only H's account of the reasons.

Decision Despite the lack of corroboration, the court ruled that it was able to make a finding of habitual mental cruelty without corroboration if it was not possible to find out the truth. The court also accepted that although the parties were living under the same roof, they maintained separate households. H got his divorce on the ground of W's habitual mental cruelty.

Comment For years, Fiji lawyers have been trying unsuccessfully to get divorces based on mental cruelty by husbands. This time, a husband succeeded in obtaining a divorce based on his wife's mental cruelty. The court did not make any conclusive finding that mental cruelty alone fulfilled the requirements of the legislation. In fact, it ignored the question, and concentrated mainly on W's refusal to have sexual intercourse and to cook and clean for H. If there had been an appeal, this case might have been overturned, as there has been no High Court decision establishing a precedent that mental cruelty alone is a ground for divorce. However this decision has value as a precedent. It is now theoretically possible for a woman to cite this case as a precedent for divorce based on mental cruelty by her husband.

What other possibilities are there? There are some avenues of escape for a battered wife who wishes to get a divorce before the end of three years of marriage. She may apply to the High Court for permission to divorce before three years if she can prove "exceptional grounds" for being allowed to apply early, but this requires money and legal help. In Kiribati, a battered wife who cannot prove habitual cruelty could probably apply for a divorce on the grounds of incompatibility. In Cook Islands also, a divorce could be sought on the grounds of incompatibility, but this might be difficult as the parties must be separated for two years and both must agree to the divorce.

Another option is to bring a divorce action based on the conviction of the respondent. A wife may not want the father of her children to have a criminal record but, if she has no other way of divorcing him, this option forces her to get her husband criminally convicted. Ultimately, because it is legally so difficult to escape a violent marriage, women remain in the marriage, or separate without financial security and wait out the longer periods of separation in order to obtain a divorce. By making it difficult to prove cruelty and thereby legally escape from a violent marriage, the law indirectly condones violence against women.

The limitations of the law and the discriminatory nature of the interpretation of legislation have grave consequences for women and society in general. If they are denied legal escape from violent marriages, women and children are denied also the right to a life without violence, a basic human

right guaranteed by the Constitution and CEDAW. Violence breeds violence. Children who see their mothers beaten often grow into violent adults who believe that violence is an acceptable part of life.

In most countries of our region, the legislation does not allow the family the dignified option of a no fault divorce. Habitual cruelty is hard to prove, but we have now at least the Fiji case of *Ram Shankar v Lila Wati* and the following Vanuatu case to provide precedents of the civil burden of proof required by law.

CASE *Niko v Niko (1996) Vanuatu*[55]

Facts W sought divorce, with a share of matrimonial property, on the ground of H's habitual cruelty. W gave evidence that H had hit her, made her eyes and nose bleed, bruised her face and kicked her ribs. He shamed her by swearing at her in front of her family, and had once tried to strip her naked in public. He assaulted her while they were in a moving car, and she had fallen out and injured herself. H had been convicted for intentional assault on W, and had also been sentenced to two weeks prison for having breached a restraining order. He did not support the family. H admitted having assaulted W, and W's brother-in-law supported most of W's claims. However, H said that he did not want divorce and that his custom chiefs had discussed the matter and saw no reason for divorce.

Issue, decision and comment What was the correct burden of proof in divorce cases? W's claims were supported by independent evidence, but the court said that in divorce cases, the requirement for corroboration is a matter of practice and not of law. "If corroboration were required of all facts of cruelty ... many petitioners would be unable to prove their case because ... often ... cruelty is committed in the privacy of the matrimonial home."

The correct burden of proof was the balance of probabilities, not beyond reasonable doubt and the court could have accepted W's evidence without corroboration. This commonsense approach shows that the law can achieve justice for battered women, in spite of decisions like that in *Sesebo v Lalago*.

Rape, sodomy or bestiality are criminal offences in all countries of our region. They are also grounds for divorce. They are independent grounds for divorce: each is a separate ground, despite the fact that they are grouped together. These grounds of divorce are available in all countries of the region except Tuvalu, Tonga and Nauru. For rape and sodomy, the legislation in most countries does not specify a victim. It seems to mean that a petitioner can apply for a divorce if the respondent has raped or sodomised another person or the petitioner herself. Typically, the legislation says that the grounds are available to a petitioner if

(e) ... since the marriage, the other party to the marriage has committed rape, sodomy or bestiality.[56]

Note that these three situations do not require proof that the respondent has appeared before a criminal court and has been convicted of the offence of rape, sodomy or bestiality, just that he has committed the offence. However,

a conviction would make the ground easier to prove, as proof can be difficult. For example, because bestiality is committed on animals, only human witnesses could provide direct evidence.

As we have already seen in Chapter 4, proving rape is very difficult and most countries in our region still do not recognise the possibility of marital rape. A rape conviction against the respondent might be the only sure evidence. Both rape and sodomy are crimes, but in sodomy, consent is irrelevant; with or without consent, the act is illegal. This means that if husband and wife agree to practice sodomy, neither can admit it because both could be charged with a criminal offence. However, if a husband sodomised his wife against her will, she could prosecute him in a criminal court and could also apply for divorce on this ground. To do this, she would have to supply evidence of forced anal intercourse coupled with physical injuries, but she would have to be very sure that her husband could not prove that she consented; if he could, she could be convicted as well.

In proving rape or sodomy as a ground for divorce, the standard of proof is a civil burden, not a criminal burden, as in a rape trial. Thus it is somewhat easier to prove. Evidence of sodomy committed by the respondent and another person could be provided by eyewitnesses, by physical signs that anal intercourse had taken place, or by the respondent's conviction for homosexuality or sodomy. It is also possible, but not clear, that a woman who has been raped or sodomised by her husband could file for divorce alleging the rape or sodomy as a means of proving habitual or simple cruelty.

Unlike rape, sodomy and bestiality, habitual drunkenness and intoxication are not themselves criminal offences, although habitual drunkenness often goes with habitual cruelty and other offences because drinking large amounts of alcohol reduces self-control. This is why drunkenness is often one of the excuses given by people charged with crimes, although few could say that they were forced to drink in the first place.

Habitual drunkenness or intoxication is available as a ground of divorce in Fiji, Western Samoa and Cook Islands. "Habitual" means two years in Fiji, and Cook Islands and three in Western Samoa. The Fiji legislation reads:

> (f) ... that, since the marriage, the other party to the marriage has, for a period of not less than two years -
> (i) been a habitual drunkard; or
> (ii) habitually been intoxicated by reason of taking or using to excess any sedative, narcotic or stimulating drug or preparation, or has, for a part or parts of such a period, been a habitual drunkard and has, for the other part or parts of the period, habitually been so intoxicated.[57]

To be regarded as a habitual drunkard or drug user, the respondent must have continually been taking illegal or stimulating drugs or other preparations. This would include illegal drugs like cannabis or cocaine, and might also include legal substances such as kava and betel nut.

These two grounds can be used together as well as independently. A petitioner may apply for divorce if the respondent has for a considerable

length of time been regularly drunk AND has habitually taken drugs for part of the time OR has been drunk OR taken drugs for the required time. Again, as in all other grounds, independent supporting evidence needs to be called to prove habitual drunkenness or intoxication. However, the respondent does not necessarily have to have been criminally prosecuted on these grounds.

It is also possible to leave the respondent for this behaviour, and to apply in two or three years for a divorce on the grounds of constructive desertion. This ground again reveals the ridiculous lengths people have to go to get a divorce: the petitioner must desert, or separate from, the respondent or endure years of drunken or drugged behaviour before becoming eligible for a divorce. By this time, the respondent may be beyond human help.

Frequent criminal convictions; imprisonment; physical harm to the petitioner[58]

These three grounds concern a respondent who has been charged and convicted of a criminal offence. The frequent criminal convictions ground is available only to women, not to both men and women. Similar legislation exists in Cook Islands, Vanuatu and Western Samoa. In some jurisdictions, Tonga for example, being frequently convicted could amount to unreasonable behaviour and provide another legitimate ground for divorce. Fiji legislation states that divorce is available to a married woman if:

> (g) ... since the marriage, the petitioner's husband has within a period not exceeding five years
>
> (i) suffered frequent convictions for crime in respect of which he has been sentenced in the aggregate to imprisonment for not less than three years; and
>
> (ii) habitually left the petitioner without reasonable means of support.

In effect, this means that the husband must have been convicted many times AND have served prison sentences of over three years AND have left his wife without financial support, before she can apply for divorce on this ground, using official Criminal Records Office documentation to do so.

It means also that a wife cannot divorce a criminal husband in the situations listed below.

- If he was imprisoned for less than three years.
- If the imprisonment was for three years, spread over eight years (not five.)
- If, regardless of the length of the period of imprisonment, he arranged financial support for his wife and family.

Waiting out the required period can cause great financial insecurity. Further, when wives are unable to obtain a divorce because their situation falls outside the technical limitations of this ground, they are tied to men who are constantly in and out of prison. And what happens when men are constantly fined instead of being imprisoned. What can their wives do then?

The ground of imprisonment is separate from the other ground of frequent criminal convictions but its effect is exactly the same: divorce is available to a person whose spouse has been convicted of a crime for which the punishment is death, or life imprisonment, or five or more years imprisonment. It is gender-neutral but we will discuss the case of a petitioner wife. The ground is available in Fiji, Cook Islands and Western Samoa. Fiji legislation requires the petitioner to prove:

> (h) ... that, since the marriage, the other party to the marriage has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life or for a period of five years or more, and is still in prison at the date of the petition.

All of the following conditions must be satisfied for a wife to file for divorce on this ground.

- The husband must be in prison at the time the divorce petition is filed.
- The husband must have served more than three years of an actual prison sentence.
- The offence committed must be one for which the lightest sentence must be five years.

Thus, if the respondent has committed a serious crime such as rape or manslaughter, but has been imprisoned for less than five years, the petitioner may not apply for divorce on the basis of this imprisonment. Further, a wife must wait for three years, regardless of the length of the sentence, and a husband's imprisonment does not entitle a wife to apply on the grounds of desertion, since desertion must be deliberate. The reasoning is that the husband did not intend to desert his wife by going to prison, even if he knew that his criminal behaviour might lead to prison. His wife must wait more than three years of the sentence to apply for divorce on the grounds of imprisonment, or wait the five years separation period. Courts in our region tend to imprison criminals for periods of less than five years, and many wives, thus find themselves without means of financial support.

The ground of physical harm to the petitioner may seem similar to the ground of habitual cruelty, but it is quite separate in Fiji, Cook Islands and Western Samoa. In these countries, it is restricted to cases where the respondent has been convicted of trying to kill or harm the petitioner. (In Solomon Islands, such actions could lead to divorce on the ground of cruelty.) Typical legislation states that divorce is available to the petitioner if

> (i) ... since the marriage and within a period of one year immediately preceding the date of the petition, the other party to the marriage has been convicted of
> (i) having attempted to murder or unlawfully to kill the petitioner; or
> (ii) having committed an offence involving the intentional and deliberate infliction of grievous bodily harm on the petitioner.

So the respondent must have been convicted in a criminal court of trying to kill the petitioner or of seriously injuring the petitioner, and the petitioner must have filed the divorce petition within one year of the physical harm. This ground is not very useful to women because it assumes that there is always a criminal conviction. This does not always happen, for the reasons listed below.

- Women rarely report violence by their husbands.
- The requirement for a conviction assumes that a wife, assisted by police, has pursued and obtained a conviction. But, as we have seen in Chapter 5, this is a very difficult thing to do.
- In situations where women do not report to the police or where they choose not to charge their husbands because they do not wish their husbands to have a criminal record, the law does not permit them the more civilised and less complicated option of divorce.

In Fiji, if a husband only once severely injures his wife, she will not get a divorce on this ground if she does not prosecute him, or does not obtain a conviction. Her other option is to leave the marital home and to apply for a divorce two years thereafter on the grounds of constructive desertion — the physical harm that her husband committed on her and forced her to leave him.

Wilful failure to maintain; failure to comply with restitution of conjugal rights[59]

As a ground of divorce, wilful failure to maintain arises when the husband is ordered to pay the wife and children maintenance or where the husband has voluntarily agreed with his wife to pay maintenance, but has failed to do so for a period of up to 2 years. It is applicable only in Fiji. The petitioner may apply for a divorce if

> (j) ... the other party to the marriage has habitually and wilfully failed, throughout the entire period of two years immediately preceding the date of the petition, to pay maintenance for the petitioner
> (i) ordered to be paid under an order of the Court or a magistrate's court; or
> (ii) agreed to be paid under an agreement between the parties to the marriage providing for their separation.

The petitioner must wait for two years before this ground becomes available, and have made reasonable attempts to recover the money owed; she must have spent money and time trying to recover the money that she did not have in the first place. Again this rule is unrealistic and places enormous hardship on women as it assumes that, for two years, women are able to financially support themselves and their children.

The ground of restitution of conjugal rights applies only in Fiji, where is rarely used. This situation arises when a spouse deserts the other and the deserted spouse obtains a court order, ordering the deserter to return. The Fiji legislation states that the petitioner may apply for a divorce if:

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

Insanity; separation; presumption of death[60]

Table 8.2 sets out the countries and required periods for divorce on the ground of insanity (mental disability or illness) coupled with institutionalisation.

Table 8.2 Countries permitting divorce of an institutionalised insane spouse

Country	Minimum years in an institution
Western Samoa	3
Fiji	5
Kiribati	5
Solomon Islands	5
Tonga	5
Vanuatu	5
Cook Islands	10

The legislation usually states that the petitioner may get a divorce where

(l) ... the other party to the marriage
  (i) is, at the date of the petition, of unsound mind and unlikely to recover; and
  (ii) since the marriage and within a period of six years immediately preceding the date of the petition, has been confined for a period of, or for periods aggregating not less than five years in an institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution.

So, to take the Fiji example, the respondent must fulfil the following conditions.

- He must be mentally ill when the petition for divorce is filed.
- He must be judged permanently ill.
- He must be certified insane by a medical doctor.
- He must be in, or have been in, an institution for a total period of five years. The five years is calculated on the number and length of the times that the respondent has been in the institution. When added together, they must amount to a total of five years within one six year period (not, for example, spread over ten years.)

We have already discussed separation in Chapter 7, and here we will consider it only as a ground for divorce. Separation is available as a ground for divorce in the countries, and for the periods, listed in Table 8.3.

Table 8.3 Countries permitting divorce after a period of separation

Country	Minimum years separation
Tonga	2
Cook Islands	4
Fiji	5
Western Samoa	5

Fiji legislation states that divorce is available to the petitioner where

> (m)... the parties to the marriage have separated and have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed.

This means that the separated husband and wife have to satisfy each of the following conditions.

- They must live in two separate households for the required number of years.
- The separation period must be continuous. (This is important. Cohabitation for more than three months breaks the continuous separation period.)
- There must be no chance of them being able to live together again as husband and wife.

Even opposition by the respondent cannot prevent the divorce if the petitioner can prove separation for five years. Separation is the most common ground of divorce; it is available without either spouse having to prove fault. Because of this, it is quite different from the fault-based grounds of desertion or wilful refusal to maintain; in legal terms, there is no defence to an application for divorce on the ground of separation. Either party can apply for divorce, even the party originally at fault. The only requirement is that a petitioner who committed or is committing adultery must admit the adultery in the divorce petition. The following cases illustrate these aspects of divorce after separation.

CASE *B v B (1931) Western Samoa*[61]

The High Court accepted, as evidence of separation, a written agreement that the parties would live separately. The divorce was granted.

CASE *Yui Hing v Yui Hing (1969) Western Samoa*[62]

Facts and issue H applied for a divorce on the ground that he and W had been living apart for five years, and there was no chance of reconciliation. W opposed the divorce, saying that it was H's fault that they had separated. The issue was the meaning of "living apart".

Decision There was no consortium. H and W were physically separated, and although W had objected to the divorce, she had not tried to reconcile with H. The divorce was granted.

CASE *Joseph v Joseph (1977) Fiji*[63]

Facts H and W had been living apart for over five years. H had been living in a *de facto* relationship and had not applied for divorce before five years because the law is based on the idea that only the blameless spouse may apply and, in law, W was the blameless spouse. H applied for divorce on the ground of separation for five years. W objected because her religion did not permit divorce.

Decision and comment The court refused to accept W's reason as valid since the grounds were proved in all other respects. It is necessary only to prove the fact of separation for the required period to prove divorce. Essentially, the court said that, where divorce was applied for on the grounds of separation, the respondent could do nothing to prevent it. Divorce could be denied only if the petitioner had failed to maintain his children, which did not apply in this case.

As we have just seen, if a husband has applied for a divorce on the ground of separation, but has never paid maintenance or has failed to pay maintenance on a court order, he may be denied divorce. A divorce may be granted only if the welfare of the children has been considered and satisfactory arrangements have been made. For example, failing to pay maintenance may stop a divorce being granted. A wife may then ask for a lump sum payment of maintenance or the court may see fit to make an order of maintenance. The court will grant the husband's application for divorce only if he can show that he is able to pay. This is one of the very few benefits that women have in the legislation. It is, however, of limited value because it is unenforceable, especially if no payment has ever been made. The court will eventually grant a persistent applicant a divorce. Custody and access proceedings may slightly delay a divorce but will not usually stop it.

The court does have the power to deny a divorce on the grounds of separation if it believes that divorce would be against the public interest, or harsh and oppressive to the respondent. This may happen even if the separation is for more than five years. The court may order that the petitioner make some form of maintenance or a settlement of property on the respondent before a divorce is granted. This provision is interesting but it says nothing about the principles upon which the maintenance should be ordered, or the property given to the respondent. It is up to the magistrate or judge to make such an order on broad principles of what is just and proper. Does the following case fall into that category?

CASE *O v T (1985) Tonga*[64]

Facts, decision and comment H and W had been separated for six years. W was living in a *de facto* relationship, and applied for divorce, which H opposed, saying that he wanted to reconcile with W. The Privy Council said that H genuinely did want reconciliation and denied the divorce. H and W had been separated far longer than the minimum period; W was in a *de facto* relationship and wanted divorce. What real chance was there of reconciliation?

In Fiji, Vanuatu and Western Samoa, if the petitioner can prove that the respondent is probably dead, the court will presume death and grant a divorce. This might occur, for example if there has been no contact during years of separation or if the respondent is missing at sea or has disappeared.

Grounds available only in Cook Islands, Kiribati, Nauru, Tonga, Tuvalu or Western Samoa

We have just discussed the grounds that are available in Fiji and in other countries, and sometimes in Fiji alone. Now we will look at grounds available only in Cook Islands, Kiribati, Nauru, Tonga, Tuvalu or Western Samoa. Table 8.4 includes notes on the grounds of wife's drunkenness, artificial insemination, diseases, duress or mistake, murder and another spouse living. We will discuss the other grounds separately.

No fault divorce; irretrievable breakdown; incompatibility; unreasonable behaviour or judicial separation

Irretrievable breakdown, unreasonable behaviour, incompatibility and judicial separation are similar to no fault grounds, so we will discuss them together. First however we must ask: What do we mean by a no fault divorce?

In most Pacific Island countries, the petitioner must prove that the respondent has committed a matrimonial offence, or has not done something that is essential under matrimonial law. These countries have fault-based divorce laws, and we have just discussed all the faults that make divorce available. We have seen also that fault-based divorce makes more difficult and painful a process that is already difficult and painful. For these reasons, in recent years, there has been a movement towards no fault divorce, in which neither spouse needs to prove or even say that the other spouse is wrong. All both need to do is to come to some agreement about children and property.

Table 8.4 Grounds available only in Cook Is., Kiribati, Nauru, Tonga, Tuvalu or Western Samoa

Grounds for divorce	Tuvalu *Matrimonial Proceedings Act*, Cap. 21 ss. 8-9i	Kiribati *Matrimonial & Divorce Act*, Cap. 60 s. 4 Note 2	Western Samoa *Divorce and Matrimonial Causes Ordinance 1961* s. 7 Note 4	Cook Islands *Matrimonial Proceedings Act 1963 (NZ)* s. 2b Note 1	Tonga *Divorce Act*, Cap.29 Amendment 39/88 s. 3 Note 3	Nauru *Matrimonial Causes Act, 1973* s. 8
Irretrievable breakdown/ unreasonable behaviour (x years)	yes				yes. called unreasonable behaviour	yes
Incompat-ibility (x years)		yes		yes (2) by agreement		
Wife's drunkenness & neglect of domestic duties			yes			
Wife artificially inseminated with the sperm of another man				yes		
Incurable disease					yes	
Venereal disease		yes				
Epilepsy (x years)		yes (3)				
Duress/ mistake		yes				
Murder conviction				yes		
Another spouse still living					yes	
Judicial separation by agreement			yes (3)			

Note 1 Cook Islands: The artificial insemination ground does not seem to be available to the wife of the man whose sperm has been used to inseminate the woman. Regarding the ground of murder conviction, Cook Islands and other countries have the ground of imprisonment for an offence punishable by death or life imprisonment.

Note 2 Kiribati: These grounds are gender-neutral. A spouse who has a venereal disease may be divorced, and so may a spouse who has suffered from epilepsy for 3 years. A spouse may apply for divorce if the marriage was conducted under duress or mistake. In other countries, duress or mistake may nullify a marriage.

Note 3 Tonga: Both grounds are gender-neutral. In other countries, a person who has more than one legal spouse living at any one time is guilty of bigamy, which nullifies the later marriage.

Note 4 Western Samoa: As the ground of "habitual drunkenness and neglect of family" is already available, it is difficult to see the necessity for a ground that discriminates against wives.

As we worked through the grounds available in Pacific Island countries, we often saw a note like "except in Nauru and Tuvalu". This was not because Nauru and Tuvalu aim to make divorce very difficult; it is because the only ground for divorce in both countries is irretrievable breakdown of the marriage: the spouses cannot make their marriage work.[65] Cook Islands and Kiribati both have incompatibility, which again means that the spouses are unable to live happily together.[66] In both countries, incompatibility could replace all the fault-based grounds, which are now unnecessary, because their only real use is to humiliate and embarrass a respondent.

Cook Islands and Nauru have two important limitations: separation of more than two years and the consent of both parties. If one party does not consent, the petitioner must complete four years separation. The Nauruan legislation is a small improvement on fault-based divorce, and does allow for consensual divorce: both parties can agree to get a divorce, which is the current practice. The Nauru legislation states that

> The sole ground on which a petition for divorce may be presented to the Court by either party to a marriage shall be that the marriage has broken down irretrievably.

There are no divorce judgments available in Nauru, partly because divorce is no longer based on fault. All proceedings regarding marriage and family problems are held in the special Family Court set up for that purpose. The judicial officer may sit in other courts as well, but in the Family Court he or she concentrates on applying the special principles of family law. The Family Court must be satisfied that one or more of the following situations has arisen.

- The respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

- The respondent has deserted the petitioner for more than two years.
- The parties have lived apart for more than two years and the parties both consent to the divorce.
- The parties have lived apart for more than five years.

Nauru does not have adultery as a ground. However if the petitioner can show that the respondent has had an "improper association",[67] the petitioner can use the association to show that the respondent has behaved unreasonably, and in such a way that she cannot be expected to live with him. This means that irretrievable breakdown of marriage has taken place. The following story shows this how might work.

STORY *He wants me to support him and his girlfriend as well*[68]

W had been overseas on business; when she came home she found H living in the matrimonial home with his girlfriend. They both wanted W to live with them in the matrimonial home, share sexual relations, and to support them, because she had a good job. W didn't see why she should work to support her husband and his girlfriend. In her divorce petition, she named H as respondent and his girlfriend as the person with whom H had an "improper association". She claimed irretrievable breakdown on the ground that H had behaved in such a way that she couldn't reasonably be expected to live with him. The divorce was granted.

In each of the four countries, certain facts must still be established to prove that there has been irretrievable breakdown. For example, in Kiribati, either spouse may seek divorce because of incompatibility of temperaments. This can be done without time limitations, and is potentially the most liberal ground in any Pacific Island. However, although the legislation does not require them to do so, courts in practice, continue to look for faults to prove incompatibility.

In Tuvalu, to assess whether the marriage has irretrievably broken down, the court no longer has to find one party at fault. It may however look at certain factors to make a decision that the marriage has broken down. Adultery, desertion, cruelty or insanity may be used to show that the breakdown is complete, without hope of reconciliation. The Tuvalu Court will give the parties three months to decide whether reconciliation is possible. If this is not possible, a divorce will be granted. There are no time limitations for applying for divorce. A divorce may be obtained any time after marriage.

Tonga has another ground, that of "unreasonable behaviour". This allows some broad interpretations that come close to no fault, but it still requires the petitioner to prove that "the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the petitioner".[69] When the provision is viewed from the petitioner's point of view, a whole range of behaviour may fall within the definition, from physical or mental cruelty to unreasonable demands for sexual intercourse or domestic services. The unreasonable behaviour provision is now widely used in Tonga, replacing many other grounds. After its introduction, the divorce rate rose because

people who had been unhappily married for years were suddenly able to find a ground that was simpler to prove. The rate has now settled down again, but the provision may well make useless the other divorce grounds.

In Western Samoa only, following a judicial separation by agreement for a period of three years, either spouse may apply for divorce without proving fault. (As you will remember from Chapter 7, a judicial separation means that both spouses have signed a legal document agreeing to separate and agreeing on the conditions, and it is approved by the Court.)

No Pacific Island country fulfils the formal requirements for no fault divorce, except through three years judicial separation in Western Samoa and from two to five years simple separation in other countries. A proper and clear no fault divorce law would be that after a year's separation, a party may apply for divorce without having to give a reason why divorce is sought. The respondent spouse would not be able to object to a divorce being granted, unless the welfare of the children of the marriage is not settled. In countries like Australia and New Zealand, the laws have been changed to meet the changing roles of parents and the family as a whole. The no fault divorce system is progressive and humane; it recognises the futility of refusing divorce when one party or both can no longer live happily in the marriage.

THE INCIDENCE OF DIVORCE

Within our region, in countries where fault has to be proved, separation, adultery, cruelty and desertion are the main grounds for seeking divorce.

In Fiji, most divorce applications are not contested because by the time the divorce application is filed, the period of five years separation has been established. Separation is the ground most often used, because it is the only ground where the parties are almost automatically able to obtain a divorce, and the only ground where fault does not have to be proved. Many women who cannot prove adultery, desertion or cruelty wait out the required five years separation before applying for divorce.

Table 8.5 shows 1988 Suva Domestic Court figures for the various grounds upon which divorce was sought. Later statistics were not available, but there are suggestions that more women than men have applied for divorce in the last 10 years, possibly because women have improved their economic and social status, and are more aware of their rights.

> Women 5 to 10 years ago used to accept everything. Now they are better educated and do not tolerate problems in their marriage ... they come out when their husband's behaviour becomes intolerable. They now expect to be a joint partner in a marriage.[70]

Table 8.5 Grounds for seeking divorce, Suva Domestic Court, 1988

Grounds	1988
Separation	204
Desertion	117
Adultery	115
Cruelty	67
Wilful refusal to consummate	32
Mental cruelty	3
Imprisonment of defendant	2
Total	**540**

All Cook Islands files containing official statistics were destroyed by fire in 1992. Informed sources[71] say that about between seven and 12 divorces are granted every year and that just as many women as men apply. Divorces are usually uncontested but custody and access disputes are common. Between 1970 and 1977 there were 124 divorces, averaging 15 to 16 per year. The lowest number granted during the seven year period was 12 and the highest was 25. Details thereafter are sketchy but 10 divorces were granted in 1981; in 1982 there were eight and in 1983 there were 14.[72]

Between 1982 and 1992, the High Court of Kiribati[73] granted 255 divorces, an average of approximately 25 per year. This is an increase of 33%, compared

to the period 1975 to 1980 when the average was approximately 15 per year. In 1993 there were 20 cases for the whole of Kiribati. Between 1982 and 1992, only two divorce cases were defended in the High Court. In the undefended actions, the other spouse either did not appear in court, or appeared and agreed that he or she was to blame for the breakdown of the marriage. Such divorces are known as "consent" divorces, although in theory the other spouse may agree that he or she is at fault, but cannot really consent to divorce because of the rules against collusion and connivance.

In Nauru, from 1970 to 1976, there were between one and five divorces a year. In 1976, Nauru changed its divorce laws to allow a single divorce ground, that of irretrievable breakdown of marriage. Thereafter there were between six and 13 divorces a year.[74]

Solomon Islands figures do not include custom divorces occurring outside the formal legal system. All legal divorces have to be filed and heard in the High Court. This makes divorce inaccessible to the majority of women, and the costs are quite high for all parties. Table 8.6[75] shows an increase of over 100% in the number of divorces granted between 1984 and 1985, but the number of divorces granted have remained relatively stable since. It was not possible to find out the number of applications made each year and what percentage of these actually succeeded.

Table 8.6 Divorces granted in Solomon Islands High Court, 1981-1992

1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992
6	15	9	12	11	24	28	29	33	21	30	26	26

Tonga registered 786 divorces between January 1985 and July 1991. This may seem high, but local social commentators say that Tongans practised a form of serial monogamy (a succession of marriages to one person at a time) until the coming of Christianity made adultery a sin. Before the 1988 amendment to the divorce legislation, the main grounds of divorce were separation and desertion. Separation need now only be for two years, compared to Fiji, which requires five years. Many applications are now based on unreasonable behaviour, and lawyers say that violence against wives can be brought under this ground. Obtaining a divorce under this ground is much easier, which perhaps explains the increases during 1990 and 1991, although the numbers have settled down since.[76]

Table 8.7 Divorces granted in Tonga, 1985-1992

1985	1986	1987	1988	1989	1990	1991	1992
105	104	161	116	102	129	147	104

We have been unable to find divorce statistics for Vanuatu. Women make most applications for divorce under the formal legal system but most clients of the Public Solicitor's Office are men, who have better access to legal aid in general. However, according to the Office, the main concern of men seems to be claiming compensation in the Island Courts for their wives' alleged adultery. If husbands obtain compensation, they do not appear to want divorce. On the other hand, the women's organisation, *Komiti Agensem Vaelens Agensem Woman (KAVAW)*, says that it is the husbands who commit adultery, and with single, rather than married, women. Wives do not usually commit adultery unless their husbands have already done so, because wives cannot afford the risks of losing custody and of paying compensation. When they seek divorce, it is because they want to sever all ties completely; they do not seek compensation.[77]

From 1970 to 1979 in Western Samoa, 422 divorces were granted. The lowest number of divorces (29) was granted in 1971 and the highest number (58) in 1977. Adultery was reported as the main fault-based ground in 1976.[78] No later statistics appear to show the grounds. The years 1990 to 1992 reveal a small increase in the numbers of divorces sought; most of these were granted. The divorces adjourned *sine die* were those that could not be proved or that lapsed because the parties discontinued proceedings. The divorces taken off the list were actions withdrawn by the spouse bringing the action.[79]

Table 8.8 Divorces in Western Samoa 1991-1992

	1990	1991	1992
Divorce filed	43	61	69
Divorce granted	29	50	48
Divorce adjourned *sine die*	5	5	1
Taken off list	4	2	1
Divorce enlarged into maintenance or custody	5	4	1

BARS TO DIVORCE

We have seen that one of the greatest obstacles to obtaining a divorce is that courts may require a standard of proof higher than the standard required by the legislation. But this is not the only obstacle; the legislation and the common law have created several technical obstacles to obtaining a divorce. These are generally called bars, and may be absolute or discretionary. An absolute bar occurs when, because of some proven fact, the court must deny the petitioner a divorce. A discretionary bar occurs when, because of some

proven fact, the court may deny the petitioner a divorce, but may use its discretion about whether to do so. In addition, certain actions of the parties, and certain legal rules operate as a bar to getting a divorce. We will first list these bars and then discuss them one by one.

- The duty of courts to promote reconciliation
- Break-up of continuous separation
- Condonation or connivance; collusion
- Conduct of the petitioner
- Time limitation
- Domicile for the purposes of divorce
- Special hardship

The duty of courts to promote reconciliation[80]

As we have seen in Chapter 7, courts have a duty to promote reconciliation before hearing an application for divorce. If a court does not explore the possibility of reconciliation, this omission may act as a bar to divorce.

The Fiji legislation is stated below.

> 4(1) It is the duty of the Court or the magistrate's court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so) and if at any time it appears to the judge constituting the Court, or the magistrate constituting a magistrate's court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the judge or the magistrate, as the case may be, may do either or both of the following:
>
> (a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with paragraph (b);
>
> (b) nominate
>
> (i) a welfare officer with experience or training in marriage conciliation; or
>
> (ii) some other suitable person to endeavour, with the consent of the parties, to effect a reconciliation.
>
> (2) If, not less than fourteen days after an adjournment under subsection (1) has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the judgement or the magistrate, as the case may be, shall resume the hearing.

So the court must try to encourage reconciliation if it thinks that reconciliation is appropriate. It may postpone divorce proceedings to do this. It may also nominate a person (not necessarily a trained counsellor) to

bring about a reconciliation. If, after 14 days, the husband and wife do not wish to reconcile, the court must continue with the divorce proceedings. However, some courts appear to ignore the time limit; the following case clearly shows the paternalistic approach.

CASE *B v B (1982) Solomon Islands*[81]

Facts and decision After having been separated for several years, the wife asked for divorce on the grounds of her husband's adultery. She asked the court to exercise its discretion in her favour, despite the fact that she had also committed adultery. The court refused, applying a 1943 case. It said that there was still a chance of reconciliation; that there were children to consider; and that it was in the interests of the community at large to maintain a balance between respect for the sanctity of marriage and social considerations about the value of maintaining a failed marriage.

Comment Here we have two people who are separated and are living with other partners. Was it in the interests of the community that these two people should stay married to each other?

Unless courts have access to special facilities to promote reconciliation on terms that both parties can accept, trying to encourage reconciliation does not make sense. Very few Government agencies have trained marriage guidance counsellors attached to the courts or social welfare departments. It is no longer possible to rely on welfare officers who do not have marriage guidance skills, or on informal bodies like church groups, religious leaders or village elders. Women, especially those who are victims of violence, now see such bodies as biased in favour of men, or as trying at all costs to maintain the institution of marriage. They see current reconciliation methods as maintaining their inferior position within the marriage. If they do listen, they return to the marriage without negotiating terms acceptable to them. They become the victims of the law because courts do not follow the legislation limiting the time in which a court may encourage reconciliation. Such rules contribute towards the continued lack of power of women to control their own lives.

Break-up of continuous separation[82]

In common law countries, a separated couple can go back to living together to try to reconcile. Living separately under one roof does not count as reconciliation. Cohabitation may occur with or without sexual relations, and reconciliation will be judged on whether or not the parties share a household, not on whether they have sexual intercourse. If their cohabitation exceeds certain periods, both parties lose their right to divorce on the grounds of continuous separation or desertion. In all Pacific common law countries with fault-based divorce laws, reconciliation for more than three months breaks up the period of continuous desertion or separation.

CASE *Ng Lam v Ng Lam (no 2) (1972) Western Samoa*[83]

Facts During five years separation, H and W had sexual intercourse with each other from time to time, and W had a child. When H sued for divorce based on five years separation, he denied that the child was his.

Issue and decision Did the acts of sexual intercourse break up the five years continuous separation? The court decided that these acts were insufficient to break up continuous separation, even though evidence showed that H was the father of W's child. The general policy of law was to "get rid of a limping marriage;" H and W were unlikely to be reconciled and the marriage had completely broken down. Therefore the court granted H the divorce.

Comment This case, like that of *Melei v Futisemanu (1959) Western Samoa*[84] suggests that a couple may come together from time to time, as long as they do not stay together for more than three months. Compare this 1972 decision with the Solomon Islands case of *B v B (1982)*, which "in the interests of the community" denied a divorce to a couple who had separated and were living with other partners. In these three cases, attitudes rather than laws again seem the deciding factors.

A person applying for a divorce on the grounds of desertion or separation must make sure the period of separation is continuous and unbroken. This provision recognises the possibility that, when a couple separate, they may get back together again to try to reconcile. If they live together for less than three months and then separate again, the time during which they lived together will not be counted against them in assessing the total period of separation. If however, they reconcile for more than three months and then separate again, the period of reconciliation will be counted against them. The continuous separation rule seems intended to allow an application for divorce from spouses who attempt a reconciliation and fail; in practice the rule is another that can make divorce difficult.

STORY *Alisi and Simi*[85]

Simi often beat Alisi but Alisi could not prove habitual cruelty as she never reported the beatings to the doctor or the police, and Simi always punched her in the stomach so that the bruises wouldn't show. Alisi was too ashamed to tell her family and friends. Simi used to tell Alisi that he would never divorce her, that no one would believe her and that anyway, it was part of Fijian culture for men to beat their wives. Alisi believed this until one day she read a Women's Crisis Centre pamphlet that said it was against the criminal law for men to beat their wives. She read also that boys who see their fathers beating their mothers may grow up and beat their wives, or their children, or other people; girls may grow up to accept being beaten, and may beat their own children.

Alisi decided to leave Simi. When they had been separated for almost two years, she would have been able to get a divorce on the ground of constructive desertion but Simi heard that she was thinking of doing this, so he went and begged her to give him one more chance. Alisi agreed, but after four months, Simi beat her again. Alisi was still unable to prove habitual cruelty, but she sought her lawyer's advice because by then it was more

than two years since the original separation. Her lawyer told her that because of the time limitation, she would have to wait a further two years before applying for divorce. By reconciling with Simi for more than three months, Alisi had lost all the first 20 months of constructive desertion.

Condonation, connivance or collusion[86]

To condone something means that you forgive or approve or overlook something. To connive at something means that you assent to, or encourage, or to pretend not to notice something. Collusion means a secret or illegal agreement to do, or not to do, something. In the legislation of all countries, proven condonation and connivance are absolute bars to divorce; collusion is discretionary bar and may be applied or not, depending on the court. In divorce law, condonation and connivance mean essentially the same thing.

25 (1) A decree of dissolution of marriage shall not be made upon a ground specified in any paragraphs (a) - (k), inclusive, of section 14 if -

(a) the petitioner has condoned the ground and the ground has not been revived; or

(b) the petitioner has connived at the ground.

(2) For the purposes of this section and of any provision of this Act referring to condonation, any presumption of condonation that arises from the continuance or resumption of sexual intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative intent to condone.

The Fiji legislation says, for example, that if R the respondent has committed adultery and P the petitioner knew about it and did not object, P may not later use that adultery as a means of obtaining a divorce. To take another example, suppose that R commits a crime for which P might divorce him, but P forgives him. Because she forgave him, P may not later use his criminal behaviour as a ground for a divorce.

Both condonation and connivance are absolute bars. What sometimes happens is that a respondent raises condonation as a defence to a divorce for a particular fault, saying that the petitioner forgave the fault or approved of it and therefore may not now use it as a ground for divorce. The following case gives an example.

CASE *Levastam v Levastam (1974) Fiji*[87]

Facts and decision H and W signed a separation agreement. H later tried to get out of the agreement saying that when W had signed the agreement, she knew that he would continue his adulterous relationship with a married woman. He said W had helped him to continue committing adultery and had therefore connived with him. It was against public policy for a spouse to connive at a matrimonial offence, and therefore the agreement was unlawful. The court disagreed, saying that there was no connivance by W, since connivance meant "winking at a course of misconduct," in this case, sanctioning or corruptly licensing adultery.

In the following case, however, we see how our courts may use the collusion and connivance rules to deny divorces.

CASE *Tuilovoni v Riginiyarawa and Toqetoqe (1994) Fiji*[88]

Facts and decision H and W had separated and were both living in stable *de facto* relationships; all were on friendly terms. Both H and W wanted to marry their new partners. H applied for divorce on the ground of W's adultery. The court said that H could not petition for divorce, because he had condoned W's *de facto* relationship; it therefore struck out the petition and the case could not continue.

Comment This decision is legally incorrect as well as being unjust and silly in trying to force married people to stay together even when their marriage is clearly finished. Countries in our region are still applying the condonation and connivance rules that have been removed in the United Kingdom. If the case had gone on appeal to the High Court, the decision might have been overturned, but the parties could not afford the costs of appealing. Because of outdated legislation and judicial interpretation, two couples live in *de facto* relationships, and are unable to legitimise the children of these relationships.

As we have seen, allowing husband and wife to agree and consent to a divorce is supposed to be against the public interest and the institution of the family. Collusion means a secret or illegal agreement to do, or not to do, something. It is very much like connivance but in Fiji, Solomon Islands, Tonga, Vanuatu and Western Samoa, collusion is a discretionary bar, not an absolute bar. Both collusion and connivance are meant to stop a husband and wife from getting a divorce by agreeing that they both want to divorce, and then working out how. It is hard to see why there is a difference in law.

In practice, however, if both parties want a divorce, they may get it despite the law against collusion. Couples who have been separated for more than one or two years often agree to obtain a divorce, sometimes even sharing the costs. Collusion may be quite obvious, but all involved, including the magistrates, and the lawyers representing both sides, pretend not to notice it. This widespread practice shows that courts do realise that outdated procedural rules prevent divorces that both parties want. But, even though social attitudes are changing, the rules are still there.

Conduct of the petitioner[89]

In certain situations, if the petitioner has behaved badly to the respondent, the petitioner may not be granted a divorce. This is a discretionary bar, not an absolute bar. In Fiji the legislation states that

> 27. The Court may, in its discretion, refuse to make a decree of dissolution of marriage upon a ground specified in any of paragraphs (a) to (l) inclusive, of section 14, if, since the marriage-
>
> (a) the petitioner has committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived;

(b) the petitioner has been guilty of cruelty to the respondent;

(c) the petitioner has wilfully deserted the respondent before the happening of the matters constituting the ground relied upon by the petitioner or, where that ground involves matters occurring during, or extending over a period, before the expiration of that period; or

(d) the habits of the petitioner have, or the conduct of the petitioner has, conduced or contributed to the existence of the ground relied upon the petitioner.

The same rule applies to all grounds of divorce. A petitioner who leaves the marital home may not apply for divorce on the ground of desertion by his or her spouse (unless the application is for constructive desertion.) A petitioner guilty of cruelty may not apply for a divorce on the grounds of the cruelty of his or her spouse. A petitioner who has committed adultery may not apply on the grounds of his or her spouse's adultery, unless the petitioner's adultery happened after the spouse's adultery. In this situation, the petitioner must specifically admit his or her adultery in the petition, and must ask the court to exercise its discretion in his or her favour.

Basically, then, the petitioner whose conduct has been not entirely blameless must ask the court to excuse his or her behaviour. If the plea for forgiveness is not sought it may prevent the divorce from taking place. In both of the following cases, the petitioner had committed adultery and had asked the court to excuse the adultery.

CASE *Gavin Snow v Nina Small (1972) Fiji*[90]

Facts and decision H and W had been separated for over five years. H committed adultery after two years separation. He applied for a divorce on the grounds of five years separation. The Magistrate's Court did not hold H's adultery against him and granted the divorce. W argued that it would be harsh, oppressive and contrary to the public interest if the divorce was granted. On appeal, the High Court said that it was not satisfied that the parties had been separated for a full five years and denied the divorce. The case went to the Court of Appeal, which said that the Magistrate's decision should be upheld, and that H's adultery would not be held against him. Further, granting the divorce would not be harsh and oppressive if W's maintenance was secured.

CASE *Ne'e v Ne'e and Another (1993) Solomon Islands*[91]

Facts, issue, decision, comment W petitioned for divorce on the ground of H's adultery. W admitted to having committed adultery after separating from H because of his adultery. The court had to consider whether W's adultery should stop her from getting a divorce on the ground of H's adultery, since H had committed adultery before W did. Should it use the discretionary powers permitted in the *Islanders' Divorce Act*?[92] The court said that its discretionary powers were wide and clear. However, in the case of *B v B* (1982) the court had refused to exercise its discretion in favour of the petitioner, after having considered the factors summarised below.

- The interests of the children.
- The interests of the party with whom the petitioner had committed adultery, with special regard to the prospect of their future marriage.
- The possibility of reconciliation between husband and wife.
- The interests of the petitioner, with special regard to the possibility of future to remarriage and respectable life.
- The interests of the community in maintaining a true balance between the sanctity of marriage and the public policy usefulness of insisting on maintaining a marriage that had utterly broken down.

But, the court said, in the present case, the first two factors were not relevant. As far as the third was concerned, W clearly did not want to reconcile with H. The court said it should take into consideration that W wanted to remarry and live respectably; it would be contrary to public policy to insist on maintaining the marriage of W and H because it had utterly broken down. The divorce was granted.

Comment In the cases of *Snow v Small* and of *Ne'e v Ne'e*, the courts used their discretion in favour of the petitioner admitting fault. On the other hand, in the apparently very similar case of *B v B*, the court insisted that the couple might still reconcile, despite the fact that both were living in *de facto* relationships. The rules do not allow for the frailties of human nature and the complexities of human relationships. Marital breakdown often occurs because both parties are at fault. The law should respond to the human situation, not create more barriers and make difficult situations worse by making couples say: "Yes, we've been naughty but our spouses are much naughtier, and it's all their fault". How can this help?

Time limitation[93]

In Fiji, Nauru and Vanuatu, time limitations are an absolute bar to the petitioner's right to obtain a divorce. For most grounds, the general rule is that a spouse may not apply for a divorce unless the marriage has lasted a certain number of years. The time limitation in Fiji and Nauru is three years; in Vanuatu, it is two.

There are exceptions to these time limits. In Nauru, a petitioner who can prove exceptional hardship or a spouse's depravity may bring action for divorce before the marriage has lasted three years. The court, in allowing an application before three years has to consider the interests of the children and the possibility of reconciliation. Nauru has an almost-no-fault divorce system, but the principle here seems to be that it should take three years for a new marriage to break down irretrievably.

In Fiji and Vanuatu, the grounds for divorce before three years are adultery; wilful refusal to consummate the marriage; rape; sodomy or bestiality. So a petitioner who can prove any of these things may apply for divorce at any time after marriage. Unfortunately the exceptions do not include cruelty, so many women must put up with years of being beaten. However, there is another way of seeking a divorce before the time limitation ends. This is by applying to the High Court for special leave or permission. The High or Supreme Court may grant permission if the petitioner can prove

that denying a divorce would cause him or her undue suffering, harm, hardship or oppression, or that the respondent's depravity would be allowed to continue.

The exact wording of the legislation may vary from country to country, but in general the petitioner must prove that, in the very special circumstances of the marriage, remaining married would cause him or her extreme suffering. A petitioner who applies for special permission on the ground of the respondent's depravity must show that the respondent is completely wicked or perverted. None of the special circumstances are easy to prove, unless they are causing public concern. As well, applications to the High Court require lawyers and heavy expenses, which most women cannot afford. So both the time limitation, and the special circumstances under which it may be waived, cause further suffering to people who would not consider divorce unless they were already suffering.

Domicile for the purposes of divorce

In order to apply for a divorce, the petitioner must be living permanently in the country in which he or she files for divorce. In some countries, the petitioner has to be domiciled in that country for a specified number of years before being eligible to apply. In Western Samoa, for example, the period is two years. As the following case shows, this rule may cause problems for foreign residents.

CASE *Dear v Bellman (1982) Fiji*[94]

H petitioned for a divorce. He held a work permit and visa for living and working in Fiji. The permit and visa would both expire after a specified time. The court had to consider what the term domiciled means in Fiji for the purposes of applying for divorce locally: whether H was permanently resident in Fiji, or whether having to have a work permit and visa made him a temporary resident. On the one hand, work permits and visas expire after a stated time, and are not automatically renewed. H might not be granted a new work permit or visa; without a visa he would have to leave, and so could not consider himself as a permanent resident. On the other hand, H had a home, investments and a business in Fiji. The court said that this showed H's intention to reside permanently in Fiji, whether he had a work permit or not. H was given the right to apply for a divorce.

This case apparently involved two expatriates, but increased overseas study, work and travel possibilities may increase possibilities of marriage (and thus, unfortunately, divorce) between expatriates and locals. Questions of domicile may affect such couples, both in the Pacific Islands and in metropolitan countries. Even highly educated or wealthy people may not know about this bar to divorce, but uneducated and poor women may place themselves in real danger by marrying expatriate men whom they do not know. In Fiji, the local newspapers carry such advertisements every day from overseas or expatriate men seeking wives. In the Indo-Fijian community,

advertising for a spouse is acceptable, and the rules are understood. In Australia, however, people who use marriage advertisements or bureaux may be suspected of having something wrong with them. Advertisements by foreign men seem to have increased in Fiji since 1990. Some may be well-intentioned, but others are clearly looking for easily exploitable marriage or sex partners.

Marriage to an expatriate does not automatically confer citizenship or residence privileges in the expatriate's country. In Australia, many Asian "mail order brides" have been ill-treated but have been unable to get a divorce, unable to work legally and hence unable to raise enough money to leave their husbands or to return to their countries. National and regional Pacific women's organisations should find ways of monitoring advertisements and marriage bureaux and of advising and counselling women who may be tempted to accept doubtful propositions.

Special hardships[95]

In certain situations, the respondent's objection to a divorce may also operate as a "bar to relief," which is another way of saying "a bar to obtaining a divorce". In Nauru for instance, the respondent may object to the granting of a divorce, if the divorce will result in grave financial hardship. The court will then consider the position of the children and the conduct of the parties. In Fiji, too, hardship to the respondent can be considered. We looked earlier at the case of *Gavin Snow v Nina Small* where the respondent said that if a divorce was granted, she would suffer grave hardship. The court said that the petitioner could have a divorce, on condition that he paid adequate maintenance.

WHAT HAPPENS IF A PETITION IS DISMISSED? ANCILLARY MATTERS: CUSTODY, MAINTENANCE AND MATRIMONIAL PROPERTY

In divorce proceedings, the main issue is the divorce itself, but other matters may also need to be settled. These other things are called ancillary matters, and include questions of custody of children, maintenance and matrimonial property. Many jurisdictions work on the principle that if the court decides to dismiss the main application, it dismisses at the same time all ancillary matters. This interpretation of the legislation and common law is technically wrong as far as custody and maintenance are concerned.

The practice creates severe hardship for women and children. Suppose a woman leaves her violent husband and applies for a divorce on the grounds of habitual cruelty; at the same time she applies for custody and maintenance.

But habitual cruelty is hard to prove, so her petition is dismissed. Because the petition is dismissed, her right to custody of the children and maintenance is also in danger. All she can do, if she has the money, is to make a new application for custody and maintenance. The effect of this practice is that if a divorce action fails, the welfare of the children may hang in the balance until a fresh application is made and heard. The following case gives an example.

CASE *Rita Shakuntala v Shui Kumar Karan (1978) Fiji*[96]

Facts, issue and decision W's petition was turned down. She appealed against the decision, and wanted also to obtain custody and maintenance. The defence argument was that was that if the divorce did not succeed, every other application had to be thrown out too. The issue was whether the court could grant ancillary relief where the divorce petition itself was dismissed. The Court of Appeal said that it could make other orders in certain limited circumstances, even if the divorce was not granted. However, these circumstances applied only to parties who had been unsuccessful in getting principal relief (the divorce.) The Court could not make an order for ancillary relief (custody or maintenance) if that was all that was being requested. In other words, applicants who were applying only for ancillary relief could not get it. In this case, once W had filed an answer to the divorce petition, W was entitled to seek ancillary orders, whether or not the petition failed. The Court said that the Supreme Court should have dealt with the issue of custody and maintenance while discussing the divorce petition. The case was sent back to the Supreme Court for further hearing.

Comment The Court of Appeal explained the rules that the Magistrate's Court and the Supreme Court had incorrectly applied, but few women can afford the costs of appealing. Note too that this case dealt only with custody and maintenance, not matrimonial property. We will see in Chapter 11 that no court will order a distribution of matrimonial property if the divorce action is unsuccessful.

CONCLUSION

The rules that apply in contracts, torts and commercial law are basically the same rules used in family law. The legal system, as it exists in most Pacific Island countries, is totally inappropriate for family cases. The legal system is based on the adversarial process, two parties fighting each other and arguing points of law. It damages the divorcing family, which is already in conflict, by increasing, or doing nothing to reduce, the conflict. Rules of procedure are used too often to punish the other party. 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, the long periods to qualify for legitimate divorce and limited access to funds, advice and legal representation.

In large, busy jurisdictions like Fiji, parties may be lucky to get a date for hearing that is less than two months ahead. Sessions with the magistrate are conducted in front of other court clerks and officials and in front of other lawyers waiting for the names of their clients to be called so that they can rush off to other courts. The husband and wife have two minutes to tell their story, the magistrate makes an interim ruling or gives them another date to appear and then they are hurried off to make way for another couple.

In our region, all "family" courts, the actual court where the divorce and related matters are heard, are usually the lower courts. Judgments are usually made by magistrates with no special training in the law nor in dealing with people trying to escape an unhappy marriage. There is an assumption that dealing with traffic offences is on the same level as dealing with the unique problems presented by each family in crisis. Even judges and magistrates with legal training may have neither special skill nor interest in family work. They may themselves be married and part of a family (or divorced for that matter) but their own experience and attitudes do not necessarily help them deal with families in the process of breaking up. Magistrates and judges listen to arguments between couples; to complaints about maintenance, custody, access, pain, hurt, humiliation and suffering; and then make technical rulings based usually on outdated and fault-oriented laws.

As well, when lawyers are trained in the United Kingdom, Australia and New Zealand, they learn new family law systems based not on proving fault but on more realistic and humane principles. When they return to the region, they have no training in divorce laws based on outdated British legislation and common law, and should be required to undertake a course of training on local family law legislation, local common law and practices in order to be admitted to the local Bar. It will be interesting to see how graduates of the University of the South Pacific's regional Law Degree Programme will perform in the practice of family law.

Needed: a new Family Court system

Training in fault-based local law is not enough. We need new legislation and courts where families in the process of breaking up are treated as human beings who are undergoing an emotionally disturbing process. Divorce itself does not necessarily cause long term psychological harm to children; what harms them is the conflict that goes with divorce. Reducing the conflict reduces the trauma for children and parents. The law should not put barriers in the way of those who want to escape an unhappy marriage. It should allow people the dignity of divorcing without difficulty.

Many countries have now adopted progressive legislation that creates a Family Court system based on principles of reconciliation, conciliation and mediation rather than on the traditional conflict-based legal processes. These

Family Courts try to work on the principle that it is better to help couples resolve their problems, and to make sensible decisions together rather than to fight each other every step of the way.

Another advantage of specialist courts is that everyone has access to them, not just people who can afford to pay for such expensive processes. Family Courts usually deal with all matters relating to the family, including adoption; affiliation; custody and access; divorce; maintenance; matrimonial property; restraining orders and separation. As well, Family Courts are able to identify problem parents and their children. Helping children when they are children may help them not to become problem adults, and thus to cause trouble for their own families and communities. From an economic point of view, early help reduces the costs of misery, violence and other crimes.

The system of divorce inherited from the United Kingdom has been totally replaced in Australia, Nauru, New Zealand, Trinidad and Tobago and in the United Kingdom itself. In these countries, the family law system is based on no fault divorce after one year of separation due to irretrievable breakdown of marriage. In Australia, since the introduction of the specialist family court system, about 95% of cases do not go to court. They are settled in legal offices, or with the help of mediators and counsellors.[97]

But what points need to be considered when establishing the new Family Court system? First we will consider the jurisdiction or powers of the Family Court. The Family Court system should be a separate system of law, falling outside the general legal system; it should not be tied to a Magistrate's Court or to a High Court, and should not be limited to the current jurisdiction. The Family Court should have power to speedily enforce breaches of orders. (It is very strange that, at present, magistrates and Domestic Courts in general have power to make orders but not to enforce them. Actions against people who defy orders must be issued in the High Court.) The Family Court must have power to immediately enforce maintenance orders, custody, access and restraining orders without going through the High Court.

What backgrounds and training are needed for those selected to work in the Family Court? The law, particularly family law, must be open to a multi-disciplinary perspective. Therefore, Family Court judges must be qualified lawyers with a broad vision of family and social concerns and gender issues. Members of the bench of the Family Court should undergo special training in other disciplines relevant to the family in general: social sciences; psychology; family welfare, and gender-sensitivity. Judicial officers appointed as Family Court mediators and conciliators should include people who understand daily life in the particular community. There should be equal representation of men and women, selected because they are sensitive to women's and family issues. All Family Court officers, legally trained or not, should also undertake human rights and gender-awareness training.

How would the Family Court work? At the first complaint, the parties would spend time with a trained counsellor or mediator who would attempt to settle the differences and help them towards reconciliation. Mediation, however, can only take place when both parties have equal power, and if

both voluntarily agree to mediation. For example if a woman has been battered, and does not want any kind of mediation, she should not be made to accept it. In such a case, or in any case where the differences between the parties are too great, a mediator would work with them to see whether they can find a compromise without litigation. Litigation before a judge would be the last resort, used only when trained mediators have failed to help the parties to work out solutions. Children would be represented by separate specialist counsel to avoid their interests being overshadowed by those of their parents.

Countries of our region have much to gain from the changes made by Nauru and other countries. But what if they do not have the economic resources to establish a full new Family Court system like that outlined above? In that case, they could adopt new no fault legislation, and have it applied by selected magistrates and court officials with specialised training. Such a system should, in the long run, cost the community less than the fault-based system does.

Removing fault does not encourage divorce; in countries that introduced no fault divorce, divorces increased for a short time and then settled back to normal level. People do not divorce for fun, and making divorce more difficult does not make people stay together. Of course husbands and wives may fight in a no fault divorce and in a Family Court, but there is one less thing to fight about. Removing fault moves enables everyone to focus on economic issues and on the welfare of the children, not on who is to blame.

9

Custody, access and guardianship of children

WHAT THIS CHAPTER IS ABOUT

When parents separate or divorce after marriage, the most painful thing may be conflict over their children.

In Chapter 8, when discussing divorce, we saw that divorcing parents often go to court to determine which parent will have custody of their children; what kind of access the other parent will have to the children; and what maintenance arrangements will be made for the children. In Chapter 9, we will focus on custody and access.

Chapter 9 begins with definitions and illustrations of what custody, access and guardianship mean. Then we will see how the laws relating to these matters have developed over the years, noting again the strength of patriarchal ideas about women and children as property. From this we turn the procedural and technical rules affecting what the courts can decide, and how these decisions may be formed. This will lead us to a discussion of the many factors affecting how courts decide the best interests of the child. We discuss what may happen in cases where a parent or guardian does not obey the court's decisions. Then we will consider decisions and their enforcement in special cases, such as when the child is a baby, or has a parent overseas, or when custody is sought by someone who is not the child's biological parent. Finally we come to the most important considerations — how these decisions, rules and procedures affect the children of the divorcing couple, and what we can do to reduce their suffering.

The custody tug of war

GENERAL OUTLINE: GUARDIANSHIP, CUSTODY AND ACCESS

What do guardianship and custody mean? In this chapter we will focus on custody and access. We will remember however that both parents continue to have guardianship rights in their children no matter who has custody. In the case of *Subhaigam v Rakoso and Permallamma (1987)*[1] the Fiji High Court described custody in its widest sense as meaning the rights that a parent has over a child. In trying to distinguish between guardianship and custody, the Court said that the two terms now largely mean the same thing. It accepted the English common law meaning.[2]

> In its wider meaning the word custody ... [means] both the personal power physically to control the infant until the years of discretion and the right ... to apply to the courts to exercise the powers of the Crown as *parens patriae*. It is thus clear that ... one of the powers conferred by custody in its wide meaning, is custody in its limited meaning, namely such personal power of physical control as a parent or guardian may have.

So when we speak of guardianship, we mean that both parents have a right to have a say in the raising of their children. There is, however, a practical difference between custody and guardianship. We continue the statement.

> Custody then in its widest sense might be perhaps somewhat crudely described as title to a child ... Just as title to a house property will be retained by the registered proprietors whether they have physical possession or custody of that house ... so may the title to a child be retained by a parent ... Thus, if a child's parents are living apart, while only one can have actual custody, the custody or title in the wide sense remains in them both ... The title (i.e. custody) of any child remains at all times in the parent of that child. Such a parent may dispose of that right in a child by deed, by will or it may be done by order of the Court ... The normal and most usual way ... is by consenting to an order of adoption under the *Adoption Act*.

Custody includes the whole range of legal rights of parents to have care and control of the children. However, when the parents live apart, the child cannot stay with both parents at once so one parent is usually given physical custody. In this chapter we will discuss two aspects of custody.

- The day-to-day care and control of the children by one parent (the custodial parent.)
- The legal rights of the custodial parent to make day-to-day decisions about the welfare of the child.

Because a decision about the custody of children is based on the welfare of the child, a decision on custody is never *res judicata* ; the court may consider varying custody if there has been a material change in the circumstances of the parents or the children. For example, if the custodial parent loses his or

her job or for any reason can no longer look after the child properly, the other parent can apply to the court to vary custody. In these circumstances, a court can make a new custody order and give custody to the other parent. On the other hand, the court will not consider applications to vary custody if it thinks that there have been no major changes in the situation.

What is access? We must remember that access to a parent is the right of the child, and not the right of the parent. All children have a right to see, visit, and enjoy the company of, the parent with whom they do not live. Access here means two things.

- The right of children to maintain a relationship with the parent with whom they do not normally live. (This parent is called the access parent.)
- The time during which the children have contact with the access parent.

The laws of all Pacific Island countries allow access. If one parent gets custody, the other will normally get reasonable access. The main aim of access is to keep up a good relationship between the children and the parent with whom they do not live. Both parents should make sure that access works smoothly so that the children will enjoy relationships with both parents, and the court will not be inclined to change the custody and access arrangements. If parents create difficulties for each other, the children and the court, the legislation allows another person (a "legal stranger") to be given custody. A court may place the children in the care of social welfare, grandparents, other relatives or foster-parents, or it may make the child a ward of the court and place the child with strangers.

After a divorce and custody battle, it may be difficult for the custodial parent to allow access to the noncustodial parent. Both parents may feel bitter and resentful because of the hurtful and degrading experience of a court battle over children. However, studies on the harmful effects of separation show that children are more likely to adjust to their new situation if the custodial parent cooperates fully in helping them keep a good relationship with the access parent, even if one parent thinks that the other does not deserve it.

One very important study shows that bad access is better than no access at all. Two researchers studied children from divorced families for 25 years following divorce. They found that even if children say that they do not want to be with the access parent, most are comfortable with that parent when they have been together for a few hours. Children who were denied access to their access parent (usually the father) were angry and resentful towards the person (usually the mother) who made access difficult. Even if the children themselves thought that their fathers were no good, they blamed their mothers and wanted to have free and open access.[3]

THE HISTORY OF CUSTODY IN THE COMMON LAW

In the case of *Subhaigam v Rakoso and Permallamma*, the High Court in Fiji used a comparison of custody rights to a child to ownership rights of a house. The idea of ownership has been very strong in modern parents, as well as in previous generations of parents and throughout the history of custody in the common law. The idea that children are the property of their parents is linked to the idea that wives are the property of their husbands. Until 1925, British law, as reflected in legislation in the United Kingdom and in its colonies, confined the rights to custody of the children to the father. Mothers had no rights to custody. (We see similarities here with some Pacific Island customs that give custody to the father.)

The fear was that if women knew that they could get custody of their children, more women would leave their husbands. This would threaten the institution, custom or tradition of marriage.[4] The law assumed, perhaps rightly, that children and not romantic love or affection kept a woman bound to her husband. In the *Seddon*[5] case, the court said that it would be good for public morality if it were known that a woman guilty of adultery would lose the custody of and access to her children. The court's view was that the possible loss of custody kept women chaste and faithful. Being deprived of her children was therefore punishment for a wife who committed adultery, but because the wife was her husband's property, the husband could commit adultery without being deprived of his children.

The law guaranteed the rights of the fathers; mothers were not even allowed access except in the most exceptional circumstances. The Australian position was summed up like this:[6]

> Unless [the mother] can prove that a father is guilty of the most gross misconduct, rendering it physically and morally unsafe for him to have the custody of the child, he can claim that child. Although he may be an absolutely debauched man, he can take the child from the mother on the very day it is born.

Under the common law, a father could control his children's custody even after his death. He could appoint a person to have custody of his children, and could lawfully stop his wife from getting custody. This situation lasted until, in the 1830s, a British woman attempted to leave her violent husband and to gain custody of her children. Her struggle resulted in changes in the laws in Britain, and later in the colonies. The story of that struggle needs to be told because the common law today still retains some of the reasoning that prevented women from gaining custody of their children.

CASE *The Norton Custody Case, United Kingdom*[7]

Lady Caroline Norton was a wealthy noblewoman who had brought to her marriage to George Norton an immense amount of land and other wealth. When she decided to leave Norton, she gave up everything: she lost her three children as well as all her property. After a jury found that Lady Norton was not guilty of adultery, she was allowed to see them for half an hour once a week in her husband's lawyer's chambers. Eventually she was allowed to see the children for half an hour in the presence of two witnesses who had given evidence against her during the court case. Adultery would have completely denied her rights even to access.

The court said that the father had complete rights to the children. Even the legal phrase "interests of the infant child" was interpreted from the perspective of the father: what he saw to be the best interests of the child. During the 1830s, Caroline Norton led the campaign for changes in the law. She was able to use her wealthy connections to organise a group of active and powerful women and men, and this eventually led to the passing of legislation giving women the same legislative rights to custody as men. We say "eventually" because the process took almost 100 years. In 1925, feminist agitation led to the passing of the United Kingdom *Guardianship Act 1925*. This made the child's welfare the first and primary consideration in deciding custody between parents. It declared also that neither parent had a superior claim. Both had to compete for custody; the courts would consider the best interests of the child, not what the parents wanted.

Before this, in 1839, the Norton lobby group's efforts had resulted in legislation giving women equal rights to custody of children aged less than seven years.[8] However, mothers who sought custody had to be absolutely blameless and to conform to society's ideals of a good woman. The problem was, of course, that society at that time would never regard a separated or divorced woman as good; the father did not have to be blameless. Courts had complete discretion and could make decisions on any grounds, taking the mother's behaviour as the starting point.

The 1839 legislation was applied in the colonies including Australia, New Zealand and other Pacific Islands, and remained in force until the 1930s. In New South Wales, the landmark Ellis case led to lobbying by women's groups and to changes to the law that again put the welfare of the child first.

CASE *The Ellis Case (1924) Australia*[9]

This case involved a custody dispute between an actress, Patricia Mary Ellis, otherwise known as Emilie Polini, and her estranged husband. When Ms Ellis was travelling overseas, she would be accompanied by a nanny, who would look after the child. When Ms Ellis was on stage at home, her mother would do this. The Supreme Court seemed to think that a career woman could not be a good mother, although the law for years had determined that men could be good fathers and appropriate custodial parents, even if they were drunks, child abusers, career men, lay-abouts or travellers. Indeed, the Court noted that Mr. Ellis was not truthful about money and possibly had other weaknesses. There was "no breath of suspicion" about Patricia Mary Ellis except her career as an actress.

When Ms Ellis lost her case, the National Council of Women, the United Associations of Women, the New South Wales Women Voters' Association and other groups lobbied to change the law to grant married women custodial rights equal to those of married men. The campaign ended in the passage of the New South Wales *Guardianship of Infants Act 1934*. Under this act, the court could grant an order for custody to either parent. Section 2(a)(i) required the court to consider the welfare of the infant; the conduct of both parents; and the wishes of the mother, as well as those of the father.

Most colonies finally adopted versions of the United Kingdom *Matrimonial Causes Act*. This legislation appeared to make the parties equal in a dispute. However, common law decisions divided women into two categories — good women (who did deserve to have custody of their children) and bad women (who did not.) Fathers could get custody whether they were good or bad. The Fiji case of *In re Sudamma (1932)*[10] gives an example of this. A father sought custody of his young son, saying that the boy's mother was an adulteress. The court said that despite the child's tender age, it would give the father custody, because the mother's alleged adultery made her "not a fit and proper person".

TECHNICAL AND PROCEDURAL MATTERS

We have seen how court attitudes to women and children have shaped legislation and decisions on custody cases, and we have seen also that public outcry can force changes in legislation. In this section we will look at technical and procedural matters: the rules and procedures by which courts make decisions and put decisions into practice.

Ancillary rules

Before attempting to decide who should have custody of a child, courts insist on formal applications from the parties involved. But the parties cannot just apply: their applications must be based on existing laws. As we will see later, such insistence may not be correct and it has certainly caused many problems in disputes over the custody of children. For example, an application to apply for custody of a child cannot be made by itself. It must be made as a secondary matter to a main application arising out of separation of the child's parents. Before beginning the process of applying for custody, one or both parents must have applied for legal separation, divorce or maintenance. If neither parent has applied for divorce or maintenance, the court will not consider an application for custody.

We see this in the Fiji case of *Pilcher v Pilcher (1972)* [11] in which husband and wife had signed an agreement for separation and custody. The court said that an application for custody under the *Matrimonial Causes Act* and the *Maintenance and Affiliation Act* has to be "ancillary to a matrimonial offence". A parent cannot apply for custody of a child unless one parent is suing the other for having done (or not done) something connected to their marriage. But suppose the parents want to separate but do not want to apply for divorce or maintenance — all they want is to sort out the problem of who should have custody of the children. Courts will not hear applications from parents in this situation; the parents may forced into divorce or maintenance proceedings, as set out in the *Matrimonial Causes Act* and the *Maintenance and Affiliation Act*.

The jurisdiction of the courts

As well as forcing parents to make divorce or maintenance applications, the ancillary rule effectively prevents a court from having jurisdiction over a child unless one or both of its parents have begun such proceedings. But all courts of law have a duty to assume responsibility over children, regardless of technical rules. Every court in the land must have, and does have, the power to consider the welfare over all children within its jurisdiction. By saying that they cannot make decisions about a child because they do not have jurisdiction in the legislation to do so, courts allow children to be taken from one home to another. This denies the responsibilities of courts towards children and denies the human rights of children; it is a breach of the Convention on the Rights of the Child.

In fact, however, all courts in our region do have power to make an order regarding custody and access, regardless of whether the "substantive matter" (a divorce or maintenance case) exists. In 1993, the High Court in Fiji made a landmark decision in an adoption case involving parties from Canada and Australia. *Lakhan v The Director of Social Welfare, the Attorney -General and Ors (1993)*[12] abolished the argument that there are circumstances in which a court has no jurisdiction to make a decision regarding children.

Table 9.1 shows the Fiji laws and rules that give such jurisdiction. Since all countries in our region have similar legislation and common law powers, there is no reason why they also should not use them.

Table 9.1 Children and the jurisdiction of the courts, Fiji

The law or rule	Summary
Matrimonial Causes Act Cap. 51	A parent who has filed a divorce application may apply also for custody.
Maintenance and Affiliation Act Cap. 52	A parent who has filed a maintenance application may apply also for custody.
Magistrates' Court Act Cap. 14 s. 16(1)(e)	A magistrate may appoint guardians of infants, and make orders for the custody of infants.
Magistrates' Court (Civil Jurisdiction) Decree 1988 No. 35 s. 2.(1)(e)	A resident magistrate may appoint guardians of infants and make orders for the custody of infants.
High Court Act Cap. 13 ss. 18, 20, 22	The High Court has a role as *parens patriae*, "the parent of its country". Therefore the Court may act as if it were the parent of any child, even by taking over the role of the child's biological parents.
High Court Rules Orders 90, 91	By making a child a Ward of the Court, the High Court may take over a parent's role and make decisions affecting the child's welfare.

The following quotation shows how the *High Court Act* was interpreted in the case of *Sachin Deo v Brij Bhan Singh (1991).*[13]

> In exercising jurisdiction in this matter, this court does so by virtue of Sections 18 and 22 of the *High Court Act* (Cap. 13) ... It exercises the jurisdiction, a judicially administrative jurisdiction in virtue of which the High Court is put to act on behalf of the State as being the guardian of all infants in place of the parent and as if it were parent of the child thus superseding the natural guardianship of the parent.

Because most cases would be covered by the rules and laws listed above, it is now wrong for a court, at least in Fiji, to deny its responsibilities by saying that it does not have jurisdiction over children. However, decisions

on jurisdiction over children still depend on whether the court wants to interpret the rules in favour of children. So, in spite of all the possibilities, the judge in the *Lakhan* case said that the rules regarding children were ancient and outdated. The court should not have to hunt around for a power under which to give itself the right to make a decision regarding a child.

> ... as we approach the 21st century it is wholly unsatisfactory that this court should have to resort to antiquated ... sources of the law to find its jurisdiction to deal with infants. Furthermore in a young population such as ours where a very large proportion of the population is under the age of 21 years the absence of any specific legislation in this area represents a serious *lacuna* in our statute books.[14]

Obviously, specific amendments are required to make the legislation quite clear that both the Magistrates' Courts and the High Court do have jurisdiction over all children regardless of the circumstances.

Conflicting jurisdictions of the courts

Other problems arise when different courts have jurisdiction over the same family.

CASE *Suresh Chandra v Roshni Chandra (1993) Fiji*[15]

Facts Two children were sent to and from their parents, because conflicting decisions were made by the Nausori Magistrate's Court and the Labasa Magistrate's Court. The Labasa court gave custody of the children to F, the father, but the Nausori court gave custody to M, the mother. At first, the children were with F and the case was brought in the Labasa Magistrate's Court without M' s knowledge. During an access visit to M, the children refused to return to their father. M took the matter to the High Court in Suva and the case got tied up in legal arguments about whether or not the High Court had the jurisdiction to decide about the children. F argued that the High Court could not hear M's case and that the Labasa court should charge her with contempt of court for breaching its order to return the children.

Decision The High Court finally ruled that the *Magistrates' Court Act*, Cap. 14 s. 33 gave it power to hear the matter regardless of the fact that the case was still before two lower courts. It ruled that M was in contempt of the Labasa court's order, and punished her with imprisonment, suspended for 12 months; after this time, the High Court would hear the custody case.

Comments The High Court punished the mother for contempt of court, but we will see many examples of fathers not being punished. The most important point, however, is that the parents had been separated since March 1991. The decision about jurisdiction (not about the actual custody) was made in August 1994. The result of legal and technical rules about overlapping jurisdiction was that, for years after their parents separated, the children were denied security and stability.

One factor in this situation was that family matters are part of mainstream law; children and family law cases have no more priority than other cases do. Another factor is that no specialist law or court deals with families that are breaking down. Clear jurisdiction and a specialist court dealing with families, adjudicated by specially trained judges, would help solve such problems.

CUSTODY AND ACCESS ORDERS

Once a court has accepted a custody case and made a decision, it may also make orders about who has custody and who has access. We will begin by discussing the different types of custody orders, looking particularly at the problems that they may cause.

Types of custody orders

The court may make an interim custody order to decide who will have custody until a more permanent custody order is made. An interim order is usually made when the parents first attend court, with the noncustodial parent getting interim access. When the case is settled, the court gives a custody order that may be really permanent, or may change if the circumstances of the lives of the parents change.

It is very unusual for courts to give an order for custody to one parent, and to deny access to the other. This kind of order is used only if the parent has proved to be completely unsuitable to have access. Joint custody orders are made more often, but not frequently, because courts think that they may cause instability and are, therefore, not in the best interests of the child. Under a joint custody order, the children move freely between the two homes and arrangements are made for both parents to share in the day-to-day care of the children. For this to work well, the parents must have a healthy relationship, with no serious conflict, and must not live far from each other.

The most common order gives custody to one parent and access to the other. (We will discuss degrees of access when considering access orders.) The access parent still has guardianship of the children, including the right to know what the custodial parent is doing with the children. For example, if the custodial parent does not discuss a change of school with the access parent, this would be against the law of guardianship.

Problems with interim custody orders

An interim custody order is a court order granting a parent the temporary right to have custody of the children until a more permanent order is made. Here again we have problems about the powers of the courts, and their

interpretation of the rules. In the case of *Kamoe v Kamoe (1984)*[16] the Fiji High Court ruled that courts do not have power to make an order for interim custody of children under the *Maintenance and Affiliation Act*. Under this Act, however, they may make a permanent order for custody when the case is finally heard — often after months and sometimes years of legal proceedings. According to this interpretation, the *Maintenance and Affiliation Act* does not give courts power to make an interim order for custody. Interim orders may be made only under the *Matrimonial Causes Act*, Cap. 51, s. 87:

> 87.-(1) The Court, in exercising its powers under this part may do any or all of the following:- ...
>
> (h) make a permanent order, an order pending the disposal of proceedings.

This means that a court may make an interim order about maintenance, custody or settlement of property under the *Matrimonial Causes Act*. If a parent applies for maintenance only, and not for divorce, he or she cannot apply for interim custody. The children can be taken from one parent by the other until one parent files for divorce, or until the maintenance case is complete and a custody order is made. But there are many reasons why parents may not want to divorce, or do not have a cause of action under the *Matrimonial Causes Act*. (This means that they do not have the right to apply for a divorce.)

In fact, however, as we saw when discussing the ancillary rules, there is a way out. This is Section 16(1)(e) of the *Magistrates' Court Act*, which gives a court the power to appoint guardians of infants, and to make orders for the custody of infants. All legislation may be interpreted in many ways, and from broadly to strictly, but this provision of the *Magistrates' Court Act* is very clear. Even under the strictest interpretation, it can be used to make any order regarding the custody of children; this includes giving interim custody until a permanent order is made. We sum up, using the example of Fiji legislation; other countries in the region do not seem to have the same problems.

- Under the *Maintenance and Affiliation Act* (Cap. 52) courts may not make interim custody orders, but they may make permanent custody orders when the case is finally heard.
- Under the *Matrimonial Causes Act* (Cap. 51) courts may make both interim and permanent custody orders, if divorce proceedings have already begun.
- Under the *Magistrates' Court Act*, courts may make any order regarding the custody of children.

Types of access order

United Kingdom courts are now moving away from defining access and are more and more leaving the parties to decide between themselves; this is possible only for parties who get past the fighting stage into the stage of

finding workable solutions. Standard practice is that when courts give one parent custody, they make orders about the kinds of access the children may have to the other parent. Table 9.2 shows the kinds of order made.

Table 9.2 Custody to one parent, access to the other

Access	Comments
Open and reasonable access	The parents do not have joint custody but are prepared and allowed to make reasonable agreements about access times and places.
Defined access	The court specifies access and strict dropping and pick-up arrangements, sometimes at a police station so that parents do not fight or refuse access. Courts do not generally order overnight access for a breast-fed baby or very young child but will usually allow access for 2 or 3 hours in the presence of a third person. For children over 3, the courts may order daytime, overnight, weekend or school holiday access. Many arrangements begin with defined access and end as open access when the parents are able to agree.
Restricted or supervised access	If access cannot happen without fights and arguments, it might have to be supervised by a welfare or police officer. Supervised access is ordered also if a parent has physically abused a child; the court may allow access only in the presence of an independent third party. Such access is rarely successful; if supervising officers are not regularly available, the parties may give up.

Now we will consider the situation when one parent has custody, but access to the other parent is denied. Denying access is rare because courts believe that children need access to both parents, but it may happen in the following situations.

- An access parent is ordered to pay maintenance, and is able to do so, but refuses to pay. (This is the most common reason for denying access. It sounds fair, but as we will see later, it tends to favour the access parent.)

- The access parent is openly and obviously disobeying court orders to return a child to the custodial parent after access visits.
- The court thinks that the access parent will take the child out of its jurisdiction (for example that the access parent might kidnap the child and go overseas.)
- The parent has sexually or otherwise abused the child.
- The child refuses to see the access parent. (Courts rarely accept this, because the custodial parent may be trying to turn the child against the access parent. However a court cannot really force a child — especially a teenager — to spend time with the access parent. On the other hand, a child may develop health and emotional problems if prevented from seeing the other parent, or even if not forced to see the other parent.)[17]

Interdependence of maintenance and access

As we have already seen, courts may deny access if the access parent does not pay maintenance. This practice is not based on legislation, but it happens in Fiji and some other countries, and makes access and maintenance depend on each other. It gives the advantage to the access parent, and particularly to fathers: as women do not pay maintenance, a mother has no way of using payment to enforce access. In addition, if access is not being provided for reasons outside the mother's control, she loses the right to enforce maintenance. Mothers may receive maintenance for children only if they provide access.

If the custodial parent is the mother, the only advantage she has is that the father must pay maintenance if he wants access. If the father who refuses to pay maintenance does not want access, this does not help a family that depends on the maintenance. As well, a father can always enforce access by threatening not to pay maintenance. The fathers argue that they do not pay maintenance because they do not receive access. The mothers say that because they have not been paid maintenance, they will not allow access. The argument is a circular one and usually ends in bitter disputes. Statistics in the Suva Domestic Court indicate that only 15% of maintenance payments are made regularly.[18] Access is provided more regularly than maintenance is paid; women are more willing to provide access even where maintenance is not paid, usually because their children insist on seeing their fathers.

Further problems arise where the family needs the maintenance payment, but the situation is complicated by one or more of the factors listed.

- The access parent insists on access but does not pay much attention to the children during access visits.
- The access parent has sexually or otherwise abused the children.
- The custodial parent does not want to provide access.
- The children do not want to visit the access parent.

If it is the mother's fault that access is denied, the law has other means of enforcing access, or would have under a more efficient system. The children still need to be housed, clothed, fed and looked after, whether the parent paying maintenance has access or not. It is not fair to deny children these basic necessities — and it can turn them into burdens on the health and welfare system.

Only financially well-off women can afford to ignore the rules, or do without maintenance, so there is a social class bias in the law as well. Parents, lawmakers and judicial officers should focus on the needs of the children so that access is actually open and free. A good relationship with both parents will make it easier for children to begin recovering from the painful and harmful things that happen to breaking families.

FACTORS AFFECTING CUSTODY AND ACCESS DECISIONS

In previous sections, we have discussed custody and access; we have looked at the history of custody, and have considered the roles and procedures of courts. In this section we will focus on the factors that influence the courts when they are deciding who should have custody, and how access is to be arranged.

Most custody cases are settled by consensus; the parents agree between themselves who should have custody and who should have access. Such agreements may happen at the very beginning, when they are separating, or after early court appearances, when they realise that if they do not agree, they must go into a long and expensive court battle. Consensus may also be brought about by sensible lawyers, or a counsellor or magistrate who persuades them to consider the best interests of the children.

The best interests of the child (the welfare principle)

If parents cannot agree on custody, courts throughout our region rely on legislation that reflects the United Kingdom common law welfare principle in which the main consideration is the best interests of the child. Table 9.3 sets out the relevant legislation.

Table 9.3 Custody and access legislation

Country	Legislation
Fiji	*Matrimonial Causes Act* Cap. 51 s. 85; *Maintenance and Affiliation Act* s. 4(b) Cap. 52
Cook Islands	*Cook Islands Act 1915* s. 583 accepts the New Zealand *Matrimonial Proceedings Act 1963* and *Infants Act 1908*
Kiribati	*Custody of Children Act* Cap. 21
Nauru	*Family Court Act 1973; Guardianship of Children Act 1975*
Solomon Islands	*Magistrates' Courts Act* Cap. 3. s. 22(1)(c); *Separation, Maintenance and Affiliation Act 1992; Islanders Divorce Act* Cap. 48, *Matrimonial Causes Act (UK)*
Tonga	*Divorce Act* Cap. 29; *Maintenance of Deserted Wives Act* (Acts 17/1916; 8/1934; 8/1966; 15/1987; 9/1989)
Tuvalu	*Custody of Children Act* Cap. 20
Vanuatu	*Matrimonial Causes Act* Cap. 192
Western Samoa	*Infants Ordinance 1961* ss. 3-6; *Divorce and Matrimonial Causes Ordinance 1961* ss. 22-26

Following, with our emphasis added, is an extract from the *Matrimonial Causes Act* (Fiji).

85-(1) In proceedings in which application has been made with respect to custody, guardianship, welfare, advancement or education of children of a marriage-

(a) the Court shall regard **the interest of the children as the paramount consideration**; and...

(2) The Court may adjourn any proceedings referred to in subsection (1) until **a report has been obtained from a welfare officer, or from some other suitable person** appointed for this purpose by the Court, on such matters relevant to the to the proceedings as the Court considers desirable and **may receive the report in evidence.**

(3) In proceedings with respect to the custody of children of a marriage, the Court may, if it is satisfied that it is desirable to do so, make an order placing the children, or such of them as it thinks fit, **in the custody of a person other than a party to the marriage**.

(4) Where the Court makes an order placing a child of a marriage in the custody of a party to the marriage, or of a person other than a party to the marriage, it **may** include in the order such provision as it thinks proper **for access to the child by the other party** to the marriage, or by the parties of a party to the marriage, as the case may be.

In Fiji, the court uses its powers under this provision when an application is made regarding a child in a matrimonial cause. (This means that the divorcing parents are fighting over custody.) A separate power is used to make decisions over children in a maintenance dispute. The distinctions are technical and have grown from the development of the law; they have nothing to do with the real issues. However, whether the application is matrimonial or maintenance, the welfare of the child is still the main consideration in deciding custody. The legislation is similar throughout our region. The only variation exists when one parent says that customary laws should override the welfare principle. We will consider this question in more detail when we discuss the influence of custom and culture on custody.

A close look at the legislation shows that a legally married mother does not have an automatic right to custody. Both parents have an equal right to custody, but if the court thinks that both are unsuitable, it can give custody of the children to someone else. Another important provision is that the legislation states that access may be given, not that it must be given.

These provisions mean that the court finds out what the parents want, and may try to work out practical matters but that it should focus on what is good for the children, not on what the parents want. Each case must be considered on its own merits, and precedents cannot be strictly applied. However courts use the general principles that the children of a family should not be separated but that a very young child should stay with its mother, an older boy should stay with his father, and an older girl with her mother. They consider also some very general questions.[19]

- Which parent will best look after the child?
- Which parent will best be able to make the child happy in a difficult situation?
- Which parent will cope best with running a single parent family?
- Which parent will provide access without conflict?

To see how the "welfare principle" is applied, we will look at one case from the United Kingdom, and one from Fiji.

CASE *J v C (1970) United Kingdom*[20]

Facts and issue This case involved a dispute between a 10 year old boy's Spanish biological parents and the English foster parents with whom he had lived for most of his life. Accepting the principle that the child's welfare was paramount, the court described the welfare principle in these words: "... the child's welfare is to be treated as the top item in a list of items relevant to the matter in question ... When all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account

and weighted, the course to be followed will be that which is most in the interest of the child's welfare ... [It is] the paramount consideration because it rules upon or determines the course to be followed."

A Fiji case heard in the Court of Appeal outlined the main features of custody decisions.

CASE *Rajendra Nath v Madhur Lata (1984) Fiji*[21]

Facts issues and decision F and M lived with *de facto* spouses at opposite ends of Viti Levu. F had the child, but denied M access. M applied for, and was given, custody of the child. When F appealed, the Court of Appeal said that lower courts did not pay enough attention to custody matters. It sent the case back to the Magistrate's Court for reconsideration, and issued guidelines for magistrates dealing with custody cases. These are summarised below.

- The magistrate should hear both parents' views. Each parent should outline a detailed plan of arrangements for custody and access. (In the case discussed above, the custodial parent lived far from the access parent. This would have made access difficult even if the parents had agreed on custody.) If one or both parents are living in a *de facto* relationship, or have remarried, the magistrate should hear evidence from the new partner, because the child will be affected by the partner's attitude and behaviour.
- Welfare reports must be obtained. If a parent has sought counsel, the reports should be made available to counsel before the hearing begins. Welfare officers' reports greatly influence magistrates and because even the most careful reports may contain misunderstandings or errors, counsel must have a chance to correct these. Magistrates may decide whether the reports should be shown to the parents, particularly if the parents do not have counsel. Welfare officers should be frank and direct, and their comments might easily be misunderstood by a parent suffering the emotional strain of a custody dispute.
- The magistrate should, if possible, interview the child. Such interviews are required by law in some jurisdictions. Obviously an interview would not be useful or even possible if the child were too young, but older children often understand the reasons for the dispute and the tactics of their parents, so an informal chat could give a magistrate a better idea of the problems and the child's feelings and wishes. The informal chat should take place in the magistrate's private office. The only other persons present should be the Court Clerk and, if necessary, an interpreter.
- The magistrate should set out in reasonable detail the reasons for making the decision to award custody to one parent and not the other. Custody is never permanently fixed. If one parent seeks a change, the court will need to know the reasons for the first decision.
- The welfare officer should be asked to comment on access, including the possible effects of giving custody to one parent, and access to the other. All parties must realise that access is the right of the child, not of the parents. Despite their differences, the parents should cooperate, for the sake of the child, to ensure that the noncustodial parent has reasonable access.

We will now see how things work out. We will begin with the welfare and interim custody reports, and then see how far these are influenced by the principle that existing arrangements should be maintained.

Welfare report

When custody is disputed, the court may order a welfare officer to investigate the case and make a written report. This report may be called a welfare report, a social development report or a custody report; it should consider the parents' situation and anything relating to the welfare of the child, and should make a recommendation as to who should get custody.

Before preparing the report, the welfare officer talks to both parents to assess each parent's home environment and financial situation. As well, the officer interviews all adults who have something to do with the child, including the parent's new partner or spouse. This interview is important: if the new person does not want or like the child, the child will be unhappy or ill-treated and will not recover well from the separation. Another important interview is with the child's teachers. Teachers often spend more time with a child than its parents do, and are independent observers who can say whether the child's behaviour and schoolwork have been affected by the separation of its parents.

After collecting the information, the welfare officer prepares the report. Its purpose is to give the court independent and unbiased information to balance what the parents, children and others involved may say. The report therefore is very important and can strongly influence a court's decision.

CASE *Lokega v Lokega (1996) Tuvalu*[22]

> **High Court statement** "The role of the Welfare Officer is very important ... It is the children's welfare with which the Court is concerned, and the Welfare Officer must be absolutely neutral ... completely uninfluenced by feelings for the father or mother, each of whom, of course, will be anxious to influence. It is the Court that makes the decision on the custody of children. It is a very burdensome decision and requires the very best unbiased reports from welfare officers."

If the welfare officer recommends that the child should live with one parent, the court gives the other parent an opportunity to agree or disagree. A parent who does not agree with the report may challenge it; for example, a mother may challenge the report if it contains a value judgment such as that the mother has committed adultery and therefore cannot be a good custodial parent. Each parent's lawyers may also see the report and challenge it; they have the right to cross-examine the welfare officer.

The report is confidential and should not be shown to unauthorised persons. In the case of *M v S (1982)*[23] a Solomon Islands mother appealed to the High Court because unauthorised persons had seen the report. The High Court said that they should not have seen it, but this was not a ground for

appeal. The Court further said that only the magistrate could make a decision based on the report, even if he had not interpreted it correctly.

Reports are made (or at least should be made) in all custody cases in Fiji. In other countries, the practice is common. Kiribati, Nauru, Solomon Islands, Tonga and Tuvalu have legislation or practices whereby courts may request a welfare officer's report to help them make a decision. Even where there is no formal way of obtaining a report, the court may consult a wide range of people to obtain an independent opinion. However, the Fiji Welfare Office does not have enough staff or resources to obtain an urgent interim custody report, and the Vanuatu Court of Appeal in 1991 noted its concern that Vanuatu lacked the facilities to provide independent reports.[24]

Lack of staff and resources causes many problems — for example, a breast-fed infant is taken from its mother and the magistrate insists on a custody report before ordering its return of the child, regardless of the fact that the report cannot be prepared quickly.

Interim custody and the maintenance of existing arrangements

Interim custody is custody between the date of the beginning of court proceedings and the date upon which the court has a final, full hearing and makes decisions about final custody. An interim custody order decides with whom the child should live while its parents are arguing about custody. The general rule is that the child should continue living with the parent with whom it lived after the parents separated. The current situation should not be disturbed unless there is convincing proof that the child's physical and mental health or moral welfare is at risk.

Usually, the court does not have a full hearing on interim custody, but persuades the parents to agree who should have interim custody. Sometimes, as in the case of *Robinson v Robinson* [25] it is necessary to have a full hearing on interim custody. The results of such hearings are usually good indications of the final decision: whoever gets interim custody usually gets final custody. As we will now see, this arises from the common law principle of the maintenance of existing arrangements.

In *Edwards v Edwards*[26] the Supreme Court of New South Wales said that if a child is in the physical custody of one party, the existing arrangements should continue until the full court hearing makes a final decision. Exceptions should be based only on proof that these arrangements really endanger the child's physical or mental health or moral welfare. Without very good reasons, the court will not try to change custody arrangements if the children are happy and well adjusted. The parent who gets interim custody will probably also get permanent custody, for the reasons listed.

- Interim custody will be given to the parent who has the children when the application is made. The children have to live with someone while the case is being heard, so the easiest option for the court is to leave the children where they are unless they are in danger.

- By the time the case is finally heard, many months may have passed and the children appear settled with the parent who has interim custody. (A *status quo* has been well established.)

Here are some regional cases involving the principle.

CASE *Fisher v Fisher (1991) Vanuatu*[27]

Facts and decision One of several issues was a custody dispute over S, the couple's eight year old son. M and F separated in 1989, and an interim order allowed S to spend alternate weeks with each parent. Both M and F were equally able to provide for the child. F lived by himself, and M lived with her *de facto* partner and his small children. The couple divorced in 1990; the Supreme Court gave M custody and F access. F appealed but the Appeal Court said that it would not interfere in the Supreme Court's decision.

CASE *Lina Sima v Nick Thomas (1994) Solomon Islands*[28]

Facts and decision F was a Papua New Guinea citizen; M was a Solomon Islander. They married in 1979 and had a daughter D and a son S. They all lived in Papua New Guinea until 1989, when M returned to Solomon Islands. The two children lived sometimes in Papua New Guinea, sometimes in Solomon Islands. When the case was heard in 1991, D was living with M's parents in Solomon Islands, and did not want to live with her father; S was living with F in Papua New Guinea. The court decided that the children had suffered severely from the family breakdown, but seemed settled, and the court would not further upset their lives.

CASE *In the matter of Pamela Nadine Gounder (1993) Fiji*[29]

Facts and decision M, a Canadian, and F, a Fijian, had a daughter D. While living in Canada, they separated and under Canadian law, M was awarded custody of D, who had weekend access to F. During a weekend access visit, F kidnapped D and took her out of Canada. After nine years of searching, M found D and raised funds to apply to the Suva Magistrate's Court to regain custody. There was a Canada-wide warrant for F's arrest when the court case took place in Fiji. During an interview with the Magistrate, D, who was then 14, firmly said that she wanted to stay with F. She did not want to look at M and said that she hated her. The court awarded custody to F because of D's wishes, and because it did not wish to upset the long-standing arrangements.

Comment The court knew of the Canadian warrant for F; he had acted illegally by kidnapping D and hiding her from her mother, the person who had lawful custody. Since she was about six, D had been hiding with F. However, the court did not consider how this very abnormal situation might have affected D, and did not call for an independent assessment by a psychologist or doctor, though D was obese and shuffled while walking. Further, it is most unusual for a child to refuse even to look at a parent whom she has not seen for years. This case again demonstrates the need for a proper Family Court system.

CASE *Cakau v Tuifagalele II (1994) Fiji*[30]

Facts After M and F separated, their children D and S lived with M who was a nurse. M had financial problems and lived in a hostel, while D stayed with relatives, where she was unhappy and her school work had been badly affected. Before the hearing, D went to live with F and his *de facto* wife, who did not work outside the home. D was happy with them.

Decision and comment The court noted that M's living arrangements were unsatisfactory, and that M worked outside the home, whereas the *de facto* wife did not. Deciding that D would be happier with F and his *de facto* wife, the court placed D in F's custody. S, the baby, was placed in M's custody. This seems a sensible decision, but M was disadvantaged because of her financial problems and because she was a working mother.

These cases show how seriously courts take the practice of not disturbing long-standing arrangements. A parent who has the child at the time of hearing usually gets custody of the child for any of the reasons listed.

- The parent has had the child since separation and the child has settled down.
- The parent has kidnapped or otherwise removed a child.
- The parent has denied access to the other parent.
- The parent has kept the child for a long time because of the delays and inefficiencies of the legal system.

Thus the longer a parent keeps a child, the more valid becomes the argument that it would be harmful to give the child to the other parent. Therefore the other parent is disadvantaged at the time of the trial, even though the parent who gets custody has acted unlawfully or unfairly or has profited from the inefficiency of the system. Further, in disputes, the most powerful parent is the one who is in a better financial position and has managed to maintain interim custody, whether lawfully because the poorer parent must leave the children behind, or unlawfully as in the *Gounder* case.

The lesson for women is that, if they have to leave, they should take the children with them. However this can be very difficult: most women have no alternative accommodation or money, and must depend on the kindness of others. We should remember, however, the precedent of the case *Re W (1983) United Kingdom*.[31] This case questioned the general rule of maintaining existing arrangements, and emphasised that every case should be examined on its particular merits, focusing on the welfare of the children. The judge said:

> First, the individual circumstances of every case vary so much that any generalisation has to be qualified in the light of a sensitive grasp of the realities of all the relationships between the child and the various grownups concerned. Secondly, the capacity of the grownups ... is of immense importance in proving their capacity for forming affectionate, loving relationships with the child or children concerned.

The emotional, physical and educational wellbeing of the child

In considering the physical, emotional and educational wellbeing of the child, the court compares the relationships between the child and both its parents. It tries to decide which parent the child loves best and feels most comfortable with. Courts take this seriously because studies suggest that for healthy psychological and physical development, a child needs a close relationship with a few adults who care strongly for it.[32]

In assessing the physical wellbeing of the child, the court focuses on the people who currently feed and generally care for the child; in particular the court focuses on the child's primary carer — the parent most involved with its everyday needs. Very young children are totally dependent on the primary carer, who is usually the mother. Courts are more likely to give custody to a mother who takes care of the child herself than to a father who leaves the children with a domestic worker or baby-sitter for most of the day, but if a mother works outside the home, she cannot be the primary carer, either. Other factors become important, and include how much time is spent with the children outside working hours.

As well, a court will consider which parent is more likely to provide for the children's educational needs. It sees which parent is more likely, or able, to supervise homework and projects and be involved in school activities and discussions of the child's progress.

CASE *Salik Ram v Anita Devi (1991) Fiji*[33]

Facts, issues, decision M applied for custody of S who had been living with F since separation. The court took the following matters into consideration, and said that clearly the happiness of this child lay with his mother.

- Present and future material needs: S's performance had dropped considerably since the parents separated. The school reported that F had not replied to a letter about S, but that M immediately did so.
- Moral welfare: F had remarried; M had a relationship with another man but the court thought that the situation might change if she was given custody. The court said that it would not treat her behaviour as adulterous for the purposes of the judgment; it therefore disregarded the child's "perceived immoral surrounding".
- Physical wellbeing: S had scabies while living with F. He walked from school to F's clinic and was often tired.
- Ties of affection: S showed more affection for M.
- Position of both parents: M was home most of the time. F spent much time at his clinic and elsewhere, but spent little time with S.
- Age of the child: S was seven years old but the court placed no importance on this besides mentioning it.

Comment This decision was sensible and well balanced. However, the court said that despite M's adultery "the perceived immoral surrounding was nil". Does this mean that in some circumstances a mother's adultery would be taken into account? Does it mean that M had to give up the relationship if she

obtained custody? Or that M had to make the relationship legal? Such a comment might force her to make a potentially disastrous decision.

As this case shows, a court should focus on the child's emotional, physical and educational wellbeing. When deciding whether the existing arrangements are satisfactory or not, the court should take into account some factors that we will first list and then look at in turn.

- The age and sex of the child
- The child's feelings and wishes
- The financial means of the parties
- The conduct and behaviour of the parents
- The hostility of the parties

The age and sex of the child

For children under five years, courts are usually inclined to give custody to the mother where all other things are equal. This is not an absolute rule but there is a presumption (an assumption or belief) that very young children, especially girls, should be in the custody of their mothers. This presumption in favour of the mother is called the tender age doctrine.

In custody decisions, what is the difference between an absolute rule and a presumption in favour? An absolute rule is a rule that the court must apply. But a court does not have to give custody to the mother of a tender-aged child. Courts assume that it would be better to give custody of the mother, but before doing so, they must look at all factors affecting the child's wellbeing. If a court finds factors that weigh against the mother, it may make other arrangements.

If both parents seem to have equal capacity to look after the child's emotional, physical and educational wellbeing, the court must always try to give a very young child to its mother. However, problems may arise. Because men are usually financially better off than women are, things are rarely equal between men and women. Here it will help us to look more closely at two important cases — an Australian case often quoted as precedent by Pacific Island judges and the current English common law precedent. We will follow these with two Tongan cases that they seem to have influenced.

CASE *Gronow v Gronow (1979) Australia*[34]

Decision and comment In arriving at its decision, the High Court of Australia referred to the practice of giving custody of a very young girl to her mother, and to studies suggesting that mothers are not necessarily the best persons to have custody. The Court concluded that courts should not feel obliged to give custody to the mother; their decisions should rely on the results of investigations of the suitability of both parents. This decision is sometimes taken as a license to take custody away from a mother without a fair

assessment of the situation. However if assessment shows that things are fairly equal between competing parents, or if maintenance or property orders would place the mother in an equally good position, the mother probably should get custody of very young children and of girls.

CASE *Re W (a minor) (Custody) (1983) United Kingdom*[35]

Facts and issues The mother of a two year old girl was granted custody, care and control of the child. The court said that a child of that age ought to be with the mother, if other things are equal, or unless there is some strong ground for saying that the child's best interest will be away from the mother. During the appeal hearing, the Court of Appeal judge said: "I would not myself think it wise to make such a generalisation about the view of the court. I would prefer to say that, as a matter of general experience, the evidence ... including the evidence of paediatricians, sociologists, social scientists, social workers ... is to this effect."

He then outlined the issues involved.

"... The individual circumstances of every case vary so much that any generalisation has to be qualified in the light of a sensitive grasp of the realities of all the relationships between the child and the various grownups concerned. ... The capacity of the grownups ... put forward as claimants for care and control is of immense importance in proving their capacity for forming affectionate, loving relationships with the child or children concerned ... If all such factors are nicely balanced, then probably it is right for a child of tender years to be brought up by his or her natural mother.

... When ... the natural mother has been cut off for a significant period ... from a small child, and the father and/or the father and another lady have stepped into the breach so that for months or years the child has been learning to place its security upon the father and/or the father's other lady, it becomes ... very delicate ... to decide whether it is ... in the interests of the child to take the risk of uprooting [it so that] it may ... be brought up by the natural mother."

Decision and comment After having considered these factors, the Court of Appeal did confirm that the mother should have custody. But the decision might have been different if the mother had been separated from her child and the child had become attached to a substitute.

CASE *Tepoula Lolohea Bailey v Peter Bailey (1988) Tonga*[36]

Facts and decision F was Canadian. M was Tongan. F, an experienced teacher, could earn a good income. At the time of the custody hearing, he was living in Canada on a boat. M was living in Tonga with the two children under ten years of age, and working for a church that provided housing. The Supreme Court gave custody to M for the following reasons:

- The children were too young to be separated from M without serious effects.
- They were settled and comfortable with M and should not be disturbed.
- M provided "a mother's love" and "continuity of care".

CASE *Bennet v Aigner (1991) Tonga*[37]

Facts M and F were both Tongan citizens. When they divorced, M was granted custody of S, their son. M and her new husband, an Austrian, decided to go and live in Vienna and F applied for a variation in custody. F said that life in Vienna would materially benefit S, but that he would lack the security of his Tongan language and culture.

Decision The court said that too much weight should not be given to the idea that mothers are automatically the best custodians of young children. However, this was generally true, especially in the case of little girls. In the case considered, if S stayed in Tonga, he would benefit from the secure Tongan culture, while Vienna would offer more long-term material benefits. His immediate emotional needs were more important; he was only seven, he needed his mother, and should remain with her.

The child's feelings and wishes

Nauru legislation[38] provides that no child over 16 will be made to live with any person with whom he or she does not want to live. In all other countries this is a common law principle. The child's wishes are not the most important factor, but the court will consider them. In *Rajendra Nath v Madhur Lata (1984) Fiji*[39] the court said that a child of six was old enough to say, during the judicial interview, with which parent he wanted to live. So in deciding custody, the court may consult the feelings and wishes of any child over six years old. In all cases, the accepted procedure is for the Welfare Officer or Magistrate to ask the parent currently looking after the child to bring it for a private talk with them. Neither parent is allowed to be present.

The following cases show the extent to which courts consider children's feelings and wishes.

CASE *Tarte v Fa (1984) Fiji*[40]

Facts and decision The parents had separated when the two boys were four and two. The boys lived with M in Suva. M had been awarded maintenance and when the boys were 13 and 15, she applied for an increase of maintenance. F applied for a variation of custody. After a judicial interview with the boys, the court gave custody to F saying that it was in the best interests of the boys. The boys had lived a long time with their mother but were now old enough to decide; they looked after themselves a lot, and wanted to live with F on his farm in Taveuni. In Suva, the boys were constantly tempted to smoke and drink. In Taveuni, F would guide and discipline them.

CASE *Maomaiasi v Olisukulu (1991) Solomon Islands*[41]

Facts and decision The parents were separated and F lived with CR, the co-respondent in the divorce case. The oldest children said that they wanted to live with M. They said also that they did not want even to see F while he lived with CR. The court strongly disapproved of M, saying in effect that she was bossy and spiteful towards F and CR, and must have brainwashed the children. However, the court gave M custody. It did not give access to F, but hoped that the children would eventually want to see him.

Comment Even though the court disapproved of M, it gave M custody, probably because of the difficulties of trying to enforce a custody order if the children were given to F. The children said they did not want to live with F and CR, and were old enough to run away and get into trouble if the court tried to make them do so.

CASE *Maramanitabua v Marakiwai (1983) Fiji*[42]

Facts, issue and decision While their mother and father were away studying, three children lived with their father's parents. When the two older children were 11 and 10, M and F separated, and M applied for custody. The court said that F had a high income but could not adequately care for the children. The issue was whether M or the grandparents would get custody. Both M and the grandparents could be good custodial parents but the two older children were old enough to choose and had clearly chosen their grandparents. The existing arrangements were working very satisfactorily and the court saw no reason to disturb them. It granted custody to the grandparents.

CASE *In the matter of Pamela Nadine Gounder (1993) Fiji*[43]

Facts and decision We have already discussed this case. The father had kidnapped his daughter from her mother's legal custody in Canada, and had kept her illegally for nine years, until her mother traced her in Fiji and applied to regain custody. By this time the daughter was 14 and when interviewed by the magistrate, declared that she hated her mother and wished to remain with her father. The court took the feelings and wishes of the child into account. It said that it did not wish to upset the long-standing arrangements in which the child was settled, and awarded custody to her father.

In all the cases above, the courts took very seriously the feelings and wishes of older children. However, in the cases of *Maomaiasi v Olisukulu* and *Gounder*, there were signs of threats or brainwashing, and in the case of *Gounder*, the father had illegally deprived his daughter of her mother's care. Such cases highlight the chief danger of following the expressed wishes of children. A child may be bribed, threatened or brainwashed into expressing a particular choice and may therefore may ask to live with a parent who cannot be trusted to look after its interests.

Courts therefore need good welfare officers who can understand what children may do when asked to choose between parents. Courts need thorough and thoughtful custody reports that point out the good and bad aspects of both parents. When both parents appear to be equally good custodial parents, courts might find it hard to decide. In these situations, the child's feelings and wishes might be the deciding factor.

The financial means of the parties

The court considers the economic position of both parents. It asks how much money each parents has access to, including earnings, maintenance payments and other income or commitments, and sees which parent is better able to

provide a proper home for the child. The following cases show how the courts compare the financial situation of both parents.

CASE *Tuiletufuga v Tuiletufuga (1979) Western Samoa*[44]

Facts and decision M was a Fijian; F was a Western Samoan. They had one child. M sued F for divorce on the ground of his adultery with CR, who had one child by F and was expecting another. F and CR wanted to marry when the divorce was finalised. F had a job in Samoa. M had been working in Hawaii for a year, and had left her son with F and CR. The court said that even though M should have custody of a tender-aged child, things were not equal. It gave custody to F because M's future was uncertain, but F was regularly employed and offered family life with his Samoan *de facto* wife and family.

CASE *Powell v Rukuyama (1986) Fiji*[45]

Facts, issues and decision F divorced M on the ground of adultery. The case involved a dispute over the custody of S, a boy of four. At the time of the hearing, S was living with F, who had a well-paid job, lived in his own home and had his own car. Both M and F worked outside the home and S would have to be looked after by others. M was a secretary. She lived in a small rented house with her *de facto* husband, two other adults and six children, used public transport and got some help from her family. Her father did not come to court to say that he was willing to help her financially, nor did her *de facto* husband say that he would marry her and support the child.

F said that because M had committed adultery, if all factors were evenly balanced, he, as the parent not at fault, should get custody. M said that if all things were equal between them, a child of tender age should be with its mother. The court said it would not consider M's adultery. This had been the "practice in the nineteenth century" but was no longer relevant to custody. The real issue was the best interests of the child. Because all things were not equal, the question of whether a child of tender age should be in its mother's care did not arise. F had good earnings and his own home, so obviously he was in a better position to care for the child than M was. Custody would therefore go to F.

Comment This decision was based on the facts, and according to the law it was fair and just. The magistrate's ruling that a mother's adultery is irrelevant to custody is important, because many magistrates still base judgments on a mother's adultery. However, the decision was made on economic grounds; M's bargaining power might have been improved if her new partner had said that he would marry her and support S.

CASE *Mohammed Aktar v Daisy Devi (1992) Fiji*[46]

Facts and decision When a Hindu woman M and her Muslim husband F separated, they had two children D, a girl aged three and S, a boy aged seven. F had a good job and a company car. He lived in his own home with his sister and her child, and there were separate rooms for the children. M depended financially on her mother and her brother and did not have a paid job. She lived in a house with 12 people using one bathroom and one toilet. M had interim custody, but F disputed this. He said that when he and M married,

they agreed that the children would be brought up as Muslims but that this had not been done. The court gave M custody of D, because D was of tender age and not yet at school. Custody of S went to F, because F had good accommodation, and because S had been brought up as a Muslim. As well, M drank alcohol, which Islamic religion forbade.

Comment Underlying the court's decision were four factors: the financial means of the parents; the age and sex of the children; the differences of religion; and the conduct of the mother. The most important factor was that the mother financially depended on others and did not have her own home.

These cases show how a disadvantaged economic situation affects a woman's ability to get custody.[47] Courts say that financial concerns are not the factor in awarding custody, but these cannot be ignored in assessing who can better provide for a child, so having a good income does improve suitability. If one parent has the family home and a good income, obviously that parent has a material advantage. Such parents are more likely to be men who own property and have better incomes; consideration of the "financial means of the parties" often therefore leads to a form of indirect discrimination against women.

The question of the matrimonial home is very important. If both parents jointly own the home, the parent who gets custody should also get possession of the matrimonial home, as far as this is possible after taking loans, mortgages and repayments into consideration. If the mother emerges as the better custodial parent in every way except that she does not have possession of the matrimonial home, she should get possession of the matrimonial home. However, unless maintenance and matrimonial property laws are improved and enforced, women face great difficulties in trying to improve their economic conditions and to become equally likely to be awarded custody. (We look at this more closely in Chapters 10 and 11.)

Courts everywhere argue that they do not have the power to order that wives should get possession of the matrimonial home. But they do have the power; their extremely broad legislative and common law powers are based on the best interests of the child, and include the power to make "any order which it considers necessary to make to do justice".[48] In the final analysis, the financial means of the parents should not have a direct bearing on custody, since the most important consideration is the welfare of the child.

Better a dinner of herbs where love is than a fatted calf with hatred.[49]

The conduct and behaviour of the parties

The common law is that the conduct or behaviour of the parents is not relevant in deciding custody, unless it will affect the child. The main principle in assessing custody is the welfare of the child, so the court will not consider a parent's conduct or behaviour, unless it has proof that this harms or might harm the child. A parent may have committed adultery, but the adultery should not in itself be used against the parent in deciding custody. On the

other hand, a parent who drinks a lot might not be capable of caring for the child; an abusive parent might harm the child; or a criminal parent might lead the child into criminal ways. But such behaviour must be proved, and it must be shown that the behaviour has directly harmed or will harm the child.

We have seen in the case of *Mohammed Aktar v Daisy Devi* that the court did take into account the fact that the mother drank alcohol, and have seen other cases in which courts focus on a mother's sexual behaviour rather than on her behaviour towards her children. Thus, if custody is disputed, women who are thought to have good sexual morals get custody of tender-aged children. Women who are considered sexually immoral do not get custody, whether or not it has been proved that their sexual behaviour directly affects the child.

If this practice were applied equally to both parties — to fathers and to mothers —it would not be discriminatory. However, the practice is applied only to women. While the general view is that mothers should get custody of children, because child-care is women's primary function, the fundamental legal view of the courts appears to be that mothers should be chaste. Adulterous women may find themselves punished. This is made obvious in *B v B (1962) United Kingdom*:[50]

> There might be other women in similar circumstances who thought they would be justified in leaving their husbands if they took the romantic view that love would triumph over all and there was no danger of losing their children. It was right that it should be brought home to them that there was a grave danger of their so doing.

In other words, if the laws give adulterous women custody of their children, more women will leave their husbands. Denying custody of children to adulterous women therefore is intended to stop women from leaving their husbands or to punish those who do so. In *Lonard (No.2) 1977) Australia*[51] the court gave custody to the father when it saw that the mother was living in a *de facto* arrangement with a married man. The mother had broken a previous promise to the court that she would marry her *de facto* husband if awarded custody. The court clearly felt that it could not approve an arrangement that went against conventional morality.

This happens time and time again in Pacific courts. We will look first at some cases from Fiji and Tonga, and then survey briefly the practices in Kiribati, Solomon Islands, Tuvalu and Western Samoa.

CASE *S v H (1988) Fiji*[52]

Facts and decision In 1988, M left her husband F, apparently for another man. She was denied custody of the baby whom she was breast-feeding. The court refused to grant M an urgent *ex parte* motion for the case to heard and an order made for the interim custody of the infant. It ruled also that there was no clear right to take custody of an infant aged under 12 months, and no power to order custody without consent, or at least a hearing involving both

parties. By the time F was finally forced to attend court, M's milk had dried up, and F was awarded custody. In 1991, M was given access to her child (by then almost three years of age) and had seen the child only six times.

Comment M said that the court had not helped her to obtain access. There had been numerous delays and officials told her she could obtain access only if she went to the High Court. When she tried to get help from the police, they told her to obtain a writ of contempt. She could not get legal aid because she had an income, though it was not enough to pay a private lawyer. She got access only because her former husband had finally relented. The court did not say so, but its attitude was obviously that M should have thought about losing custody before deserting F.

Compare the *S v H* decision to that in *Yogeeta Ben v Harold Panniker (1994) Fiji.*[53] This did not involve a mother's adultery, but the magistrate said that it did not matter that the father had not been served with the necessary documents or that a magistrate did not have obvious specific statutory powers to order the return of custody. He would order custody immediately to the mother of an infant, because the law in general gave magistrates the power to make any order that was in the best interests of the child.

CASE *Khan v Khan (1975) Fiji*[54]

Facts M sued F for custody of their child and for maintenance on the grounds of F's cruelty, desertion and adultery. She did not prove her case but was awarded custody by the Magistrate's Court. F appealed to the High Court against the decision, arguing that M was unfit to be a custodial parent; she should not get custody because she had an illegitimate child before marriage and she was too "sociable". M said she had an occasional night out, that she enjoyed a social drink, and that she occasionally got "merry". However, she said, these things taken together did not make her unfit to have custody.

Decision and comment The High Court said that M's behaviour did not show the kind of "moral turpitude or depravity which reveals her unfit to have custody". M's sociable nature should not be held against her. Her illegitimate child, first marriage and adultery were not relevant to the issue of custody, since they did not necessarily affect M's ability to be a good mother. The Court said M earned as much as F did, and that in both cases the child would be looked after by a housekeeper so there was nothing to compare there. It gave custody of the child to M and access to F.

Compared to the decision in *S v H (1988)*, this decision appears to be fair and sensible; it certainly does not punish M for her conduct. However, the court did not ask any questions about F's behaviour, although M had alleged cruelty, desertion and adultery. Nor did the court ask whether F should even raise the issue of M's illegitimate child. If she was good enough for him to marry, and to bear him a child, how was she not good enough to be a custodial parent?

Now we will look at cases from Tonga, where the practice in most situations is to give custody to the mother. Magistrates' Court files contain little information as most judgments are not recorded. The Senior Police Magistrate says that custody issues are usually settled by consent but he

has split custody on many occasions. If custody is disputed, he will usually give it to the mother "unless she is an adulteress or *fokisi*" (street girl).[55]

CASE *'Afa v Tali and Sika (1990) Tonga*[56]

Facts, decision and comment We looked at this case in Chapter 8. F obtained a divorce on the ground of M's adultery. The Supreme Court considered damages for adultery, and the custody of the children. In discussing damages, the Court said that if damages were awarded, they should be only $250, because M had been previously unfaithful and was not a good mother. F was awarded custody. The Court had no evidence on which to base its finding that M was not a good mother, but apparently thought that adultery makes any woman a bad mother.

CASE *M v S (1991) Tonga*[57]

Facts and decision M the mother of two children had been awarded interim custody. Because M had an illegitimate child since separating from F, a magistrate awarded custody to F, and allowed him to take the children overseas before M could get legal advice. She appealed to the Supreme Court, which awarded custody to M, saying that the magistrate should have considered the children's good, not M's sexual morals.

CASE *Sugar v Sugar (1991 and 1993) Tonga*[58]

Facts and decision A Swedish father was awarded a divorce because of the adultery of his Tongan wife. The Supreme Court criticised M's immorality but gave her custody for the following reasons.

- It did not want to disturb the *status quo*; the two children had been with M since the parents separated.
- The two children were girls under six years old.
- M would be able to take care of the children herself.
- F would have to get his parents to take care of the children; there was no guarantee of visas for his parents.
- F's parents did not speak English or Tongan, the children's first language.
- The Social Welfare Officer's custody report recommended custody to M.

Ten months later F applied for variation of custody. He said that he had remarried, and that his new wife was willing to look after the girls, who were living in a "damaging physical and emotional environment". He further claimed that M denied him access. M claimed that F had breached the previous custody order, and had sexually abused the children. The court rejected M's claims, saying that her approach was "if convenient, tell the truth, if the truth be not convenient, then fabricate". F was awarded custody.

Comment The original decision may have been influenced by the fact that F was not Tongan. The change seems to have been due both to F's changed circumstances, and to M's loss of credibility.

Practices vary in Kiribati, Solomon Islands, Tuvalu and Western Samoa.[59] Kiribati courts rely greatly on the recommendation of the Social Welfare Officer, whose view is that the mother should generally have custody, unless she goes to nightclubs, plays cards and drinks alcohol; no such views were

expressed about fathers. The Social Welfare Officer disapproves of mothers who do not breast-feed babies less than one year old, and will get the approval of the families and remove the child if necessary. When the child is over six, the Social Welfare Officer tends to recommend custody to the father in order to ensure land succession. Sometimes both parents are overlooked and grandparents are awarded custody.

Solomon Islands lawyers say that the parties' sexual conduct does not appear to affect custody decisions in Magistrates' Courts. Sexual conduct does affect custody when the matter is indirectly dealt with in custom. Local Courts are not supposed to deal with custody, but rural women complain of interference indirectly by courts dealing with custom matters, or directly by chiefs dealing with custody in custom cases. The only solution is for women to go to one of the main centres and apply at the nearest Magistrate's Court. A female lawyer said that she would not advise any of her clients to seek justice in the Local Courts; custom law always favoured men.

The Social Welfare Officer says she recommends custody for the father only where the mother is homeless or of completely unsuitable moral character. She says that she applies the same standards to the father. She does not believe in automatically giving children to the father, as is done in custom. She says that women do not go to the Local Courts if they can help it, because they do not expect to get justice there.

The Tuvalu Resident Magistrate says that he never gives custody to a parent who has committed adultery, whether or not there is proof that the parent's behaviour affects the child. Custom favours the father being given custody. Court officials in Western Samoa say that custody is always based on the welfare of the child. The adultery of the mother is taken into account only if it affects the moral upbringing of the children. "Misconduct" therefore does not usually have a bearing on custody. However, in one Western Samoan case[60] a father was awarded custody of his three eldest children. The mother was awarded custody of the baby, whom the father had never seen. The reason was not given, but the only recorded relevant fact was that the father accused the mother of adultery. This had not been proved and there was no other evidence or accusation that the mother was unfit to be a parent.

All these cases show that, especially in lower courts, the conduct of the parents does affect custody decisions. This practice seems to be particularly applied to women whose sexual behaviour is an issue, or whose behaviour is not what the court views as proper for a woman. Thus, a woman who is separated from her husband, socially active, independent and assertive, or dresses in Western clothes may be seen as "loose", and will stand little chance of obtaining custody in a dispute, particularly in the more traditional Pacific communities. Women rarely dispute custody if their adultery is proved.

We have seen that courts tend to focus on the mother's sexual behaviour, and to ignore the sexual behaviour of the father. But what do they do about the father's repeated violence towards the mother? This seems to have little effect on the awarding of custody. The adultery of the mother has a strong bearing on custody decisions but the violence of the father does not.

As we have seen in our discussions of battered wives, there is strong evidence that children exposed to violence suffer lasting psychological harm and in turn may become violent adults. However, no award of custody has yet turned on the issue of the father's violence, which in local courts is rarely recognised. An allegation of violence is sometimes seen as a tactic by the mother, rather like an allegation of sexual abuse, to obtain custody.

The common understanding by the courts is that mothers say these things simply to get custody of their children. Yet mothers are battered, the children know this, and many men who batter their wives also batter their children. Studies show that the extent of the abuse suffered by the mother is an indicator of the extent of the abuse suffered by the child. The United States Government has accepted this, as shown by House Concurrent Resolution 172, passed unanimously by the House and the Senate in 1990.[61] The Resolution states that believable evidence of physical abuse should create a statutory assumption that it is harmful to the child to be placed in the custody of an abusive parent: a violent father will probably not be a good custodial parent. Similar findings were made in the United Kingdom.[62]

Because of the wealth of evidence showing the results of physical abuse on a child, courts should recognise that a child should not be placed in the custody of an abusive parent. But when compared with the number of cases decided on the basis of the mother's adultery, the discrimination against women seems clear. Established case law shows that the conduct of the parties is irrelevant unless it directly or indirectly affects the welfare of the children. Lower courts in all common law jurisdictions do not seem to be able to accept this, but higher courts in Australia have ruled time and time again that fault and conduct are irrelevant unless they are proved to affect the child's welfare.[63]

The hostility of the parties and the solution less likely to give the court trouble

Courts look particularly at the parent who has actual custody of the children. A key question is whether the custodial parent will make problems for the access parent. The court therefore asks whether the custodial parent is willing to grant easy access to the access parent. Will, for instance, a mother who has custody make it easy or difficult for the children to see their father?

This factor is related to another consideration — will the court have constant trouble in trying to enforce access? If one parent makes this difficult, the court may give custody to the other. We have seen a suggestion of this in the Solomon Islands case of *Maomaiasi v Olisukulu* where the relations between the parents were obviously bad. Courts also appear to place some emphasis on the anger or hatred shown by one parent to the other. The leading Australian case *Gronow v Gronow*[64] is locally often used as persuasive precedent. Here the High Court said that what tipped the scales in favour of giving custody to the father was the obvious hostility of the mother. The lesson for women is that if they have custody, they must give trouble-free access to the father or risk losing custody.

The influences of religion, custom and culture

So far we have discussed the influence of the child's family situation on court decisions about custody and access. Now we will see how the child's community and religion influence court decisions. Again we will see that courts are influenced by their own attitudes, communities and religions, whether they know it or not. In the following case, for example, we see a conflict between religion and the tender age doctrine.

CASE *Reddy v Nisha (1981) Fiji*[65]

Facts F, a Hindu, and M, a Muslim, had two children, a girl D and a boy S. When custody was first argued in the Magistrate's Court, the parents withdrew the case and agreed that F would have custody of D and M would have custody of S. Both would have access to the other child, and both children would be together every weekend with one or the other parent. Each child would be brought up in the religion of the parent with whom it usually lived.

When the case went to the High Court for divorce, the judge gave custody of both children to F; S was about 10 and D was about seven. M disputed the decision; she argued that the fact that D had been brought up as a Hindu should not have a bearing on custody. She argued also that the tender age doctrine applied; young children should be placed with their mother.

Issues and decision The High Court said that the religious question was one of utmost importance; the girl who had been living with her father was being brought up as a Hindu, and it was definitely contrary to her interests to transfer her to a Muslim household. The Court accepted that the tender age doctrine might apply in this case. However it said that, in precedent cases, courts did not have to look at what would happen where was such a serious problem as the "divergence of religious faith between the parents and the effect of that divergence on the young children". In the end, the Court returned the children to the parent with whom they had lived and to the religions in which they had brought up for the previous four years.

Comment That was in 1981. In the 1992 case of *Mohammed Aktar v Daisy Devi*, the court gave custody of the boy who had been brought up as a Muslim to his Muslim father, and custody of the baby daughter to her Hindu mother.

Like religion, the customs and culture of the community may directly and indirectly affect custody awards. Even formal courts are obliged by their constitutions to recognise customary law and customary practices. However, there are few guidelines, and the extent to which customary law should be recognised and applied seems to depend on the attitude of the particular judge or magistrate. Often, customary law favours one parent, usually the father, and sometimes favours grandparents over the father and the mother. On the other hand, the legislation in all countries makes the welfare of the children the primary consideration. Legislation requires custody to be dealt with in formal courts, but in practice, rights over children may also be dealt with in custom in the local or island courts. There may therefore be direct conflict between legislation and customary law.

Let's now look briefly at customary law and custody in Cook Islands, Western Samoa, Kiribati, and Tuvalu.[66] (We will end with Solomon Islands and Vanuatu, where bride price payment adds more difficulties to a difficult situation.) In Cook Islands, as in Fiji and other Pacific Islands, custody law is complicated by a custom in which a baby may be adopted by grandparents. However, very few cases ever go to litigation; they are settled out of court with the encouragement of Justices of the Peace and judges.

The situation in Western Samoa is similar. Here, a man's family can claim the eldest son, or senior members of a family can ask to be given other children, and it is hard to refuse. In the following true story, a Samoan woman who had no daughters had asked her nephew and niece to give her their baby if it was another daughter.

STORY *If you have another daughter, please give her to me*

My third sister was born when I was about seven. My aunt had no daughters so she asked my parents for the baby. When my other sisters and I saw my mother crying, we went to our aunt's place and took our baby sister and brought her home to our mother. Mother held the baby for a while, then told us to take her back to Auntie. We did this and didn't get into trouble. But we could see that Mother missed her baby and we were so sorry for her that we went again to Auntie's place and brought the baby back. This time Mother smacked us and told us we had to leave the baby with Auntie.

Kiribati legislation makes the welfare of the child the first and most important factor, but very few family cases reach the High Court. Most go to the Island or Magistrates' Courts and are dealt with by village elders, but records are rarely kept. Women say that if a couple separates, custody always goes to the father, and mothers are often denied access. Custody may also be dealt with in the Land Court because land inheritance rights have much to do with who has custody of children. On the whole, mothers tend to give custody rights to fathers because children in the custody of their father are more likely to get land rights by inheritance. Limited land rights therefore affect the ability of women to get custody of their children.

Tuvalu's legislation gives both parents equal rights to custody, except that when an illegitimate child reaches two years of age, it should be given to its father in order to get a share of the father's property. In customary law as it is currently understood, custody of the children goes to the father.

In Solomon Islands, only the Magistrates' Courts and the High Court should deal with custody issues. Although the legislation does not allow Local Courts to deal with custody matters, they do so in practice. Most cases do not come before the higher courts, but are dealt with informally in custom by village elders. Others are dealt with as matters affecting customary law in lower Local Courts qualified to look at customary matters.

According to a Solomon Islands welfare officer, the application of custody laws depends greatly on the character and personality of judges, magistrates and police officers. A 1993 bill[67] drafted by senior Government officials is said to have recommended that children and mothers should have no

automatic rights; in custody cases, the male line has rights over the children. As one Solomon Island former magistrate put it, the practice is "blow the candle out rather than share the light".

In Magistrates' Courts or High Courts, custody is usually bitterly disputed. On the one hand, the legislation gives equality to men and women. On the other hand, customary law appears to favour the father, especially if his family paid bride price. Magistrates have based decisions on customary law and given custody to the father. Many women do not know that the Constitution and the custody legislation gives women equal rights, so they do not challenge decisions that follow custom. Some women, however, have not been willing to accept such decisions, and have challenged them. The following cases give some examples and useful precedents.

CASE *Sukutaona v Houanihou (1982) Solomon Islands*[68]

Facts and issue The Magistrate's Court gave the father custody of the children on custom grounds. Their mother appealed to the High Court. Which law was to apply? The customary law that the children should go to their father? Or the legal principle that neither the mother nor the father had priority: the decision should be based on what was in the best interests of the children?

Decision and comment The High Court said that although custom was part of Solomon Islands law, the legislative principle of the welfare of the child was still the most important. Further, what was or was not custom must be proved by expert evidence given in court by unbiased persons. An expert giving evidence about a particular custom would not necessarily be automatically believed. He might be cross-examined by the mother's lawyer and other experts might be called in to contradict him. The court would not rely only on the customary law principle. The legislation would be studied, and so would the welfare reports, which were therefore essential. The High Court noted that the tender age doctrine required courts to make a "presumption in favour" of giving custody to the mother of a very young child, and did so in this case.

CASE *In re B (1983) Solomon Islands*[69]

Male witnesses from Kwar'ae and West Are Are (the husband's and wife's districts) gave evidence that the payment of bride price guaranteed custody to the father. The West Are Are witness said: "If a woman is bought, the children to the marriage belong to those who buy the woman ... no-one from the woman's side would claim the children". When asked what he would do if his daughter left her husband, the witness said that he would look after her "until the husband came to take them again". He said also that a child inherits land and property rights through its father.

Comment Whatever bride price meant historically, it means now that a woman and her future children are sold by her father's family and bought by her husband's family. How can this deeply patriarchal custom still be a source of empowerment for Melanesian women?

CASE *K v T and Ku in re custody application (1985) Solomon Islands*[70]

Facts M and F had seven children. They had been married in custom. When F died, his brothers took the children, but M filed for custody. The Social Welfare Officer's report said, in effect, that the children would be equally comfortable with M or with their uncles. A custom law expert gave evidence that payment of bride price bought the right to the children. He further said that the mother's right to access could be bought off by further compensation if she agreed.

Decision The Chief Magistrate used *Sukutaona v Houanihou (1982)* as precedent regarding the children's welfare. Saying that M's determination showed her deep love for her children, he ruled that there was no evidence that M was not a good mother; in the children's interest, M should be awarded custody.

Comment The custom expert witness said in effect that if the uncles did not want M to visit her children, they could pay her to give up access. But this goes against the legal principle that access is the right of the child; it is not something that a parent can buy or sell. He said also, in passing, that pregnancy before marriage would decrease the amount of bride price. In both statements we see the patriarchal attitude that women and children are property, but the Chief Magistrate congratulated M's determination in challenging the custom despite the strong male dominance of the culture.

CASE *Sasango v Beliga (1987) Solomon Islands*[71]

Facts M and her husband had been married in Malaita custom. M's husband died and his brothers took the children and some custom valuables without M's consent. When M applied for custody of her children and the return of the property, the brothers argued that they had paid bride price; in Malaita custom the children and the property passed to them after their brother's death.

Decision The Magistrate's Court held that the most important consideration in formal law was the welfare of the child. It accepted the view that in custom a man's line may have rights over the wife and children; custom was important and was to be given effect according to the Constitution, but it had to be proved as evidence. M had not been criticised as a mother. The tender age doctrine applied in this case. The welfare principle must prevail and the children would be given to their mother's custody. Regarding the valuables, the Court said that it could give a decision only about property disputed under customary law. Because M had given her evidence clearly and truthfully, on the basis of credibility, the Court would give her the property.

Comment In this case, custom law was not proved in evidence. What if it had been? Then the Court would have been faced with the issue of legislation opposed to custom law. The proper answer would be that the Constitution grants equal human rights to men and women, and must override the custom law. Custom law may operate only when there is no legislation or common law. The property decision is important where matrimonial property is concerned. The Court's decision was fair within its limits, but it did not apply the matrimonial property principles of just distribution. As we will see in Chapter 11, it therefore has little precedent value in matrimonial property disputes.

These cases are interesting. In all except *In re B (1983)*, the women were able to take their cases further because of their determination and the assistance of the Public Solicitor's Office, which deals with family law cases as well as criminal cases. In the last two cases, the Chief Magistrate was an expatriate lawyer trained in the common law tradition and apparently with knowledge of Solomon Islands custom, and the situation of women. But what if, as in *Sukutaona v Houanihou* or *In re B*, the court had accepted that the payment of bride price also automatically bought the right to ownership of the property and children? And what if the father, or his family, were clearly not capable of looking after the children? Would custom law apply?

Very similar problems occur in Vanuatu. However, there seem to be fewer examples of women challenging discriminatory decisions in court, possibly because the Public Solicitor's Office focuses its limited resources on defending accused persons in criminal matters, rather than on family cases.

CASE *Case (1991) Vanuatu*[72]

M was accused of adultery. F said he would take the matter before the chiefs for customary separation and the children would be given to him. He would send M back to her village. M sought the advice of the Public Solicitor who told her that both parents had equal rights to custody and that she could not be forced to go to her village. There was no further information on file. Lawyers at the Public Solicitor's Office thought that custom law would prevail, and M would give up the children. She would find it very hard to risk the possibility of being shunned by her community if she did not follow custom.

Ni-Vanuatu women now have two Supreme Court cases that they can use as precedents in custody disputes.[73] In *John Noel and Ors v Obed Toto (1995)*, the Supreme Court said that where customary law conflicted with the Constitution, the Constitution should prevail. In *Banja v Waiwo (1966)* the Court ruled that customary law would not apply in cases where there was relevant legislation or common law. In custody cases influenced by bride price, ni-Vanuatu and Solomon Islands women may, therefore, argue that Constitution and the common law should prevail over customary law.

ENFORCEMENT OF CUSTODY AND ACCESS ORDERS

We have just discussed the factors that influence decisions about custody and access. But a decision by itself it is not enough; if a decision is not obeyed, it may need to be enforced. To see how this is done in theory and in practice, we look at a sample court order about divorce, custody and access.

DECREE NISI

IN THE SUVA MAGISTRATE'S COURT
DIVORCE JURISDICTION

Action No. 444 of 1994(S)

Between : LOIS KENT PETITIONER

And : CLARK KENT
RESPONDENT

And : KATTY LORREN

CO-RESPONDENT

Wednesday the 19th day of April, 1994

Upon considering the petition filed herein and evidence taken thereon the Court Decrees that upon and subject to the decree of the Court becoming absolute the marriage between the abovenamed petitioner and respondent solemnised on the 11th day of March 1972 be dissolve

AND the Court orders further that the Decree Absolute be issued at the expiry of 3 months from today. The custody of the Children namely **JIMMY KENT** born on 20th May 1980 and **ZAIN KENT** born on the 22nd day of January 1985 be granted to the Petitioner with access every fortnight from 9 am Saturday to 4 pm Sunday to the Respondent. The Respondent to pay $100 maintenance fortnightly for the children until the children turn 18 years. Terms and Condition of agreement now endorsed by the Court.

Pronounced this 19th day of April, 1994

Magistrate's Court Magistrate

Figure 9.1 *Sample court order: divorce, custody and access*

As Figure 9.1 shows, when a court makes its decision about custody and access, the terms and conditions of decision are contained in a court order. The order is a legal court document signed by a magistrate showing who has custody, and who has access and at what times. If the order is not obeyed, the court system can be used to enforce the order.

STORY *How does this work?*

Lois Kent is the custodial parent and Clark Kent is the access parent. Lois does not let the children go to Clark on Saturdays, so Clark goes to his lawyer, who persuades Lois's lawyer to tell her that she must obey the court order. During a weekend access visit, Clark takes off with the children. As custodial parent, Lois gets her lawyer to seek help from the court. So the first steps are to see if the custodial and access parent can agree; if they can't, or if there are serious problems, one parent or another can go to court to have the custody order enforced.

Most Pacific Island countries have legislation providing for enforcement of custody at the lower court level, usually in magistrates' courts. The Fiji legislation[74] states:

> s. 32. Where an order under this Act contains a provision committing to the applicant the legal custody of any children of the marriage, a copy of the order may be served upon any person in whose actual custody the children may for the time being be, and thereupon the provision may, without any prejudice to any other remedy open to the applicant, be enforced by imprisonment for two months in the same way as if it were an order of the court requiring that person to give up the children to the applicant: Provided that imprisonment shall cease when the children mentioned in the order have been handed over to the Court.

If the access parent does not return a child to the custodial parent at the end of an access visit, the magistrate may imprison the access parent until the child is returned to the custodial parent. In theory, if a parent goes to the police and produces a Magistrate's Court order showing that he or she has an identifiable Custody Order, the police should act immediately. If the children are not returned, a copy of the court order should be given to the access parent. If the children are not returned within a reasonable number of hours, the police should take them from the access parent and return them to the custodial parent.

The purpose of having a written court order is to get the police to ensure the safe return of the children. The parent who has not obeyed the custody order should be required to attend court the next day to explain why he or she disobeyed the order. If there is no satisfactory and provable explanation, he or she should be imprisoned, or warned once and imprisoned if it happens again. However, imprisonment is rarely used; the parent usually gets only a warning, even after repeatedly disobeying the order.

Access orders are even more difficult to enforce. If an access order is disobeyed, because the custodial parent has not provided the children for access, or because the access parent has turned up at the wrong day or time, it is not quite so simple to file a court case against the offending parent. Courts are unwilling to devote time to what they regard as unimportant matters. Their usual attitude is that the parties should sort out the problem between themselves. Legal action is usually taken only when there are serious

repeated breaches of the access order, or when the custodial parent completely refuses to provide access.

In Fiji and in other countries with maintenance laws based on United Kingdom legislation, these provide for Magistrates' Courts to enforce custody orders. However, nothing provides for enforcement of access orders in Magistrates' Courts. The only possibility is to apply to the High Court. This takes considerable time, the filing of numerous documents, and is very expensive. When the case comes for hearing, the custodial parent might have disappeared with the child, or may have persuaded the child to hate the access parent.

Lower courts are cheaper and easier to reach than the higher courts, and the parent does not necessarily need a lawyer. A woman may seek the help of a someone familiar with the system, or may be able to enforce custody herself, if she understands the system and has the time and the money. For access, many parents informally use lawyers to telephone the offending parent's lawyer, or the parent, and attempt to persuade them to abide by the court order. A lawyer who does this may be on the phone, or having meetings, at all hours of the night and day with worried and angry people. Family law cases take up huge amounts of time and energy, and this is one reason why most lawyers avoid them or charge huge fees.

The whole system does not work in practice as it should in theory. This is what usually happens.

- Documents (motions and affidavits) must be filed in court.
- If and when the defendant is found, the legal documents must be properly served.
- Court appearances are required.
- There is a trial.

In Fiji, therefore, the enforcement of custody and access orders is almost like having a new hearing all over again. Women and children are the main victims of poorly drafted legislation, poorly trained magistrates, ineffective procedures and poor allocation of resources to the courts.

Proceedings in higher courts

In considering the enforcement of custody and access, we have mentioned the role of higher courts. Contempt of court proceedings or *habeas corpus* proceedings must take place in a higher court such as the High Court or the Supreme Court. Special knowledge is needed to find the way through the legal jungle of documents, briefs and delays. Specific legal documents have to be prepared and filed in a particular form. Proceedings are very costly and always need legal representation. The process itself is very time-consuming and further delays occur if courts give priority to criminal cases.

Contempt of court

Contempt of court proceedings may be undertaken when a person refuses to obey a court order or for any other reason does not obey it. They, therefore, are the main method of enforcing court orders concerning access, and may be also used to enforce custody orders if the Magistrates' Courts have been unable to do so. The steps to enforcement of a contempt of court order are listed below.

- The plaintiff gets legal advice.
- Summonses, motions and affidavits are drafted and filed in court.
- The documents are served on the respondent.
- The respondent files a response by affidavit, or does not reply.
- The parties appear in court to get a hearing date.
- The case is heard in court with witnesses and lawyers.
- If the respondent agrees that he was in contempt of court, the judge usually warns him and lets him go.
- If the respondent says that he was not in contempt, a hearing will ensue to see whether he is telling the truth.
- The judgment is given.
- The sentence is given. This is rarely imprisonment; it usually ends with another warning.

The following contempt of court case was even more complex.

CASE *RP's case (1989) Solomon Islands*[75]

Facts and decision M and F married in 1975 and had four children. In 1988 M committed adultery. When the couple separated in June 1989, F took the three youngest children to his home village. M reconciled with F but soon left him because of his excessive drinking, persistent cruelty, excessive sexual demands and abuse of the children. She applied for a non-cohabitation order, custody of all the children and maintenance. The Malaita Magistrate's Court granted all orders. F did not obey them. M undertook contempt proceedings in the High Court, asking for a writ of attachment to be issued against F. The order for custody in M's favour was made in November 1989. The children had been living with F's brother. F still refused to obey the custody order saying that it was M's adultery that broke up the family. Further contempt proceedings took place and the case became another custody hearing. A custody report recommended that two children should go to M and two to F's family.

The Chief Justice ordered that F be imprisoned for four weeks if he did not produce the children. F said he had transport problems and could not produce them; he wrote to the court explaining the delays and asking for a reconsidered decision, because the children did not want to move. A church also wrote on F's behalf, saying that the children did not want to go with M. The court agreed to hear the case without the parents being present, to see what the children really wanted. Suddenly M lost her housing and had nowhere to keep the children. The file is closed.

Comment Immediate imprisonment of F after the contempt proceedings would probably have ensured the immediate return of the children. Contempt proceedings should be used to enforce a custody order but often end up as a retrial. The judgment seems to have been influenced by the adultery that M had willingly admitted, explained and regretted. As well. M's suitability as custodial parent was ruined by her lack of a permanent home at a critical stage — another case in which a woman's past sexual behaviour and poor financial position deprive her of her children.

Habeas corpus

Habeas corpus is a Latin phrase, meaning roughly "Let's have the body". *Habeas corpus* proceedings were originally used to stop people being thrown into prison and killed or kept without trial. Now they may be used, for example, in a custody dispute, if someone takes children from their legal custodians and refuses to bring them back.

Habeas corpus ad subjiciendum is a writ ordering someone to bring a child before a judge, so that the court can decide whether the child is being kept legally or not. Anybody who disobeys a *habeas corpus* writ can be charged with contempt of court. Later we will see how a father used *habeas corpus* proceedings to force his daughter's grandparents to bring her before the court.[76] That case shows how *habeas corpus* proceedings can be used to get a custody case heard when the parents are not married to each other or cannot seek divorce. However, because it can be heard only in the High Court or other superior courts, it is too expensive for most women.

The situation in our region

In Fiji, Western Samoa, Solomon Islands and Vanuatu, the enforcement of custody and access orders appears to be a major problem. In Cook Islands, Kiribati, Nauru, Tonga and Tuvalu, the problem exists but is not so great. Why is this? There are several possible explanations.

- The populations are smaller.
- Orders that are disobeyed are settled by families and by police who know the parties, and persuade them to obey the custody order; courts are not involved.
- Police collect the children and return them to the lawful custodians.

People in small communities rarely challenge police authority, because they think that the police know the law and would not break it. If police decide, without a custody order, who should have custody the community probably accepts it. As well, the village policeman is often the only law officer immediately available. Therefore the law is applied according to the standards, custom and religion of the policeman and his community.

Cook Islands custody cases rarely come to court, where custody is generally given to the mother. The traditional methods of discussion and negotiation are used. Police say that they are rarely called to enforce custody

and access orders; where police are involved, their presence alone is enough to ensure the safe handing over of children according to the terms of the court order, which is usually strictly observed.[77]

Kiribati police rarely take part in custody and access arrangements. Police realise that the formal law, which gives equal custody rights to both parents, conflicts with custom, which gives rights to the father. Police may try to negotiate in disputes arising from this conflict. In general, however, women give up and police do not make arrests for nonpayment of maintenance or breaches of custody or access orders. Tuvalu magistrates say that custody and access orders are rarely disobeyed and if they are disobeyed, the offenders are arrested and imprisoned. However, as everywhere in the Pacific, it is almost impossible to enforce custody or access if a child is taken to another island.

Unlike other countries in our region, Nauru[78] seems to have wide powers to make police enforce custody and access orders. The Magistrate's Court (Family Division) may order that a child be forcibly taken from someone who may intend to take it illegally out of Nauru. A person who illegally attempts to take a child, or who does take a child, out of Nauru may be punished by a $500 fine or three months imprisonment. The Court can order the police by warrant to enforce any order affecting a child. Such warrants give police extensive powers to act under authority.

In Western Samoa, parents and grandparents may argue their custody disputes in the Maintenance Office, in the presence of the maintenance officers. Ideally, custody and access agreements are made by mutual consent. Custody usually goes to the mother and access to the father. Defined access is rarely recorded in the court files, so when an access order is disobeyed it is difficult to enforce, and the parties eventually end up in court. Police are expected to help enforce custody and access and, if requested by the Maintenance Officer, will go with the mother to enforce a custody arrangement. The parties usually obey. If negotiation fails, the parties have no option but to file contempt of court proceedings. A maintenance officer says that police often do not help, especially if the offender is a powerful person.[79] Such reluctance is common in many other countries.

Solomon Islands legal aid files show that a considerable number of women have legal custody. On the whole, mothers are more likely to obey court orders than fathers are. Most custom experts say that bride price is really child-price, paid to secure ownership of the children of the marriage. If formal courts give custody to the mother, the father is quite likely to kidnap their children and take them to other islands or villages, thus denying the mother custody and access.[80] Other Solomon Islands legal aid cases concern women trying to enforce access rights where the fathers have custody. The following case gives an example.

CASE *Bufafi v Sade (1991) Solomon Islands*[81]

Facts and decision M and F married under custom. They had one child, but M was unable to have another. F wanted another woman so he tried to get M to leave him. He said that she could take anything she wanted, and paid compensation to her brother. M felt that she did not have the power to contest custody of her child, so when F said he would give easy access, they agreed in court to give him custody. In spite of the court's access orders, F refused access. M regularly went to court to try and enforce them, and spent a lot of money on enforcement proceedings. The last entry in the court record was that the court had again awarded M access three times a week. There was nothing to show that F had been punished or warned for openly defying each previous access order.

Comment The court should have taken into account F's hostility and refusal of access. It should then have awarded custody to M and access to F. Continuing to order F to allow defined access was pointless because he had refused to obey previous orders. Imprisoning F after two breaches might have given him a different attitude to access.

This possibility is illustrated by another Solomon Islands case.

STORY *Seven days that changed his mind*[82]

M wanted to take her children abroad with her while she was studying. F refused to give her custody. M was terrified of F and his family and had to have police protection while the custody report was being compiled. M did get custody but had to issue contempt proceedings and take the children back from F by force. F was sent to prison for seven days and came out a changed man. The Social Welfare Officer believes that prison should be used more often to enforce custody and access orders.

In Vanuatu, if the father takes the children to an outer island, it is almost impossible to enforce custody or access orders, especially in a culture where the village authorities are likely to support the father. The files show four cases in which fathers forcibly took custody of their children. In all four cases the mothers had tried unsuccessfully for years to regain custody.[83]

SPECIAL CASES IN CUSTODY, GUARDIANSHIP AND ACCESS

All custody and access cases are special cases because they deal with individuals. However, there are some groups of custody and access cases that are always difficult. These cases concern babies; persons who are not the child's biological parents; and overseas custody.

Babies

Often the parents of an infant separate, or one parent deserts the other. If the case gets to the hearing stage, the court rarely orders custody to the father. The tender age doctrine normally applies and the mother gets custody. The father is entitled to daytime access in the presence of the mother or a third person. Overnight access is rarely ordered.

But sometimes a baby is taken from its mother, who is unable to obtain an urgent court hearing or to serve legal notice on the person responsible. Then we have the problem that courts generally do not make an order *ex parte*, without notice to the other parties involved. They usually insist on an *inter partes* hearing, one with all the parties present. Occasionally, a magistrate may make an immediate *ex parte* order on the mother's application for the return of a very young infant, and the police have been prepared to enforce the order. (This happened for example in Suva in the case of *Yogeeta Ben v Harold Panniker*,[84] but a paralegal worker from the Fiji Women's Rights Movement had to go with the police and show them what to do and why.) However, magistrates usually say that there are no legislative provisions to treat an infant differently from other children, even if the baby is breast-fed or otherwise dependent on its mother. Hearing and settling a disputed custody case usually takes from a month to a year, during which time a very young baby may be deprived of both breast-milk and its mother's care.

This practice is illustrated by the previously discussed case of *S v H* and by the following case.

CASE *Kamoe v Kamoe (1984) Fiji*[85]

Facts and decision The parents were married in 1983. The mother M gave birth to a daughter. M was in hospital for three days during which time she breast-fed the baby. F, the father, did not come and see M and the baby, F's aunt collected M from the hospital, took the baby away from M and gave it to F. M issued a summons against F under Cap. 52 of the *Maintenance and Affiliation Act*, claiming his desertion and asking for custody of her baby. The Suva Magistrate's Court gave M interim custody until a final custody order could be made after a full hearing. F did not return the baby; he appealed to the High Court arguing that the Magistrate should not have ordered interim custody to M, because it had no power to make such an order under the *Maintenance and Affiliation Act*. The High Court said that it had no power to order interim custody under that Act, which gave courts power to make an order for interim maintenance but not for interim custody. The Magistrate's Court had gone beyond its powers in ordering that M have custody of the baby. This decision was made 10 months after the newborn baby was taken from M.

Comment What is the use of legislation giving courts power to order interim maintenance but no power to order interim custody? A divorce application would have given M clear power to apply for interim custody, but divorce was impossible because M and F had been married less than three years. By ruling that it lacked power to order the immediate return of a breast-fed child to its mother, the High Court demonstrated that Fiji courts do not know about

or do not want to use the very broad powers given to Magistrates' Courts "to appoint guardians of infants, and to make orders for the custody of infants".[86] This surely includes orders to give interim custody.

Courts in other Pacific Islands seem more flexible than the Fiji courts. In Solomon Islands, Tonga, Vanuatu and Western Samoa, Magistrates' Courts have ruled that their role of *parens patriae* gives them power to make an *ex parte* order for an infant to be returned to its mother. The police in all these countries have stated that such an order is immediately enforced. Western Samoa police say that although there is no written law or policy, they do not need a court order to seize custody if a baby under 12 months of age is taken from its mother. The police act quickly in these circumstances, although they would need a court order for an older child.[87]

The following United Kingdom case gives another view, and remains a precedent in the common law.

CASE *Re W (a minor) (Residence Order) (1922) United Kingdom*[88]

Facts and decision A child was born to parents not married to each other. M had agreed to give the child to F to bring up, and did so two days after the child's birth. Soon after, she changed her mind. The lower court ordered that the child remain with F, but M appealed against the decision. When the appeal was heard, the baby was three weeks old. The Court of Appeal said that it would not assume that a child of any age was better with one parent or the other. The child's welfare was the most important factor and usually a *status quo* would not be disturbed. The situation might be different with older children, but it was not really possible to establish a *status quo* within the first three weeks of a child's life. The *status quo* argument might be defeated by strong evidence (for example from welfare reports) that a baby's best interests were served by being with its mother. In this case the child was less than one month old and should be with its mother pending welfare reports.

Comment The fact that F had the baby for one month was not long enough to establish *status quo*, but how long does a parent have to keep a child before courts apply the rule? What is important is that the United Kingdom Court of Appeal said that there is a strong common law presumption that a baby should be with its mother. This case can be used as precedent to remove any doubt that magistrates have power both under the legislation and the common law to order the immediate return of a baby to its mother.

Custody and guardianship by persons who are not the child's biological parents

Any person who is not the biological parent of a child may seek custody or guardianship of the child. Where disputes arise, they are usually between the people listed below.

- Parent and grandparent or other relative.
- A mother and the legal strangers to whom she agreed to give her child up for adoption.

- Relatives fighting over a child whose parents have died.
- Two sets of adopting parents.

The Fiji High Court has ruled in several cases that courts have power to consider any application for custody and guardianship of any child who is not the subject of a matrimonial or maintenance action within its jurisdiction — even a child who is not a Fiji citizen. The High Court's rulings are set out in cases such as *In the matter of Brian Nitin Naidu: an infant (1984) Fiji*[89] and in *Lakhan v Director of Social Welfare, the Attorney-General and Ors (1993)*. Before looking at this complex dispute, we will consider the *Baby Dixit* case, which involves a dispute between a father and the maternal grandparents of his child.

CASE *Sachin Deo v Brij Bhan Singh and Aruna Devi (1991) Fiji*[90]

Facts Baby Dixit's father and mother had been living apart. When her mother died, Baby Dixit was two years old, and her maternal grandparents refused to allow her to leave their home. Her father could not apply for custody under matrimonial or maintenance legislation, which concerns only spouses, so he applied to the High Court for a writ of *habeas corpus* for the return of the child to him. The Court would see Baby Dixit and find out by what right, if any, her grandparents were keeping her. Eventually the case was sent from the High Court to the Magistrate's Court for hearing. The Magistrate gave custody of the child to the grandparents. The father appealed to the High Court. At the time of the judgment, Baby Dixit was three and a half years old.

Decision The High Court used its powers under Sections 18 and 22 of the *High Court Act* Cap. 13 and Order 54 of the *High Court Rules* to make decisions regarding Baby Dixit. It said that the rule that the welfare of the child is the first and paramount consideration may be applied not only in matrimonial matters but also in guardianship applications, where the child's parents are not involved.

The Court referred to the *Mala v Chan and Dev (1989) Fiji*[91] decision that the rights of a suitable parent would be stronger than those of a suitable legal stranger. In the present case, both the parent and the grandparents (the legal strangers) were suitable custodians. However, the rights of a suitable parent must come before the rights of a suitable legal stranger. The Court did not accept the grandparents' argument that Baby Dixit would suffer from being removed from her home, and being placed with a parent whom she no longer knew. It said that psychological problems caused by the move would be temporary; the child would recover. Baby Dixit was given to her father.

Comment The High Court used its powers to make decisions about the child. It said that the welfare of the child must be the most important issue, no matter who applied for custody. Note also that a writ of *habeas corpus* can be used to get a custody case heard when the parents are not married to each other or cannot seek divorce. However, because it can be heard only in the High Court or other superior court, it is too expensive for most women.

CASE *Lakhan v Director of Social Welfare, the Attorney-General and Ors (1993) Fiji*[92]

Facts Baby N, an illegitimate Indo-Fijian boy, had been taken into the custody of the Department of Social Welfare (DSW), who placed him in an institution and offered him for adoption abroad according to established procedures. When Baby N was six months old, Australian and Fiji adoption panels selected an Australian couple as adoptive parents. During this time, a Canadian couple on holiday in Fiji visited the institution, saw Baby N and wanted to adopt him. The DSW and other authorities told them that Canada was not part of the existing Inter-Country Adoption arrangements and therefore they could not adopt the child. The Canadians obtained an injunction to prevent Baby N being adopted by the Australians. In the High Court, six lawyers represented the Canadians, the Attorney-General, the Director of Social Welfare and the Australians. In a rare move, the Attorney-General appointed a special counsel as lawyer to look after Baby N's interests. For legal and other reasons, the case had taken more than two years to reach the High Court. By this time, Baby N was over three years old and had spent all his life in the institution.

Issues The case concerned children under the legal care and control of the Director of Social Welfare. In particular, it concerned the following issues.

- Under Section 6(4) of *The Adoption of Infants Act*, nonresidents may not adopt children in Fiji. According to Inter-Country Arrangements existing only between Fiji, Australia, New Zealand and other Pacific Island countries the child is sent abroad with the adopting parents and adopted there.
- The Canadian plaintiffs said that there was no reason why the court should not consider Canada in the Inter-Country Arrangements. It was a matter of public policy, not of law, that only Australia, New Zealand and other Pacific Islands were included.
- The plaintiff husband was an Indo-Fijian former citizen of Fiji with ethnic, religious and cultural ties in Fiji. The plaintiffs said these factors made them an appropriate adoptive parents for Baby N. They said also that the DSW had acted improperly in not considering them as potential adoptive parents, and in not considering an adoption deed which they said Baby N's mother had signed.

Decision The judge gave reasons why the High Court had jurisdiction to consider both the application by the Canadians and the child's welfare. However, the Court refused to consider which of the couples would make better parents. The Juvenile Court had made an order to give legal custody, care and control to the Director of Social Welfare. The DSW, thereby, became the parent (*in loco parentis*) to the child and had full authority over it. The Court would not interfere in the DSW's decision unless it could be proved that he had acted in bad faith. As this had not been suggested, the Court would not interfere with the DSW's choice.

Comments From this case we learn several things.

- Courts have power to consider any application for custody and guardianship of any child who is not the subject of a matrimonial or maintenance action within its jurisdiction.
- A child under the care of DSW can be adopted out of Fiji only according to Inter-Country arrangements. Only residents from Australia, New

Zealand and other Pacific island countries may apply to adopt children from Fiji ; they must do this through agencies in their own countries.

- A child not under the care of DSW can be given away by deed or court order to nonresidents. However, nonresidents cannot adopt children in Fiji. They have to take the child to the country in which they live, and apply for adoption there; before doing this, they must apply to their country for a visa for the child.
- There is nothing illegal in a parent giving custody of a child away to a legal stranger.
- Because courts deal with these matters as conflicts, they allow people to go to great lengths to get what they want. Two couples wanted Baby N, so he lived three years in an institution while they fought over him. Was that in his best interests?

So far we have said little about wardship. A "ward of the Court" is a child whose legal guardian is the High Court. Making a child a ward of the High Court means that the Court has the immediate right to make any decision regarding the child's welfare, including the authority to decide where a child should be placed. This temporarily takes away a parent's right to make any decisions about the child. Applications to have a child made a ward of the Court could be used to restore custody or to enforce access. They could be used also if a mother thinks that the father will try to take a child overseas without her consent. She could apply to the High Court to make the child a ward of the Court. The father would then have to seek the permission of the Court if he wants to take the child overseas.

Wardship is largely an invention of English common law. However, some countries have passed legislation formally recognising the power of the superior courts to make a child a ward of the Court. Nauru has done this under Section 33 of the *Guardianship of Children Act 1975.* Wardship proceedings are rarely used in the Pacific, but could be used to give the Court immediate powers of jurisdiction over a child. However, like *habeas corpus* proceedings, wardship proceedings may only be filed in the High Court or other superior court, and are outside the reach of women who do not have the necessary money, legal aid and legal representation.

Overseas custody orders

CASE *T.M. v G. M. (1995) Cook Islands*[93]

Facts and decision M and F had three year old twins when they agreed to a separation and custody order giving custody to M. Later, M applied for permission to take the twins overseas. F objected, saying that M had no secure job or income overseas, and that he would lose access. He said that he now wanted custody, and that his sister, who had five children, would look after the twins. M said that she had secure accommodation with her brother overseas; she would have family support, and she would have opportunities for further training in her profession, but that F was financially unreliable. The High Court asked for a welfare report. This confirmed that the twins would be better off with M, who was awarded custody and permission to take them out of the country.

Through study, jobs and travel, more Pacific Island women seem to be meeting and marrying foreigners, either locally or overseas. The break-up of such marriages causes difficult problems in custody and access; when one parent is living overseas with the children of the marriage and the access parent is living in another country, it is almost impossible to enforce an order. These arrangements work only if one or both parents have the finances and the will to make them work. If the arrangements do not work, a very difficult problem is whether or not local custody orders will be enforced overseas and *vice versa*. All countries in our region have powers to make orders permitting a parent to take children out of the country, but show little consistency in recognising and enforcing overseas custody orders. The same applies to overseas courts; there seem to be no general rules, and each case seems to be decided on the particular facts of that case.

Of the following four cases, two were heard again in full. In the other two, a Fiji court accepted a New Zealand order, and an American court accepted a Fiji decision. We will begin with the two cases that were heard again in full.

CASE *In re D (1982) Solomon Islands*[94]

Facts and issue The marriage of an Australian father and Solomon Islands mother broke up in Australia, where F was granted custody of their baby daughter. M took the daughter to Solomon Islands, and F went there to get the Australian custody order enforced. The Solomon Islands High Court had to consider what weight should be given to the Australian order.

Decision The High Court said that despite the overseas order the welfare of the child was still the "first and paramount consideration". It granted an interim custody order to M and ordered a rehearing of the whole case. It granted also a restraining order stopping F from taking the child out of the country. The Court said it would try to follow the same principles as the foreign court in making a decision; the principles laid down in Solomon Islands legislation were in any case the same as those in Australia.

CASE *In the matter of Pamela Nadine Gounder (1993) Fiji*[95]

Facts, issues, decision We have referred to this case several times, and have outlined it fully when discussing the maintenance of existing arrangements. Here we will focus on the issue of whether the Magistrate's Court should enforce the Canadian court order, or hear arguments on custody based on the child's current welfare. The 14 year old girl did not want to leave her father, and the Court gave custody to the father.

Comment Basically the Court had two choices: to give custody of the child, a Canadian citizen, to her Canadian mother despite the child's strongly expressed wishes to remain with her father; or to let the child stay with her father, make the child happy, and attract the scorn of international legal system. The first choice would have made the girl very unhappy. However, it would have earned Fiji and its legal system the respect of the international legal

system, which had issued a warrant for the father's arrest. Equally importantly, any future Fiji court orders would have been implemented in Canada. The Court however chose the second option; this reinforces the view that Fiji has a court system where people who break the laws of other countries will escape punishment; it makes it less likely that Canadian courts will enforce Fiji court orders.

In these two cases, the local courts elected to re-hear the custody issue from the beginning just like a new trial. Both cases illustrate the principle that custody is never *res judicata* even with an overseas custody order. In the next case, the High Court in Fiji did recognise and enforce the decision of a foreign court — the New Zealand Family Court.

CASE *Tirlotma Roshni Singh v Rahul Singh (1992) Fiji*[96]

Facts and decision M and F were Fiji citizens, living in New Zealand. Their children had lived in New Zealand for most of their lives. When the couple separated, the children lived with M and had access to F. During an access visit in 1991, F took the children to Fiji but M applied to the New Zealand Family Court for interim custody, which she obtained. She then went to Fiji to have the custody order enforced. In a Fiji Magistrate's Court the parents agreed that the children were to be returned to New Zealand. M went to New Zealand but F did not return the children. M came back to Fiji and again she and F agreed in the Magistrate's Court that F was to return custody to her. M and the children then left for New Zealand. F also returned to New Zealand and during an access visit, again illegally took the children to Fiji. M applied to the High Court in Fiji for a Writ of Attachment or Committal Order against F. She said F should be found in contempt of court, and imprisoned, for not having obeyed the November 1991 Magistrate's Court Consent Order giving her custody of the children. F disputed this, and the case continued with motions and counter motions accompanied by affidavits, technical rulings and other delays. Two years later, the High Court gave interim custody to M, as the New Zealand Family Court had done. The High Court ruled that F had deliberately disobeyed the order and that he was, therefore, in contempt of court, but F was not imprisoned. The Court ruled also that it was wrong for a Fiji court to assume jurisdiction in this matter, and that any further hearing of the case should be done in a New Zealand court.

Now we will see how a decision of the Suva Magistrate's Court was recognised and enforced in the United States of America.

CASE *Hermanson v Hermanson (1992) Fiji and USA*[97]

Facts and decision M was Fijian and F was a United States citizen. After a long and bitter custody battle in the Suva Magistrate's Court, M obtained custody of their two very young daughters. During an access visit, F illegally took the girls to the United States, and M did not find them for almost a year. Then she went to the United States to try to get the Fiji Magistrates' Court custody order enforced there. The United States court recognised and enforced the Fiji custody order.

Comment M was determined and able to spend huge amounts of money to find F and the children; to file legal proceedings in a United States court using United States lawyers; and to go to the United States and appear in court. We may doubt whether the order would have been enforced if M had stayed in Fiji and relied on Government agencies to enforce it. The United States court enforced the Fiji order mostly because the principles on which custody was decided in Fiji are very similar to those applied in the United States. As well, United States has signed the Hague Convention on the Civil Aspects of International Child Abduction, which recognises child custody orders of other countries who have signed it. Fiji had not signed the Convention but the United States gave the Fiji custody order the same status as a that of a country that has done so.[98]

Local courts can learn from this case. In the three previous cases, three different local courts might have recognised an overseas order, but only one did so. If Pacific courts want their orders to be respected in other countries, they should sign the Hague Convention on the Civil Aspects of International Child Abduction, and should respect orders made by other countries.

HOW SEPARATION AND DIVORCE AFFECT CHILDREN[99]

Previously, we have considered custody and access as being problems mainly for parents, courts and law enforcement agencies. Now, before coming to any general conclusion, we will consider the problems of the child whose custody and access is being disputed.

Studies done in Western countries show that children suffer from psychological trauma, shock, disturbance or depression when their parents separate. Their suffering varies in degree, depending on the nature of separation, the nature of the conflict, fights before the separation and after it, and on the child's personality. Stories and experience suggest that non-Western children who live in extended families may suffer less than children in nuclear families, but they still suffer.

Some children suffer deep and long depression; others suffer only short and temporary damage. Almost without exception, however, the pain and suffering ease unless conflict between parents continues after separation. Short-term effects vary depending on the age of the children. A study of the years after separation showed that children of all ages found separation most painful for about a year. The same children in all age groups had recovered within a year, and most of the intense pain and bitterness had disappeared after one or two years. The children who took longest to recover were those whose parents had difficulties in facing their new lives and who continued to fight with the other parent. The children's recovery was also closely tied to their mothers' feelings and situation. If their mothers recovered

quickly after divorce or separation, the children were also likely to heal quickly. In a stable life, with few economic worries, the children were also more likely to recover sooner.

Table 9.4 shows some common effects and how they may vary with age.[100]

Table 9.4 How separation and divorce affect children

Age group of child	Effects
Toddler and preschool	Aggression and irritability Changes in bladder and bowel habits Going back to baby habits Changes in eating habits Sleeping problems Depression, whining and crying Fear
5 to 7 years	Sadness Fear Feeling deprived Blaming themselves for the separation
8 to 12 years	Taking one parent's part Intense anger mostly at the parent blamed Headaches and stomach aches Decline in school performance Hoping that the parents would reconcile Bitterness Depression Self-blame and low self-esteem
Teenagers	Anger, loss and betrayal Insecurity Delayed entry into maturity "Bad" behaviour

The most interesting finding of such studies is that the conflict that comes before, or accompanies, the separation causes more pain than the separation itself does. In fact, children in families where the parents fight continuously are just as likely to be damaged as are children whose parents separate. Children in single parent families appear to function better than do children in families in which the parents stay together "for the children's sake" but continue to fight.

Even if parents come to friendly arrangements about divorce, maintenance and property, there may be difficulties with custody and access. The parent who gets access might feel that the parent-child bond has been weakened, and that the relationship with the child will never be the same again. But with mutual cooperation, divorcing parents may lessen the pain

caused by separation and divorce. The access parent can maintain strong ties with the children.

STORY *I hate you!*

Harry and Lina are so concerned with themselves that neither believes that the other cares about the children. They fight about everything, but chiefly about custody, access, maintenance, property, conduct and behaviour. They fight in front of the children. They use the children as weapons against each other. The conflict makes everyone miserable. Their children take a long time to recover; some are harmed for the rest of their lives.

STORY *Our first concern is the good of our children*

Ana and Tomu are mature and reasonable parents. They realise that their own relationship has come to an end but that their first concern should be the best interests of the children. They do not want to cause family conflict or more unhappiness than there already is. They want their children to continue a strong loving relationships with both of them. Ana and Tomu mutually agree on custody, access and make arrangements for adequate maintenance. There are no accusations and no court battles over custody, access and maintenance. The children maintain a good relationship with the absent parent, approved and encouraged by the custodial parent. The children recover relatively quickly from separation and divorce.

The effects of separation on children should be factors that a court considers when making a decision about custody, access and maintenance. However, the legal system is not designed to foster goodwill and cooperation. In fact, it works in the very opposite way; it is designed to settle fights, for example between parents fighting over ownership of their children. This makes the emotional conflicts worse. It does not produce a situation that fosters a reasonable compromise, so that each parent feels that the best solution was reached. Nobody wants to lose in a system where winning is the goal.

If, instead, the system was based on the principles of discussion, mediation, negotiation and consensus, coming to a mutual agreement would not make a parent feel that he or she had lost. We may know that system as the Pacific Way, so it is very sad that Pacific people rejected the Pacific Way and adopted some of the worst aspects of colonial law as far as children are concerned. Unless the legal system is prepared to change, the children suffer most. There are no winners in a custody battle.

CONCLUSION

Where custody and access arrangements have been agreed and the parties cooperate, there are fewer problems. If custody and access are fought out in court, the person who loses the battle may feel bitter and jealous enough to try to upset the arrangements. Fathers as well as mothers face difficulties in enforcing orders. Many fathers say that they have great difficulty in obtaining access when mothers get custody. This may be true in some cases, especially when a father is living with another woman. However, the experience of public legal aid offices in Fiji, Solomon Islands and Vanuatu suggests that when mothers get custody, they are usually willing to give access to fathers — partly, perhaps, because they may have maintenance problems if they do not. On the other hand, if fathers get custody they are less willing to provide access, particularly if they think the mother is committing adultery. The overall reality is that men have greater financial resources and more access to the court and lawyers than women do, so men are in a better position to assert their legal rights than are women.

The enforcement of court orders for custody and access is a major problem in most jurisdictions, especially the larger ones. This is due to the legal and financial problems of the individuals, as well as to lack of resources in the courts. Currently, police have extremely limited powers to arrest and imprison for breach of custody and access. Police need to be given wide powers to enforce custody and access orders, as Nauru has done.

As well, most Magistrates' Courts have limited powers to imprison an offender for breaching a Magistrate's Court access order. Only a superior court, like the High Court in Fiji, has the power to commit a person to prison for contempt of court. The law must be changed, by legislation, to enable magistrates as well as judges to cite for contempt and/or imprison a parent for not obeying custody and access orders.

When we say enforcement we mean that a person must be forced into doing something that he or she does not like. Why forced? Because the person feels unfairly treated. Why? Because the legal system has set two people or groups against each other. To enforce custody and access orders, parents must rely on a system based on conflict, rather than on negotiation. Why do we not have a Family Court, with trained professionals who understand the formal legal system, the parents, the children and the influences of traditional and community values? Such a court might really be able to get agreement on the best interests of the child.

Legislation and the common law affecting custody decisions appear evenly balanced and not discriminatory. However two things weigh against women.

- Their poor economic position affects their claims as custodial parents. The financial means of the parents is in theory given minor attention: in practice, it sways the court. Men have greater advantages in this respect. A father with a good job and a proper home is in a better

position than a mother with part-time or no employment, living with relatives or friends in rented or squatter housing. Fairer maintenance and property law and policies would give women a better position in custody matters.

- Courts tend to focus on the sexual behaviour of the mother and to ignore a father's sexual or violent behaviour. Over the last 10 years, Pacific courts have improved. There are now sincere attempts to make custody decisions on the basis of the welfare of the child. However, there is still significant indirect discrimination against women in the award and enforcement of custody and access, especially in societies that have double standards about behaviour for women and men. The most sensible and nondiscrimination approach to custody would be that the conduct of the parties is not relevant to the issue of custody unless the conduct can be proved harmful to the child.

If a court denies that it has power to make decisions on a child's welfare, that court is denying the child its fundamental human rights expressed, for example, in the United Nations Convention on the Rights of the Child. If courts find the existing legislation unclear or inconsistent, they should push for legislation that does give them clear powers to make both temporary and permanent decisions about children.

Remedies in the superior courts are available only to the rich and powerful. Magistrates' Courts are the courts of easiest access and must be given clear powers to make decisions about children. Likewise, Magistrates' Courts must have clear powers to make and enforce orders without going to the superior courts. Magistrates must have specialist training to deal with families in the process of breaking up.

The legal system fails to recognise how seriously custody and access disputes affect the whole family. Children will recover much more quickly if the legal system is based on an entirely different approach. The process can be started by minimising conflict, by strictly enforcing custody and access orders and by ensuring that mothers receive adequate regular maintenance for the children.

The whole basis of the family law system must be changed from a battleground approach to one of conciliation and mediation. However mediation and conciliation must be facilitated by trained professional and independent advisers. Nauru and Cook Islands have provision for a lawyer or pleader to be appointed for the child. Fiji has special legislative provisions whereby the Attorney-General may appoint a special counsel to separately represent the interests of the child at a court hearing.[101] The counsel for the child is not influenced by either parent and makes independent representations based on the child's welfare. There is no direct provision for the appointment of counsel for the child in other countries, and it is rarely done in Fiji. This should be considered in relation to the establishment of a new Family Court system.

Unlawful and discriminatory practices continue, not only because of injustices in the legislation, but also because of injustices in court practices and attitudes. Article 16(1)(d) of the United Nations Women's Convention requires signatory states to ensure equal rights for men and women in matters relating to marriage and the family, and states that "in all cases, the interests of the children shall be paramount". In custody and other cases where privilege or customary law conflict with a child's best interests, women should get their lawyers to quote this Article, and the Convention on the Rights of the Child.

We will discuss in Chapter 15 some strategies for change. In the meantime we end this chapter with a list of what we need in order to solve problems of custody and access.

- Legislation that clarifies issues of jurisdiction
- Better understanding of the relations between customary and formal law
- Better training of judicial officers in law and gender issues
- Better legal aid systems
- Simpler legal procedures
- More and better resources for enforcement
- More and better use of mediation
- More challenges by women
- Improvements in the economic and social status of women

10

Maintenance for married women and legitimate children

WHAT THIS CHAPTER IS ABOUT

In Chapter 9 we discussed the custody and guardianship of children. We saw that following a separation or divorce, the children of the marriage usually stay with one parent (the custodial parent) but have access to the other parent (the access parent.) The custodial parent may need money to house, feed, clothe and educate the children. Applying for maintenance is one way of getting this money. Children have a right to maintenance, but their mothers, fathers or guardians do not have this right. In Chapter 10 we focus on maintenance for legitimate children and for legally married women.

Only a very small percentage of Pacific women earn money for their work; most work without pay in the home and in subsistence farming. A single parent has many financial burdens, and payment of adequate and regular maintenance can do much to reduce the load and create a better life for her children. Because of their low status, lack of personal power and lack of fair wages for paid work, Pacific women generally have little money or land. When divorced or separated, they need — but often do not get — adequate and regular maintenance and a fair share of land and matrimonial property.

In Chapter 10 therefore we will first look at an overall picture of the maintenance legislation, and how it affects families in our region. Then we will ask general questions about maintenance, before moving to detailed questions about how it works in practice. We will then consider the economic factors that determine how much maintenance can be ordered, and whether families can live on these amounts. Finally, after discussing the enforcement of maintenance orders, we will try to identify ways of improving the system.

MAINTENANCE LEGISLATION

In this section we will look first at the overall picture of legislation on maintenance. Table 10.1 lists the principal legislation in countries of our area, and shows that all countries have separate pieces of legislation dealing with maintenance. Divorce-related maintenance for instance, is covered by divorce legislation. Maintenance without divorce, or maintenance of illegitimate children, are both covered by legislation such as Fiji's *Maintenance and Affiliation Act.* We will see in our case studies the kinds of confusion that the different pieces of legislation can cause.

Table 10.2 shows what the legislation covers. It states which courts may deal with maintenance and who (husband, wife or any other person involved) may apply for maintenance. It shows also who may be expected to pay maintenance, and who may be entitled to receive it.

Table 10.1 Maintenance legislation in Pacific Island countries

Country	Legislation
Fiji	*Maintenance & Affiliation Act* Cap. 52; *Matrimonial Causes Act* Cap. 51; *Magistrates' Courts Act; High Court Rules and Acts; Maintenance (Prevention of Desertion & Miscellaneous Provisions) Act* Cap. 53; *Maintenance Orders (Facilities for Enforcement)* Cap. 54; *Income Tax Act* (Fiji) Cap. 201 s. 11(n).
Cook Islands	*Infants Act 1908* (NZ); *Cook Islands Act 1915* ss. 548-573; *Matrimonial Proceedings Act 1963* (NZ)
Kiribati	*Maintenance (Miscellaneous Provisions) Act* Cap. 53; *Matrimonial & Divorce Act* Cap. 60
Nauru	*Maintenance of Wives & Children Ordinance 1959-1967; Matrimonial Causes Act 1973*
Solomon Island	*Matrimonial Causes Act (UK; Affiliation, Separation & Maintenance Act*, 8/1971 (Amendment 13, 1992); *Islanders Divorce Act*, Cap. 48
Tonga	*Maintenance of Deserted Wives Act* Cap. 31; *Divorce Act* Cap. 29
Tuvula	*Maintenance (Miscellaneous Provision) Act*, Cap. 4; *Matrimonial Provisions Act*, Cap. 21
Vanuatu	*Maintenance of Family Act Cap 42; Matrimonial Causes Act*, Cap. 192; *Maintenance of Children Act*, Cap. 46
Western Samoa	*Maintenance & Affiliation Act 1967; Divorce & Matrimonial Causes Ordinance 1961; Infants Ordinance 1961*

Notes

Fiji: Married women who apply for divorce and maintenance must apply under the *Matrimonial Causes Act*, but the maintenance application is ancillary to the divorce application. Married women who do not apply for divorce but want maintenance must apply under the *Maintenance and Affiliation Act*. Women who apply for maintenance of illegitimate children mustapply under the *Maintenance and Affiliation Act*. A new *Family Law Bill* is in preparation.

Cook Islands: Maintenance laws are confusing and governed by New Zealand as well as local statutes.A *Family Law Bill* has been in preparation since 1981.

Western Samoa: The legislation provides a specialised Maintenance Office. The Maintenance Officer (MO), acts like a legal aid lawyer and may file a maintenance application for an applicant. The MO may appear in court to have an agreement made into an official court order, but cannot argue a case.

Table 10.2 shows what the legislation covers. It states which courts may deal with maintenance and who (husband, wife or any other person involved) may apply for maintenance. It shows also who may be expected to pay maintenance, and who may be entitled to receive it.

A "yes" reply to "Must a wife prove fault against her husband to get maintenance for herself?" indicates the countries that require a wife to show that her husband's bad behaviour was responsible for the situation. A "yes" reply to "Is there a specific cohabitation rule?" means that the country's legislation specifically states that maintenance will not be paid if the parties are living under the same roof. Finally, most countries specify the different ages at which maintenance for male and female children must cease.

How many families do these laws affect?

Even in countries where the legislation is gender-neutral, women are the only recipients of maintenance. Significant numbers of Pacific women rely on maintenance; however, there is a growing number of female-headed households. In 1989/1990 in Fiji, 10% of households had female heads, and women were heads of 70% of the families receiving state assistance in 1993. The number of families receiving such assistance rose from 5166 in 1978 to 7972 in 1993.[1]

In Fiji, as Table 10.3 shows, maintenance laws affect many women, both single and married: between 1985 and 1994, a total of over 11000 families (over 1000 families per year) had some contact with the family law system in Suva Magistrate's Court, and Fiji has 12 Magistrate's Courts.[2] The large number of families who come into contact with the legal system justifies having an efficient family court system where maintenance payments are regularly enforced.

No figures are available for Kiribati and Tuvalu, in which, under customary law, custody of children belongs to the father. Very few maintenance cases come before the courts. The social welfare departments of both countries usually deal first with applications for maintenance, and most payments are agreed without going to court.

The Solomon Islands Public Solicitor's Office in Honiara serves 90% of the country's population. Its records show that approximately 25% of cases concern family law and especially maintenance, affiliation, custody and divorce. Solomon Islands formal maintenance laws therefore affect large numbers of women and their families.

Table 10.2 What the legislation covers

Country Courts	Fiji Magistrates' Courts	Solomon Islands Magistrates' or Local Courts	Tuvalu Magistrates' or Island Courts	Kiribati Magistrates' or Island Courts	Western Samoa Magistrates' Courts	Cook Islands High Court	Vanuatu Magistrates' or Island Courts	Tonga Magistrates' Courts	Nauru Family Court
Who may apply?	Wife	Husband, wife	Anyone	Anyone	Anyone	Anyone	Wife	Wife	Wife, husband
Against whom?	Husband	Husband, wife	Anyone	Anyone	Anyone	Anyone	Husband	Husband	Husband, wife
For whom?	Children, wife	Children, husband, wife	Anyone	Anyone	Children, wife, husband	Children, wife, husband	Children, wife	Children, wife	Children, wife, husband
Must a wife prove fault against her husband to get maintenance for herself?	Yes	Yes	Yes	Yes	—	Yes	Yes (Husband convicted of criminal offence)	Yes	—
Is there a specific cohabitation rule?	Yes	Yes	—	—	—	—	—	—	—
What are the age limits for children?	18 or 16	18	—	18 or 16	16 or 19	—	16 or 19	16 or 21	16 or 21

Table 10.3 Maintenance actions in Fiji Magistrates' Courts[3]

Nature of action	1984	1985	1986	1987	1988	1989	1990	1991	1992
Divorce	763	790	884	1099	1122	1078	1051	947	889
Maintenance	648	606	636	451	621	630	667	643	627
Affiliation	483	419	476	351	377	339	344	391	385
Application for variation	275	294	329	400	277	326	299	298	402
Application for enforcement	1545	1608	1520	1408	1419	1253	1283	1323	1517

Table 10.4 Family cases dealt with by Solomon Islands Public Solicitor's Office, 1985-1990

Year	Family cases	Total cases
1985	489	2317
1986	456	2077
1987	484	2308
1988	555	2048
1989	464	2059
1990	492	2384

Figures in Table 10.4[4] are based on the Public Solicitor's Office annual reports, which reveal growing concern about criminal assault against women in the home. They refer to the need for divorce law reform, and comment on the rising number of maintenance and affiliation cases. The 1988 report mentions that the family area remains at the top of the list. The 1989 report notes that women are using the law more, and are becoming more aware of their legal rights. It again notes the urgent need for divorce law reform.

In Tonga[5], under the custom of *fahu*, a brother was obliged to help his sister if she asked him to do so. A deserted woman could (in theory) therefore be maintained by the men of her family. Although women's privileges through *fahu* were not formalised, women were indirectly powerful and influential. However, the 1862 *Code of Laws* made it unlawful to "beg authoritatively, in Tongan fashion". Women in Tonga therefore can no longer rely on traditional privileges to survive, and are using the legal system to obtain maintenance. Court officials say that the numbers are steadily growing each year, but women face many problems trying to enforce maintenance orders or in dealing with widows' rights, custody, access and divorce.

In Vanuatu's capital, Port Vila, about 300 cases of all kinds are heard annually in the Efate Island Court. Court officials[6] believe that about 30% of

these cases deal with marriage matters, such as affiliation, custody and domestic disputes. This does not include figures from the other Island Courts, presided over by village elders with no legal training or authority to deal with maintenance, although in fact they do. In 1994 ,the *Komiti Agensem Vaelens Agensem Woman (KAVAW)* dealt with 155 new cases, about 28% of which involved maintenance applications.[7] Women complain about court systems and particularly about the Island Courts, with which most women have their first and only contact. They have major practical and legal problems in dealing with the high costs of bringing court actions, delays, weak enforcement procedures and the difficulties of proof.

The only available statistics in Western Samoa come from the Maintenance Office in Apia, the capital.

Table 10.5 Western Samoa Maintenance Office statistics, 1990-1992

Matter	1990	1991	1992
Interviews re family matters	261	253	309
Applications in court	62	152	137
Orders	30	37	49

Although the Maintenance Office may represent both men and women, most clients are women. It is not clear from the records what percentage of cases concern maintenance applications. Of all cases dealt with by the Maintenance Office, nearly half involved married couple, most of whom reconciled after discussions with a maintenance officer.

Throughout the region, divorce and maintenance laws affect thousands of women and children. Many women do not seek divorce because they fear that, once they are divorced, they will not receive maintenance. This is incorrect; a divorced woman is still entitled to receive maintenance for her children, and, in some cases, for herself as well. Maintenance laws affect even women (and their children) who do not apply for maintenance for cultural reasons, or because they just cannot deal with the system. One of the difficulties of the system is that there are different laws for different situations; we now list examples of these situations, and will explain them later.

- The woman's application was not made under the legislation affecting her particular situation.
- The woman or her advisers did not follow the correct procedure for that particular legislation.
- The woman applied for divorce and for maintenance, but was not granted a divorce, and thus was denied maintenance.

Fault-based laws create another difficulty. Women find it very hard to prove fault, especially cruelty and adultery, which are among the most

common grounds. Possible witnesses often do not want to attend court, and women face great pressure to remain in marriages. They face the same problems in proving fault to obtain maintenance as they do in proving fault to obtain divorce. This is why they usually apply for maintenance for the children and not for themselves.

On the whole, the higher up the court system a woman can take her case, the more likely she is to succeed. But this is not possible for most women, who usually deal with the lower courts — the Magistrates' Courts or Local or Island Courts. These are not usually adjudicated by legally trained magistrates. Most have limited power to deal with maintenance matters but many do, as a matter of custom, or because they are the only courts that people can reach. Very few women can afford the costs of appealing or of bringing any action to the higher courts and even if they could afford the costs, they are required by jurisdiction laws to file their applications in the lower courts, unless they are applying for a divorce.

The lower courts seem to emphasise rules and procedures, rather than the rights of individuals. We will look later at examples showing that wives and children may not get maintenance because the technical rules have not been properly followed. But without maintenance, they may have to live in shacks, go hungry and drop out of school, thus creating more trouble for themselves and the courts. This is why we need an independent new family court system.

QUESTIONS ABOUT MAINTENANCE: GENERAL QUESTIONS

Who may apply for maintenance? When can it be sought?

Maintenance can be sought when husband and wife separate or when one leaves the other; when they divorce; or when the husband refuses to provide for the wife and children. (In some countries, however, maintenance will not be ordered if husband and wife are living under one roof).

When a person agrees or is ordered to pay maintenance, this means that he should pay money or provide goods and services to the people for whom the court says he is responsible. We say "he" because even in countries with gender-neutral legislation, the father, not the mother, is usually the parent who pays maintenance. If the children of separated parents are living with their mother or another person, the children have an automatic right to be maintained. Their father may make the payment to their mother, but it is not for her; it is for the children. He may also pay for his wife's or ex-wife's maintenance, but this is a different question. A court will always order

maintenance for the children but does not always order maintenance for the person who cares for them, even if this person is their mother, and she has no other income.

In Solomon Islands, a 1992 amendment[8] allows a husband to claim maintenance against his wife. In Tuvalu and Kiribati, any person can apply for maintenance by any other person liable to provide maintenance under a legal or customary provision. Both wives and children could legally be entitled to maintenance from husbands under this provision, and adult children might be liable to maintain their parents. However, there are no legislative guidelines regarding customary entitlements. Very few maintenance cases come before the courts, and there are no cases explaining the principle through the common law.

In Cook Islands and Western Samoa, the legislation recognises the custom whereby members of an extended family are expected to take responsibility for looking after other members of the family. Under the *Cook Islands Act*,[9] any party, including a mother, father or grandparent, may be made to pay maintenance to any other party. In Western Samoa, courts have the power to make a "near relative" pay for the support of a destitute person. Such provisions have the effect of making the community responsible for a person who has no money. Courts can therefore make the community share the costs of raising children.

Solomon Islands and Vanuatu recognise custom marriages as legal, so women married under custom may apply for maintenance of their children and themselves. In all countries, unmarried women and *de facto* wives may apply for maintenance of their children, but not for themselves. In countries where maintenance is available only to married persons or legal wives, the legislation discriminates against women who have been living in *de facto* relationships for long periods, and against women who have been married only in a religious ceremony. This discrimination can cause problems for women who do not know their rights and who do not or cannot register their marriages.

All Pacific countries allow maintenance to be ordered as part of a divorce action. This grant is regarded as ancillary relief—additional relief connected to the divorce action. Maintenance after divorce is affected by the wife's conduct and her need and ability to earn. A deserving wife may continue receiving maintenance after divorce where there was previously a maintenance order in her favour. If there was no previous maintenance order, the court granting a divorce may order maintenance: women do not automatically lose their right to maintenance when they are divorced.

Throughout the Pacific, the legislation may have different names and be worded differently but its effects are similar. Maintenance is always available for children. Some countries have gender-neutral legislation allowing the mother or the father to apply, depending on who is the custodial parent. However, it is mainly women who seek maintenance, since relatively few women work in paid jobs.

Where are maintenance applications made? What documents are needed?

The answer to the first question depends on whether the woman is applying only for maintenance or a maintenance enforcement order, or whether she is applying for divorce and maintenance. If she is applying only for maintenance or a maintenance enforcement order, she may apply in the nearest Magistrate's or Island Court. If she is applying for divorce and maintenance, she must apply in the court that deals with divorce; in some countries, Magistrates' Courts deal with divorce but in others, divorces are heard only in higher courts. As we have seen, such applications are made under different legislation.

Wherever the application is made, applicants must produce marriage certificates and children's birth certificates. A very frequent problem is that women do not keep copies of these certificates at home or have had to leave home without them. Obtaining copies may take months, and during this time the woman and her children have no income. Marriage and birth certificates are essential for maintenance applications and for many other different dealings with government offices and the law. Every parent should know how to get them, and as far as possible every family should have copies on hand. Women's groups might arrange discussions or make leaflets to inform mothers how necessary these certificates are, how to get copies, and how to make sure that they are available in an emergency.

What is interim maintenance?

An interim maintenance order is a temporary order given so that children (and sometimes the parent looking after them) have something to live on while the question of permanent maintenance is being considered. An interim order has a life of only two or three months, depending on the country; it will stop if it is not renewed or made permanent. It needs to be renewed at every court appearance, otherwise it will automatically cease. The interim order will end when a final order is made, or if the parties are reconciled. We will discuss later some of the many problems that arise with interim maintenance applications and orders.

Throughout our region, the legislation gives courts powers to order interim maintenance. If there is no specific legislation, the power is covered by the country's *Magistrates' Courts Act*. Magistrates generally work on the principle that if they have power to make permanent maintenance orders, they may make temporary orders too, as the Fiji legislation shows.

> 14 ... (1) Where, on the hearing of an application for an order of maintenance, such application is adjourned for any period exceeding seven days the court may order that the husband do pay to the wife or to an officer of the court or third person on her behalf, with effect from the date of service of the application a weekly sum not exceeding such an amount as might be ordered to be paid under a final order for the maintenance of the wife or any child or children in her custody until the final determination of the case:

Provided that no order directing such payment shall remain in operation for more than two months from the date on which it was made and any such order may be renewed from time to time until the final determination of the case.

(2) Any order made under the provisions of subsection (1) shall be enforceable in like manner as if it were a final order of the court.[10]

The applicant has a right to receive interim maintenance from first appearance in court up until the time that a permanent order is made. The defendant does not have to appear in court, but must be sent a notice that the interim maintenance order has been made. (This is very important because family courts lack staff and resources and sometimes a court hearing takes a long time to finish.) Interim maintenance may be ordered in the situations listed.

- The defendant father agrees to pay some maintenance for the children, but he argues about the amount. The interim order will be ordered until the court hearing. Then a final order will be made.
- The defendant father is disputing custody of the children and refuses to pay the mother maintenance for the children. If the mother is granted interim custody she should receive interim maintenance. When a "permanent" custody order is made, a maintenance order can also be made.

Usually, with or without appearing in court, the father will agree to pay maintenance for the children. There is no point in arguing about this; the father is legally responsible, regardless of who is to blame for the marriage break-up. The Fiji practice is to order interim maintenance for the children but not for the mother. On his first or second appearance in court, the father usually agrees that he is liable to pay maintenance for his children, although he may not agree to pay the amount requested.

An important point is that courts can order interim maintenance (and interim custody) without a full hearing. They do not have to have a means report, and can make a maintenance order on the basis of the claimed facts when the applicant appears in court. A means report is not essential at this stage. The following case illustrates the point.

CASE *Narayan v Renuka Sharma (1978) Fiji*[11]

Facts W applied for maintenance against H on the grounds of desertion. At the first appearance in the Magistrate's Court, when W sought interim maintenance, both were present. There was no full hearing about whether or not an order should be made: the Court ordered interim maintenance without hearing evidence on oath, or inquiring into H's ability to pay. H objected.

Issue The *Maintenance and Affiliation Act* Cap. 52 s. 14 allows courts to make interim maintenance orders that can be renewed regularly until a permanent order has been made. H argued that a full hearing was necessary before an order could be made. The main issue was whether the court had to hear full and proper evidence before making an order for interim maintenance.

Decision and comment The court said that the main purpose of the legislation was to secure temporary maintenance; having a full hearing would defeat this aim. All that was necessary was to give both H and W an opportunity to be heard. The court might ask a father whether he objects to paying maintenance, but even if he does object, the court can still order maintenance. The amount will be based on what the court considers appropriate to the situation, and is usually smaller than the amount finally ordered.

Fiji courts have powers additional to the power given by Section 14 of the *Maintenance and Affiliation Act*. For example, the *Magistrates' Court Act* and the *Magistrates' Court (Civil Jurisdiction) Decree 1988*[12] give courts wide powers to make any order regarding the welfare of children, including the power to make interim orders. As well, as we saw in Chapter 9, the High Court has a *parens patriae* role in making any order regarding the welfare of the child, and may therefore make a temporary order while a permanent solution or order is being considered. In fact, a court can do almost anything it wishes, temporarily and in the best interests of the children. This is important, because proceedings involving a full hearing may take up to a year, especially if an application for maintenance is strongly defended.

The family law legislation as a whole lends itself to both genuine and false delays. In particular, the present system allows defendants to abuse it by seeking delays on the grounds that a maintenance order will upset the reconciliation process. The following true story illustrates this.

STORY *Justice delayed is justice denied*[13]

Shanti and Hari had four children. Shanti thought that Hari was committing adultery but he beat her when she asked him. When she found that he had committed adultery, she and the four children left him. In the first court appearance, Shanti said that she needed interim maintenance because she had no money. Hari said that he did not want to pay interim maintenance because it was embarrassing, and because he and Shanti's family were discussing reconciliation.

Shanti's legal aid lawyer argued that payment of interim maintenance would improve the chances of reconciliation by showing that Hari really cared about her and his children. The court refused to make an order, and set the hearing date two months later to give Shanti and Hari an opportunity to reconcile, although Shanti had told the court that she would not reconcile. When Shanti and Hari again appeared in court, the case was again adjourned for two months to allow a welfare officer to complete a means report on Hari's ability to pay and to give a further opportunity for reconciliation. The case was finally heard 10 months from the date of first call. During the 10 months Shanti and her children did not receive any maintenance at all, except from relatives, none of whom could afford to support five extra people.

This is a classic case of "justice delayed is justice denied". The rules say that an adjournment for reconciliation may last only 14 days. If the parties do not then wish to reconcile, a hearing date should be given and a interim maintenance order made. The court should have ordered interim maintenance but did not; it was persuaded over and over again to delay its decisions. As we will later see in the case of *Soavele v Tauiliili (1993)*[14]

> proceedings may be adjourned to allow attempts at reconciliation, but this does not have to stop interim maintenance. A father truly concerned for his children will agree to an interim order, since interim orders automatically stop if the parents reconcile.

Surprisingly few magistrates know about the broad powers that the legislation gives them. Some do not even seem to know that they can make an interim maintenance order without a full hearing, or that there is a time limit for reconciliation attempts. As a result, women and children live for months with no support from their husbands and fathers.

QUESTIONS ABOUT MAINTENANCE: SPECIFIC QUESTIONS

What is the cohabitation rule?

Children are always entitled to maintenance. For example, Fiji's *Maintenance and Affiliation Act* s. 3(f) states:

> 3 ... Any married woman whose husband ...
>
> (f) has been guilty of wilful neglect to provide reasonable maintenance for her or for her infant children, whom he is legally obliged to maintain ... shall be made to pay maintenance.

This seems to mean that a husband can be ordered to pay maintenance if he deliberately does not maintain his wife and children. However, the cohabitation rule sometimes deprives children of maintenance. How does this happen? It happens because maintenance orders are made only when the parents are separated. If they are living together, courts will not make an order of maintenance. In some countries, like Fiji and Solomon Islands, this rule is stated in the legislation and in other countries it is inherited through the common law. Here is Fiji's *Maintenance and Affiliation Act*.

> 6 ... No order made under the provisions of this Act shall be enforceable and no liability shall accrue under any such order whilst the spouse in favour of whom the order was made resides with the spouse against whom the order was made and any such order shall cease to have effect if for a period of nine months after it was made the spouses continue to reside together. Any such order shall also cease to have effect when the spouses having lived apart after such order has been made resume cohabitation.[15]

This means that if a wife applies for maintenance under this act, a maintenance order will not be made or enforced if she is living under the same roof as her husband — even though he is not maintaining her and

their children. Further, if an order has been made, and the parties reconcile and live in the same house for more than nine months, the maintenance order will stop.[16] On the other hand, a wife who is still living with her husband may apply for, and get, maintenance if she applies for a divorce. This shows how much we need one comprehensive piece of legislation rather than bits and pieces of legislation scattered throughout several statutes.

It is not hard to see why some people think that the cohabitation order is fair. They think that if husband and wife live together, they must be reasonably happy and the husband must be financially maintaining the family. But the reality is that husbands and wives may have to stay under the same roof, even if they lead separate lives. As well, some men live with their families but spend most of their pay elsewhere; there is not enough left for the family. Many women stay in the matrimonial home because they have nowhere else to go.

The cohabitation rule should be challenged in the High Court. The common law is that a husband and wife can get a divorce when they are living separate lives, but under the same roof. Why should the same interpretation not apply to maintenance cases?

When are wives eligible for maintenance? Fault-based maintenance and the conduct and behaviour of the wife

Some women are turned away from the court when they seek to apply for maintenance. In fact, a court clerk has no right to decide whether or not to turn away an applicant whose papers are complete and correct and has fulfilled all the administrative requirements. Court clerks have no power to make a decision that a woman's application is not a proper legal application. This is the Magistrate's responsibility. If a clerk turns a woman away, saying that she is not eligible to apply, she may challenge the clerk's decision in a court, and it would most likely be overturned. However, women who have no legal help think that court clerks are legally able to make such decisions, and rarely do challenge their advice or decision.

Children always have a right to maintenance regardless of the circumstances under which their parents separate. However, wives do not always receive maintenance for themselves. In Tuvalu, Kiribati, Western Samoa , Cook Islands and Nauru, the legislation does not require a wife to prove fault on the part of her husband to claim maintenance for herself. The legislation appears to instruct the courts to order maintenance on whatever basis they think appropriate, in the following situations:

- A husband leaves his family without financial support. (Courts assume that if a wife and family have been left without maintenance, the husband has deserted them.)
- Any person liable to support a wife and child does not do so.

In Nauru, wives can apply for maintenance if they can prove that the husband or father has left his family without support. In Tuvalu and Kiribati, a wife may apply for maintenance if she can prove that there is a legal or

customary right. A wife should be able to prove this without too much difficulty, but wives rarely file cases for maintenance, perhaps because they do not know that they have the right, and there seems to be a general feeling that husbands who desert or divorce their wives are no longer legally obliged to maintain them. Usually, therefore, women return to their own families and are supported by them. Separated Tuvalu and i-Kiribati women are reluctant to claim maintenance in case the fathers of their children counterclaim for custody, because, under customary law, men have a better right to custody. In Tuvalu and Kiribati, most maintenance cases are dealt with by the Departments of Social Welfare and are settled out of court. Usually maintenance is paid only for children.

In Cook Islands and Western Samoa, either parent may be made to pay adequate maintenance to the children and to the other parent. This means maintenance "reasonably sufficient for necessities such as lodging, feeding, clothing, training, schooling and medical and surgical relief".[17] Western Samoa legislation[18] says that the strict rules of evidence do not need to be followed strictly in maintenance proceedings. As well, the burden of proof is on the defendant; he must prove that he has good reasons for not paying maintenance. We will consider later the case of *Soavele v Tauiliili (1993)*[19] in which the Supreme Court of Apia set out the criteria under which assessment of maintenance should be made. However, the Western Samoan legislation is an exception, and few women go to court for maintenance.

Countries with fault-based maintenance are Fiji, Solomon Islands, Vanuatu and to a lesser extent, Tonga. Fiji and Solomon Islands have almost identical fault-based grounds, except that Solomon Islands allows a husband to apply for maintenance for himself if he can prove that his wife is at fault.[20]

Table 10.6 Fault-based maintenance

Country	Fiji	Nauru	Solomon Is.	Tonga	Vanuatu
Require proof of husband's fault	Yes	No	Yes	Yes	Yes
Refuse wife maintenance:					
if she has committed adultery	Yes	Yes	Yes	Yes	Yes
if she is "a drunk"	No	Yes	No	No	No

It is not necessary to prove fault to obtain maintenance for children. A wife's maintenance is separate from maintenance for the children. A husband has an obligation to support his children, regardless of the reasons for the separation.

The Fiji legislation follows.

3 ... Any married woman whose husband-

(a) has been convicted of an offence against her person under Chapter XIII (Offences endangering life and health) and Chapter XXV (Assaults) of the Penal Code and sentenced to pay a fine of more than $10 or to a term of imprisonment exceeding two months; or

(b) is a habitual drunkard; or

(c) has been guilty of adultery, and such adultery has not been condoned or connived at or been conduced by her wilful neglect or misconduct; or

(d) has deserted her; or

(e) has been guilty of persistent cruelty to her or her children; or

(f) has been guilty of wilful neglect to provide reasonable maintenance for her or for her infant children, whom he is legally obliged to maintain; or

(g) whilst suffering from venereal disease and knowing that he was so suffering, has insisted on having sexual intercourse with her; or

(h) has compelled her to submit to prostitution or has been guilty of such conduct as was likely to result and has resulted in her submitting herself to prostitution;

may apply to the court for an order or orders under the provisions of this Act.

In Tonga , it is not necessary to prove specific types of fault on the part of a husband. However, the legislation retains elements of fault by requiring a woman to prove that her husband deserted her, or wilfully neglected, or refused to maintain her. Therefore, in effect, Tonga still has a fault-based system of maintenance for married women. To obtain maintenance for a wife, fault or blame or guilt must be proved.

Solomon Islands legislation is very similar to that of Fiji, with the fault grounds almost the same as the grounds for obtaining a divorce. There are no other grounds for proving fault. If a wife leaves her husband for behaviour not covered by these grounds, she will not get maintenance. This means that if a husband is inflicting mental cruelty on his wife or if a husband and wife just do not get on, maintenance will not be granted to the wife if she leaves.

The following two cases deal with the common problem of a wife or husband who does not get on with the in-laws. In both cases, a woman left the matrimonial home because she was unhappy with her husband's family, but her husband refused to set up a separate home with her.

CASE *Raj Mati v Amika Prasad (1959) Fiji*[21]

Facts W left H because she was unhappy living with her in-laws. She said she would return to him if he agreed to live separately from his parents. W sought an order of maintenance against H on the grounds of desertion and wilful neglect to maintain. The magistrate said that W was being unreasonable in expecting H not to live with his parents; therefore she could not prove desertion. W appealed against this decision.

Decision The Court of Appeal said that H was unreasonable in refusing to live separately with W. Therefore H was at fault; he was "in desertion" by causing his wife to leave him. It was unreasonable to assume that because a wife had at first agreed to stay with her in-laws, she could not change her mind. It was not at all unreasonable for her to want to set up an independent home. The Court of Appeal sent the case back to the lower court for rehearing with this in mind.

CASE *Sharifa Begum v Amjad Hussein (1989) Fiji*[22]

Facts W was living with H and his family. She was very unhappy but H refused to live separately with her. The real problem, as found by the Magistrate's Court was "the presence of the mother-in-law in the matrimonial home". W left the house and filed for maintenance on the grounds of constructive desertion, persistent cruelty or a husband's wilful neglect to maintain his wife.

Issue and decision To obtain maintenance, W had to prove that it was her husband's fault that she had to leave the matrimonial home. The question for the court was whether a husband or a wife had a right to choose where both should live. The Magistrate's Court said that neither the husband nor the wife should dictate where both should live. However, it was unreasonable for W not to live in the matrimonial home with H and his mother. If H wished to stay with his family, and W chose to leave, she would not get maintenance.

Comment In this case, W failed to prove a specific fault on her husband's part. In both cases, the Magistrate's Court decision reveals a common attitude: a woman's duty is to live wherever her husband wants to live; a woman who does not want to live with her husband's family is being unreasonable. Lower courts still have a problem dealing with desertion in this context. Higher courts are more likely to look realistically at individual cases, and the 1959 Court of Appeal decision could be useful in other cases.

The Vanuatu legislation makes it a criminal offence for a man not to maintain his family, and for a mother to desert her children. However, only married women can claim maintenance for themselves.

1. Any

   (a) man who for a period exceeding 1 month fails to make adequate provision for the maintenance of the woman to whom he is legally married or his legitimate children being under the age of 18 years

   or

   (b) [a mother who deserts her children] shall be guilty of an offence and on conviction shall be liable to a fine of 20,000 *vatu* [and/or imprisonment for up to three months. If circumstances beyond a person's control make him incapable of providing maintenance, he is not committing an offence.]

2. Where a man is convicted under the provisions of Section 1 the court may in such manner as it thinks fit order him to make adequate provision for his wife or children being under the age of 18.[23]

In order to obtain maintenance, a wife must first obtain a criminal conviction against her husband for desertion and failure to maintain. But we have already seen in Chapter 8 that to get a criminal conviction, the wife must prove beyond reasonable doubt that her husband has committed the crime. This provision places a magistrate in a difficult position. If the magistrate convicts the husband, he must fine and/ or imprison the husband. If the husband is poor, who will pay the fine and maintenance money? But if the magistrate does not convict the husband, maintenance is not payable. Who then will support the deserted wife and children?

Of all maintenance legislation affecting Pacific women, Vanuatu legislation is the most restrictive. The following case shows just how restrictively it can be interpreted.

CASE *Niurrie v Niurrie (1996) Vanuatu*[24]

Facts H and W had two children. In February 1995, a Magistrate's Court convicted H of failing to maintain his family, and fined him, but did not order him to pay further maintenance. In December 1995, following a new complaint made by W in July 1995, H was again found guilty of failure to pay maintenance, fined 4000 *vatu* and ordered to pay 8000 *vatu* per month maintenance for the two children, with nothing for W.

The lawyer acting on W's behalf applied in a civil case for an increase in maintenance, and the matter was decided in April 1996 in the Senior Magistrate's Court. W did not claim that H had disobeyed the order; the problem was that the amount was not adequate. The Senior Magistrate refused the application, saying that the *Maintenance of Family Act* required maintenance cases to be heard as criminal matters, not civil; that H had already been punished in December 1995; that the court order could not be varied; and that therefore W would have to make another complaint, as a criminal matter "if the defendant in future fails to comply with the order of 14 December 1995". W appealed to the Supreme Court.

Issues Could a civil action for variation of maintenance be based on the *Maintenance of Family Act*? And if it could not, could it be based on Article 47(1) of the Constitution?

Decision The case was decided on 17 July 1996. Answering the first question, the Acting Chief Justice said that, under the *Maintenance of Family Act*, maintenance may be granted only (and at the court's discretion) when a defendant has been convicted of "failing to make adequate provision" for the family. He thought that it would be against general principles to make someone liable for criminal proceedings as a result of separate civil actions, and the *Maintenance of Family Act* does not expressly allow this to be done. Therefore the Senior Magistrate was right in saying that the court cannot hear civil actions under the Act.

In answering the constitutional question, the Acting Chief Justice quoted Article 47(1) of the Constitution, which gives a court the power to make decisions "according to substantial justice" if there is no relevant law. W's lawyer had argued that the *Maintenance of Family Act* had said nothing about how a father or mother could seek a variation of maintenance, that there was no other legislation on the matter and that therefore Article 47(1) should be

applied. The Acting Chief Justice said that Article 47(1) could not be applied: the Act was "much less detailed" than other similar legislation, but it allowed a wife, for example, to bring new complaints against her husband for not making "adequate provision".

Further, he said, "what constitutes adequate provision ... must depend on the circumstances of each of the parties and cannot ... be fixed once and for all time". The court might have then made "new and increased orders". The court's power to hear and decide maintenance matters was not limited to cases where a defendant does not maintain his family at all or in any way disobeys a maintenance order; it applied to "adequate provision" and may therefore be used to vary an order. What W might have done, he said, was "to make still another complaint and have that determined as prescribed in Cap. 42". For all these reasons, he dismissed W's appeal again the Senior Magistrate's decision.

Comment What are the consequences of this decision for Vanuatu parents? On the one hand, the legislation obliges a court to punish a husband for a criminal offence if he is convicted of having failed to make adequate provision for his family. On the other hand, the legislation does not oblige the court to order the convicted husband to make future adequate provision, and thereby avoid future convictions.

If an order is made, and the husband or wife wants to vary it, the wife may charge her husband with the criminal offence of having failed to make adequate provision but it is not clear what a husband should do. The *Maintenance of Family Act* may imply that husband or wife may argue in court the meaning of "adequate provision" but it does not give specific instructions on how to obtain variations in maintenance. Article 47(1) of the Constitution could therefore have been applied.

You can starve because I've put your husband in prison, or you can starve because I can't make him give you anything. Which would you like?

> The Acting Chief Justice said that it would be wrong in law for a court to state that a wife must wait for her husband to disobey the order before she makes the charge. This is what the Senior Magistrate did say, but the Acting Chief Justice still upheld the Senior Magistrate's decision, and thereby left the way open for other courts to misinterpret the law. The Vanuatu maintenance legislation urgently needs revision, and removal from the criminal courts.

Fault-based maintenance legislation may be specifically directed at wives as well as at husbands. In four Pacific countries —Fiji, Solomon Islands, Tonga and Nauru[25] — the legislation disqualifies an adulterous wife from receiving maintenance. In Nauru, the legislation disqualifies also a wife who is a "drunk". The Fiji legislation is typical.[26]

> 7. No order shall be made under the provisions of this Act for the maintenance of a married women if it shall be proved that such married woman has committed an act of adultery unless the court is satisfied that the husband has condoned or connived or by his wilful neglect or misconduct conduced to such act of adultery;
>
> 8. (2) If any married woman in whose favour an order shall have been made under the provisions of this Part shall commit an act of adultery such order shall on proof thereof beyond all reasonable doubt be discharged:
>
> Provided that the magistrate may, if he thinks fit
>
> (a) refuse to discharge the order if the opinion of the court such act of adultery was conduced to by the failure of the husband to make such payments as in the opinion of the magistrate he was able to make under the order...

So if a wife commits adultery, even after separating from or divorcing her husband through her husband's fault, she is not entitled to claim maintenance for herself. If she commits adultery — even only once — while she is receiving maintenance, the maintenance will stop, unless the husband caused her or helped her to commit adultery, or neglected to pay maintenance. Courts do have the power to overlook adultery in particular circumstances, but whether this power is used depends on the attitudes of the magistrate administering the law. The strength of social attitudes is illustrated by the fact that, even in countries without this legislation, courts operate on the principle that if a wife commits adultery, she will immediately stop receiving maintenance. A wife's maintenance is therefore granted in exchange for her lifelong sexual faithfulness to a husband with whom she no longer lives, even if that husband has remarried or is in a *de facto* relationship. The assumption seems to be that, as a result of a sexual relationship, the man provides for the woman. This is not true; it is also insulting to both men and women.

These laws are based on discriminatory standards about women's sexuality; they tie maintenance to faithfulness rather than to need and ability. If a woman has been receiving maintenance from her estranged or divorced husband, this should cease only when she has remarried or when she has

found paid work that meets her reasonable needs. Each case should be decided individually, depending on the particular needs of the wife and children. Higher courts have said that a woman's adultery should not affect her right to apply for custody, but we have so far no case examples of women challenging the current strict interpretations regarding maintenance — largely because if a woman needs maintenance, she cannot afford the costs of a challenge. We have therefore no way of assessing the potential attitudes of judges in the higher courts.

Can maintenance orders be varied?

Most countries have legislation allowing courts to increase, decrease or discharge a maintenance order. (The position in Vanuatu is complicated. The Supreme Court ruled in *Niurrie v Niurrie (1996)* that although the *Maintenance of Family Act* does not mention any such procedure, courts could consider applications for variation under the Act as part of a criminal charge.)

A parent paying maintenance might apply for a decrease in maintenance because he has lost his job, or because the custodial parent's situation has improved in some way. A parent receiving maintenance may need a variation for any of the reasons listed.

- The defendant's income has increased.
- Costs of living have increased.
- The custodial parent's income has decreased.
- The children have changed schools.
- As they grow, children cost more to feed, clothe and educate.

As Table 10.7[27] shows, the Fiji Magistrates' Courts record a steady demand for variations, varying between 275 and 402 per year over 9 years.

Table 10.7 Applications for variations of maintenance orders, Fiji Magistrates' Court, 1984-1992

Year	1984	1985	1986	1987	1988	1989	1990	1991	1992
Number of applications	275	294	329	400	277	326	299	298	402

To apply for an increase in maintenance, the custodial parent must prove that the situation has changed since maintenance was awarded. The more changes that a custodial mother can show and prove, the more likely she is to get an increase. This requires well documented preparation and the help of many people such as school teachers, accountants, landlords and advisers, because cases involving increases of maintenance are usually bitterly contested. The following case is typical.

CASE *Parbhu Das v Jaya Ben (1972, 1973) Fiji*[28]

Facts In 1966, W got a maintenance order of $15 per week for herself and the two children. In 1972 one child reached 16, so H was no longer was no longer legally obliged to support that child. Evidence showed that H had received $50,000 from a land sale. He was a member of Parliament, had been appointed as Assistant Minister and had therefore increased his salary. W sought an increase of maintenance on the grounds that H's circumstances had changed since the 1966 order. The Magistrate's Court increased maintenance to $60 per week for W and $15 per week for the child still legally requiring maintenance. H appealed against the increase.

Decision The Court of Appeal said that the basic question was whether or not there had been a change in the circumstances of the parties between the time of original award, and the time of the application for an increase. W had shown in evidence that H's circumstances had greatly improved, so an increase was justified, but $60 per week for W was too much. The Court of Appeal lowered it to $40.

When does a child's maintenance stop?

All Pacific Island countries have age restrictions for children receiving maintenance: the law assumes that after a certain age, a child can support itself. The general situation is that if the parents remain legally married, the children receive maintenance until they reach 16 years of age, but if the parents are divorced, the children receive maintenance until they reach 18 years of age. In Fiji[29] maintenance for illegitimate children stops at 16. It stops for legitimate children at 16 if the parents are still legally married, and at 18 if the parents are divorced. If a court makes an order under maintenance legislation, maintenance will be paid until the children reach 16. Under the divorce legislation in Fiji, courts may extend the maintenance payments beyond 18 if "there are special circumstances that justify the making of such an order for the benefit of the child"[30] but rarely do so; education beyond high school level is not considered a special circumstance. There is no similar power under the maintenance legislation.

Some countries of our region are more flexible about payment beyond the statutory age limit. Western Samoa legislation[31] allows the court to order payment of maintenance beyond the 16 year maximum up to 19 if the child continues education. In Nauru and Tonga, a child has a right to maintenance until 16 under maintenance legislation, and until 21 under divorce legislation.

Legitimate or not, a young person needs to eat, wear clothes and sleep somewhere. The age limit severely disadvantages young people, and reduces their chances of higher education. It should to be increased to 18 for both legitimate and illegitimate children. As well, courts must have discretion to extend the payment of maintenance beyond 18 years if the mother cannot meet the child's financial needs, and the father is financially able to pay.

When does a wife's maintenance stop?

In most countries of our region, maintenance for the wife will stop if she commits adultery or remarries, or if the defendant proves that he is no longer capable of paying. It usually stops also on the death of the husband or ex-husband, although the children of the marriage generally continue to receive maintenance from the father's estate. The following case involves a very large estate and a maintenance claim by a widow who was left nothing in her estranged husband's will.

CASE *Estate of Carruthers (Richard Hetherington) re Carruthers (Bernadette Taputitea) (1991, 1992) Western Samoa*[32]

Facts and decisions H died, leaving a estate worth some $1.8 million. He had been married four times and had children by each wife. He and W, his latest wife, were separated at the time of his death, and W lived in a home on the family compound with two of H's children. H had left nothing for W in his will. When W applied to the Supreme Court for maintenance, it gave her a lump sum of $100,000, and said she would have to move out of the compound. W appealed because if she was evicted, she would have to buy land and build a house elsewhere. The Court of Appeal said that although W and H were separated, H had failed in his moral duty to provide for his widow; she had two of his children with her, and had done nothing that justified cutting off maintenance. The Court of Appeal therefore increased the lump sum to $275,000.

What kinds of maintenance payment are made? Lump sum and periodical payments

There are two basic types of maintenance payments: lump sum payment and periodical payments. A lump sum is paid once and for all; a periodical payment is paid regularly (weekly, fortnightly or monthly) for years. A person who accepts a lump sum will not get periodical payments as well.

We will look first at the lump sum payment. This may be made as well as, or as part of, a matrimonial property settlement. Some countries provide for a maximum lump sum payment for the maintenance of an illegitimate child, but there is no such statutory maximum lump sum payment for a wife and legitimate children; they must negotiate the sum. English common law favours the lump sum option, which is based on the "clean break" principle that the husband and wife can make a clean break from each other and have no further ties or financial obligations. For example, we will see that in the case of *Leong v Leong (1990)*[33] the court adopted the clean break principle and gave the wife and children a lump sum payment. Courts often suggest such payments because couples who are fighting with each other may create problems about periodical payments in order to continue their bitter struggle.

With periodical payments, the person responsible (usually the husband) regularly pays smaller sums of money to the court and the person receiving (usually the wife) collects the payment from the court. These payments should be made until the end of the legal responsibility to maintain — for example, the children might reach adulthood or the parties might make a separation agreement, either in the court or without going to court.

What are the advantages and disadvantages of both types?

Lump sum

Advantages

- There is a clean break: both parties can try to get on with their lives.
- The person receiving the lump sum can plan what to do with it — for example pay debts, buy a house or invest.
- The person receiving a lump sum has none of the problems associated with collecting, waiting for or trying to enforce periodical payments.

Disadvantages

- Most Pacific Island men cannot pay a lump sum that will cover the total costs of providing for children until they reach adulthood.
- A woman who agrees to accept a lump sum payment might not get as much as she would if she regularly received periodical payments made over the years.
- Wealthy people can hire lawyers to help them arrive at sums that might be fair for all. On the other hand, most women do not have independent legal advice and can therefore be cheated.
- A person who receives a lump sum may come under pressure from family members and others who want a share in the sudden wealth.
- Very careful planning and budgeting are needed. A woman who is not well off and who can't get a good job may soon find that all the lump sum has gone, and she has no source of income.
- Once the payment is accepted, no more claims can be made, even if the sum is not enough.

Periodical payments

Advantages

- Adequate and regular periodical payments provide a regular income that might over the years amount to more than a lump sum.
- The custodial parent may apply for an increase in maintenance when living costs increase or when the person paying maintenance has an increase in income.

- The person paying does not suddenly have to find a large sum of money.

Disadvantages

- Periodical payments are a constant drain on the income of the person paying.
- If the person paying applies for, and wins, a reduction in payment, the recipient will have to manage on a smaller income.
- Most periodical payments are not regularly paid; the recipient may spend a great deal of time and money in trying to enforce payment.
- If the parents continue to fight, the children remain torn between two people in conflict.

As both methods of payment have advantages and disadvantages, the parties need to think very carefully and very clearly about which method is best in their particular case. This is hard to do in the present system that sets husband and wife against each other. Until the system is changed, the best we can hope for is good legal advice and help.

How much maintenance is payable?

Most maintenance awards are standard orders for fixed amounts, which are low throughout in our region. In 1993, Cook Islands orders ranged from $10 to $20 per week per child and were the highest in the region, although salaries also were higher. The most common order in Western Samoa was $10 per week per child. In Vanuatu in 1996, the Women's Centre sought between 5000 and 10000 *vatu* per child per month, rising to between 10000 and 20000 if the mother had no other income. Solomon Islands orders are as low as in Fiji and have little relation to children's needs or the father's ability to pay.

Maintenance orders in Domestic Courts in Fiji range from $7 to $10 per week per child — very rarely, as much as up to $20. A wife may receive between $10 and $15. Magistrates, as a matter of practice, order an average of $10 per week per child if the husband is earning, regardless of how much he actually earns. (Ten dollars a week means four hours' work to a man who earns $2.50 an hour; it means half an hour's work to a man who earns $20 an hour.)

Courts should look at the requirements of the children first and then decide what can be spared for the other parties involved. However, Fiji courts do not, for example, use the Fiji Food and Nutrition Council's recommendations on the minimum income necessary to provide simple nutritious meals for growing children. In 1994, an average family in Fiji would have needed $58.11 per week for the most basic necessities,[34] but the Garment Industry Wages Council Order set the minimum wage of a garment worker at 94 cents an hour. Even by working 45 hours a week, a garment worker would be unable to earn the minimum amount needed for her family.

Courts tend to focus more on protecting the father's income than they do on the common law principles of the needs of the wife and children as well as on the defendant's ability to pay. Courts have instead developed a judicial practice of not ordering more than one-third of a defendant father's income in maintenance. This was meant only as a guide and starting point in assessing maintenance by looking at the incomes of all the parties, including the incomes of new spouses and partners. It is not in the legislation, but has developed into a rule. The reasoning runs like this:[35]

- When a marriage breaks up, the husband has two households to pay for, instead of one.
- Therefore the husband has more expenses than his wife does.
- Therefore the assets and earnings cannot be equally divided — half to the husband, half to the wife.
- Therefore the husband should keep two-thirds, and the wife and family can have one-third.

So a mother and her children (several individuals) will have to survive on no more than one-third of the income that they survived on when they lived with the father as a family. The father (one individual) has two-thirds of the family income. How can a mother looking after children have fewer expenses than does a father with only himself to look after? The rule does not make sense — or it makes sense only if we assume that the father is maintaining his own wife and children and has taken responsibility for someone else's wife and children as well. But he is legally obliged to support his own children, not someone else's wife and children.

In the following case, the two-thirds rule was blindly applied.

CASE *Kumari v Sharma (1990) Fiji*[36]

Facts W and H had been married for seven years and had two children. H, the only income earner, provided the total family income of $95 per week. H beat W often and had once been convicted of common assault. As well as beating W, he had poured kerosene over her and offered her a match to set herself on fire. On the day W finally left, H had beaten her for three hours. She proved that H was guilty of habitual cruelty.

Decision and comment The Magistrate's Court ordered that W get custody of the two children. H was ordered to pay $10 per week for each child and $10 a week for W. So out of the family's total weekly income of $95, H paid $30 per week maintenance for three people, and had $65 a week for himself.

Why did W endure seven years of cruelty? Because she had no other income and knew that it would be hard to support her children by herself? If that was her main reason, the Magistrate's Court proved her right by ruling that she and the two children would have to survive on $30 per week. H was proved to be at fault but was allowed to benefit from the common law "one-third rule" even though there is no such rule in the legislation.

This case is unfortunately typical, but if the Court had taken seriously the needs of the children, it might have said something like this:

- The total income is $95 per week for two adults and two children in separate households.
- $95 will not cover the costs of two households. The wife will have to get a job to help support the children.
- The husband could pay extra until the wife has got a job, even if she must upgrade her skills to enable her to do so.
- The total family income should be assessed against the costs of maintaining each individual within the available income. This might be done by dividing $95 between four individuals, making $23.75 for each. After adjustments based on age and need, the mother and children should get approximately two-thirds and the father one-third.

Father	$35 per week
Mother	$25 per week
Child (5 yrs)	$20 per week
Child (2 yrs)	$15 per week

The maintenance would be adjusted when the mother obtained paid employment. Because the sum is small, it would be hard for everyone to survive, but the court would (and should) have made some attempt to give priority to the children's needs.

Magistrates are not given enough guidelines to help them decide an appropriate figure. Most magistrates in our region are not legally trained and few have education to tertiary level. With little training or guidance, many magistrates blindly apply what they believe the law is, or base decisions on what they feel is right. This is one of the reasons for the unofficial "glass ceilings" or maximum amount, as shown by the one-third rule. Another reason may be that magistrates believe that it is right that family income should be the father's money because he physically earned it. They do not take into account that a housewife makes a non-financial contribution to the family income. They assume also that a woman will find a new provider.

Most Pacific Island legislation states that the welfare of the child is the most important consideration in deciding custody of the children, but they do not apply similar principles to the making of maintenance orders. Yet the welfare of a child is closely linked to its mother's financial status; a mother with no or little maintenance will not have the resources to care for her children. In Australia and New Zealand, where the welfare of the children is also the first consideration, the legislation provides detailed guidelines on how a court must make decision about maintenance amounts. The principles are similar to those used in assessing matrimonial property and sharing financial resources.

Are maintenance payments taxable or deductible?

Until 1 July 1992, Fiji husbands could claim payment of maintenance as a deductible expense; paying maintenance reduced the amount of tax they paid. They therefore benefited from paying maintenance. This is no longer

so. The Fiji *Income Tax Act* states that "alimony and maintenance due and paid under an order of a court of competent jurisdiction" must be included as taxable income.[37] This means that women receiving maintenance must show that money as part of their income, and it will be taxed as part of that income. The 1995 minimum level for payment of tax was $5000; dependent women receiving maintenance were liable to pay tax if they were unemployed and receiving more than $96 per week maintenance. They were liable also if they were employed and their combined weekly income and weekly maintenance was more than $96 per week.

On the one hand, supporting mothers are encouraged to work but if they do, taxes may reduce their income and maintenance. On the other hand, fathers may not reduce their taxes by paying maintenance. Taxation on maintenance increases the economic burdens of mothers and fathers, and may increase the state's burden of trying to look after people on or below the poverty line.

ECONOMIC FACTORS AFFECTING MAINTENANCE

There are very few legislative guidelines on how to calculate the amount of maintenance, although some legislation states that the court shall take into account "the means both of the husband and the wife" in making a "reasonable" order.[38] Cook Islands and Western Samoa legislation[39] instructs courts to make provision for "adequate maintenance" for parents and children without regard to ability to pay. The basis of the legislation is that maintenance must be sufficient to provide the basic necessities, whether the person paying maintenance can afford to pay that amount or not, but this is contradicted by a provision taking into account a father's inability to pay. For example, the Cook Islands legislation instructs the court to take into account the factors listed.

- The ability of the wife to look after the children.
- The paid employment of the wife.
- The means and responsibilities of the husband.
- The conduct of the parties.

As in other countries of our region, the Cook Islands/New Zealand legislation is typically based on rules of thumb inherited from the English common law. These rules are that maintenance awards should be based on the twin principles of the needs of the wife and children and the ability of the husband to pay. The court may assess such needs and abilities by examining the income and earning capacities of the parties, and their

standard of living before separation. One way of doing this is by obtaining a means report.

The means report

A means report is the result of an investigation by a welfare officer into the financial situation of each party. Most courts of the region have the power to require a welfare officer to provide the court with a means report on the financial obligations and needs of both parties.[40] The parties may challenge the report in cross-examination; they can question the welfare officer and suggest that the report is inaccurate. Unfortunately, most welfare offices are understaffed and the officers are not trained in investigating the means of defendants, many of whom know how to hide their real incomes.

Despite the fact that courts have the power to order a means report, they do not usually do so. They rely on women to supply details of their needs and earning capacities, as well as proof of their husbands' income and earning capacities. But most women apply for maintenance because they have no money, so it is unrealistic to assume that they know how to find out their husbands' real incomes.

The needs of the wife and children

In deciding what the parties and children need, courts should work on a case-by-case basis. The burden is on the woman, whose first consideration should be the welfare of the children. She must therefore show the court the costs of maintaining a child. At the very least the court is supposed to make the type of settlement that provides adequate shelter and food for the dependent children. The more the information the court has, the more likely it is to award a sum that adequately reflects the children's needs.

The income and earning capacities of the parties

The means report (or the person applying for maintenance) should also give the court information on the income of the father and the mother, and their earning capacities including not only what they actually earn, but also what they are capable of earning. The court will look at the respective financial obligations of the mother and the father — their debts, mortgage commitments and so on. Earning capacity and sources of income can be established by examining the following documents:

- Wage and salary documentation (for example wage slips)
- Bank statements
- Tax forms
- Documentation of any income from other sources such as pensions, insurance or investments, rent or shares

- Affidavits from any person who might have knowledge about the parties' income including information from financial controllers or accountants in finance companies, hire and purchase schemes, home finance corporations, share certificates showing investments, tax declarations, documents on assets or any other documents showing the parties' lifestyle.

Some people, particularly defendants, refuse to provide these documents. When this happens, the applicant can apply to the court for an order of discovery, the legal process by which the parties to a legal action find out information from each other to argue their case. Full discovery of all the facts and documents requires the defendant's full cooperation. The defendant may receive an order of discovery telling him to file the documents with the court, but he can find ways of delaying the process for many months or even years, or (particularly if he is self-employed) he can supply an inaccurate affidavit of means.

However, the following two cases show that courts do not necessarily need documents showing the complete income of the defendant.

CASE *J v J (1955) United Kingdom*[41]

Facts and issues H was a property developer; according to his tax forms, he earned a very small taxable income. However, W was able to show that H lived like a man with plenty of money, and could borrow large amounts for his business. The issue was whether H should pay a small amount of maintenance because his taxable income was small, or a larger amount because he had access to money not shown in the documents.

Decision and comment The court based the maintenance award on H's lifestyle and ability to raise money when he wanted to. A person's lifestyle may therefore be used to assess maintenance and matrimonial property distribution. If a husband claims to earn a small salary, but the court knows that he lives like a rich man, the court may conclude that he has more money than he says, and may order a larger share for his wife.

CASE *Leong v Leong (1990) Solomon Islands*[42]

Facts, issues, decision H was a wealthy businessman. He and W lived together for four years and had two children. When they separated, W applied for maintenance. There was no matrimonial home, and immediately after the separation, H transferred all the family assets to his father's name. He said that this was a Chinese custom, and the court recognised the custom. H admitted an income of $36,000 per annum but the court said it could not assess his full financial position. However, his lifestyle was very comfortable.

The court accepted that W had contributed to the marriage by having and raising two children. It said however that, because the marriage had lasted only four years, W could not claim any assets or any part of H's business. It said further that the basis of maintenance is not more that one-third in assessing a lump sum settlement but after such a short marriage that percentage was too high; in the circumstances, one-quarter was more appropriate. The court then said that $25,000 was one-quarter of H's income

as estimated from his lifestyle. This $25,000 was to be multiplied by three, so that the total settlement would be a lump sum of $75,000. There was no provision for future maintenance for the children. The lump sum would be the only settlement ordered.

Comment This judgment is important for both lump sum maintenance settlements and for matrimonial property settlements. It has important precedent value, because the court recognised women's unpaid work or non-financial contribution. Another useful precedent is the recognition that a husband's lifestyle may show more about his income than his documents do.

However, there are other ways of trying to avoid or reduce maintenance payments; some fathers deliberately remain jobless, or work in low paying jobs, even if they could find better ones. Courts should establish capacity to earn, and not actual earnings, as the following case will show.

CASE *Jayanti Lal v Kalawati Parmar (1971) Fiji*[43]

Facts and issue W and H separated after being married for 11 years. H was a qualified teacher but was working for a small salary in his father's business. When the Magistrate's Court awarded W maintenance of $5 per week, H appealed, saying that in assessing his means, the Magistrate's Court should have looked only at what he actually earned, not what he was capable of earning. He offered W $2 a week. The issue was whether the maintenance awarded should be based on what H actually earned or on what he was capable of earning.

Decision and comment The High Court said that assessing maintenance, a court could properly take into account the defendant's potential earnings as well as his actual earnings. So the Court should take into account that H was a teacher, who was capable of earning more, but had chosen to work in the family business and earn a smaller sum. That was his choice; his wife should not suffer for it. A woman can therefore base the amount of her maintenance application on her husband's earning capacity: what he could earn if he wanted to or had to.

Despite the examples from the higher courts, lower courts very rarely use the capacity to earn principle. Domestic and family courts almost always use the husband's actual income in order to make an assessment. They accept what the defendant father says he is earning, and rarely require a defendant to file even an affidavit of means. Requiring an affidavit of means should be standard practice. Without it, the court has no proper way to assess real income.

Most lower courts expect a mother and father to share equally the costs of maintaining children. The custodial parent is expected to make some contribution even if she has no income. If she is employed, or at fault, a proportion of the child's needs will be set against the proportion that the court expects her to contribute. But if a father is the only income earner, the court will take into consideration the fact that his income must support two separate households.

In assessing the wife's income, the court may take into account also the income of her new partner or husband. For some women, the only way of surviving is through men; they merely exchange one boss for another. Good and fair maintenance and matrimonial property settlements would ensure that women are not forced into finding and depending on new partners.

Should courts consider the standard of living of the parties before separation?

Should the courts look at the lifestyle of the parties before they separated and take it into consideration when making a maintenance settlement? This question might come up, for instance, where wealthy parties separate and a claim for maintenance is made. Is the husband supposed to give the wife and children a maintenance settlement that will allow them to maintain their lifestyle? The common law says that a court is very rarely able to order a settlement that will ensure exactly the same standard of living. However, some recognition will be given to the previous standard, and adjustments will be made if the father is financially able.[44]

In our region, relatively small numbers of women earn money, so small incomes are usually split between the father on the one hand and the mother and children on the other hand. Before the break-up, one income (usually the father's) was maintaining one household. After the break-up, the same income might have to support two households. However, wives are usually worse off because they have less earning power than men, and courts rarely order an equal distribution of family income. The husband almost always gets more money than do his wife and children; courts rarely award more than one-third of the husband's salary to the wife even if she has custody of the children. For the vast majority of Pacific women, separation means being sucked down into new or greater poverty.

What things should courts consider?

The Australian *Family Law Act*[45] has listed everything that a court should take into consideration when making a decision about maintenance. The list could be a model for our courts, as it is based on logic, common sense and fairness. We have summarised it below, with some changes in wording.

- The age and state of health of each of the parties.
- The income, property and financial resources of each, and their physical and mental capacity for "appropriate gainful employment". (This means employment with fair and adequate wages.)
- Whether either party has care or control of a child of the marriage under 18 years of age.
- Each party's commitments to support herself or himself, and to support a child, or other person, whom he or she has a duty to look after.

- Either party's responsibilities in supporting another person, for example a sick or elderly parent.
- Where the parties have separated or the marriage has been dissolved, a standard of living that "in all the circumstances is reasonable".
- To what extent the payment of maintenance would increase the earning capacity of the party to whom maintenance is paid. (For example, could the person seek further education, improve skills or set up a business? If one party does not have the skills for a better paid job, the court takes that into account. It might give that party extra maintenance for training for a better job, thus eventually reducing the need for maintenance.)
- To what extent the party whose maintenance is being considered has contributed to the income, earning capacity, property and financial resources of the other. (For example, if the wife has supported her husband's further education, or has worked without pay in the family business, or has gardened or fished and sold produce for her husband and family, she has contributed to her husband's income.)
- The length of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is being considered. (For example, a wife who left her job, or did not continue her formal education, in order to have and care for the children may not now be able to get a good job. This might increase her share of maintenance.)
- The need to "protect a party who wishes to continue that party's role as a parent".
- If either party is living with another person, the financial circumstances of the cohabitation. (For example, if H the ex-husband and his new partner are well off, but W the ex-wife and new partner are poor, the court may consider increasing W's share of maintenance. If W is now better off, the court may consider reducing her share of maintenance.)
- The court will consider the terms of any order made or proposed under a matrimonial property settlement. Both maintenance and matrimonial property will be considered at the same time.
- Any other fact or circumstance that, in the opinion of the court, "the justice of the case requires to be taken into account".

In the following case, the Supreme Court of Western Samoa shows how these principles may be applied.

CASE *Porotesano Soavele v The Maintenance Officer on behalf of Liliolevao Tauiliili (1993) Western Samoa*[46]

Facts H and W married in 1991, lived together for three weeks and then separated. W filed a maintenance claim through the Maintenance Office. The case was heard in 1992. W said she earned about $30 per week from a small shop but could not count on it. H was a carpenter-builder; he did not always have work but spent some money on beer. The Magistrate's Court ordered H

to pay interim maintenance of $20 per week while the case was adjourned to allow reconciliation to take place if possible. H did not pay it, and W brought an action, asking for a disobedience order to be acted upon. H appealed to the Supreme Court, saying that the interim order was against Sections 16 and 25 of the *Maintenance and Affiliation Act 1967*; that the permanent order should not have been made without his lawyer; and that the disobedience order was unlawful. The case was heard in 1993.

Decision The Supreme Court noted that because so many maintenance cases come before Magistrates' Courts or the Supreme Court, the "maintenance laws are of real practical importance" and "call for urgent updating and revision". Referring to Section 16 of the *Maintenance and Affiliation Act*, and the lack of guidelines for assessing maintenance, the Court said that no order should be made without proof that a husband was able to contribute towards his wife's maintenance. Courts should take into account "the needs of the person seeking maintenance" as well as the extent to which that person could meet such needs, even by improving his or her earning ability; the means, earning ability and responsibilities of the person from whom maintenance is sought; the "duration of the marriage and the extent to which it has affected the earning capacity of the person seeking maintenance" and any other relevant matter.

In the present case, the Court said, there had been proof that H could earn enough to pay maintenance. It rejected his appeal, and sent the case back to the Magistrate's Court for rehearing and assessment based on the principles outlined.

The matrimonial home and maintenance

In proving that they deserve maintenance, women face barriers similar to those they face in proving that they deserve an equal share to matrimonial property. The lack of recognition of women's rights to matrimonial property affects their ability to stay in the matrimonial home after separation. If courts recognised that women and men had equal legal rights to matrimonial property, women would have some rights to possession of the home until the children reached adulthood. We will consider the general question of matrimonial property in Chapter 11; here we focus on two specific questions:

- When a couple separates, which of the two will live in the home they once shared?
- How will this affect any maintenance payments?

These questions are very important, both for the parents and for the children. But the legislation does not face the questions, and in the common law, very few cases have attempted to answer them. The assumption is that whoever legally owns the home (usually the husband) will have the right to live in it, whether or not he has custody of the children. Children need stability and when their parents separate, continuing to live in their former home might help them adjust better to their new lives. However, few cases have attempted to use the broad principles of the welfare of the children on which to base the rights of a mother with custody to stay in the matrimonial

home. No court has stated clearly that the custodial parent has the right to remain in the matrimonial home unless its sale would allow that parent to buy a new home.

In the case of *Prem Prabha Azam v Mohammed Azam (1967) Fiji*[47] the husband agreed to transfer the matrimonial home to his wife if she agreed to him leaving the country without arranging maintenance, but that case was not concerned with the welfare of children. The following case does involve the welfare of children, and illustrates the position in Fiji.

CASE *Shahudin Nisha v Mohammed Ashraf Ali (1992) Fiji*[48]

Facts and decision H and W were poor and had worked very hard during their marriage. H had earned some money but W had stayed home to housekeep and look after their two children. They owned a house but only H's name appeared on the Certificate of Title. After separation, W and the children lived in the matrimonial home, with no income except a small social welfare allowance and maintenance of $5 per week for each child. H tried to evict them, and to sell the house. The High Court used general provisions to order that W and the children remained in the matrimonial home. It said that Section 87(1) of the *Matrimonial Causes Act* allowed the Court to "make any other order which it considers necessary to do justice".

W managed to remain in the house by obtaining several injunctions on the ground that it would be against the interests of the children to be evicted. The injunction prevented the house from being sold and included a *caveat*. The *caveat* expires if not renewed but cannot be extended indefinitely. When the *caveat* expired, W could not obtain an extension, because the court assumed that its order was enough to protect the property from being sold to a third party. The property was therefore unprotected; H sold it, leaving W and the two children homeless.

Comment Although the High Court attempted to do justice, it failed to help W. It did not consider that it had power under the *Matrimonial Causes Act* to extend the *caveat* on the property. Also, it did not order that W's name be included on the title. This would have prevented the home from being sold, because a buyer has to seek the consent of every person named on the title. The Court had power to do this under the same broad powers it used to order the injunctions protecting the children's interests. However, when land and property rights are involved, courts rarely wish to use such powers.

Courts could use their powers under existing legislation to grant a wife the right to stay in the home until the children are older. However, they need also explicit powers to instruct the Registrar of Titles to extend the *caveat* indefinitely; they need as well to have powers to place a wife's name on the Certificate of Title until her share can be determined. The legislation should be amended to recognise that wives have equal rights to matrimonial property; their names should also be on the title to matrimonial property, so that a spouse may not sell matrimonial property without the other's consent.

Martin and Mesher orders

The Fiji case above could be compared with the case of *L v L (1993) Western Samoa*,[49] in which the Court of Appeal said that in some circumstances a woman could remain in the matrimonial home even if she did not own it. We will discuss that case in detail in Chapter 11, as here we will focus on two British cases that have become landmark decisions in the United Kingdom and in other common law countries. These two cases are based on old legislation in the United Kingdom, similar to that currently followed in most Pacific Island countries. As a result of these cases, two different orders may be made. They are called *Martin* orders and *Mesher* orders.

- The *Martin* order delays the sale of a house until the financial situation of the party living in it changes. Both husband and wife continue to pay the mortgage payments. The house is eventually sold and the profits are divided fairly between the husband and wife.
- The *Mesher* order delays the sale of the house until the children of the marriage reach adulthood. The custodial parent and children live in the house. The order is much like an order instead of, or part of, a maintenance order. Both husband and wife continue to pay the mortgage payments. The house is eventually sold and the profits are divided fairly between husband and wife.

We will look first at the *Martin* case.

CASE *Martin v Martin (1977) United Kingdom*[50]

Facts H and W married in 1957. They had their own home, but only H's name was on the Certificate of Title and mortgage documents. In 1972 H left W for another woman, CR, whom he wished to marry. H and W were divorced in 1974. Neither had any assets other than their interest in the matrimonial home. Each was employed; H earned about £30 and W earned about £23. H was likely to get official tenancy of the state-funded house in which he and CR lived. W had applied for council housing, but seemed unlikely to obtain it. W continued to live in the matrimonial home. At this time the property was worth £11,000, and both accepted that each was entitled to the equity in equal shares; H and W agreed that they had equal rights in half shares to the profits if the house were sold. W applied under Section 24 of the *Matrimonial Causes Act 1973* for H's interest in the matrimonial home to be transferred to her, because she had no other accommodation and H could not afford to pay her maintenance.

The Registrar dismissed her applications and she appealed. The court ordered that the property should be held by the parties jointly, on trust, for W's sole use until her remarriage or until she left voluntarily, whichever happened first. Then it should be held on trust for sale and the proceeds divided equally, half of the profits to each. H appealed to the Court of Appeal.

Decision The Court of Appeal dismissed H's appeal, and laid down the following principles: "... It is of primary concern ... that on the breakdown of the marriage the parties should, if possible, each have a roof over his or her head. That is perhaps the most important circumstance to be taken into account

in applying s. 2 of the *Matrimonial Causes Act 1973* when the only available asset is the matrimonial home.

... There is no magic in the fact that there are children to be considered. All it means is that the interest of the children take priority in these cases, so that often there can no be question of sale while the children are young. But the situation that will arise when the children reach the age of 18 requires to be carefully considered. Otherwise a great deal of hardship may be [created] ... by treating it as a rule of thumb. In some cases it is the only way of dealing with the situation. For example, take a husband who has an onerous mortgage round his neck. He may badly need some capital as soon as it is reasonable to give it to him. In such a case a wife who remains in the matrimonial home with the children may have to endure the hardship of giving up the matrimonial home to relieve the husband's hardships. But that is a matter of weighing each individual case on its merits, of weighing up each side's resources and trying to ensure that neither party is rendered homeless."

Comment The Court of Appeal acknowledged that the husband would suffer some hardship, but because of the wife's difficult financial situation, she would be allowed to live in the house until her situation improved or until she died or remarried. The husband would not lose his legal or financial interest in the home. When the house was sold, he would get his half share. The Court weighed up all the competing interests of the parties and made the fairest decision in the circumstances.

In the *Mesher* case, the circumstances were different, so a different decision was made.

CASE *Mesher v Mesher (1980) United Kingdom*[51]

Facts H and W had a child D, and owned their own home, which was in both names on the Certificate of Title. They had been married for 14 years when H left W and D in the matrimonial home, and went to live with CR and her child. He and CR bought a house and put it in their joint names. After the divorce, W and D lived in the former matrimonial home with her new partner, Jones, who had transferred his own house to his former wife. W got an order transferring the former matrimonial home to her and requiring H to pay maintenance for their child. H and W and their new partners had similar incomes. H appealed against the order arguing that the transfer of his half share was unfair.

Decision The Court of Appeal's decision is set out below.

"... Matters are very evenly balanced, and in these circumstances, Counsel for the husband submits that it would be quite wrong to deprive the husband of the substantial asset which his half-interest in the house represents. Indeed he referred us to ... *Wachtel v Wachtel* and suggested that as a result of the observations of Lord Denning ... in that case, there would be something to be said for cutting down the wife's share to one third. But he did not ask for such an order. He was content that this valuable asset should be divided equally.

Counsel for the wife, however, strongly supported the order. She pointed out that after 14 years of marriage, it was the husband who broke it up, as the judge rightly said, and that, despite what this court said in *Wachtel v Wachtel* under the express words of s. 5(1) *Matrimonial Proceedings and Property Act*

1970, conduct is a matter to put into the scales. She points out that owing to the forthcoming marriage between the wife and Mr. Jones, the husband will be absolved from the liability to maintain the wife and that the order ... in respect of the daughter is on the low side.

So far as that last point is concerned, it is obviously open to the wife to apply for an increase in maintenance if the circumstances justify it. But as far as the main problem in concerned, one has to trace a broad approach to the whole case. What is important here is ... that the wife and daughter ... should have a home in which to live rather than ... a large sum of available capital. With that end in view, I have come to the conclusion that counsel's submission for the husband is right ... I would set aside the judge's order so far as concerns the house and substitute instead an order that the house is left by the parties in equal shares on trust for sale but that it is not to be sold until the child of the marriage reaches a specified age or with leave of the court. That ... would be the fairest disposal of this matter. I would allow the appeal accordingly."

Comment The Court allowed the appeal because the financial positions of each of the parties was similar, and therefore it was not right to take away H's half interest in the former matrimonial home. However it was important that W and D should have a home. Clearly, the Court gave first priority to the interests of the child. The custodial parent benefited from being able to live in the matrimonial home, and the noncustodial parent did not lose his interest in it. They could not sell the house until D came of age, but would benefit from it eventually. The *Shahudin Nisha* case was heard in 1992, more than 10 years later. The Fiji court could have applied the *Mesher* principle, with a *caveat* on the Certificate of Title, warning buyers that the court had a special interest in the home and that no person was allowed to buy it.

In the *Martin* and *Mesher* cases, the courts did not blindly apply rules. They accepted that custodial mothers would be greatly helped by being allowed to live in the matrimonial home as part of a maintenance settlement, or instead of maintenance. The father would not lose the matrimonial home as it would still be in his name. When the children became independent, the home could be sold and the profits divided fairly between the husband and wife. The *Martin* and *Mesher* principles require courts to look at individual situations and to take into account individual needs and finances. They require courts to recognise that even if a wife's name is not on the title, she has made, and continues to make, a contribution to the family. These are logical, just and clear principles that all Pacific Island countries should adopt through the common law.

ENFORCEMENT OF MAINTENANCE

A father may be ordered to pay maintenance, but this does not mean that he will pay it, or that he will pay it on time. If he does not, there are enforcement of maintenance procedures that aim to make him pay. However, throughout

our region, the responsibility for enforcing maintenance is left to the recipient. Women have major problems in enforcing arrears of maintenance through the unwieldy and ineffective legal system. They can spend week after week attending court, trying to locate defendants, to file new information, to apply for enforcement warrants and to persuade bailiffs to enforce them.

In theory, the bailiff finds the defaulter and presents him with a maintenance order. However, as some defaulters deliberately avoid payment by changing jobs, addresses and even names, this is very hard to do in any country. In Australia, for example, the sheer size of the country makes defaulters hard to find, while in our region, the major problems are lack of resources and lack of will. For example, only two bailiffs service the entire Greater Suva Peninsula, which has a population of some 200,000. Neither bailiff has an official vehicle. In addition, court registries lack staff and resources.

As Table 10.8 shows, many Fiji women attempt to enforce maintenance orders. Most of these women could relate stories of the courts' inability to enforce orders. Because of the enormous amount of time it takes to deal with enforcement problems, women often must choose between losing their jobs or giving up their fight for maintenance. In 1992, the largest domestic court in Fiji, the Suva Domestic Court, issued 501 warrants for nonpayment and heard 287 maintenance and 179 affiliation cases. Currently of all maintenance orders only about 15% of orders are enforced regularly, 35% are enforced sometimes and the remainder not at all.[52]

Table 10.8 Applications for enforcement of Maintenance Orders, Magistrates' Courts, Fiji

Year	1984	1985	1986	1987	1988	1989	1990	1991	1992
Number of applications	1545	1608	1520	1408	1419	1253	1283	1323	1517

Cook Islands women and courts have similar problems.[53] Children are cared for by the extended family when separation occurs and only when the divorce actually occurs is a maintenance order made. Maintenance orders are very difficult to enforce; women rarely sue for maintenance and if they do they eventually give up trying to enforce the orders.

Western Samoa[54] has the best maintenance legislation framework in our region. The legislation provides for the appointment of a special maintenance officer to recover arrears, and allows a 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: the husband's chattels, land and goods can be sold to pay off arrears. Despite the legislation, many women give up because of the time and energy needed to enforce regular payment. The Maintenance Office's files show a cycle of

nonpayment of maintenance. The court orders a warrant of enforcement to be issued and the father pays. He again defaults and another warrant is issued. The defendant then pays and the cycle continues at considerable cost to all concerned.

In the Vanuatu Efate Island Court,[55] 25% of 170 civil cases filed in 1991 involved complaints for unpaid maintenance. In 1992, the percentage rose to 32% of 121 civil cases. Enforcing maintenance is a very lengthy and tiring process. One order for 1000 *vatu* a week might need repeated warrants, long delays and problems of service, often because the defendant has gone to an outer island to avoid payment. Furthermore, there are not enough sheriffs to enforce warrants. The Public Solicitor's Office complains about the inefficient procedures. Court officials and *KAVAW* agree that families suffer from the current ineffectual enforcement procedures. *KAVAW* says that the Island Courts do very little about maintenance. *KAVAW* clients complain that even where husbands do not maintain their families, they stop their wives from working because they want to control them; local chiefs have warned *KAVAW* to stop complaining to police about domestic violence and maintenance problems.

Unlike other countries, Tonga seems to make a defendant responsible in the legislation. Under Section 12 of the *Maintenance of Deserted Wives Act*, a man's tax allotment can be given to a mother or other custodian if the child's father refuses or neglects to pay maintenance under a court order. However, the court records show no indication of this remedy ever being used. Instead, the main court bailiff[56] reports that every week there are cases of arrears of maintenance. In Nuku'alofa, approximately 50% of orders are regularly disobeyed. The number of warrants of enforcement issued in Nuku'alofa Magistrate's Court rose from seven in 1991 to 19 in 1992. Women have to pay each time they apply for a committal warrant to enforce orders. The process is burdensome, and the most needy women are the ones who have to spend the most time and money enforcing small amounts.

Barriers to enforcement

Before we consider the ways in which payment can be enforced, we will first list and then discuss, some basic difficulties that may delay or prevent enforcement.

- Confusion about the jurisdiction of the courts
- Unemployment (The defendant is unemployed, only casually employed, or lies about being employed.)
- Problems of service (The defendant cannot be found or has left the country.)

Confusion about jurisdictions of courts

Many of the problems about enforcement of maintenance are due to overlapping jurisdictions of two different levels of court. As the following story and cases show, jurisdiction problems can be used very effectively against women, particularly women who know little about the law.

STORY *Neither court knew what had happened in the other*[57]

In the Magistrate's Court, W obtained an interim maintenance order for $3000 per annum. H did not pay it, and got a divorce in the Supreme Court. W did not know about the divorce. When she tried to enforce the interim order, the court ruled against enforcement saying that the order was only an interim order and that it had lapsed and could not be enforced after divorce. By the time W (who was unemployed) gave up trying to make the order permanent, H owed her $19,000. The Supreme Court Judge granting divorce did not ask whether any orders had been made at the Magistrate's Court level and so did not know about the interim order. One level of court did not know or bother to find out what had happened at other levels. W herself did not know that there was a divorce action against her in the Supreme Court, and so had nobody to look after her rights.

CASE *Pridgeon v Pridgeon (1990-1996) Fiji*[58]

Facts and decision W and H had two school age children and matrimonial property worth considerably more than $15,000. When they separated, W began her action in the Domestic Court, which at that time could not hear the case because it involved property worth more than $15,000. (The common law has since ruled that this is now possible.) The case went up to the High Court. The High Court order replaced the Magistrate's Court order regarding maintenance and other matters. W tried to enforce the High Court maintenance order in the High Court. Here she was told that the Domestic Court was the proper Court in which to enforce maintenance orders, and she had to enforce it there. So W brought the case before the Domestic Court Magistrate, who told her that the order was a High Court order and required a writ of contempt (from the High Court) to enforce it. As well, the Magistrate did not make the High Court order, so he could not enforce it.

Comment The Domestic Court refused to accept that W was properly using the warrant procedure to enforce the High Court orders. It said she had to go back to the High Court to enforce maintenance, but the High Court had already told her to go to the Domestic Court. W could not afford the expensive, time-consuming procedures for a writ of contempt of court. She had no money to pay new lawyers, and was not even able to obtain her files from her former lawyer because she could not afford to pay him either. At that stage, she had not received any maintenance for 10 months and was unable to pay the children's dental and school bills. The case dragged on for 6 years.

CASE *Sugar v Sugar (1991) Tonga*[59]

Facts and decision We have referred to this case in other chapters. When he was awarding custody of the children to the mother, the judge said that proper procedures had not been followed.

> "Under Section 19 of the *Divorce Act* (Cap. 29) the court is entitled to make a maintenance order for the parties' children. The court cannot however do that *ex proprio motu* ["off its own bat"] but must be asked to do so in proper form. The correct procedure is set forth in Rule 16 of the *Divorce Rules 1991* and requires a Summons supported by Affidavit ... henceforth the *Divorce Rules* must be followed to the letter."
>
> Strictly speaking, therefore, the judge could not award maintenance for the children. He actually did award maintenance, but said that this was an exception; in future, the procedures must be followed.

In all these cases and, for example, in the case of *Postulka v Postulka*, which we will discuss later in this chapter, the women brought actions in both higher and lower courts, and therefore must have had lawyers or at least some legal advice. But the rulings show that their legal advisers were wrong about technical rules. If legally trained people do not understand the technical rules of law, how can lay people understand them? And how can most magistrates understand them? Most lower court judicial officials are not legally qualified. They receive very little legal training and are certainly not trained to deal with fine points of law on jurisdiction.

Unemployment

Obviously, if a father has no job and no money, he cannot pay maintenance, and probably would not have been ordered to pay it. A loving father who has no money and no work will do his best for his children in any way he can, perhaps by sending them food whenever he can find or afford it. But a father who does not want to provide for his children can use one of the largest loopholes in the law — he can say that he does not earn any money.

Our legislation is modelled on United Kingdom legislation, and therefore assumes that most people are wage-earners. It simply does not provide for subsistence economies. When people work on their own in agriculture and fishing, there is no way of knowing whether they are earning cash and if so, how much. There are no procedures and rules to ensure that defendants can pay in kind, if not in cash.

The law must accommodate Pacific Island economies. If it is difficult for the defendant father to pay cash, he should be allowed to give food and other local products instead. This also could be hard to arrange and to enforce, but it might be less difficult than trying to enforce cash payments. It could provide better nutrition for the children and might be a lesser burden for the State, if only by reducing the load of the overworked bailiffs. The choice of form of payment should be left to the recipient mother, but payment in kind should be one of the choices.

Problems of service

We have just seen that a defendant can claim that he has no job and cannot pay. Now we will consider the problems created if the defendant cannot be found or has left the country.

The legislation requires strict service of all documents. All domestic proceedings require that the defendant be formally presented with all legal documents; every time a defendant defaults, the wife has to take out a warrant against him. The bailiff, or other official, serving the legal documents then has to find the defendant and either arrest him or make him appear in court to answer the wife's application. Every fresh application requires service of documents on the defendant, even if he is a habitual defaulter for whom unsuccessful searches have already been made.

In Tonga under Sections 10 and 11 of the *Maintenance of Deserted Wives Act*, if the court thinks that the defendant is deliberately avoiding service of the summons or warrant of arrest, it can make an order in his absence. The position in Fiji and other countries is different; the court will not proceed with a maintenance case if papers have not been served. The following example shows how important service of legal documents is in the enforcement of maintenance, and how the Women's Crisis Centre in Suva deals with service problems.

STORY *Service problems: the approach of the Women's Crisis Centre, Suva*

The Women's Crisis Centre no longer uses the Domestic Court system to serve notices. Crisis Centre staff have learnt to serve the documents themselves. They have become skilled at finding the defendant by using their extensive contacts in the community. They spring the documents on him in a situation where he cannot escape. They then file an affidavit of service verifying that they have given him the document. If the defendant does not turn up in court on the day stated in the legal document, the wife can proceed to have her case heard. It does not matter if he is not present; in such a situation, even a maintenance order can be varied in the defendant's absence. The court might also order that the defendant should be arrested and imprisoned.

Sometimes women wait for up to two years for service of documents to be completed. The Crisis Centre's policy helps women to provide their children with the basic necessities of life.

A defendant may deliberately leave a job and go to another village to avoid paying maintenance. In Solomon Islands and Fiji, if the defendant changes his address and does not inform the court, he may be fined but this method of punishment is rarely used. Solomon Islands has only three fully operating Public Solicitors' Offices and all are in the main urban areas. Once a defendant is on an outer island, the situation becomes almost hopeless, especially when husband and wife are in different areas.

Service generally has to be done by some person other than the person trying to enforce payment: the mother cannot serve the documents herself. Usually the court bailiff or other official serves. Other people may be used to serve most documents. In Western Samoa, the applicant herself may serve the documents. The argument is that the mother is the only one who knows where the defendant is or has the determination to find out. Courts are prepared to accept her word that she has indeed served the defendant with

the relevant documents. The service of the actual court order is not necessary, and if the defendant is overseas, a magistrate may hear an application without him.[60]

Western Samoa allows service by radio notice: the broadcast notice says that if payment is not made, an arrest warrant will be issued. Using newspapers to serve maintenance notices does not seem to be allowed, even though in most Pacific Islands an applicant may ask the court's permission to serve divorce documents by advertisement in this way. Both methods — radio and newspaper — are obviously useful for both purposes, and women's groups should consider exerting more pressure to get them used.

Absconding debtors

So far we have seen what problems can arise when defendants cannot be found, and we have outlined possible solutions. Now we will go further, and see what happens if a defendant leaves the country without arranging maintenance payments.

In Nauru, if the court thinks that someone is trying to hide or transfer money out of the country or transfer money or property to someone else in order to avoid maintenance, it can undo the transfer or make any order to ensure that court orders about property are met. In our region, the legislation of most countries provides for the enforcement of maintenance if the defendant intends to leave for overseas without paying maintenance or without ensuring that his maintenance will be paid while he is abroad. The following case shows what might happen to an absconding debtor.

CASE *Chiman Lal v Pan Bhai (1978) Fiji*[61]

Facts and decision The Magistrate's Court had ordered H to pay maintenance. When H and W divorced, H tried to leave the country. W had him arrested on a warrant of apprehension.[62] H said that after the divorce he was no longer W's husband, therefore the court had no power to arrest him. The court said that the maintenance order continued after the divorce and therefore the court did have power to arrest H and make him pay maintenance. H was not allowed to leave the country until he had made full arrangements to pay what he owed. He had also to make satisfactory arrangements for future payments.

Some countries allow the court to hold the defendant's passport until he has made satisfactory arrangements to pay maintenance in arrears or to prevent future arrears.

23 ... A judge, magistrate or court may require

(a) any person belonging to Fiji who is in arrears with payments under a maintenance order;

(b) any person belonging to Fiji who is brought before the court under arrest in the course of enforcement of a maintenance order,

> and to deposit his passport, being a Fiji passport, with the court. The passport may be detained until the court is satisfied that suitable arrangements have been made either by the provision of sureties or otherwise for compliance during the absence of such person from Fiji with any maintenance order made or to be made against him.[63]

This means that the Magistrate's Court may keep the passport until arrangements to pay have been made. The defendant might have to pay a lump sum into court so that the mother can collect a specified amount over a specified number of years. The defendant might also be ordered to provide a guarantor who will be made to pay if he fails to pay future maintenance, but courts do not commonly seek to enforce maintenance against a guarantor. Judges are very reluctant to seize a person's passport as they regard this as violating a person's freedom of movement guaranteed in the Constitution. They prefer to rely on inter-country reciprocal arrangements involving the registration of overseas orders to enforce maintenance payments. However, as we will see later, such procedures are almost useless.

Overseas orders

Most Pacific Island countries have reciprocal arrangements for enforcing overseas orders. The legislation in each country enables the courts to recognise and enforce judgements of superior courts in other countries that do the same in return.[64] The procedure requires that a particular judgment be registered locally in the local court and then enforced in the normal way. However, there is no provision to vary such an order although there may be various exceptions for dismissal of those orders. In *Pickering v Pickering (1957) Fiji*[65] the court said that an Australian court order registered in Fiji could be enforced in Fiji. Fiji courts had no power to vary a maintenance order made in Australia but it could be enforced locally under the *Maintenance Orders (Facilities for Enforcement) Ordinance*.

Enforcement of overseas orders both locally and overseas requires the cooperation of all governments concerned. Unfortunately, if the various departments do not have the resources and the will to cooperate, overseas orders are almost impossible to enforce locally and abroad. (A Western Samoan woman was owed arrears of $13,000 but gave up trying to enforce her judgment overseas.)[66] Despite the legislation, therefore, most defendants who go overseas rarely continue to pay maintenance.

What can be done to enforce payment?

The sad truth is therefore that if a defendant has no job and no assets, or cannot be found, whether in his own country or overseas, little can be done to enforce maintenance. Whether he is ordered to do so or not, a father who wants to provide for his family will do what he can; whether he is ordered to do so or not, a father who does not want to provide for his family can find ways of not providing for them. The present system makes mothers angrily

chase the fathers of their children, and makes fathers angrily decide that they do not want to help their families. With these facts in mind, we will now look at what can be done if the defendant has a job or assets and can be found.

There are many solutions (legally called remedies) available to a wife who has been awarded maintenance but whose husband refuses to pay or does not pay. We list them all, and will explain them in detail in the same order. Unfortunately, there are no clear procedures in any country of the region for enforcing maintenance and women adopt a variety of methods to make their husbands pay. Usually, they try a number of alternative methods and hope that at least one will succeed.

- Warrants of enforcement in Magistrates' Courts or any lower court
- Writs of contempt or contempt proceedings in High Courts or other superior courts
- Committal orders for imprisonment (this order may or not follow a warrant of enforcement or a writ of contempt)
- Fines and imprisonment in general without the warrant procedure
- Attachment of earnings orders
- Judgment debtor summons procedures
- Summons to show cause.
- Motions and affidavit by ordinary action.

Warrant of enforcement procedures

The warrant of enforcement procedure is available throughout our region, whether specifically in maintenance legislation or in Magistrates' Court legislation. It is the most common method, and can be quite effective; a surprising number of defendants immediately find the money to pay arrears when they are imprisoned. Only a few defendants (usually those who have lost their jobs) genuinely cannot pay. As an example of what the procedures are, we will summarise and comment on those laid down in Section 27 of the Fiji *Maintenance and Affiliation Act* Cap. 52.

- When a maintenance payment is more than five weeks behind, the magistrate may sign a warrant to bring the defendant before him.

  The court will not do this automatically; the wife or other recipient must apply for the warrant. This is usually a standard warrant form that the wife must fill in, and swear on oath that her complaint is true.

  If the defendant is one week in arrears and the wife can show that the family is suffering extreme hardship, the court may consider issuing a warrant. In practice, court officials in Suva consider enforcement claims only when the defendant is more than five weeks in arrears. Defendants often do not pay until the last day of the six weeks so the family receives maintenance every six weeks.

- A sheriff or bailiff or police officer may arrest the defendant under the warrant and bring him before the court. He will then be given an opportunity to pay and will be set free if he does. If he does not, he has to appear before the magistrate again.

  However, if he is arrested, a defendant is usually allowed to pay only a portion of what is owed on the warrant. For instance, a defendant who owes $500 in total may immediately pay $100 to avoid imprisonment and promise to pay the balance within seven days, but then not do so.

- If the defendant cannot give good reasons for not paying, the magistrate may order his goods and chattels to be sold to recover the maintenance under a warrant of distress.

  A warrant of distress is an order to seize the property of the defaulter to enforce payment of maintenance. The court directs the defendant's goods to be sold in order to pay what is owing. However, courts almost never order that the defendant's goods and chattels be sold to recover a maintenance debt.

- The magistrate may imprison the defendant for not paying, if he does not pay the amount required then, or until his goods are sold and maintenance is paid from the proceeds of the sale. Then the defendant will be released.

- If the defendant's goods cannot be sold or the defendant does not make other arrangements to pay and he cannot give good reasons, the magistrate can put him in prison for up to three months. In 1993, 12% of inmates (91 out of 1089) admitted to prison in Fiji on a given day were admitted under the warrant provision.[67] In 1994 only six defendants spent more than one month in prison.

- If the defendant is imprisoned, he still has to pay even if he serves a full sentence and is released. If however the circumstances are appropriate, the magistrate may write all the arrears off. This means that the magistrate might agree that the defendant no longer pay his arrears, no matter how much he owes. So if a defendant's defence is good enough, he may be allowed not to pay maintenance at all.

How does the Fiji legislation compare to that of other countries in our region? Vanuatu procedures are similar except that the default period is 14 days, not five weeks. Courts may impose larger fines or imprison for six months a parent who does not obey a further order. They may also write off all arrears of a defendant who cannot pay because of hardship or circumstances beyond his control.

Western Samoa[68] procedures are similar to those of Fiji, except that a warrant may be issued after 14 days, when women can take out an "information for failure to pay money". If the defendant does not pay, a warrant for arrest is issued. An additional advantage is that a Registrar may issue a warrant when a magistrate is not available. (In Fiji only a magistrate

may issue a warrant.) Western Samoa police say that there is a high rate of imprisonment for nonpayment and that the police would not hesitate to arrest and imprison. However, only five constables are available for service of all warrants, including those for enforcing maintenance.

Solomon Islands legislation[69] gives a magistrate power to commit a person to prison for default in payment for a term of up to six weeks. The magistrate must be satisfied that the person has the means to pay but is refusing or neglecting to do so. In cases where a recipient has been owed maintenance for many years and has only just applied, the court will enforce only what has been owed for the last 12 months. This practice follows that of most common law countries.

In Tonga, a defendant who fails to pay maintenance within 14 days is guilty of a criminal offence. He is liable to pay a fine of up to $50. If there is no payment, imprisonment of up to six months may be ordered. Imprisonment does not excuse the defendant from paying the arrears. In Nauru,[70] if the defendant father leaves his wife and child without support, the court may seize and sell his goods. A warrant can be issued and the defendant made to serve one day's imprisonment for specific amounts in default. This will not happen if the defendant cannot find employment. The court also has the power to imprison for failure to pay. A defendant cannot be imprisoned a second time for failing to pay that amount for which he was imprisoned for the first time. The Nauru Magistrate and Family Court have power to enforce all orders under to the *Civil Procedure Act 1972*.

In all countries, the end result of a warrant of enforcement procedure is that when a defendant is wilfully and deliberately refusing to pay, the court should issue a committal order for imprisonment.

Committal for contempt of court

A person guilty of contempt of court is a person who has deliberately disobeyed a court order. So a defendant who is ordered to pay maintenance and does not pay may be guilty of contempt of court. Contempt of court proceedings are usually taken out in High Courts or other superior courts of the region. In maintenance cases, it is up to the recipient to apply and ask the High Court to find the defendant in contempt of court.[71] The court may order the defendant's arrest and imprisonment if the wife's application succeeds but the wife has to prove that the defendant deliberately and wilfully disobeyed the order. To get a committal order for imprisonment is very difficult ; the defendant can easily provide excuses for not paying, or show that he did not deliberately disobey the court.

In the first of our two cases, the defendant was imprisoned for contempt of court.

CASE *Teulilo v Teulilo (1991) Tonga*[72]

Facts H owed considerable arrears. The High Court said that if H could not afford to pay, he could have come back and applied for a variation order, but he had chosen not to. H's lawyer argued that imprisonment for nonpayment of maintenance could be used only if H had "wilfully failed to comply with the order".

Decision and comment The High Court said that it would consider imprisonment in the following two situations: that the defendant wilfully failed to pay maintenance, or that there was "insufficient distress" (not enough possessions worth selling) to enable the wife to be paid under an order. If a situation did not fall into one case it might fall into the other. H was imprisoned for contempt of court. He had shown contempt of court by not asking for a variation of maintenance. Most nonpayment cases would be covered by one or both situations, and more courts in the region should use imprisonment as a deterrent to other chronic defaulters.

The second case failed because of the very complicated rules about contempt of court proceedings.

CASE *Postulka v Postulka (1987) Fiji*[73]

Facts H had been ordered to pay W interim maintenance of $200 per month. The order was made under a divorce action, not a maintenance action. H did not pay. W applied under Order 52 of the *High Court Rules* for the committal of H for contempt in disobeying the High Court. W relied on the *High Court Rules* Order 45, which was effectively a Penal Notice. (This means that the information given to H did not include a notice that imprisonment could result if the order was not obeyed. The fact that it was a Penal Notice was left out by mistake.)

Decision The High Court said that the notice was penal in nature with penal consequences (such as imprisonment). The Court was therefore not prepared to use the order of committal procedure for enforcement, when other remedies were available under the *Matrimonial Causes Act*. The Court said also that a Judgment Debtor Summons procedure to enforce maintenance could also be used, under s. 4 of the *Debtors Act*. If reasonable alternatives to imprisonment were available, these alternatives should be adopted. The Court refused to grant the order of committal for H's imprisonment. It told W that she was free to try other means of enforcing maintenance.

Comment Courts do not seem to understand that a woman who needs (and does not get) $200 per month can hardly have the money to seek other means of enforcement. So, after an expensive High Court case, W was told that she had been wrong from the beginning. She was following the wrong procedures. She was asking for the wrong thing. She was applying for a wrong remedy under the wrong statute. Was justice really done? Are such strict rules of procedure appropriate in family law?

If W's maintenance was granted under the matrimonial legislation and not under the maintenance legislation, Section 102 of the *Matrimonial Causes Act* says that maintenance orders shall be enforced under the *Maintenance Prevention of Desertion and Miscellaneous Provisions* Cap. 53. In fact it should

state that the enforcement procedures under the *Maintenance and Affiliation Act* should be adopted. This is a major legislative oversight that needs attention.

This case reveals the problems associated with having several different statutes and several different levels of court covering the problems of families that are breaking down. It shows the desperate need for a single specialised family court. This would save women from going from one court to another trying to enforce their children's maintenance. Finally the case shows that contempt of court procedure is a long costly process inevitably requiring lawyers and the filing of many documents — and in the end, the procedure may not work. It is beyond the reach of most women in all common law countries with similar procedures.

Fines and imprisonment

In Kiribati, Tonga, Vanuatu and Western Samoa, the legislation[74] allows courts to impose fines for nonpayment and/or to imprison defaulters with or without a warrant or writ of contempt procedure. Defendants can be immediately imprisoned for nonpayment, and courts do not have to go through the cumbersome committal process. In Kiribati, failure to pay can bring a fine of $50 or six months imprisonment, in addition to being required to pay off the arrears. In Tonga, defendants may be imprisoned for nonpayment after 14 days. In Vanuatu a defendant may be fined 5,000 *vatu* for failing to maintain after an order is made. In Western Samoa, failure to maintain is a criminal offence, punishable by six months imprisonment. Once a warrant has been issued, a defendant who fails to pay within 14 days may go to prison or be fined 100 *tala*. A defendant who tries to leave Western Samoa may be arrested.

STORY *Western Samoa Maintenance Office*[75]

Maintenance arrears are still a major problem, and there is an unwillingness to punish offenders for nonpayment. In one case, the defendant owed $500, and the magistrate imprisoned him for one month. In another case, the defendant owed $700. He was imprisoned and told to pay $350 by 4 o'clock that afternoon or he would be imprisoned for another four months; he paid $700. But these were rare attempts to use the severity of the law. The legislation to enforce maintenance orders is there, but courts lack the will to use the legislation. Indirect discrimination against women is evident.

Throughout our region, court records suggest that fines and imprisonment are rarely used. In Vanuatu, the 1984 register shows four convictions under the previous laws for failure to maintain a family.[76] The 1992 records show one imprisonment. In Fiji, 12% of those in prison in 1993 were imprisoned for nonpayment of maintenance — a considerable improvement on previous years, where it was almost impossible to obtain a committal order for imprisonment. Most serve one day in prison, and then make arrangements to pay the arrears so that they can get out. Some are chronic defaulters who pay only when arrested. Even for these defaulters,

courts are very reluctant to order imprisonment or sale of the defendant's chattels, but both actions are possible under the legislation.[77]

Courts should have a policy of imprisoning a chronic defaulter for a minimum of seven days for each default. Courts argue, however, that imprisonment will prevent the defendant from earning money and so being able to pay maintenance. Fiji legislation[78] allows night imprisonment, which would enable a man to work during the day, but courts do not use this remedy. One reason is that women do not know what remedies are possible, and do not ask courts to use them. Such problems highlight the need for legal literacy for women.

Attachment of earnings orders

Most countries in our region have legislation[79] allowing courts to make Attachment of Earnings Orders. These aim to avoid enforcement problems by asking the employer to take the sum out of the defendant's salary and send it to the court for payment to the claimant. The claimant does not have a right to an Attachment of Earnings Order. It is issued at the court's total discretion, and all she can do is to ask the court to make the order. If the court agrees, it will serve the notice on the employer, requiring the employer to send the maintenance directly to the court.

Obviously, such orders are useful only when the defendant has formal regular employment. There are few guidelines as to how courts should use their powers of discretion, and again courts seem reluctant to issue such orders. In Fiji, the practice is to order a wages attachment order only after several defaults, provided that the defaulter agrees. On the other hand, Western Samoa, courts can make an *ex parte* order without asking the permission of the defendant or his employer[80] and the Public Solicitor's Office in Solomon Islands always seeks an order after the first default in payment. Its records show that attachment of earnings orders are the only way for women to get regular payments. There are similar problems in Vanuatu and Tonga. The policy should be that the first nonpayment of maintenance automatically entitles the recipient to an attachment order if the defendant is receiving a regular wage or salary.

Other remedies: judgment debtor summons; summons to show cause; motion and affidavit by ordinary action

The judgment debtor summons procedure is available in civil courts to recover any debt and is the ordinary method by which a person owed money under a contract or other arrangement seeks to enforce nonpayment. The High Court in Fiji has suggested this as an alternative method for a mother to collect maintenance.[81] It requires the mother to take out an ordinary writ of summons in a Magistrate's Court or High Court. Mothers claiming maintenance get no priority; they line up with other debtors and a case may take up to three years to be heard.

It is also possible to use ordinary garnishee proceedings to enforce maintenance. Under the garnishee procedure, a person who owes money to the defendant father is made to pay the recipient mother the money she is owed. The father does not get the money; the person who owes it to him pays it direct to the mother of his children. Both procedures are time-consuming, expensive and unfair to the children.

A summons to show cause procedure is more commonly used to apply for a variation of maintenance but has been used in the past to enforce maintenance. In Fiji, there is now a standard form for an application for variation. The method has been used to enforce maintenance if a mother does not wish to anger the father unnecessarily by taking out a warrant against him. Nonpayment under a summons to show cause cannot result in imprisonment. With no means of enforcing payment, it relies on persuasion. A motion and affidavit by ordinary action should really be used only to apply for a change in order in a custody and maintenance order, but it is often an indirect enforcement method. Women sometimes use it to get their complaints before a magistrate again, but it is not very effective.

We have now discussed eight methods of enforcing payment of maintenance. Under the current laws, the two most effective are attachment of earnings orders or imprisonment, but the attachment of earnings order is possible only when the defendant has a regular job. Like imprisonment, it can be applied only when the defaulter has been found.

CONCLUSION: COMMON FEATURES OF LEGISLATION AND PRACTICES

Maintenance laws may be slightly different in each Pacific Island country but they have many common features, based on common social and economic forces and attitudes. All of these influence the ways in which the laws are interpreted; the amount and nature of resources devoted to make them work; the ways in which they are enforced; and finally, their effects on the people whom they should help.

Interpretation and enforcement: attitudes and resources

Maintenance rules and procedures operate to protect those who wish to avoid their responsibilities as parents. The present legal system is based on setting one person against another, and when applied to broken families, it worsens the conflicts and problems that it is supposed to solve. Too often, one parent can use the rules of procedure to punish the other parent; inevitably, the children are those who suffer most.

Further, many court and Government department officers think that women should stay in marriages and that if they leave, they only have themselves to blame. Our story expresses views that many women have heard from such officers.

STORY *Is maintenance a right or a privilege?*

> Why should the law help you get the money that your husband went out to work for? You should be grateful if your husband gives you something for the children. If he doesn't, we have more important things to do than to chase him for you. If you need money, why don't you sell your wedding clothes or jewels? Why don't you go out to work? A wage-earning woman doesn't need maintenance for herself or her children. If you can't earn enough, you should have thought about the children before you left your husband or made him leave you. But look out if we find you with another man!

How women behave (and particularly their sexual behaviour) determines whether they will receive maintenance and how much they will receive. This may be an incorrect interpretation of the legislation, but it is a common legal practice, whether based on law or on tradition.

Such attitudes result in low priority being given to resources for "domestic matters". The low priority delays revision of the many different laws and practices that affect maintenance in particular and family law generally. There is also basic confusion about jurisdiction. If lawyers and judges do not know, or argue about, what laws should be applied, and what courts should hear cases, how can a lay person find a way through the muddle? Courts tend to apply rules of thumb. In particular, they use standard awards with maximum ceilings that bear little relation to the needs of women and children.

Low priorities result also in lack of human and financial resources. Domestic and family courts everywhere in our region suffer from not having enough staff or resources to be efficient. Family cases are delayed, because such matters have the lowest priority. "Family" courts are staffed by the least qualified magistrates, especially in the smaller countries. Family cases cannot compete with, for example, commercial cases with big business and expensive lawyers behind them. Most magistrates and court officials do not have the time and training to deal with family problems.

At present, the Suva Domestic Court staff situation does not permit more than one day for filing court summonses. In other jurisdictions, court staff deal with domestic as well as other matters. In Vanuatu, Solomon Islands and Western Samoa, women have similar difficulties, because courts set aside only one day a week for maintenance matters. At the Suva Domestic Court, only half a day a week (Monday morning) is set aside for filing maintenance claims and for enforcing maintenance orders. The Registry cannot deal with more than 40 claims, so a woman has to be among the first 40 applicants, or return on the following Mondays until she gets into the 40. If the woman has a job, she has to ask for time off, not only to attend court sessions but

also to file claims, summonses, warrants and so on. Employed women may thus risk losing their jobs. Women in rural areas or islands are in an even worse situation because they usually have no access to a court registry, and have to make special trips to the large urban centres.

Even where the legislation is clear and adequate, attitudes and insufficient resources place barriers in the way of women trying to obtain regular maintenance. Of all the complex and difficult processes, the most difficult is enforcing the small amounts of maintenance awarded.

Effects and consequences

Many women do not like having to depend on money given them as maintenance by their husbands when they are separated. They would prefer to earn enough money to take care of their own children. They feel humiliated first by having to obtain maintenance and secondly by constantly having to enforce payment. Childless women rarely apply for maintenance. Women with dependent children seek maintenance only when they do not earn money, or earn such small amounts that they cannot afford to take care of their children themselves. Eventually most women give up trying to enforce payments because of the ineffective and basically hostile system of badly drafted and badly enforced law. Poor women depend on relatives or the state (as in Fiji through Social Welfare Family Assistance Allowances.) Some beg or turn to prostitution. Their children — poorly fed, poorly housed, poorly clothed and poorly educated — have little hope of making a good living for themselves. They grow up depending on relatives or the state, in and out of jail or hospital.

What can be done?

Many of the problems faced by women in our domestic courts would be solved by more training for magistrates and court officials, and by more resources to allow proper enforcement of existing legislation. However, the legislation itself needs to be improved. The laws, court procedures, precedents and judicially imposed practices have combined in a system that operates against poor and working class women.

Other jurisdictions have dealt with the problem of nonpayment of maintenance by making the state responsible for collecting and paying maintenance. In Australia, collection of maintenance is enforced by the Government and is done by deducting maintenance at the taxation level. This could be done in our region, but only where defendants are formally employed and have to file tax returns. However, where the defendant is not formally employed or has casual work, more efficient methods of enforcement must be found.

No country in our region has an adequate social welfare system. At a policy level, Governments and policy planners do not take seriously the connection between discrimination against women and the welfare of their

children. Juvenile delinquency, crime, poor health and dependence on the state are natural consequences of a system that discourages or prevents supporting mothers from taking good care of their children. Early intervention, at a legal and policy level, in the lives of disadvantaged women and children would make it easier for the state in the long run.

Political short-sightedness is evident everywhere in the laws that affect women. Any legislation or common law practice that discriminates against women and children is in breach of Articles 15 and 16 of the United Nations Women's Convention and the Child's Rights Convention, and it is therefore up to women to see that Governments and policy planners correct this short-sightedness.

11

Matrimonial property

WHAT THIS CHAPTER IS ABOUT

In Chapter 3 we discussed land rights, and in Chapters 8 and 10, we discussed divorce and the maintenance of children and married women. In Chapter 11, we will focus on laws about matrimonial property, the property that husband and wife own together. The definition of marriage for the purposes of matrimonial property distribution includes legal marriages and customary marriages. *De facto* marriages are not subject to matrimonial property laws because only legally married women, including women married under custom in Melanesia, may apply for a share of matrimonial property when husband and wife divorce.

Notice that we have said "when husband and wife divorce". Matrimonial property settlements are ancillary to divorce proceedings: an application for settlement or distribution of matrimonial property may be sought only as part of a divorce application. A separated husband and wife have to get a divorce if they want a settlement of matrimonial property. Further, if a spouse does not succeed in obtaining a divorce, or if an application for matrimonial property settlement is not made as part of an application for divorce, the court will not order a matrimonial property settlement.[1]

In this chapter, we will first try to answer some questions about matrimonial property. Then we will look at the legislation in our region, and discuss some of the problems associated with court powers and procedures. A particular problem is the meaning of contribution when applied to the unpaid work women do, and we will see how courts have approached this problem. We will conclude with discussions of legislation designed to come closer to the United Nations Women's Convention requirement that member states "eliminate discrimination against women in all matters relating to marriage" and ensure "the same rights for both spouses in respect of the ownership, management, administration, enjoyment and disposition of property".[2]

QUESTIONS ABOUT MATRIMONIAL PROPERTY

In this section we will discuss some basic questions about matrimonial property: what it is, what it is not, what legal papers are necessary to prove possession, the position of squatters, and what happens when property is divided between husband and wife. We will begin by defining matrimonial property.

What is matrimonial property? What is separate property?

When a couple divorce, whatever is classified as matrimonial property may be divided or shared. Whatever is separate property may kept by the owner. The decision about what is matrimonial property and what is separate property is one of the first and most important decisions that the couple should make.

Matrimonial property is all property acquired, bought, accumulated, won or gained after marriage by both husband and wife together, or by either the husband or the wife. This has to be divided between them after they divorce, and should include all items listed below.

- The matrimonial home owned by the family, and the land upon which the home is built, unless it is on custom land
- Paintings and objects of art
- Linen (sheets, towels etc.)
- Kitchen items and electrical appliances
- Car or other means of transport (for example a fishing boat)
- Farm: land; buildings; animals; implements
- Other houses and equipment
- The remainder of a lease
- A business, whether owned separately or together
- All income in wages, salaries or other benefits
- Insurance policies on persons or property
- Pension or provident funds
- Investments or shares in a company

- Gifts received by one or both spouses, and considered to be owned by both
- Property purchased with matrimonial property for the use and benefit of both spouses
- Joint or sole debts for the use and benefit of either or both spouses. Any debt will be the joint responsibility of both parties if they divorce.

Separate property is all property other than matrimonial property and includes most property that a spouse owned before marriage; gifts that one spouse received during marriage, and inherited property generally acknowledged to be the inheritance of one spouse.

The position of inherited property, and of property acquired before marriage, is not clear in our region. One Fiji judgment appears to suggest that inheritances fall outside the definition of matrimonial property[3], and as we will see, the Vanuatu High Court has also attempted to decide whether property bought before the marriage becomes matrimonial property after marriage.

CASE *Fisher v Fisher (1991) Vanuatu*[4]

Facts We have already discussed this case, and here will focus on the matrimonial property issues. H filed for divorce on the grounds of W's adultery. The adultery was not contested, but the other issues were discussed first in the Supreme Court and then in the Court of Appeal. In the Supreme Court the value of the majority of the matrimonial property was agreed and each party was given half. However, the parties could not agree on a United Kingdom property that H had bought before the marriage. W said she was entitled also to half of this property, the final mortgage payment of which had been made during the marriage. H said that he had bought the house well before the marriage. He argued that matrimonial property was all property bought or acquired after marriage. Therefore the house was separate property and could not be subjected to division between H and W.

Issue and decision The property had been bought before marriage but finally paid off after the marriage. Was it matrimonial property or separate property? The Court of Appeal said that normally property bought before marriage was separate property. However W and H had both worked together for the mortgage payment that finally paid off the house. Therefore the increase in value since marriage should be taken into account. W would not get half the total value of the house, but she was entitled at least to half of the increase in value since the marriage. As there was no way of knowing what the exact increase was, H had to pay W half the value of the final mortgage payment.

Comment Suppose that a woman who is in paid work marries and lives in a home owned by her husband before marriage. She may be entitled to a share of the increase in value of the property. For example, if she has contributed to extensions or to maintenance of the home, she could get a share of the value of the extensions and maintenance on the property. Another interesting aspect of this case is that the Court of Appeal said that Vanuatu Magistrates' and Island Courts had no authority to deal with any contested or defended matrimonial cases.

It is not clear whether gifts made by a husband to a wife or vice versa would be considered as matrimonial property and therefore subject to division between the parties. In the *Fisher v Fisher* case above, the Supreme Court said that items like watches and jewellery were "personal gifts" and were to be considered as separate property.

What is a Certificate of Title?

A Certificate of Title is the legal document that contains the names of all parties who have an interest in a property. It proves ownership and other interests. The following list shows what it might cover.

- The present legal owner/s
- The previous legal owner/s
- The mortgagee (the lending body whether person, bank or other institution) to whom the owner owes money
- Any other person or body who might have an interest in the property
- Any *caveats* (warnings)
- Any other encumbrances (things that might affect the sale, including easements, restrictive covenants and leases.)

The original copy of the Certificate of Title is usually kept in the national Land Registry office. If the owner does not owe any money on the property, he or she should have a duplicate copy, and should keep it in a safe place. If the owner does owe money on the property, the mortgagee keeps the Certificate until the debt is fully paid. When the debt is fully paid, the lending body informs the Land Registry by registering a discharge that clears the mortgage. The Registry notes this on the original Certificate of Title and returns a copy of the updated Certificate to the owner as proof that the debt is discharged.

This should happen automatically, but an owner who pays off a debt should follow it up as soon as possible with the mortgagee and Land Registry in order to make sure that the title is cleared. One reason for following it up is that when the Certificate of Title is clear of any claim, the property may be bought and sold. If it is not clear, the owner may not legally be able to sell it. This is why anybody who wants to buy a property should search the Certificate of Title at the Land Registry before making any agreement.

In matrimonial property, problems arise when the Certificate of Title identifies one spouse (usually the husband) as the legal owner. Unless the wife can have a *caveat* placed on the title to warn potential buyers that she has an interest in the property, the husband can sell it without giving her a share. We will discuss this very serious problem later. In the meantime, we stress that wives should always make sure that their names are on the Certificate of Title, or on any documents to do with their homes and other properties. If a wife works at home, and not in a paid job, she should be particularly careful to do this, or she may end up with no money and no home.

In Fiji, no legislation or Government policy requires a matrimonial home to be registered in the names of husband and wife. The Housing Authority does not require names of both husband and wife to be on the documents showing ownership, unless both are paying part of the mortgage from automatic salary deductions. The same is true of other housing finance institutions and banks in our region. All institutions require only the husband's name on the title unless the wife is also paying off the mortgage, or unless the husband insists on including his wife's name.

It is true that sharing ownership makes women liable to debts. However in the long run, it is better that women share responsibilities in all ways, including responsibility for debts, in order to improve their rights to land and property in general. At present, women have responsibility for domestic work, thus freeing their husbands for paid work. Most women are not paid for their work; most women are not registered with their husbands as legal owners of their homes and therefore do not have title to their homes.

Pacific Island governments need to develop policy guidelines for all public-funded home ownership schemes to follow. Both spouses' names must appear on documents of debt and ownership. Recommendations to private commercial banks along similar lines would also create awareness among lending institutions about wives' rights to matrimonial property.

What happens when the couple do not have title to the property?

Matrimonial property laws apply mainly to women who own or rent property in urban communities and who have rights in non-custom land or leased custom land. If a couple have not finished paying for the property, they do not hold the Certificate of Title, but the property is treated as matrimonial property. If they rent the property, it is not matrimonial property. We will discuss separately the very complex question of the matrimonial property rights of women living under custom or on a custom title.

Squatter land

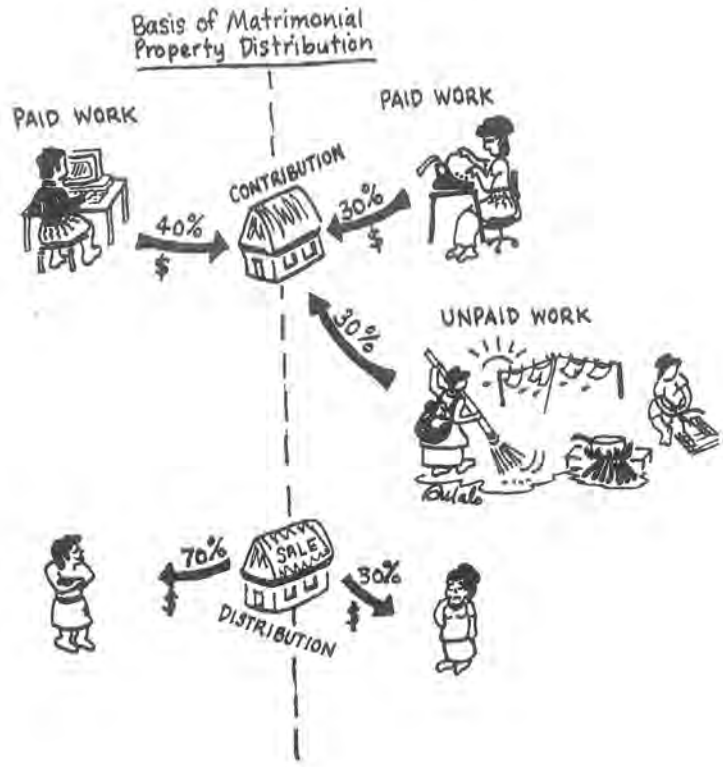
If the couple are squatting on the property, their legal position is simple: squatters (men, women or children) have no rights at all to the land on which they are squatting, or to their buildings on squatter land. The owner of the land can evict squatters at any time. Thus the large numbers of squatter women, if turned out of their homes, will get no help from the law. Many Indo-Fijian women, for example, contribute to the building of their homes by providing "tin and lakri" (metal and wood.) If the house is on squatter land and they are thrown out, or have to leave, they cannot undertake matrimonial property litigation because their possession of the land is illegal.

In this case, a wife might take out a civil case against her husband for a share of the house built on the land. She must do this in a civil court, not a family court, and she would have to prove the value of her financial contribution to the dwelling. This would most likely be based on proving the costs of the materials used to build the house. The ordinary law would then apply, based on actual ownership. A wife would be entitled only to the items for which she paid, or to her share based on her actual contribution. She may legally be entitled to get back her contribution to building the house, but her share may not be enough to be worth the time, trouble and expenses of the civil court case. Nevertheless, it is still worth keeping records of everything bought for the building of the house: receipts for iron, wood, glass or other materials may entitle a wife to the return of the same items or to the value of the items. Even if they are not worth a court case, the wife's legal adviser might point out to the husband that she has the records and could take him to court if necessary. This might help persuade him to pay her a share of the value.

What happens in a settlement of property?

Distribution of matrimonial property does not necessarily mean that the house will be split down the middle or that one party will get the house, the other the car and so on. Each case has to be decided on its own individual set of facts, because each family's circumstances are different. However the following list of steps may be useful.

- The court, or the parties, make an assessment based on expert evidence, by for example a valuer, accountant or real estate agent.
- The value of the assets is assessed separately or in groups (e.g. home, kitchen items, furniture) and in total.
- The parties are given an opportunity to divide things according to the percentage share allocated by agreement between them or by the court. For example, the parties or judge may decide that 70% of the property should go to the husband and 30% to the wife. Then the parties can decide together who will get what to make up the share.



- If one party has spare money or can arrange to borrow money from the bank, the court may give him or her the opportunity to buy the other out, especially in regard to the home. (We will look at other options when discussing the possession of the home.)
- If the parties cannot decide how the assets are to be divided, the assets will be sold. The husband and wife will use the agreement about their share to divide up the net proceeds after all debts are paid.

MATRIMONIAL PROPERTY IN CUSTOM MARRIAGES

We have said that women married under custom may apply for a share of matrimonial property upon divorce. We will now consider the matrimonial property rights of women on customary land. (Before looking at this, you may wish to return to Chapter 3, which deals with land rights of women in general.)

Custom land

Matrimonial property laws apply mainly to women who live in towns or who have rights in non-custom land or leased custom land. This includes both freehold land and long term leaseholds of custom land. Therefore a divorce may involve disputes about who owns freehold land or who owns the lease on custom land. Obviously, neither men nor women on squatter land, or on custom land not belonging to their clan, have rights to the land upon which they live. They may however share rights to the matrimonial home; we will discuss this in the section dealing with the meaning of "contribution" in relation to the matrimonial home.

Most Pacific citizens do not own land, whether freehold or custom, but many do have some customary rights. Custom land cannot be alienated in any Pacific Island country; it cannot be permanently given away or transferred, and cannot generally be sold, although Melanesian countries may permit custom sales to other custom land-holders. Custom land may, however, be leased, and people may buy and own leasehold rights for many years.

Countries in our region apply similar common law principles to assets and to land that can be alienated. For example, the bigger jurisdictions like Fiji, Western Samoa, Solomon Islands and Vanuatu have both custom land and freehold land, and their matrimonial property laws apply to freehold land and to leases of custom or crown land.

In the smaller countries, all land is custom land and there is little legislation relating to matrimonial property. Kiribati and Tuvalu, for example, have no matrimonial property legislation, so the only legal way open to women is to apply for a share under the constructive trust principle, which we will discuss later. All land is owned under custom and is distributed according to the land code legislation, so the issue of land as matrimonial property does not arise. Since all land is dealt with in accordance with custom, there is no question of division of land upon divorce as it is assumed that the a wife will return to her father's family. In Tuvalu, if she returns to her family, the wife still has the right (in theory) to use her family's *kaitasi* land.

In Kiribati the only legislative provision for division of matrimonial property of any sort is contained in the *Gilbert and Phoenix Islands Lands Code* of the *Native Lands Act*, Cap. 61 . This concerns ownership of pits and ponds for agriculture or fishing. If a married couple dig a pit or pond on the land of the husband or the husband's family and the couple have no children or are divorced, it will pass to the husband or his family. The same will apply in the case of the wife's land or the land of her family. If a married couple dig a pit or pond on the land of a person other than a member of their families and the couple have no children or are divorced, the property will be shared between the husband and wife, or their families upon death. These rules apply in three islands only.

If Kiribati women do have land, it is usually their own inherited land. Custom in Kiribati usually dictates that if a husband dies and the wife does not have children, she will be too "shy" to live on that land with her husband's

relatives and will usually return to her parents' land. Where the law requires documents (such as a Certificate of Title) as evidence of land ownership, husbands rarely include their wives' names. Women in the Line Islands in Kiribati have worked together to attempt to get husbands to do this, but we have little information about whether the move has been successful[5].

Land in Nauru is passed on by customary law and is protected by statute. The legislation does not refer to the issue of matrimonial property. The *Maintenance Ordinance 1959*, s. 17, however, provides for an interesting Protection Order, allowing a deserted wife to make an *ex parte* application for a Protection Order. This does not require the court to serve the notice of hearing on the husband, and he does not have to appear in court and defend himself against the application for the order. The order protects a woman's property from being taken by her husband and/or his creditors, provided that the desertion was without reasonable cause. If the woman did not give her husband reasonable grounds to leave, she can seek a protection order for her property. If the property is taken despite the order, the wife may sue her husband or his creditors or agents for twice the value of the property. She will not get the actual land back, only the award, if it can be enforced. Although the legislation looks helpful, it cannot order that a woman's land be returned to her. It also gives women the responsibility, and therefore the financial burden, of taking the matter to court to enforce it.

We will discuss later the development in Tonga of the common law on constructive trusts in matrimonial property. However, Tongan courts cannot award women the actual land in making a division of property. They are limited to ordering lump sum settlements, equal to a wife's contribution based on the constructive trust principle.

The *Cook Islands Matrimonial Property Act 1992* makes the *New Zealand Matrimonial Property Act 1976* apply, with some exceptions, to Cook Islands. One exception recognises customary rights to land: native freehold land cannot be regarded as matrimonial property since the land itself cannot be divided or alienated (sold, bought or permanently given away). Customary entitlements do not become matrimonial property. However, if one spouse holds the native title the value of the house is assessed and an equitable (usually half) sum of money given to the other spouse. According to Section 4 of the 1992 Act, if the matrimonial property includes native land, the judge may compensate one spouse to the extent that he or she has been disadvantaged by the fact that native land cannot be divided or alienated. The *Cook Islands Matrimonial Property Act 1992* and the *New Zealand Matrimonial Property Act 1976* have many interesting features that could be a model for revised legislation in other Pacific Islands. We will examine both Acts more closely when concluding this chapter.

Custom valuables and other assets

So far we have looked only at the land aspects of matrimonial property under custom. In Fiji, English common law principles apply to other assets

as listed in our general definition of matrimonial property. Kiribati and Tuvalu have no record of litigation on this issue. Obviously, most arguments about these would be held in custom courts, but we have one Solomon Islands case where the Chief Magistrate had to consider what to do with custom valuables claimed by a widow. In discussing this case in Chapter 9, we studied the decision regarding the custody of the children taken by her husband's brothers. Here we will consider only the matrimonial property aspects.

CASE *Sasango v Beliga (1985) Solomon Islands*[6]

Summary of facts When H died, his brothers took the children and certain custom valuables including pigs, shell money and porpoise teeth. W had not agreed to this; she applied for custody of her children and the return of the property. The brothers argued that they had paid bride price for W according to Malaita custom so the children and the property passed to them when their brother died.

Decision and comment As far as the property was concerned, the Chief Magistrate said that he could give a decision only about the property that was disputed. Custom was important and was to be given effect according to the Constitution, but it had to be proved as evidence; it was not possible to say that a certain practice was regarded as custom without proof. W had given her evidence clearly and truthfully, and on the basis of credibility he would give her the disputed custom property (except the pigs, which had died.)

The Chief Magistrate focused on the need for formal proof of statements about custom. This is important, as it means that a woman might be able to produce evidence that a statement about custom is not necessarily true in a particular context. On the other hand, the Chief Magistrate did not consider the general question of matrimonial property. He looked only at the disputed custom valuables; the decision itself was just, but as it did not apply the principles of just distribution, it has limited precedent value.

THE COURTS: LEGISLATION, HISTORY AND JURISDICTION

Throughout our region, except in Cook Islands, the law is that when couples divorce, matrimonial property will be divided according to the constructive trust principle (which we will discuss in detail later) or to very general principles of what is just and equitable. Sometimes the principle of sharing is in the legislation, but most of the legal principles applied are common law rules that local jurisdictions have inherited through case law. Where this is true, constructive trust principles will be applied.

Legislation

Fiji's legislation is an example of legislation that obviously anticipates the sharing of matrimonial property between spouses upon divorce. Section 86 of the *Matrimonial Causes Act*, Cap. 51 says:

> 86.-(1) The court **may**, in proceedings under this Act, by order, require the parties to the marriage, or either of them, to make for the benefit of all or any of the parties to, and their children of, the marriage, such a **settlement of property**, to which the parties are, or either of them is, **entitled** (whether in possession or reversion) as **the court considers just and equitable** in the circumstances of the case. (Our emphasis added.)

So, under very broad principles of justice and equity, courts may order a division of property between spouses for the benefit of all members of the family. However, the legislation does not contain any guidelines on what "entitled" means, so the courts have developed common law about what proportion of property should be settled on the parties. In the landmark case of *Pratima Devi v Rajeshwar Singh (1985) Fiji* [7] we see the decision that the High Court did have powers to order a division of matrimonial property upon divorce. The Court said it had clear powers to make a division of matrimonial property, both under the constructive trust principle and under the broad powers given it under Section 86. Courts may use this provision together with Sections 84, 85 and 87 of the *Matrimonial Causes Act*, which gives them wide powers to make orders for a division of matrimonial property together with lump sum payments in lieu of matrimonial property.

> 84 —(1) Subject to the provisions of this section, the court may, in any matter or cause in which application has been made with respect to the maintenance of a party to a marriage, or of children of the marriage ... and all other relevant circumstances.
>
> (2) Subject to this section and to the rules, the court may, in proceedings for an order for the maintenance of a party to a marriage, or of children of the marriage, pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.
>
> 85 —(1) In proceedings in which application has been made with respect to the custody, guardianship, welfare, advancement or education of children of a marriage-
>
> (a) the court shall regard the interest of the children as the paramount consideration; and
>
> (b) subject to paragraph (a) the court may make such order in respect of those matters as it thinks proper.

87 —(1) [The court in exercising its powers under this Part, may do any or all of the following]:-

(a) order that a lump sum or a weekly, monthly, yearly or other periodic sum be paid ...

(d) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order ...

(h) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a like or during joint lives or until further order;

(i) conditions;

(l) make any other order which it considers necessary to make to do justice.

So when the husband and wife are divorcing, courts have considerable discretion and freedom. Their powers include those listed below.

To investigate all the assets that the parties own either together or separately.

- To decide who will have custody of the children.
- To decide who will benefit from making an order about property.
- To decide what each party has a right to have.
- To order any deed to be executed or signed.
- To distribute the property between the two parties, depending on what it thinks is wise and fair.

But

- This does not mean that a court must distribute property, the court must decide for itself whether it is wise and fair to do so.

Tongan legislation is different and provides that, when a marriage is dissolved, each spouse may keep his or her own property.[8] This provision sounds fair but effectively prevents any case for matrimonial property by women, since land is held by men. However, an amendment[9] to the legislation indicates a change allowing a lump sum to be paid to either party. This amendment is more relevant to the question of maintenance, but it has been used to make settlements of matrimonial property under the constructive trust principle.

The history of matrimonial property in common law

Underlying matrimonial property legislation, court procedures and practices is the attitude that women and children are the property of their husbands or fathers. This attitude is clear in most customary law, and, as we will now see, has operated also throughout the history of matrimonial property in common law.

Ownership of land became important when marriage became legal, instead of being required only by the church. Under common law, when a woman married she lost any right to own property. She did not even have the right to keep any money. Money and property belonged legally to her husband, even after separation or divorce. You may remember the story of Lady Caroline Norton,[10] whose marriage brought her husband an immense amount of property and wealth. She bore him three children, and when she left him in the early 1830s, she lost her children, her money and her property. She and a group of influential friends began campaigning against unjust custody and property laws. However, it was not until the late 19th century that laws began to be passed to allow women to keep, hold and own property in their own right.

In common law countries, there was much opposition to the passing of such legislation, usually called the *Married Women's Property Act*. Parliamentarians argued that granting women property rights would upset the natural order of things. An Australian parliamentarian said that giving wives economic independence "might have the effect ... of severing the ties of affection between the husband and wife by giving to the wife a position of independence apart from her husband". Another view was that this sort of power should not be given to women, because generally they did not have the education to control money.[11]

The legislation of all countries of our region except Tonga grants all citizens equal rights to own property. In Fiji, the *Married Women's Property Act*, Cap. 37 was passed to grant married women the right to own property in their own right, and this is supported by the *Matrimonial Causes Act*, Cap. 51. However, the passing of such legislation does not help women in our region much as far as matrimonial property is concerned. The access of women to property other than that defined as separate property has not really improved, and, as we have seen in Chapter 3, the legislation in Tonga is openly discriminatory. Throughout the region, legislation and precedent allow courts considerable discretion in deciding what is "just and equitable in the circumstances" for both husband and wife, but courts tend to continue to interpret the legislation against the interests of women.

Jurisdiction: the powers of the courts

For many Pacific Island women, the only relevant court is a custom gathering or the Local or Island Court, controlled by a male village chief or Justice of the Peace without any formal legal training. The chief or Justice of the Peace usually knows the people involved and applies custom principles regarding property. When a husband and wife separate, the rules governing who gets the children or the chattels depend on what the customary rules are, and how the court feels about the people involved. Land is rarely an issue; it is governed by customary rules and inheritance rights over which marriage has little influence. If a woman moved to her husband's village upon marriage, she would most likely return to her own village upon divorce;

whether she takes her children or chattels with her depends not only on the customs of the area but also on the attitudes of the village justice or elder.

Very few Melanesian women seem to respect the administration of justice in such courts. Most do not even try to get any matrimonial property; they concentrate all their energies on obtaining custody; if they do obtain custody their next priority is obtaining maintenance.

What about women who do have access to formal courts? In Vanuatu, Magistrates' Courts may not consider settlements for property worth more than one million *vatu* (roughly $10000 in most of our currencies.) Such cases must be heard in the Supreme Court. Further, as we have seen in the case of *Fisher v Fisher*, Magistrates' and Island Courts do not have any jurisdiction over disputed matrimonial property cases; they may deal only with cases where husband and wife have come to an agreement, and the courts have only to record the terms of the agreement.

Most countries limit matrimonial property disputes to the superior courts, for example the High Court. The main reason for this is that many lower court magistrates do not have sufficient legal training to make decisions about matrimonial property more complicated than a home and chattels. Disputes involving companies, businesses, overseas assets, shares and investments in other companies and so on may be extremely complicated, and thus belong in the High Courts.

Higher level Magistrates' Courts (for example the Senior or Chief Magistrate's Courts) may hear disputes on property amounting in value to between $5000 and $15,000 depending on the country concerned. So if a matrimonial home with other assets is worth more than, for example, $15,000, the lower court may not arbitrate over the matter. The case has to go to the High Court. In Fiji, the jurisdiction of the Domestic Court (equivalent to a Magistrate's Court) used to be limited to F$15,000 and any claims beyond this had to proceed to the High Court. This meant that if the total worth of the matrimonial property being disputed was more than $15,000 the case had to be dealt with by the High Court, not the Domestic or Magistrate's Court.[12] However, in May 1995, the Fiji High Court in Labasa ruled that Magistrates' Courts do have power to hear matrimonial property disputes whatever the value of the property. [13]

Advantages and disadvantages of Magistrates' Courts

Advantages

- Most women live closer to a Magistrate's Court than to a High Court
- Most women cannot afford the court and legal costs of challenging an unjust distribution of matrimonial property in the lower courts, let alone in the superior courts.
- High Court proceedings require filing of complex legal documents; hearings are preceded by various smaller hearings dealing with various technical issues. The needs of poor women and children often get lost in legal battles about technicalities.

- It may take a long time to get a case heard in a Magistrate's Court but it takes even longer in a High Court, where priority is given to commercial matters.

Disadvantages

A magistrate without legal training cannot cope with complex cases. He may not be able to deal with cases concerning women who do not have simple clear cut claims to matrimonial property, for example where a woman who does not earn an income or where the husband's property is hidden in companies and other investments.

Summary

In smaller jurisdictions, until magistrates have legal training, complex matrimonial property cases are best heard in superior courts.

Jurisdiction laws limit the already limited ability of women to obtain a fair share of matrimonial property. Matrimonial property disputes may be dealt with by untrained magistrates, or by judges and magistrates who may be trained in legal complexities, but have little understanding of the human tragedy that surrounds a divorcing family, nor of the fact that the longer the parents dispute, the more the children suffer. The real problem is that neither type of court is a good place in which to sort out family disputes. We need a Family Court with special jurisdiction tied neither to the Magistrate's Court nor to the High Court. Matrimonial property disputes should be heard at the same time as disputes over divorce, custody and maintenance so that the court has an overall picture of the effect of a particular decision on the divorcing family. It is equally important to have specially trained judges who understand both legal complexities and the social consequences of their decisions.

THE COURTS: PRACTICES AND PROCEDURES

We have identified some of the problems caused by trying to make family cases fit within the jurisdiction of existing courts. Now we will look at problems caused by the legislation itself, or by court practices and procedures. These will be discussed under the following headings.

- Proceedings ancillary to a matrimonial cause
- Procedural and technical problems
- *Caveats* and the matrimonial home
- Access to chattels

- Disposal of property and orders regarding overseas property
- Discovery of documents and access to corporate property

Proceedings ancillary to a matrimonial cause

The law says that matrimonial property proceedings are an ancillary (additional or secondary) matter to a matrimonial cause.[14] Therefore they depend on the success or failure of a divorce action. We summarise below the application of the ancillary rule to matrimonial property.

- An application of matrimonial property may not be brought in court without an application for divorce.
- The application will be considered only if the application for divorce is successful.
- The application will be considered only after husband and wife have separated.

The following case and story show why this is one of the most difficult procedural rules to overcome in all courts of our region,.

CASE *Mohammed Farouk v Shahnaaz Begum (1986) Fiji*[15]

Decision and comment In this case the court said and accepted that "counsel for both parties agree that Section 89 of the *Matrimonial Causes Act* precludes the magistrate from making an order under s. 86 as the petition has been dismissed". So if an application for divorce has been rejected, the court will not order a matrimonial property settlement. Husband and wife must therefore succeed in getting a divorce if they want a division of matrimonial property.

In a further complication of the rule, the Fiji High Court has stated that an application for matrimonial property may not be sought in Fiji unless the divorce hearing has also taken place in Fiji.[16] The following story has been invented, but it shows what could happen to any of the many Fiji citizens who have migrated overseas, or who have married foreign spouses.

STORY *Lila and Mohan*

Lila and Mohan migrated to Australia with their three children, and rented out their matrimonial home in Fiji. Lila and the children are dependent on Mohan. When they divorce, Mohan is making enough money to keep one household but not enough to keep two. Neither Lila nor Mohan can seek a distribution of matrimonial property in Fiji, because they were not divorced in Fiji. So one of them has to get a divorce all over again in Fiji, or apply in Australia for matrimonial property distribution, and then try and enforce that judgment in Fiji. But how does a court in Australia assess the value of property in Fiji? This rule wastes the time, energy and money of the spouses and the courts. If the couple have children, the children will suffer too.

The ancillary rule in general creates enormous hardship for women and children, particularly in countries where fault has to be proved to obtain a divorce. Some women have to wait years before applying for no fault divorce. Many court cases take from three to six years to be completed and if there is an appeal, it may take longer still before the parties get any benefit from the property. The road to hearing is often complicated by delays, interim hearings, and technical problems. In the meantime, children lose the benefit of the matrimonial property and sometimes do not have a stable home during their vital growing years.

Procedural and technical problems

As we have already seen, in many areas relating to women, children and the family, judges and magistrates have wide general powers to make decisions. They often do not use these powers, sometimes because they do not know that they have them, and sometimes because they do not want to use them. In these areas, specific legislation would be useful. One such area is matrimonial property, which we now discuss.

Caveats and the matrimonial home

We discussed *caveats* in detail in Chapter 10. You may like to refer to it, and particularly to the *Shahudin Nisha* case[17] for its discussion of the difficulty of protecting a wife's rights to the matrimonial home when she is trying to prevent the home from being sold before the case is decided. She may do this is by having a *caveat* placed on the title to the matrimonial home, thus warning a potential buyer that someone else already has an interest in the property and that the property cannot be sold. However, as we saw in the *Shahudin Nisha* case, a *caveat* protects the property for a certain period only, and must continually be renewed. Another difficulty is that a wife could apply to have a *caveat* placed on the title, but so could any other person with a financial interest in the home, for example, a bank or money-lender who is owed money for the home and holds the mortgage. What do the courts say about this situation?

CASE *ANZ Bank v Oline Maharaj (1983) Fiji*[18]

Facts W was seeking a divorce from H, and the action included maintenance and a matrimonial property settlement. The ANZ Bank had a mortgage over the property. In order to prevent the matrimonial home from being sold during the matrimonial property hearing, W had placed a *caveat* on the Certificate of Title. She had also obtained an injunction to prevent H or his agents from selling the home, and an order preventing the Registrar of Titles from removing the *caveat* from the title to the property. As long as the *caveat* remained on the title, it would act as a warning to a potential buyer that W had an interest in the property. It was very important for the *caveat* to remain on the title indefinitely, or at least until a court decision about the rights of H and W to the matrimonial home. If the *caveat* lapsed, the bank could sell the

home to recover the money owed them. The ANZ Bank applied to the Court of Appeal to remove the *caveat* that W had placed on the title, so it could sell the house and recover the money owed to them.

Decision and comment For technical reasons not concerned with W's rights, the Court denied the Bank's application, and said that the *caveat* would remain until a full hearing determined H's share, W's share and the Bank's rights. This case shows how important it is for women to learn about and understand the technical and procedural problems they may face in protecting their rights to matrimonial property. It shows also the difficulties they face in protecting their rights to land against other debtors before a matrimonial property hearing.

New legislation is required so that *caveats* attached to disputed matrimonial property can be renewed easily, but be removed only by a High Court order. The Registrar of Titles must automatically become a nominal party to all proceedings involving matrimonial property, in order to know about disputes. This would give a spouse no opportunity to sell the property to someone who knows nothing about the dispute. United Kingdom law automatically creates the wife's right of possession to the matrimonial home. This is a registerable charge on a Certificate of Title; a wife can register her name on the title as a special charge to protect her interests.

Access to chattels

Often, when women and children leave the matrimonial home, they leave in a crisis, sometimes with only the clothes they are wearing, and do not stop to take any belongings. However, no country in our region has specific legislation giving women urgent access to their clothes, chattels and other personal belongings. Magistrates are usually unwilling to exercise any of their wide powers to order a husband to give his estranged wife her belongings. Usually the magistrate tries to persuade the husband to do this, but if the husband does not want to, the wife will have to take him to court. Specific legislation is needed to give courts clear powers to make urgent orders.

Disposal of property and orders regarding overseas property

There are few directions as to how local property is to be sold and the proceeds divided when the court has made an order. Every step requires negotiation and directions by courts that apply the ordinary laws of civil procedure, and the practices and procedures of enforcement of court orders. This increases the financial and other burdens for all parties, but is particularly difficult for poor women and children. For overseas property, courts have limited ability to make orders, and are highly unlikely to attempt to do so.

Discovery of documents and access to corporate property

An order of discovery is an order obliging a person to give the court, or parties to a dispute, access to all documents relating to a case. Orders of discovery have to go through the normal civil law, which is time-consuming, costly and subject to numerous delays. Courts lack power to order discovery of documents relating to hidden property; they do not have direct powers to uncover the assets or property under company names and titles, and to include such property as matrimonial property. If they cannot get a true picture of the total value of assets, they cannot make a fair division of the total property. To illustrate problems of discovery and access to overseas and corporate property, we describe a case in which the wife gave up because of the obstacles put in her way by "the system".

CASE *Discovery and access to overseas property (1990) Fiji*[19]

After her divorce, W applied for a share of the matrimonial property. W and H had shares in a business, and had property overseas. Some shares had been in W's name, but H had (unlawfully) transferred them to his name. W had no documents proving her ownership of the shares and contribution to the business, because H had paid all the professionals servicing the business. The court was reluctant to order discovery of the shares and property overseas. It was not prepared to order discovery of anything. It expected everything to take place by negotiation, although it was obvious that negotiation had failed. W abandoned further efforts.

The case collapsed because of constant delays, the court's acceptance of H's excuses and the sheer inefficiency of the legal system. Judges and magistrates have limited specific legislative power to deal with any property more complex than a simple matrimonial home. Attempts to hide assets are usually successful because the law has limited means of discovering the truth. Even where a broad interpretation of the legislation is possible, sexist attitudes about women's work and roles prevent courts from having the courage to use such powers to give women a just share of matrimonial property. Judges and magistrates argue that until the legislation changes, their power to give more just settlements to women is limited to current practices. These problems exist everywhere but women in other common law countries have more overall legal rights than Pacific women do.

THE ASSESSMENT OF CONTRIBUTION

In the assessment of contribution, we find one of the most important examples of legislation used against the interests of women. Division of matrimonial property is still based mainly on financial contribution to the purchase of the matrimonial property. Matrimonial property is divided between the spouses according to their financial contribution, and assessment of financial contribution depends on whether or not the spouse does paid work. Thus the common law still does not automatically count women's unpaid work at home, or in the fields, as contribution towards matrimonial property.

Colonial attitudes reinforced traditional cultural attitudes about women's roles, and both are reflected in current laws. Society and custom decree that once women marry, they accept the responsibility of doing the things defined as "women's work". In our region, most women are engaged in unpaid labour, doing any or all of the work listed below.

- Household work: preparing meals, washing dishes, cleaning, washing and ironing clothes, home maintenance, making clothes and other household items, child care, budgeting and overall management of the household.
- Caring for other people: partners, family members and children, sick people, older relatives.
- Agriculture and fishing: gathering food, working in farms and subsistence gardens, growing vegetables for home and sale; fishing for the family and community; selling vegetables or fish in markets or to market vendors.
- Small businesses: small scale sewing and making and selling food, sweets, jams and so on.
- Community work: voluntary work for education, welfare, the arts, sports and child care.

To emphasise the range of roles and activities involved in "women's work", an Australian women's group invented an advertisement for a housewife. How much would you expect to have to pay a manager with these responsibilities and qualities?

Position vacant: housewife[20]

Applications are invited for the position of manager of a lively team of demanding individuals with differing needs and personalities. The successful applicant will be responsible for the mental and emotional well-being of the team. She will be required to perform and/or to coordinate the following functions: companion; counsellor; child care supervisor; finance manager; purchase officer; teacher; nurse; chef; nutritionist; decorator; cleaner; driver; social secretary; sexual partner and recreation officer. She may, in addition, be required to hold a second job in order to make a direct financial contribution to the team's budget.

Qualifications: The successful applicant must be healthy, creative, active and outgoing in order to encourage the physical and social development of team members. She must have imagination, sensitivity, warmth, love and understanding and must be competent in the practical skills listed above. She must be able to communicate on a range of issues with people of all ages including public servants; teachers; doctors; dentists; trades-people; business people; teenagers and children. She must have unlimited drive and a highly developed sense of responsibility. She must be skilled in the management of people of all ages. She must be able to work under stress, for long periods if necessary. She must have the flexibility to do many conflicting tasks at the same time. She must have the adaptability to handle all new developments in the life of the team, including emergencies and serious crises.

Hours of work: Unlimited.

Salary or wage: None. Housing and food and allowances by arrangement with the income-earning member of the team. No guarantees.

Benefits : No guaranteed holidays. No guaranteed sick leave, maternity leave or long-service leave. No guaranteed sickness or accident insurance. No workers' compensation. No superannuation.

Is women's work at home real work?

Women regard such activities as work but the law does not. Unpaid work at home, in agriculture and fisheries is not regarded as real work and is not included in the assessment of contribution towards the family. This is shown in community attitudes, statistics that do not count subsistence work as contribution to development[21] and in the law's blindness to unpaid work as deserving a share in matrimonial property.

The matrimonial property rights of husband and wife generally depend on their financial contribution towards the purchase and acquisition of matrimonial property. Their share will be based on their financial contributions, and a wife's share will be equal to the amount of her financial contribution to the purchase of the property and the total family income. Neither the legislation nor the common law automatically recognises the principle of equal partnership in a marriage. Except in Cook Islands, which we will discuss later, a wife's non-financial contribution is not given value equal to the husband's financial contribution.

Married women do not have an equal voice with men in the management of property acquired after marriage. The general rule is that distribution of matrimonial property is based on financial contribution and paid work, in spite of the inherited principle that settlement of property will be based on what is "just and equitable". When making a distribution of property, courts consider only the economic contribution of the parties to the marriage, but this is not based on legislation; it is based on common law interpretations of women's roles within marriage and the family. What does it mean in practice?

STORY *One for you and two for me*

Caroline does all the housework and cares for the children. Through her paid work, she contributes one-third towards the costs of the bank repayments on the house, the groceries and other bills. Her husband Peter contributes two-thirds towards these costs. When they divorce, Caroline gets one-third of the value of the property after the debts are paid off and Peter gets two-thirds.

Women's domestic non-financial contributions are usually seen as having no economic value, and therefore no legal value. The end result is that if a husband works in paid employment and the wife works unpaid at home, she is not entitled to anything except maintenance for the children and sometimes for herself.

The right to remain in the matrimonial home

This interpretation of contribution influences most assessments of who should get possession of the matrimonial home. The most sensible thing would be to allow the person with custody of the children (usually the mother) to stay in the house, with the option of buying out the other's share. If this is not practical, the court should be able to make a possession order enabling the wife to stay in the house with the children until she could afford to buy her husband's share; or until the youngest child reached adulthood; or until the wife remarried, or agreed to some other fair arrangement.

While discussing maintenance in Chapter 10, we dealt with specific cases and the general principles involved. Here we note that, generally, Pacific Island courts have no specific powers to order that a wife and children are entitled to remain in the matrimonial home upon separation or divorce. However, courts may use several general legislative provisions relating to

the welfare of the children to allow women with children the right to stay in the matrimonial home. For example, Section 85 of the Fiji *Matrimonial Causes Act* Cap 51 states:

> 85 —(1) In proceedings in which application has been made with respect to the custody, guardianship, welfare, advancement or education of children of a marriage-
>
> (a) the court shall regard the interest of the children as the paramount consideration; and
>
> (b) subject to paragraph (a) **the court may make such order in respect of those matters as it thinks proper.** (Our emphasis added.)

However, these powers are rarely used and courts continue to argue that they need specific legislation to give power to make such orders. Even when the powers are used, the court may not be able to protect its own order. We have already referred to the case of *Shahudin Nisha*[22] which shows that the legislation as drafted is insufficient to protect women's rights to even temporary possession.

Solomon Islands and Cook Islands in 1992 and 1994 respectively passed legislation[23] allowing women to remain in the matrimonial home after separation, if a non-molestation order has been granted. The legislation is gender-neutral (either party can apply for it) and allows courts to make an order barring a violent spouse from entering the matrimonial home. As the legislation is aimed only at violent spouses, it does not help women who divorce for other reasons, but if violence is the problem, the wife may be able to remain in the home indefinitely, or at least until an order for divorce is made. The husband's legal rights to title of the matrimonial home are not affected, and the order cannot replace a matrimonial property settlement.

In a Western Samoa case, the Court of Appeal said that there might be instances when the wife would have a right to remain in the matrimonial home, even if she did not own it. This case may be useful to women in similar situations, and we will discuss it in detail.

CASE *L v L (1993) Western Samoa*[24]

Facts and issues H was a Samoan citizen. His wife W was a Rotuman. H and W married in 1990 in Fiji and went to live in Samoa, at first with H's family. Then they moved into a property owned by H. Both were unemployed, and lived on H's savings and family help. W did most of the household work. H played golf nearly every day. In early 1991, W got a paying job and they lived on her income. H said that he paid for all the household expenses from casual work as a taxi driver. Later he found work as a civil servant.

In 1992 the marriage broke down. W alleged several instances of violence and said that H was having a sexual relationship with one of his relatives. W left the home for two weeks but returned. H left in May 1993 to live with another woman, and filed for judicial separation, not divorce, against W on the grounds of her cruelty, because she had accused him of committing incest. H said that in Western Samoa, such accusations were very serious. By accusing

him of incest and by spreading rumours about him, W was being cruel within the meaning of the *Divorce and Matrimonial Causes Ordinance 1961*, which states that cruelty was a ground for divorce (and therefore for judicial separation.)

In the High Court, where the case was first heard, the Chief Justice found that H had been violent towards W, and denied H's claim, saying that W had acted reasonably in the circumstances. She had not spread rumours and had spoken only to H's brother about the incest. Therefore her actions did not amount to cruelty.

The other main issue was that of the matrimonial home. H claimed that because he had bought the house before the marriage, it could not be matrimonial property subject to division between the spouses. W said she was not claiming an actual interest in the property but just a right to occupy the house until they were divorced. The case went to the Court of Appeal.

Decision The Court of Appeal said that there was no legislation in Western Samoa to divide matrimonial property between spouses upon divorce. Any decision would have to be based on English common law rules; these were still highly persuasive and applicable locally. A wife might therefore have a relevant non-proprietary right to live in her husband's home. (This means that even though the wife does not own the house, or a share in it, she may have other rights to it.) In this case, W was not claiming ownership in H's house, but she did claim a right to live in it. The Court of Appeal based its decision partly on the case of *National Provincial Bank Ltd v Ainsworth* [25]and said that the following questions might be relevant:

- Could H provide suitable alternative accommodation for W?
- Did H's conduct amount to desertion?
- Had W behaved in such a way to deprive herself of the right to be housed?

The Court of Appeal further said that the Chief Justice had been right in taking into account the facts listed below.

- W was a foreigner, unable to speak the language and without family and social support.
- H could live with his family.
- W could not be expected to live with H's family.
- W's salary was too low to allow her to rent or buy a place of her own.
- H could not afford to rent or buy another place for W.

The Court gave W the right to stay in H's home as long as the parties remained married. It said the parties could negotiate rent and maintenance. The Chief Justice's statements were accepted as proper Western Samoa common law.

Comment Essentially this decision is an extension of the English common law *Martin* order. It may be used in other cases to request a right of occupation as long as the marriage subsists. Courts might or might not be prepared to extend the right to occupy the home after a divorce, but the case provides women with a local precedent to request to be allowed to stay in the matrimonial home at least until a more permanent solution is found.

Martin and Mesher orders

United Kingdom courts have developed common law to assist a wife and children to remain in the matrimonial home after divorce where a division of matrimonial property will cause great injustice. Most local courts do not see that they have the power to make such orders. However, there is nothing

to stop them, because they may use common law precedents. In particular, local courts may use two special and well-known types of order. In Chapter 10, we discussed the *Martin v Martin* and *Mesher v Mesher* cases[26] on which these orders are based, so we repeat only the definitions here.

- The *Martin* order allows the children and the custodial parent (usually the wife) to live in the home and delays its sale until there is a change in the financial situation of the parent living in it. Both husband and wife continue to pay the mortgage payments. The house is eventually sold and the profits are divided between the husband and wife.
- The *Mesher* order delays the sale of the house until the children of the marriage reach adulthood. The house is occupied by the children and the custodial parent. The order is much like an order in lieu of or part of a maintenance order. Both husband and wife continue to pay the mortgage payments. The house is eventually sold and the profits divided between the husband and wife.

Constructive trusts

Until courts were able to apply the constructive trust principle to matrimonial property, they were faced with the situation where the main item of matrimonial property (usually the home) was held in the name of one spouse only (usually the husband) and the other spouse lost any share in it. This could happen even if the loser had directly or indirectly contributed towards the purchase or acquisition of the home.

To help achieve justice in domestic property disputes, United Kingdom courts developed, through the common law, the constructive trust principle.[27] The constructive trust principle is a part of the law of trusts in equity. It may apply to legally married women when there is no specific matrimonial property legislation covering the case. (We will discuss in Chapter 12 its applications to *de facto* wives.) When applied to matrimonial property, the constructive trust principle is based on the idea that the spouse in whose name the property is usually registered (usually the husband) has bought and holds "in trust" the share of the other spouse (usually the wife.) The value of this share is based on the value of her financial contribution. It has been used to grant women a share of matrimonial property, in the types of situation listed.

- The couple is divorced.
- The wife has made financial contributions to the family income or purchase price for the matrimonial home.
- Her name is not on the Certificate of Title to the matrimonial home.
- She has no other means of proving that she made financial contributions to the purchase of matrimonial property or to the family income.

This sounds fair, although as it is still based mainly on a wife's direct financial contribution, it does not help women who have no money of their own and are not earning an income. But the most fascinating and revealing aspect of the history of the development of the principle is that it was not originally intended to help women, as we see in the case of *Pettit v Pettit*.

CASE *Pettit v Pettit (1970) United Kingdom*[28]

Facts W had paid for the matrimonial home, and the Certificate of Title was in her name only. H did maintenance work on the house during the marriage. When H and W divorced, H claimed a share in the house, arguing that it was matrimonial property and should be shared even though his name was not on the title. The case finally was heard in the House of Lords.

Issue H had contributed to the maintenance of the house, but his name was not on the Certificate of Title. Could he have a share in the house?

Decision The House of Lords did not give H a share. However it began to develop the idea of a constructive trust. Lord Diplock said when a family asset was first acquired by one party, the title or ownership rights must remain with one party or with both. If both spouses had bought the property, their shares in the property depended on what they had arranged between them. If they did not say anything about their arrangements, the court should assume that there was a common intention that both should share in the property.

Comment Until this 1970 case, if a house and a mortgage were in the husband's name only, but the wife contributed towards the mortgage payments, she still did not acquire an interest in the property. For over 50 years, feminists had been agitating for reform in the United Kingdom. Feminist lawyers had been arguing that matrimonial property laws discriminated against women, and that the trust concept or other legal strategy should be developed to enable wives to receive shares of property held by their husbands. The courts did not do much to improve the situation until this case, where the wife (not the husband!) held the title. This immediately helped them to see the injustice of the law. The later case of *Gissing v Gissing (1971) United Kingdom*[29] and many other cases accepted and developed into new common law the principle of a constructive trust as entitling a party to a share of matrimonial property in the following circumstances:

- The couple have shared the financial contributions.
- There has been a common intention to acquire the property on behalf of both and this common intention has been expressed or implied by words or behaviour.

Thus women owe their current rights to share property under the law of constructive trusts to the very small number of men who suffered discrimination. This case also shows the importance of having lawyers to argue in court concepts of law that could be developed to advance women's rights within the law. Local courts can apply this principle to matrimonial property through precedent, just as they can use *Martin* and *Mesher* orders.

In our region, we see the principle of constructive trusts used in several cases. We will look at two Fiji cases and one from Tonga.

CASE *Philp v Tupouniua (1977) Fiji*[30]

Facts H was a very wealthy European businessman, much older than W, who bore him three children and looked after them and the home. As well, she contributed to his business by doing unpaid secretarial and other work. H obtained a divorce based on W's admitted adultery. W claimed a share in the business.

Decision The High Court found that W had contributed to the family by her unpaid secretarial and other work. It admitted that her contribution as wife, housekeeper and mother also entitled her to a share of property. The High Court said, in effect, that a constructive trust had been established by W's secretarial contribution to the H's business which had become extremely prosperous. Therefore a constructive trust had arisen in H's assets: H held W's share as a constructive trust for her.

The Court said also that the conduct of the parties was part of the total circumstances of the case and should be considered in making a division of property. The difference in age and background did not excuse W's adultery. On the basis of her unpaid work and her economic contribution to the family fortunes, the Court granted W $30,000.

Comment The Court recognised W's unpaid contribution as a home-maker but gave it very little or no economic value. On the other hand, it did try to value her unpaid secretarial work, although not very highly, partly because of W's adultery. The "conduct of the parties" is not relevant to a division of matrimonial property, but her adultery was mentioned in relation to the property. (Would a "blameless" wife have got more?) However we see from this case that if a wife can prove that she contributed to a business by unpaid but economically measurable work, she may get a share of matrimonial property.

The second case explains the principle of constructive trusts and has become a local precedent.

CASE *Pratima Devi v Rajeshwar Singh (1985) Fiji*[31]

Facts W sued for a share of two properties. She argued that, although the properties were in H's name, H held her interest as a constructive trust. This case went through three levels of court because the lower courts doubted their power to grant to grant W rights to matrimonial property. The Court of Appeal ruled that the Fiji legislation did allow the lower courts the power to make a division of matrimonial property between the spouses.

Decision Regarding constructive trust, the Court of Appeal stated: "And as the argument advanced on behalf of the appellant developed ... it became manifest that this part of her case was advanced under two separate bases. First ... that when one person has made substantial capital contributions to the acquisition or the improvement of a property in the name of another and when a common intention of shared beneficial ownership is established either by direct evidence or by inference, the court may hold a trust for an appropriate share to exist for the benefit of that other ... Secondly, if ... there be no evidence of an express or implied intention to create such a trust, the court is entitled

to impute such an intention by forming its own opinion as to what would have been the common intention of reasonable persons in the circumstances obtaining. [This is shown in] *Pettit v Pettit...; Gissing v Gissing* ... and ... *Rathwell v Rathwell.*"[32]

The Court said that W's right to a share in the properties was based on the principle of a constructive trust. Thus if W had made substantial financial contributions to the purchase of or improvements on the property; and if H, the legal owner, had shown in some way (by actually saying the words or by his actions or conduct) that he was holding the property on behalf of W as well, a constructive trust would be assumed and W should be given a share based on her contributions. Because of this ruling, H and W settled out of court, and the Court did not have to decide how much each should get.

Comment This case, in which expatriate appeal judges presided, gives cautious encouragement to local High Courts and lower courts to give Section 86 of the *Matrimonial Causes Act* a broader interpretation than that currently followed. In particular, courts should think of the children's future needs when making a distribution, and should make a matrimonial property settlement based on that.

In our last example, the wife was unsuccessful in trying to have the principle applied.

CASE *Re 'Etueni 'Alatini (Deceased) (1988) Tonga*[33]

Facts H died without leaving a will. W, his widow, applied to the Supreme Court for letters of administration for permission to take control of H's estate, all its assets and debts. W said her significant unpaid contributions to her husband's business entitled her to a share of H's estate.

Decision and comment The Supreme Court decided as follows: a wife is not entitled to a share of the property of her deceased unless she can establish a constructive trust. A constructive trust cannot be implied merely from the fact that W was a good wife and had helped her husband in his business. The present case did not establish a constructive trust. The items belonged to the husband alone (in effect to his heirs.) W got nothing for her years of work. She could not prove constructive trust because her contributions were unpaid, and she could not produce evidence of her dead husband's intentions.

Although the constructive trust principle is established in our region, a wife must satisfy the criteria listed below.

- She can prove that she directly contributed a certain amount of money to the marriage

  or

- If her proven contribution was unpaid, it must be economically measurable by local standards (for example by the average local rates for secretarial work.)
- She can prove that her husband by words or conduct or both made her believe that she had an interest in the property.
- She can prove that both she and her husband had a common intention of buying the property and of owning it together.

- Some courts think that she should not be an adulteress or "pleasure seeker". (It is difficult to see what this has to do with matrimonial property, unless a wife's sexual behaviour affects her contribution.)

CASE STUDIES: GETTING A SHARE OF MATRIMONIAL PROPERTY

Figure 11.1 shows the most important questions that decide whether a wife is likely to get a share. From these, we conclude that a woman with her own financial resources is more likely to get a share of matrimonial property than is a woman with no financial resources. A woman whose name is not on the title and who cannot prove direct or indirect financial contribution and constructive trust will get a share only if the court takes into account her unpaid contribution to family income and well-being, the needs of children of whom she has custody, or other responsibilities.

Now let us test our conclusions by examining cases from the region. We will begin with wives who have their own financial resources, whether by inheritance, gift or earnings, and who contribute directly and indirectly to the family income. Then we will look at the unfortunately much larger group of wives who do not have any such resources. Finally we will see that the only hope for such women is that the court will give a broad interpretation of unpaid contribution.

Wives who have a personal income

Suppose that a wife has an income from paid employment (or has other resources), and the matrimonial property was bought after marriage, and her name is on the Certificate of Title to the property, or that her name is not on the title to the property, but she can prove financial contribution. She is entitled, through legislation or the constructive trust principle, to a proportion of the economic value of the property according to the financial contribution she made to the purchase of the home or mortgage re-payments or family income.

The ideal situation is where both husband and wife are earning similar incomes, and have bought a home together or are paying off the mortgage together in equal shares. This situation may arise only among relatively well-off women in the paid work-force. It is uncommon in our region, where women make up a small percentage of the paid work-force and are usually paid less than men are.

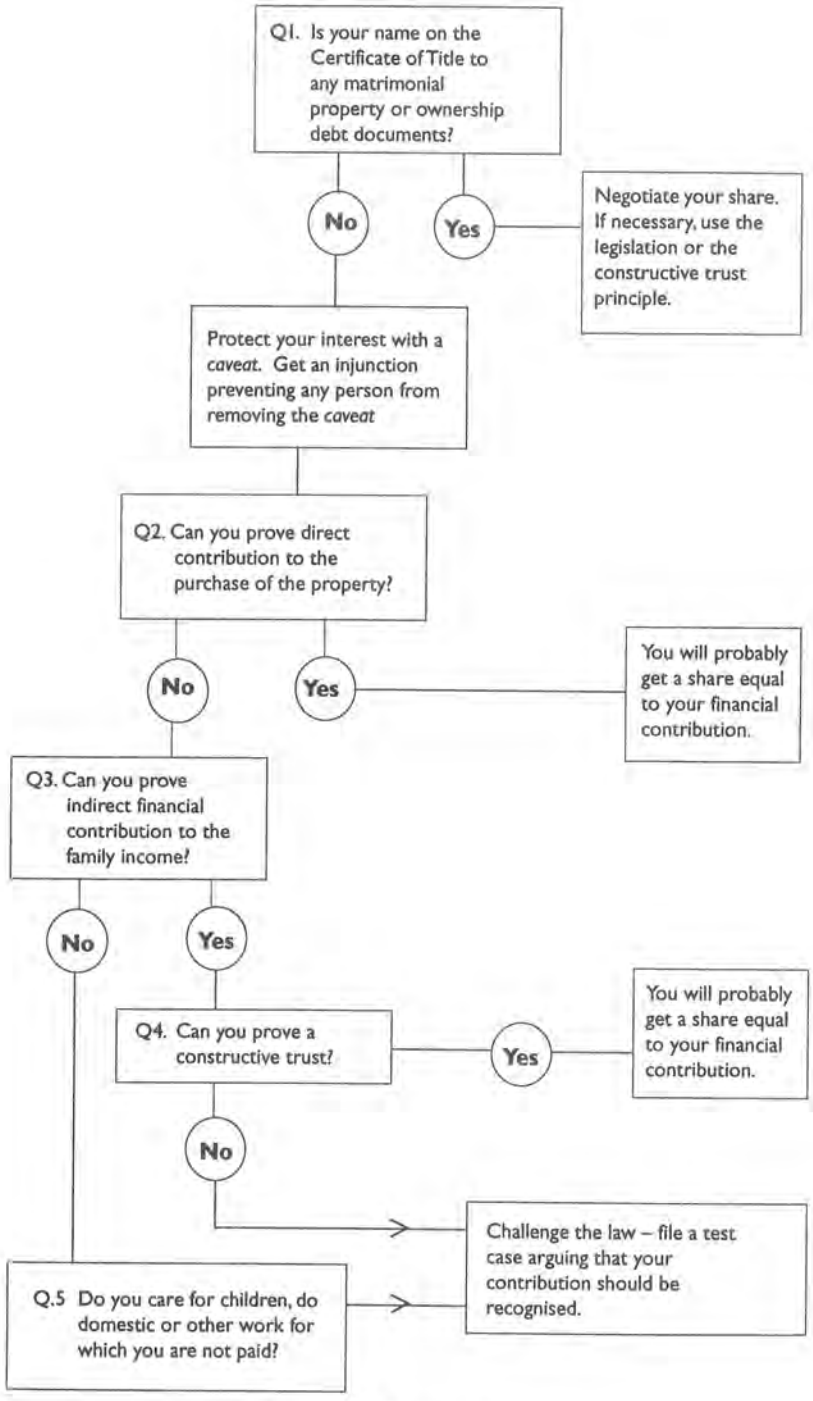


***Figure 11.1** Matrimonial property*

STORY *Nancy and Willy (Vanuatu)*[34]

Vanuatu lawyers maintain that women who are earning and making an economic contribution may obtain a share of freehold or leasehold property. In one case, Nancy and Willy owned a lease jointly and both were earning. Upon separation, Nancy obtained custody of the children. The court ordered that Willy remain in the matrimonial home and pay rent to Nancy. Willy took possession of the house but paid no rent, although the Public Solicitor's Office tried by letters and persuasion to get him to do so. The Office was considering filing a case with the High Court to force Willy to sell the house and share the proceeds with Nancy. The case would be based on common law principles of constructive trust.

The following cases show how important it is to be able to prove direct financial contribution.

CASE *Me Folau v Tevita Folau (1960) Tonga*[35]

Facts W claimed certain leasehold property in Nuku'alofa and damages from her former husband H. Both had financially contributed to the purchase of the lease but the property was registered only in H's name.

Decision The court held that the property was jointly owned by them in trust for each other. However, it based the distribution only on their original financial contribution. It gave W one-seventh of the total value of the assets; H got six-sevenths.

Comment This case was decided before the development of the constructive trust principle, but the court still recognised W's financial contribution. However, it did not recognise W's non-financial contribution, including domestic work and caring for the family.

CASE *Malti Vati Singh v Satyendra Prasad (1980) Fiji*[36]

Background and facts H and W had bought land and built on it. A bank financed purchase of the home, land and subsequent extensions. They together paid off all the loans, but the property was in H's name only. At the time of the application for settlement of property, the land and home were valued at $55,000. The car, furniture, savings and other chattels were part of matrimonial property, but had not been valued.

W filed in the Magistrate's Court for divorce and ancillary relief (custody, maintenance and matrimonial property) on the grounds of H's habitual cruelty. The divorce was dismissed, mainly because of the definition of habitual cruelty accepted by the Magistrate's Court. Therefore all ancillary matters were also dismissed, according to standard practice. W appealed to the High Court. When her appeal failed there, she appealed to the Court of Appeal. This Court found that there was clear evidence of cruelty, and noted that lower courts were applying too narrow a definition of cruelty. It provided as a new precedent a broader definition of habitual cruelty, and granted W a divorce. The Court of Appeal sent the case to the Magistrate's Court to deal with the matter of matrimonial property.

Issues before the Magistrate's Court W applied for a settlement of matrimonial property asking for an order that she be allowed to occupy the matrimonial home, and an order that H transfer a one half share in the matrimonial home to her. W said that her contribution throughout the marriage was as a wage earner and that she had contributed towards household expenses. She had been able to get big discounts for the materials for the house. She had also bought and paid for the car and the furniture. She contributed towards the deposit for the land and helped pay off the mortgage. H said that he paid for the house, it was in his name and that W had made no contribution towards the house payments. He also had contributed towards household expenses.

Decision The Court said the jurisdiction of the Magistrate's Court to make a decision about matrimonial property was found in the *Matrimonial Causes Act*. Sections 84, 86 and 87 of the Act gave courts broad powers to make a settlement of property for the benefit of wives and children. Courts could base a settlement not only on financial contribution but also on other considerations. The powers under s. 86 were so broad that it was unnecessary to go into the common law of constructive trusts. (This could have been proved, since there had been a common intention that the property was held on behalf of both H and W even if only H's name was on the title.)

As to the actual property, the Court said that both parties had worked hard and by their thriftiness has acquired a home, savings, pensions and property. Both had worked for the common good of the family.

"From the outset it is plain that as a married couple they set out to provide a home for themselves and their family and such other amenities as by their joint efforts they could attain. I find it highly unlikely ... that each was even then reserving... exclusive ownership of this item or that ... by division of the commitments they were able to complement each other's efforts .. The ability of one partner to undertake a share of the commitments freed the other to take care of the rest."

Because W was taking care of the household expenses, and thus freeing H to make the mortgage repayments, both would have an equal share in the matrimonial property. However, because W had migrated, there was no point in transferring one half share of the home to her; therefore W would get half the economic value of the home. W was awarded half the value of the home at the time of separation. H had taken the car and furniture but the Court did not take that into account, since no value was put on it. W had also saved $13,000 so the Court seemed to consider that in any case it balanced out.

Comment The case took over seven years, but the decision was both fair and unusual. W earned an income. She had money to pay lawyers and she was strong about twice challenging all the decisions against her through three levels of court. She fought the legal system for seven years, and finally got justice in the Court of Appeal and thence from a magistrate, who took into account the decision of the same court in another matter and gave her a share of matrimonial property, mainly based on her financial contribution.

It is important to remember that H could have sold the house without W's consent at any time to a purchaser who knew nothing about her interest because her name was not on the Certificate of Title. But W protected her interest with a *caveat* that had to be renewed with the help of lawyers. This too required money and determination. Most women would not have had the emotional strength or the money to pursue the matter, but the case now

has important precedent value for women in all Pacific Islands, for two reasons.

- The Magistrate stated that the *Matrimonial Causes Act* gives Magistrates' Courts the powers to make the decisions he made.
- The Magistrate pointed out that, although he did not need to use the constructive trust principle in this case, he could have done so.

CASE *Saras Wati v Parma Nand (1982) Fiji*[37]

Facts H and W separated in 1981. W worked in paid employment and earned money throughout the marriage. She contributed to household expenses and to H's buying and selling of properties. The properties were in H's name only, and he controlled all the information and documentation. At the time of the hearing, H had two properties in his name, one quite large. W had no information about the properties, and H did not give the court any information. The court said W was "a good wife, looking after the house and children and helping her husband ... and... not a pleasure seeker [as] the husband would have me believe". It accepted W's evidence that the disputed properties were bought after the marriage, not before, as H had tried to prove. It said further that if it made a mistake in W's favour, H had only himself to blame because he had not shown the court all the important documents.

Decision The court decided that the parties' contributions and efforts were equal. W was given a half share in the matrimonial home, and half the value of the interest in the properties that H currently owned. The court said that H had sold W's shares in the former properties and bought new ones without her consent; he had re-invested her interests as well whenever he purchased another property. He had used the proceeds of the sale of properties to buy others. Therefore he held the profits from the re-investments in trust for W. H could pay W the money or transfer one of the properties to her to live in.

Comment W's name was not on the Certificate of Title but the court applied the constructive trust principle, as well as acknowledging her contribution as a wife and mother. W was in paid employment, so she had made a significant financial contribution to the family income and could afford to pay lawyers to argue her case. The court did not have to use the constructive trust principle because Fiji has matrimonial property legislation; the constructive trust principle is based on the common law, and should be applied only where there is no relevant legislation. However, even where there is legislation, courts sometimes use the principle to help them arrive at a fair solution.

CASE *Chow v Chow (1990) Solomon Islands*[38]

Facts W ran her own tailoring business. H owned a motor vehicle company, a cake and biscuit supply company and some residential and commercial properties. Most were in H's name only. The matrimonial home had been used as security in a mortgage for H's business. When H and W divorced, a joint custody order was made for both children. W applied for an order of distribution of matrimonial property and for maintenance for herself and the two children.

H and W had agreed on the relative values of the properties: the matrimonial home; the house that H lived in; another house; a commercial

property that W claimed that her father had given her; and another commercial property on which H's business was run. The total value of properties amounted to $600,000, but there were debts. If the cake company was sold off to pay the debts, there would be no money left from the sale. W had tried to sell her business but was unable to. H also had $41,000 in savings and had sold 4 cars since the marriage break-up.

Decision The court said that generally, if both parties were working and both had made equal financial contributions to the purchase of the matrimonial property, everything should be split equally. However, H had put the businesses in trust for the children, so to sell the businesses would not be sensible. H and W would each keep their own businesses. The value of the residential homes and profits from the sale of the cars should be split equally. H was already substantially contributing to the children's upkeep, therefore maintenance would not be ordered for them. W would not receive maintenance either, because she was a clever businesswoman and would be able to get a job in Australia where she was now living.

Comment If a husband owns a business, the home and car may also be registered in the name of the business. If the wife is not making financial contributions, she probably would not be entitled to a share in the husband's business even though she may make large non-financial contributions, shouldering domestic responsibilities to free her husband to devote all his time to the business. In this situation women are not usually entitled to a share in the business unless they are registered as shareholders. Such wives should insist that they be registered as shareholders.

Wives who do not have a personal income

Wives may get a share of matrimonial property if they can show that they have earned an income and contributed to the family income. Their share is usually based on financial contribution, but some courts might recognise non-financial contribution, and increase the share. However such increases are always very small, because unpaid work is never given equal value to paid work.

If a wife is doing unpaid work in the home or subsistence farming, or fishing, and her name is on the title to the matrimonial home, she may use this to negotiate a settlement. The husband cannot sell the house without her approval, but the law does not secure her position. Her name on the title merely gives her an ability to negotiate a settlement. This situation does not guarantee her a share, as the husband may live in the matrimonial home as long as he likes, and there is little she can do about it unless she proves contribution through litigation. Her domestic work or other non-financial contribution would probably only get her a small lump sum settlement.

Wives who can prove direct financial contribution

If a wife's name is not on the title and she is not making financial contribution to the family income, her position is even worse: she has no power at all to negotiate a settlement.

CASE *Pratima Devi v Rajeshwar Singh (1985) Fiji*[39]

We have already discussed this case, where the lower courts had doubted their powers to give the wife a share of matrimonial property. We quote from the lower court decision.

"The petitioner has asked the court ... for an order that the respondent is holding the two properties half in trust for her in accordance with her contributions to their acquisition. Unfortunately... there is no law in Fiji which is the equivalent of Section 17 of the *Married Women's Property Act 1882* of the United Kingdom and there is no law in Fiji which is equivalent of the *Matrimonial Causes Act 1973* ... In the United Kingdom the *Matrimonial Causes Act 1973* gives very wide powers to the courts to divide property belonging to the spouses, taking into account not only specific contributions but, for instance, the amount that a wife and mother who does not work can be said to have contributed, so as to make a fair and just division among the parties. Similar powers are given to the court in New Zealand, Australia and many other countries. But no such power exists in Fiji."

Comment Here we see the assumption that a wife who does not earn money does not work. Fiji inherited from the United Kingdom a system of matrimonial property law that did not give women a share of property upon divorce, unless they could prove actual financial contribution. Women did not acquire any rights upon marriage. Their position was basically the same as that of anyone who contributed towards purchasing an item and thus became entitled to a share in proportion to the financial contribution. The United Kingdom has changed its laws to recognise non-financial contribution. The court said, however, that Fiji was stuck with the old laws. The court could only make the decision that it did; it was not prepared to make an assessment based on what was just and equitable according to s. 86 of the *Matrimonial Causes Act*.

For many reasons, the Court of Appeal reversed this judgment and ordered a retrial. It urged an assessment based on justice and equity, and the case became a landmark for decisions based on constructive trust. However, the judgment quoted here still reflects the attitudes of most Pacific Island courts to real work.

CASE *Sasago v Sasago (1989) Solomon Islands*[40]

Facts H and W owned a store, and the house in which they lived. H also ran a car business. All assets were in H's name. W successfully ran both the home and the store. She said she had an interest in the business, and claimed half the matrimonial assets.

Decision The court ordered that the store and matrimonial home be shared equally and be registered in both names. It ordered also that W be able to live in the matrimonial home, to run the store and to draw an income from the store. The court made no order about maintenance and did not mention H's business. It did not explain how it decided to make the distribution.

Comment Most women do domestic work, agriculture and fishing, mainly for subsistence. This is not what courts recognise as real work. Where a wife is working unpaid in a situation regarded as real work (for example, running a store), courts are prepared to recognise her contribution, but they do not go very far. In this case, if the court had recognised the principle of equal partnership of marriage, W would have got a share in H's business as well.

CASE *Taniela Kinikini v Pohahau (1989) Tonga*[41]

Facts W earned more than H, and had some savings. They pooled their money in one account and H's salary was used to pay off the loans for the matrimonial home and car. W's salary was used for living and household expenses and for supporting the family. While the house was being built, W had prepared meals for the workers, as well as working in her paid job. Without W's contribution the couple could have not afforded the mortgage repayments.

When the couple adopted a child, W left her paid job to look after it. H and W separated and the court ordered maintenance for W and the child. At the time of litigation, H owed W $1704 in maintenance arrears. W sued for an order that she and H owned the matrimonial home equally, or for an order to H to pay all maintenance owed to her. H applied for divorce. W applied for a one half-share in the matrimonial home, or the $1704 that H owed her.

Decision The Supreme Court said that Section 18(1)(b) of the *Divorce Amendment Act* (No. 39 of 1988) empowered it to order a lump sum payment regardless of rights of ownership. However, first, the Court had to determine what share, if any, the wife held in the house. It ordered that the money held in the joint account was held equally, regardless of who had paid what. Then it said: "But the matter does not end there. When a wife works over a period of years, she contributes to the family assets either directly by actually providing for their purchase, or indirectly by relieving the husband of the need to meet routine expenses so that he can use the money to buy things. In this way ... the wife builds up a share in those assets. Even if she does not go out to work and earn money she still makes a contribution. She does what every wife does and cares for the home, the husband and any children. She may work to produce mats and *ngatu*, which in themselves are family assets. If the marriage breaks up, it is unjust that she should receive no return for what, in many cases, is a very substantial contribution. In most cases this cannot be quantified precisely. So the Court has to resort to assessing her interest as a proportion of the family assets. The longer the marriage, the greater the wife's contribution and her share of assets is correspondingly greater.

"... Following English law, the conventional starting point for assessing the wife's share of the matrimonial assets is to give her one-third, leaving the husband two-thirds. This takes account of the fact that the husband's direct contribution is normally greater, and so are his commitments. It is not a rule of law but a practice which has been followed over a long period. Despite occasional criticism, it is a useful practice which provides general guidance and helps to achieve consistency."

The Supreme Court granted W her claim, using the principles summarised below.

- The starting point for assessment for the wife's claim was one-third, based on United Kingdom law.
- There were no reasons to increase or decrease the amount from the starting point of one-third.
- H's property did not include items financed by his family or bought by him after separation.
- W was entitled to one-third of the financial value of the matrimonial property in Tongan dollars.

Comment This was one of the first cases in our region to accept women's unpaid work as a recognisable contribution to the family. The Supreme Court failed however to establish the principle of equal partnership in a marriage; it did not go so far as to say that women's unpaid work has equal value to men's paid work, but accepted as a fact that the husband makes a greater contribution, and has more commitments, than his wife does. The case shows also that when courts recognise women's unpaid work, they do so only if the wife has made also some financial contribution to the family income at some time during the marriage.

From W's application it appears that she applied for a share in the matrimonial home only because H had failed to pay maintenance. In a system based on justice she would have been applying for both maintenance and property. W had been earning a higher income than H for a long time before giving up paid work to look after the child. Even so the Court gave her only one-third of the total value of the assets, and half of the savings to which she had contributed. The recognition of her non-financial contribution was therefore very small.

Wives who cannot prove direct financial contribution

In the case above, the court said:

> Even if she does not go out to work and earn money she still makes a contribution. She does what every wife does and cares for the home, the husband and any children. She may work to produce mats and *ngatu*, which in themselves are family assets.

However, we do not know of any Pacific Island case in which courts have given a wife a share if she has not made a direct financial contribution. United Kingdom courts have tried to help such women and the Vanuatu Court of Appeal referred to this issue in *Fisher v Fisher (1991)*[42], discussed earlier. Referring to the United Kingdom decision in *Watchel v Watchel,*[43] the Vanuatu Court of Appeal said:

> A non-working wife who brings nothing into a marriage acquires very little in the first few years of marriage, but for a marriage lasting several years the starting point for assessing her share is one-third ... The case has been much distinguished and criticised, but in the interests of consistency, courts need a common starting point and nobody has yet suggested anything better. We therefore accept the same approach.

Comment We might object to the court describing a housewife as "a non-working wife", but this judgment could be used as precedent for a wife who has been married a long time to obtain a share of matrimonial property even if she is not earning an income. So far, we know of no such judgments in our region.

Needed: a broad interpretation of contribution

The only hope for women who cannot prove financial contribution is that the court will give a broad interpretation of unpaid contribution. The following case studies give examples from our region.

CASE *Prem Prabha Azam v Mohammed Azam (1967) Fiji*[44]

Facts H and W jointly owned the matrimonial home but the property was in H's name. They separated. H left to live with another woman in New Zealand. He gave W a written acknowledgment that he sold to her all his interest in the property. H returned to Fiji with his new partner and moved into the matrimonial home. W moved out and went to court asking for specific performance of the promise that H made: that H be forced to transfer the house to her in her name. W said H had offered to transfer the property to her for the children and herself. H said W had blackmailed him into promising the transfer.

Decision The court said that it believed W. H had left Fiji without making any financial provision for the family other than the transfer; he had not made any maintenance arrangements. The court said that H and W had formed a contract. W had agreed to let H leave without providing for her maintenance under Section 8 of the *Maintenance (Prevention of Desertion and Miscellaneous Provisions) Ordinance 1962* in exchange for the house. The court said it would enforce the agreement, and the house was to be transferred to W.

CASE *Takaohu v Waihou (1990) Solomon Islands*[45]

Facts, decision and comment In a dispute over H's business, W claimed an interest in the assets and principal funds, collectively referred to as capital. The High Court accepted that H had started the business to provide financial assistance to his village, but it pointed out that he had accumulated some of the capital during the marriage. H had begun, and invested in, the business after the marriage so any investment was part of matrimonial property and therefore subject to division. The court ordered that W was entitled to a half share of H's belongings, and that she was to have a half share in his capital in the business. The amounts were very small, but the case recognised the principle of W sharing even in business assets. It did not, however, outline principles upon which to base future actions.

CASE *Peck v Peck (1992) Fiji*[46]

Facts W and H were distant cousins. W had worked for the United Nations in Geneva. H and W married and lived in Fiji in a house that was in H's name. Their marriage lasted 21 months. W sued H for divorce, maintenance and property settlement on the grounds of cruelty and constructive desertion. She alleged that H had asked her to leave the matrimonial home. H counter-sued on the grounds of W's cruelty. H said that W had "independent means" but he had made his money through his own hard work; W had made no contribution towards his wealth; she had an ample pension, and that in any case their marriage was so short she was not entitled to anything.

Decision W proved her divorce on the grounds of constructive desertion. The High Court said that H's behaviour was unreasonable and that W had a

good reason for leaving. It very clearly said that Sections 84, 86 and 87 of the *Matrimonial Causes Act* gave courts very broad powers.

"... the Court's powers under Sections 84, 86 and 87 of the *Matrimonial Causes Act* Cap. 51 are very wide and comprehensive. In particular, Section 84(1) empowers the Court to make a maintenance order 'as it thinks proper having regard to the means, earning capacity, and conduct of the parties to the marriage and all other relevant circumstances' and under Section 86(1) an order for 'settlement of property'... as the Court considers just and equitable in the circumstances of the case."

The Court considered W's situation. H was very wealthy; W was over 70, and had left her well-paid position in Geneva to marry him. She would not be able to return to this position, but would have to move back to Europe and needed relocation costs to do so. The Court made an order based on what was "just and equitable" in the circumstances. It said there was not enough information about H's assets and wealth mainly because he had been uncooperative. The Court ordered the sum of $100,000 maintenance and property settlement in W's favour.

Comment It is important that the amount combined matrimonial property and maintenance settlement. If the Court had concentrated mainly on matrimonial property, it may not have been able to award that amount since the largest part would have been a lump sum maintenance settlement. In order to use this case as a precedent, we need to know the specific principles upon which the amounts were arrived at; what proportion was a maintenance settlement; and what proportion was a matrimonial property settlement. The Court did not set out guidelines upon which future actions could be based, nor did it lay down any general principles of contribution for the purposes of distribution. It arrived however, at a fair settlement.

Cases such as these show why it is so important for Pacific women to push for gender-sensitivity training for judicial officials. However, changing the legislation will only marginally assist women. The rest is up to the judges and the courts. We have no record of any case in our region in which a woman without a separate income has been granted a share of matrimonial property. It is important for women to argue this particular issue before the courts so that we can see what strategies are necessary in order to change the law.

CONCLUSION

When pressing for new legislation, women can learn from the experiences of other countries such as Cook Islands, New Zealand and Australia. In this final section of our matrimonial property chapter, we will look at these attempts to provide a realistic just and equitable settlement, and we will try to reach some conclusions about what more needs to be done.

From our discussions of laws and cases, we may state the following conclusions about the present situation in our region.

- Current interpretations of matrimonial property laws reduce the opportunity to promote greater equality in the distribution of wealth through land, to which women have little access except through male-controlled leases. This effectively excludes women from power through connection with land and therefore wealth.
- In matrimonial property disputes, the women who obtained some justice were relatively well educated and well off. They had the knowledge, the money to employ lawyers and the determination to challenge the system.
- Most women cannot afford lawyers and most do not know that they have rights to matrimonial property, even if their names are not on the documents of ownership. They do not try to get justice, and they do not get justice.
- To get justice, they need money, but this in itself is unjust.

Women do have a legal right to share in matrimonial property but only if they are recognised as having made financial contributions to the family income. The right is based on legislation or on the principle of constructive trust or on broad principles of justice and equity. In addition, if they are earning an income, the court will also acknowledge their non-financial contributions as home-makers or informal workers. However, courts have paid only lip service to women's non-financial contributions. They do not recognise that women's non-financial contribution deserves recognition equal to men's financial contribution. This impoverishes women in the Pacific, since most do unpaid work. So what has been done about the situation?

Cook Islands and New Zealand

Through the *Cook Islands Matrimonial Property Act 1992*, Cook Islands adopted most of the provisions of the *New Zealand Matrimonial Property Act 1976*. We summarise and list below the main provisions of Cook Islands laws applying to non-custom land. Matrimonial property includes the following:

- All property bought during marriage or immediately before marriage, if the couple were intending to marry
- Both local and overseas property
- The stated matrimonial home

In general, each spouse shares equally in the matrimonial property. Financial and non-financial contributions have equal value and the distribution of property depends on principles of equal contribution to marriage, whether the wife is in paid employment or not. Financial contribution is not worth more than non-financial contribution: unpaid work in the home and paid work outside the home have similar value. This

legislation seems to have encouraged couples to make out-of-court agreements based on the outlined principles of equality.[47]

The legislation may however be criticised for faults similar to those that the New Zealand Ministry of Women outlined for New Zealand matrimonial property legislation.[48]

> The present system for matrimonial property is based on the presumption that equality means a 50/50 share of the property acquired through the marriage. This concept looks very reasonable. Indeed New Zealand was considered to be at the fore-front in passing legislation incorporating that presumption of equality. However, for most women, equality is not the reality they experience when couples separate; most women are not socially and economically equal to men in our society. Research confirms that many women, especially women with children, experience severe reductions in living standards after marriage breakdown. One American study reported that, with or without children, separated women were at great risk of dropping into poverty. Another study found that divorced women and their families suffered a substantial drop in living standards, but that the situation of their male partners actually improved. The present New Zealand law fails to ensure equality of results for women, especially in the following aspects.
>
> - In a significant number of cases, it does not achieve equality between the partners after separation.
> - It does not apply realistically to a wide range of domestic relationships.
> - It does not define contribution, nor does it extend the concept to include such things as women's unpaid work.
> - The Ministry sought a wider definition of matrimonial property to include, for instance, any qualifications that a partner may have acquired during the course of the marriage. These are potential income-producers and the non-earning spouse should have the benefit of the proceeds.

The New Zealand Ministry of Women, then, says that equal sharing of property does not generally work for women because women start from a disadvantaged position. For example, a 50/50 distribution is not a fair settlement when the wife has to look after a child or children as well as herself, and the husband has only himself to look after, nor when the wife has no skills to obtain employment that will allow her to earn a reasonable wage. The courts must try to make a decision that produces equality in effect between the husband and wife.

Australia and other countries

Substantial changes to matrimonial property legislation have been made in other countries, such as Australia. In these countries, as in Cook Islands and New Zealand, most property disputes do not even go to court. They are settled out of court because lawyers are obliged to tell husbands that the law is most likely to give wives a share, so there is no point in court actions. We summarise below the most important advances.[49]

- The legislation is based on the principle of equal contribution to marriage, irrespective of the relative financial income of the parties concerned.
- Money contributions are no longer treated as being worth more than other types of contribution. The law legally recognises women's unpaid domestic and child care responsibilities, and gives political and legal recognition to women's unpaid labour.
- The laws are based on the principle that there are many complex reasons for marriage breakdown. The concept of blame or fault is irrelevant in most cases. One partner may be more to blame than the other, but this does not affect the division of property. On the other hand, if, for example, one party has deliberately destroyed property, this kind of conduct may be taken into account, and that party's share may decrease.

In addition, courts have specific instructions on what factors to consider when making an assessment of contribution to a marriage.

- The financial contributions of both spouses towards the acquisition, care and maintenance or improvement of the property through wages, salaries and other income.
- The non-financial contribution of both towards the property; this is usually the unpaid domestic work of the wife, and is regarded as her indirect contribution to the acquisition, conservation or improvement of the property.
- The contribution made by a party to the welfare of the family including any contribution made in the capacity of parent or home-maker.
- The effect of any proposed order upon the earning capacity of either party. (Will this order worsen or improve his or her situation? Can he or she manage on the amount given?)
- Who gets custody of the children.
- The future needs of both parties.

Courts therefore are required to try to avoid situations where the division of property does not adequately meet the needs of both parties. To do this, courts must take into account the need factors, or matters that will affect a party's ability to manage on what he or she gets. We saw this kind of approach in the 1981 case of *Hanlon v The Law Society*, where, in the United Kingdom Court of Appeal, Lord Denning described what should happen:

> [The court takes] the rights and obligations of the parties all together and puts the pieces into a mixed bag. Such pieces are the right to occupy the matrimonial home or have a share in it, the obligation to maintain the wife and children, and so forth. The court then takes out the pieces and hand them to the two parties - some to one party and some to the other, so that each can provide for the future with the pieces allotted to him or her. The court hands them out without paying any too nice a regard to their legal or equitable rights but simply according to what is the fairest provision for the future, for mother and father and the children.[30]

Amendments to the *Australian Family Law Act 1975* spelled out the need factors that Australian courts must now consider. We summarise these as an example of what our region might consider in working towards a more just and equitable approach. [51]

Summary of Australian Family Law Act need factors

- The age and state of health of each of the parties.
- The income, property and financial resources of each of the parties and the physical and mental capacity of each for appropriate gainful employment. (What are their assets now? What are their future employment possibilities? If the husband will eventually earn more because he has a University degree, perhaps the wife should be given a bigger share now.)
- Whether either party has the care or control of a child who has not reached the age of 18 years. (If the child is very young and the mother has custody, the mother must get a larger share of the matrimonial property to meet the child's needs over a longer time.)
- The financial needs and obligations of each of the parties.
- The responsibilities of either party to support any other person. (If, for example, one has to support an aged parent, that may be a relevant factor to adjust the share.)
- The eligibility of either party for a pension, allowance or benefit and the amount of any such pension, allowance or benefit paid to either party.

  Where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable.
- The extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling him or her to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income. (Will that amount help the person get an education so that his or her earning capacity will be increased?)
- The extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party. (Did one work for money to help pay for the other's study or training expenses?)
- The length of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration. (If the wife gave up her job to have and care for children, how has that affected the her ability to get a well paid job now? If, on returning to paid work she gets less than she would have if she had stayed in the job, the wife's share might be adjusted.)

- The need to protect a party who wishes to continue that party's role as a parent.
- The financial circumstances of a party who is living with another person. (Is the new partner poor or well off? What effect does this have on the needs of the party?)
- "The terms of any order made or proposed to be made under Section 79 in relation to the property of the parties".
- "Any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account".

Our region: towards a just and equitable approach

The United Nations Women's Convention requires each member country to attempt to "eliminate discrimination against women in all matters relating to marriage" and includes ensuring "the same rights for both spouses in respect of the ownership, management, administration, enjoyment and disposition of property".[52]

But what do we need before these things can happen? Basically, before judges and magistrates will develop the common law in a fairer way, we need both changes in legislation and a shift in judicial attitudes towards the nature of marriage and women's work. We need a judiciary that is sensitive to the status and concerns of women. The courts must start off on the basic assumption that marriage is a partnership of two equal persons whose different roles and different work deserve equal value even if one person does not receive an income. We have seen some of the higher courts give some recognition of women's unpaid work as real work, but we still need a decision that could be used to develop the common law to a fairer distribution of matrimonial property. However, as judicial officials cannot be compelled to develop the common law, legislation may be the only alternative.

Throughout this chapter we have highlighted the problems arising from confusion about jurisdiction, the ancillary rule and other problems associated with Certificates of Title, *caveats*, access to chattels, disposal of property, overseas property, discovery of documents and access to corporate property. Enlightened legislation in these areas would help, but we need more than bit-by-bit reform. We need a total and coherent reform, based on the Australian, Cook Islands and New Zealand approaches.

We need also increased emphasis on legal literacy. The more legally literate Pacific women become, the less likely they are to be left with nothing when a marriage fails. They must, for example, learn to insist that their names go on all relevant documents. If wives' names automatically appeared on titles, amendments to *caveat* laws would be unnecessary. If women are more aware of the laws, they are also more able to negotiate better settlements for themselves without having to go to court. If they are more aware of the laws, they are more likely also to press for improvements in the laws — and, as in Cook Islands, such improvements may also encourage out-of-court settlements.

However, along with improved legislation and increased legal literacy, we need increased access to lawyers, through legal aid and access to the courts. A new Family Court system with jurisdiction not tied to a Magistrate's Court or to a High Court would enable a single court to deal sympathetically and realistically with matrimonial property as part of the overall situation of the family.

12

De facto relationships, affiliation and natural children

WHAT THIS CHAPTER IS ABOUT

In Chapters 5 to 11 we focused on the situation of legally married women and legitimate children: marriage, divorce, custody, access and property rights. This chapter is about the rights of single mothers, *de facto* wives and their children; their problems are similar to, but even more serious than, those of legally married women and legitimate children.

We begin by asking a question: What rights do single and *de facto* mothers and their natural children have? We see that most of these rights, where they exist, depend on being able to prove that a particular man is the father of a particular child, and we discuss what kinds of proof are needed in a court of law. If a court accepts the proofs, it will order the father to pay maintenance for his child. We look at the amounts and kinds of maintenance payment, and we see that the problems of obtaining maintenance are similar to those experienced by legally married women. Finally, in Table 12.3 we summarise the legislation and common law rights of natural children and their mothers in our region. We will note that legislation, the common law, court practices and social attitudes push single mothers, *de facto* wives and their children into the most disadvantaged groups of our societies. What improvements are needed and how can we help to bring them about?

SINGLE MOTHERS, *DE FACTO* WIVES AND THEIR NATURAL CHILDREN: WHAT RIGHTS DO THEY HAVE?

In earlier chapters, we have referred to single mothers, *de facto* wives and natural or illegitimate children. By single mother, we mean a woman who is caring for her child by a man to whom she is not legally married. By *de facto* spouse, we mean a man or woman who lives as husband or wife without court, custom or registry marriage. This situation is sometimes called a common law marriage and has been described thus:

> ... the relationship between a man and woman who, although not legally married to each other, live together as husband and wife on a *bona fide* domestic basis.[1]

The status of the child, then, depends on the marital status of its parent or parents. A child is legitimate in the following situations:

- The child's mother is still legally married to her husband.
- Its parents were legally married to each other by a registered marriage officer at the time when it was born.
- Its parents were married in custom in a country whose law recognises custom marriage as a legal marriage.

- Its parents married each other after the child was born.

On the other hand, the following situations result in the child being illegitimate.

- The child's mother was not married when it was born.
- Its parents are living together in a *de facto* relationship but are not legally married to each other.
- Its parents have gone through a religious marriage ceremony that has not been lawfully registered. (In Fiji, some couples have a Hindu marriage ceremony or the Muslim marriage ceremony *nikah*, but do not register their marriage in a registry office. Their children are illegitimate.)

To illustrate these distinctions, let's look at three different women.

STORY *Lusi, Mere and Elena*[2]

Lusi is a single mother. She had a short sexual relationship with Jone but did not know that he was legally married to Mere. When Lusi became pregnant, Jone took no further interest in her or in their son Joeli. Lusi is registered as Joeli's mother but Joeli has no legal father. Joeli is counted as illegitimate by the law.

Mere and Jone are legally married to each other. Mere had a secret relationship with Vili, by whom she had a child, Mosese. The law regards Mosese as Jone's legitimate child, and Jone's name will automatically be entered on Mosese's birth certificate. Vili's son Mosese is legitimate because Mere is married to Jone. Jone had a secret relationship with Lusi but their son Joeli is illegitimate because Lusi is not married to anyone.

Elena is a *de facto* wife. Elena and Tevita have been living together as man and wife for three years, and they have a natural daughter, Ana. Elena and Tevita are both registered as Ana's parents, but Ana is illegitimate too.

Paternity and affiliation mean fatherhood and proof of fatherhood. Two old English sayings sum up legal attitudes to fatherhood.

> Maternity is a matter of fact, but paternity is a matter of opinion.

> It's a wise child who knows his own father.

These two sayings mean that it is easier to identify a child's mother than it is to identify the child's father. When a woman gives birth, it is obvious that she is giving birth, but because the child's father does not give birth, his role is not immediately obvious. Legal arguments about who is the biological mother of a child are very rare (although you may remember how King Solomon solved a dispute between two women.) On the other hand, arguments about who is the biological father of a child are very common, especially when a natural child's mother tries to obtain maintenance from her child's father.

Proving paternity in law means proving fatherhood. This is done by filing an affiliation application in court. An affiliation case happens when a single mother (called the complainant) files a legal action in a court, alleging that the defendant is the father of her natural child. If the complainant succeeds in proving paternity, the defendant will be judged to be the putative father of the complainant's child, and the court will issue an affiliation order. The complainant will be entitled to receive maintenance from the defendant for her child. Courts do not say that the defendant is the child's father — they say that he is the putative father, the man who is most probably the father. However, despite this legal insult to the mother, the results are the same: the court orders the defendant to pay maintenance for his child.

Most cases follow a standard pattern, as in the following example.

STORY *Lusi and Jone*

Lusi, the complainant, is a single mother. She files an affiliation application against the defendant Jone. She says that she had sexual intercourse with Jone after her last period and approximately nine months before she gave birth to her child Joeli. Lusi is seeking an order that Jone be judged the putative father of Joeli. This will enable her to obtain maintenance for Joeli. Jone will defend himself against the affiliation application. Jone may argue that he never had sexual intercourse with Lusi, or that he did have sexual intercourse with Lusi but not around the dates of possible conception.

An affiliation case may arise from a *de facto* relationship that has ended, or from a short sexual encounter. In a short sexual relationship, paternity is very difficult or almost impossible to prove, because such relationships are usually secret. (Without blood tests, Lusi, the single mother of our example might find it impossible to prove that Jone is Joeli's father. Jone might find it impossible to prove that Vili is the father of Mosese.) As we work through this chapter, we will time and time again see how the difficulties of proving affiliation affect the rights of mothers and their natural children.

Rights of natural children: maintenance and property

Many high chiefs in the Pacific Islands were illegitimate but achieved very high status in their communities. With the adoption of Western values and Christianity came the dishonour of illegitimacy, sometimes called bastardy. In some communities, there is still no stigma attached to being illegitimate or having an illegitimate child, but in others, single mothers are treated as being "loose" and without morals.

Under the common law, a child was legitimate only if its parents were actually married when it was born.[3] Even the subsequent marriage of the natural child's parents did not make the child legitimate. An illegitimate child had no right to succeed to his parent's property, nor to receive maintenance and other benefits that legitimate children received. In the mid-20th century, the law changed: natural children could be legitimised if their

parents married each other. There was some argument about restricting this right to children whose parents had been free to marry each other when the children were conceived, but the common law position is that the marriage of *de facto* spouses automatically legitimises their natural children. When legitimised, natural children have some, but not necessarily all, of the rights previously given only to legitimate children. At present, in all countries of our region, the marriage of parents automatically legitimises the children born before their marriage.

Natural children can claim maintenance from their father if paternity has been proved through an affiliation case. However, some countries distinguish between legitimate and natural children. In Fiji, for example, legitimate children have the right to receive maintenance until they are 18 years old, but natural children are entitled to receive maintenance only until they are 16 years old. This rule clearly discriminates against natural children and, through them, against their mothers.

STORY *Lata's story (Fiji)*[4]

Lata, an Indo-Fijian Hindu woman, had a religious ceremony of marriage with D, an Indo-Fijian Hindu man in Labasa. They did not register the marriage. They lived with D's wealthy parents who treated Lata as a daughter-in-law. Lata worked very hard as is traditional in an Indo-Fijian extended family. She cooked the meals and did most of the domestic work. Although the family was wealthy, Lata had no spending money of her own. D bought another house which he rented out. When D threw Lata out of his parents' home without any money, they had three daughters aged between seven and nine, but because Lata and D were not legally married, D's name was not entered on the children's birth certificates

Lata went to Suva with the youngest child. She totally depended on handouts from her poor parents, who were ashamed of her and embarrassed by her child. Her lawyer had to tell her that she had no right to maintenance nor to a share of the rented property. The child was entitled to receive maintenance if Lata could prove that D was the father of the child. Lata would have to file an affiliation case against D and bring witnesses to prove that she was living with D at the time the child was conceived. Lata decided it was too difficult to file a court case as all the witnesses were D's relatives and they would not come to Suva to give evidence on her behalf. Lata felt that even if she got maintenance, D would not pay regularly and she could not afford to keep trying to enforce an order. She did not continue.

Natural children share some rights with legitimate children. However in countries like Tonga where inheritance to land is specifically based on male primogeniture (inheritance goes to the eldest son) natural children rank behind legitimate children.[5] In addition, some specific rights are denied to natural children by the operation of the common law, although some countries (Tuvalu and Kiribati for example) recognise the rights of natural children to inherit the land of their fathers. Court cases show different attitudes regarding the rights of natural children to inherit their father's land upon his death.

CASE *Gloria Harris and Another v L.M.D. Hedmon and Ors (1981) Nauru*[6]

Facts and decision The father died, leaving all his assets to his *de facto* wife and eight natural children. He left nothing to his two legitimate children. When they challenged the will, the court ruled that under Nauruan custom, if a man dies without a will, his property automatically passes to his legitimate children. The legitimate children could therefore challenge the will as invalid in court. This meant that the legitimate children would be entitled to inherit some or all of the land in a court case on that issue.

CASE *Karu v Official Administrator (1985) Solomon Islands*[7]

Facts and decision The father died without a will, leaving two families — one with a legal wife and legitimate children, and another with a *de facto* wife and a natural daughter. He had lived with his *de facto* wife and child for 10 years. The High Court had to consider whether the child of a long-standing *de facto* relationship was entitled to inherit property left to the mother by the father. The legitimate children argued that the natural child had no right to inherit; ordinarily the law was that when a man dies without a will, his property automatically went to his legal widow. His land was registered land and not custom land. The Court applied common law principles, and said that the long-standing relationship led to the assumption that the parties had been married. Therefore the natural daughter could inherit. This case shows indirect common law recognition that natural children have rights to inherit their father's property.

CASE *John Noel v Obed Toto (1995) Vanuatu*[8]

We have already referred to this case in Chapter 3 and elsewhere. The dead father had been legally married to his first wife, but not to his second wife, and had children by both. One issue was whether the children of the *de facto* wife had rights to inherit their dead father's custom property. The High Court recognised the right of all the children, natural or legitimate, to inherit their father's property equally.

Rights of single mothers and *de facto* wives

Basically single mothers and *de facto* wives have the same rights, since the law regards them both as single mothers, and recognises only formal law and custom marriages. However, proving paternity is easier if the parents lived together for a long time. If a father tries to deny legal and financial responsibility for his children, there is usually some evidence or proof that the parents lived together at the time the children were conceived.

Maintenance, property, non-molestation orders, employment, pensions

De facto wives do not have the same rights as legal wives. Generally, *de facto* wives and single mothers have no right to obtain maintenance for themselves; to claim matrimonial property under the matrimonial laws; to claim pensions; or to seek the protection of a non-molestation order. We will now look at each of these in turn, and will see that there may be some exceptions.

For maintenance, *de facto* wives do not generally have the same legal rights as legal wives. However in Tuvalu and Kiribati, the current maintenance legislation gives them the possibility of claiming maintenance from their *de facto* husbands. The maintenance legislation in these two countries is not fault-based, nor is it limited to married women, nor is it based on proving wrongdoing. The legislation allows any person to claim maintenance from any defendant whom he or she can prove has a legal or customary obligation to do so.[9] A *de facto* wife would have to prove that, under custom, her *de facto* husband should provide for her after separation. It would not necessarily be easy, and there are no case examples on record of it, but it is theoretically possible. This interesting provision is framed in gender-neutral terms. It allows anyone to claim against any other person who has a customary obligation to provide maintenance. However, Tuvalu women do not claim maintenance for their natural children as they fear the custom practice giving custody to the father's family. (We will come back to this when we discuss custody of natural children.)

In Chapter 11, we outlined the situations in which legal wives could claim a share of property. If the name of a single mother or of a *de facto* wife appears on the Certificate of Title, she may claim a share. If it does not, she may claim a share of property if she can prove that she made financial contributions to its purchase and maintenance. Because she is not legally married, she cannot sue under matrimonial legislation, but she may sue in the ordinary courts of law under the law of trusts.

One landmark case in Fiji attempted to grant *de facto* wives some limited property rights.

CASE *J Chand v Sheila Maharaj (1984) Fiji and United Kingdom*[10]

Facts C, the complainant and D, the defendant had lived together for 12 years as *de facto* spouses. They had one child. The relationship was stable and seemed permanent. When D bought some land and applied to the Housing Authority to participate in the subsidised housing scheme, he said that C was his wife and that he and she were married. Later D submitted a formal application and named C as his wife saying that they had children together, and that bought the property for himself and for C. Both C and D signed the document.

C worked in paid employment for a time but made no direct financial contribution towards payments for the land; she did not pay off the mortgage but contributed to the family income. They built and lived in a home on the land but later separated, and D married another woman. After separation D allowed C to live in the home, but then claimed the property and served her with a notice of eviction (a notice to leave.) C had no money to pay for legal fees but, with the assistance of sympathetic lawyers, she defended the application. She went through two levels of court in Fiji before taking her case to the United Kingdom Privy Council, which was then the final court of appeal for Fiji. (Its present equivalent is the local fourth tier court, the Supreme Court.)

Decision: High Court, Fiji The High Court ruled that it could not give C any legal right to stay, but said she had an equitable right to stay as long as she lived. This means that although she would never own the property, she could use it for her lifetime. Then it would revert to D or his heirs.

Decision: Court of Appeal, Fiji. D appealed to the Court of Appeal, which disagreed with the decision of the High Court. It said that even if D had given C a licence to live in the home, the licence was cancelled when D gave C notice to leave. The Court of Appeal said that although the strategy of constructive trust had been used to accommodate the kinds of social relationships that existed today in other countries, it could not be used in Fiji until Parliament saw fit to change the legislation. Only Parliament could change the laws to give *de facto* wives rights through new legislation. It was not the function of the Courts to extend the rights of *de facto* wives through the common law.

Decision: Privy Council, United Kingdom. C and her lawyers took the case to the United Kingdom Privy Council. The Privy Council basically agreed with the High Court. It said that if the property was legally owned by one partner, in certain limited circumstances a constructive trust was available to a *de facto* wife so that she and the children of the relationship could live in the home that the couple had shared. She could live in this home as long as she needed for the sake of the children. The Privy Council said that C had a licence to stay in possession of the home, but did not become the legal owner of the property nor did she acquire an estate or interest in the property. This means that although C could live in the home as long as she wanted to, she could never sell the home, or use it to obtain a mortgage or transfer it into her own name.

Comment This case did not extend a *de facto* wife's rights, and did not create new common law by placing *de facto* wives in the same position as married women. C's claim was refused in the Fiji Court of Appeal, which said that as long as the legislation remained, the Court could not grant her the right to the home. The local Court of Appeal was not prepared to develop the common law along the lines eventually developed in the Privy Council.

C went through four levels of court to get justice, but did not have to pay her legal costs; the case was heard free of charge by special leave of Her Majesty in Council. However, most women in her position cannot afford even to seek the help of lawyers.

In other countries of our region, the position of *de facto* wives and property has not been tested. For example, in New Zealand law, a *de facto* wife may claim property from her husband if they have been living together as husband and wife for a specified number of years. New Zealand common law extends to Cook Islands generally, and, if challenged in the courts, *de facto* relationships could be legally recognised, as they are in the 1994 Cook Islands legislation giving *de facto* wives protection from violent partners.[11] As we have seen in Chapter 5, most other Pacific Island countries grant a legal wife the right to a non-molestation order for protection against violence, but do not grant a *de facto* wife the same right. In the case of *State v Croker (1993) Fiji*[12], the High Court sentenced a man to only 18 months imprisonment for beating his *de facto* wife to death.

In Tonga, discrimination against single mothers may affect their jobs and livelihood. An unmarried civil servant has to resign from her government position if she gets pregnant.[13] This is apparently also the policy of the Kiribati Government, and is unjust not only to the woman, but also to her child. In

Fiji, the pensions legislation[14] makes only the legal widow and legitimate children of a contributor eligible to receive a contributor's pension. This provision therefore discriminates against a contributor's *de facto* wife and natural children.

Custody and access

In most countries of our region, the only right that a single mother or *de facto* wife has is the right to custody of her child. This is covered by the common law, which says that the custody of a natural child belongs only to the mother. In a dispute over a legitimate child, the principle upon which custody is based is the welfare of the child or what is in the child's best interest. This is not the case in a dispute over a natural child. So if there is an argument over the custody of a natural child, the common law clearly says that the father of a natural child has no legal right to the custody or access of that child. Only the mother has an absolute right to custody.

This seems to be the situation in Fiji, Nauru, Solomon Islands, Tonga and Vanuatu. Further, the father of a natural child has no right to access to the child, but can get access with the consent of the mother. The only exception to this rule is that the legislation allows the court to give another person custody if the mother is an unfit person to have custody, or is of unsound mind, or is in prison, or has abandoned or neglected the child.[15]

As far as adoptions are concerned, right up until an adoption order is made in a formal court of law a mother can change her mind about giving her child up for adoption.

CASE *Subhaigam v Rakoso and Permallamma (1987) Fiji*[16]

Facts: An unmarried mother, C had a child. She had no money. D, the father, pressured C to give the child up for adoption. The child was placed in the care of the respondents, R and P. C said that she placed the child with R and P temporarily because she was sick. R and P argued that C placed the child with them for adoption. C went to court to get the child back. The Magistrate's Court ordered the child to remain with R and P for adoption saying in effect that C had abandoned the child. C appealed to the High Court.

Decision and comment: The High Court said that placing a child with someone else is not an irreversible or final decision. C could change her mind if she wanted to without breaking the law—right up to the date of adoption, even if the other parties could give the child a better life. The welfare of the child was not the basic test in a dispute over a natural child. In any case, C had not abandoned her child; she had made several unsuccessful attempts through Social Welfare to get the child back. The High Court concluded by saying "It is fundamental law that an unmarried mother ... has exclusive rights of custody to her child". So three years after its birth, the child was returned to the custody of his natural mother.

Despite the fact that single mothers have clear custody to children, it is quite common in our region for natural children to be illegally taken by the father or the father's family. In some countries the father's family argue that they have a customary right to do so. In Vanuatu it is quite common for the

father to apply for custody of a natural child, but the court will award custody to him only if he can prove that the mother is unfit to have custody.[17] Under Solomon Islands law[18] a person who takes a child unlawfully may be liable to a $200 fine or three months imprisonment. This matter may be dealt with by the Magistrate's Court. In Fiji on the other hand, to enforce custody and access orders, women may have to go through the long, difficult and costly process of filing writs for contempt in the High Court: the *Subhaigam v Rakoso and Permallamma* case took three years and a full High Court trial before the child was returned to its mother.

In 1992 in Fiji, the High Court appeared to be saying that the father of a natural child should be given more rights to custody and access.

CASE *Ravula v Evanson (1992) Fiji*[19]

Facts and issue C, the mother, had obtained an affiliation order and had agreed to give the wealthy father access in exchange for generous regular maintenance payments for the child. C and D had both signed an agreement (recorded in court) that neither would take the child out of the country without the express permission of the other. The dispute arose over C's wish to take the child overseas on holiday. D did not want the child to go abroad with C. The issue in the High Court was whether a father had any rights over his natural child.

Decision The High Court said that United Kingdom laws had been changed by legislation to give both natural fathers and natural mothers similar rights to a natural child. However, the common law in Fiji had remained the same; no legislation had been passed to improve a father's rights to a natural child. The Court expressed concern over the lack of rights of fathers, but reinforced the law that currently gives the mother exclusive rights to custody of her natural child.

The Court also said that the father had some rights but only very limited ones. Even if C lost custody, D would not necessarily get it. D did not even have rights to access. C was allowed to take the child abroad but the Court made some comments about improving the rights of fathers of natural children: "... If my analysis of the law relating to illegitimate children and putative fathers in Fiji is correct then there is a major lacuna in the law relating to such children and fathers. Whether or not we approve of it, the fact is that an increasing number of children are born out of wedlock. Even though many of such children will be brought up within the extended family system, some will not and given that illegitimate children need at least as much care as children of a marriage, it would obviously be sensible for putative fathers to have some say in the way in which they are brought up and in suitable cases for them to enjoy access to them. [The *Maintenance and Affiliation Act*, Cap. 52] needs to be amended to allow putative fathers approximately parallel rights to those already granted to mothers ..."

Comment The putative father therefore has no legal rights over his natural child except where it is proved that the mother has abandoned the child or is unfit to have custody of the child. However the High Court said the law should be changed by legislation to give putative fathers more rights over their children.

This statement is important for women activists who wish to use the common law or judicial decisions to develop women's legal rights. It is

> significant, however, that although Pacific women lack many legal rights, courts rarely express concern or make moves to improve their rights under common law. Courts generally seem to fall back on the argument that Parliament has to improve women's rights by new legislation. They argue that it is not their place to change the law, even when they are constantly developing the law and adopting different interpretations by analysis in other areas. They do this where the legislation is capable of a variety of interpretations. Yet in cases where the common law rule allows women to enjoy greater rights, courts appear to act quickly to protect or improve the rights of men — or, at least, to suggest that legislation needs to be changed to give men more rights.
>
> The United Kingdom and other countries have now granted fathers of natural children the same rights to custody and access as mothers, but along with a general improvement in legal rights for women. Fiji has not done this. When the legislature and courts amend all the laws to improve the rights of women, then it may be possible to grant men and women similar rights to custody and access of natural children.

Nauru legislation[20] gives the father of a natural child no rights to custody. However, the legislation indicates that the father may apply to be guardian, if he can prove paternity and if the court accepts the application. It is not clear whether he would become the joint custodian, or have custody instead of the mother, but joint custody seems more likely. The position is the same if the child was conceived after the mother's divorce from the child's father. In these circumstances, if the mother of the child dies, the father can apply for custody.

The Cook Islands custody position is different. We have found no cases showing a dispute over the custody of a natural child. However if the common law of New Zealand were to apply, it is probable that both the natural mother and father have an equal right to apply for custody. The legislation states that a maintenance order can be made against either parent (including the mother) of a natural or legitimate child in favour of the child.[21] Possibly, then, a natural father can claim custody of a natural child, though it looks as if the child has to be living with the father or some other person in order to enable the court to make a maintenance order against the mother.

Nothing in Western Samoa law guarantees a mother custody of a natural child. The Maintenance Officer says, and files indicate, that the putative father usually admits paternity. Custody, if by consent, usually goes to the mother. This means that the fathers may also have a right to custody.

In both Tuvalu and Kiribati, the father of a natural child is favoured in custody disputes: when the natural child is two years old, the father has an automatic right to custody, if he accepts paternity. The idea behind the legislation is that giving the father custody ensures that the child will inherit his father's land. In practice the child usually lives with the father's parents and the mother has a lesser right to her child than do the grandparents. The child will inherit land in the same way as the father's legitimate children.

Tuvalu paternity laws are covered by the *Native Lands Act*, Cap. 22. This is because the birth of a natural child has a bearing on land rights in

Tuvalu — an emotional and complex issue in a country with so little land. Land rights are dealt with under customary law as recognised by the Constitution and land legislation. Section 20 of the *Native Lands Act* Cap 22 says that if a single woman has a child the Land Court can summon her to appear before it, presumably even against her will, and inquire into the paternity of the child.

> (1) If in any island a single woman is delivered of a child, the court may summon before it that woman and all other such natives as it may think fit and may inquire into the paternity of the child.
>
> (2) Subject to anything to the contrary in the native customary law, the court may make an order regarding the paternity of the child and its future support in one of the following ways-
>
> (i) If the father being a native accepts the child as being his, such child shall after reaching the age of 2 reside with the father or his relations and shall in accordance with native customary law inherit land and property from his father in the same way as the father's legitimate children; or
>
> (ii) If the putative father being a native does not acknowledge paternity of the child, but the court is satisfied that he is the father of the child, it may order that the child shall live with the mother and may transfer to the child title to any such portion of land or other property owned by the putative father as shall be necessary for the maintenance and support of the child; or
>
> (iii) If the putative father being a native does not acknowledge paternity of the child, but the court is satisfied that he is the father of the child, it may order that the child shall live with the mother and may if such putative father owns no land which will be of assistance in maintaining the child, order monetary maintenance up to an amount not exceeding $2 per month or maintenance by supply of foodstuffs to be paid by the father to the mother, or whoever is supporting the child, until such time as the child reaches the age of 21, or the father inherits sufficient land to allow for a transfer as provided for in paragraph (ii), and in which even a transfer shall be ordered in substitution for the order for maintenance, and any sum of money or foodstuffs due under such a maintenance order may be claimed as a civil debt in the island court.

Paternity is not a private matter for the mother and father; it is a public matter for the law. If the father accepts that the child is his, the mother may keep the child only until the child is two years old; then it is given to the father and the mother has no more rights to custody or access, unless the father allows it. The practice of giving custody to men is not confined to the natural father and his family. In a disputed custody case in Tuvalu [22] the natural mother fought her uncles for custody of a 10 year old illegitimate girl. The mother's uncles got custody and the mother was denied the right to take the child abroad with her new expatriate husband.

This law is double-edged; it denies the mother her rights to her child but gives a natural child the same rights to land as legitimate children. Women's rights are sacrificed, theoretically for the good of the community. Not only

do Tuvalu women bear the scorn of the community for having children outside marriage but if they claim maintenance they risk losing custody to the fathers who generally would rather claim custody than pay maintenance. The better right of a father to a natural child is thus used as a defence to a claim for maintenance. This partly explains why Tuvalu women do not claim maintenance for their natural children.

PATERNITY, AFFILIATION AND MAINTENANCE

After this brief survey of rights, we will see what has to be done to obtain rights. In this section, we will discuss the courts and their powers to hear cases. We will then see what must happen before the court will even accept an application for affiliation and maintenance orders.

Courts and their jurisdictions

In Fiji, a paternity suit is filed in the Domestic Court in Suva or through the ordinary Magistrate's Court in other areas. Other countries of our region do not have special Domestic Courts. Except in Kiribati and Tuvalu, where the legislation allows affiliation cases to be heard by lay magistrates with little or no legal training, affiliation cases should not be heard in Local or Island Courts or informal village level courts or by magistrates without formal training in law. In most countries, the legislation requires the complainant to file affiliation cases in the Magistrate's Court, the Chief Magistrate's Court, or the first level formal court where a qualified lawyer sits to hear the case.

However, this is not how the system works in practice. In all countries with outlying islands or other areas with no formal courts, women have access only to Local or Island Courts. Further, as we have seen in Kiribati and Tuvalu, national custom as well as national law may determine the fate of an illegitimate child. This is true in other Pacific Islands, especially in Melanesia, where having a child outside marriage may affect a woman's bride price. In Melanesia, affiliation cases are unofficially heard in the Local or Island Courts. Here there is a conflict between laws regarding affiliation cases, and laws regarding custom. In Solomon Islands, only the main Magistrates' Courts in urban centres may deal with such cases, but the Local Courts have powers to deal with custom matters. So Local Courts have *de facto* jurisdiction over single mothers attempting to obtain maintenance. In Vanuatu, too, only legally qualified magistrates are allowed to adjudicate in affiliation cases, but in practice such cases are brought before Island Courts, and may never be heard in a formal Magistrate's Court.

Thus, despite what the affiliation laws officially say, women go before Island and Local Courts whose officers may have no legal training and may be prejudiced against women who have children outside marriage.

Applications for affiliation and maintenance orders

Discussions with lawyers working in legal aid schemes throughout our region suggest that more children are being born outside legal marriage. Obviously, affiliation and maintenance orders are made for only a fraction of these children but Fiji statistics show that many women and children are affected by affiliation laws.[23]

Table 12.1 Fiji: Affiliation cases filed in Magistrates' Courts, 1986-1992

1986	1987	1988	1989	1990	1991	1992
476	351	377	339	344	391	385

We will now therefore see what the legislation requires from a woman who wants to apply for an affiliation order. The procedure of application for an affiliation is the same as that of filing for maintenance for legitimate children. To begin the court action, both require the filing of a summons against the defendant. As the conditions governing the acceptance of the application are different, we will now see who may apply and within what time period. We will also see that the legislation of some countries gives the courts power to refuse to accept an application.

Who may apply?

- A single pregnant woman
- A single mother
- Another person on behalf of the mother where the mother has died
- In Tonga only, a "reputable person" or the Attorney-General.

Table 12.2 Legislation: maintenance of natural children

Country	Legislation
Fiji	*Maintenance and Affiliation Act* Cap. 52
Cook Is.	*Cook Islands Act 1915* ss. 545-567; *Infants Act 1908* (New Zealand)
Kiribati	*Maintenance (Miscellaneous Provisions)* Cap. 53; *Magistrates' Courts Act* Cap. 52 s. 65
Nauru	*Maintenance Ordinance 1959*
Solomon Is.	*Affiliation, Separation and Maintenance Act*, No 8 (1971); *Affiliation, Separation and Maintenance Amendment Act*, No. 13 (1992)
Tonga	*Maintenance of Illegitimate Children Act* Cap. 30
Tuvalu	*Maintenance (Miscellaneous. Provisions) Act* Cap. 4; *Native Lands Act* Cap. 22 s. 20
Vanuatu	*Maintenance of Children Act* Cap. 46
W. Samoa	*Maintenance and Affiliation Act 1967*

All countries in our region, except Tonga, have legislation that is similar except for time limitations. The Fiji legislation is typical.[24]

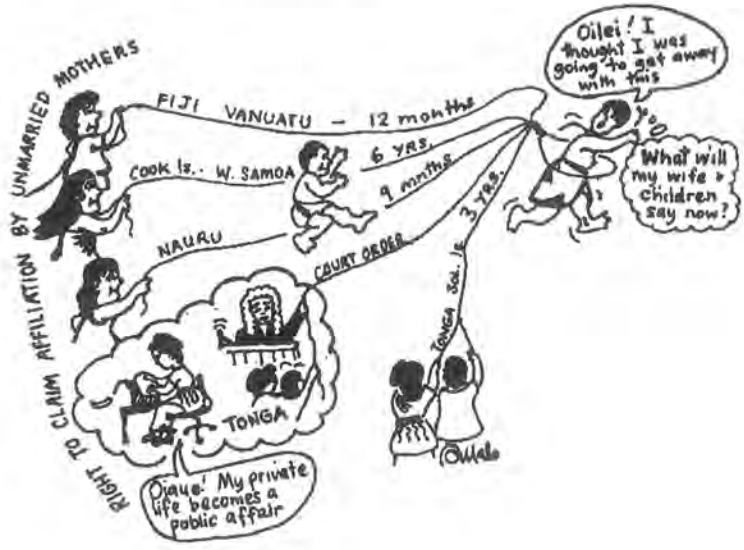
> A single woman who is with child or who has been delivered of a child may
>
> (a) before the birth of the child; or
>
> (b) at any time within twelve months after the birth of the child; or
>
> (c) at any time thereafter upon proof that the man alleged to be the father of the child has before, or within twelve months after, the birth of the child paid money or has otherwise made provision for its maintenance;
>
> or
>
> (d) at any time within twelve months after the return to Fiji of the man alleged to be the father of the child upon proof that he ceased to reside in Fiji within twelve months next after the birth of the child,
>
> make an application on oath to a magistrate having jurisdiction in the place where she reside, for a summons to be served on the man alleged by her to be the father of the child.
>
> Provided that where the mother has died before making any complaint under the provisions of this section, the person in whose care the child has been placed may make application in her stead.

The Tongan legislation on natural children has some interesting provisions that do not appear in the legislation of other countries of our region. Its *Maintenance of Illegitimate Children Act* goes further than the Fiji legislation. Applications may be made not only by the mother, but also by a "reputable" person or

> by the Attorney-General if either of these parties believes that the father has failed to provide for the child or intends to fail to provide for the child.[25]

The general procedure in Tonga is that the magistrate issues a summons requiring the defendant to appear in court and answer the allegations. The purpose is to ask the defendant if there is any reason why an affiliation order should not be made against him. After the hearing, the magistrate may find the defendant to be the putative father, and may order that the defendant's name be entered on the child's birth certificate. (The provision for the entering of the name on the birth certificate is unique in our region.) Under Section 4, if it appears that nobody intends to apply on the child's behalf, the Attorney-General has a duty to make the application. This is unusual, and puts the legal responsibility on someone other than the mother to obtain financial assistance from the putative father. On the other hand, it means that the mother's private life may be made public.

When to apply (time limitations)



An affiliation application may be made before the child is born, and during a certain period after the birth. The reasoning behind time limitations is that the sooner the application is made, the fresher is the evidence and the better the memory of witnesses. In theory, affiliation applications should be made as soon as pregnancy is confirmed, unless miscarriage is likely, so a waiting period of three or four months after confirmation could be required. At present, no country of our region has legislation making it necessary to wait for the child's birth to file an affiliation claim.

In practice, however, court registries require a birth certificate in order to issue a summons for maintenance. It would therefore be difficult to file an affiliation application until the child is born, but it is legally possible. If a pregnant woman tried to file an affiliation application and was prevented from doing so by the Court Clerk, she would be likely to succeed in challenging this decision in a higher court. The problem is that women who make such applications usually do so because they have little money.

Under Fiji legislation, a single woman who has given birth to a child may apply for an affiliation order within the listed time limits.

- Within twelve months of the child's birth (before the child's first birthday).
- After the child is twelve months old if the mother can prove that the defendant was supporting the child financially or otherwise (for example, by gifts and food) during the twelve month period after birth.
- If the defendant left to go overseas before the child turned twelve months old, and the complainant could not file her claim, she may file a claim within twelve months of the defendant's return to Fiji.

Kiribati and Tuvalu appear to have no legislative time limitations. Other countries have time limitation periods ranging from nine months to six years.[26]

- 9 months — Nauru
- 12 months — Fiji, Vanuatu
- 3 years — Solomon Islands, Tonga
- 6 years — Cook Islands, Western Samoa

The Nauru legislation is the most restrictive, because it limits the application period to nine months after birth, or longer if the mother can prove paternal support. In Solomon Islands and Tonga, a single mother has up to three years after her child's birth to file an application. She has even longer if she can prove some contribution from the defendant father. If the father has gone overseas, the period of absence is not be counted within the three years: the mother has one year after the defendant's return within which to file her claim. In Solomon Islands, an amendment to the principal legislation allows a generous discretion whereby the High Court can, at any time for good cause, lengthen the limitation period.

Tonga has a three year limitation period, unless there is proof of contribution, or the parents of the child have been living together as man and wife. In this case the complaint may be made any time after three years if the application is made within twelve months of the last contribution by the defendant or the last date at which the parties were living together. If the father is away from Tonga, the period of absence is not counted towards the limitation period.

Cook Islands and Western Samoa allow six years for the mother to make an application for an affiliation order and maintenance. If the defendant has been absent from Cook Islands, the period of absence is not counted as part of the 6 years. Application is allowed beyond six years if the father was supporting the child or living with the child's mother, thus covering a situation where the father has been supporting the child but suddenly withdraws his support.

Such provisions contrast sharply with Fiji legislation, which gives no discretion to extend the limit beyond that allowed in the legislation.

CASE *Prasad v Kumari (1984) Fiji*[27]

Facts C did not claim maintenance within twelve months of the birth of B, her child, because D the defendant had supported her and B until B was over three years old. When he stopped support, the case was argued twice in the Magistrate's Court and twice on appeal to the High Court. C was unemployed. D was employed and had family money to support him.

Issues The main issues were these: C had applied more than twelve months after B's birth. Could she prove that D's support had made it unnecessary for her to apply until the support stopped? Was evidence by C's mother unbiased and acceptable? Did D's acts amount to corroboration?

Decision The High Court said that there was plenty of evidence that D had supplied milk, money, clothes, food and soap for B until B was over three years old. Therefore the application for an affiliation could be filed outside the twelve month limit. There was no rule of law that the evidence of a close relative was not good evidence. The mother's evidence would be accepted by the Court. There was enough corroboration in the mother's evidence that C and D had sexual intercourse in a hotel and in C's house. D visited C frequently at her house. During C's pregnancy, D gave her money and clothes and told C's mother that he would be responsible for his problem, and D had admitted paternity to the welfare officer during a joint meeting. The Court held D to be the putative father of the child and ordered him to pay maintenance until the child reached 16 years.

Comment Here we see so much evidence of D's paternity and support that we may wonder why he denied it in the first place — and why it took C four court cases to get his responsibility accepted.

CASE *Prabhudass Narsi v Mareta Mani (1982) Fiji*[28]

Facts While C was living in Suva, she met D, a citizen of India who frequently visited Fiji. C became pregnant and went to live in Rotuma, where she gave birth to a child. She claimed that D was the father. D left the country four days after the birth of the child.

C could not file her claim because she was in Rotuma and did not know when D was in Suva. She was therefore not able to file her claim within twelve months of her child's birth as required by the legislation. When D returned to Suva, C was in Rotuma. C finally filed her claim but at this time D had been in the country for more than twelve months. In the Magistrate's Court, C proved her claim that D was the father of her child. D appealed on the grounds that C had applied more than twelve months of the child's birth, or more than twelve months of his return to Fiji.

Decision The High Court accepted that C had great difficulty in filing her claim because D was overseas and because C was in Rotuma. It noted that C, a young mother without legal advice and assistance, had difficulties also in trying to take legal action against a young man who was obviously trying to avoid her. However the High Court said that it had no choice but to overturn the Magistrate's Court's decision. It said that the legislation gave it no power to ignore the twelve month rule, even in exceptional circumstances. C lost her case. D was not required to pay maintenance for his child.

Comment If the law in Fiji had been similar to Solomon Islands law, C would have been treated more justly. Such time limitations further reinforce the discrimination that women already suffer. Women are disadvantaged if they live in rural areas or outlying areas where there is no access to a full time formal court, or if they have no access to legal advice and no money to pay for legal assistance. In Chapter 15 we will discuss the case of *L v C (1994) Hong Kong* where the claimant successfully argued that the time limitation was against human rights principles.

Short time limitation periods are a form of indirect discrimination against women, particularly in our region. The original law was passed for people living in the United Kingdom, where most women have relatively easy access to courts of law and to legal information and help. The same law, applied in our region, does not take into account the problems of isolation and limited resources that women face locally. In its effects, the law particularly discriminates against rural women.

Refusal to accept applications

In Fiji, Solomon Islands and Vanuatu a magistrate may refuse to accept an application for an affiliation order. Vanuatu magistrates may refuse an application if "during the normal period of conception the mother was of notorious loose behaviour" or if during the same period the mother had a sexual relationship with another man. A further discriminatory provision states that a finding of paternity shall not be made if at the time of conception the mother was a common prostitute.[29] Fiji and Solomon Islands magistrates may refuse the complainant's application that a summons be filed against the defendant if the magistrate thinks that the application is not made in good faith or that it is being made to threaten or blackmail someone.[30]

In other countries the assumptions operate through the common law but here the assumptions have take specific legislative form. Fiji, Solomon Islands and Vanuatu give legal weight to assumptions about women's sexual

behaviour and trustworthiness. Their legislation suggests that women are less believable than men and that women file actions to obtain money from innocent men. The Vanuatu legislation goes further and suggests that a woman who was not a virgin must be lying about who fathered her child, or that if a woman has had more than one lover, she herself cannot know who fathered her child. But who is to judge what "notorious loose behaviour" is? According to whose moral standards — those of Pacific Island societies or those of the imported cultures upon which our legal systems are based? And does the law ever apply these standards to men?

The provisions adopted by Fiji, Solomon Islands and Vanuatu punish a woman who has been sexually active by denying her maintenance for her child. Such provisions allow irresponsible fathers to profit from the fact that women are rarely able to challenge legal decisions or to afford legal representation. By denying the human rights of natural children to be maintained and cared for, the laws breach the United Nations Convention on the Rights of the Child.

CORROBORATION IN PATERNITY, AFFILIATION AND MAINTENANCE

We have just seen how assumptions about women's sexual behaviour and trustworthiness have influenced affiliation legislation and common law in our region — and not only in our region. The legal term "putative father" relies on the old saying that "paternity is a matter of opinion" even though proofs have been accepted. Everywhere in our region, just as in practice (if not in law) sexual assault charges require corroboration, the paternity and affiliation legislation require corroboration before a magistrate can decide that the defendant is the putative father of the natural child. So if the defendant says that he is not the father of the complainant's child, the complainant must bring independent witnesses to court to corroborate her evidence.

Corroboration is material and independent evidence that tends to prove the truth of the complainant's evidence. In a paternity case, it could be one or more of the types of evidence listed below.

- The defendant directly admits, in speech or in writing, that he is the father of the child. He may say this to the magistrate or to someone else who can give evidence in court.
- The defendant indirectly admits paternity, for example by having his name on the birth certificate.
- The defendant indirectly admits paternity by his acts; he may act as if he were the father of the child by giving gifts, money or support.

- Witnesses provide direct or indirect evidence that he is the child's father.
- A combination of proven facts allows the court to be reasonably satisfied that the defendant is the child's father.

Corroboration is required by law[31]

Corroboration in affiliation cases differs from corroboration in sexual assault cases. Corroboration in proving paternity is essential. Corroboration in proving sexual assault cases is not essential, although most courts in our region continue to seek it. In affiliation cases, corroboration of the complainant's evidence is required by legislation or by common law. Courts must find corroboration before they can decide that a defendant is or is not the father of a natural child.

In all countries of our region except Vanuatu, which we will discuss separately, the legislation is similar to that of Fiji, quoted as follows.[32]

> 18. -(1) On the hearing of the complaint, the magistrate shall hear the evidence of the complainant and such other evidence as may be produced in support, and shall also hear any evidence tendered by or on behalf of the defendant.
>
> (2) If the evidence of the complainant is corroborated in some material particular by other evidence to the satisfaction of the magistrate, he may adjudge the defendant to be the putative father of the child, and may also, if he sees fit in all the circumstances of the case, proceed to make against the putative father an order for the payment by him.

Cook Islands, Western Samoa and Tonga do not necessarily require the evidence of the mother to prove paternity. A finding of paternity may be made even without the mother's evidence. In Tonga[33] evidence may be given as to the existence of any practice that has a bearing on the issue of paternity. This means that when the court has to form an opinion, other members of the family can give evidence, for example that a child was treated as a son by a particular man. Evidence may also be taken in the outer islands and areas if witnesses cannot attend court in front of another magistrate. The documents can be transmitted as evidence in the court of hearing, if the magistrate wishes.[34] This is a very sensible rule because it is difficult to get witnesses from villages and outer islands to attend courts in the larger towns.

In other countries, including Vanuatu, the mother herself must give evidence that a natural child has been born to her and that the defendant is the father of her child. The evidence must be corroborated independently. Her word alone is not enough. The burden of proof, the responsibility of proving the truth of what she is saying, rests on her. The Vanuatu corroboration legislation[35] is the most restrictive of our region.

A cause of action shall only lie if there is evidence to the fact -

(a) that during the normal period of conception [defined as] from the 300th to the 180th day before birth there was an offer of marriage; or

(b) that during the same period the parties lived together as husband and wife; or

(c) that the man alleged to be the father of the child had at some time provided for or contributed to its maintenance and upbringing in a paternal capacity; or

(d) that the man alleged to be the father admitted the paternity of the child.

If given their usual legal meaning, the words "shall only lie" mean that the court can accept only the situations listed. It is not up to the court to decide whether any other evidence (for example public knowledge, blood testing or genetic testing) is sufficient corroboration. There must have been an offer of marriage or a *de facto* relationship during the 300 to 180 days before the birth, or the alleged father must have admitted that he was the father or supported the child in some way suggesting that he had accepted the child as his. This seems to exclude any relationship in which the couple did not live together and which ended before or after the birth without an offer of marriage at least 180 days before the birth.

STORY *Sophie and Walter (Vanuatu)*[36]

Sophie is a single girl and Walter is a married man. They had an affair that lasted several months, but when Sophie told Walter she was pregnant, he said that was her problem, not his. He will not admit paternity and he will not support the child when it is born. Several people know about the affair but there is nothing Sophie can do because Walter did not offer to marry her, and she and Walter did not live together. So there is no corroboration that a Vanuatu court can accept.

In all countries in our region, the nature of the evidence makes affiliation cases very difficult to prove. Corroboration requires independent evidence. People do not like to come to court and talk about such private and personal matters. Further, sexual relationships outside marriage (other than *de facto* relationships) are usually private. Because other people do not usually see the sexual act itself, they may not be able to give any direct evidence, and the defendant may accuse them of lying and evil gossip. For these reasons, most affiliation applications fail even before the hearing starts, because the lawyers advise their clients that there is not sufficient corroboration to proceed. The direct consequence of this for single mothers may be poverty, dependency on relatives or prostitution.

Corroboration and the burden of proof

Affiliation cases belong to civil law, and not to criminal law. In a criminal case, evidence has to be proved beyond reasonable doubt; this is the criminal

burden of proof. In civil law, the burden of proof is on the complainant to prove the truth of what she is saying "to the reasonable satisfaction of the magistrate".[37]

In an affiliation case, the complainant is not on trial nor has she been accused of committing a crime. The legislation of Fiji and other countries (even Vanuatu) uses words like "to the satisfaction of the magistrate" or "sufficient evidence" or "satisfactory" evidence to make it quite clear that in affiliation cases the burden of proof — the responsibility of proving the truth of the complainant's story — is a civil burden of proof. The court must be satisfied that the complainant's evidence proves that she had sexual intercourse with the defendant at the time of conception.[38]

However, in practice, courts in our region require a burden of proof similar to that required in criminal trials. The complainant has to prove almost beyond reasonable doubt that her word is the truth. Two cases, one from Fiji and the other from Solomon Islands, show that even High Court judges apply the criminal burden of proof to affiliation cases. We will discuss the Fiji case more fully later, when we see how the complainant's past sexual history may be used to show that her word cannot be trusted.

CASE *Gyanandra Dass v Milika Adiqa (1990) Fiji*[39]

The High Court said that the proper burden of proof was "beyond reasonable doubt" — the complainant had to produce proofs that left no doubts in the minds of reasonable people. The High Court was wrong in applying the criminal standard of proof to an affiliation case. The proper burden of proof is clearly outlined in the *Maintenance and Affiliation Act*; it is the "balance of probabilities," which is inferred in its natural ordinary meaning from the words in the legislation, or "to the satisfaction of the court". The High Court's error made C's claim almost impossible to prove. C did not have the resources to appeal to the Court of Appeal, which might have overturned the High Court's decision.

CASE *J v S (1986) Solomon Islands*[40]

The High Court said that the same standard of proof should apply to affiliation as in adultery because a finding of putative fatherhood had a stigma attached to it. The proper standard to apply was a "preponderance of probabilities" in proving paternity.

Comment You will see the difference between a "balance of probabilities" and a "preponderance of probabilities" if you think of weights on a pair of scales. If the weights are more or less equal, the scales will more or less balance. If one weight is much heavier than the other, the heavy side will be much lower than the light side. So if the complainant must prove that the "preponderance of probabilities" favours her, her evidence must be very much weightier than the defendant's evidence. In Solomon Islands as in Fiji, the burden of proof for affiliation case is legally the civil one, and again the High Court was wrong in requiring a criminal burden of proof.

The reason given by the Solomon Islands High Court is noteworthy — the criminal burden of proof must be applied because a man may be shamed if he is suspected of being the father of an illegitimate child. But what of the

shame of a single mother whose motherhood reduces her bride price? Clearly the shield of law moves very quickly to protect the rights of men. There are many other examples of such errors throughout the region. They provide clear evidence of common law discrimination against women.

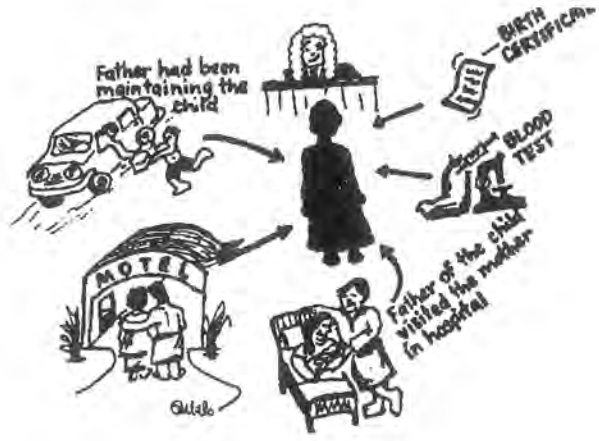
What kinds of evidence may be offered?

If we accept that some kind of corroboration is necessary — if only because people believe that some dishonest women have made false claims — then we must look at what kinds of evidence may be offered as corroboration. We will first list the different kinds, and then discuss each in turn.

- Birth certificate
- Menstrual cycle
- Blood test
- Association and opportunity
- Customary practices and rituals

The birth certificate

All Pacific Island countries have a register of births and deaths, and most make some arrangements allowing births and deaths to be registered even in outer islands and rural areas. Birth certificates may be produced from these registers, although sometimes this can be done only by a central registry. The mother's name is usually registered. If a man is registered as the child's father, the courts accept this as *prima facie* evidence (evidence sufficient to establish a fact) that he is the father.[41] So a defendant whose name is on the birth certificate will be assumed to be the father unless he proves that his



Kinds of corroborative evidence

name has been included by fraud or mistake. In this case, the defendant must prove that he is **not** the father.

In our region, there are two ways in which a man's name can be registered as the father of a child.

- A married woman produces her marriage certificate. If there has been no entry of a divorce against that certificate, the woman's husband's name will be automatically registered as the child's father, and will appear on the birth certificate.
- The father of a natural child agrees to his name being registered by going to the Birth Registry office and signing a form naming him as the father of the child. His name then appears on the birth certificate. This is more likely to happen in a *de facto* relationship than in a short or casual one.

The entry of a man's name on the register is not a legal act. It is an administrative one. However, when the father's name does not appear on the birth certificate, and the father denies paternity, there has to be a court case involving lawyers, witnesses and the tendering of evidence in order to prove fatherhood so that an affiliation order may be obtained.

The menstrual cycle

If the father's name does not appear on the child's birth certificate, the first thing that the complainant must prove, on the first day of the court hearing, is that she and the defendant had sexual intercourse after her last menstrual period before her pregnancy was confirmed.

The menstrual cycle is the cycle during which a woman's body prepares itself for conception. It begins with a period and if the woman does not conceive, it ends with a period, then starts again. As the cycle usually takes about four weeks it is called a menstrual (monthly) cycle. A woman who files an affiliation application must accurately remember her period dates, the dates of sexual intercourse with the defendant, and the dates when she missed her periods.

The dates of last periods, missed periods and possible conception dates must match the date of the child's birth. If the period dates cannot possibly match the date of birth, the complainant's lawyer may advise her to reconsider proceeding with the hearing. In one Fiji affiliation case, the court said that the complainant could not possibly be telling the truth. This was because the dates of intercourse were not consistent with the length of a normal pregnancy, a short term pregnancy or even what the magistrate described as a "freak pregnancy". The court ruled that the complainant could not therefore have become pregnant from sexual intercourse with the defendant.[42]

This raises the question of what the courts accept as a normal pregnancy. They accept as normal the rule of 280 days gestation (length of pregnancy) dated from the first day of the last normal menstrual period (LNMP). This idea of the period of gestation is based on a perfect 28 day cycle. The rule of

thumb made famous in *Preston-Jones v Preston-Jones* is accepted almost as a principle of law.

CASE *Preston-Jones v Preston Jones (1951) United Kingdom*[43]

The House of Lords said that the average period of gestation was to be judged according to the medical knowledge of the time. At the time of this case, the theory was that the period of gestation must be between 275 and 280 days, or occasionally 266 days.

Comment Since that case, medical knowledge has advanced. A baby is now considered to be fullterm if born anywhere from 259 days after the LNMP, although many are born earlier and survive. If a mother has had an ultrasound scan or has seen a competent doctor early in pregnancy, it is now possible to fix her dates accurately. However, as most single mothers in our region do not have the resources to call expert witnesses, the rule has stayed the same as it was over fifty years ago.

CASE *Morrel v Dalituicama (1991) Fiji*[44]

Facts and decision C died after having a child. The child's guardian brought a case against D. The question for the Magistrate's Court was whether D was the child's father. D gave evidence and admitted that he had sexual relations with C. However the possible dates of conception did not fit neatly with the required 275 to 280 days of gestation from when D admitted having sexual relations. There were three possible dates of conception. The dates were 16 days out, meaning that, even on the least likely date of conception, the child was born 16 days after the expected date of birth. Because C was dead, the Court could not find out whether her periods were regular. The Magistrate said that conception could take place only 14 days before or after the first day of the last menstruation. He accepted D's argument and dismissed the application for affiliation.

Comment D had admitted sexual intercourse with C and there was no evidence of any other potential father. It is difficult to see how, in 1991, a magistrate could make a statement that could have been contradicted by the experience of people within his own circle — and especially by any who relied on "safe period" contraception. One problem is that most complainants do not, or cannot, pay to bring in expert evidence that a normal fullterm baby may be born when it is ready to be born, regardless of whether this is before or after the birth date fixed by old-fashioned methods.

The important principle is that the given dates must corroborate the complainant's evidence. However, many women do not keep any record of their periods. In addition many women do not understand their own menstrual cycles or bodies, and few women want to discuss these matters before a court. A Consultant Obstetrician and Gynaecologist at the Colonial War Memorial Hospital in Suva has stated that "fullterm" babies are born from pregnancies lasting 37 to 42 weeks (259 to 294 days.) A random survey by the same specialist found that most of the women who understood their cycle or could remember their dates were Indo-Fijian. Only 40% of women

attending the clinic understood their menstrual cycle; of 16 women seen on one clinic day, 10 could remember the date of their last period.[45] It is easy therefore to understand why many cases are lost.

- Complainants cannot remember the correct dates.
- Complainants may remember the correct dates but get nervous and confused in court while being cross-examined by the defendant's lawyer.
- The dates of possible conception, as understood by the court, do not fit in with the dates of the complainant's last period. Courts (lawyers, judges and magistrates) may not themselves understand the menstrual cycle and the wide variety of variations from the average 28 day cycle.
- A complainant says that her period usually occurs at a certain time, and the court assumes that the period always occurs at that time.
- A complainant does not have an average 28 day cycle but does not bring medical evidence to prove this.
- A complainant's child is born before or after the expected date of birth, but she does not bring medical evidence showing that the defendant could still be the father of the child. Poor women cannot afford to bring expert evidence that the timing of their periods does not necessarily exclude the possibility of conception and pregnancy resulting from a particular act of sexual intercourse. Many poor and rural women do not even see a doctor during their pregnancies.

Blood test

In some overseas countries, genetic testing makes it possible to find out exactly who is the father of a child. However, these tests are extremely expensive and are not yet available in our region. Here, testing samples of the blood of the defendant, the complainant and the child is one way of showing that the defendant might be the father. A blood test can show only whether the defendant and the child share the same blood groups. If they do not, the defendant is not the father. However, if they do share the same blood groups, the defendant may or may not be the father. A blood test can show who the father is not, but it cannot show who the father is.

We have no written laws referring to blood tests for this purpose. The practice has developed over the years to make the task of the courts easier. It requires the consent of the alleged father. When the defendant first appears in court, the magistrate may request that he submit to a blood test. If the defendant agrees, the mother, child and the defendant are tested in a public hospital, which sends the results to the court. If the tests are negative, the complainant has no case. If the tests are positive, the defendant may be given another opportunity to say whether he is the father of the child. If the defendant accepts paternity, the case is formally proved with both the complainant and defendant giving formal evidence in the witness box.

Maintenance will then be ordered. If the defendant denies paternity again, there must be a full court hearing. The results of a blood test showing a possibility of fatherhood is only one factor that a court can consider when making a decision about whether the sum total of facts amount to corroboration.

What happens if the defendant does not agree to having a blood test? Our region has no legislation forcing defendants to take a blood test. In the United Kingdom, the complainant does not have to ask. Courts may automatically direct the use of blood tests with or without an application from any of the parties, but cannot order the parties to provide a blood sample. Each must consent to a sample being taken.[46]

As the following case shows, in the United Kingdom, a refusal to provide a sample may be used as partial corroboration. If the defendant refuses to take the blood test, the lawyer for the complainant and the court may ask questions on the reasons for his refusal. If there is other corroborative evidence, the lawyer may suggest that a likely reason was that the defendant had sexual intercourse with the mother and was concerned that a blood test might show the possibility of fatherhood.

CASE *McVeigh v Beattie (1988) United Kingdom*[47]

Facts C, the complainant, was caring for D's children. She got pregnant and alleged that D was the father of her child. D denied the claim and refused to agree to a blood test.

Issue and decision Could D's refusal to agree to a blood test amount to corroboration? Was it evidence that D had sexual relations with C and was frightened that the test would reveal the possibility of paternity? If D could give no reasonable explanation for not submitting to a blood test, his refusal could amount to the type of evidence that might be corroboration. Because he refused without a reasonable excuse, the court found D to be the putative father of C's child and ordered him to pay maintenance.

No similar rule exists in Fiji or elsewhere in our region, and courts are not allowed to draw any conclusions from the defendant's refusal. If the defendant does not agree to a blood test, his refusal is accepted without protest, and the complainant has to use other evidence to prove her case. It is therefore not surprising that few women succeed in winning affiliation cases.

In Fiji's Domestic Court, from 1986 to September 1990, there were 793 affiliation cases, but only 54 defendants agreed to blood tests. Courts have stopped lawyers from asking why a defendant has refused to submit to a blood test. A lawyer may not even mention the refusal, despite the fact that English common law is applicable locally. This is yet another obstacle that women face in proving paternity. It should be challenged through a test case in the High Court, using *McVeigh v Beattie* as a precedent.

Association and opportunity

As we have just seen, the complainant will have to bring witnesses to prove that, approximately 280 days before the child's birth, she and the defendant had a sexual relationship. For this, family members as well as other people may give evidence in court, usually concerning an association between the complainant and defendant, and opportunity for them to have had sexual intercourse around the appropriate dates. We list some examples of evidence of association and opportunity for sexual relations about time of conception.

- The complainant and the defendant were living together at the possible time of conception.
- They were seen going into a bedroom or another convenient place together at the possible dates of conception.
- The defendant was heard to say, or to imply, he was the father.
- The defendant had given the complainant money for an attempted abortion.
- The complainant and the defendant visited a doctor together.
- After the birth, the defendant visited the complainant.
- The defendant had been maintaining the child, giving money, gifts or other kinds of provisions.
- The child resembled the defendant and shared some of the defendant's racial characteristics.

Many types of evidence could be quite specific to the natural parents of the child, so we will now look at various cases to see what evidence has or has not been accepted as corroboration. Note that all examples in this area are from Fiji because we have not been able to trace any cases in which women in other countries of our region appealed to superior courts, and there are few records of cases at lower levels. In Vanuatu, for example, the very specific corroboration legislation could exclude most association and opportunity evidence and thus could severely restrict the number of cases accepted.

CASE *Vinod Lal v Ambika Devi (1974 - 1976) Fiji*[48]

Facts C, a single mother, said that D was the father of her child. The evidence consisted of one witness who saw C and D go into a bulk store and remain inside for 15 minutes. As well, C's mother said D used to visit her daughter and that C had no other relationships. D chose not to give evidence at the Magistrate's Court hearing. At the Court of Appeal he said that the time in the bulk store was "mere evidence of opportunity" to have sexual intercourse. He argued also that the mother's evidence could not be independent evidence, as she was C's mother.

Issues There were three issues: What weight was to be given to the fact that D had failed to give evidence? Was the 15 minutes in the bulk store evidence of opportunity only? As a close relative of C, could C's mother's give acceptable evidence?

Decision The Court of Appeal said that the failure of the defendant to give evidence did not amount to corroboration in itself, but it should be taken into account in deciding what weight should be given to the total evidence. The visit to the bulk store was evidence of more than mere opportunity: the parties might have gone there with the purpose of having intimate relations. The mother's evidence added to the belief that the complainant was probably telling the truth. It was evidence of the association between the parties. The Court of Appeal held that D was the putative father of the child. The order for maintenance originally made in the Magistrate's Court was confirmed. D was ordered to pay all the arrears of maintenance and to pay maintenance to the child until the child was 16 years old.

Comment The fact that one of the complainant's witnesses was C's mother did not affect the evidence. This is important, as many women think that courts would not believe their relatives. It is also important that the Court of Appeal accepted that some significance could be given to the fact that the defendant did not give evidence in the Magistrate's Court. There is little doubt that women are more likely to get justice in the higher courts of law, since the lower courts that hear affiliation cases do not closely follow the rules of the Court of Appeal. However, few women have the means to challenge lower court decisions in the higher courts of law.

CASE *Chand v Ligalau (1978) Fiji*[49]

Facts and decision C could not prove any association between herself and D, the defendant, before she became pregnant. However there was ample evidence that they knew each other after she had become pregnant. While C was pregnant, D had taken her to Navua in a bus; they spent the night together at a hotel. They spent another night together at D's relatives' house, and D's parents brought D and C back to their home together and contacted C's parents. The court accepted these facts as corroboration of C's claim. It said that they together pointed to a very intimate association. It led the court to believe in the existence of a relationship at an earlier date around the time of conception.

Comment The court accepted C's claims of a close association after conception. Therefore it accepted that she was probably telling the truth about how she became pregnant. In a later case *(Prasad v Disaurara (1983)*[50] the court accepted that even if there is no evidence of association around the time of conception, evidence of previous sexual relations might be corroboration.

CASE *Azam Ali v Sereana Rogolea (1982) Fiji*[51]

Facts C, an indigenous Fijian, claimed that her child's father was D, an Indo-Fijian. The child was clearly of mixed Fijian and Indo-Fijian heritage. C said she was a virgin when she met D. There was also evidence that C and D were acquainted and that D used to go to C's house and they would leave together. These allegations were not challenged. C made a mistake about the dates of possible conception. She said she had sexual intercourse many times with D. At the Magistrate's Court hearing the magistrate had said that, although C was mixed up about dates, she was otherwise a reliable witness.

Witnesses had alleged that the child looked like D, and the child was brought into the courtroom and shown to the magistrate. D's lawyer

complained that the magistrate had treated the child's appearance as corroboration in finding D to be the putative father. D appealed to the High Court.

Issues Could the fact that the child was of mixed race amount to corroboration of a relationship between two people of different races? And if the complainant is confused about her menstrual cycle, should this work against her?

Decision The High Court said that a court should not normally give the appearance of the child too much weight. However, in certain exceptional circumstances, the appearance of the child might be significant. In this case the baby was obviously a child of mixed racial origin, not a typical ethnic Fijian baby. This lent weight to C's claim. The fact that an uneducated witness might get her dates wrong should not work against her, since uneducated people's knowledge and estimation of dates were "notoriously inaccurate". The High Court dismissed the appeal, found D to be the putative father and ordered him to pay $8 per week maintenance for the child.

Comment The physical resemblance of a child to its father had been discussed already, both in the United Kingdom and in Fiji.[52] These cases had confirmed the common law that the resemblance of a child to its father is admissible evidence, but little value should be given to it. A court may look at the child to see if it resembles its father. Resemblance will not be taken as corroboration, but it can be considered if there is other supporting evidence.

CASE *Wise v Little (1983) Fiji*[53]

Facts and decision C said D was the father of her child. D denied it, but the court accepted the following as corroboration: the dates of C's periods and sexual intercourse with D were consistent with a normal pregnancy. D and C had spent time alone at night together in a flat and in a garage, so there was more than a mere opportunity to have sexual intercourse. D's sister accompanied C to the hospital for her pregnancy test. The court thought this was very significant, saying that if the child was not D's, there was no reason why his sister should show so much compassion to C.

Comment There must be more than a mere opportunity to have sexual intercourse. Rarely will only one event or only one proven fact be enough to be corroboration. Usually a whole set of proven facts taken together will amount to corroboration.

CASE *Ramesh Chand v Subadra Wati (1984) Fiji*[54]

Facts C, aged 14, and D were cousins living in the same house. Sexual relations began six months before D became pregnant. D pleaded guilty to the crime of defilement because C was not old enough to give her consent to sexual intercourse, but when C sued D for maintenance, D denied that he was the father of C's child. However, he wanted custody of the child.

Decision The High Court decided that D was obviously the father, for the following reasons: he and C had been living in the same house at the time of conception; D pleaded guilty to defilement; and he had also wanted custody of the child. The Court said D was not likely to tell the welfare officer that he wanted the child if it was not his own: this was a significant evidence amounting to corroboration.

Customary practices and rituals

Can customary practices or rituals be evidence of corroboration of paternity? In some countries where customary practices follow the birth of a natural child, lower courts have attempted to answer this question. If in Fiji for instance the defendant's family offered the complainant's family a traditional ceremony of acceptance, apology or the seeking of forgiveness, would that evidence be corroboration of the complainant's case?

If recognition of custom in the law is an appropriate practice, the ritual should theoretically be admissible as evidence. If the parties' families participated in such a ritual, this should be taken to mean that the defendant's family accepted the complainant's child as the child of the defendant.

CASE *Tuiburelevu v Shandil (1984) Fiji*[55]

Facts and decision This case was between C, an ethnic Fijian and D an Indo-Fijian. C alleged D was the father of her natural child. D had proposed marriage to C, and had arranged a feast at his uncle's residence to discuss marriage plans resembling an indigenous Fijian marriage. D twice visited C's house to make the offer of *sevusevu* required in Fijian custom. D later denied that he was the father of C's child, and gave $10 to C's mother to persuade her not to take him to court. When she did, D defended the affiliation application. He said that C had sexual relationships with two other men but offered no evidence to prove his claim. The Magistrate's Court accepted D's acts as corroboration of C's claim. D was judged to be the putative father of C's child and was ordered to pay $6 maintenance per week to the child.

CASE *S Marama v M Rasalato (1991) Fiji*[56]

Facts and decision C and D, both ethnic Fijians, had lived together as husband and wife for five months in D's parents' home. D and his relatives had come to C's home with a whale's tooth to say that C was acceptable to D's family and that they could live together in his parents' house until a formal marriage took place. The period of living together included the possible date of conception of C's child, but D denied that. The magistrate accepted that the customary ritual was corroboration of C's claim that the child was D's, and found D to be the father.

Comment In both cases, there was other corroborative evidence, but they may be used as precedent if a defendant himself has participated in the customary ritual.

Because customary rituals may not openly state the fault, the defendant may argue, for example, that *bulubulu* took place without his permission. He may argue that *bulubulu* was done by his family, not by him and had nothing to do with him. Several cases in the Magistrate's Court in Suva have not proceeded because the Court decided that *bulubulu* was not an admission by the defendant himself that he was the father of the child.[57] In sexual offence cases, on the other hand, courts have accepted the *bulubulu* done by an accused rapist's family as being sufficient to decrease a rapist's sentence — even when the woman victim is not involved in, or does not

consent to *bulubulu*. Courts appear to be selective in accepting customary practices and rituals as corroboration.

Should the complainant's sexual conduct be relevant?

In our region, Vanuatu is the only country with legislation[58] preventing a woman of "notorious loose behaviour" from receiving an affiliation order. But what is a loose woman? A woman who was not a virgin before the occasion when she got pregnant? Had more than one lover? Lost her virginity when she was quite young? Such questions may give Vanuatu defendants a quick and dirty way out of paying maintenance. Other countries in our region do not have this legislation about "loose women," but as in sexual assault trials, the complainant's credibility is affected by evidence that she might have had sexual partners other than the defendant. Such evidence is used to challenge the corroboration provided by the complainant. The defence may argue or suggest that the woman is not a virgin, so her word about this particular man cannot be believed, and/or that she has had other lovers so she cannot know who the father is.

The major issue in an affiliation trial is establishing the identity of the father of the complainant's child. Although there is no legislation permitting it, the common law allows the defendant to bring evidence that some other man might have fathered the child.

STORY *You don't know who your baby's father is*

C had sexual relations with two men, D and E, for several months. When C got pregnant, she claimed that D was the father of her child. D however knows that C has another lover, E, and can prove that C and E were seen together in a hotel bedroom around the time that C is supposed to have conceived. D's lawyer may then say to C: "The defence will bring evidence that during the evening in question (the possible date of conception) you were with E at Hotel X. Is this true?" If it is, C will probably lose her case because even if she can prove that she was with D the day before or after, the court might reasonably doubt that she knew whether her child's father was D or E.

If the defence has definite proof that the defendant might not have fathered the complainant's child, the defence is entitled to bring evidence about the complainant's sexual relations around the time of conception, and to ask the complainant questions about these. This principle has been established in Fiji for many years. In the case of *Hussain Bibi v Mohammed Aziz (1976)*[59] the High Court said that evidence of other relationships was not admissible unless there was a direct link between another relationship and the possibility that the other man had fathered the child.

However, as we will see in other case studies, courts allow the defendant's lawyer to ask questions about the complainant's sexual experience with men even if these sexual relationships have nothing to do with the possibility that another man might have fathered the child. Occasionally a magistrate

may state in judgment that random questions or evidence about the complainant's "love life" are irrelevant. The interesting thing is that, although the questions are not relevant and should be stopped, the magistrate does not stop them. This practice is in direct contrast with what is allowed in the questioning of the male defendant. If he refuses a blood test, the court cannot ask why, and questions about his virginity and relations with other women would be regarded as ridiculous as well as irrelevant. On the other hand, the defendant's lawyer is allowed to ask questions like the following:

- Were you a virgin before you got pregnant?
- How old were you when you lost your virginity?
- How many lovers have you had?

Such questions are clearly irrelevant and should not be allowed: the defence is asking such questions deliberately to shame the woman and make the court believe that she is sexually active and therefore probably lying. That is the assumption around which legal practices are built. It allows the defence to take any of the following lines of argument.

- The defendant never had sexual intercourse with the complainant; she has falsely accused him to get money or status or revenge or whatever.

  or

- They did have sexual intercourse, but not at the time of conception.

  or

- They may have had sexual intercourse around the time of conception, but the complainant had at least one other lover at the time so she cannot claim that the defendant is the father.

In all these arguments, the defence finds it useful to attack the complainant's character and sexual behaviour. Case law in our region shows how much the trial process still relies on the principle that a proper defence is not possible without such attacks.

CASE *Tawake v Singh (1977) Fiji*[60]

Facts C and D had sexual relations, but parted before the birth of C's child. C sought an affiliation order against D. The Magistrate's Court found plenty of corroboration that C and D had sexual relations around the time of conception. This, it said, indicated that C was probably telling the truth. However, X and several other of D's friends all gave evidence that they had also had sexual intercourse with C. None could prove that intercourse had taken place around the time of conception. C said that she had intercourse with X but only after the birth of the child; she denied having intercourse with any of D's other friends. The Magistrate's Court said that C was obviously promiscuous and dismissed her application. The case went to appeal in the High Court.

Issue and decision D had admitted intercourse with C at the relevant time. Was admission of sexual relations with other men relevant? The High Court said the evidence of sexual relations with other men was irrelevant. C's

relationship with X would have been relevant only if it had happened around the time of conception, and then only if X could possibly be the father of the child. The case was sent back to the Magistrate's Court for rehearing.

Comment D's friends said that they had intercourse with C at unspecified times. C said that she had intercourse only with X, and then only after the relationship with D had ended, after the child's birth. Who was being allowed to tell lies? By the time the case was sent back to the Magistrate's Court, three years had elapsed and C had not received any financial assistance at all.

CASE *Mahesh Chand v Savitri Devi (1982) Fiji*[61]

Facts C gave birth to a fullterm child 270 days after her last period. She claimed that D was the father of her child; D admitted having sexual intercourse with her on various occasions close to the possible date of conception as well as 17 days after the pregnancy became apparent. D's lawyer asked C whether she had sexual intercourse with D's brother. C denied all claims of sexual misconduct and D's lawyer brought no supporting evidence.

Decision The Court of Appeal said that a defendant's admission that he had sexual relations with the complainant within two to four months of conception could amount to corroboration. It could be supportive evidence that C was telling the truth in claiming that D had also had sexual relations with her at the time of conception. The Court held D to be the putative father of the child, and ordered him to pay maintenance.

Comment D's lawyer accused C of sexual misconduct, but he did not produce witnesses to offer a single shred of evidence of sexual intercourse with any person except D. The lawyer was plainly trying to panic C into saying something that would damage her. The question should not have been allowed unless D's lawyer could produce a witness to give evidence that the complainant had sexual relations with another man at the time of conception. The question did not apparently affect the outcome, but why was it allowed?

CASE *Gyanandra Dass v Miliko Adiqa (1990) Fiji*[62]

Facts C and D had lived together. C had a child and brought an affiliation application against D. The Magistrate's Court found D to be the putative father and ordered D to pay maintenance. In his appeal to the High Court, D argued that the Magistrate had not taken into consideration that C had other lovers. D's lawyer said that the Magistrate had not paid attention to the "loose character and flirtatious disposition of the respondent".

Issue Although it was not put like this, the real issue clearly was whether the fact that C had other lovers affected her credibility and therefore her corroboration.

Decision The High Court commented that an affiliation case will shame the father and the child. The proper burden of proof therefore was "beyond reasonable doubt". In this case both the existence of other lovers and C's "flirtatious disposition" led the judge to cancel the finding of D's fatherhood. The case was sent back to the Magistrate's Court for rehearing.

Comment We have already discussed the High Court's error in stating that C had to prove her claim "beyond reasonable doubt," the same as for a criminal case. D was represented by a lawyer. C was not, and so had less ability to

defend herself. Overall the attitude of the lawyers, the court and the double standards about women's sexual behaviour caused great injustice to C and her child. These types of cases underscore the importance of high quality legal aid for poor women.

Corroboration laws and practices discriminate against women. Corroboration of a complainant's evidence is required only in cases involving sexual offences such as rape, defilement, unlawful sexual intercourse, child sexual abuse and incest and in proving paternity. In sexual matters, the evidence of women and children has been singled out to require independent corroboration. But are women and children more likely to lie about sexual matters than men are? There is no statistical evidence to support this view.

The law should be based on sound logic and reason, on what happens in most situations, and not on prejudices about women's sexual behaviour, greed and general untrustworthiness. A woman needs to be very strong and to have financial resources and family support to win a paternity case — and as we will see in the next section, her problems do not end just because she has an affiliation order.

MAINTENANCE ORDERS AND AWARDS

Overview of the legislation

If the complainant succeeds in getting an affiliation order, the court will make an award of maintenance against the defendant. The award is made in much the same way as an award of maintenance for married women. The court may say that payment should be made to the child's mother or to some other lawful custodian, for example the child's grandparents if the child lives with them most of the time. As in the maintenance of legitimate children, the money may be paid as a lump sum or weekly or monthly.

The court may order an investigation into the means of the parties. An investigation into the means of the defendant to pay requires the court to order a welfare officer to investigate each party's financial and home situation. The welfare officer is required to file a Means Report based on the complainant's need and the defendant's ability to pay, and showing that the defendant is able to pay a certain amount. Both parties have the right to see and challenge the report.

In general, most Social Welfare officers have no training in preparing a proper means report, and most Social Welfare Departments do not have resources to spare welfare officers to prepare means reports. Usually therefore the complainant is responsible for proving that the defendant could pay the amount she requests. For the reasons outlined in Chapter 10, most women

face great difficulty in proving how much they need, and how much the defendants could pay.

The Fiji legislation is set out below.[63]

> The defendant may be required to make payment
>
> (a) of a sum of money not exceeding $520 annually for the maintenance and education of the child;
>
> (b) the expenses incidental to the birth of the child;
>
> (c) the funeral expenses of the child if it has died before the making of the order; and
>
> (d) such costs as may have been incurred in obtaining the order:
>
> Provided that the magistrate, in making an order for payment of a sum of money under the provisions of paragraph (a) may direct that such payment shall be made by weekly, fortnightly, monthly or quarterly instalments.
>
> (3) If the application is made before or within 2 months after the birth of the child the payment to be made under paragraph (a) of subsection (2) may, if the magistrate thinks fit, be calculated from the date of the birth.
>
> (4) The magistrate if he thinks fit, may, in lieu of payments under paragraph (a) of subsection (2), order that a lump sum not exceeding $2600 be paid into court and that such sum shall be expended on the maintenance of the child in such manner as the court may direct.
>
> (5) The magistrate, on the hearing of the complaint, may, if the complaint is dismissed, order that the complainant pay to the person alleged to be the father the reasonable costs incurred by him in defending the proceedings.

This is the text of the original *Maintenance and Affiliation Act* that limited awards to a maximum sum of $520 per year or $10 per week per child. In 1986 the Act was amended and the maximum ceiling was removed.[64] Magistrates are allowed to take current costs of living into account, and there is legally no longer any reason why they should award no more than $10 per week per child. However, many magistrates do not seem to know that there is no longer a limit, and they continue to order $10 per week or $520 a year for each child.

If the mother applies for maintenance within two months of the child's birth, the magistrate may order that payments be backdated to the date of birth. So suppose that C's child is born in May 1995. C applies in June 1995 and is awarded maintenance in May 1996. She may get about 52 weeks in back payment, as well as future payments. However, the legislation does not require the magistrate to make orders for back payment. The magistrate is allowed to make the order but rarely does so.

Similarly, in most countries of the region, the legislation allows courts to order a father to pay birth and hospital expenses, but they rarely do so. According to a public legal adviser who worked for seven years in the Fiji

Social Welfare Department, the Domestic Court in Suva did not once make such an order for any of the Department's legal aid clients.

In Fiji and Solomon Islands, the legislation says that if the woman loses the case, she may be made to pay the defendant's court and legal costs. This sounds fair, because if the defendant loses, he may be made to pay these costs. In effect, however, the law makes it difficult for women to prove paternity and then punishes them if they are not able to do so.

Amounts: maximum ceilings

We have seen that Fiji no longer has an official maximum ceiling, and there are apparently none in Cook Islands and Western Samoa. As a matter of policy, not of law, as soon as a single Cook Islands woman gives birth, she is entitled to a one-off payment of $100 from the Government. In setting the amount of maintenance payable by a defendant, the practice seems to be for the complainant's lawyer to work out the total weekly cost of caring for the child, and to ask for half or a third of that amount, depending on the incomes of the complainant. In Western Samoa, maintenance orders in affiliation cases range from $5 to $20 per week per child. The higher orders seem to be decided by consent, where the father has willingly agreed to pay that amount.

Kiribati, Tuvalu, Tonga and Vanuatu still have specific legislation.[65] In Tuvalu and Kiribati if the father has no land, the court can order payment of maintenance of up to $2 per month per child or the equivalent in foodstuff. In practice however larger orders are made, mostly because the Magistrates' Courts do not appear to know of the maximum ceilings in the legislation. Courts in Tonga have power to order only a maximum of $15 per week per child until the child reaches 16 years of age and a sum not more than $50 for past maintenance owed. Vanuatu legislation limits the amounts that can be claimed to 1000 *vatu* per week per child plus birth expenses. The Court Clerk's register shows that the amount is never exceeded. The most common maintenance order made is 4,000 *vatu* per month per child.

Such maximum ceilings do not take into account the possible ranges of a defendant father's income. If a defendant can afford more, why does the law impose an arbitrary ceiling for lump sum or periodic payments? In these countries, and in countries that set their own unofficial limits, laws and practices seem to take more interest in protecting a father's money than in his child's right to be adequately maintained.

Lump sum payments

Courts in Fiji and Solomon Islands by legislation,[66] and in some other countries by common law, have the power to order that the defendant pay the complainant a lump sum. We have quoted above the Fiji Act making the maximum $2,500 but, as in periodic payments, since 1986 there is no longer a maximum ceiling on lump sum payments. Many woman are attracted to a lump sum payment because they do not want to have any more dealings

with the child's father or with the problems of enforcement of periodic payments. We will discuss later the problems of enforcement, but only briefly, since we have dealt with them in detail in Chapter 10, which outlines also the advantages and disadvantages of lump sum over periodic payments. Here we want to emphasise that once a woman accepts a lump sum payment she may not come back later and apply for any more. It is a one-off payment for all future needs of the child.

Periodic payments

Periodic payments are regular weekly, fortnightly or monthly payments. In Fiji the most common maintenance order for a natural child is between $5 and $10 per week per child, even when the father of the child is earning a good salary, and although there is no longer a legislative maximum ceiling.

Solomon Islands courts can order periodic payments, birth expenses, and the costs of obtaining the affiliation order. If an application is made within three months of birth the court can backdate the order to the date of birth. The legislation does not put a limit on the amount that can be claimed either annually or for a lump sum; courts look at the means of the father in making the assessment.

The kinds of affiliation orders made in Solomon Islands are fairly typical and similar to Fiji. During 1993, in one case the Magistrate's Court ordered $250 in birth expenses and $30 per month until the child reached 16 years of age. In another, the father agreed to pay $35 per month provided the mother returned his "things". The defendant was ordered, in another, to pay $20 per month in enforcement proceedings for nonpayment. In another, $30 per month was ordered. The range is thus between $5 and $10 per week per child.[67]

In the first of the following two Solomon Islands cases, we see that the High Court arrived at its decision on periodic payments by balancing the needs of the child against the needs of the father's legitimate family.

CASE *Babaua v Roselyn (1988) Solomon Islands*[68]

The High Court reduced the maintenance of a natural child from $80 to $30 per month saying that, given the defendant's income, it was beyond his means to continue paying $80 per month. The court said that D was also supporting a wife and children and that $30 per month was sufficient to meet the natural child's needs. The test used to arrive at an amount was the reasonable needs of a child as against the means of the putative father. The High Court said that illegitimate children ranked in priority ahead of a man's relatives but behind his legitimate wife and children.

In the second case, we see a disturbing decision that could affect both lump sum and periodic payments.

CASE *Joyce Tonaware v Kelly Wanefiolo (1991) Solomon Islands*[69]

Facts and issue R the respondent had been ordered to pay C the complainant $15 per month in maintenance for their natural child. He stopped paying, but later gave C $400 to pay for the child's birthday. C tried to enforce payment of the arrears, which were considerably more than $400. The issue for the court was whether the $400 for the birthday party could be considered a maintenance payment.

Decision and comment Saying that it would be a sad day for a father to learn that the money he spends on maintaining his child is not maintenance unless he gives it to the complainant, the court decided that the $400 was a maintenance payment within the meaning of the statute. This decision means that any money given for a special occasion or special needs (for example birthdays, Christmas or sickness) can be considered part of the official affiliation maintenance payment, rather than as a gift. It leaves the way open to all sorts of abuse.

Varying the amount

All Pacific Island countries have powers to vary the amount of maintenance under an affiliation order.[70] The legislation gives the magistrate power to increase or decrease maintenance but limits the amounts to the maximum payments. The ceilings are so low that this power seems futile.

CASE *K v B (1985) Solomon Islands*[71]

Facts C had obtained an affiliation order in the Magistrate's Court in Malaita. D, the putative father appealed to the High Court, arguing that his father had paid C's father $500 in customary compensation for C's loss of bride price value, according to an order of the Local Court in their village. D therefore asked for a decrease of the maintenance order. The Magistrate's Court in Malaita accepted the argument that the $500 compensation was a type of maintenance and ordered that the maintenance order be reduced by $8 per month for six years.

Decision: On appeal the High Court said that, under the Act, custom payments must be taken into account when assessing maintenance if the custom payment had affected the putative father's ability to pay. However, in this case the payment of $500 had been for the loss of bride price, not for maintenance. Thus the High Court increased the child's maintenance from $12 to $20 per month.

Comment: This case shows that formal courts like the High Court recognise traditional forgiveness and compensation. It shows also that, because they indirectly have power over affiliation matters as matters of custom and they also deal with enforcement of maintenance, they have considerable influence over women's daily lives.

Age limits

The children of legally married women have the right to receive maintenance until they are 18 years old. The children of single women in Fiji and Tonga lose their right when they reach 16. The law assumes quite incorrectly that

from age 16 a natural child is able to care for itself or is able to find employment. Legitimate or not, young people need food, shelter, clothes and education; they may not be able to find work. Yet the law imposes an arbitrary age at which the father's responsibility may cease, regardless of the child's needs or the father's ability to pay.

Most countries in our region do set a maximum age limit for natural children receiving maintenance from the putative father. The general age limit is 16 years, but Vanuatu sets the limit at 18 and Kiribati and Tuvalu set it at 21. The Fiji legislation allows magistrates to order that maintenance payments stop when a natural child reaches 13 years of age if the child can maintain himself or herself (presumably, for example, in big towns by begging, prostitution, pushing barrows or cleaning shoes, since these seem to be the jobs available for children.)

In Cook Islands and Western Samoa maintenance normally ceases when the child reaches 16 years of age but the maintenance legislation allows for exceptions whereby the father (usually) is required to pay for a further period (between 16-19 years of age) for the child's education and training where the court thinks it useful to do so. The maintenance rules in this statute apply to both legitimate and illegitimate children. Solomon Islands legislation used to state that liability to pay maintenance continued only until the child reached 16 years of age. The 1992 amendment allows courts to order an extension of payments beyond 16 for the purposes of education and if the circumstances warrant it. It is thus within the power of the magistrate to order payment of maintenance beyond 16 years of age.[72] Fiji maintenance legislation also has a "special circumstance" exception but it applies only to legitimate children. A 1990 case attempted to have the same consideration extended to natural children.

CASE *E v P (1990) Fiji*[73]

Facts The case was heard in the Suva Magistrate's Court. C's natural son was an intelligent young man with the potential to undertake university studies. He had been receiving $10 per week but when he turned 16, his father D applied to stop paying maintenance. D was the manager of a motor dealership, was earning $18,000 a year, and had the means to continue paying maintenance. C was a hard-working single mother, earning $35 per week. C's lawyer argued that C's case was a "special circumstance" and that "substantial justice" would be done if the court ordered D to continue to pay for his son's education. D objected.

Decision and comment The Magistrate was sympathetic to the "special case" argument, but was unwilling to make a decision based on substantial justice and equity, because of the possibility of appeal. However, a higher court might have supported the Magistrate's right to exercise judicial discretion if the circumstances warranted it.

Imposing an age limit for receiving maintenance is an example of legislation that is indirectly discriminatory because it does not take into consideration the economic disadvantages of women. The legislation also

fails to account for the fact that in the Pacific (as everywhere) women have primary responsibility for caring for and bringing up children. The rule particularly disadvantages poor women and children who rely on small amounts of income to survive. Such rules contravene the UN Convention on the Rights of the Child (CRC).

Courts everywhere seem unwilling to extend payments of maintenance to beyond the age stated in the legislation, even where the legislation allows it. The law should remove a court's discretion to consider the future education needs of a natural child when a father applies to stop paying maintenance; it should oblige the court to consider the child's needs. We have listed below the kinds of questions courts should ask.

- Is the child in secondary or tertiary education?
- Does the child have the potential to advance in education and become economically independent?
- Can the child's mother provide for the child's financial needs?
- Can the child's father continue to provide reasonable maintenance?

Enforcement

The problems associated with enforcement of affiliation payments are almost the same as the maintenance enforcement problems of married women and legitimate children, considered in Chapter 10. Both single mothers and legally married women find it difficult to obtain a realistic and adequate order and to enforce that order if it is made.

In Fiji, activists with daily experience of magistrates' courts observe that single mothers are treated more casually and indifferently than are married women. Activists believe also that affiliation order enforcement rates are lower. (Cook Islands women cannot even claim arrears of maintenance for a natural child once the amount owed goes above $100.)

In Solomon Islands, if paternity is proved, it is usual in custom for the father and his family to make a one-off payment to the complainant's family and there is no continuing liability to pay the child maintenance in future. That at least is how it may be seen in the lower courts, but the case of *K v B (1985)* should encourage women not to take paternity cases to the village level courts, or to Local Courts with the power to deal with customary law. Affiliation cases are not meant to be heard by Local Courts. It is better for single mothers to insist that their cases be dealt with only in a Magistrate's Court by a legally trained magistrate. However, the reality is that in the Magistrate's Court, women obtain the initial affiliation order and maintenance. They may follow the order up a few times if there is money owing but because of problems of distances from the Magistrate's Court and the Court's attitude to enforcement they give up.

Vanuatu affiliation cases may be enforced in Island Courts run by village elders as lay justices with traditional respect and authority. If the putative father does not pay, he may be convicted and fined 1,500 *vatu* and if he breaches twice in five years from the date of the first default in payment, he

may be sentenced to three months imprisonment. The register and files indicate defaults repeated time and time again but virtually no records of imprisonment. Some women at the Island Court in Efate said that they did not know of these provisions and that the law enforcement officials did not tell them that the provisions existed.

Wages attachment orders

A wages attachment order (sometimes called an attachment of earnings order) is available in most countries, through either specific legislation[74] or through the powers of the court. If a defendant is in regular paid employment, courts have discretionary powers to order an employer to deduct the appropriate sum from the defendant's pay and to send it direct to the court for payment to the complainant.

There is evidence everywhere that maintenance payments are regular only when there is a wages attachment order on the defendant's salary. However courts seem unwilling to issue a wages attachment order, unless the defendant consents. They protect the defendant from the shame of having his employers and others know that he has an illegitimate child, but they allow the complainant to be publicly shamed by irrelevant and offensive questions during the trial. Despite the enormous problems of enforcement of maintenance, the defendant has to agree to the order or has to miss payments many times before a court will make a wages attachment order.

Departure of the defendant overseas

All countries have provisions to attempt to enforce maintenance orders when the defendant wants to go overseas. These are usually covered by general maintenance provisions and we have discussed them in Chapter 10. The following case highlights the difficulty of enforcement when the complainant and defendant have different nationalities.

CASE *Valentine v Donnan (1981) Fiji*[75]

Facts and decision D, a British citizen, had an affiliation order against him. When he tried to leave Fiji, C took out a warrant against him arguing that D was trying to avoid payment of maintenance by going overseas. D was arrested by order of the Magistrate's Court and his passport was seized. D appealed against the taking of his passport. The case went to two courts, and the Court of Appeal ruled that courts had no power to retain the defendant's passport as he was a British citizen. C would have to register the affiliation judgment in the United Kingdom and try to enforce her judgement there.

Comment For C this was no solution; she had no money to enforce payment in the United Kingdom. How many single mothers can afford to hire lawyers overseas to enforce local judgments and orders? The effect was that D went back to Britain and totally escaped responsibility for his child.

Cook Islands and Tonga legislation give a penalty of up to two years in prison for any person who, in the 12 months following an affiliation order against him, attempts to leave the country without the written permission of a judge.[76] The punishment seems strict but whether the rules are observed and enforced is another matter. Throughout our region, casual attitudes to enforcement push single mothers and children into the most disadvantaged of an already disadvantaged group.

SUMMARY AND CONCLUSION

We have now surveyed the rights of natural children and how these rights may be obtained. We have noted that the affiliation laws and practices of Fiji and other Pacific Islands have many features in common.

Table 12.3 summarises the legislation and common law affecting mothers and their natural children in our region. From this table and from our discussions we may draw the conclusions listed below.

- Affiliation matters are often brought under custom before male elders in traditional village courts and Local, Island or Land Courts.
- In most (not all) countries, only the mother has a right to custody of her natural child.
- There are time limitation periods for applying for affiliation and maintenance.
- A court may refuse a single mother's application for a case to be filed against the defendant, if it thinks she is of poor moral character.
- The complainant's evidence must be corroborated.
- Courts apply outdated rules of thumb in establishing possible conception dates.
- The defendant may refuse a blood test to establish paternity and this refusal cannot be used as corroboration against him.
- The complainant may be questioned about her sexual relations with the defendant or anyone else, whether or not these relations could have resulted in the conception of the child.
- There are official or unofficial maximum ceilings on the amounts of maintenance.
- The amounts of maintenance bear little relation to the defendant's income.
- Legislative age limits are lower for natural children receiving maintenance than they are for legitimate children.

- Enforcement procedures for maintenance and custody are as poor as, or poorer than, those used for legitimate children.
- Courts are unwilling to punish offenders for nonpayment of maintenance.
- Courts are unwilling to issue wages attachment orders.

Through the common law, many countries have recognised the rights of single mothers, *de facto* wives and their children. This has not happened in our region. Here affiliation laws have discriminatory features, directly because of the legislation, or indirectly through outdated common law, and misapplications of both the legislation and the common law. These discriminatory laws and practices place women and illegitimate children at a severe disadvantage; they make affiliation cases very difficult to prove; and they are in breach of Articles 2(f), 15(1) and 16(1) of the United Nations Women's Convention and the Children's Rights Convention.

Many women fail because they are uneducated or cannot afford the costs of appealing cases to the higher courts where justice is more likely to be done. Women would get a fairer deal if they could afford to challenge unjust decisions; numerous cases are lost because they do not have money to pay lawyers. New legislation may remove specific discriminatory features, but an overall strategy for an improvement of women's rights requires more than specific legislation and the provision of proper legal aid. It requires an improvement in attitudes of all those who administer the legal system as a whole — lawyers, judges, lay magistrates and court officials. This in turn requires education and re-education.

Table 12.3 Legislation: the rights of natural children and their mothers

Legislation	Fiji *Maintenance & Affiliation Act* Cap 52	Solomon Islands *Affiliation Separation & Maintenance Act* 8/1971 and *Affiliation Maintenance Amendment Act 1992*	Tuvalu *Native Lands Act* Cap. 22 s. 20; *Maintenance (Misc. Provs.) Act* Cap. 4 *Native Lands Act* Cap. 22 s. 20	Kiribati *Magistrates' Court Act* Cap. 52 s. 65; *Maintenance (Misc. Provs.) Act* Cap. 53	Western Samoa *Maintenance & Affiliation Act 1967*	Cook Islands *Cook Islands Act 1915* s. 545; s. 545-567; *Infants Act 1908 (New Zealand)*	Tonga *Maintenance of Illegitimate Children Act* Cap. 30	Vanuatu *Maintenance of Children Act* Cap. 30	Nauru *Maintenance Ordinance 1959*
Does a *de facto* wife have legal recognition & rights?	No	No	*Maintenance Act* allows anyone to apply for maintenance	*Maintenance Act* allows anyone to apply for maintenance	No	In some ways through New Zealand law	No	No	No
Can she get a non-molestation order	No	No	No	No	No	No	No	No	No
Does a natural child have land rights?	If registered in the *Vola ni Kawa Buka*	See *Koru v Official Administrator 1985*	Yes, if paternity proved	Yes, if paternity proved	Uncertain	Yes	If paternity proved; ranks behind legitimate children	Yes; common law.	No
Within what time period must the mother apply for affiliation?	12 months	3 years	None	None	6 years	6 years	3 years	12 months	9 months

	Fiji	Solomon Islands	Tuvalu	Kiribati	W. Samoa	Cook Islands	Tonga	Vanuatu	Nauru
On what grounds may courts refuse applications?	Outside period; applicant suspected of trying to blackmail or frighten the defendant	Outside period; applicant suspected of trying to blackmail or frighten the defendant	No grounds	No grounds	Outside the period	Outside the period	Outside the period	Outside the period; applicant prostitute or of loose behaviour	Outside the period
Is corroboration of paternity required?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Can the court order the defendant to take blood tests?	No	No	No	No	No	No	No	No	No
Is there a legislative ceiling on child maintenance?	No	No	Yes: $2 per month	Yes: $2 per month	No	No	Yes: $15 per week per child	Yes: 1,000 vatu per week per child	Unstated
Until what age is child maintenance payable?	16	16 unless in special circumstances	21	21	16; in special circumstances to 19	16; in special circumstances to 19	16	18	Unstated
Who has custody?	Mother (common law)	Mother (common law)	Father after age 2	Father after age 2	Mother or father	Mother or father	Mother (common law)	Mother (legislation)	Mother (common law)
Does the father need the mother's consent to access?	Yes	Yes	Unstated	Unstated	No	No	Yes	Yes	Yes

13

Women and work

WHAT THIS CHAPTER IS ABOUT

In this chapter, we focus on women as paid and unpaid workers. We will refer often to two publications[1] that highlight laws affecting the status of women throughout the Pacific, and aim to assist women in all countries of our region. The publications are *Labouring under the law*, a thorough analysis of how the law affects working women in Fiji, and *Women of Fiji: a statistical gender profile*, which provides tables, and analyses the position of Fijian women in both paid and unpaid work. Both deal primarily with Fiji but are essential to any informed discussions of Pacific women and work, and should be read with this chapter.

We will begin by discussing what work is. After a general survey of the present position in our region, we will consider how the legislation affects working women, and will see how the few existing laws tend to discriminate directly or indirectly against them. We will see further examples of this in our discussions of conditions of employment and matters related to equal pay, maternity leave, workers' compensation, provident funds and sexual harassment. Our concluding section will discuss the need for affirmative action and for adherence to United Nations conventions to help change both the legislation and the attitudes that shape the legislation.

Before we start any of this, we must ask a basic question: what is work?

WHAT IS WORK?

According to *The Macquarie dictionary*, work is "exertion directed to produce or accomplish something".[2] So work is any kind of activity aimed at getting something done or produced; the activity may be physical or mental, and does not have to have any obvious economic value.

Paid and unpaid work

However, social and legal attitudes towards work are strongly influenced by who does the activity; where the activity is done; and whether or not it is given an economic value. Money is what makes the economy move, so the more a person is paid, the more potentially valuable that person seems to be to the economy.

It follows then that a person who is not paid does not seem to be valuable to the economy. We list some examples of work traditionally carried out by women.

- Household: preparing meals, washing dishes, laundry, home care, sewing, budgeting and overall household management.

- Caring for other people: children, partners and other family members.
- Agriculture and fishing: gathering food, working in farms and subsistence gardens; fishing for the family and community; selling vegetables or fish in markets or to market vendors.
- Small businesses: making and selling food or sweets or doing small scale sewing at home.
- Community work: voluntary work for education, welfare, the arts, sports and child-care.

Whether paid or not, these activities involve a great deal of "exertion directed to produce or accomplish something" and may help to produce healthy families and a healthy nation. However, governments usually recognise only the exertions of the economically active population, which means people in the paid work-force. Few countries in our region gather statistics on the economic value of work done in the home, or of subsistence agriculture and fishing, in both of which women play a very active part. The attitude is that if women do the work, it probably does not have an economic value, and if it is work done in the home, it is not real work. Further, because unpaid work is not recognised in government and development planning, any projects that aim to involve women in development may really place a greater burden on women by adding recognised work to their unrecognised workload.

Women's unpaid work is generally invisible in the law. As we have seen in Chapters 10 and 11, the value of unpaid work is rarely recognised in matrimonial property disputes. Another problem is that women in the home and in the unpaid subsistence sector are not entitled to workers' compensation if they are injured while working. Legislative changes may be required to recognise women's work as having legal and economic value.

The lack of legal and economic recognition means that a wife's unpaid work in the home has usually been regarded in the common law as part of consortium, the rights and obligations that one spouse owes to another. Two cases show how the principle worked.

CASE *Kealley v Jones (1979) Australia*[3]

Jones had caused injury to both husband and wife in a car accident. The wife was unable to perform domestic duties and the paid work that she did outside the home. The court agreed that her husband had a right to bring an action against Jones for loss of consortium and a decrease in the services that the wife could perform.

CASE *'Afa v Tali and Sika (1990) Tonga*[4]

We have outlined the facts of this case in Chapter 8. Here we focus on the Supreme Court's decision on the question of damages for adultery. H, the husband got a divorce on the grounds of his wife's adultery, and claimed $1000 in damages against his wife's lover. The Supreme Court said that Pacific common law still allowed actions for loss of consortium, including the loss of a wife's unpaid work, and in Tonga, the legislation specifically allowed such

actions. The Supreme Court based its decision on the *Divorce Act* legislation. One of its criteria in assessing damages was that assessment should be based on the actual value of the wife, in money, domestic and sexual services and companionship.

Comment In this case, the Supreme Court relied on common law and on local legislation. In the 1952 case of *Best v Fox*[5] the House of Lords had ruled that a wife had no similar right to an action for loss of consortium of the husband's services: a wife could not seek compensation from a person who had injured her husband. A husband could sue for loss of the domestic services of his wife but a wife's unpaid domestic work did not entitle her to a share in matrimonial property: husbands could benefit from the unpaid work that their wives did, but wives themselves could not benefit from their own work. Under current common law, a husband or a wife may sue another person for causing loss of consortium.

PACIFIC WOMEN AND WORK

In this section, we begin with a statistical survey of Pacific women in paid and unpaid work. We will consider Fiji first, and then look in turn at Cook Islands, Kiribati, Nauru, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa.

In Fiji[6] according to the 1986 census, only 23% of the economically active people in Fiji were women. If the census definition of "economically active" had included homemaking, 84% of women would have been recognised as economically active, compared to 85% of men. By 1989-1990, the *Household economic activities survey* indicated that the percentage of women in paid work had increased to 55% of the total. This increase may be partly due to women working in the garment and manufacturing industry from 1985 to 1989 but the increase is not noted in official estimates. By 1992, the number of paid workers and self-employed persons was 171, 572. Women made up 29% of these.

Employment in the Civil Service accounts for about one-third of formal sector employment. Women make up 44% of civil servants, but are generally employed in the lower levels. Generally, women are concentrated on the lower rungs of the employment ladder, and are rarely found in senior administrative and managerial positions. Only 1% of employed women are in this category and only 8% of all senior administrative and managerial positions are held by women. Women are under-represented in formal sector agriculture but much represented in professional, technical and clerical occupations.

In 1989, the average salary was $8,055 per year. The average salary of females has been assessed at 88% of the average for males. The average income of paid workers in subsistence agriculture, forestry and fishing was $335 per month; women earned 64% of the average male income.

Ethnic Fijian and Indo-Fijian women have approximately similar numbers in the paid work-force. Most women are concentrated in unpaid labour, mainly domestic work, and subsistence agriculture and fishing. In recent years, unemployment and poverty levels have risen, and more women are heads of households. Government response to the growing number of poor women is ineffective. In one year, the Poverty Alleviation Fund received 3,000 applications; of the 609 granted, 149 were for women's projects.[7]

From these data, we draw the conclusions listed below.

- Fiji women earn low and discriminatory wages.
- They have poorer work conditions than men do.
- They are confined mainly to junior positions.
- They have little access to promotion opportunities.
- They work mostly in non-unionised labour.
- They concentrate on community, public or personal service.
- They have a higher rate of unemployment (15%) than men (5%).
- In 1989-1990, 10% of heads of household were women.

Most Cook Islands women are classified as doing home duties. In 1991, the public service employed 2,680 people. 32% were female but few women held senior public service positions. Women earned an average weekly wage of $154 per week while men earned $173. A 1989 survey found that the unemployment rate for men was 5.2% ; it was 7% for women. The number of persons who earned a wage or salary was 4,778, and women made up 37% of this group. However, the survey's definition of economically active did not include self-employed people in activities such as making and selling handicrafts. If they had been included, the statistics for women workers would have risen considerably.[8]

In Kiribati in 1985, women made up 25% of all those in paid work; by 1990 the figure had risen to 28%. In 1990, 56% of subsistence workers were women. Women engaged in paid work were concentrated in teaching, nursing, clerical and the private sector. Only 20 women held any of the 182 positions in the top third of the public service; four of these were expatriates.[9] For most Nauruans, money from work is a secondary source of income. Women make up about 36% (married 24% and single 12%) of the total work-force of 2,453 in a population of 10,000.[10]

The 1986 Solomon Islands census, unlike the censuses of other countries of our region, defines work as both "work for money" and "village work". Thus 84.3% of women and 86.5% of men are classified as economically active. The most common activity was "village work for no money," which includes both subsistence and traditional agriculture; 53.3% of males and 71.3% of females were in this category. In 37% of such households, women were the sole income earners but only 8% of these regarded themselves as heads of households. In 1986 only 14.5% of adult females were working for money. They were concentrated in teaching, nursing, clerical and the service sectors.

Only 18% of the public service were women, but there were more self-employed women than men: 9.4% of women and 5.5% of men.[11]

The 1986 census of Tonga showed that 81.3% of males and 18.7% of females were employed. These statistics do not take unpaid and subsistence work into account. Men are four times more likely to be employed than women: 28.4% of men and 71.6% of women were stated to be unemployed.[12] In Tuvalu in 1985, 66% of females were engaged in home duties compared to 54% of men. The cash economy throughout Tuvalu involved 12% of women and 31% of men. In the capital, Funafuti, these figures rose to 26% of women and 50% of men. However, many women sold handicrafts through the Tuvalu Women's Craft Centre and such activities were becoming significant sources of household income. In the public service, men held all the top posts. Women were concentrated in the lower rungs. "Even in situations where male applicants have less experience and/or inferior academic qualifications, they still manage more frequent promotions."[13]

Vanuatu women in 1989 made up 47.8% of the urban labour force, and 25% of government workers, but were barely represented in the higher grades. Only two of 39 departmental heads were women. 84% of the women were classified as economically active, working in agriculture, nearly all in rural areas. Their contribution to the agricultural sector is equal to that of men and they are, as well, still primarily responsible for domestic duties and child-care. In spite of this, women have little access to agricultural credit.[14]

The Western Samoa subsistence sector in 1991 was said to involve 59% of the labour force. Two-thirds of males were classified as economically active. 76% of women worked for money and 22% in subsistence agriculture. Most employed women worked in professional or technical work, clerical and related work, and sales and services. Over half of public service employees were women, but women held only less than a quarter of senior management positions: three of 26 departmental head positions, and five of the 26 positions directly below departmental head. Women featured at middle management levels, but men dominated the higher levels.[15]

The general position of women in employment

Throughout the Pacific Islands — and everywhere else if unpaid work is considered — women work more hours than men.[16] Papua New Guinea women work an average of eight hours a day more than men do. In Cook Islands and Tuvalu, women work an average of five hours a day more. As well, Pacific women generally get up between 5.00 a.m. and 6.00 a.m., and go to sleep between 10.00 p.m. and 11.00 p.m. Pacific men, on the other hand, rise an hour or two later and go to bed two hours earlier. Another interesting feature of Pacific women's lives is that they spend most of their time working for the family and have little time for relaxation; men have significantly more time for relaxation but spend less time with their wives and children. The heavy burden of multiple responsibilities has severe consequences for the health, as well as for the economic power, of women.

The patterns of women's employment may vary from one Pacific Island country to another, but we may identify some common features.

- Most countries do not consider women as economically active unless they work for money.
- Where women work for money they earn generally less than men.
- Women working for money are concentrated in "female occupations" like nursing, teaching, clerical and service industries.
- Work in subsistence agriculture and fishing is recognised but usually only indirectly.
- 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.
- There are few trade unions in "women's industries" and this ultimately contributes to women's lack of power in paid labour.
- Because they lack power, women get few promotion opportunities and may suffer sexual harassment as well.

It is difficult to compare the situation of men and women in paid work because men and women are doing different kinds of work. Work or labour is generally gendered — women and men are assigned skills and jobs based on their supposed sexual characteristics. The end result of the sexual division of labour is that women's work is undervalued and not recognised in the law. This partly explains why little legislation covers work done by women, although it is clearly required in the areas listed below.

- Minimum wage guidelines.
- Different kinds of leave with pay.
- Health and safety legislation protecting workers from danger in the work-place.
- Compensation for injuries.
- Provision for training.

If, for example, most garment workers were men, we would see a great deal more legislation in such areas, and the legislation would probably be enforced, or more serious attempts would be made to enforce it. Work done by men is taken seriously and given a correspondingly important value by lawmakers and enforcers. Certainly, many individual women are making great strides into areas of work that have traditionally been done by men, but work is still mostly gendered. This has important consequences for women; employment laws reflect community's attitudes to the sexual division of labour.

COMMON FEATURES OF THE LAW ON THE EMPLOYMENT OF WOMEN

The status of women within the paid and unpaid work-force is more influenced by political factors, economic policies, educational levels and social and cultural forces than it is by the law. Some laws do actively discriminate against women, but in general women are more affected by what the law fails to do for them than by what it does against them.

Sex discrimination legislation

No country in our region has a Sex Discrimination Act or similar legislation to allow women to challenge discrimination in the paid work-place. (In countries that have legislated to outlaw discrimination, women have used the law to their advantage. We will discuss this when we consider forms of sex discrimination and forms of sexual harassment.) So far within our region, Vanuatu is the only country whose *Employment Act* attempts to make discrimination in the paid work-place illegal. The *Employment Act* attempts to grant women the right to equal pay or comparable pay, and to prevent the exploitation of labour for both women and men. We summarise below the relevant sections.[17]

- s. 8 (1) If a woman and a man are doing similar work in the same organisation, they should receive similar rates of pay.
- s. 8(2) A woman is regarded as doing the same work as men if her work and theirs is the same or broadly similar, and if any differences between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment.
- Section 8(3) The section above may not apply if the employer can prove that a variation in wages is due to a genuine difference and not a sexual difference.
- Section 13(1) Employers must make appropriate sanitary arrangements and, wherever possible, arrangements for breast-feeding and other care of employees' young children.
- Section 22 Employers must not make any employee work more than 44 hours or more than six days a week or more than eight hours a day excluding free time.

Most Constitutions in our region prohibit discrimination on the grounds of sex. In such countries, both direct and indirect discrimination against women are therefore illegal. Any woman who believes that she is being discriminated against because she is a woman can currently seek a declaration in court about her rights under her country's Constitution. We have already seen cases regarding Constitutions and customary rights, and will later discuss a case regarding the dismissal of a married woman from the Nauru public service.

Exclusion of women's work

There is very little legislation in areas dominated by women, such as the garment industry in Fiji or domestic work everywhere. Certain categories of workers are excluded from the definition of employee and are not entitled to the limited protection of the legislation. Legislation covering occupational health and safety in women's work (for example the *Factories Act* in Fiji) is inadequate and, like the legislation in other areas, is poorly drafted and enforced. Women in female-dominated industries do not have adequate legal protection.

Similarly in non-formal employment, few regulations cover wage guidelines. In Fiji, domestic workers (including cooks, house servants, child nurses, gardeners and washerwomen) are not protected by the *Employment Act*.[18] They have no statutory benefits like paid annual and maternity leave nor do they have the right to seek worker's compensation for injury. They are not entitled to representation by Labour Officers and therefore may be exploited.

The lack of legislation, and the ruling that the legislation does not apply to such workers, imply that women's paid work does not deserve the same legal protection as men's work.

Legal restrictions on women's work

In countries with specific legislation directed at working women, the legislation usually aims to prevent women from working during certain hours (for example at night) or in certain industries (for example in mines.) No similar restrictions are placed on men's work. This legislation is quite discriminatory, because in effect it limits women's access to work. Many women need to work at night because the hourly rates are higher, or because they cannot find day work, or because there is always someone home at night to look after the children.

We may argue that night work is wrong for women because they go out to work at night and look after families by day, and this is bad for their health. We may argue that women who work at night are away from their families at night, and that this is bad for their families. These disadvantages are the disadvantages of night work generally. If night work harms the worker and the community, it harms all workers and their families, not just women and their families.

In Fiji, Kiribati, Nauru, Tuvalu, Vanuatu and Western Samoa, the legislation[19] limits women's paid work in various ways. The Western Samoa legislation states that women cannot be employed at night, or in work unsuited to their physical capacities, and the Nauru *Public Service Act* prevents married women from working in the public service unless there are special circumstances. In Fiji, the position changed with the 1996 amendment to the *Employment Act*. The following stories deal with some of the problems caused by the pre-1996 Act, and with community attitudes towards women who work in paid jobs at night.

STORY *Are bakers essential?*

In Fiji, a Taveuni baker was told not to employ women bakers at night because Section 65 of the *Employment Act* forbade the employment of women between 8.00 p.m and 6.00 a.m. One exception was that women might be employed in the public interest in times of serious emergency, or if the work involved the use of raw material that would deteriorate if not used. The Fiji Women's Rights Movement made submissions to the Labour Department:, arguing that in Taveuni, there were few jobs, particularly for women. These women desperately needed their jobs, and the baker said that the women were his best workers. The flour would deteriorate if not used. Baking bread was an essential industry needed to meet public demand; it was exempt from the Sunday ban on work. Suva had many bread shops and bakeries where women worked at night. The Suva Labour Department did not consider that these women were breaking the law.

This problem remained unresolved until May 1996 when the Fiji Parliament passed a bill amending the *Employment Act*. The Senate passed it on 10 June 1996 so women and young people may now work between the hours of 8.00 p.m and 6.00 p.m, provided that the Minister of Labour is satisfied with the conditions offered. The passing of the amendment caused debate within and outside Parliament.

STORY *Should women work at night?*[20]

One Member of Parliament was reported to say that women and men should be given equal rights. The hours from 8.00 p.m and 6.00 a.m are prime times for earning overtime. If women are given transport after hours, men should also be given transport. Women are not the only ones responsible for looking after children and the family. Both sexes needed to share those responsibilities. "What about men that work at night? The family will miss his presence. Why single out women?" She added that if women go out to work, men were obliged to stay home and look after the family.

Criticisms made inside and outside Parliament included that the bill had been introduced without consulting the workers, and that it would be difficult to ensure fair working conditions.

> Night work restrictions cannot be relaxed until acceptable safeguards are put in place by amending wages council orders to provide transport, shift penalty, overtime rates, meal allowances, child care facilities. Those who think that workers can negotiate these ... have no idea what the proposed changes mean, and how little the workers can do about [them]... The Department of Labour did not have enough resources to monitor the labour situation.[21]

Other criticisms focused on the dangers of night work ; the long hours; the effect on family life; and the possibility of "extramarital affairs".[22] These are familiar arguments, based on real situations, but the effect of protective laws is to prevent women from gaining access to all types of paid work.

Speaking for the Bill, one Senator said that shift work creates more jobs and that being allowed to work at night "removes any vestige of

discrimination against the fairer sex" in this regard. Another Senator drew attention to the safeguards:

> We are no longer in the early days of industrial revolution or colonialism ... We have unions that are very strong ...they will make sure that ...orders ... will be discussed thoroughly in the Labour Advisory Board ... If we have fears about the exploitation of women and young people, I would ask honourable Senators not to reflect on that because it will not happen. We have very responsible employers in Fiji ... they know that if they mistreat their labourers or workers, they will lose them.[23]

It took women over 300 years to change legislation that stopped them from fully participating in public and economic life. For example, women were prevented from going to university, because studying prevented them from doing their wifely duties; education would expose them to all sorts of "ugly" aspects of life, so they were not allowed to be doctors or lawyers or to earn money. Ultimately, women were protected because they were thought not to be intelligent enough to make decisions about their own lives.

Women must have the right to control and to make decisions about their own lives. Who is to be the judge of what is and is not, a good or bad decision? Making decisions is part of being an adult. Whether women choose to work in mines or at night, or not to do paid work outside the home, is for them to decide. Putting legal restrictions on women's work does not protect women; it confines more women to undervalued and underpaid work. It is legalised discrimination.

On the other hand, legislation to remove discrimination may be a noble aim, but it does not guarantee that discrimination will disappear. As we have seen in the debates on the amendments to the Fiji *Employment Act*, there is little point in changing legislation unless there is a general improvement in working conditions. The effect of the legislation may be to increase the existing exploitation. Women's groups and unions are monitoring the effects of the changes in Fiji's legislation.

CONDITIONS OF EMPLOYMENT AND PROBLEMS OF ENFORCEMENT

Concerns about the effects of removing restrictions on night work are based on the present poor drafting and poor enforcement of the legislation covering the rights of women workers. The garment industry in Fiji has been severely criticised in this area, where the legislation seems to favour employers.[24]

- Employers are not required to have wages councils or to allow workers to join unions.

- Employers are not required to submit employment data to the appropriate government ministry. Ministries therefore have little information on the workers or their working conditions.
- Government inspectors who visit job sites have to notify employers in advance,[25] thus giving them opportunity to cover up any irregularities.
- Penalties against employers are ineffective. An employer who withholds wages can be fined a maximum sum of $200 or be imprisoned for six months.
- There seems to be a reluctance to prosecute offenders. As a matter of policy, employers are given a grace period of up to one month to rectify the problem. Persistent offenders are merely visited more frequently. Prosecution is a last resort.

Part of the problem is the lack of enforcement of labour laws and the lack of human and financial resources. Fiji's Labour Administration staff totalled 42 in 1993. Only 21 labour inspectors were expected to enforce, throughout the whole of Fiji, the various labour laws including the *Employment Act* and the *Workmen's Compensation Act*. No women are employed as labour inspectors, although they might get better access to information in women-dominated industries. Approximately 80,000 inspections should be carried out in any one year, but in 1987 only 50% of the total number of registered employers were visited. Inspections concentrate on routine machinery checks or on following up complaints rather than on monitoring working conditions.

The Fiji *Employment Act* makes no provision for paid sick leave or public holidays; it is up to the unions to negotiate these conditions through collective bargaining or wages councils. If workers (for example domestic and many garment industry workers) do not have unions or wages councils, they have no guarantee of paid sick leave.

Equal pay and comparable worth

Male wages are based on the idea that men are the natural heads of household and are thus responsible for their immediate families and other dependants. For female wages, the low social value of domestic work has been carried over into the labour market. Payment of lower wages is based on assumptions that women work to obtain pocket money not because they have to, but because they want to. In 1996, women in the Fiji garment industry got from 72 cents to 94 cents per hour, an amount considerably less than the minimum manufacturing rate of $1.50 per hour or the $1.42 per hour paid to unskilled workers on building sites.[26]

In our region, there have been no serious attempts to pass laws ensuring that women are paid a fair wage for their work. In industries relying on women, such as the garment industry in Fiji, employers oppose legislation to help women obtain better conditions, and it is in any case contrary to economic development policies seeking overseas investors.

When women and men are doing the same kind of work, it is easy to compare whether or not women are being discriminated against. Public service positions offer the most obvious examples of possibilities to compare whether or not women are receiving less money for the same work. However one of the major obstacles to equal pay is the concentration of workers in "men's jobs" and "women's jobs" and the lower wages that go with the "women's jobs".

The concept of comparable worth is a way of offsetting this historical bias and achieving real equal pay for work of equal value. The comparable worth method compares a traditionally female-dominated occupation with a traditionally male-dominated occupation. In this method, the value of the work is looked at. It allows comparison of the work value of quite different jobs. In the United States, for instance, comparable worth criteria have been used to compare the work of secretaries and truck drivers, and this has resulted in significant pay increases for women workers.

Carefully chosen nonsexist criteria should be used. Examples of the kinds of work value criteria are listed below.

- Attributes (skills, experience, personality) required for the performance of the work.
- Responsibility for the work material and equipment and for the safety of the plant and other employees.
- Quality of work attributable to and required of the employee.
- Versatility and adaptability (for example in performing many different functions.)
- Skill exercised.
- Knowledge of processes and of the plant.
- Supervision over others, or necessity to work without supervision.
- Conditions under which the work is performed (heat, cold, dirt, wetness, noise, necessity to wear protective equipment).
- Importance of the work to the overall operations of the plant.

These criteria are extracted from an Australian source.[27] They are obviously based on factory work and are not altogether clear. They appear to have a male bias, and have omitted certain skills used in women's work. However, they represent a starting point from which Pacific women could negotiate better conditions.

The introduction of a Sex Discrimination Act and/or an Equal Pay Act establishing equal pay for work of equal value would be an important step towards removing gender-biased practices. The wage council legislation needs to be reviewed to ensure equal treatment of men and women to remove unfair wage discrimination.

Maternity rights and child-care

Legislation to protect pregnant women, and to keep their jobs safe while they are on maternity leave, differs from protective legislation that restricts women's work. Protective legislation in regard to pregnancy and maternity leave is necessary for the achievement of equality. If it did not exist, women would have nothing to protect their jobs when they take maternity leave. Pregnancy, childbirth and post-pregnancy rights legislation are not discriminatory. Women get pregnant and give birth to children; men do not. Nevertheless women in paid employment are not treated fairly when they are pregnant or when they take leave to care for their children. They suffer a form of indirect discrimination in that the work-place does not easily adjust to pregnancy and child-care when women work outside the home.

The legislation does not recognise the burdens of pregnancy, the pain of childbirth nor the difficulties of child-care. The law's failure to recognise this is reflected in its attitude to pregnancy or maternity leave, maternity pay and its attitudes to pregnant women. Many women have no guarantee of being able to return to work after childbirth, or have no redress when they lose their jobs because of pregnancy. There is no legal provision to excuse pregnant women from heavy labour, to protect them from exposure to harmful substances, nor from working excessively long hours.[28]

Protection from dismissal

In our region, there is general protection from dismissal when a mother is on maternity leave for three months. However, the employee must be covered by a collective agreement or protection from a trade union that has specifically negotiated protection for pregnant workers. If not, she has no remedy against an employer who gives her the required period of notice and wages and dismisses her.

However, there does not appear to be any specific legislation preventing an employer from dismissing a female worker for being pregnant; it is probably not illegal for an employer to dismiss a worker when the employer discovers that she is pregnant, and employers have done this.[29] In the Tonga civil service, the discrimination is quite clear; an unmarried pregnant civil servant must resign.[30] Solomon Islands in its *Unlawful Dismissal Act 1982* has specific protection for all workers, but as Section 4 provides fairly wide grounds that employers may use for dismissal, it is not clear how much protection the Act gives pregnant women.

There is however a common law action for wrongful dismissal: a woman could sue her employer for damages for unlawful dismissal, by proving that she was dismissed only because she was pregnant and for no other reason. It would also be possible for her to use her Constitution's provisions making discrimination against women illegal. This would be a long and costly process, and most women do not have the financial resources to use the law to challenge unjust decisions.

Maternity or paternity leave

Currently only women are entitled to maternity leave: men who wish to take leave to take care of their children may not do so. Particular categories of workers are not covered for maternity leave under the legislation of most countries. In Fiji, these are domestic workers, and casual workers employed for less than five months. The position is much the same elsewhere in the region.

In Fiji, female civil servants have the right to a total of 84 days fully paid maternity leave under the *Fiji Government Leave Regulations*[31] for the first three pregnancies. After the first three pregnancies, women may get leave without pay for up to 84 days. This leave is discretionary: it may or may not be granted. Fiji's *Employment Act* [32] covers rights during pregnancy and maternity leave of women working in the private sector. It entitles these women to $5 per day maternity allowance, if they are not covered by specific collective agreements on the amount of pay. Women may not be dismissed if they cannot return to work after taking 42 days maternity leave. They may stay away from work for up to three months after the end of their normal maternity leave, but must produce a medical certificate approved by a doctor. If they are still unfit for work after this time, they are not protected from dismissal, even if do they have a medical certificate.

They may not choose to take their 84 days leave in one block after the birth, as most women would prefer. They are obliged to take this leave in two blocks, 42 days before and 42 days after the birth. Only the employer can approve any variations. Women are permitted to work during their pre-confinement and post-confinement leave period but may not be compensated for doing so. Other workers are entitled to leave pay if they forfeit their leave, so this restriction is discriminatory.[33]

Cook Islands civil service female staff are entitled to six weeks paid maternity leave. This is laid down in Government regulations. Any necessary additional leave is taken from sick leave, or leave without pay when the sick leave runs out. For the private sector, there is no legislation except the *Cook Islands Industrial and Labour Ordinance 1964*. This states that no woman may work in a factory for the six weeks following her confinement. It states also that if a woman is employed in a position where she is requires to stand continuously, she is entitled to ten minutes rest every three hours. Private sector workers have no protection if they take maternity leave. There is no penalty for employers who sack women for pregnancy or maternity leave. Some companies have private contracts with their employees; one company gives four weeks paid leave for maternity leave. A draft bill (*The Labour Act 1991*) proposed to grant women paid maternity leave after 12 months full-time employment, and proposed also to provide for paternity leave. At the time of writing it does not seem to have been passed.

Kiribati, Solomon Islands and Tuvalu have legislation that is similar in many respects. In Kiribati, female civil servants are entitled to 12 weeks maternity leave on full pay for two children. The Solomon Islands Public

Service, by amendments to internal regulations, has altered the conditions for female public servants so that 12 weeks leave on full pay is now available. For the third and later pregnancies a woman may take maternity leave without pay.[34]

In all three countries, a woman may be granted leave by her employer for up to 12 weeks. The legislation covers all workers, not just civil servants. Once a woman has given birth, she cannot return to work for six weeks. During her absence she is entitled to at least 25% of her wages. If a woman cannot return to work after 12 weeks leave, she will not lose her employment if she can prove that she was too ill to return. The legislation says that maternity leave must begin from six weeks before the birth and last until six weeks after. If the legislation is strictly applied, women cannot decide to work until just before the birth, and to add their leave on to the six weeks after birth. In practice, at least in the civil services of most of our region, women are allowed to do this, but it is not a right. It depends on the consent of the employer.

Tongan women are granted 30 days maternity leave in addition to normal vacation leave. On medical grounds, women may get leave up to 42 days on full pay and 48 days on half pay.[35] Vanuatu women are entitled to 12 weeks maternity leave and to at least half their normal earnings. Women under union agreements may be able to negotiate better maternity leave conditions.

Nursing breaks

In Fiji, although the medical profession and nutritionists continually highlight the importance of breast-feeding, employment laws do not provide for any nursing breaks for employed mothers. Women in Tuvalu, Kiribati, Solomon Islands and Vanuatu are entitled to breaks twice a day for breast-feeding. In Solomon Islands, a worker may breast-feed her baby up to twice a day for one hour without penalty. The *Labour Act* states

> (5) An employer shall allow a female worker who is nursing a child to leave her work for this purpose for up to an hour twice a day during her working hours. Such interruptions of work shall be counted as working time and shall be remunerated accordingly.[36]

Most other countries permit up to 30 minutes for each break, but the provisions are meaningless because if there are no child-care facilities, women cannot bring their babies to work.

STORY *We can't allow this precedent*[37]

The staff of a University department obtained their head's permission to set up, in their staff-room, an area in which to breast-feed their babies during the day. They raised money and obtained gifts and made a pleasant little private area with cot, chair and changing table. However the University's management stopped the project, possibly because mothers in other departments would want to do the same.

Child-care facilities and leave

For women who work outside the home, lack of child-care facilities is a major problem. In the smaller Pacific Island countries, extended families usually care for children but this previously dependable system is breaking down, particularly in towns. There is no legislation entitling women to child-care facilities, and no major multinational companies provide such facilities. There are no legal provisions for paid leave to take care of sick children. If children are sick, women have to take leave from their own sick leave benefits or appeal to an employer for leave without pay. Employers complain about women who take their children to work or have to take time off work to care for them. Fathers rarely take time off to look after sick children, or bring their children to work. If they did, employers might complain even more.

Women are constantly and publicly reminded to fulfil their roles as nurturers and care-givers. Unless legislators and communities are prepared to assist women to fulfil these roles, it is hypocrisy to emphasise them.

Workers' compensation

Workers' compensation is available to both men and women workers in Fiji.[38] However, it does not cover unpaid workers; domestic workers; family members living and working in the family home; or women who work at home. This means that as most women do unpaid work at home or in subsistence fishing and agriculture, most women are not entitled to compensation if they are injured while working.

Provident Fund discrimination

Until recently only employees within the technical definition of employee and other stated persons could become a contributor to the Fiji National Provident Fund (FNPF) scheme, but policy change now permits voluntary contributions for domestic workers. This requires complete and voluntary cooperation by the employer. An employer who does not want to cooperate does not have to do so.

According to the *Fiji National Provident Fund Act*, Cap. 219, women may withdraw their accumulated savings when they marry, but men may not. This may sound like positive discrimination, but it is based on the assumption that women stop working when they marry. A woman who does withdraw her savings should be careful not to lose control over them and thus lose future financial security especially in the case of desertion or divorce. Her name should be on the Certificate of Title for the family home. She must insist on having registerable shares in the family business if she has put her savings into the business. Currently the FNPF demands that certain conditions be fulfilled when funds are borrowed to build homes and so on. It is possible for the FNPF to demand that if a woman withdraws money for investment purposes, the investment must include her name. The legal documents cannot be altered without FNPF approval. A woman who withdraws funds may use this requirement to protect her savings.

FORMS OF SEX DISCRIMINATION AND SEXUAL HARASSMENT

In previous sections, we have described certain laws and practices as discriminating against one sex or the other, but usually against women. In this section, we will discuss sex discrimination itself, whether direct, by stereotype or indirect. We will look also at sexual harassment, which is an extreme form of sex discrimination.

Sex discrimination

When discussing common features of labour-related legislation in our region, we noted that only Vanuatu has specific legislation forbidding sex discrimination in paid work. On the other hand, most countries in our region have Constitutions forbidding sex discrimination, as well as legislation preventing women from working in certain industries or at certain times. Tonga forbids pregnant unmarried women to work in the civil service[39] and Nauru forbids women to work as permanent officers if they are married.

> A female officer shall be retired from the Public Service upon her marriage unless the Minister is satisfied that there are special circumstances which make it desirable that she should continue in the Public Service.[40]

Another common feature is that very few women go to court to challenge discriminatory laws and practices, by pointing out for example that such legislation is contrary to their country's Constitution and to the United Nations Women's Convention. A rare example is that of a Nauruan woman who challenged the *Public Service Act* provisions requiring women to retire from the Public Service when they marry.

CASE *Cindy Kephas v Chief Secretary (1993) Nauru*[41]

Facts In 1970 Cindy Kephas began work in the Nauru Public Service as a temporary teacher on probation. When her probation ended, she continued to teach in the Public Service. In 1977 she married and continued teaching until she gave birth to her first child. She took maternity leave for 11 months and then resumed employment. She was dismissed in 1991. She appealed against her dismissal to the Government Public Service Appeal Board, which sent the case to the Supreme Court.

Ms. Kephas argued first that, because she had been allowed to continue in the Public Service when her probation finished, she was not a temporary employee of the Public Service. She was a permanent officer. Therefore she had a right to appeal against her dismissal. To this the Government replied that she had remained a temporary employee, therefore she did not have the right of appeal. Ms. Kephas argued also that because the Government had continued to employ her when she married in 1977, she had continued to be employed under the "special circumstances" exception of the *Public Service Act* s. 61, whereby the Minister may allow a married woman to continue in service after her marriage: the Minister had not dismissed her on her marriage in 1971 and could not dismiss her some 14 years later for still being married.

Decision Chief Justice Donne in the Supreme Court said: "In order for a female public servant to be kept on in the Public Service after marriage, there must be a direction by the Minister ... and special circumstances to allow this ... A married female can only be lawfully ... a substantive officer ... if a direction of the Minister is given". He said that, because Ms. Kephas was a temporary employee, the Government of Nauru could dismiss her at will. Because she was a temporary employee, she had no right to appeal. He could find in the Constitution no fundamental right which would allow the Court to find unlawful the discrimination against a female officer.

Comment Was justice done in this case? Clearly not. As the Chief Justice himself points out, the legislation is "badly drafted" and could have allowed Ms. Kephas to believe for 14 years that she was a "substantive officer". Further, although the Chief Justice did not say so, there seem to have been some administrative mistakes that also allowed her to believe for 14 years that she was a substantive officer.

The Court might have taken an entirely different view: that the Public Service did not terminate Ms. Kephas's employment when she married, and therefore lost the right to do so. As it had allowed her to assume that she was being kept on, it lost the right to terminate her employment years after the right to terminate arose. The reasoning on the constitutional issue is also difficult to follow. The Nauru Constitution, Article 2 says that any law inconsistent with the Constitution is invalid. Article 3 states, among other things, that every person shall have the right to the protection of the law whatever their sex. Unlike the Tuvalu Constitution, whose definition of discrimination specifically does not include sex discrimination, the Nauru Constitution has no special definition of discrimination. Therefore it is possible to argue that s. 61 is against Article 3 and therefore invalid.

This case reinforces discrimination against women in the Nauru Public Service and again demonstrates how the attitudes of judges may affect the position of women in the law.

Nauru's *Public Service Act* seems to be based on old Australian Commonwealth and State Public Service legislation and practices. The employment policy of "retiring" women upon marriage was regarded as legal in Australia until quite recently. As late as 1978, when Rockhampton Council in Queensland sacked an employee because of this policy, the woman had no legal remedy for her dismissal.[42]

Such legislation and practices were discriminatory not only in not allowing married women to be permanent officers, but also in regulations regarding pregnancy and maternity leave. In the Australian Commonwealth Public Service in the 1950s and 1960s, a single woman was allowed maternity leave once only. Public Service staff joked that one pregnancy could be an accident, but more than one was proof of unprofessional carelessness as well as of immorality. Another bitter joke was that staff could not claim sick leave for pregnancy complications or for sunburn because both pregnancy and sunburn were held to be self-inflicted. The South Australian State Public Service did not allow paid sick leave for pregnancy complications because "pregnancy is not a sickness".[43]

But those were the bad old days. Largely because of pressure from women's groups and activists, Australia now has a *Sex Discrimination Act* and an *Equal Opportunity Act* designed to help women obtain their legal rights in cases of discrimination in paid work. Dr. Jocelyn Scutt in her book *Women and the law*[44] discusses the Australian legislation and gives examples of direct discrimination, indirect discrimination and sexual stereotyping as discrimination. No such legislation exists in the Pacific, and only Vanuatu has legislation covering discrimination in the paid work-place. In the following discussions of forms of discrimination, we therefore lean heavily on examples and cases taken from Dr. Scutt's work.

What is direct discrimination?

Direct discrimination is discrimination openly based on a person's race, age, religion, political beliefs, marital status or sex. It usually means that the person is deliberately denied some right available to other people of different race, age, religion, political beliefs, marital status or sex.

Throughout this book and in this chapter we have seen many examples of direct discrimination against women. These include, but are not limited to, restrictions on hours of work; losing permanent civil service status on marriage; and dismissal because of pregnancy. The following Australian case involves direct discrimination, and shows what can be done if there is appropriate legislation.

CASE *Wardley v Ansett (1984) Australia*[45]

Facts Ms. Wardley, a qualified pilot, applied for a position with Ansett Airlines, which at that time had no women pilots. Twenty-nine applicants were assessed and Ms. Wardley scored well. At the interview Ms. Wardley stated that she wanted to have children and that she was prepared to make any necessary compromises to do this and to continue to work as a pilot. The interview committee said that Ms. Wardley obviously qualified for the job. Although Ms. Wardley had been assessed more highly than half the 14 new pilots, she was not employed. In its letter to Ms. Wardley, Ansett said that its policy was to employ only male pilots; an all male crew was safer than a mixed crew.

An Equal Opportunity Board had been set up under the Victoria *Equal Opportunity Act 1977*. This Board is like a court of law; it has judicial functions and exercises the powers of a court. It can make a decision but that decision is subject to appeal. Ms. Wardley complained to the Equal Opportunity Board that she had suffered discrimination as defined and forbidden by the *Equal Opportunity Act*. The particular provisions are stated below.

"s. 16(1) A person discriminates against another person on the ground of sex or marital status in any circumstances relevant for the purposes of a provision of this Act if on the ground of sex or marital status of the other person the first-mentioned person treat the other person less favourably than he treats or would treat a person of the other sex or of a different marital status.

s. 18(1) It is unlawful for an employer to discriminate against a person on the ground of sex or marital status ... (c) by refusing or deliberately omitting to offer employment."

The Board's hearing produced evidence of other reasons for not employing a woman. Ansett would need new uniforms if women were employed as pilots; it was concerned by how the crew would react to having a female pilot and its main problem was that Ms. Wardley was engaged to be married and wanted to have children. Ansett's lawyers argued that failure to employ Ms. Wardley was not discrimination. The legislation justified discrimination on the grounds that pregnant women cannot hold a license to fly. It was reasonable for an employer to make a decision based on the good of the industry, and the expenses of allowing women pilots leave for pregnancy and maternity.

Decision The Equal Opportunity Board said that Ms. Wardley had suffered discrimination as defined in the *Equal Opportunity Act*. Before passing this legislation, Parliament must have considered the possibility of women bearing children, which was the basic distinction between men and women. Therefore Ansett's actions were still discriminatory. The Board ordered Ansett to pay Ms. Wardley compensation for her losses and ordered it to employ Ms. Wardley as a pilot. Ansett appealed to the High Court, which ruled that the Board was correct in making a finding of discrimination within the meaning of the legislation.

Comment Ansett Australia actually said that it did not employ Ms. Wardley because she was a woman. The discrimination was expressly and explicitly based on her sex.

Discrimination by stereotyping[46]

Direct discrimination is obvious, but what happens when the discrimination is less obvious and more subtle, hidden or secretive? Or when the discrimination happens not because someone is a woman but because of some characteristic that women are supposed to have or not to have?

We can call this "discrimination by stereotyping". Stereotype is technically a process for making metal printing plates: once a plate has been made it can be used to produce the same words or pictures over and over again. When applied to ideas, it means the kind of fixed mental pictures we have about different races, sexes and so on. We use them over and over again without thinking.

Such stereotypes are carried over into employment policies. The next two cases, both cited by Dr. Scutt,[47] give examples of two American women who were denied promotion because their behaviour was thought unwomanly.

CASE *Hopkins v Price Waterhouse (1989) USA*

Facts The firm of Price Waterhouse had 662 partners (apparently people in management positions.) Seven of these were women. Ms. Hopkins was a staff member; she had generated more business than any of the other 87 candidates for 47 partnerships. She was the only woman candidate for a partnership and she did not get it. She was told that she was too "macho" (pushy and masculine) and that she lacked "social graces". She would be more likely to get promotion if she would "walk more femininely, dress more

femininely, wear make-up, have her hair styled and wear jewellery". Ms. Hopkins said that she did not have time for that "baloney" during the week because she was a single mother of three children. She left Price Waterhouse but brought a discrimination case against them in the District Court. During the case, a partner giving evidence said that all the firm's existing women partners were "unimpressive".

Decision The District Court said that Ms. Hopkins had been discriminated against under the *Civil Rights Act 1966*. She had not been evaluated as a manager, but as a woman manager. The evaluation was based on a sexual stereotype that prompts males to regard assertive behaviour in women as not appropriate for women and therefore more offensive than similar behaviour by men.

Comment If Ms. Hopkins had behaved in ways that the firm thought "womanly," she might have been made a partner. It is not clear however what the firm expected of its partners. Did it choose its seven "unimpressive" woman partners as decoration or as high-performance managers?

CASE *Southerland v Arthur Young and Co. (1987-1989) USA*

Facts, decision and comment Ms. Southerland proved that she was denied promotion because she was not "meek and mild" enough. She proved also that there was a pattern of discrimination at the firm. She had asked for money for her female assistant's overtime but a senior partner said that the assistant already earned a lot of money "for a woman". He told another woman employee that she should not have submitted a meal voucher, because she should have been at home cooking anyway. Ms. Southerland showed that the firm had stereotyped ideas about what women should be and do: women should be "meek and mild;" they should be content with lower salaries; and they should give priority to home life. Ms. Southerland was penalised for not fitting the stereotypes; the court awarded her $241,425 in damages as compensation for this discrimination. She left the firm and set up her own business.

Indirect discrimination

We have just seen two cases of discrimination by stereotype, one direct and the other more indirect. The Australian *Sex Discrimination Act* defines indirect discrimination in the following way.[48]

> For the purposes of this Act, a person [the discriminator] discriminates against another person [the aggrieved person] on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition
>
> (a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;
>
> (b) which is not reasonable having regard to the circumstances of the case; and
>
> (c) with which the aggrieved person does not or is not able to comply.

Indirect discrimination may therefore arise where the person doing something (for example employing or promoting) expects a woman to fulfil a particular condition that most men can fulfil, but most women cannot.

STORY *Strange justification of indirect discrimination*[49]

A firm wanted to improve its library, which had been run by an unqualified woman. It advertised a new position at management level with specified professional qualifications. Qualified women applied but the position went to an unqualified man. The women wanted to know why. The confidential answer was that as a senior manager, the librarian would have to know what was going on in the firm. The best place for gathering such information was the senior men's washroom, which a woman could not enter.

CASE *Najdovska v Australian Iron and Steel (1985) Australia*[50]

Facts and decision A group of women complained to the Equal Opportunity Board that Australian Iron and Steel's job vacancy and retrenchment (laying-off) policies were discriminatory. When women applied for jobs they were placed on a waiting list, sometimes for three years. Men on the other hand were employed with little waiting. The company had the usual "last in first out" policy. Whenever employees had to be retrenched, women had always been last employed so they were always the first to be laid off. The Board said that the company's practices and policies seemed gender-neutral because they appeared to affect men and women equally. But if women were the last to be employed, the retrenchment policies affected women more than men. The company's policies led to indirect discrimination against women. When the company appealed, the court supported the Equal Opportunity Board's decision.

Indirect discrimination is the most difficult to see, because it may appear to be gender-neutral. Even if all legislation and policies were changed to remove direct discrimination, indirect discrimination would remain. However, the law could play a significant role in overcoming discriminatory laws and practices that women face. Before discussing this possibility, we will focus on an extreme form of sex discrimination — sexual harassment.

Sexual harassment: what is it?

Sexual harassment is any kind of sexual conduct that is unwelcome and uninvited.[51] It focuses on a person as a sexual object and often continues even when it is obviously embarrassing or annoying the victim. In fact, the aim of much sexual harassment is not to get the victim to agree to a sexual relationship; it is to embarrass or annoy the victim.

In work-places where there are men and women there will naturally be a wide variety of relationships. Where men and women enjoy more or less equal power, mutual flirtation is not sexual harassment; nor are mutual teasing and good humoured banter and even quite explicit sexual remarks if the emphasis is on mutual exchange and good will. The person on the

receiving end is the one who determines whether the behaviour is welcome or not. She is the one who will have the final say on whether she treats a look, touch or comment as a compliment or as sexual harassment. In countries where sexual harassment is against the law, the courts define it as conduct which is unwanted or unwelcome from "a reasonable woman's point of view".[52]

Men may be subject to sexual harassment, by other men or by women in more powerful positions, but most victims tend to be women, and many take it for granted. Where men and women work together, the women are often in lower status jobs, while the men are more likely to be in supervisory roles and in positions of authority. Promises of promotion and threats of dismissal increase the vulnerability of women who have a narrow range of job opportunities and who work in jobs where they can be easily replaced. Sexual harassment is the ultimate weapon by which women can be excluded from the paid work-place.

Sexual harassment is very common in Fiji's work-places. During a Fiji Women's Rights Movement survey, between 80 and 90% of the female police officers interviewed treated offensive jokes or comments as "part of the job". Domestic workers, garment workers and shop assistants claimed that male workers and bosses or customers frequently asked them for sexual favours. Waitresses and other restaurant and cafe workers had countless stories of male customers who physically touch or make suggestive sexual remarks to them.

Many people regard sexual harassment as an unimportant part of a working day, or as a problem blown up by feminists. It can however have serious consequences for the victim, the organisation and its community.[54]

Potential costs of sexual harassment at work

Victim	Emotional stress that can lead to physical illness. Loss of the desire to work. Absences. Potential loss of promotion and/or training opportunities. Resignation or dismissal.
Organisation	Tension and gossip in the work-place. Lessened efficiency and productivity. Loss of valuable employees. Increased staff turnover and costs. Bad public image.
Community	The problems of the victim and the organisation flow on to the families and the community. In the long run, sexual harassment hinders the achievement of equality. By ignoring the problem, society condones sexual assault.

Organisations should make their own policies on combating sexual harassment. An organisation should state clearly that sexual harassment is unacceptable; it should clearly define what it means by sexual harassment, both to warn potential harassers or frivolous complainers, and to help their victims. Ideally, management should appoint one male and one female counsellor, so that victims can see whomever they prefer. This would be possible for larger organisations, but in smaller organisations, the counsellor should preferably be a woman since sexual harassment victims are usually women. The employer should also set up formal and informal complaint procedures. When complaints are received, action should be taken promptly so that workers realise that their complaints are being taken seriously. Above all, there must be guaranteed confidentiality so that the victim does not have to face added harassment regarding the complaint itself.

The law on sexual harassment

Fiji's *Penal Code*, Section 154(4), is similar to the legislation of other common law countries and could cover some more obvious types of sexual harassment, such as indecent exposure, obscene calls or letters or indecent assault or rape.

> Whoever, intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman or girl, or who intrudes upon the privacy of a woman or girl by doing an act of a nature likely to offend her modesty, is guilty of a misdemeanour, and is liable to imprisonment for one year.

In criminal offences, evidence must offer proof beyond a reasonable doubt. The nature of sexual harassment makes this an extremely difficult burden to prove. In civil matters, the complainant would have to prove the sexual harassment "on the balance of probabilities", which is not as difficult.

Our region has no specific laws or national legislation against sexual harassment in the work-place or elsewhere. Currently complaints are handled by union officials or women's organisations who try to negotiate on the woman's behalf, particularly if she wishes to stay in her job. The Civil Service, the University of the South Pacific and some multinational corporations, banks, statutory agencies and large companies have internal procedures to deal with conspicuous forms of sexual harassment.

In countries with sex discrimination legislation, many women and some men have effectively used the legislation to fight sexual harassment in the paid work-place. Australia's *Sex Discrimination Act* established the Sex Discrimination Commission, the Sex Discrimination Unit and the Sex Discrimination Commissioner. Most cases handled related to sex discrimination in the paid work-place; in 1995, more than 300 were sexual harassment complaints. The following examples of cases handled in Australia

by the Sex Discrimination Commission illustrate how the legislation works in practice.[54]

STORY *No protection from harassment*

A woman gardener worked for three years in a large male-dominated company. She said she was harassed and discriminated against by her workmates and that the employer failed to protect her and to discipline the harassers; she was continually subjected to crude comments, remarks about her sex life and suggestions that her work and qualifications were not good enough. She said that one supervisor kept pornographic material in the work area, made sexually explicit comments to her and told her about his sexual experiences.

The woman claimed that she had complained to her manager but no effective action was taken and she was forced to take stress leave, transfer to another work area and finally resign. Medical evidence supported her claim that she was unable to return to her previous work. The employer denied liability but acknowledged some problems related to the integration of women. The employer claimed to be trying to deal with these problems through training.

During investigation, two other women supported the allegations about the behaviour of their male colleagues and the attitude and response of the management. A conciliation conference (a meeting with the complainant, the harasser and an independent person) was held but the complaint was not settled. Negotiations continued and an agreement was reached. The woman received $70 000 compensation.

STORY *You don't fit in*

Another woman in a male-dominated occupation complained to her co-workers about pornographic pictures covering an entire wall of the work area, as well as in the shared toilet. Her co-workers made fun of her and did not remove the pictures. After several months, she went to management but was told that she should expect that kind of behaviour; she did not fit in, and she had an attitude problem. She was victimised for two years after her first complaint and believed that many people in the organisation did not want women there. She went to the Sex Discrimination Commission. In conciliation procedures, the organisation's head office eventually agreed to provide an apology; $50,000 without admission of liability (without saying that the employer was in the wrong); a redundancy package, references and reimbursement for counselling fees.

STORY *You owe me a favour for this*

A woman working for a large national company complained to her union about the behaviour of two managers. One made vulgar remarks; asked questions about her sex life; broke wind in her office and locked her in. The other manager made crude comments and would often put his arm around her shoulders, rub her back and comment on her appearance. He put his hand on her knee when he was interviewing her for a promotion and said she owed him a favour.

After the union notified the company, a meeting was held between senior management, the complainant and one of the alleged harassers, the other having left. The union was not invited to attend but found out at the last minute and sent a representative. The union was unhappy with the inquiry and with the way in which the matter was handled. It wrote to the company, offering another opportunity for negotiation. The company did not reply. The union lodged a complaint with the Sex Discrimination Commission. In conciliation talks, the two managers denied the allegations, although there was evidence that one had been warned about his vulgar behaviour. The matter was settled with $4,500 compensation and no admission of liability.

STORY *You can't take a joke*

A woman investigator with a government agency complained that a colleague said offensive, sexually explicit things to her. When she told him that these upset her and asked him to stop, he said she had no sense of humour, and tried to frighten her. The woman complained to management but she was seen as a troublemaker and was not taken seriously. Eventually she took stress leave. She lodged her complaint with the Sex Discrimination Commission, which found that the employer had made an internal investigation. This had shown that her complaints were justified; her colleague had been disciplined. The employer made a settlement, which included an apology, assistance with returning to work, references and an *ex gratia* payment of $20,000.

STORY *He's my gigolo*

A man working in a government agency complained that he was being sexually harassed by a woman colleague. She spread false rumours that they were having an affair; called him a *gigolo*; posted notes at his work-station implying that he and she were having sexual relations at work; and treated him rudely in front of other staff. The employer moved them to separate offices, against their express wishes, but denied that there had been any sexual harassment. After investigation, the employer admitted that there had been "improper behaviour" and settled the complaint for $4,800 in compensation for lost earnings and injury to feelings. The woman was counselled and the man's work was protected. He requested that no further action be taken against the harasser.

So what can we learn from Australian experience as shown in such cases?

- Most complainants are women.
- Women do not complain lightly and after only one small incident; they complain after repeated incidents.
- Most complaints are settled by conciliation.
- The employer, not the actual harasser, is legally responsible for damages and compensation.
- Sexual harassment is taken seriously.

Needed: a sex discrimination tribunal?

Most other common law jurisdictions have legislation making sexual harassment a civil matter. The legislation usually provides for some form of tribunal to deal with sex discrimination and sexual harassment, since the present court structure could not accommodate such complaints. Dealing with sex discrimination in a tribunal setting rather than in a court has these advantages.

- It is quicker, more efficient and cheaper than the mainstream courts.
- The cases are considered by specialists with training on the particular legislation and on gender issues.
- The tribunal may also have a stated public education function; few mainstream courts would be able to accept this function.

For these reasons, the countries of our region might prefer to use the tribunal approach, rather than trying to deal with discrimination cases as criminal matters.

ILO CONVENTIONS AND AFFIRMATIVE ACTION

In this concluding section we will look at some ways in which we may be able to improve the status of women in the paid work-force. These include using intergovernmental agencies such as the International Labour Organisation, and promoting the concepts of affirmative action.

ILO Conventions

The International Labour Organisation (ILO) works in much the same way as any United Nations agency; it has the specific aim of improving the rights of workers and of promoting equality in the work-place. ILO does this by setting up international labour standards, and by drafting conventions and recommendations for signature and implementation by its member governments. Most of the independent Pacific Island states are members, and the ILO office in Fiji has been very active in helping to promote women's rights. ILO has produced several international conventions useful in improving working conditions for women in the paid work-place.[55]

ILO Conventions and how to use them

- Convention No 100: Equal Remuneration Convention, 1951.

  According to this convention, men and women who do the same or similar jobs should receive the same pay. There is no ground for

discrimination based on sex. If a country ratifies this convention, it agrees to reform its labour laws to remove wage discrimination.

- Convention No 111 : Discrimination (Employment and Occupation) Convention 1958

  This convention prohibits work-place discrimination on the basis of race, colour, sex, religion, political opinion or social origin. It covers training opportunities, access to jobs and the terms and conditions of the job.

- Convention No 156: Workers with Family Responsibilities, 1981

  This convention applies to both male and female workers with family responsibilities, for example for dependent children and elderly family members needing care and support. When a country ratifies this convention, it agrees to enact laws and policies that will allow women and men workers with family responsibilities to engage in employment without being discriminated because of these responsibilities.

Assuming that your country is a member of the ILO, find out whether or not it has signed and ratified these conventions. If it has, activists may point out to Government any local action or practice contrary to the relevant convention. If it has not ratified the Conventions, activists will need to lobby and persuade Government to do so. (In Chapter 15 we will discuss ways of doing this.)

Affirmative action and equal opportunity

The Australian *Affirmative action handbook*[56] describes affirmative action in the following ways.

> Affirmative action is the taking of positive steps, by means of legislative reform and management programmes ... to achieve demonstrable progress toward equal employment opportunity. These measures are more effective if they are coordinated in an affirmative action plan. Under an affirmative action plan, government, management and unions deal with discrimination in a positive and active way [so that] the remedy for discrimination does not rely on grievance procedures ... by individuals.
>
> Affirmative action is not a new concept. Positive steps to remedy recognised disadvantage have been taken for groups of people in Australia in the past. ...It is now proposed to take steps similar to those well tested procedures on behalf of other groups ... seriously disadvantaged ... by discriminatory practices deeply embedded in Australian society.
>
> An affirmative action plan is based on the following principles:
>
> - Equality of employment opportunity is a matter of basic social justice.
> - There are two kinds of discrimination: direct and indirect. Both of these must be addressed if equal employment opportunity is to be achieved.

- Past discrimination and its enduring legacy require redress in

  ... (a) positive and active steps to eradicate discrimination.

  ... (b) remedial programmes for members of groups who have suffered discrimination.

- Improvements in equality of employment opportunity should be visible ...
- Affirmative action programmes should have specific goals ... where possible, numerical [and] qualitative, together with a timetable for their achievement. Programmes should be evaluated in terms of their redistributive effects and their success in regard to the nominated targets. This does not constitute proportionate hiring or quotas...

An affirmative action plan coordinates affirmative action programmes in the following areas of employment: recruitment; selection; training and development; promotion and transfer; conditions of service. Affirmative action is needed also to assist people before they enter the [paid] work-force. This may be achieved partly through programmes for developing awareness and skills and through recruitment campaigns in schools and other education institutions. More generally, people may be reached through the various media. Many government departments and authorities thus have responsibilities as both educators and employers.

From this, we understand that affirmative action policies are policies designed to counter discrimination in the paid work-place. A principal feature of affirmative action is helping women gain access to work traditionally considered "men's work" and to help women get promoted within particular occupations. Affirmative action policies recognise that women have not in the past been able to acquire the experience necessary to enable them to compete in the paid work-place for better jobs. Affirmative action helps women overcome these disabilities.

Affirmative action programmes are not meant to be permanent in development programmes. They are meant to help women as a group catch up with men as a group. When this happens in any particular area of work, there should no longer be any need for the particular programme.

CONCLUSION

In Chapter 15 we will discuss in more detail the ways in which we may work together to improve the status of women. Here we will briefly list some strategies that may be used to improve the status of women in both paid employment and unpaid work.

- Removing legislation that directly discriminates against women.
- Using ILO Conventions (including those protecting safety and health) as a lobbying tool.

- Passing general sex discrimination legislation to eliminate direct and indirect discrimination in the work-place.
- Passing equal opportunity legislation so that women have a way of enforcing equal access to work, promotions and opportunities.
- Passing equal pay legislation so that women are paid the same wages as men in areas where they do the same work, and comparative salaries where they do work of similar skills in female-dominated industries.
- Adopting affirmative action policies to eliminate indirect discrimination and to give women access to work.
- Challenging work-place discrimination by using the Constitutions of Pacific countries.
- Lobbying for women's unpaid work to be legally recognised in judicial interpretation and the common law.

The law can play an important role in improving women's status. It can do this by creating legislation that will encourage employers to adopt affirmative action policies in favour of women: make discriminatory practices in employment illegal: and apply principles of comparable worth to women's labour so that women get comparable wages.

However, by itself, legislation will have a limited effect. We need significant changes in attitudes about what is appropriate work for men and what is appropriate work for women. Passing equal pay legislation has limited effect as long as men and women are doing different kinds of work. Equal pay laws are meaningless when there are no men doing the same kind of work.

To improve the access of women to paid work, and to improve their position in paid work, the struggle must be waged on all four fronts: the legal; the political; the economic and the cultural.

14

Women lawyers and legal aid for women

WHAT THIS CHAPTER IS ABOUT

A major theme of this book is that social attitudes shape laws and the practice of the law. In this chapter, we will discuss the legal profession's attitudes to its own women. These women work in what many people think is the most privileged of professions. Yet they, in their personal careers and in their work for their clients, often crash head-on against discrimination based on legal and social attitudes.

STORY *Newspaper item Fiji, 1996*[1]

> A woman lawyer had a nasty experience when she appeared before a magistrate in an air-conditioned courtroom. Because of the chill, she asked the court clerk to increase the temperature of the room. But to her annoyance, the magistrate quipped to a male lawyer... "Mister, the lady lawyer is feeling cold. Why don't you do something about it?" Now if that is not sexual harassment, what is?

In the last 30 years there has been a great increase in the number of women lawyers. By the year 2000, we should have some 200 lawyers who have been trained in our region. Nearly half of these should be women. We will therefore ask some important questions. What effects will this have on the making and practice of law in the Pacific? Will there be changes in attitudes? Or will women lawyers be expected to concentrate on women's cases in legal aid programmes?

Women's organisations concerned with legal rights see a desperate need for a comprehensive legal aid scheme for women and poor people. In the final section of this chapter we will discuss the existing situation of legal aid. We will then discuss ways of improving the situation — keeping in mind that the quality of such aid will depend on the skills, attitudes and knowledge of the individuals who provide it.

WOMEN LAWYERS

> The law is no longer a profession that attracts the brightest and best of men. It seems to increasingly attract those who are in it only for the money. I'd rather work with women.[2]

> The ironic reality of women's work experience in law is that [even though they are disadvantaged] women lawyers as a group come much closer than men to actually living up to the service ideals of the profession.[3]

These two quotations illustrate a general feeling that women lawyers tend to be more concerned about meeting the ideals of the law than men do. For instance, more female than male lawyers work in legal aid units; and more give free time to helping non-governmental organisations and working with crisis centres. We do not say that women are better lawyers than men, or that they are more honest or noble than men — just that women bring a different range of experiences into the legal profession.

In general, the legal profession anywhere in the world consists largely of people who come from professional families, and often from families who specialise in law.[4] Because of the length and intensity of legal studies, poorer students find it difficult to survive even if they have scholarships. Students with no scholarships and little support from their families often drop out because they cannot support themselves and keep up with their studies. (In our region, many students spend over 10 years on legal studies through distance education, doing one or two courses a year. At the same time they work full-time in a paid job and shoulder family responsibilities.) These conditions affect both men and women, so we still find that most women lawyers also come from the higher income groups. However, despite sharing a privileged socioeconomic background, they have personal and direct experience of sex discrimination. This is shown clearly in the fascinating history of women's attempts to enter the legal profession.

Historical background

In order to enter the legal and medical professions, women had to prove that they were "persons" — human beings. This interesting legal discovery was not made until the twentieth century, and followed several court cases in which women had tried unsuccessfully to enter medical and legal schools or to work as professionals in these areas. We will look at three of these cases. One of the earliest is that of Myra Bradwell in 1869, over 120 years ago, and one of the latest is that of Ms. Bebb, in 1914. In 1996, some of us still have relatives who were living at a time when women were not legally "persons." It is therefore not surprising that attitudes to women still contain traces of the idea.

CASE *Myra Bradwell (1869) USA*[5]

Facts In 1869, in the United States, Myra Colby Bradwell successfully completed all the required law studies. Her attempt to obtain a license to practice law in Illinois failed because the statute allowing persons to practise law referred to "he" and "him". Ms. Bradwell argued that legally such words included the female gender; she should therefore be granted a license. The case was argued all the way up to the Supreme Court, where it was heard by eight judges.

Decision Seven of the eight judges ruled against Ms. Bradwell. They said: "It could not be assumed that one of the privileges and immunities of women as citizens is to engage in any and every profession, occupation, or employment in civil life. The civil law, as well as nature herself, has always

recognised a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organisation, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman has no legal existence separate from her husband, who was regarded as her head and representative in the social state; and notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist ... One of these is that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him ... Many women are unmarried and not affected by any of the duties, complications and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of women are to fulfil the noble benign offices of wife and mother. This is the law of the Creator."

Comment According to the judges of the day, women belonged in the home; it was a privilege for women to work; women were far too delicate to have a career; and in any case, women had no separate existence from their husbands, therefore they were not persons. Therefore they could not practice law.

CASE *In re Edith Haynes (1904) Australia*[6]

Facts Edith Haynes, in Western Australia, had been allowed to take all except the final law examinations. She needed these to be admitted as a barrister and solicitor to the Supreme Court Bar, and therefore to practise in courts of law. She applied to take the examinations and was refused. She appealed to the Supreme Court of Australia, on the grounds that the relevant legislation permitted admission to "any person".

Decision The Supreme Court refused to admit Ms. Haynes. The relevant legislation permitted admission to "any person" but the Court said that there had to be express or deliberate provision for the admission of women to the profession. Once again, women did not qualify as persons under the legislation. One of the three judges said: "... The common law of England has never recognised the right of women to be admitted to the Bar ... Throughout the civilised world, so far as we know, we have not been able to ascertain any instance where the right of women to be admitted has even been suggested ... The statute says "any person". That does not appear to me to be very forcible. It is a privilege ... which from almost time immemorial has been confined to the male sex."

Comment We see elsewhere in the report that the judges placed great weight on the possibility that if women were admitted to the Bar, it would become possible for women to "sit on this bench," thereby becoming a "brother" judge. Therefore they held that women were not persons.

CASE *Bebb v Law Society (1914) United Kingdom*[7]

Facts In the United Kingdom 10 years later, the Law Society advanced similar arguments, again denying women entry into the law profession. Ms. Bebb, a single woman, took her case to the Court of Appeal and then to Chancery, seeking to be declared a person so that she could be admitted to the Bar to practise law.

Decision The Court of Appeal said that a married woman was not a person, because upon marriage a woman and her husband became one and that one was the husband. Replying to the argument that a single woman did not have a husband, the Court said that single women would at some time in their lives become married. There was no point in allowing them entry into the profession when upon marriage they would in any case become ineligible, as they would then cease to be a person within the meaning of the law. The Court of Appeal dismissed Ms. Bebb's appeal, and Chancery agreed with the Court's decision.

When did women become persons?

It took acts of parliament to make women persons and fully human. The Victorian State Parliament was one of the first parliaments of the world to pass legislation saying essentially that "words importing the masculine gender include the feminine gender". This was done in an amendment to the *Legal Profession Act*, superseded in 1926 by the *Women's Qualification Act*.[8] Tasmania, Queensland and South Australia also passed legislation in the years after 1903, but New South Wales waited until 1918; the United Kingdom waited until 1919, and Western Australia until 1923.[9]

The law was the last of the learned professions to admit women. One reason may be that the longer the history of the profession, the more resistant it was to change. Could another reason also have been that the law is an important avenue through which women gain access to political power?

To date, no studies have been done on the status of women in the legal profession in Pacific Islands, although the increasing number of Pacific women lawyers will offer possibilities for future research. For the present we will turn to Australian research to help us identify the problems that our women lawyers might face.

Current status: Australia[10]

The 1940s saw a big increase in the number of women lawyers in Australia, with 29 women being admitted as solicitors. Statistics from the Australian Women Lawyers Association show that in 1958 there were marked differences in rates of pay, superannuation entitlement, promotion potential and retirement provisions between male and female solicitors. Family connections and the "old boy network" remained important.

During the 1960s, largely because of the influence of the international women's movement, there were great increases in the numbers of women entering the professions. The 1966 census identified 377 women lawyers, and the 1970s saw the greatest increase in the numbers of female law students.

Between 1976 and 1981, there was a 28% increase in the number of male solicitors compared to a 165% increase in the number of females. In 1984, women constituted 41% of all law students in Australia.

The position of women in the legal profession has improved considerably in the developed world.[11] However, the legal profession is still politically conservative. Lawyers tend to represent the pinnacle of the values of a traditional, male-dominated society. In 1980, the public service was a major employer of female lawyers, perhaps because of better equal opportunity policies and maternity leave conditions, but only 7% of public service lawyers were women. In the 1980s, a study by Justice Jane Mathews[12] showed that women concentrated in lower ranks of university teaching. In 1982, there were only two women law professors. In 1986 only three women were Readers or Associate Professors. By 1988, 29% of teachers of law in New South Wales were women; there were three women professors of law, and 13% of public service lawyers were women. In mid-1987, less than 5% of magistrates and judges were women, and these were mostly in the lower courts.

In the 1990s, about 43% of law students were women, although in some institutions, there were more women than men. There is some suggestion that female students work harder, but appear to have higher dropout rates, than male students do. University records show that women average better academic results in all categories in law school. However, in work, they command lower salaries, and a very large number do stereotyped "women's work" such as family law and probate. In 1990, only 9% of all women solicitors were partners in law firms compared to 40% of all male solicitors who were partners. They still do not make up 50% of the profession. We will recognise the reasons, which are similar to those produced by the stereotypes that beset women in other professions.[13]

- 35% of women graduates reported that their gender was a disadvantage in finding work.
- 33% found that their gender was a problem in day-to-day work.
- 9% said that being female was an advantage.
- 1% of men said that being male was a disadvantage.

The most difficult sector to break into has been that of barrister, especially in Queensland and New South Wales, where the distinction between barristers and solicitors appears rigid.

> The profession in New South Wales is organised into two distinct branches, offering separate career lines ... Barristers are [by statute] prohibited from acting as solicitors; solicitors ... refrain from exercising their rights to undertake advocacy in lower courts.[14]

What is the difference? A solicitor advises clients and may represent clients in the lower courts but not in the higher courts. Barristers represent clients in the higher courts. To do this they rely on cases (called "briefs") prepared by solicitors. Barristers group together in "chambers", a suite of

offices that may have common facilities, but from which each barrister works as an individual. Because of their experience in the higher courts, and their greater influence, barristers are more likely to be appointed as judges than are solicitors. Barristers are therefore seen as belonging to an exclusive, largely male club.

Justice Mathews herself met prejudice trying to break into that club, and of the 40 women barristers studied, 31 had a range of complaints ranging from being patronised to outright discrimination. Most thought that their career patterns would have been very different if they had been men, and Justice Mathews notes:

> My impression had always been that women at the Bar tended to become typecast into the family law fields ... and the results of this survey strongly support this ... It seems that ... the only effective way a woman can remain out of the family law field is by refusing to take that type of work ... Unless she does so, she stands a very strong likelihood of ... specialising in family law, whether she wants to or not.[15]

Justice Mathews found too that marriage itself was not a barrier to a career in law, but that childbearing and child-care certainly were.

> The perception of women as primarily suited for child-rearing and homemaking [is] the biggest single obstacle for women in the law. In the meantime, women lawyers are growing both in numbers and in reputation and if the present trend continues the image of the law as a male-dominated profession cannot last much beyond the 1980s.

A key problem is one faced by all women in the paid work-place: how to cope with the demands of the job and of family care responsibilities. Women lawyers average slightly fewer hours of work than male lawyers, but work considerably longer hours than do librarians, social workers, secretaries, scientists or engineers of either sex. Taking time off work to have and raise children is also a key factor. One British barrister revealed perhaps the attitude of the profession when he asked: "Why should men barristers nurse [the women's] practices while [the women] nurse their brats?"[16]

The barriers to the advancement of women in the legal profession have been identified as follows.[17]

- Greater availability of certain types of work.
- Idealism. (Women lawyers (28%) are more likely than men (17%) to offer community service as a motive for doing law.)
- Needs for work flexibility especially in regard to child-care.
- Expectations of fairer treatment in the public sector.

Many researchers have pointed out that the atmosphere of the courtroom is very male. The stereotype male lawyer is "deep-voiced, arrogant, able to project knowledge with certainty even when he is ignorant about something". However, society prefers women to be gentle, quiet, cooperative, submissive, not competitive and "not bossy". These ideas of appropriate

female behaviour are totally at odds with ideas of what makes a good barrister. Women lawyers, more than any other professionals, seem to have tried to copy masculine attitudes because of the adversarial nature of the profession.[18]

Sexism is now more subtle and women barristers do not know which behaviour to confront. Clothing may also be an issue. The goal of many woman lawyers is to be neither too feminine nor too masculine. What are the choices for women lawyers? Do we dress like men? Do we imitate their styles? Do we become honorary males? Or do we celebrate our difference? Women lawyers, in dress and manner, symbolise the current debate in the women's movement.

Case study: women in the legal profession, Sydney, 1991[19]

The author interviewed one male solicitor, three women barristers and two women members of the Bench, including a High Court Justice. We will first list, and then summarise answers to, the questions she asked them.

- Is there discrimination against women lawyers?
- Why have women found it difficult to succeed as barristers?
- Do women have to be like men in order to succeed as barristers?
- What about personal styles in dress and manner?
- Do women lawyers make a difference to the legal system?

Is there discrimination against women lawyers?

Women who entered the profession earlier reported more discrimination but said there had been improvements since the 1960s. Women did not "rock boats" but had to be aggressive to succeed. Upper class bias was as evident then as it is now. All women cited specific incidents of sexism, and of discrimination that was less subtle then than it is now. A former Chief Justice told one woman: "Mother Nature's only mistake was a woman barrister". One male barrister refused to practise at the Bar with "lesbians" but if accused of practising discrimination, most men barristers would say "It's not personal".

One barrister had suffered sexual harassment but did not take any action because of the consequences for her career and social life. All said judges were fairly similar in their treatment of barristers, male or female. The attitudes of male barristers ranged from being patronising to outright dismissal of any woman's capabilities as a barrister.

A barrister, at the Bar for three years, noted the difficulty of obtaining briefs. She said that new male barristers have the old boys' network to rely on; solicitors were worse than their clients, and sometimes hid their own prejudices by saying that the client did not want a female barrister. Another barrister had great difficulty finding a master (a supervisor or sponsor.) This woman had been practising commercial law, and lost many briefs because

of her gender, although some women clients specifically requested a woman barrister. This woman had never done family law but had to take it up when she became a full-time barrister and was given only family law briefs. A senior woman lawyer friend of hers had just been turned down for partnership after having brought in a major financial client.

One woman found it an advantage to be a woman barrister in criminal law because male defendants thought that "women care more", and some accused rapists thought that it was tactically good to have a woman defence counsel. However, women barristers are still rare in criminal or commercial areas.

Asked whether they would defend men charged with rape or other offences against women, all the interviewees said that they would. Most believed in the law as an institution. The form of the law was tried and tested. Every person had a right to a defence. "Either you are in the business of defending people or you are not".

Why have women found it difficult to succeed as barristers?

The male lawyer said that women have problems in divorcing personal views from work. Women barristers, he said, show hostility to men if they lose, and take their losses personally. Women tend to lose sight of their duty to act fairly. Men's camaraderie and the old boys' network serve the client well. Women cannot do that. Women, he concluded, are not very good at the fine technicalities of the law. They allow "other things" to come in.

Most of the women lawyers interviewed regarded the Bar as cut-throat, adversarial and competitive, as well as demanding very long working hours. The Justice said that women lawyers may regard the nature of the Bar as being the high point of what they do not like about the law. There were also problems of finance. One barrister made $2,000 a year during two years.

Age and family were obstacles to work at the Bar. The Bar makes no provision for maternity leave or children. Because of study and career demands, many professional women delay having children until they are 30 or older, but this effectively means interrupting a career at a very important stage. On the positive side, successful barristers might have more flexible hours than solicitors do. Women who have succeeded at the Bar can afford nannies and this is important if they want to continue being a lawyer after having children. Many women lawyers spend half their salaries on child-care.

Do women have to be like men in order to succeed as barristers?

The Justice said that the ethos of the profession is to be like "real men". This may be a survival technique. The same qualities were needed to be a good defence counsel. The male lawyer said that women are most successful at the Bar by being aggressive, but that they should be "feminine" in appearance. Women should retain their sense of fallibility because it serves

the client better. His firm (one of the larger firms) did not give briefs to women barristers because it regarded the current women barristers as not competent, or not sufficiently senior. The woman barrister who said she was not treated in a discriminatory manner said that this was because her loud voice and manner allowed her to fit into the conventional idea of what a barrister should be like. The women who are succeeding are those who are like men; they have connections; and they are assisting Queen's Counsel.

What about personal styles in dress and manner?

A barrister said she never thought about what she wore, but that a wide range of styles was tolerated. Another said that she wore very feminine clothes, vibrant and flamboyant. She did not dress like a man and did not want to. Yet another said that she was very conscious of her dress and manner. She dressed "smart and stylish" in a feminine way. She never wore trouser suits because "it would raise eyebrows"; she did not necessarily want to "confront men with my equality ... They might not be able to cope". Women lawyers were constantly being judged as women as well as by their professional attitudes and competence. She said that sometimes it could be an advantage to appear feminine but when questioned could not think of an example.

Do women lawyers make a difference to the legal system?

A barrister said that her philosophy was to ignore all the sexism and it would eventually go away. One of the real differences between women and men was that women recognise their fallibility. This is better for the client because it allows more negotiation; women are not determined to win at all costs, and two opposing women lawyers are more likely to arrive at a negotiated settlement. Another woman lawyer said that there was less pretence among women lawyers.

The Justice said that if women had designed the legal system, the system would be different. Women have to have energy to make it change. They have to make sacrifices. They have to change family arrangements. Women who work in the law are making a difference inside and outside the courtroom, simply by being there. A woman teacher of law confirms this view.[20]

> After the first week of classes, a first year student ... from a Greek immigrant family [told me] how delighted she was to be taught by a female because everyone in her family told her that law was no place for a woman. The very fact of that teacher's position helped the student in her resolve to battle with her family's perceptions about her career goals.

The Justice expressed grave concern about the lack of women at the High Court where members of the Bench were usually selected. This was a pity because the High Court could be regarded as the ideal place for women; it has none of the traditional aggression of the lower courts. A barrister said

that when there were a few women at the Bar there was a greater sense of camaraderie. The women who have made it to the Bench as judges were remarkable because they had not lost their sense of humanity, and resisted enormous pressures to act like the male Justices.

Another concern was the class bias in Australia. All interviewees regretted that the increase in numbers of women lawyers was not affecting the class composition of the profession. Women were still largely from the upper middle class. There were still too few working class women lawyers.

All round, women in the law do make a difference. Women are approachable. Clients and witnesses respond to women, and women try to shape the law. However, in order for them to succeed in male terms, they have to compete the way that men do. Women lawyers, like all women trying to break into new areas, find themselves competing against each other. This is an unfortunate aspect of the patriarchal system. It breaks down the sense of sisterhood that women have always experienced from sharing a common oppression. It is important for us to keep these features of patriarchy in sight so that we can ensure that they do not take our energies away from fighting the real war — trying to change the system so that it works better for women.

> If tomorrow, women were to comprise half the politicians or business executives, or priests or scientists ... they would be coming into a system which men have devised for themselves, in which the values and the rules of the dominant group are already decreed, and into which the newcomers would have to fit. For women to contribute to our value systems, our social ideology and view of the world, on the same terms as men, women would have to be free to decree at least half of the rules ... by which men would have to abide.[21]

If women want a more gender-conscious legal system, they need more female involvement in the system to hasten the process. If issues and values important to women are to influence the legal system, increasing the number of women in the law profession will increase the chances of this happening. There must be a sufficient number (a "critical mass") of women in the law, as court officials, lawyers, magistrates and judges, to make a difference.

A critical mass of women in the law

Women lawyers in the Pacific Islands

What are the chances of this happening in our region? We have few women lawyers, Justices of the Peace, magistrates and judges; the reasons are similar to those discussed in the Australian studies and are related to the social status of women. They include the late entry of women into the profession and government reluctance to appoint women to such positions.

Table 14.1 Practising lawyers in countries covered by this study 1995

Country	Total lawyers	Women lawyers
Cook Islands	20	5
Fiji	150	15
Kiribati	8	2
Nauru	4	0
Solomon Islands	30	3
Tonga	20	2
Tuvalu	2	0
Vanuatu	24	4
Western Samoa	35	8
Total	**293**	**39 (13%)**

Notes:

Cook Islands — 10 lawyers (including one woman) were employed outside legal practice by offshore banking companies. The only senior woman in the judicial system was a Deputy Registrar. Justices of the Peace acted as magistrates; most had no formal legal qualifications and were full-time Government employees. There were no women JPs but the only former woman JP apparently had an excellent reputation.

Fiji — The figures do not include expatriates. There were four women Justices of the Peace. The only female partner in a law firm practised with her lawyer husband. In July 1996, two qualified female lawyers were appointed as magistrates (many other magistrates do not have legal qualifications.) There were no women judges. After having acted as Director of Public Prosecutions for some time, a woman was confirmed in the position amid much controversy. (One High Court judge said to counsel in chambers that the DPP job was "not a job for a woman".)

Kiribati — Magistrates in the Island Courts do not need legal qualifications; there were no female magistrates.

Solomon Is.	There were no female magistrates in the Magistrates' Courts or in the Local Courts.
Tonga	The 20 fully qualified lawyers included some who visited Tonga when necessary. The two women were in the Crown Law Office. In addition, there were 19 "licensed lawyers"— lay lawyers who may not be qualified but who purchase licenses for $60 per annum and practise as lawyers; five women were in this category. No woman had ever been appointed as judge or magistrate. One woman lay lawyer said that she had applied four times for a lay magistrate position; each time someone less qualified had been appointed.
Vanuatu	There was one recently appointed woman magistrate, a deputy registrar. Most male and female lawyers were expatriates.
Western Samoa	There were no female judges. One of the three Government-appointed judiciary committee members was a woman.

Law students

Some researchers suggest that women law students, and students from developing countries, are at a disadvantage in law classrooms. Law classrooms have been compared to courtrooms, as "hierarchical, amoral and adversarial"[22] — a war zone where everyone has a set place and a set role; where the skill of the arguer is more important than the morality of the argument; and where someone has to win and someone has to lose. The argument is based on American studies of law classroom teaching and may not be so relevant in Australia, where women students seem to do well.

However, University of the South Pacific teachers in all disciplines say that Pacific Island students (especially, but not only, women) have difficulties in expressing their opinions in the classroom. The University of the South Pacific and the University of the West Indies are the only two truly regional universities in the world. Both offer law degree studies, and both draw their students from island nations whose first language is not English and whose cultures are not based in Europe. Both would be good places for comparative studies on the effects of different approaches to teaching law.

Until 1994, the University of the South Pacific offered only vocational level training in law. Students wanting degree level law studies had to study outside the region. For example, the 1995 Fijian Affairs Board scholarship graduates included four new Bachelors of Law, and one Bachelor of Jurisprudence. The 1996 Fijian Affairs Board scholarship holders included 16 studying law in Australia, New Zealand, the United Kingdom, the United States and the University of the West Indies. 10 of these scholarships were for postgraduate studies.[23] We do not have figures for private students, nor for countries other than Fiji.

Figures from the University of the South Pacific's Law Degree programme indicated a regional interest in legal studies. This programme began in 1994 and by June 1996 had 211 students.[24]

Table 14.2 Students enrolled in USP Law degree courses, June 1996

Year	Male	Female	Total	Complete 5 year programme in
Year 3	30	27	57	1998
Year 2	47	39	86	1999
Year 1	42	26	68	2000
Total:	**119**	**92**	**211**	

In 1996, Year 1 was taught both face-to-face on the Suva campus, and by distance education to students outside Suva and in the region. The Year 1 figures are for students on the Suva campus only; we do not have the total number. Nor do we have a country breakdown for the Year 3 students, but over 40 are from Fiji. The next largest group appears to be from Western Samoa. On the other hand there appear to be no Cook Island, Niue or Tokelau students and very few from Kiribati, Nauru, Solomon Islands, Tonga, Tuvalu and Vanuatu itself, where the Year 3 courses began in 1996. Of the Year 3 students, (13 men and 9 women) chose to study Family Law. This is over 40% of the total number of students — one third of the women, and nearly half of the men — and indicates the importance that our students, or their sponsors, place on Family Law.

Table 14. 3 provides a country and sex breakdown for Year 2 students, and again shows Fiji with the largest number of students. Fiji, Kiribati and Western Samoa have more women than men students. The only Tokelau student is a woman, and the two ni-Vanuatu students are men.

In 1995, our region had 293 practising lawyers. Many were expatriates and none had completed law degrees at the University of the South Pacific; 39 were women. By the end of the year 2000, our region will not only have more young Pacific Island graduates from law schools outside the region; it should also have over 200 young Pacific Island graduates from a regional programme that aims to produce lawyers who understand the region, are familiar with its laws and are capable of analysing and questioning those laws.[25] This will be a remarkable increase in the number of available lawyers, and indeed in the number of Pacific Island women lawyers.

What difference will the study of law make to these Pacific Island students? What difference will these Pacific Island students make to the practice and teaching of the law in the Pacific Islands? Is it possible that "the growing numbers of women ... might affect the style of legal practice by changing the aggressive and combative role played by male lawyers?" And that "lawyers might change their image and become a helping and problem-solving profession?"[26]

Table 14.3 Year 2 Law students at the University of the South Pacific, 1966

Country	Total law students	Women law students
Cook Is.	0	0
Fiji	49	27
Kiribati	4	3
Marshall Is.	0	0
Nauru	0	0
Pitcairn	0	0
Solomon Is.	15	1
Tokelau	1	1
Tonga	4	1
Tuvalu	0	0
Vanuatu	2	0
West. Samoa	8	5
Others	3	1
Total	**86**	**Total 39 (33%)**

LEGAL AID

These questions are very important in the field of legal aid, since unless law becomes a more "helping and problem-solving profession," legal aid can become or remain a battle between the sexes. It is, for example, easy to imagine a situation where legal aid allows an "aggressive and combative" criminal lawyer to confront a rape survivor with little legal background. There is little point in talking about legal rights for women, or about improving women's legal situation, without improving women's access to justice through free or cheaper legal representation. One of our themes has been that the more women challenge or appeal decisions in the superior courts, the more likely they are to obtain justice. Women must therefore be able to obtain competent legal representation.

The present situation

At present, in most Pacific Island communities, only people from middle to high income groups can afford lawyers, and can thus benefit from the legal system. As most women are low-paid or engaged in work that is non-paying, free legal aid must be more comprehensive and widely available to allow them better access to justice.

All Pacific Island countries except Tonga have some type of legal aid service. These range from informal services, as in Cook Islands, to a

reasonably comprehensive service, as in Solomon Islands where women are becoming more aware of their rights through the Public Solicitor's Office. We will begin therefore with Cook Islands and Solomon Islands, representing the bottom and top of the range. Then we will look at Kiribati, Tuvalu, Vanuatu and Western Samoa, and end with Fiji which passed a new *Legal Aid Act*[27] in 1996.

Cook Islands has no formal provision for legal aid although a lawyer in the Ministry of Justice may provide free legal advice to those who cannot afford private lawyers. The lawyer files applications for divorce and custody matters but this is done informally with the approval of the Secretary for Justice.

Solomon Islands has the most sophisticated legal aid system of all countries in our region. In 1995 there were five lawyers in the Public Solicitor's Office, a constitutionally created office governed by the *Public Solicitors Act 1987*[28] and its amendments. These set an upper limit of $6,000 in earnings per annum (although the Public Solicitor's Office says that the upper limit is actually $12,000). Article 92(5) of the Constitution says a person may challenge, in court, the refusal of the Public Solicitor to take a case. This, of course, requires money so few needy persons do appeal.

CASE *In the matter of Art. 92(5) of the Constitution and In the matter of an application by Sir. P. Kenilorea*[29]

Facts and decision The Office of the Public Solicitor refused Sir Peter Kenilorea's request for free legal aid. Sir Peter challenged the refusal. The High Court held that the upper financial ceiling did not limit the power vested by the Constitution. This did not set a ceiling, and it said that Public Solicitor must provide legal aid to "persons in need". The High Court said therefore that the issue was not one of only financial concerns. Any person in need was eligible for free legal aid. However, the High Court denied Sir Peter's request, on the grounds that his right concerned a public interest issue. Legal aid was limited to private rights, for example family law matters and criminal defence.

In any year, the Public Solicitor's Office deals with roughly 5,000 clients, about half of whom need legal representation. The problems of the Public Solicitor's Office are vast and include lack of proper accommodation; lack of adequate incentives (losing lawyers to private practice) and lack of personnel (five lawyers serving 90% of the population.) The Office worries about political moves to do away with its services, perhaps because there are too many challenges to the politicians from persons using the legal aid system. It believes also that the legal aid limits are improper, because a fixed figure does not reflect the ability of an applicant to obtain private legal services.

Solomon Islands women are becoming more aware of their rights and more willing to use the law to their advantage. However a woman who lives far from legal services and who has been classed as "over the limit" may not be able to use the nearest Public Solicitor's office. She may have to go to Honiara every time she has to appear in court, or get legal advice. This limits her access to legal advice, paid or free.

The position of People's Lawyer in Kiribati is presently filled by an expatriate provided by aid. The People's Lawyer charges a nominal fee to people employed in the cash economy but provides free representation to those who cannot afford to pay. If both parties apply for legal aid, the People's Lawyer may decide to provide help to the person who is more deserving, economically and socially. However, the general rule is "first come, first served". Thus the more informed the citizen, the more likely he or she is to obtain legal services. In 1995 women were the majority of applicants in family law matters.

The People's Lawyer in Kiribati has a wider and more comprehensive role than in Tuvalu. There are slightly more lawyers in Kiribati in private practice and more are able to obtain legal representation. In Tuvalu, a People's Lawyer, an expatriate provided by aid, represents those who cannot afford lawyers and provides free legal advice to all citizens. As there are only three lawyers (two of whom are in Government) the People's Lawyer is the only lawyer who can represent and give legal advice to private citizens. This is adequate for criminal matters, as the Attorney-General prosecutes, and the People's Lawyer defends, people charged with criminal activity.

Very few women are prosecuted for serious criminal activity, so the service is of limited help for the majority, who have problems in family law and related issues such as rape, domestic violence, divorce, custody and access. In such matters the People's Lawyer can advise both parties but cannot represent either in court, as one party will be without the advantage of legal representation. This situation is clearly unsatisfactory. The National Council of Women is very aware that in order for the situation of women to be improved, more lawyers are needed. The Council, assisted by the People's Lawyer, is contributing towards legal literacy by preparing a Tuvalu language brochure on women's rights in the law.

The Vanuatu Public Solicitor's Office first opened in Port Vila in 1985. The Office deals with 200 to 500 clients a year, but this figure does not include letters and telephone calls. With a staff of three solicitors for a potential clientele of over 150,000, it has little capacity to provide civil legal assistance and limits aid mainly to assisting those charged with criminal offences.

The Western Samoa Attorney-General's Office provides a public defender for serious crime. The Chief Justice will grant a certificate for legal aid after the Secretary of Justice has interviewed the client, and made a decision that the charge is serious and that the client does not have the means to pay for defence. A private lawyer is usually engaged.

The Maintenance Officer attached to the Attorney-General's Office files maintenance and custody cases, appears in court and acts as representative for those who cannot afford legal representation. The Maintenance Officer places great emphasis on reconciliation and the majority of his time appears to be spent on counselling. There appears to be no official means test. When both husband and wife approach the Office, the Maintenance Officer decides which applicant is more deserving. If a case proceeds to the higher courts, the Maintenance Officer may unofficially use one of the Attorney-General's lawyers. Those who want to apply for divorce have to hire private lawyers.

Wanted: an alternative approach to legal aid

The inefficiencies and inadequacies of Pacific legal aid systems reinforce the unsatisfactory situation of women in the law. So what can we do about legal aid? We will try to provide some answers and suggestions by taking Fiji's efforts as a case study.

Case study: Fiji: The Legal Aid Act 1968

As noted above, Fiji passed a new *Legal Aid Act* in August 1996. We will begin this study by discussing the provisions of the previous Act,[30] under which an accused "poor person" has the right to the assistance of an interpreter and paid legal representation at all levels of courts. Legal aid is available to needy persons in criminal trials, but only for manslaughter and murder charges. The system is administered by the Chief Justice and the High Court Registry. Civil legal aid is limited to family law matters and is administered through the Social Welfare Department.

For legal aid criminal defence matters, an accused has to find a lawyer willing to represent him or her for the small sum of money that the Government is willing to pay — a maximum fee of $300 per day per trial. The fees do not take into account the time required for case preparation. In 1996, private lawyers' fees in Magistrates' Courts ranged from $300 to $500 per day and in the High Court from $500 to $2000 per day, depending on the complexity of the case. Very few legal counsel are willing to accept legal aid work, so an accused person has no guarantee of a good defence.

One legal aid lawyer, called the Public Legal Adviser, is seconded to the Social Welfare Department by the Office of the Attorney-General, and attends mostly to Domestic Court matters. This officer serves the entire Fiji population, and deals with some 2000 clients a year — over 10 per working day. (We have already discussed the problems of Solomon Islands, with five legal aid lawyers, and Vanuatu, with three. Both countries have considerably smaller populations, but both have more clients than they can effectively handle.)

Applicants for legal aid must take a means test, and have to be in particularly poor financial and social circumstances to qualify for legal aid in the family court. The means test presents specific problems for women. In matrimonial and family law matters, all who are unemployed and have no other access to income are eligible. Some employed applicants earning $5,000 may also be eligible. The test does not take into account that a supporting mother who has several children and earns $10,000 per annum may be in the same position as a woman who earns $5,000 but has no dependants. Neither can afford private legal representation.

In 1996, about six lawyers provided free *ad hoc* legal assistance to women. The Women's Crisis Centre identifies the lawyers available, and puts clients in touch with them. This free assistance is usually only for non-contested cases and those that do not involve too much of the lawyer's time. For complex cases and those requiring several court appearances, lawyers usually charge fees.

Moves to establish a Legal Aid Commission

Clearly a voluntary system of legal aid is not a practical long term solution in Fiji. A total law fraternity of approximately 150 lawyers in a population of 800,000 is not enough to create or strengthen a voluntary legal aid system. Then where will the funds come from? In Australia and some other countries, interest on solicitors' trust accounts is used to finance both law society activities and free legal aid services. These trust accounts consist of money held by a solicitor on behalf of a client, and a busy solicitor may hold very large amounts.[31] The interest can be correspondingly very high and, in large countries could provide a major source of money for legal aid. As we will see in Fiji's case, smaller and poorer countries might have to supplement the interest from other sources.

Submissions made to the Beattie Commission[32] reveal various viewpoints, all with an important bearing on the establishment of a comprehensive legal aid system in Fiji and the question of legal aid for women. Here we will discuss in turn the different views of the Fiji Government; the Great Council of Chiefs; the Fiji Law Society; and Fiji women's movements.

The Government of Fiji proposed the setting up of a Legal Aid Commission providing legal aid facilities funded in the following ways:

- Interest on solicitors' trust funds.
- Grants from Government.
- Contributions by persons assisted.
- Any legal costs awarded by the court to persons assisted.

Interest on solicitors' trust accounts is seen as the primary means of funding. The Attorney-General's submission suggests that 10% of these funds should go to the Fiji Law Society, 10% to the Government-funded Judicial and Legal Services Commission for funding the Law Library, and the rest to provide funds for legal aid. The Commission would be administered by persons elected by the Government and the Fiji Law Society. It would apply a means test, and aid would be directed towards people in the priority groups listed below.

1. Persons most severely disadvantaged if legal aid is not provided.
2. Persons whose individual liberty is threatened by the legal process.
3. Persons who as a result of old age or infirmity have a special need for legal aid.
4. Persons who in the community interest should receive priority (such as children.)
5. Persons who are receiving benefits under the family assistance scheme.
6. Persons who are so poor that in no circumstances could they afford a private solicitor.

These priorities are gender-neutral and do not directly discriminate against women. On the other hand, most people receiving family benefits from the Social Welfare Department are women, and this could put

supporting mothers fifth on the priority list. If "persons whose individual liberty is threatened" means persons facing criminal charges, rapists and child abusers are more likely to get legal aid than are their victims, who are mostly women and girls.

In May 1996 the Great Council of Chiefs met to consider, among other things, crime in Fiji.

> The Great Council of Chiefs agreed in principle to the establishment of a Legal Aid Unit by the Fijian Affairs Board to help Fijians who need a lawyer and cannot afford one. [They] also called [for] the establishment of the Fijian courts system, which is in the 1990 Constitution. The chiefs ... did not specify the amount of money they wanted to start the unit but it is believed that the office would be funded from the FAB budget. Government already has a Legal Aid Unit ... available to accused people of all races who cannot afford a lawyer ... Prepared by the Prime Minister, the paper [presented to the Council] shows that well over half of the total prison inmates in Fiji are Fijians.[33]

The Fiji Law Society's submission to the Beattie Commission supports the setting up of a comprehensive Legal Aid system. It is, however, "against control of funds going outside the Law Society". It believes that the Government, by relying on interest from solicitors' trust accounts, is shying away from its responsibility in providing free legal aid. Legal aid, it believes, is Government's responsibility; the Fiji Law Society should provide only one-third of the interest from trust accounts towards legal aid in Fiji and the balance should remain with the Society. The Society does not seem to disagree with having a means test, nor with the Government's priority list. Legal aid to women would not necessarily be a priority for a legal aid system supported by the Fiji Law Society. Again, accused persons would still be Priority 2.

Women's organisations concerned with legal rights agree that there is a desperate need for a comprehensive legal aid scheme for poor men and women, who should not have to rely on voluntary help by sympathetic lawyers.[34] They therefore agree with the Government and Fiji Law Society about the necessity to establish a Legal Aid Commission. They agree generally with Government on the sources of funds, but point to a need for sufficient funds for separate counsel for children who are involved in cases. They point also to a need to make the means test more realistic and flexible. This could be done by raising the maximum annual income to above $5000, and by putting more emphasis on individual circumstances.

Women's organisations agree with the Fiji Law Society that the Commission must be independent of Government. However, the organisations want the Legal Aid Commission's governing body to include women and non-government organisations, and they stress that women applicants should have higher priority than that proposed by Government and the Fiji Law Society. The Fiji Women's Crisis Centre and the Fiji Women's Rights Movement believe that no Legal Aid Scheme, however funded, will be satisfactory unless it gives women priority. As a matter of policy, there

must be a commitment to understanding the difficulties that women and children face in obtaining access to justice. This in itself requires a commitment to improving the amount and quality of legal aid.

In the short term, to counter the severe problem of obtaining legal aid, particularly in the family law area, the organisations suggest that the number of legal aid lawyers be immediately increased. An increase of 10 lawyers would cater for the immediate needs of the public in major centres such as Suva, Lautoka, Ba, Nausori and Labasa. Another immediate improvement would be a policy allowing paralegals to accompany clients to court, and to intervene on behalf of clients who have no counsel. Currently in Fiji, paralegals rely on the magistrate's discretion but other Pacific countries like Tonga and Nauru officially recognise them and their right to represent and support clients as *amicus curiae*. Such assistance is particularly important to women who are not used to speaking in public or to asking for their rights from men in authority.

For the long term, the women's organisations suggest that Government should adopt a policy of seconding scholarship holders to the Legal Aid Office for at least one year after completing their legal studies. As we have seen in our brief survey of law students, a considerable number of new graduates should become available by the year 2000. If these new graduates have been trained to be sensitive to the gender, race and class issues of Pacific law, they should provide a fresh approach to legal aid.

Finally, women's organisations believe that a legal aid unit should be established to focus on aid to women, and to carry out the essential activities listed below.

- Advise and assist clients.
- Take women's rights cases (constitutional; discrimination; human rights; precedent-making) to court.
- Conduct, and/or assist women's NGOs to conduct, national legal literacy programmes
- Conduct regional legal literacy programmes based on local prototypes.

The Legal Aid Act 1996

What has been the result of all these expressions of differing views about legal aid priorities, funding and control? The *Legal Aid Act 1996*[35] focuses on the establishment of a Legal Aid Commission. There will be six part-time Commissioners, appointed by the Attorney-General. Three will be nominated by the Fiji Law Society and three nominated by the Government, via the Attorney-General and a Minister. The Attorney-General's nominee must be a legal practitioner. Of the Minister's two nominees, one may be a legal practitioner; the other nominee must not be a legal practitioner and will represent "the needs of legally assisted persons".

The Commission's chief duty is to provide legal aid to "impoverished persons", defined as persons "unable to reasonably afford the cost of legal services". The Commission may provide aid directly, through private or Government lawyers, and indirectly through public education programmes.

Applications for assistance should be made in writing, normally on a form that the Commission will distribute to private lawyers and Court Registries. The Registries will be responsible for helping people to complete the form. There will be a means test which will take into account the costs of providing the service as well as the assets, income and liabilities of the person seeking assistance, and the possibilities of that person getting financial help elsewhere. Depending on individual circumstances, the Commission may provide a completely free service, or may contribute towards the costs of the service or may require the assisted person to contribute.

The Commission will establish guidelines dealing with what types of cases the Commission may support; eligibility for support; whether and to what extent the Commission may require the assisted person to contribute to costs; and whether and to what extent the Commission may pay costs awarded against an assisted person.

To sum up, the Act deals with the composition and administration of the Legal Aid Commission, and speaks only in general terms about how it will be funded and what its priorities will be. Control will be shared by the Government and the Fiji Law Society, and there will be no direct input from women's groups, or NGOs generally, unless they do so via the Commissioner appointed by Government to represent "the needs of legally assisted persons".

Funding may come from a variety of sources, but the intention seems to be that the main source will be interest from solicitors' trust fund accounts. None of the submissions by women's groups seem to have been taken into account, but as no guidelines have yet been officially established, such groups may lobby for higher priority in legal aid for women and children. If, however, their efforts are unsuccessful, women's organisations might have to explore ways and means of setting up an independent legal aid system. In our final chapter, we will discuss how women's organisations can learn, teach, and organise to challenge current priorities, attitudes and laws.

15

Strategies for change

WHAT THIS FINAL CHAPTER IS ABOUT

Without power, freedom does not mean much. The basic principle of empowerment is to enable women to make decisions about the central issues affecting their lives. Just to have rights is not sufficient; women must be able to benefit from those rights. Doing this requires critical knowledge of the law. Our aim has therefore been to help Pacific women use existing laws, and where necessary to change laws. The process of change includes learning about the law, recognising the law's limitations but attempting to work within it for short-term gains. Ultimately, the law is only one of the many aspects of an unjust society that needs to be transformed.

At the 1994 *Seminar on women and the law in the Pacific Islands*,[1] 45 Pacific women delegates reached the conclusions listed below.

- Pacific women have very little information about the law.
- The extent of discrimination that Pacific women suffer under the law reduces their ability to obtain some basic services and to exercise their human rights.
- Their access to justice, legal literacy and legal aid is severely restricted. This in turn has severe consequences for women's participation in development.

In previous chapters, we have made specific suggestions about what can be done in specific cases and issues. Chapters 1 to 3 concerned the fundamental questions of feminism and constitutional and land rights. Chapters 4 to 6 focused on women and the criminal law: sexual offences and other criminal assaults on women, and criminal offences committed by women. In Chapters 7 to 12, we discussed the legal problems of women as wives and mothers: marriage, separation, divorce, custody, maintenance, matrimonial property and affiliation. Chapter 13 concerned women as paid and unpaid workers, and Chapter 14 discussed women as lawyers and as receivers of legal aid.

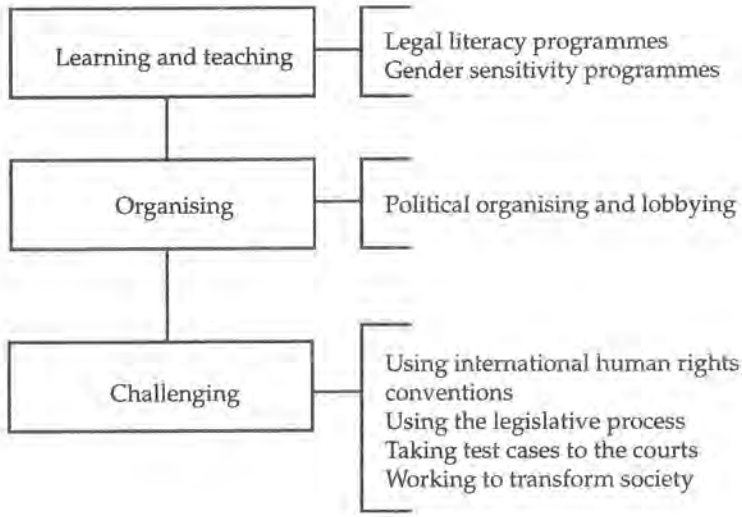
In Chapter 15, we will discuss the overall strategies by which women may change the system: learning; organising; and challenging the system. Before we begin, we will remind ourselves of the meaning of four words that we have met before: sex; gender; demystify and empower.

- **Sex** is the set of biological differences between men and women; **gender** is the sex role that is socially defined for women and men.
- In this book, we have tried to **demystify** the law, to remove some of its mysteries and make it understandable and useable.
- In this book we have tried to **empower** women, to help women to have power over their own lives. Legal literacy is an essential part of empowerment.[2]

STRATEGIES FOR CHANGE: LEARNING AND TEACHING; ORGANISING; CHALLENGING

What is a strategy? A strategy is a plan to bring about change. When applied to changing the situation of women, a strategy becomes "a series of organised actions that either challenge or use the legal system to empower women economically, politically and socially".[3] In Figure 15.1, we have divided the particular strategies into three groups: strategies that involve learning and teaching; strategies that involve organising and planning; and strategies for challenging. We will discuss each of these in turn.

Figure 15.1: Strategies for change



LEARNING AND TEACHING

Legal literacy programmes: what is legal literacy and why do we need it?

Literacy is generally defined as the ability to read and write. However, in a social context, literacy goes beyond the ability to read and write. A programme to promote legal literacy may involve, or be closely related to, programmes intended to improve reading and writing skills since these are necessary in dealing with the law. Legal literacy has been defined as "the process of acquiring critical awareness about rights and the law, the ability to assert rights, and the capacity to mobilise for change".[4] Its immediate aim

is to help people gain knowledge of the law, but it does not stop there. It is a tool and a weapon for empowerment, but women cannot use the law as an instrument for empowerment and social change unless they understand the law in the setting of their social and economic position.

The law plays an active role in supporting the class-based, racist and patriarchal structures of society and thus in maintaining and legitimising women's social and economic subordination and marginalisation in the development process. This means that the law is partly responsible for making women second class citizens and for making women's second class status legal. The legalistic form of the law is based on the principle of formal legal equality. It applies theoretical legal principles without distinction or qualification to all people. It does not differentiate between people. It treats men and women alike and the wealthy and the poor alike. A fine of $100 may embarrass a wealthy man, but it does not make much difference in his life. For a poor woman, a fine of $20 will almost surely mean that her children will go hungry.

For centuries, men have drafted and written most legislation. They have decided and defined the practice of the law. Formal legal equality assumes that all disputants who seek justice are in fact equal before the law: that the law is gender-neutral; that justice is blind and affects men and women similarly. The strength of this myth has meant that the structure and content of the law have rarely been questioned. The myth does not take into account that women are economically and socially disadvantaged and cannot compete on the same terms as men. Justice is applied without reference to the differences between groups of people; in this way it is unjust, particularly to poor women.[5]

If male Judges & Magistrates got pregnant.....

When most Pacific women and other disadvantaged groups try to make links between legislation and legal practices that affect their lives, they believe that the law and the legal system are beyond their reach. They believe that ordinary people with no legal training cannot understand the law. This happens because the law is written in a very formal and old-fashioned style that makes it difficult to understand, even for lawyers. However, once they learn the language and the system, most lawyers and legislators prefer to protect their professional status by keeping things this way, as "gatekeepers of knowledge".[6] The judicial system and law enforcement agencies process cases according to set procedures. Formal legal documents written in technical language must be presented at each step of the way. The costs of lawyers and court hearings are far beyond the reach of most people. Poor people in general are affected, but even if a man and a woman are equally poor, the woman probably has other disadvantages, for the reasons listed below.[7]

- Women tend to have less access to information about the legislation and laws that affect them than men do.
- Women are less likely to be forceful about their rights. (In our region, both men and women learn to respect persons of authority, but women learn from birth that all men have authority. Women find it difficult to stand up to those who have the power to deny them their rights, and who use it to maintain the *status quo*.)

Legal literacy programmes help to foster public awareness of human rights and thus increase the potential for understanding and a better system of enforcement of laws. Such programmes not only provide legal education to a wide range of Pacific Islanders. They are also a resource for activists and others engaged in the daily struggle to empower women to use the law to better their lives.

Features of legal literacy programmes: objectives; content; methods, devices and resources

In discussing legal literacy programmes, it may help us to analyse a statement about the objectives of such programmes, and to see what is involved in fulfilling the objectives.

> The overall purpose of a legal literacy programme for women is to increase general awareness of human rights and the legal status of women and encourage actions to eliminate disadvantageous and discriminatory legal provisions against women.[8]

In this statement, we find three objectives: one very long-term, one long-term, and one medium to short term. The very long-term objective is to help bring about equality for women by eliminating "disadvantageous and discriminatory legal provisions against women". The long-term objective is "to increase general awareness of human rights and the legal status of

women"; and the medium to short term objective is "to encourage actions" relevant to these. No legal literacy programme can by itself achieve its very long-term objective. However, it is an action that encourages further actions; all these are steps along the way to equality.

An effective legal literacy programme would include the following general objectives, expressed from the point of view of the programme planner.

- To transfer information on the content of the law.
- To demystify the law, make it understandable in the language of the target group.
- To examine the content of the law.
- To examine the structures and practices of the law.
- To criticise the content, structures and practice of the law and the extent to which they protect or deny the rights of women and other disadvantaged groups.

This implies two more specific objectives:

- to raise consciousness of gender issues; and
- to raise consciousness on the social, economic and political realities of women's lives.

But in order to achieve the specific objectives, we may have to reach three separate target groups.

- Women and other key players.
- Members of the public; they need to know about the particular issues in order to bring about improvements.
- Trainers and providers of information.

So in setting specific objectives for any particular programme, we ask two basic questions:

- For whom is the programme intended? (In jargon, who is the target group?)
- What is the purpose of the programme? What do we want the target group to know, do and become as a result of completing the programme?

As well, we may have to ask questions about each group:

- Which particular women or trainers or members of the public will this particular programme reach?
- What do we want this particular group to know, do and become as a result of this particular programme?

Once we have answers to these questions, we can establish the particular objectives for the programme. We need to do this not only from the point of view of the person providing the training but also from the point of view of the participants. In this way, we will see which aspects of the programme's content we need to stress, so that we can decide how to present the content.

For example, a programme for trainers might emphasise ways of teaching and communicating ideas and information about the law: they would learn content, and how to communicate content. This would include how to select and present the content to a particular group for a particular purpose — how, for example, to enable a group of women to understand and fill in forms required for divorce, maintenance and custody applications. On the other hand, a gender sensitivity workshop for village policemen would need a quite different approach.

Before deciding precisely what content should be presented, we need to ask more basic and important questions:[9]

- Should we teach only the law itself?
- Or should we also discuss and criticise the discriminatory aspects of that law?

One view is that participants are trying to understand the law, and may be confused by criticism of it. Another view is that the law is a patriarchal institution that maintains women in a subordinate position. If we do not teach women to criticise the law, we make the law more powerful. The latter view has influenced both the objectives listed above and the overall content listed below.

- Relevant legislation and how to understand it.
- Legal practices and procedures, and how to deal with them.
- Legal and society attitudes towards gender, race and class.
- What should be changed?
- How can we work towards such change?

Of course, the specific content will depend on the specific objectives for the particular group, and so will the emphasis placed on any aspect of the content. For example, if the workshop is dealing with legal forms, discussions of the discriminatory effects of laws and practices might arise naturally and almost casually through the experiences of the women. In a workshop on gender sensitivity, the topic might be a planned part of the course, but specific instances would arise out of discussions of a particular law or practice, such as rape laws and procedures in rape trials.

Having defined the objectives, the target group and the content of a legal literacy course, we now need to establish how to help the target group to achieve their objectives of understanding and using the content. The methods, devices and resources should therefore fit the objectives and content of the particular programme and the needs and capabilities of the target group. A method that works well in one situation may not work at all in another.

We list some of the methods and devices that can be used. Groups working on getting their message across might use the list as a discussion exercise, in which they would first define the content and target group, and then select the most appropriate methods and match the devices to these methods, modifying both to suit local conditions.[10]

Methods
Action learning
Brainstorming
Case studies
Discussions (group and person-to-person)
Drama (moot courts, role plays, street theatre and other simulations)
Games
Lectures
Monitoring real court proceedings
Music or songs
Projects
Reading and writing
Research
Using media press releases, columns, interviews etc.

Devices
Audio and video cassettes
Blackboards or whiteboards
Board games (for example, snakes and ladders or bingo)
Books, notes, newspaper reports, newsletters
Butchers' paper
Cartoons and comics
Computers
Flip charts
Overhead projectors
Posters
Puppets

All of these methods and devices have been used in formal and non-formal education. Some have been drawn from personal experience, as well as from community education resource materials prepared by local, national, regional and international bodies. (We have provided a list of such resource materials in endnote 10 of this chapter.) Most do not focus on the law or on legal literacy, but they do provide advice and information that can be used in preparing or teaching legal literacy programmes.

This brief analysis of the aims and methods of legal literacy leads us to a study of one of the key groups in any legal literacy programme — the paralegals. Paralegals are key groups, whether as trainees, trainers or providers of information. As well as teaching and informing women and the public about the law, a legal literacy programme may teach others to teach the law.

Who are paralegals and what can they do?[11]

All over the developing world, paralegals are being used more and more to teach legal literacy and to inform disadvantaged groups on how the law may be used as a resource. This is particularly important in our region, where

there are few lawyers and women have little money to pay for professional advice. In the United States, a paralegal worker is usually a person who assists lawyers and works in a law office. In developing countries, however, a paralegal worker (often called "a paralegal") is usually a person who has basic knowledge of the law and procedures, and the motivation, attitude and skills to help others deal with the law and its procedures. A paralegal may be a person who lives and works in the community, and is often an activist or grassroots worker to whom disadvantaged groups have easier access than they do to lawyers. A fully trained paralegal might undertake any or all of the activities listed.

- Conduct education programmes to enable disadvantaged people to become aware of their rights.
- Help people to create organisations to enable them to demand their rights.
- Help people to find mediation and reconciliation in matters in dispute.
- Conduct preliminary investigation in cases that have to be referred to a lawyer.
- Help the lawyer with written statements, required evidence and other relevant information for the case.

STORY *Salote, paralegal at the Women's Crisis Centre, Fiji*[12]

Salote is a member of the collective of the Fiji Women's Crisis Centre and is an employee of the Centre. She cannot deal with complex legal issues herself but has a basic understanding of the law. She knows when to seek legal professional help from a lawyer. She will also try to find a lawyer to assist a woman at a reasonable fee if that woman cannot get legal aid. Salote counsels women and children who are victims of violence or who need legal assistance. She gives basic information to women on how to use the legal system whether in the criminal courts (rape or assault charges) or the domestic court (for example in filing an application for maintenance.) She helps women fill in legal aid application forms and will attend court with them. She knows the steps to be taken, what documents are required and the proper order of the procedures. She also knows the kinds of evidence that are required for the court case and will often take down a witness's story or account for the lawyer to read. She sometimes serves legal documents on defendants and files affidavits swearing on oath that she has served the relevant documents. She assists a woman and her children from the beginning of a court case to the end. Another part of Salote's work is the production and distribution of materials that help people understand the law. As well, she is a resource person in workshops on aspects of the law. Salote has no formal training in law, but she uses fully her practical knowledge, skills and talents.

Currently, there are few trained paralegals in our region. Most act as disseminators or distributors of information and/or can explain court practices and procedures. Paralegal disseminators of information need legal awareness programmes. They may give information on the content of the

law, how to use the legal system and access legal aid. However, they also know how and when to seek legal professional assistance from lawyers if it is needed. They do not formally teach legal literacy, but they indirectly teach by helping individuals to access the legal system. Paralegals who wish to teach legal literacy must have legal awareness training first and then further specialised training. They will require training in teaching and communication skills as well as in the law, so that they will be able to teach legal literacy to groups in their own communities.

Legal literacy programmes take the mystery out of the law, and thus present a challenge to the established and elitist patriarchal legal system.[13] A further, necessary component of a legal literacy programme must ultimately be to encourage the provision of legal aid. Legal literacy will increase the demand for legal aid. Knowledge about the law is ultimately useless unless it is accompanied by affordable legal services. Although it is not possible at the beginning of any legal literacy programme to provide for a legal aid component, it is the first step in raising awareness about the necessity for legal aid. Training interested and able people as community legal educators is the best method for carrying out legal literacy education. It truly empowers women because it builds their leadership skills and provides them with tools to gain access to the legal system.

Gender sensitisation programmes

One of the themes of this book has been that gender bias against women is a specific and overriding problem in the making, interpretation and enforcement of laws. In this section we will discuss three questions:

- What is gender bias?
- What is gender sensitivity training and who needs it?
- How do we get the message across?

What is gender bias?

> People are born female or male, but learn to be girls and boys who grow into women and men. [We] are taught what the appropriate behaviour and attitudes, roles and activities are for [us] and how [we] should relate to other people. This learned behaviour is what makes up gender identity and determines gender roles.[14]

Attitudes towards gender influence the interpretation and enforcement of all laws. They influence how a judge or magistrate understands a law, and what the judge or magistrate decides about a case. They influence a lawyer's understanding, advice and behaviour in court. The same is true of police officials. The general attitudes that shape their thinking also influence whether or not they choose to enforce a law that is being broken. Passing new legislation can remove obvious forms of legal discrimination but it cannot force judges, magistrates and lawyers to have nonsexist and

nondiscriminatory attitudes, or to consider how a legal decision might worsen the situation of a woman. Their views about women and women's roles influence their decisions. Consciously or unconsciously, the police and the courts are therefore major barriers against legal rights for women.

Women can see examples of gender bias by monitoring what goes on in the courts. Some women's groups and individual women sit in a court and observe what is happening. They listen to or read the judgments and generally try to get to know how the courts operate. Such activities may be part of legal literacy training but they can also show court officials that women are concerned about court decisions and practices.

What is gender sensitivity training and who needs it?

> A woman, a dog and a walnut tree: the more you beat them, the better they be.

This traditional English rhyme illustrates a very insensitive set of attitudes and biases, but we all have our own gender biases, the ones that we learnt when we were babies. How often have we heard a woman say disgustedly "Men!" when she's annoyed with her husband? Or a man say "Women!" when he's annoyed with his wife? But there are hundreds of reasons why two people may annoy each other, and some have nothing to do with gender. One danger arises when men and women do not really think of each other as persons, but as things that behave in a certain way and can be treated in a certain way. On the other hand, we should not ignore gender altogether, because, as we have seen, attempts to be gender neutral often result in indirect discrimination.

The solution is to be gender sensitive — to think of men and women as individual persons who are biologically different but who should have the right to choose their own roles as individual persons. Gender sensitivity is something that both men and women should learn; it should be part of the content of a legal literacy programme. It should teach all members of the legal system the rules of treating men and women as persons.

- See this person. (Who is she? How does she live?)
- Hear this person. (What does she need? What are her priorities? What does she think of the situation?)
- Count the value of this person's unpaid work.
- Respect this person. (She has rights as a human being.)
- Care about this person. (How will this decision affect her?)

In the field of law, we may identify some specific target groups: politicians who vote and otherwise influence the lawmaking process; judges and magistrates from the formal legal system and from custom courts; legislative drafters; lawyers; law enforcement officials (police and court); judicial administrators and court staff (court clerks and bailiffs for example.) Gender sensitivity training for these target groups would include a general analysis of the situation of women and how the law disadvantages women. It might also include opportunities for members of the target group to reflect on their

own gender biases. As with any course, however, the particular composition, needs and interests of the target group should determine the content and methods of the course.

Until gender issues are included in the curricula of police training academies, workshops can be useful. Such workshops should aim to convince police that learning about gender will bring about better law enforcement and that women activists will help police in prosecutions of offenders. Professional lawyers would be asked to look at the law from a woman's perspective, and overseas-trained lawyers might also need training on local legislation.

How can we get the message across?

It could be difficult to get such officials, particularly members of the Bench, to participate in such training. Most members of the Bench would not regard themselves as biased or sexist. They sincerely believe that their legal training teaches them to be absolutely neutral and unbiased. The trouble is that judicial neutrality is bad for women (and, as we asked at the beginning of this book, can decisions ever be neutral?) Nevertheless, advances are being made. We quote one of the conclusions of the 1996 Asia-Pacific conference of senior judges.

> ... Many opportunities exist for judges and other judicial officials to draw on the Convention on the Elimination of All Forms of Discrimination against Women [CEDAW] ... to interpret and apply creatively constitutional provisions, legislation, the common law and customary law ... They drew attention to the wealth of decisions from countries with shared jurisprudential traditions where judges had engaged in such creative interpretation and application. [They stressed] the importance of educating the judiciary and the legal profession [regarding] international human rights standards and principles relevant to gender issues ... as well as the need for national judiciaries to carry out studies on gender bias in the judicial process.[15]

This is an important statement, made by a group of eminent members of the legal profession in our region and in the wider Asia-Pacific region. The statement encourages judges and other members of the profession to consider constitutions, laws, cases and customary practices in relation to CEDAW and other human rights conventions and agreements. It highlights the need for gender sensitivity training for all members of the legal profession; and it highlights the need for research into how gender bias affects laws and practices in the countries of our region and beyond. We must not let this important statement be forgotten. We must publicise it in every possible way in order to inform not only its target group, but also all persons working in legal literacy and gender sensitivity programmes in our region.

How can we get this and other messages across? We have discussed teaching methods and devices for legal literacy programmes in general. Here we will list strategies that may be appropriate for a specific target group — influential members of the legal profession.

- Identify and engage approachable members of the profession.
- Give papers at Law Society and other meetings.
- Publish articles or short notes in legal periodicals, newsletters and Internet.
- Bring gender issues into judicial meetings by referring to international conventions and instruments signed by Pacific governments (CEDAW, for example.)
- Get agencies to provide funds for gender training and to invite officials to attend workshops with expert teachers about gender and the law.
- Invite parliamentarians or judicial officials to open women's conferences and workshops with an address on "women's rights are human rights".
- Teach gender sensitivity training under a general platform of human rights issues.

In some countries, gender sensitivity training is included in continuing legal education programmes. In the United States, 26 out of 50 states are involved in looking at ways of promoting gender fairness in the courts through judicial education. Some states have already begun a programme of judicial education. The programmes are supported by the Chief Justices and the state legislatures.[16] In our region at present, formal gender sensitivity training does not seem to be part of the requirements for a law degree. How gender-sensitive is the current crop of University of the South Pacific law degree students? They will have had little formal training in the field, but it will be interesting to see whether they are influenced by the general atmosphere of a University that has housed some of the region's most noted feminists, and that had (in 1997) mostly women lecturers in its Law School.

Promoting gender sensitivity is never easy, since it upsets our ideas about ourselves and our most intimate relations with others. Further, it requires the people who benefit most from the system to realise that the system is unjust. Their first response will not necessarily be sympathetic. For these reasons an aggressive campaign would probably cause a backlash of anger and ridicule. Great skill and knowledge of community values will be required to get the message across.

ORGANISING: LOBBYING AND PRESSURE GROUPS

Legal literacy programmes are effective only if they are part of the bigger strategy: to help (and to force if necessary) the community and those in authority to realise that changes are needed. Legal literacy might also be

seen as a method of politicising women. Women acknowledge that the public world and political life can be hostile to them, but they must organise themselves within the current structures to get short-term changes in the law. In this section, therefore, we will discuss women's organisations. We will look first at women's NGOs and then at women who enter politics.

Before we do this however, we will define two words that we will use often: "lobbying" and "pressure groups". By lobbying, we mean putting pressure on those in authority to do, or not to do, something. This pressure can be applied by one person or by a pressure group, a group of people organised for that purpose.

Women's NGOs

Political organising and lobbying are significant strategies in bringing about both changes in the law and changes in the community. Political organising also includes promoting good governance principles, the legitimacy, accountability and competence of governments. Individual ministers and civil servants may get public support because of their own personal or traditional status, by improving the supply of services and by competence and accountability, but this does not mean that the whole government achieves legitimacy. Governments get support by being competent and by accepting responsibility for the successes and failures of their policies and actions. Legitimacy may result from public pressure. If citizens are taught about the importance of good government, then they can demand good government. This pressure will force governments to achieve legitimacy through competence and accountability. Legal literacy is one of the tools through which citizens learn about good governance and demand good government.

If women want to change community attitudes, one way is by forming groups of dedicated activists who can work together. The women themselves might not see these activities as political, but getting a government department or agency to change in some way for the benefit of women or children is a political act because it promotes good governance. Such group activities may also attract financial aid from overseas and from local agencies interested in human rights. Some individuals have brought about major changes but this rarely happens without support from others; wherever there have been advances for women, these advances have come because women have organised themselves into pressure groups.

Almost without exception, the women mobilised as non-governmental organisations. Being part of the government sometimes makes it difficult to challenge the *status quo*, especially when it is necessary to criticise laws and policies. However, government support is always necessary at some stage, so the NGO must have good contacts with government departments and individuals. Traditionally women have formed NGOs on the basis of race, religion, traditional activities or as a women's wing of a political party. In our region, in the mid-1980s, women got together in religious groups, and

as handicraft makers and sellers. Since then, these groups have been joined by other groups that initially mobilised around the issue of violence against women. Most progressive women's NGOs in the Pacific Islands are in this category. Unlike the more traditional women's NGOs, they have a definite feminist platform although very few openly describe themselves as feminist. Some of these are listed below.

- *Te Punanga Tauturu Inc.* Rarotonga, Cook Islands
- The Women's Crisis Centre, (WCC), Suva, Fiji
- The Fiji Women's Rights Movement, (FWRM), Suva, Fiji
- The *Komiti Agensem Vaelens Agensem Woman (KAVAW)* (Committee Against Violence Against Women, VWC).
- Women in Politics, National Council of Women, Suva, Fiji

Some Pacific Island NGOs have specifically mobilised to challenge laws and policies by using the law as a main or supporting platform. Two examples are the Fiji Women's Rights Movement and the Women's Crisis Centre. The Women's Crisis Centre helps victims of rape, child abuse and domestic violence, and tries to educate the public on these issues. The primary aim of its sister organisation, the Fiji Women's Rights Movement, is to improve the status of women in the law in Fiji. To that end it has been involved in two major campaigns — a project against rape, and a project on women's work and economic rights. The FWRM's ultimate objective is to bring about law reform for women through legal literacy campaigns.

STORY *Fiji Women's Rights Movement (FWRM) and legal literacy*

The Fiji Women's Rights Movement has been described as a feminist NGO that "combines local concerns and a global perspective".[17] Formed in 1986, the FWRM is a women's NGO dedicated to improving women's status with an emphasis on legal and political status. FWRM works closely with the Women's Crisis Centre and lobbies Parliament and government bodies for progressive legislative and policy changes primarily in the areas of constitutional rights, citizenship laws, family and rape laws, and employment legislation. It targets questions of inequalities in paid and in unpaid labour, and it campaigns against violence in the home and the community.

FWRM has run a number of campaigns including a national legal literacy project on family law for women. In 1994, it conducted a nationwide Family Law Legal Literacy Project. A series of mass media articles in English, Fijian and Hindi on family law, civil procedure and legal aid were prepared. The articles attempted to explain the law in simple language, with disadvantaged women as the main target group. All articles were in English, Fijian and Hindi, and were used to prepare radio programmes, brochures, family law workshops and a radio play. A series of pamphlets were based on the material pretested through the mass media articles, at workshops and with women who use the family court system.

The radio programmes were aired in English, Fijian and Hindi during the women's weekly programmes and during prime time. The prime time programmes for the private radio stations were paid at a discount rate. Partly

as a result of the radio programmes and the first Family Law Workshop held in Suva, the FWRM was asked to do village workshops on other islands. The radio programmes were followed by talk-back programmes in which members of the public aired their views. The mass media articles were published in three major newspapers in the three languages once a week until all the articles were published. The success of the articles prompted *The Fiji Times* to invite FWRM's legal adviser to write a weekly column on women's issues. This is a direct result of the success of the mass media articles, particularly the publications in Fijian and Hindi. FWRM thus has a permanent public voice in one of the most influential media outlets in Fiji. Responses from the public have been both positive and negative. Some were openly hostile to the idea of women having access to legal information, saying, for example, that it would cause marriage breakdowns or that only lawyers should have access to legal information: it was "dangerous if more women learn about the law". The FWRM regards this comment as being a measure of the impact of the legal literacy programme. The overwhelmingly positive response from poor women indicates that the information reached many of the target groups and achieved no small measure of empowerment for some.

Women must work with whatever agents of change are available, and politicians can be very effective agents of change, especially when they are powerful men and women who have a strong voice in their parties. Politicians do not usually help people just out of the goodness of their hearts; they will help support changes only if they can see how the changes will benefit them in the long term. For example, women may want new legislation, affirmative action laws and policies, but the politicians who vote on the legislation may not understand the legislation or disagree with it. The women who want the legislation or policies will then have to plan ways of helping politicians understand why changes are necessary. This is where lobbying strategies become important.

How to influence people in power (learning to lobby)[18]

1. Decide what ideas you want to communicate and who you want to influence.
2. Know what interests and attitudes he or she has.
3. Get ... individuals and organisations to support the issue and plan with them about how to influence this person.
4. Plan to meet the person.
    a. Prepare some written materials with a simple report or story ... using the facts you have gathered [and] things you think fit the interests and concerns of the person in power.
    b. Make copies [including at least] one for your own records.
    c. If you think it wise, send the material to the person to study before you meet. Otherwise take copies with you when you go to the meeting.
    d. Plan with others who will speak and what points you wish to make when you have the meeting. Role play and practise what you will say.

5. Go to the meeting with two or three other people. It is best if these are influential people themselves.
6. Make sure you are on time for the meeting.
7. Be confident, polite and clear ... Make sure you hold your body straight. Speak clearly, and look at the person so that he or she can hear and understand your message.
8. Be brief and to the point. Leave your printed information for the person to read. Get the person to promise some follow-up action (if possible.)
9. Follow up ... with a polite "thank you" in writing. Also send more information, for example, signatures of people or groups that support you, and ask if [the person] has done what [he or she] promised.

Other techniques for lobbying politicians include organising people to write individual letters to their members of Parliament; organising petitions to be presented to Ministers and members of Parliament; getting your member or another sympathetic member to ask a Parliamentary questions; organising people to say that they will or will not support a member or party at the next election; and holding public meetings and debates and inviting members of Parliament to take part.

STORY *Open Letter to the People of Fiji*[19]

In August 1996, to mark the first anniversary of Fiji's ratification of CEDAW, several feminist NGOs in Fiji joined together in the Women's Coalition for Women's Citizenship Rights to organise a public forum on citizenship rights. They invited all members of Parliament and the Senate to the forum, and in their Open Letter to the People of Fiji published the names of all who responded, along with a polite hope that the others would attend the public forum. The Open Letter contained also the text of the discriminatory articles of the Constitution and a story and case about citizenship rights. Chapter 2 of this book was the source of most of the material used in the Open Letter. (This is a useful example of how source material may be adapted for a particular purpose and audience.)

Gaining the cooperation of policy makers

Women in politics

Political organising also means getting more women in Parliament. We cannot assume that all women politicians will support women's concerns in Parliament, but they often do. In Fiji in late 1995, a woman Senator (who had just attended a three day legal literacy workshop on women's legal rights) voted against and thereby defeated a Bill to amend the *Banaban Settlement Act*, because its definition of "elders" would exclude Banaban women from the Banaban Council. The Senator said that the Bill was against the Fiji Constitution, which made it illegal to discriminate against women.[20] The Bill was amended accordingly, and in 1997 a woman was elected to the Council.

It is important to get a critical mass of women into Parliament because larger numbers of women are needed to make a difference. The Fiji Women in Politics project, run by the National Council of Women, was founded in 1994. Like other women's NGOs, it runs workshops and uses the media, for example by news releases and columns. Its particular aim is to encourage and assist more women to play a direct role in the political life of Fiji — not by making and serving tea and cakes at political meetings, but by presenting themselves for election and serving as members of Parliament and local government.

CHALLENGING

Learning and organising are elements of the process of causing change. Challenging the *status quo* is a further element. In this section therefore, we discuss particular ways of challenging the way things are. We will begin by discussing international conventions and how we may persuade governments to adopt and enforce them; then we will focus on how to persuade governments to make, change or enforce national laws.

In order to persuade governments, women's groups will use a combination of various lobbying techniques. There is however another way of bringing about change: taking test cases to the courts. In the final part of this section we will see how we may use international conventions, national constitutions and previous cases to argue new cases against discrimination.

Lobbying governments to adopt or use international law: United Nations Conventions

National law covers relationships between individual persons and relationships of individual persons with the state. International law is the law covering relationships between states. Conventions are part of international law, but may become part of national law when they are

incorporated into law. In Chapter 13 we discussed ILO conventions as they affect women and work; in this section we will discuss conventions dealing specifically with women.

What is a convention?

Conventions are part of the United Nations way of lawmaking. They are treaties or agreements containing international standards agreed upon by two or more states. Once a convention is drafted, it is open for signature by all countries that are member states of the United Nations. By depositing a signed document, called an instrument of ratification, at the United Nations, the state agrees that it is bound to comply with the convention. When a sufficient number of states have done this, the convention comes into force as part of international law.

Why do countries implement conventions?

By ratifying a convention, a state says that it will follow the standards or rules laid down in the convention. It is therefore morally obliged to do so. Although it is almost impossible for the United Nations to force an unwilling state to implement a convention that it has signed, most countries do implement conventions. They do this for the reasons listed below.

- They want reciprocity. (States may obey the main principles of a convention because they want other states to obey the same principles, for example in the exchange of prisoners, and in getting criminals back to face charges in court.)
- They want international standing and respect. (No state really wants to be seen as betraying international standards, especially those of human rights.)
- They want international assistance, persuasion and encouragement. (This system of enforcement applies particularly to human rights conventions. Every country is defensive about its human rights record. Poorer countries are concerned that a poor human rights record will stop them from getting financial aid from rich countries interested in human rights. Such countries may demand that a poor country improve its human rights record in exchange for aid or other assistance.)
- They are afraid of threats of international sanctions and embargoes, such as having their important exports and imports stopped.
- They do not want United Nations peacekeeping forces in their country or on their borders.
- They do not want war.

How do countries implement conventions?[21]

In some countries, ratifying a convention means that the convention automatically becomes part of the internal or national law of that member state. There is no need for further incorporation into national law. (This is called adoption.) However, in almost all common law countries, including most Pacific Island states, ratifying the convention means only that the state has an international responsibility to do what is required. They have to pass local legislation in national parliaments before a convention becomes part of national law. (This is called transformation.) We will discuss later how governments may be persuaded to take an international convention into national law.

Incorporation might happen in different ways. One country might decide that its national legislation is just as good as the convention, so new legislation is unnecessary. Another country might decide that its national legislation covers some of the provisions of the convention. In this case, the country may pass the pieces of legislation necessary to bring its national laws up to the standard of the convention, providing that these do not conflict with the Constitution. Another country might decide that, because the entire convention is completely in accord with its Constitution, it will pass a new law adopting the entire convention as part of the national law. In this case, any other law that conflicts with the new law is automatically useless and may be challenged in a court.

CEDAW: the Women's Convention

Many international human rights conventions cover women's rights but the most important of these is the United Nations Convention on the Elimination Of All Forms of Discrimination Against Women 1979. In this book, we use some standard ways of shortening this long title. These standard abbreviations are listed below.

- CEDAW
- the United Nations Women's Convention
- the Women's Convention
- the Convention

The Women's Convention does not describe the real situation of women anywhere in the known world. No country, developed or otherwise, could argue that it provides the quality of life demanded by the Convention. It contains internationally accepted standards for the status of women. It has a three stage action plan, and states that sign the Convention commit themselves to following it. They agree to try to remove discriminatory laws and other obstacles to equality; to promote equality by affirmative action, and to eliminate discriminatory attitudes, conduct, prejudices and practices. It is therefore a goal, a guide for action and a tool for mobilising action. However, the Convention recognises that not all member states have the

financial and other resources to put all its standards into effect. Like other United Nations conventions, it allows states to agree with reservations — to agree to some provisions but not to others.

Obligations of signatories

The Women's Convention is made up of a number of articles, each dealing with different aspects of women's status. (In previous chapters, we have referred to those dealing with the legal status of women.) The Convention's provisions cover the areas set out below.

- Women's basic human rights on an equal basis with men.
- Equal rights to citizenship, regardless of marital status.
- Equal rights to education, in all subjects and at all levels.
- Equal rights to employment, promotion and training; equal pay for work of equal value; maternity leave: child-care; the prohibition of dismissal on the grounds of pregnancy or marital status.
- Equal rights to health care and access to family planning.
- Equal rights to participate in social, cultural and economic activities, including access to credit.
- Equal rights to participate in political and public life, including the right to vote, to stand for election and hold public office, and to represent their countries internationally.
- Equal rights in the law, including property and contractual rights, freedom of representation and movement and marriage and family law.
- The particular roles, responsibilities and rights of rural women, including their right to equal participation in development.
- The problems of prostitution, and the need to suppress all forms of traffic in women.
- The need to eliminate sex role stereotyping, particularly those based on notions of the inferiority or superiority of either sex.
- Policy measures to eliminate discrimination and achieve equality (including the abolition of all discriminatory laws and customs and the promotion of affirmative action).

The general legal equality provisions of the Convention — Articles 2, 9, 15 and 16 — have the most immediate bearing on women's legal status. They place responsibility on member states to carry out specific actions.

Article 2 : to amend any national laws (legislation; common law; customary practices) that discriminate directly or indirectly against women.

Article 9: to amend national laws that discriminate against women's citizenship and nationality status for themselves and their children.

Article 15: to make illegal and stop judicial practices and procedures that discriminate against women in courts and tribunals, as well as in domicile laws.

Article 16: to improve the status of women within the family and in family law.

The Convention established an independent committee (the CEDAW Committee) to monitor the progress made by signatories and to consider their reports. The Secretariat of the Committee is part of the United Nations Division for the Advancement of Women. The Committee consists of 23 experts of high moral standing and competence, elected by states to serve in their personal capacities for four-year terms. Women from all areas of the world are represented. The Committee reports annually to the United Nations General Assembly.

Only states have legal standing in international law. For example, a woman may want a United Nations agency (or the South Pacific Commission or South Pacific Forum) to carry out a project in her country, but she cannot personally ask them to do so. She has to convince her government to ask for assistance. An unusual aspect of the Convention is that it has an Optional Protocol that states may ratify if they wish to allow individual women to take discrimination complaints to the CEDAW Committee. This would allow a woman to appear before the Committee and to complain about how women are treated in her country. To date, no state has signed the Optional Protocol.

Why do some countries sign with reservations or not sign at all?

Fiji signed on 28 August 1995, just before the United Nations Fourth World Conference on Women in Beijing, China, with significant reservations about citizenship and other matters. Some countries do not sign at all. One reason for this is that they have reservations about a fundamental provision of the Convention. For example, if a country's national Constitution does not prohibit sex discrimination, the country would need to think about whether it wants to amend the Constitution first. If it does not want to do this, there is little point in acceding to a Convention that aims at removing sex discrimination.

There is a more general argument against signing the Convention: that the Convention is a "Western document", a creation of privileged countries that understand little, and care less, about the realities of life in poor countries. This is just not true. Why?[22]

- The original Convention was drafted by women selected from the developed and Third World or developing countries. Women from these countries outnumbered the women from developed countries.
- The women who drafted the Convention knew that there was little point in a document that member states would not support. Therefore it contains provisions taking into account different cultures and religions.

- There were extensive consultations. No country's viewpoint was ignored. When the Convention was first submitted to all member states, 40 states and the specialised United Nations agencies and bodies suggested amendments. Over the next five years, the wording of the Convention was amended and refined to take into account the concerns of all states and United Nation bodies. Most of the suggested amendments were incorporated, but none changed the essence or basic approach of the text.
- The Convention was finally adopted in 1979 by the General Assembly, which consists of all member states including Third World countries. It was adopted by 104 votes with no votes against, although 10 governments did not vote. These 10 governments all voted in favour of the Convention at the next sitting of the General Assembly. Not a single country said that the Convention was unnecessary or should not be passed.
- Ratifying the Convention does not mean that cultures (for example, Pacific Island cultures) will be totally changed. Cultural practices that discriminate against women would require certain long-term changes, but more in attitudes than in legislation.

The "Western document" argument is dangerous, because its hidden aim is to persuade governments not to sign the Convention and therefore to maintain the *status quo*. Not to sign it is to deny that Pacific women suffer discrimination; countries that do not sign and implement the Convention are cutting their women off from development. Similarly, signing the Convention with reservations is a signal that women can be equal in some respects but not in others. Suppose, for example, that a country wants to deny citizenship rights to foreign men, and therefore makes its women lose citizenship if they marry foreign men. The country may sign the Convention but with reservations on Article 9. This means that the country intends to follow all the articles in the Convention except for the one relating to the citizenship rights of women.

Reservations allow the state to protect its interests. On the other hand, according to international law, every treaty is binding upon the parties and must be performed in good faith. That is why the Convention allows only reservations that are not against its object and purpose. Reservations to key articles of the Convention undermine the purpose of the Convention. If a state enters reservations to Article 2 (amending national laws and culture to eliminate discrimination against women) or to Articles 7, 9, 11, 15 and 16, it expresses a refusal to be bound by the Convention. In this case, it might just as well not sign at all. Some governments may argue that all matters of national importance are already secured in the Constitution, and that they must enter reservations to the Convention because signing in total might take away some of these rights. This is nonsense; the Constitution overrides all other laws, including the Convention.

A very useful point about reservations is that, if a country reserves on a particular article, it focuses international attention on that reservation. Reservations signal to human rights organisations that the country does not intend to improve a particular aspect of the status of women. This lowers international respect for the country, and causes human rights and women's organisations to mobilise a campaign against the reservations. For these reasons, other states and bodies within the state can object to particular reservations, and the CEDAW Committee actively encourages withdrawal of reservations.

Which Pacific island states have ratified the CEDAW? What steps should they take to implement it?

To June 1996, Cook Islands; Fiji (with reservations); Niue; Papua New Guinea; Vanuatu and Western Samoa had signed the Convention. The steps to implementing the Convention apply equally to all Pacific Island countries. The following story shows how they would go about successfully implementing it.

STORY *Tipota and the Women's Convention*[23]

The Tipota Government accedes to the Convention, ratifying it by depositing an instrument of ratification at the United Nations. The Convention enters into force 30 days after ratification. In Tipota, as in many other common law countries, ratification does not mean that a convention like CEDAW is automatically part of Tipota's national law. Ratification is a sign that Tipota intends to abide by Convention principles, and may even mean that Tipota intends to make a new law transforming the Convention into a national Tipota law.

The Convention's Article 18 requires the Tipota Government to submit to the Secretary-General of the United Nations an initial report within one year of ratification, and thereafter at least every four years. These reports are to be considered by the CEDAW Committee. CEDAW cannot demand that the state does anything, it can only persuade and encourage. Tipota obtains the CEDAW guidelines for initial reports and finds out how to give an overall picture of the situation of women in Tipota. Then Tipota gets its ministries and non-governmental organisations to help prepare the report. NGOs know that goodwill on all sides is necessary to improve the status of women, so they encourage a cooperative relationship with Government. With the cooperation of its ministries and NGOs, Tipota prepares a report that discusses, under each Article of the Convention, the achievements made; the obstacles encountered; and the measures adopted to overcome such obstacles. Tipota's record is no better but no worse than most countries. Its report states honestly that, in the last few years, good efforts have been made to improve the status of women but that there is still a long way to go.

The CEDAW Committee considers the initial report, and contacts the Tipota Government if it has any questions about the report. Tipota does not need to submit a follow-up country report for four years. Follow-up reports concentrate on changes since the previous report. They also provide replies to any CEDAW Committee queries not answered previously. The Tipota

Minister for Women presents the report to the CEDAW Committee for a "constructive dialogue". This is an exchange of ideas and experiences in order to identify gaps and handicaps on the road to equality and to encourage new action. The Minister is not on trial. CEDAW Committee members are women held in high regard by their Governments. They would not be there unless their governments approved of their appointments.

Four years later, Tipota makes and submits another report to CEDAW. Each report shows that some small but significant improvements have been made. The Minister for Women is glad to appear before CEDAW. She has little doubt that she will be able to demonstrate more changes as more and more women gain access to education and employment, and participate in public life. She asks for aid (financial or in other forms) for further improvements. She knows that CEDAW is only a beginning.

In her next report, the Minister is able to say that she submitted to the Tipota Cabinet a bill for an act incorporating the Convention into national law. It has been accepted by the Tipota Parliament, and has become part of the national law as the *Sex Discrimination Act 2005*. In the four-yearly reports that follow, she will detail the advances made as a result of this Act.

The Convention is a symbol of commitment to the advancement of women. It provides an ideal to which women, states and the law can aspire even if that ideal is never reached. Pacific women can use the Convention to mobilise women and to join forces with women in other countries. They can lobby their governments to sign the Convention. When a government signs the Convention, Pacific women can lobby the government to pass laws removing discrimination against women, to pass affirmative action laws in favour of women and to adopt affirmative action policies for women.

The Convention has become the model for review and analysis of the situation of women. A primary purpose is to encourage national action and mobilisation for the creation and enforcement of laws to provide women with legal protection and access to courts of law. However, legal provisions are little use to disadvantaged groups who do not know their legal rights. Furthermore, such groups cannot take effective action to realise those rights until they know what options are available. Legal literacy programmes have been identified as being of foremost importance in achieving the goals of the Convention.[24]

Lobbying governments to make, change or enforce national laws

Throughout this book, we have emphasised the need for governments to make, change or enforce national laws. In this section, we focus on how governments do these things. Basically, governments can do some things through policy and other things through legislation. They may adopt policy decisions and see that these are successfully implemented, and/or they may make, amend and enforce legislation to put policy into effect.

What is the difference between legislation and policy? Legislation is law created by Parliament. All citizens have to abide by it. If they do not, they may face criminal charges or other civil law consequences. A policy is not a law; it is a set of actions defined for a particular purpose. A telephone

company, for example, may have a policy of eliminating bad debts by cutting off the telephones of people who do not pay their phone bills within a stated limit. This policy directly affects only the people who do not pay their bills and the people who enforce the policy. It does not affect all citizens because it is not part of the national law.

Obviously, governments and organisations have official and unofficial policies that affect women. Some policies are intended to affect women, while others affect women indirectly. For example, in Chapter 4, we saw that, in Fiji, in spite of the Chief Justice's sentencing guidelines (which are in effect policies) magistrates have tended to give light sentences for rape. In Chapter 5, we saw that police have been reluctant to intervene in domestic disputes and violence. In 1995, however, the Chief Magistrate announced that as a matter of policy, he would encourage magistrates to have rape cases tried in the High Court and to give harsher sentences if such cases were heard in their own courts. The Commissioner of Police announced that, as a matter of policy, he had instructed police to improve their efforts to prevent domestic violence.[25] However these improvements are policy improvements, not improvements to the legislation, and are difficult to enforce, especially in a system that relies on overworked and under-qualified magistrates and police.

Trying to bring about change by changing policy works only within government departments and agencies, because all public servants are obliged to implement state policy. Affirmative action policies requiring departments to employ or promote women are enforceable only within government or government-funded agencies and bodies. Private bodies are not obliged to follow government policy, and enforcing affirmative action outside government requires legislative change. The Australian case of *Wardley v Ansett Transport Industries (1984)*[26] is a classic example of this. As we saw in Chapter 13, Ansett Transport Industries did not employ Deborah Wardley because it had at that time a policy of not employing women pilots. Wardley however won her case by arguing that this policy was contrary to the *Equal Opportunities Act*, passed by the Victorian State Government in 1977.

Affirmative action legislation and policies are needed to allow women to catch up with men, economically, politically and socially. Affirmative action requires giving women favourable treatment in a number of fields. Affirmative action would be required in the law and in every aspect of public life. All government departments, statutory agencies and public-funded bodies would have to give favourable promotional opportunities to women and to grant an equal number or more scholarships to women. Affirmative action by government cannot force the private sector to employ more women; but, government may encourage the private sector, for example by tax incentives to companies that adopt real affirmative action policies.

A good strategy would be to pass a comprehensive piece of legislation, for example a Sex Discrimination Act, making illegal both indirect and direct discrimination. The other way would be to go through each statute of law one by one, identify any that are directly or indirectly discriminatory, and

then to change these by new legislation, but this would be very time-consuming and costly. It would be cheaper and more efficient to pass one Act and let the courts or a Human Rights Commission or Tribunal decide what is illegal. Passing a Sex Discrimination Act would force courts not to make a decision that might discriminate against men or women on the grounds of their sex. It would automatically make illegal any discriminatory legislation and practices except for legislation in the Constitution. If necessary, the Constitution could itself could be amended by a decision made by the required majority (two-thirds or three-quarters) of all the members of Parliament.

In the following example, we will continue the story of Tipota, which was able to report to the CEDAW Committee the successful passing of a *Sex Discrimination Act.*

STORY *Tipota's Sex Discrimination Act*

A strong women's NGO ran a national public campaign for a *Sex Discrimination Act*, focusing on particular issues that had been causing problems for Tipota men and women. These included citizenship rights, the legal definition of rape, night work, and maternity and paternity leave. The campaign used a variety of methods and devices, adapted for particular target groups. They had a public relations media campaign in the newspaper, and on radio and television, public debates and workshops, and they used the United Nations Women's Convention as a rallying point for other women's NGOs, human rights groups and concerned men and women.

The NGO and its allies lobbied, and made alliances with, various government bodies and agencies, especially those whose aims might be furthered by the passing of such legislation. These included the Department of Women, the Office of the Director of Public Prosecutions, Labour and Social Welfare, the Law Reform Commission and the Police. The Department of Women managed to put the need for a *Sex Discrimination Act* on the legislative agenda by getting it mentioned in the President of Tipota's speech at the opening of Parliament. This was a symbolic commitment by the Tipota government.

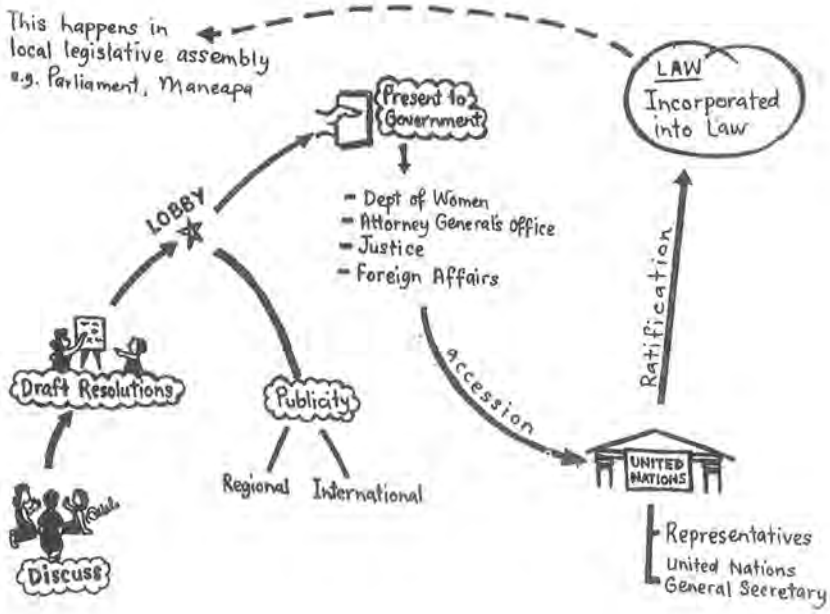
Public consultation was possible because the Tipota government was committed to democratic principles. The NGO and its allies therefore successfully lobbied for a Commission of Inquiry into legislation and judicial practices related to sex discrimination. (An alternative would have been a National Committee set up by the Law Reform Commission.) The Commission of Inquiry publicly asked any interested person or body to make submissions. It then studied the submissions, and from these made its recommendations to the Tipota government. Its main recommendation was the need for a *Sex Discrimination Act*. The government accepted the recommendations and requested the Attorney-General's Office to draft a *Sex Discrimination Bill.*

The NGO provided the Attorney-General's Office with its own draft bill based on legislation tried in other countries. Their bill considered, among other things, who should administer the legislation. Should it be the courts or should it be a special type of court where the adjudicators are specialists in their field? In some countries (for example Australia) sex discrimination

cases are brought before a tribunal whose judges specialise in the field. Anyone who does not like the tribunal's decision can appeal against the decision to the courts of law, usually a superior court, and many organisations do this. If the superior court agrees with the tribunal's decision, this reinforces the value of the decision as a precedent. The need for specialist courts and tribunals is relevant to every aspect of women's lives, and should therefore be seriously considered in any programme that involves changing national legislation.

The NGO lobbied a powerful cabinet minister who could get the support of the Cabinet, the legislature. It lobbied also women Ministers and individual political lobbyists who had the ear of the Prime Minister and other Cabinet ministers. (As a backup, the NGO was prepared to work with a particular Minister to sponsor a Private Member's Bill if Cabinet did not support the Bill.) It successfully suggested that members of Parliament should be allowed a free vote, not a vote on party lines.

The NGO and its allies held a public meeting about the Bill. They focused on members of the party currently in power, because that party had the numbers necessary to get the Bill passed. At the same time, they kept on good terms with the Opposition. They stressed the value of the women's vote in the next election. Tipota women (who make up about half of the total voters) could be inclined to vote for members who supported the Bill in Parliament. The NGO encouraged women to stand for Parliament in the next election, because the more women in Parliament, the more likely Parliament is to pass legislation improving the status of women.



The Attorney-General presented the Bill to Cabinet. Cabinet endorsed the Bill, which was tabled to be presented as a Tipota Government Bill in the next session of Parliament. (If Cabinet had not supported the Bill, a member of Parliament could have presented it as a Private Member's Bill.) However, the NGO had really managed to get the necessary support in Parliament and outside. After several readings, the Bill was debated and passed into law as the *Sex Discrimination Act 2005*. If it had not been made into law, the issue would have been discussed and would be firmly on the national agenda. The NGO would have learnt some valuable lessons and would continue its work. Ultimately the votes of women cannot be ignored.

Here we have seen how women's groups might succeed in getting anti-discrimination laws passed in a country with strong NGOs and a government committed to democratic principles. Getting anti-discrimination laws passed would be very much harder in countries that lack these, and we must remember that passing laws does not mean that they will be enforced. It does, however, mean that they are there to be used. In the next section we will discuss how women can use existing laws to challenge the ways in which laws are enforced and interpreted.

Taking test cases to the courts

So far we have focused on how to use lobbying techniques and pressure groups to change or enforce existing laws and to make and enforce new laws through action by government bodies and in parliaments. But women cannot always wait for new legislation, so we will focus now on using the legal system — the courts of law. We have seen that the same law may be understood and used in many different ways, depending on the knowledge, abilities and attitudes of the people making decisions. This is why a test case can be very important.

What is a test case and how can it be used? One way to get a more just interpretation of the law is the use of litigation — choosing a test case, one that has a great potential impact on large numbers of people, and taking that case to the highest court necessary to get a landmark decision. A landmark decision is one that creates a precedent for all courts, including the lower courts, to follow whether they want to or not. For women, this means fighting cases that have a potential impact on large numbers of women. A woman may do this by herself if she has the time, money and necessary support, or several women may join together in a class action, an action by a group of people with the same grievance.

Test cases provide the opportunity for the development of the common law outside the political process. Another advantage of test cases is that when new legislation is introduced or passed in Parliament, a politician may not have to explain why he or she supports it or not. (We all know of politicians who have conveniently been absent during the passing of a bill.) Judges, however, have to comply with the rules of equity, justice and fairness. They have to give reasons and present arguments for adopting or not

adopting a particular interpretation. Such reasons give women and their lawyers the opportunity to find errors and omissions in an argument.

Women therefore should fight test cases to find short-term solutions and to create new precedents that may be used by other women. It is important that the particular legal issue at stake gets put before a trained judge in the superior courts, or before a court sitting with three or more judges. We saw a good example of this in the case *J. Chand v Sheila Maharaj*[27] which went to the Privy Council in the United Kingdom. The higher up the court hierarchy, the greater the number of judges who sit to hear the same issue; for example the Courts of Appeal in our region sit with three judges to hear arguments and to make a decision, and they may not all agree on a decision. A decision on which all judges agree is a stronger precedent than one where there are one or more dissenting opinions. However, even if a decision is a minority opinion, if the case goes to a higher court, the judges there may change it to a majority opinion. Thus the dissenting opinion may provide an opportunity for development of the law later on.

Test cases have been used for many years in the United Kingdom, United States and other large countries; in Chapter 13, for example, we discussed the class action test case of *Najdovska v Australian Iron & Steel (1985)*[28] in which a group of women took action against a discriminatory employment policy. We have fewer examples of such cases in developing countries, but they are increasing and, we hope, will increase as a result of the call for "creative interpretation and application" of case law made by senior Asia-Pacific judges in 1996.[29] We will illustrate this point by summarising four cases where women in Zimbabwe, Namibia, Hong Kong and Vanuatu proved that specific laws and practices were contrary to the anti-discrimination articles of the Constitution of their countries. The cases, which have all taken place since the establishment of CEDAW, deal with the following instances of conflict between a country's Constitution and that country's laws or practices.

- The Namibia Constitution's requirement for equality before the law, and the corroboration rule in rape evidence.
- The Vanuatu Constitution's guarantee of freedom of movement, and customary law.
- The Zimbabwe Constitution's guarantee of freedom of movement, and the same Constitution's restrictions on residence permits for foreign husbands.
- The Hong Kong *Bill of Rights'* provisions regarding the rights of children, and the time limitation period for applying for an affiliation order.

CASE *S v D and Anor (1991) Namibia*[30]

For our purposes, the main issue of this rape case was whether the corroboration rule in sexual offence cases discriminated against female complainants. The court said that the rule applies to both men and women.

However, most complainants in such cases are women, and the rule seemed to have the sole purpose of discriminating against women, so it was contrary to Article 10 of the Namibia Constitution, which guarantees all persons equality before the law, regardless of sex. The corroboration rule no longer applies in Namibia; all that is necessary is to prove beyond reasonable doubt that the act took place and that the complainant did not consent. We have discussed the rule in Chapters 4 and 12. As the Constitutions of most countries in our region do guarantee all persons equality before the law, this argument might have been used in many previous cases, and may be used in future cases.

CASE *PP v Kota and Ors (1993) Vanuatu*[31]

Facts and decision The custom chiefs of Tanna forced a woman to leave Port Vila and return to her husband. She argued that the action by the chiefs had violated Vanuatu's constitutional guarantee of freedom of movement. The chiefs argued that customary law gave them the right to make a woman return to her husband. The judge said: "There is a conflict between ... Custom and the Law of Vanuatu as passed by Parliament and the people of Vanuatu ... the chiefs must realise that any powers they wish to exercise in custom [are] subject to the Constitution ... and Statutory Law of Vanuatu ... A significant number of cases ... come before this Court as a direct result of the failure to treat women equally as the Constitution requires in Article 5(1)b. Further, freedom of movement is guaranteed under Article 5(1)i, and Section 105 of the *Penal Code* makes it unlawful to force "any person to go from one place to another".

The judge referred to the male bias of the chiefs' point of view, and drew attention to a general misunderstanding of the constitutional rights of the chiefs. He said that if any legislation were passed to clarify the roles of chiefs, "the fundamental rights of women must be protected".

Comment We have previously discussed other conflicts between custom and the constitutional rights of women. This case reinforces previous decisions that the Constitution takes precedence over customary law.

CASE *Rattigan and Ors v Chief Immigration Officer & Ors (1994) Zimbabwe*[32]

Facts, decision and comment Zimbabwe's citizenship laws are very similar to those of the Constitutions of Fiji and of other countries of our region. In a class action, Rattigan on her own behalf and on behalf of two other Zimbabwe nationals married to foreign men, argued that the Immigration Office had refused to give a residence permit to allow her husband to live with her in Zimbabwe. She wanted to live with her husband, but did not want to be forced to leave her own country to do so. The refusal therefore denied her freedom of movement as guaranteed by the Constitution. The courts agreed that the refusal had denied Rattigan's constitutional rights and ordered the Government to give her husband a residence permit. Chapter 2 provides more detailed discussions of this case, the precedent provided by the 1992 *Unity Dow* case, and the later case of *Salem v Chief Immigration Officer and Anor (1994) Zimbabwe*.

CASE *L v C (1994) Hong Kong*[33]

Facts, decision and comment Hong Kong affiliation laws are similar to those of Fiji and other countries in our region. The complainant had an illegitimate child but for various reasons did not apply for an affiliation order against D the defendant until after the 12 month time limitation. D said she could no longer apply, but the complainant said that the time limitation period was a denial of her child's fundamental human rights to be maintained. The court ruled that the intention behind Hong Kong's *Parent and Child Ordinance* was that illegitimate and legitimate children should be in the same position as regards maintenance, and that it was therefore unlawful to put obstacles in the way of a mother seeking maintenance. The 12 month limitation period was an obstacle to maintenance and was therefore against the Hong Kong *Bill of Rights* and therefore unlawful. This Hong Kong case may be used in similar cases in our region.

It would be interesting to look at all the Pacific Island cases throughout this book, and to see how many of them involve conflicts between a country's existing laws and practices, and that country's constitutional guarantees of human rights. More importantly, however, cases such as those above provide precedents that Pacific and other women can use in future cases.

Using CEDAW and other conventions

All constitutions in our region grant women *de jure* equality and some make sex discrimination specifically illegal. We have just seen examples of how women may be able to use their country's constitution in cases involving human rights. They may also be able to challenge discriminatory legislation and common law by using not only their constitutions but also United Nations and other international conventions such as the ILO conventions, the Convention on the Rights of the Child, the First Call for Pacific Children and the Women's Convention. These are extensions of general human right agreements into specific areas: work, children and women.

The historic *Unity Dow* case, discussed in Chapter 2, was one of the first in which the United Nations Women's Convention was used in a decision.

CASE *Unity Dow v the Attorney-General (1992) Botswana*[34]

Unity Dow sued her Government saying that the nationality law of Botswana discriminated against women. Under the *Nationality Act 1984* the children of Botswana women married to foreigners were not entitled to Botswana citizenship. The children of Botswana men married to foreigners were automatically entitled to Botswana citizenship. Unity argued that the *Nationality Act* was against the Constitution of Botswana. This granted men and women equal rights, but the Act gave different treatment to Botswana men and women. She said that the Act was therefore unconstitutional and invalid. The High Court ruled that the *Nationality Act* was discriminatory, because the Constitution prohibited sex discrimination. The Court also cited the United Nations Women's Convention as a guide for countries to follow; it would be against the principles of the Convention and the Botswana

Constitution to interpret the *Nationality Act* in ways that discriminated against women. The Court relied on the Constitution as the main way to declaring the discriminatory provisions of the *Nationality Act* illegal, and used the Convention to give more weight to its decision.

In this case, the Botswana High Court used CEDAW to back up a decision based on the Botswana Constitution. Now we will see how other common law countries have used CEDAW or other international conventions such as the Convention on the Rights of the Child.

Canada and Australia are both common law countries that have ratified CEDAW. In both countries, an international convention must be formally made part of national law before courts must accept it as national law. In 1996, neither country had done this for CEDAW, so they have only a responsibility to make decisions that obey it. In a paper published in 1994, a Canadian researcher identified seven cases in which CEDAW had been mentioned in decisions made by Canadian courts. One case ruled that CEDAW could not be used because the Supreme Court had made a decision that was inconsistent with it. In three cases, CEDAW was mentioned but was not relevant to the outcome; three other cases used CEDAW to support a decision made on other grounds. The researcher concluded that Canadian courts seem to use CEDAW or other international human rights conventions to support decisions made on other grounds, but if they want to make decisions that conflict with CEDAW, "they will simply ignore it" — even though the common law says that unless the international convention conflicts with national law, the international convention should be applied.[35]

Note however, that the research was published in 1994, so these cases took place within the first five years of the establishment of CEDAW; there may have been further developments in Canada, which has a reasonably good human rights record, and in other common law countries. One such development was a 1994 Australian case.

CASE *Minister for Immigration and Ethnic Affairs v Teoh (1994) Australia*[36]

Issues and decision The High Court of Australia analysed the national responsibilities of a country that ratifies an international convention. The case specifically concerned whether the United Nations Convention on the Rights of the Child should be applied to a particular child in Australia, which had ratified the Convention but had not formally made the Convention part of national law.

The High Court said that although such conventions cannot be used as "a direct source of individual rights and obligations under the law", ratifying a convention was a "positive statement to the world and to the people of Australia that the ... Government and its agencies will act according to the convention". In the case considered, Australia had ratified the Convention on the Rights of the Child in 1990 and since then the people of Australia, and the international community, have had a right to expect that the Government and its agencies would abide by the principles of the Convention and "treat the best interests of the child as a primary consideration". This would be a general and "legitimate expectation". Individual persons would not have to

> prove that they personally expected courts to do this, or even that they knew about the convention in question. They would have to prove that it was reasonable for them to have the expectation.
>
> However, the Government and its agencies did not have to act in a certain way even though there was a legitimate expectation that they would. In a particular situation, a court for example might want to make a decision that conflicted with the "best interests" principle of the Convention. If a court did decide to do this, fairness required it to inform the child, or its representatives, and give them an opportunity to present a case against the decision.

Just as it has done for the Convention on the Rights of the Child, the Australian Government has ratified CEDAW but has not formally made it part of national law. The 1994 High Court of Australia decision means that by ratifying CEDAW, Australia has created a legitimate expectation that the Government and its agencies will act in accordance with CEDAW principles. The decision has created a precedent that other common law countries (including the countries of our region) will have to take seriously if they have ratified CEDAW, the Convention on the Rights of the Child, an ILO convention, or for that matter any international convention. What, then, should be the effect of CEDAW on courts in our region?

In 1996, a senior judge analysed the situation of Kiribati (which was not in 1996 a signatory) and laid down the principles that courts in signatory countries should follow.[37]

> There is currently no basis for the courts in Kiribati to use the Convention in the interpretation of existing laws. However, ratification would inevitably lead to [its] provisions being incorporated into the laws of Kiribati. The Convention would then prove useful in litigation and decision making in the following ways:
>
> (1) Judges would adopt a more progressive interpretation of the domestic law, according women equality with men before the law...
>
> (2) [In cases where judges might use their own discretion] a judge would have to abide by the principles of nondiscrimination ... This would have considerable impact [if gender-neutral legislation had previously been interpreted in ways that] discriminated against women.
>
> (3) Where there was a conflict of legislation, the interpretation would be in accordance with the Convention.
>
> (4) Customary laws and practices discriminating against women would henceforth be interpreted in the light of the Convention.

The judge is here suggesting that the best way of ensuring human rights for women is by first getting countries to ratify CEDAW, and then getting them to formally transform CEDAW into a national law. This would remove the problem of "hypocrisy" highlighted by our Canadian researcher.

> ... the eagerness of the international community to set standards masks a deep-seated reluctance to design corresponding implementation schemes. [Courts seem to use CEDAW or other international human rights conventions to support decisions made on other grounds, but if they want to make decisions that conflict with CEDAW] they will simply ignore it.[38]

So far, however, no country in our region has both ratified CEDAW and formally made it part of national law. The Australian case of the *Minister for Immigration and Ethnic Affairs v Teoh (1994)* does offer "opportunities ... for judges and other judicial officials to draw on ... [CEDAW] ... to interpret and apply creatively constitutional provisions, legislation, the common law and customary law"[39] by making it possible to argue that, by ratifying CEDAW, any common law country arouses legitimate expectations that the country will abide by CEDAW principles. If these expectations are linked to basic constitutional rights for all citizens or to the expectations aroused by other conventions, we could see some very creative applications and interpretations.

But this will not happen by itself. Test cases, whether by individuals or by class action, take a long time; they are very expensive; they are very hard on the people involved. If women want to use test cases, they must find funds to litigate the cases and to pay lawyers who are competent, who are committed to the issues and who can dedicate their time to thorough preparation.

And so we go back to where we started: to improve the status of women, we have to learn and to teach; to organise ourselves and others; and to be prepared to challenge faulty systems wherever we find them.

CHANGE: A COMBINATION OF STRATEGIES

In this chapter we have focused on strategies for change.

- Learning and teaching legal literacy and gender sensitivity.
- Organising women's NGOs and getting more women representatives into politics.
- Challenging the system by lobbying governments to adopt or use international conventions; lobbying governments to change or enforce national laws; or taking test cases to court.

We have stressed that most action plans require a combination of strategies. One strategy alone will not succeed. Presenting a Bill to Parliament without mobilising women's NGOs, or without lobbying influential members of Parliament will not get the Bill passed. Once it is passed into law, and becomes an Act, there is no guarantee that it will be properly

implemented unless informed public opinion demands that it is properly implemented. This in turn requires public education and attitude change.

In this book, we have examined the law as it relates to Pacific women. We have pointed out its deficiencies and have suggested way of bringing about change. By so doing we have tried to contribute towards public education and attitude change. The law cannot by itself change the status of women in society, but it can work together with other instruments of change to bring about a broader and more just transformation of society.

Chapter 1 – The law and women's lives

1. *SEC16: Custom and customary law. Course Books One, Two and Reader,* prepared by Jean Zorn. Rev. ed. Suva: University Extension, USP, 1994: Course Book One: 10-11. These became available to us during final revisions of this book, but we have used them wherever possible.

2. M. Schuler (ed). *Empowerment and the law: strategies of Third World women* OEF International, 1986: 22.

3. Zorn. *SEC 16 ... Course Book 1* (1994): 8.

4. In the case of *Banja v Waiwo* (Vanuatu. Supreme Court Appeal Case 1(1996), the Supreme Court stated that customary law should apply only if there is no legislation or relevant common law, and the custom is not unjust or against the Constitution. If customary law is to apply, proper evidence must be given that a particular principle or practice is customary law. Common law takes precedence over customary law because Vanuatu is a common law country.

5. Zorn. *SEC 16 ... Course Book One (1994):22-23.*

6. In the banishment case of *Taamale and Taamale v the Attorney-General* (Western Samoa Court of Appeal 2/95B) Sir Robin Cooke referred both to the kinds of cases that might be dealt with under custom and to the constitutional issues raised. He said that serious crimes such as murder and rape should be dealt with by the Supreme Court, and that the constitutional rights of the accused included the right to legal counsel.

7. *Taamale and Taamale v the Attorney-General* above.

8. In *SEC 16: custom and customary law reader* (1994), Zorn collected 18 cases involving both customary and formal law; five of these concern women appealing against custom decisions: two Papua New Guinea (unlawful detention, 1991); two Solomon Islands (custody 1981, 1983); one Nauru (land, 1972). We will refer frequently to more recent cases including *John Noel v Obed Toto* (1995) Supreme Court of Vanuatu Case 18(1994), and *Banja v Waiwo* mentioned above.

9. The following books explain the similarities and differences of the content of Pacific legal systems. As well, they offer more detailed discussions of the structure and context of legal systems.
   - M. A. Ntumy (ed). *South Pacific Island legal systems.* Honolulu: University of Hawaii Pr., 1993. Covers the countries and territories of the SPC region: constitutions, structure, formal and customary law. Hard cover and expensive, but should be in the library of anyone teaching Pacific law.
   - Don Paterson. *LA 101: legal systems 2, courts. Course Books and Reader.* Suva: University Extension, USP, 1994. Covers the history, structure and development of courts in the USP region; textbook for first year USP law students on campus and throughout the region. Many illustrations and activities; cheap and readily available.
   - Guy Powles and Mere Pulea (eds). *Pacific courts and legal systems.* Suva: IPS, USP and Faculty of Law, Monash University, 1988. Part 1 consists of contributions by Pacific Islanders concerned with the law. Part 2 describes the legal systems of countries and territories of the SPC region. Used as a textbook at USP; cheap and readily available.

10. Schuler (1986): 22.

11. Zorn. "Custom, the common law and the Constitution" in *SEC 16 ... Course Book 2* (1994) :2-20.

12. These are not the real names of the people concerned.

13. Adrienne Riche and Erika Sabine in E. Sabine "Patriarchy and the State." *Australian Journal of Law and Society,* 3 (1986): 53.

14. Schuler (1986).

15. The *Sex Discrimination Act 1984* ((Australia) s 5.1 defines direct and indirect discrimination.

16. Chris Ronalds: *Affirmative action and sex discrimination: a handbook on legal rights for women.* Sydney: Pluto Pr., 1987:96 also describes and defines the various forms of discrimination. Pages 151-159 detail arguments against the *Sex Discrimination Act 1984.*

17. Based on the "strict identical treatment; identical treatment with biological exceptions; treatment according to all differences; subordination principle" approaches outlined by Elizabeth A. Sheehy:*Personal autonomy and the criminal law: emerging issues for women.* (Background Paper for the Canadian Advisory Council on the Status of Women, September 1987) cited by R. Graycar and J. Morgan in their *Hidden gender of the law.* Annandale, NSW: Federation Pr., 1990: 40-45.

18. *Andrews v Law Society of Canada (1989)*, Supreme Court of Canada Reports 1 (1989): 143.

19. Kamla Bhasin and Nighat Said Khan: "Some questions on feminism and its relevance in South Asia."*Kali for Women*, 1986: 2.

20. "Women doing theology." *Womenews Newsletter*, (April 1990).

21. Brown, B. "Pacific women: challenge to change." Paper presented at the *Fourth Regional Conference on Pacific Women*, held at Suva, Fiji, 1988. Noumea: SPC, 1988.

22. Based partly on Rosemarie Tong (*Feminist thought: a comprehensive introduction.* Boulder, California: Westview Pr., 1989), and on "Gender" in Stephen Bottomley and others. *Law in context.* rev.ed. Leichhardt, NSW: Federation Pr., 1994: 255-284.

23. Eleanor Condo. "Gender and access to justice: the challenges ahead." in *Gender and access to justice: a report of the Regional Training Programme.* Asia Pacific Forum on Women, Law and Development, 1992, cited by Graycar and Morgan (1990). The quotation that concludes the chapter is also taken from Graycar and Morgan.

24. Based on Ronalds (1987): 8-9.

25. Bottomley and others (1994: 257) analyse Ngaire Naffine's division of feminist legal theory into three phases, and point out "Whilst law is undoubtedly connected with the values of a male-dominated society, there are also contradictions within it. Some aspects of the law can favour women and the feminist task is to exploit [these aspects.]"

26. Based on the Asia Pacific Forum on Women, Law & Development (APWLD) training module for Feminist Legal Theory and Practice Training, Chiang Mai, Thailand 1995.

Chapter 2 – Constitutional status, citizenship and customary law

1. R. B. Lussick, Chief Justice of the Republic of Kiribati. "Litigation raising issues relating to women's human rights in the Asia Pacific region." [Paper prepared for the] *Judicial Colloquium on the domestic application of international legal instruments on women's human rights, Hong Kong, 20-22 May 1996.* The paper provides an overview of women's rights aspects of the Kiribati Constitution, citizenship rights of foreign husbands and their children, land rights, domestic violence, sexual assault, customary law, the signing of CEDAW, and submissions by NGOs to the Kiribati Government.

2. Cap. 92 s. 65.

3. See reports by Bernadette Hussein: "Rabi bill ousted on the grounds of race, sex" and "Adi Finau defends Bill defeat." *Fiji Times*, (15 December 1995: 5 and 18 December 1995: 5.) Senator Adi Finau Tabakaucoro used Article 16 to prevent the passing in the Senate of the Bill to amend the *Banaban Settlement Act*. The 18 December 1995 article reports her objections to the definition of elder as "any [Banaban] male over 60 ... The definition ... was contradicting what the Constitution said on discrimination against gender".

4. One argument against change might use a principle of statutory interpretation inherited from the English common law — that the specific must override the general. Under this principle, Art. 16 has general application to other statutes but not to a provision under the Constitution. However, discriminatory laws in other statutes are subject to Art. 16.

5. *The Fiji Islands: towards a united future. Report of the Fiji Constitution Review Commission*, by Sir Paul Reeves, Tomasi Rayalu Vakatora and Brij Vilash Lal. [The Reeves Report] Suva: Government Printer, 1996. (Parliamentary Paper 34(1996). *Daily Post* and *Fiji Times* articles and letters in the first week of its release (10-17 September 1996) show very strong reactions from people who cannot have had time to read and think about the report as a whole.

6. *The Constitution of Tonga Amendment Act*, no.23 (1990).

7. *Penal Code* (Vanuatu) Cap. 135 s. 150.

8. *John Noel v Obed Toto (1995)* Supreme Court of Vanuatu Case 18(1994), Luganville, Santo, and *Banja v Waiwo* Supreme Court of Vanuatu Appeal Case 1(1996). We will refer frequently to these cases. Another relevant case is that of *PP v Kota and Ors* Criminal Case 58(1993) [1989-1994] 2 VanL R 661.

9. Civil Appeal Case 32(1988) [1988/1989] SILR 113. We are grateful to Jennifer Corrin Care, the defending lawyer in the original case, for supplying this citation.

10. Affidavit of the Native Lands Commissioner in *Ah Koy v The Registration Officer* Fiji Court of Appeal Civil Appeal 23(1992).

11. The story and the names are invented; we do not know of any one family to which all the details apply.

12. *Ah Koy v The Registration Officer* cited above.

13. Tuvalu Constitution Art. 46.

14. *Citizenship Act 1977* (New Zealand); *Cook Islands Entry and Departure Ordinance 1963*.

15. *Immigration Act*, (Fiji) Cap. 88, ss. 7 (1) (e); 7(3).

16. The 1996 Constitutional Review Committee proposed such changes.

17. Cook Islands (s. 4 *Cook Islands Entry and Departure Ordinance 1963)*; Fiji (Art. 25); Kiribati (Art. 21)(1); Nauru (Art. 72); Solomon Islands (Art. 22); Tonga *Nationality Act* Cap. 59 s. 2 (b); Tuvalu (Art. 45(2); Vanuatu (Art. 11); Western Samoa (*Citizenship Amendment Act 1989* s. 2).

18. Constitution Art. 30 (1).

19. Constitution Art. 26 (2) (b).

20. The story and the names are invented; we do not know of any one family to which all the details apply.

21. In discussing affirmative action legislation and practices in Australia and the USA, Stephen Bottomley and others (*Law in context*, Annandale: Federation Pr., 1991: 270, 282-284) give a useful summary of the concerns of feminist lawyers and liberals.

22. This story was told to us by Dr. Konai Thaman, the only woman Professor in the University's history, and one of the leaders in the campaign for a women's charter.

23. Two important texts in customary law are those of Michael Ntumy (ed) *South Pacific Islands legal systems*. Honululu: University of Hawaii Pr., 1993, and Jean Zorn: *SEC16: Custom and customary law. Course Books and Reader*. Rev. ed. Suva: University Extension, USP, 1994. Both became available to us during final revisions; we have used them wherever possible.

24. Guy Powles: "Tonga" in Ntumy (1993): 317-319.

25. Of the 18 cases collected by Jean Zorn in *SEC16: custom and customary law reader* (1994), 7 refer directly to constitutional questions. Other cases involving customary law and constitutional questions are those of *Tuivaiti v Sila* [1980-1993] WSLR 17-21; the fatal shooting of Fatiala Nuutai Mafulu described by Ulafala Aiavao in "Death in the village." *Islands Business Pacific*, (Nov. 1993): 20-26; *Taamale and Taamale v. the Attorney*-General (Western Samoa Court of Appeal 2/95B); *John Noel v Obed Toto* and *Banja v Waiwo* both cited above. The decision in the *Noel v Toto* case was that where customary law conflicted with the constitution, the constitution should prevail. *Banja v Waiwo* established the order of precedence as: constitution; legislation; common law; customary law. We will discuss these cases more fully in the appropriate chapters.

26. For example the *Islanders Marriage Act; Islanders Divorce Act; Wills, Probate and Administration Act; Local Courts Act*. In 1993, a *Customs Recognition Bill* was prepared but in 1996 had not been presented to the Solomon Islands Parliament. One of its aims was to settle the question of the standard of proof required in evidence in customary law cases. (Jennifer Corrin Care: "Solomon Islands." *Asia Pacific Constitutional Yearbook 1994*. Carlton, Vic: Centre for Comparative and Constitutional Studies, 1996 : 224-23).

27. Ntumy (1993): xxiii.

28. This was the decision in *K v T and Ku in re custody application* (Central Civil Case 37/1985 [1985/1986] SILR 49); see Chapter 9.

29. Statement by Ratu J. Madraiwiwi, Permanent Arbitrator, at the 1993 Law Convention, Fijian Hotel, Fiji.

30. Fiji Women's Rights Movement, Women's Crisis Centre and Fiji Association of Women Graduates: Submission no 8 to the *Commission of Inquiry on the Courts, 1994 (Beattie Commission)* [Suva: Government Printer, 1994].

31. Another potentially useful case for women is *Taamale and Taamale v the Attorney-General* cited above. Sir Robin Cooke said: "... The punishment of offences is a matter for the criminal courts. Serious crime [like murder or rape] is properly dealt with by the Supreme Court. The accused has constitutional rights ... including the right to counsel."

32. [1980-1993] WSLR 17-21; Guy Powles refers to this 1980 case in Ntumy (1993) : 407, 653. In 1993, conflict between customary authorities and formal law involved the fatal shooting of Fatiala Nuutai Mafulu. Ulafala Aiavao (1993) discusses it in relation to the *Village Fono Act 1991*.

33. Reported in *Women's Watch: the International Women's Rights Action Watch* (University of Minnesota) 6, 1 (July 1992): 3.

34. *Unity Dow v the Attorney-General* [1992] LRC (Const) 623, Bot CA, reported in *MS Magazine* (November/December 1991).

35. [1994] 1 LRC 343; [1995] (2 SA 182 (Supreme Court of Zimbabwe).

36. [1994] 1 LRC 354.

Chapter 3 – Land rights

1. A useful text is that by Nick O'Neill. *SEC06: Land law. Course Book and Reader.* Suva: University Extension, USP, 1989. Although needing revision, it gives an overview of concepts of land law, and of land laws in our region. It deals also with customary land dispute settlement. For customary land law, see also Jean Zorn "Unit 7: Land law" in her *SEC16: Custom and customary law. Course Books One, Two and Reader.* Rev. ed. Suva: University Extension, USP, 1994. Course Book 1: 118-142.
2. *Pacific Islands Yearbook*, 17 (1994):734.
3. C. Bolabola. "Fiji: customary constraints and legal progress." in *Land rights of Pacific women.* Suva: Institute of Pacific studies, USP, 1986: 1-67. Except where otherwise stated, information regarding Fiji is taken from this text.
4. O'Neill (1989): 33.
5. Constitution of Tonga Articles 107 and 111 dealing with inheritance, and the rights of widows. *Land Act* 1927 ss. 7, 30, 41, 43, 80-88.
6. Constitution Article 111.
7. *Land Act* ss. 80, 81.
8. [1962-1973] Tonga LR 15.
9. Respectively [1923-1962] 2 Tonga LR 45; [1923-1962] 2 Tonga LR 109. In these cases, the widow was no longer married, and therefore could not have committed adultery unless her partner was married. If, however, she had committed fornication, she could still lose the land.
10. Respectively, Land Court of Tonga Case 2/1989; [1962-1973] Tonga LR 36.
11. "The status of women in Tonga." Country overview paper for the *South Pacific Regional Seminar on the United Nations Convention on the Elimination of all Forms of Discrimination against Women*, sponsored by the United Nations, and the Governments of Australia and New Zealand [held in Cook Islands, March 1991] (SPS/CEDAW/1991.WP4, draft, p.141).
12. *Tuvalu Lands Code* s. 9 (ii), found at the back of the *Native Lands Act*, Cap. 22.
13. *Tuvalu Lands Code* s.14.
14. The author was told about this case, but no source was given.
15. *The Alienation of Customary Land Act 1965.*
16. [Western Samoa]. Country overview paper (SPS/CEDAW/1991).
17. Aiono Fana'afi."Western Samoa: the sacred covenant." in *Land rights of Pacific women.* (1986): 102-110.
18. *Gilbert and Phoenix Islands Lands Code 1977* s. 11.
19. Section 4(iii).
20. *Situation of children and women in Kiribati.* [Suva] Govt. of Kiribati and UNICEF, 1991: 30.
21. High Court Land Appeal 10/1978.
22. High Court Land Appeal 16/1978.
23. High Court Land Appeal 66/1979.
24. 1979 Kiribati LR 83.
25. Land Appeal 14/1969.

26. *Akepae v Detanamo (1977) Nauru* Land Appeal 7/1977.

27. The *Succession, Probation and Administration Act 1976* (Nauru) s. 16.

28. Solomon Islands Constitution Article 110.

29. *Situational analysis of women and children in the Solomon Islands.* [Suva] Solomon Islands Government and UNICEF, 1993: 53. Unless we have stated otherwise, we have based the following discussions on this paper.

30. T. Takoa and J. Freeman. "Provincial courts in Solomon Islands." in G. Powles and M. Pulea (eds.) *Pacific courts and legal systems.* Suva: Institute of Pacific Studies, USP; Faculty of Law, Monash University, 1988: 73-77.

31. Vanuatu Constitution Articles 71-74.

32. D. Kenneth and H. Silas. "Vanuatu: traditional diversity and modern uniformity." in *Land rights of Pacific women.* (1986): 67-85.

33. Kenneth and Silas (1986): 71.

34. T. Bakeo. "Land disputes in Vanuatu" in G. Powles and M. Pulea (1988): 127-129.

35. Discussions with the Clerk, Steven Bani.

36. Case 18(1994) Supreme Court of Vanuatu, Luganville, Santo.

37. *Obed Toto v Philip Pasvu* Land Appeal Case L6 (1985), [1980-1988] 1 VanLR 300-304. Obed Toto was supported by his father Crero Toto and nephew John Noel in this appeal against a 1979 Island Court decision in Pasvu's favour. Pasvu had claimed the land through several ancestors, including his grandmother. The Supreme Court said that Pasvu descended from his grandmother's third marriage and that the claims of the descendants of her two previous marriage would be stronger.

38. *Cook Islands Act 1975* s. 422.

39. "Status of women in the Cook Islands". Country overview paper (SPS/CEDAW/1991.WP4:5-8).

40. Heather Booth. *Cook Islands: a statistical profile on men, women and children,* prepared for the UNDP/UNIFEM Pacific Mainstreaming project and the UNICEF Pacific Office. [Suva: UNDP, 1989?] (PMI/89/W01).

41. M. James. "Cook Islands: approaching equality" in *Land rights of Pacific women.* (1986):110-112.

Chapter 4 – Sexual offences against women and children

1. Useful summaries and discussions of Pacific legislation are provided in *SEC07: Criminal law. Course Book; Reader, Supplementary Reader,* prepared by David Weisbrot and revised by Alan Marsh. Suva: University Extension, USP, 1990-1993. The *Reader* and *Supplementary Reader* contain the legislation for Cook Islands, Fiji, Solomon Islands, Tonga, Vanuatu and Western Samoa. Chapter 20 "Sexual offences" of *Archbold Criminal pleading, evidence and practice,* (Sweet & Maxwell) Volume 2(1996) reviews the many changes in United Kingdom legislation and case law between 1956 and 1994.

2. Unless otherwise stated, we have drawn information in this section from a 12 page brochure written by C. Carter and illustrated by Phil Somerville: *Rape.* Suva: Open Training and Education Network, NSW TAFE Commission for Fiji Women's Crisis Centre, 1992.

3. Personal communication, Vanuatu Public Prosecutor, 1993.

4. Police Complaints Authority of Victoria."Sexual assault victims and the police [1988]." cited in R. Graycar and J. Morgan. *The hidden gender of the law.* Annandale, NSW: Federation Pr., 1990: 314.

5. *DPP v Wama Dokanave (1988) Fiji* High Court Criminal Appeal 8/1988.

6. *Fiji Times* (19 November 1994).

7. Ngaire Naffine. *Law and the sexes: explorations in feminist jurisprudence.* London: Allen & Unwin, 1990: 142.

8. *R v Clarke (1817)* ER 171 (2 Stark 24); *Anne Keystone (1824) Times* (20 August 1824); *R v Morley (1837) Times* (10 April 1837); *R v. Derby (1844) Times* (18 August 1844). See also S. Edwards *Female sexuality and the law.* Oxford, Martin Robertson, 1982.

9. Edwards (1981): 32.

10. Edwards (1981): 32.

11. Susan Brownmiller. *Against our will: men, women and rape.* London: Penguin, 1975: 380.

12. Edwards (1981): 101.

13. *DPP v Morgan* [1976] AC 182, reprinted in *SEC07: criminal law. Reader* (1990): R23-24.

14. Graycar and Morgan (1990): 339.

15. *R v Ives* [1973] Qd R 128.

16. *R v Sherrin (No.2)* [1979] 21 SASR 250 at 254.

17. Cited by Anna Clark. *Women's silence, men's violence: sexual assault in England 1770-1845.* Pandora, 1987:181.

18. *Crimes Act 1969* (Cook Islands) s. 140.

19. *Criminal Offences Act* (Tonga) Cap. 18 s. 118(2); *Crimes Act* (Western Samoa) s. 46.

20. Edwards (1981): 34.

21. High Court Criminal Case 21/1991.

22. *R v R (Rape and Marital Exception)* [1991] 3 WLR 767 and [1991] 2 All ER 257. R appealed to the House of Lords against his conviction. The House of Lords reviewed the question, referred to over 30 cases from 1794 to 1991, and dismissed the appeal. [1992] AC 599, summarised in "Husband's rape appeal bid dismissed" *Fiji Times* (25 October 1991) reprinted in *SEC07 ...Supplementary Reader* (1993): 52.

23. *R v Okea and Kenikaesia (1991) Solomon Islands* High Court Criminal Case 5/1991.

24. Fiji High Court Criminal Appeal 38/1982.

25. *Crimes Act 1900* (NSW) s. 61a.

26. Oral history from the editor's memory.

27. Carter (1992): 4.

28. Michael Levi. "Violent crime" in *Oxford handbook of criminology* (ed M. Maguire and others). Oxford: Clarendon Pr., 1994: 317.

29. The 1992 population estimates were supplied by Heather Booth, National Centre for Development Studies, Canberra. Other sources were the Fiji Police Force Statistics Office and *Women of Fiji: a statistical gender profile* [compiled by Heather Booth] Suva: Department of Women and Culture, 1994:61; Kiribati Police Station; 'Atu Emberson-Bain, *Women in development, Kiribati*. Country Briefing Paper, Asian Development Bank, Manila, 1995:29; Solomon Islands Royal Police Force; Royal Tongan Police Force; Vanuatu Police Force statistics collected by *KAVAW*; Western Samoa *Police National Statistical Crime Report 1981-1993* , and the Attorney-General's Law Library, Apia.

30. Sgt. Titus Taripu, *Vanuascope* (12 May 1993).

31. Personal communication, 1993.

32. *Situational analysis of women and children in the Solomon Islands.* [Suva] Solomon Islands Government and UNICEF, 1993: 65.

33. *Broadsheet* New Zealand (Summer 1991).

34. *Fiji Business Review* (November 1994); *Fiji Times* (11 November 1994).

35. Fiji Court of Appeal Criminal Appeal 64/1986.

36. *R v S* [1996] Cr App R 274; (1995) Crim LR 838, noted in *Archbold Supplement* 2 (1996): 5.49a.

37. Fiji Court of Appeal Criminal Appeal 1/1988.

38. Government of Fiji. *Chief Justice's Chambers Circular Memorandum* No.1 (1988).

39. *Fiji Law Talk*, 1(1) 1990.

40. Government of Fiji. *Chief Justice's Chambers Circular Memorandum* No.1(1990).

41. Respectively: *Daily Post* (1 May 1991); Suva Magistrate's Court, September 1993; *Fiji Times* (16 December 1993); *Fiji Times* (22 December 1993).

42. *Mohammed Kasim v The State (1993) Fiji* Court of Appeal Criminal Appeal 21/1993.

43. Respectively, *R v Temakoua (1978) Kiribati* Criminal Appeal 2/1978; *R v Morea (1991) Kiribati* High Court Case 9/1991.

44. *Republic v Olsson (1983) Nauru* [1983-1989] Nauru LR Criminal Case 2/1983.

45. *Republic v Karl (1983) Nauru* [1983-1989] Nauru LR Criminal Case 3/1985.

46. From prison records, October 1992. Indecent assault: 2 years (2 prisoners); 3 years (2 prisoners); 4 years (2 prisoners).

47. An incest-rape, *R v Toke (1989) Solomon Islands* High Court Criminal Case 50/1989. The other cases cited are respectively *Korua and Kaitira v R (1988) Solomon Islands* [1988/1989] SILR 4 and *R v Hiolohana (1991) Solomon Islands* High Court Criminal Case 11/1991. The University of the South Pacific Law Library received, late in 1996, incomplete sets of High Court judgments from 1994 to 1996. We were unable to analyse these, but some indicate higher sentencing of sexual offences.

48. Unless otherwise stated, the following information was obtained though the kind assistance of the Public Prosecutor and the Public Solicitor, both of whom allowed me access to their internal records in 1993. The *Vanuatu Law Reports* (1980-1995) contain few judgments relating to sexual offences.

49. *Prisons (Administration) Act* (Vanuatu) Cap. 20 s. 30.

50. *R v Williams (1984) Cook Islands*. 1984 cases are taken from loose-leaf judgment files.

51. For example, 9 years in *R v Kimiia (1992)* reported in *Cook Islands News* (28 March 1992) and in *R v Pirangi (1992)* reported in *Cook Islands News* (16 December 1992). Both may have been repeat offenders: *R v Kimiia (1985)* High Court Case 630/1985, 2 years probation, and *R v Pirangi (1986)* High Court Case 117/1986, 4 years prison.

52. *Cook Islands News* (28 March 1992).

53. *R v Puruto Piri (1993) Cook Islands;* personal communication.

54. The Western Samoa data are based on discussions with a Crown Prosecutor and on records and figures kindly supplied in 1996 by the Attorney-General's Law Library. We referred also to sample issues of *The Samoa Observer* and *The Samoa Times* (1992-1993) including a *Samoa Times* account (7 July 1992) of an indecent assault of a 7 year old girl; the offender was sentenced to 14 months imprisonment. On the same day, the Acting Chief Justice warned that the victim's name should not be published.

55. Levi (1994): 308, 317.

56. C. Carter and Phil Somerville (illustrator): *Child sex abuse.* Suva: Open Training and Education Network, NSW TAFE Commission for Fiji Women's Crisis Centre, 1992.

57. Figures and comments from *Women of Fiji* (1994): 60-62 and Nazhaat Shameem, Director of Public Prosecutions, Public Lecture, 1993.

58. "Child abuse: on whose agenda?" *General Practitioner,* (Fiji College of General Practitioners) 2 (2) 1995: 2.

59. Respectiveiy, *R v Ariki (1990) Solomon Islands* High Court Criminal Case 23/1990; *R v Mule (1990) Solomon Islands* High Court Criminal Case 34/1991.

60. Labasa Magistrate's Court Case 914/1994.

61. *Samoa Times* (5 December 1992).

62. Figures 1987-1993 from the Statistics Office, Fiji Police Force; post-1993 figures and reports, *Fiji Times* (6 March 1996) and "Child abuse cases up: DPP." *Fiji's Daily Post* (7 November 1996): 6.

63. Fiji Court of Appeal Criminal Appeal 40/1984.

64. [1985/1986] SILR 145.

65. Respectively: *Fiji Times* (11 September 1988); *R v Kaboa (1979) Fiji* Court of Appeal Case 42/1979; *Fiji Times* (3 November 1994).

66. Respectively: *R v Richard (1984) Cook Islands* High Court looseleaf files; *R v Kimiia (1985) Cook Islands* High Court Case 630/1985; *R v Ngametua and Ors (1986) Cook Islands* High Court Case 154/1986; *R v Marsters (1988) Cook Islands* High Court Case 158/1988; unreported incest/gang rape, personal communication, 1993.

67. Because the case was withdrawn, we do not give the original case title.

68. *R v Saulo (1982) Tuvalu* Court of Appeal 5/1982.

69. Tonga Prison records, October 1992.

70. *Situational analysis of women and children in the Solomon Islands.* Suva: Solomon Islands Government, 1994: 51; examples respectively: *R v Roko (1990) Solomon Islands* High Court Case 36/1990; *R v Mule (1991) Solomon Islands* Court Case 34/1991; *R v Toke (1989) Solomon Islands* High Court Case 50/1989.

71. Examples from Public Prosecutor's files, including the following 1992-1993 cases: *Public Prosecutor v Atuary (1992) Vanuatu; Public Prosecutor v Ialumiau (1992) Vanuatu; Public Prosecutor v Tukuna (1993) Vanuatu.*

72. *Vanuascope* (12 May 1993).

73. Unless otherwise stated, the following examples are from Public Prosecutor's files.

74. Vanuatu Civil Appeal 3/1990.

75. *Public Prosecutor v Mereka (1992) Vanuatu* Appeal 7/1992.

76. "Prevent child abuse." *Fiji Times* (24 October 1996):18.

77. *The Macquarie dictionary*. New budget ed. Sydney: The Macquarie Library, 1985: 221.

78. In Vanuatu, the case must be heard in the Chief Magistrate's Court. For Kiribati, the principle of allowing rape offenders to choose was set out in *R v Temakoua*, Criminal Appeal 2/1978.

79. *Taamale and Taamale v the Attorney-General (1995) Western Samoa* Court of Appeal 2/95B.

80. Personal communication, Senior Police Magistrate, Tonga, 1993.

81. Personal communication, Social Welfare Officer, Solomon Islands.

82. This case and the case below are extracted from the Public Solicitor's files, Vila, 1991.

83. Respectively: [1988] SPLR; *Samoa Times* (25 May 1992); *Attorney-General v Fereti (1993) Western Samoa* Court of Appeal 1993.

84. *Attorney-General v Tautiaga Paiutu Faamatu (1995) Western Samoa* Court of Appeal CA 6/1995.

85. Personal communication, Mr Justice Kent, Supreme Court of Vanuatu, 1993.

86. *Fiji Times* (14 December 1993).

87. Mr Justice Kepa in Miscellaneous Case No. HAMOOO6 (1994S).

88. Personal communication, 1995.

89. *Taamale and Taamale v the Attorney-General* cited above; *John Noel and Ors v Obed Toto (1995) Vanuatu* Supreme Court Luganville, Santo Case 18/1994.

90. Children's Coordinating Committee: Submissions 7 and 9 to the *Commission of Inquiry on the Courts, 1994 (Beattie Commission)* [Suva: Govt. Printer, 1994].

91. *The State v Muni Deo (1993) Fiji* in *The Fiji Times* (21 October 1993).

92. " Child abuse cases up: DPP." *Fiji's Daily Post* (7 November 1996): 6; "Justice system to give children better deal." *Fiji Times* (7 November 1996):3.

93. Respectively: Western Samoa Supreme Court 1978; Solomon Islands High Court Criminal Case 49/1983; Fiji High Court Criminal Appeal 23/1983; Fiji High Court Criminal Appeal 28/1991.

94. [1976] AC 192.

95. *Penal Code* (Fiji) Cap.17 s. 10; *Criminal Offences Act* (Tonga) Cap. 18 s. 118.

96. Fiji Court of Appeal Criminal Appeal 34/1982.

97. Peter Murphy. *A practical approach to evidence*. Blackstone Pr., 1980.

98. *Rep v Katatia* (1977) discussed later in this section.

99. [1916] 2 KB 658; citation from *PP v Michael Mereka (1992) Vanuatu* [1989-1994] VanL R 613; Supreme Court Appeal 2/1992.

100. See for example *R v Poutney* (1989) Crim LR 216.

101. *R v Mohammed Kasim* cited above; *R v Bauro* Kiribati Civil Appeal 1/1977; *R v Iererua* Kiribati Court Case 13/1978; Case from Public Prosecutor's files, 1985 Vanuatu; *R v Kolopitu* Solomon Islands High Court Case 9/1989; *R v Maetarau* Solomon Islands High Court Case 4/1990; *R v Mezer* Solomon Islands Criminal Case 12/1990; *PP v Pakoa* Vanuatu Court Case 19/1992.

102. Tonga Criminal Appeal 343/1992.

103. See for example *Hayes* [1977] 1 WLR 234.

104. M. Rieser: "Decantantions in child sexual abuse cases". *Child Welfare*, 70(6)1991: 611-622. We have not seen *True and false allegations of child sexual abuse: assessment and case management* (edited by T. Ney. NY : Brunner-Nagel, 1995), which should be a useful source of information.

105. *R v Hampshire [1995]* 2 All ER 1019; *Archbold Supplement* 1(1996): 16.36 notes that Clause 30 of the United Kingdom *Criminal Justice and Public Order Act 1994* abolishes the requirement for a corroboration warning.

106. *Condominium v Kalotuk* New Hebrides Joint Court A15/61 (9 September 1961); *Rep v Agir* Nauru LR Court Case 5/1975; *Rep v Katatia* Nauru LR 4/1977; *R v Tonana* Kiribati Criminal Case 7/1978; *R v Alfred Saolo and Ors* Western Samoa Supreme Court, 1978; *R v Iroi* Solomon Islands High Court Criminal Case 17/1991; Newspaper case report, *Samoa Times* (20 December 1992); *Police v Gese Kuki* 1994 Western Samoa Court of Appeal; *R v Geoffrey Basiota* Solomon Islands High Court Criminal Case 21/1995 (22 Dec.1995).

107. Carter (1992): 3.

108. Murphy (1980).

109. [1917] Cr App R 280.

110. Criminal Appeal 4 (1992) Lautoka High Court.

111. Discussed by J. Rowland. "Rape, the ultimate violation." in *Confronting violence: a manual for Commonwealth action*. London: Commonwealth Secretariat, 1992: 71-110.

112. Respectively: *Fiji Times* (23 February 1988); *R v Toada and 5 Ors (1989) Solomon Islands* High Court Case 20/1989; *The State v Tevita Aca (1994) Fiji* Labasa Magistrate's Court Case 252/1993 and Labasa High Court Case 4/1994.

113. *R v Viola* [1982] 3 All ER 73.

114. Personal communication, 1993.

115. Graycar and Morgan (1990): 347.

116. *Jane Doe v Police Board of Commissioners (Metropolitan Toronto)* [1989] 4:58 DLR 396.

117. Rarotonga High Court Plaint 36/1989.

Chapter 5 – Criminal assault against women in the home

1. *Balfour v Balfour* [1919] 2 KB: 57.

2. Coined by Jocelyn A. Scutt. *Women and the law: commentary and materials*. Sydney: Law Book Co., 1990.

3. *Pacific Islands Monthly* (October 1992): 19.

4. *Confronting violence: a manual for Commonwealth action*. London: Commonwealth Secretariat, 1992: 7.

5. *Confronting violence* (1992): 10.

6. S. Lateef. "Rule by the *danda*: domestic violence amongst Indo-Fijians". *Pacific Studies*, 13 (3)1990: 43-61.

7. In each story, W is the wife and H is the husband. The Fiji story is taken from the Public Legal Adviser's 1992 files. In Solomon Islands and Tonga in 1993, the author was told the stories by the women themselves and saw the terrible scars of the Tongan woman.

8. Michael Levi. "Violent crime" in *Oxford handbook of criminology*, ed. by M . Maguire and others. Oxford: Clarendon Pr., 1994: 312.

9. C. Carter. *Domestic violence*, illustrated by P. Somerville. Suva: Fiji Women's Crisis Centre and Open Training and Education Network, NSW TAFE Commission, 1992: 2. The Crisis Centre collated the figures in Table 5.1.

10. Data from *Women of Fiji: a statistical gender profile* [compiled by Heather Booth] Suva: Department of Women and Culture, 1994: 60.

11. P. I. Jalal. "The urban woman, victim of a changing social environment." in L. R. Va'a and J. Teaiwa (eds) *Environment and Pacific women: from the globe to the village*. Suva: Fiji Association of Women Graduates, Proceedings of the Biennial Convention, USP, 1988.

12. *Fiji Times* (12 February 1991).

13. H. Booth. *Cook Islands: a statistical profile on men, women and children*. Suva: UNDP/Unifem (Pacific Mainstreaming Project PMI/1989/W01): 18.

14. Inspector Rua, Rarotonga Police Force. *Cook Islands News* (17 December 1992).

15. *Broadsheet*, 2 (Summer 1991): 28-29, quoting a reporter for Cook Islands News.

16. Statement by Tai Nicholas, Secretary to Government for Justice, at a training session, Pacific Regional Rights Resource Team, January 1996

17. *Royal Tongan Police Report 1991*, the latest available in 1993.

18. [Tongan country paper] in *South Pacific Regional Seminar on the United Nations Convention on the Elimination of all Forms of Discrimination against Women, sponsored by the United Nations, and the Governments of Australia and New Zealand* [held in Cook Islands, March 1991] (SPS/CEDAW/1991.WP4, Country overview papers).

19. *Domestic and sexual violence against women in Western Samoa*. Apia: Mapusaga O'Aiga, March 1996.

20. [Kiribati Country Paper] *Regional Seminar on Women and the Law in the Pacific*, International Commission of Jurists and the Fiji Women's Rights Movement, Sigatoka, Fijian Hotel, 25-29 April 1994.

21. Jenny Hardy and Cathy Emery in *Report of the NGO Workshop on Domestic Violence*, conducted by the Attorney-General's Office and The Foundation of the Peoples of the South Pacific, Kiribati, October 1994.

22. Tiantaake Beero and Cathy Emery in *Report of the Workshop for Police Officers on Domestic Violence*, conducted by the Attorney-General's Office and The Foundation of the Peoples of the South Pacific, Kiribati, October 1994.

23. Unless otherwise indicated, information in this section is taken from Shireen Lateef. *Women in development: Solomon Islands*. Manila: Asian Development Bank, Programs Department Briefing Paper, November 1990: 15-16.

24. Personal communication, 1993.z

25. Lorretta Poemo. *Domestic violence in the Solomon Islands*. Brisbane: Dept. of Health and Behavioural Science, Griffith University, 1995.

26. *Situational analysis of women and children in Vanuatu*. [Suva]: Vanuatu Government and UNICEF, 1993: 76.

27. Vanuatu National Council of Women. *Famili Loa Bill*. Port Vila: VNCW, 1985.

28. Unpublished report held at the *KAVAW* office, 1993.

29. Public Prosecutor. *Violence in the family in Vanuatu*. Lecture series at the USP Complex, Port Vila, 2-5 July 1994.

30. Titus Taripu, *Vanuascope* (12 May 1993).

31. Based on Carter (1992).

32. *MS Magazine* (September/October 1994): 39.

33. Levi (1994): 312.

34. Commentary, *Fiji Times* (13 September 1996) following publication of Mensah Adinkrah:*Violent encounters*. Suva: Fiji Council of Social Services and others, 1996.

35. Respectively: *PP v Sam Kalou (1994) Vanuatu*, noted by the Public Prosecutor. *Violence in the family in Vanuatu (1994)*; *Fiji Times* (16 September 1993); *Fiji Times* (25 February 1993).

36. *Rep v Beretia Bakati (1994) Kiribati* High Court HCC&C 52/1994.

37. *Fiji Times* (12 February 1991; 19 May 1994; 7 October 1994) respectively.

38. *R v Angelique Lavalle* Supreme Court of Canada File No 21022/1990.

39. *Blackstone's commentaries on the laws of England* 1(1867): 443, cited by Regina Graycar and J. Morgan. *The hidden gender of the law*. Annandale, NSW: Federation Pr., 1990: 114.

40. Cited by Scutt (1990): 446-447 as *Clobury* (1630) Het. 149; 124 ER 414; *Lister* (1795) 1 Str. 478; 93 ER 645; *Cochrane* (1840) 8 Dowl 630; 4 Jur. 534.

41. [1891] 1 AC 671.

42. *Penal Code* (Fiji) ss. 244-245.

43. Respectively: Kiribati and Tuvalu, both *Penal Code*, s. 237; *Crimes Ordinance 1961* (Western Samoa) s. 78; *Penal Code* (Solomon Islands) Cap. 5 s. 237.

44. Respectively: *Criminal Offences Act* (Tonga) Cap. 18 ss. 112, 106, 107; *Penal Code* (Vanuatu) Cap. AA1 s. 107.

45. Personal communication, Inspector Rua, Rarotonga Police Force, 1993.

46. G. Geller. "Justice for battered women." Paper presented at the *Fourth International Interdisciplinary Congress on Women*, New York, 1990.

47. [1969-1982] Part D Nauru LR 51 Criminal Appeal 11/1976.

48. *Confronting violence* (1992): 18-19.

49. Personal communication, Honiara, 1993.

50. Personal communication, Apia, 1993.

51. [Kiribati Country Paper] (1994).

52. Beero and Emery (1994).

53. *Criminal Procedure Code* (Fiji) Cap. 21 ss. 14, 21.

54. *Time Magazine* (5 September 1983): 46.

55. *Confronting violence* (1992): 20.
56. *MS magazine* (September/October 1994):35.
57. *Fiji Times* (16 January 1996).
58. Personal communication.
59. *Confronting violence* (1992): 20.
60. Cited in Graycar and Morgan (1990): 292 as 396 NYS 2d. 1974 (Supreme Court of New York County).
61. P. W. Gee. "Ensuring police protection for battered women; the *Scott v Hart suit*." *Signs 8* (1983): 554; cited in *Confronting violence* (1992): 21.
62. Suva Magistrate's Court 1994.
63. Jalal (1988).
64. Lateef (1990): 15.
65. A. Pollard. "Solomon Islands" in T. Tangamoa (ed.) *Pacific women: roles and status of women in Pacific societies*. Suva: Institute of Pacific Studies, USP, 1988.
66. *KAVAW. Six-monthly report* (September 1992 - February 1993).
67. Personal communication, Court Clerk, Efate Island Court, 1993.
68. *Tuavaiti v Sila* [1980-1993] WSLR 17; *John Noel and Ors v Obed Toto (1995)* Vanuatu Supreme Court Luganville, Santo Case 18/1994.
69. *Confronting violence* (1992): 26.
70. *MS Magazine* (September/October 1994).
71. Jennifer Mantz, Seattle, describing the victimless prosecution policy. *MS magazine* (September/October 1994): 49.
72. Personal communication, Court Clerk, Rarotonga District Court 1993.
73. Personal communication 1993; Alan Marsh, People's Lawyer, 1986-1988.
74. *Samoa Times* (24 April 1992); (23 February 1993).
75. Examples respectively: *Fiji Times* (14 June 1986); *Fiji Times* (24 May 1989); *R v Emori Rabo* Nausori Magistrate's Court.
76. Examples from Women's Crisis Centre files, 1993-1994 and respectively: *State v Croker (1993) Fiji Times* (16 September 1993); *Fiji Times* (24 January 1996).
77. *Fiji Times* (13 September 1996) following publication of Adrinkrah (1996).
78. This story is true.
79. Port Vila Magistrate's Court, 1992; unless otherwise indicated, the 1993 cases come from the Public Prosecutor's Office files, 1993
80. *PP v Andre Thomas (1994) Vanuatu*, noted by the Public Prosecutor. *Violence in the family in Vanuatu*. (1994); *PP v Leo (1994) Vanuatu*, Magistrate's Court, Luganville, Santo, Case 338/94; personal communication, Public Prosecutor, 1994.
81. In Fiji, under Order 52, R.1, *Rules of the High Court of Fiji*.
82. High Court Civil Action 65/1980.
83. Constitution (Vanuatu) Article 41; *Courts Act* (Vanuatu) s. 29.

84. Discussions with the Police Station staff, Honiara, 1993.

85. Graycar and Morgan (1990): 285.

86. Based on Geller (1990) and *Confronting violence* (1992).

Chapter 6 – Women as criminal defendants

1. M. Pulea. *Family, law and population in the Pacific Islands*. Suva: Institute of Pacific Studies, USP, 1986: 102.

2. *Fiji Times* (17 November 1994), based on a World Health Organisation report.

3. *Fiji Times* (7 May 1994), letter from the Family Planning Association of Fiji.

4. Most of this brief historical introduction is drawn from Jocelyn A. Scutt. *Women and the law: commentary and materials*. Sydney: Law Book Co., 1994: 173-175, or from the sources listed above.

5. *Penal Code* (Fiji) Cap. 17 ss. 172 -174 , 234.

6. *Criminal Offences Act* (Tonga) Cap. 18 ss. 94-103; *Penal Code* (Tuvalu and Kiribati: identical) Cap. 67 ss. 214, 277; *Penal Code* (Solomon Islands) Cap. 5 ss. 214, 277; *Crimes Act 1969* (Cook Islands) ss. 172 -174; *Crimes Ordinance* (Western Samoa) ss. 73, 73A; *Penal Code* (Vanuatu) Cap. 135 AA1 ss. 113-117; *Criminal Code of Queensland 1899* (Nauru) s. 224.

7. *Penal Code* (Fiji) Cap. 17 s. 234.

8. Supreme Court of Fiji Criminal Appeal 16/1976.

9. High Court Criminal Appeal 8/1992.

10. *State v Tabua (1991, 1993)* Fiji Criminal Appeal 6/91, reported in *The Fiji Times* (18 May 1993).

11. *Fiji Times* (16 December 1993).

12. Pulea (1986): 108.

13. Heather Booth. *Cook Islands: a statistical profile on men, women and children*, prepared for the UNDP/UNIFEM Pacific Mainstreaming project and the UNICEF Pacific Office. [Suva: UNDP, 1989] (PMI/89/W01)18.

14. Personal communication, Public Prosecutor, 1993.

15. *Fiji Times* (18 May 1993).

16. Fiji College of General Practitioners policy statement: *Medical Therapeutic Termination of Pregnancy (MTOP) 1994*.

17. *Penal Code* (Fiji) Cap.17 s. 205, ss. 198 - 201 (manslaughter).

18. *Penal Code* (Tuvalu; Kiribati) ss. 192, 199 and their identical *Criminal Procedure Code* s. 159; *Crimes Ordinance 1961* (Western Samoa) s. 72; *Penal Code* (Solomon Islands) Cap. 5 s.199; *Criminal Offences Act* (Tonga) Cap. 18 s.199; *Crimes Act 1969* (Cook Islands) s.198.

19. Much of this is based on Mensah Adinkrah. *Crime, deviance and delinquency in Fiji*. (Suva: Fiji Council of Social Services & others, 1995), and a review and commentary on it: *Fiji Times* (18 January 1996).

20. Office of the Director of Public Prosecutions, Fiji, 1996.

21. *Fiji Times* (27 October 1993).
22. High Court Criminal Case 24/1991.
23. Personal communications and police records in each country, 1993.
24. *Samoa Times* (24 April 1992).
25. Office of the Director of Public Prosecutions, Fiji, 1996.
26. Adi Eci Kikau Nabalarua. University of the South Pacific Public Lecture 1994: *Fijian culture and tradition in transition*.
27. Scutt (1990): 381-398.
28. *Penal Code* (Fiji) Cap.17 ss. 166-168.
29. This happened at a regional workshop at the University of the South Pacific Library in 1992; the theft was not reported to police.

Chapter 7 – Marriage and separation

1. *Marriage Act* (Fiji) Cap. 50 s.15.
2. Quoted by Regina Graycar and J. Morgan. *The hidden gender of the law*. Annandale, NSW: Federation Pr., 1990 : 114.
3. Graycar and Morgan (1990): 114-115.
4. This verse introduces some versions of *The waggoner's lad* and occurs in other traditional songs taken by early migrants from the United Kingdom to America. It was recorded by singers like Jean Ritchie in the 1950s.
5. *Matrimonial Causes Act* (United Kingdom) s. 59.
6. *R v R* [1992] 1 AC 599.
7. Cited by J. Brophy and C. Smart (eds). *Women in law; explorations in law, family and sexuality*. London: Routledge & Kegan Paul, 1985: 8.
8. *Marriage Act* (Fiji) Cap. 50 s.13.
9. Court of Appeal Case 386/1985.
10. S. M. Cretney and J. M. Masson. *Principles of family law*. 5th ed. London: Sweet & Maxwell, 1990: 55.
11. S. Lateef. *The practice of purdah: the subordination of Indo-Fijian women in Suva, Fiji*. Doctoral thesis, Monash University, Melbourne, 1988.
12. [1982] 4 Family LR 232 cited in Cretney and Masson (1990): 59.
13. Supreme Court Case 293/1981.
14. Cretney and Masson (1990): 67.
15. The case concerned a custom marriage between Sina, a Samoan girl and an American, Joseph Collins. (*Samoan Public Trustee v Collins and Ors (1953) Western Samoa*, High Court, Apia, confirmed in *Supreme Court of New Zealand v Collins and Ors (1961) New Zealand*.
16. *Islanders Marriage Act* (Solomon Islands) Cap. 47 ss. 4 -18 and *Marriage Act* (Vanuatu) Cap. 60 ss. 1,15.

17. [1984] SILR 94.
18. G. Molisa; M. Tahi; H. Lini Leo. [Country Paper, Vanuatu] presented at the *Women and Law Seminar*, Fiji Women's Rights Movement and the International Commission of Jurists, Fijian Hotel, Sigatoka, Fiji, April 1994.
19. M. Dodds (ed.) *Family law textbook*. 16th ed. HLT Publications, 1994: 261.
20. Suva Magistrate's Court Maintenance Case 198/1989.
21. [1950] 1 All ER 832.
22. (1959) 7 FLR 28.
23. *Dunn v Dunn* [1948] 2 All ER 882.
24. *King v King* [1941] 2 All ER 103.
25. *Maintenance and Affiliation Act* (Fiji) Cap. 52 s. 6.
26. For example, the *Matrimonial Causes Act* (Fiji) Cap. 51 s. 4.
27. For example, the *Matrimonial Causes Act* (Fiji) Cap. 51. s. 28; *Cook Islands Amendment Act 1994* ss. 523A - 523F.
28. For example, the *Matrimonial Causes Act* (Fiji) Cap. 51 s. 47.
29. Supreme Court Civil Appeal 1/1972.
30. [1980] 1 WLR 1410 cited in Cretney and Masson (1990): 450.
31. [1984] 1 All ER 168 cited in Cretney and Masson (1990): 451.
32. Solomon Islands High Court Civil Case 249/1990.
33. Cretney and Masson (1990): 446-450.

Chapter 8 – Divorce

1. *Matrimonial Causes Act* (Vanuatu) Cap. 192 s. 4.
2. *Islanders Divorce Act* (Solomon Islands) Cap. 48 s. 4.
3. S. M. Cretney and J. M. Masson. *Principles of family law*. 5th ed. London: Sweet & Maxwell, 1990: 81-83.
4. Cretney and Masson (1990): 93.
5. *Crimes Act* (Western Samoa) s. 58A.
6. *Adultery and Fornication Act 1919* (Tonga) Cap. 21.
7. *Criminal Offences Act* (Tonga) Cap. 18 s. 117.
8. *Tonga Police Force Report* (1991): 120.
9. *Penal Code 1981* (Vanuatu) s. 97A, removed by the *Penal Code Amendment Act* No. 14 (1986). Vanuatu introduced its *Matrimonial Causes Act* also in 1986.
10. Vanuatu Nasonal Kansel blong ol Women. *Famili Loa Bill =Submissions on the Family Law Bill*. Port Vila: [National Council of Women, 1985]: 12.

11. P. I. Jalal. "Opinion." *Fiji Times* (16 June 1994).
12. *Matrimonial Causes Act* (Fiji) Cap. 51 s. 66.
13. *Matrimonial Causes* Act (Fiji) Cap. 51 s. 31.
14. *Islanders Divorce Act* (Solomon Islands) Cap. 48 s. 18
15. *Divorce Act* (Tonga) Cap. 29 s. 13 ; *Matrimonial Causes Act* (Vanuatu) Cap. 192 ss. 14-17.
16. *Surendra v Daya Wati (1976)* Fiji Supreme Court Division, Action 59/1976.
17. [1990] Tonga LR 18 Divorce Case 57/1990.
18. Supreme Court of Tonga (Divorce Jurisdiction) Divorce Petition 29/1991.
19. *Banja v Waiwo (1966) Vanuatu* Supreme Court Appeal Case 1/1996.
20. *Divorce Act* (Tonga) Cap. 29 s. 9.
21. Civil Action HBCO 585/1993.
22. See *Fisher v Fisher (1990) Vanuatu*, Supreme Court of Vanuatu Civil Case 114/1990.
23. *Matrimonial Causes Act* (Fiji) Cap. 51(1) s. 93; *Divorce Act* (Tonga) Cap. 25 s. 4(3); *Matrimonial Causes Act* (Vanuatu) Cap. 192, s. 9(3).
24. (1974) 20 FLR 75.
25. (1961) 7 FLR 177.
26. (1974) 20 FLR 75.
27. (1977) 23 FLR 77.
28. Privy Council Case 4/1985.
29. *Matrimonial Causes Act* (Fiji) Cap. 51 s. 14(b).
30. *Weatherly v Weatherly* [1947] AC 628.
31. High Court, Apia, August 1957.
32. *Matrimonial Causes Act* (Fiji) s. 15.
33. (1977) 23 FLR 86.
34. Fiji High Court Civil Appeal 7/1985.
35. *Matrimonial Causes Act 1973* (Nauru) s. 11.
36. *Pulford v Pulford* [1923] cited in Cretney and Masson (1990): 17.
37. [1949] AC 227 cited in M. Dodds (ed) *Family law casebook*. 15th ed. HLT Publications, 1994: 46.
38. [1964] 1 WLR 1085 cited in Cretney and Masson (1990): 117.
39. Nausori Magistrate's Court, Matrimonial Cause 27/1989.
40. *Matrimonial Causes Act* (Fiji) Cap. 51 s. 14(c).
41. Fiji Court of Appeal 4/1980. A similar decision was reached in *Vineeta v Nath*, Fiji Court of Appeal 31/1980.
42. Supreme Court Action 28/1980.
43. [1972] 1 WLR 236.
44. *Matrimonial Causes Act* (Fiji) Cap 51 s. 14(d).

45. *Rayden on divorce*. 7th ed. London: Butterworths, 1958: 111.
46. Court of Appeal 62/1980 ; Civil Appeal 306/1981.
47. [1982] SILR 1.
48. Supreme Court Civil Appeal 7/1985.
49. [1985/1986] SILR 204.
50. CRC 214/1990, High Court.
51. Civil Case 108/1992, High Court, Gizo.
52. High Court HC-CC154/1994.
53. "Survey tells cause of murder" and "Editorial". *Fiji Times* (13 September 1995). See also Mensah Adinkrah. *Violent encounters*. Suva: Fiji Council of Social Services & others, 1996.
54. Nausori Magistrate's Court Matrimonial Cause 27/1989.
55. Supreme Court of Vanuatu Civil Case 69/1996.
56. *Matrimonial Causes Act* (Fiji) Cap. 51 s. 14(e).
57. *Matrimonial Causes Act* (Fiji) Cap. 51 s. 14(f).
58. *Matrimonial Causes Act* (Fiji) Cap. 51 ss. 14(g)-(i): respectively: frequent criminal convictions; imprisonment; physical harm to the petitioner.
59. *Matrimonial Causes Act* (Fiji) Cap. 51 ss.14 (j)-(k): respectively: wilful failure to maintain; failure to comply with restitution of conjugal rights.
60. *Matrimonial Causes Act* (Fiji) Cap. 51 ss.14 (l)-(n): respectively, insanity; separation; presumption of death.
61. High Court, Apia, August 1931.
62. Supreme Court of Western Samoa, 1969.
63. Court of Appeal 22/1977.
64. Privy Council Appeal 5/1985.
65. *Matrimonial Causes Act 1973* (Nauru) Act 21/1973 s. 8; *Matrimonial Proceedings Act* (Tuvalu) Cap. 21. s. 9.
66. *Matrimonial Proceedings Act 1963* (Cook Islands); *Matrimonial and Divorce Act* ((Kiribati) Cap. 60 s. 4.
67. *Matrimonial Causes Act 1973* (Nauru) Act 21/1973 s. 6.
68. A true story; the people concerned do not live in the region.
69. *Divorce Amendment Act 1988* ((Tonga) Act 39/1988 s. 3(1)(g).
70. Magistrate Moti Rai, Suva Domestic Court, *Fiji Times* (2 December 1989).
71. Jimmy Maiva, Registrar, District Court, Rarotonga, 1993.
72. Mere Pulea. *The family, law and population in the Pacific Islands*. Suva: Institute of Pacific Studies, USP, 1986: 138.
73. This section is based on Pelise Bokai and Jenny Hardy. [Kiribati Country Paper] *Regional Seminar on Women and the Law*, Fiji Women's Rights Movement and the International Commission of Jurists, Fijian Hotel, Sigatoka, Fiji, April 1994.
74. Pulea (1986): 137-139.

75. Solomon Islands High Court Registry, 1993.
76. Discussions with lawyers and others, Nuku'alofa 1993; 1986 to 1991 figures from *The Tonga Chronicle* (29 August 1991); 1992 figures from Tonga High Court Registry.
77. Based on discussions with the Public Solicitor's Office and *KAVAW* staff.
78. Pulea (1986): 137.
79. Western Samoa High Court Registry, 1993.
80. *Matrimonial Causes Act (Fiji)* Cap. 51 s. 4.
81. [1982] SILR 5.
82. *Matrimonial Causes Act* (Fiji) Cap. 51 s. 28; *Divorce Act* (Tonga) Cap. 29 s. 3(2).
83. High Court, Apia, 1972.
84. High Court, Apia.
85. Not their real names.
86. *Matrimonial Causes Act* (Fiji) Cap. 51 s. 25; *Matrimonial Causes Act* (Vanuatu) Cap. 48 s. 9(2-3)
87. (1974) 20 FLR 30.
88. Suva Magistrate's Court Divorce Case No. MDD O1690/1994.
89. *Matrimonial Causes Act* (Fiji) Cap. 51 s. 27; *Islanders Divorce Act* (Solomon Islands) Cap. 48
90. (1972) 18 FLR 41.
91. Solomon Islands High Court Civil Case 165/1993.
92. *Islanders Divorce Act* (Solomon Islands) Cap. 48 s. 8(2) proviso.
93. *Matrimonial Causes Act* (Fiji) s. 30; *Matrimonial Causes Act* (Nauru) Act 21/1973 s. 4; *Matrimonial Causes Act* (Vanuatu) Cap. 192 s. 6.
94. (1982) 28 FLR 1.
95. *Matrimonial Causes Act* (Fiji) Cap. 51 s. 23; *Matrimonial Causes Act* (Nauru) s. 14.
96. Fiji Court of Appeal Civil Appeal No 11/1978.
97. Justice Lindemayer. "The Australian Family Court". Discussions at the *2nd Fiji Legal Intensive*, Queensland Law Society, April 1995, Coral Coast, Fiji.

Chapter 9 – Custody, access and guardianship of children

1. Fiji Civil Appeal Case 1/1987.
2. *Hewer v Bryant* [1970] 1 QB 357.
3. Judith S. Wallerstein and Joan B. Kelly. *Surviving the break-up: how children and parents cope with divorce*. London: Grant McIntyre, 1980: 77.
4. J. Brophy and C. Smart (eds). *Women in law: explorations in law, family and sexuality*. London: Routledge & Kegan Paul, 1985: 6.
5. [1862] 2 Sw and Tr 642, 164 ER.

6. "Whose child? Custody of children in New South Wales 1854-1934", in J. Mackinolty and H Raid (eds) *In pursuit of justice: Australian women and the law 1788-1979*. Sydney: Allen & Unwin, 1989: 129-130.
7. Cited by J. A. Scutt. *Women and the law: commentary and materials*. Sydney: Law Book Co. 1990: 277-230.
8. *Infants Custody Act (1839)* United Kingdom.
9. Unreported, N.S.W. Supreme Court, Harvey J, 8 April 1924, cited by Scutt (1990): 279.
10. (1932) 3 FLR 148.
11. Fiji Supreme Court Civil Appeal 1/1972.
12. Fiji Civil Action HBCO585/1993.
13. Fiji Civil Appeal 18/1991.
14. *Lakhan v The Director of Social Welfare, the Attorney-General and Ors (1993) Fiji* Civil Action HBC0585/ 1993.
15. High Court of Fiji Civil Action 178/1993.
16. Fiji Civil Appeal 3/1984.
17. Wallerstein and Kelly (1980): 77.
18. Personal communication 1988.
19. S. M. Cretney and J. M. Masson. *Principles of family law*. 5th ed. London: Sweet & Maxwell, 1990: 520.
20. [1970] AC 668 at 710-711, cited in Cretney and Masson (1990): 520.
21. Court of Appeal Case 11/1984.
22. Tuvalu High Court Case 1/1996.
23. Solomon Islands High Court Civil Appeal Case 13/1982.
24. *Fisher v Fisher (1991)* to be discussed in the next section.
25. Suva Magistrate's Court Divorce Action 243/1989.
26. [1966] Family LR NSW 460.
27. Court of Appeal Appeal Case 1/1991.
28. Solomon Islands High Court Civil Case 182/1994.
29. Magistrate's Court Miscellaneous Action 10/1993; referred to as the *Gounder* case.
30. Suva Magistrate's Court Matrimonial Cause MAD 0067/1994(S).
31. We will discuss this case more fully in the next section.
32. Cretney and Masson (1990): 521.
33. Suva Magistrate's Court Matrimonial Cause 408/1991.
34. (1979) 144 CLR 513 at 520.
35. (1983) 4 Family LR 492 cited in *Justice of the Peace* (8 September 1984).
36. Supreme Court of Tonga Divorce Jurisdiction Nuku'alofa, Divorce Case 39/1988.
37. Court of Appeal Appeal 17/1991.
38. *Guardianship of Children Act 1975* (Nauru) s. 33.

39. Court of Appeal Case 11/1984.
40. Magistrate's Court Matrimonial Cause 277/1984.
41. High Court Civil Case 19/1991.
42. Suva Magistrate's Court Maintenance Case 125/1993.
43. Magistrate's Court Miscellaneous Action 10/1993.
44. Supreme Court of Western Samoa Apia, August 1979.
45. Suva Magistrate's Court Divorce Case 19/1986.
46. High Court of Fiji Civil Action 2/1992.
47. Scutt (1990): 284.
48. *Matrimonial Causes Act* (Fiji) Cap. 51 ss. 86, 87(1)(l)(1).
49. Bible. Proverbs 15, Verse 17.
50. *B v B (1962)* cited by N. Naffine: *Law and the sexes: explorations in feminist jurisprudence.* London: Allen & Unwin, 1990: 142.
51. [1977] 2 Family Law Reform Reports 1657.
52. Suva Domestic Court unwritten judgment, 1988.
53. Suva Magistrate's Court Miscellaneous Cause 27/1994.
54. (1975) 21 FLR 122.
55. Personal communication 1993.
56. [1990] Tonga LR 18; Divorce Case 57/1990.
57. Supreme Court Appellate District of Vava'u Registry Appeal 15/1990.
58. Supreme Court of Tonga Divorce Case 141/1991.
59. Unless otherwise stated, this section is based on personal observations and discussions in these countries in 1993; there may have been changes since then.
60. Reported in *The Samoa Times* (13 March 1992).
61. Barbara Hart. "State codes on domestic violence: analysis, commentary and recommendations." *Juvenile and Family Court Journal*, 43 (4)1992: 7 cited in *The Complete Lawyer* (Magazine of the American Bar Association) 12 (1) Winter 1995.
62. Reported in the United Kingdom publication *The Magistrate* (November 1995).
63. For example, in *Smythe v Smythe (1983) Australia* 91 FLC 337.
64. (1979) 144 CLR 513.
65. High Court Civil Appeal 73/1981.
66. Unless otherwise stated, this section is based on personal observations and discussions in these countries in 1993; there may have been changes since then.
67. *Customs Recognition Bill 1993.* In late 1996 it had not been presented to the Solomon Islands Parliament. (Discussions with Jennifer Corrin Care regarding her "Solomon Islands." *Asia Pacific Constitutional Yearbook 1994.* Carlton: Centre for Comparative and Legal Studies, 1996: 223-224).
68. [1982] SILR 12.

69. [1983] SILR 222; reasons for, and consequences of, bride price payment are examined by Alice Pollard: "Solomon Islands" in *Pacific women: roles and status of women in Pacific societies*. Suva: Institute of Pacific Studies, USP, 1988:43.

70. [1985] SILR 49.

71. [1987] SILR 91.

72. Public Solicitor's Office files 1991.

73. *Noel v Toto (1995) Vanuatu* Supreme Court, Luganville, Santo Case 18/1994; *Banja v Waiwo (1966) Vanuatu* Supreme Court Appeal Case 1/1996.

74. *Maintenance and Affiliation Act* (Fiji) s. 32.

75. Civil Case 74/1989.

76. *Sachin Deo v Brij Bhan Singh and Aruna Devi* High Court of Fiji Civil Appeal 18/1991.

77. Discussions with Inspector Piho Rua, Rarotonga, 1993.

78. *Guardianship of Children Act 1973; Family Court Act 1975* ss. 20-21.

79. Discussion in Apia 1993.

80. Public Solicitor's files 1993; *R P's case (1989)* is a good example.

81. Civil Case 297/1991.

82. Personal communication Honiara, 1993.

83. Public Solicitor's files 1993.

84. Suva Magistrate's Court Miscellaneous Cause 27/1994.

85. Civil Appeal 3/1984.

86. *Magistrate's Court Act*, Fiji Cap. 14 s. 16 (1)(e).

87. Personal communication Apia 1993.

88. [1922] 2 Family LR 332.

89. Civil Action 33/1984.

90. Civil Appeal 18/1991; known also as the *Baby Dixit case*.

91. Civil Action 17/1989 based on a British case, *Re Thain* [1926] 1 Ch. 676.

92. Civil Action HBCO585/1993; known as the *Baby N* case.

93. High Court, Rarotonga DP1/1995. We have already discussed Tongan cases involving taking children abroad: *Bailey v Bailey (1988); Bennet v Aigner (1991)*.

94. [1982] SILR 85.

95. Suva Magistrates' Court Miscellaneous Action 10/1993.

96. Civil Action No 482/1992 Suva High Court.

97. Suva Magistrates' Court Matrimonial Cause 330/1992.

98. *Parental child abduction*, United States Dept of State Bureau of Consular Affairs, August 1993.

99. Except where otherwise stated, this section is based on research by P. I. Jalal. *A look at the children of divorce*. Unpublished LLM paper, University of Auckland, 1983.

100. Wallerstein and Kelly (1980): 38.

101. *Matrimonial Causes Act* (Fiji) ss. 76-78.

Chapter 10 – Maintenance for married women and legitimate children

1. *Women of Fiji: a statistical gender profile* [compiled by Heather Booth] Suva: Department of Women and Culture, 1994: 12, 57.
2. Judicial Department. *Annual Report 1984-1992*, Parliament of Fiji (Parliamentary Paper No. 22, 1994).
3. Suva Magistrate's Court figures courtesy of Magistrate E Sauvakacolo, Domestic Court, Suva.
4. Solomon Islands. Public Solicitor's Office. *Annual Reports* (1986 to 1990).
5. This information is based on two sources: M. Moengangongo. "Tonga: legal constraints and social potentials." in *Land rights of Pacific women*. Suva: Institute of Pacific Studies, USP, 1986: 86; and "The status of women in Tonga." Country overview paper for the *South Pacific Regional Seminar on the United Nations Convention on the Elimination of all Forms of Discrimination against Women*, sponsored by the United Nations, and the Governments of Australia and New Zealand [held in Cook Islands, March 1991] (SPS/CEDAW/1991.WP4, draft) 145.
6. Discussions with Steven Bani, Efate Island Court, 1993.
7. Vanuatu Women's Centre. *Annual Report* (1994).
8. *Affiliation, Separation and Maintenance Amendment Act* 13/1992 (Solomon Islands) s. 11.
9. *Cook Islands Act 1915* ss. 547-542.
10. *Maintenance and Affiliation Act* (Fiji) Cap. 52 s. 14.
11. (1978) 24 FLR 137.
12. s. 2(1)(e).
13. Not their real names. Case from Public Legal Advisor's files, Social Welfare Dept, Suva, 1990.
14. *Porotesano Soavele v The Maintenance Officer on behalf of Liliolevao Tauiliili (1993) Western Samoa*. Supreme Court, Apia, MIS15431/1993.
15. *Maintenance and Affiliation Act* (Fiji) Cap. 52 s. 6.
16. *Affiliation, Separation and Maintenance Act* No. 8, 1971 and Amendment 13,1992 (Solomon Islands).
17. *Cook Islands Act 1915* s. 541; *Maintenance and Affiliation Act 1967* (Western Samoa).
18. *Maintenance and Affiliation Act 1967* (Western Samoa) s. 56.
19. Western Samoa. Supreme Court, Apia, MIS 15431/1993, cited above.
20. *Affiliation, Separation and Maintenance Amendment Act* 13/1992 (Solomon Islands) s. 11.
21. (1961) 7 FLR 28.
22. Suva Magistrate's Court Maintenance Case 198/1989.
23. *Maintenance of Family Act* (Vanuatu) Cap. 42 ss. 1(a); 2.
24. Port Vila Magistrate's Court Civil Case 17/1996; Supreme Court Civil Appeal 7/1996.

25. *Maintenance and Affiliation Act* (Fiji) Cap. 52 s. 7; *Affiliation, Separation and Maintenance Amendment Act* 13/1992 (Solomon Islands) s. 14(2); *Maintenance of Deserted Wives Act* (Tonga) Cap. 31; the *Maintenance of Wives and Children Ordinance 1959-1967* (Nauru) s. 5(6) says that if a wife is a drunk or has committed adultery she is not entitled to maintenance.
26. *Maintenance and Affiliation Act* (Fiji) Cap. 52 ss. 7, 8.
27. Judicial Department. *Annual Report* (1984 to 1992).
28. Civil Appeal 12/1972, Supreme Court Civil Appeal 40/1973 Court of Appeal.
29. *Maintenance and Affiliation Act* (Fiji) Cap. 52 s. 4c; *Matrimonial Causes Act* (Fiji) Cap. 51 s. 84(3).
30. *Matrimonial Causes Act* (Fiji) Cap. 51 s. 84(3).
31. *Maintenance and Affiliation Act 1967* (Western Samoa) s. 14.
32. [1980-1993] 2 WSLR 407 (Supreme Court Apia 9 May 1991) and 491 (Court of Appeal 6 May 1992).
33. Solomon Islands High Court Civil Case 213/1990.
34. Data from Fiji National Food and Nutrition Council, 1994.
35. M. Dodds. *Family law textbook*. 16th ed. HLT Publications, 1994: 119.
36. Magistrate's Court Nausori Matrimonial Cause 29/1990.
37. *Income Tax Act* (Fiji) Cap. 201 s. 11(n).
38. *Maintenance and Affiliation Act* (Fiji) s. 4(c).
39. *Matrimonial Proceedings Act 1963* (NZ) for Cook Islands; *Maintenance and Affiliation Act 1967* (Western Samoa) ss. 16-17.
40. For example the *Maintenance and Affiliation Act* (Fiji) s. 15(3).
41. [1955] 3 WLR 72; [1955] 2 All ER 617.
42. High Court Civil Case 213/1990.
43. (1971) 17 FLR 15.
44. S. M. Cretney and J. M. Masson. *Principles of family law*. 5th ed. London: Sweet & Maxwell, 1990: 397-398.
45. *Family Law Act 1975* (Australia) s. 75, discussed by J. A. Scutt. *Women and the law, commentary and materials*. Sydney: Law Book Co., 1990: 310.
46. Supreme Court Apia MIS 15431/1993, referred to above.
47. (1967) 13 FLR 115.
48. High Court Civil Appeal 11/1992.
49. Court of Appeal Action 21/1993.
50. [1977] 3 WLR 101 Court of Appeal, cited by Dodds (1994) 117-118.
51. [1980] 1 All ER 126 Court of Appeal, cited by Dodds (1994) 118-119.
52. Based on the following sources: P. I. Jalal. "The urban woman, victim of a changing social environment." in L. R. Va'a and J. Teaiwa (eds) *Environment and Pacific women: From the globe to the village*. Suva: Fiji Association of Women Graduates, Proceedings of the Biennial Convention, University of the South Pacific, 1988; *Women of Fiji: a statistical gender profile* (1994): 57; Judicial Department. *Annual Report* 1984-1992; Magistrate E Sauvakacolo, Domestic Court, Suva.

53. Discussions with Tirangi Bartlett 1993.

54. Based on the *Maintenance and Affiliation Act 1967* (Western Samoa) Cap 52 ss. 36, 38, and Maintenance Office files 1993.

55. Based on discussions with Steven Bani, Efate Island Court, Vila and *Kavaw* members 1993.

56. Discussions with David Lea'amanu 1993.

57. Not their real names; based on Maintenance Office files Western Samoa 1993.

58. Magistrate's Court Matrimonial Cause 169/1990; High Court Matrimonial Cause 7/1992.

59. Tonga Supreme Court Divorce Case 141/1991.

60. *Maintenance and Affiliation Act 1967* (Western Samoa) s. 53.

61. (1978) 24 FLR 121.

62. Under the *Maintenance and Affiliation Act* (Fiji) Cap. 52 and the *Maintenance (Prevention of Desertion and Miscellaneous Provisions) Act* (Fiji) Cap. 53 s. 23.

63. *Maintenance (Prevention of Desertion and Miscellaneous Provisions)* (Fiji) Cap. 53 s. 23.

64. For example: *Maintenance Orders (Facilities for Enforcement) Act* (Fiji) Cap. 54; *Maintenance Orders (Facilities for Enforcement) Act* (Solomon Islands) Cap. 10; *Reciprocal Enforcement of Judgment Act 1970* (Western Samoa); *Maintenance Orders (Reciprocal Enforcement) Act 1973* (Nauru).

65. (1957) 5 FLR 90.

66. Maintenance Office files Apia 1993.

67. *Women of Fiji* (1994): 63.

68. *Maintenance and Affiliation Act 1967* (Western Samoa) s. 49.

69. *Magistrates' Courts Act* (Solomon Islands) s. 22 (g).

70. *Maintenance of Wives and Children Ordinance 1959-1967* (Nauru) s. 11(5).

71. *High Court Rules* (Fiji) Order 52; *Cook Islands Act* s. 553.

72. Civil Appeal 6/1991; judgment given in 1992.

73. High Court Divorce Action 3/1987.

74. For example, *Maintenance (Miscellaneous Provisions) Act* (Kiribati) Cap. 53; *Magistrate's Court Act* (Tonga) Cap. 11 s .27; *Maintenance and Affiliation Act 1967* (Western Samoa) ss. 77-79.

75. Maintenance Office File M/3850/1990.

76. Vanuatu National Council of Women. *Famili Loa Bill.* Port Vila: VNCW, 1985: 21.

77. For example, *Maintenance and Affiliation Act* (Fiji) Cap. 52 s. 27.

78. *Maintenance (Prevention of Desertion and Miscellaneous Provisions) Act* (Fiji) s. 21.

79. *Maintenance (Prevention of Desertion and Miscellaneous Provisions) Act* (Fiji) s. 12; *Islanders Divorce Act* (Solomon Islands) Cap. 48 s. 20, *Affiliation, Separation and Maintenance Amendment Act* 13/1992 (Solomon Islands); *Enforcement of Judgments (Payments from Wages) Act* (Tuvalu) s. 94; *Maintenance of Wives and Children Ordinance 1959-1967* (Nauru) s. 8; *Maintenance and Affiliation Act* (Western Samoa) s. 37.

80. *Maintenance and Affiliation Act 1967* (Western Samoa) s. 37.

81. *Debtors Act* (Fiji) Cap. 32 s. 4; *Postulka v Postulka (1987) Fiji.*

Chapter 11 – Matrimonial property

1. *Matrimonial Causes Act* (Fiji) Cap. 51 s. 89.
2. United Nations Women's Convention Articles 15(1) and 16(1)h.
3. *Kennedy v Kennedy (1977) Fiji* High Court, Suva, Matrimonial Cause No. 229/1977.
4. Supreme Court Civil Case 114/ 1990; Court of Appeal, Appeal Case 1/1991.
5. Personal communication, 1993.
6. (1987) SILR 91.
7. (1987) 31 FLR 109; Court of Appeal Civil Appeal 29/1985.
8. *Divorce Act* (Tonga) Cap. 29 s. 15.
9. *Divorce Amendment Act 1988* (Tonga) No 39/1988.
10. See discussion in Chapter 9 based on J. A. Scutt. *Women and the law: commentary and materials*. Sydney: Law Book Co, 1990: 277-230.
11. Scutt (1990): 207.
12. *Mohammed Farouk v Shahnaaz Begum (1986) Fiji* Supreme Court, Labasa, Miscellaneous Cause 25/1986.
13. *Aisha Bi v Mohammed Fida Hussein (1995) Fiji* High Court, Labasa, Civil Appeal 0004/ 1994.
14. *Matrimonial Causes Act* (Fiji) Cap. 51 s. 89.
15. Supreme Court Miscellaneous Cause 25/1986.
16. *Janson v Janson (1994) Fiji* High Court, Divorce Action 0005/1994.
17. *Shahudin Nisha v Mohammed Ashraf Ali (1992) Fiji* High Court Civil Appeal 11/1992.
18. Court of Appeal Civil Appeal 49/1983.
19. We are unable to provide the reference to this case, because it was never completed.
20. Based on *Occupation housewife*, an undated flyer published by NSW Women's Advisory Council, Australia.
21. *Women of Fiji: a statistical gender profile* [compiled by Heather Booth] Suva: Department of Women and Culture, 1994.
22. Cited above. The Court could have protected Shahudin's home by ordering a specific deed executed under Section 87(d) of the *Matrimonial Causes Act*.
23. *Affiliation, Separation and Maintenance (Amendment) Act 1992* (Solomon Islands) s. 17(C) Amendment 13/ 1992; *Cook Islands Amendment Act 1994* (Cook Islands) ss. 523G-523H.
24. Court of Appeal Action 21/1993.
25. [1965] 2 All E R 472.
26. *Martin v Martin* [1977] 3 WLR 101; *Mesher v Mesher* [1980] 1 All E R.
27. H. Insall. *Trusts*. (LBC nutshell sries) 2nd ed. Sydney: Law Book Co.1991: 89-90.
28. [1970] AC 777.
29. [1971] AC 886.
30. Civil Action 92/1977.

31. Court of Appeal Civil Appeal 29/1985.
32. *Rathwell v Rathwell* [1978] ALR (3rd.) 289.
33. Supreme Court Tonga Probate Case 11/1988.
34. Based on Public Solicitor's Office files, 1993; names have been changed.
35. (1923–1962) 2 Tonga LR 208.
36. Suva Magistrate's Court Matrimonial Cause 7/1980.
37. Supreme Court Lautoka Civil Action 55/1982.
38. High Court Civil Case 248/1990.
39. (1985) 31 FLR 109.
40. High Court Civil Case 40/1989.
41. Supreme Court Divorce Case 22/1985; judgment in 1989.
42. Vanuatu Spreme Court Civil Case 114/1990; Court of Appeal Appeal Case 1/1991.
43. [1973] 1 All ER 829.
44. (1967) 13 FLR 115.
45. High Court Honiara Civil Case 215/1990.
46. High Court Suva Divorce Action 2/1992.
47. M. Mitchell. *Cook Islands Periodic Report on the International Covenant on Civil and Political Rights, 1992* :10 (unpublished).
48. *Panui* (Ministry of Women, New Zealand).
49. "Fair shares: the law of matrimonial property." *New Zealand Department of Justice Family Law Series Booklet* 8: 1-7.
50. *Hanlon v The Law Society* [1981] AC 124, 146.
51. *Australian Family Law Act 1975 with Regulations and Rules*. 5th Ed. Sydney: CCH Australia, 1986 (Up to date to 3 February 1986.) The summary of need factors is based on Section 79 (2).
52. United Nations Women's Convention Articles 15(1) and 16(1)h.

Chapter 12 – De facto relationships, affiliation and natural children

1. New South Wales Law Reform Commission (1983). "Report on *de facto* relationships." in J. A. Scutt. *Women and the law: commentary and materials*. Sydney: Law Book Co. 1990: 223.
2. These names are invented.
3. S. M. Cretney and J. M Masson. *Principles of family law*. 5th. ed. London: Sweet & Maxwell, 1990: 477.
4. Based on fact, names invented.
5. *Legitimacy Act* (Tonga) Cap. 32.

6. [1969-1982] B Nauru LR 151; Land Appeal Case 6/1981.
7. [1985/1986] SILR 132; High Court Civil Case 83/1985.
8. High Court Santo Case 18/1994 (19 April 1995).
9. Tuvalu and Kiribati both: *Maintenance (Miscellaneous Provisions) Act* Cap. 4.
10. Court of Appeal Case 229/1984.
11. *Cook Islands Amendment Act 1994.*
12. *Fiji Times* (16 September 1993).
13. The status of women in Tonga." Country overview paper for the *South Pacific Regional Seminar on the United Nations Convention on the Elimination of all Forms of Discrimination against Women*, sponsored by the United Nations, and the Governments of Australia and New Zealand [held in Cook Islands, March 1991] (SPS/CEDAW/1991.WP4, draft).
14. *Widows and Orphans Pension Act* (Fiji) Cap. 80 s. 2.
15. *Maintenance and Affiliation Act* (Fiji) Cap. 52 ss. 22-23.
16. High Court Civil Appeal Case 1/1987.
17. Public Solicitor's Office files, 1993.
18. *Separation Maintenance and Affiliation Act* (Solomon Islands) No. 8(1971) s. 8(4).
19. Civil Appeal Case 13/1992.
20. *Guardianship of Children Act 1957* (Nauru) ss. 6-7.
21. *Cook Islands Act 1915* s. 549.
22. Personal communication, People's Lawyer, 1993.
23. Judicial Department. *Annual Report 1984-1992* (Parliament of Fiji, Parliamentary Paper 22, 1994).
24. *Maintenance and Affiliation Act* (Fiji) Cap. 52 s. 16.
25. *Maintenance of Illegitimate Children Act* (Tonga) Cap. 30 ss. 2-4.
26. *Maintenance Ordinance 1959* (Nauru); *Maintenance of Children Act* (Vanuatu) Cap. 46 ss. 2-4.
27. High Court Lautoka Civil Appeal 3/1984.
28. High Court Lautoka Civil Appeal 6/1982.
29. *Maintenance of Children Act* (Vanuatu) Cap. 46 s. 4(a), s. 6(5).
30. *Maintenance and Affiliation Act* (Fiji) Cap. 52 s. 17; *Affiliation Separation and Maintenance Act* (Solomon Islands) s. 4.
31. For example: *Maintenance and Affiliation Act* (Fiji) s. 18; *Cook Islands Act 1915* s. 546; *Maintenance Ordinance 1959* (Nauru) s. 6; *Affiliation, Separation and Maintenance Act* (Solomon Islands) s.5; *Maintenance of Illegitimate Children Act* (Tonga) s.6; *Maintenance of Children Act* (Vanuatu) s. 3; *Maintenance and Affiliation Act 1967* (Western Samoa) s. 10(2).
32. *Maintenance and Affiliation Act* (Fiji) s. 18.
33. *Evidence Act 1926* (Tonga) ss. 27-28.
34. *Maintenance of Illegitimate Children Act* (Tonga) s. 13.
35. *Maintenance of Children Act* (Vanuatu) s. 3.

36. The story and names are invented.

37. *Maintenance and Affiliation Act* (Fiji) Cap. 52 s. 18.

38. See for example *Maintenance and Affiliation Act* (Fiji) s. 18; *Maintenance of Illegitimate Children Act* (Tonga) Cap. 30 s. 3(2); *Native Lands Act* (Tuvalu) Cap. 22 s. 20(2)(iii); *Maintenance of Children Act* (Vanuatu) Cap. 46. s. 5(1).

39. High Court Suva Civil Appeal 15/1990.

40. [1985/1986] SILR 209.

41. Cretney and Masson (1990) 498 quoting the *Births and Death Registration Act 1953* s. 43(2).

42. Names unavailable; judgment 4 August 1983 by Magistrate Moti Rai.

43. [1951] AC 391.

44. Suva Magistrate's Court (Domestic) Affiliation Case 60/1991.

45. We are grateful to Dr. Wame Baravilala (Consultant Obstetrician and Gynaecologist, Colonial War Memorial Hospital, Suva, Fiji) for supplying this data from the survey carried out on 3 January 1996.

46. Legislation in *Family Law Reform Act 1987* (United Kingdom) s. 23; refusal in *S v S, W v Official Solicitor United Kingdom* [1972] AC 24.

47. [1988] 2 All ER 500.

48. (1974) 20 FLR 70; Fiji Supreme Court Case Civil Appeal 229/1975 ; Court of Appeal 1976.

49. High Court Lautoka Civil Appeal 13/1978.

50. Fiji High Court Civil Appeal 3/1983.

51. High Court Lautoka Civil Appeal 20/1982.

52. *C v C* [1972] 3 All E R 577; *Hussain Bibi v Mohammed Aziz (1976) Fiji* High Court Lautoka Civil Appeal 7/1976.

53. Magistrate's Court Lautoka Affiliation Case 28/1983.

54. High Court Lautoka Civil Appeal 8/1984.

55. Suva Magistrate's Court (Domestic) Affiliation Case 96/1984.

56. Nausori Magistrate's Court Affiliation Case 47/1991.

57. Personal knowledge.

58. *Maintenance of Children Act* (Vanuatu) Cap. 46 s. 4(a).

59. High Court Lautoka Civil Appeal 7/1976.

60. High Court Lautoka Civil Appeal 11/1977.

61. Court of Appeal Civil Appeal Case 308/1982.

62. High Court Suva Civil Appeal 15/1990.

63. *Maintenance and Affiliation Act* (Fiji) Cap. 52 s. 18(2).

64. *Maintenance and Affiliation Amendment Act* (Fiji) Act 4/1986

65. *Magistrates' Court Act* (Kiribati) Cap. 52 s. 65; *Native Lands Act* (Tuvalu) Cap. 22 s. 20; *Maintenance of Children Act* (Vanuatu) s. 5(1); *Maintenance of Illegitimate Children Act* (Tonga) Cap. 30.

66. *Affiliation, Separation and Maintenance Act* (Solomon Islands) s. 5(4).

67. Data from Public Solicitor's Office files, 1993.

68. [1988/1989] SILR 22.

69. High Court Honiara Civil Case CC 247/91 (5 Dec. 1991).

70. For example, *Maintenance and Affiliation Act* (Fiji) s. 20.

71. [1985/1986] SILR 39.

72. *Affiliation, Separation and Maintenance Act* (Solomon Islands) s. 7, amended by Amendment 13/1992, s. 4.

73. Public Legal Adviser's files, Social Welfare Department 1990.

74. For example, *Maintenance (Prevention of Desertion and Miscellaneous Provisions) Act* (Fiji) Cap. 53 ss. 12-20.

75. High Court Suva Civil Appeal Case 157/1981; Court of Appeal 3/1983.

76. *Cook Islands Act* s. 567; *Maintenance of Illegitimate Children Act* (Tonga) Cap. 30 s. 8.

Chapter 13 – Women and work

1. 'Atu Emberson-Bain and Claire Slatter. *Labouring under the law*. Suva: Fiji Women's Rights Movement, 1995 and *Women of Fiji, a statistical gender profile* [compiled by Heather Booth and others] Suva: Department of Women and Culture, 1994.

2. *The Macquarie dictionary*. New budget edition. Sydney: The Macquarie Library, 1985.

3. [1979] 1 NSWLR 723 cited in Regina Graycar and J. Morgan. *The hidden gender of the law*. Sydney: Federation Pr., 1990: 76.

4. [1990] Tonga LR 18; Divorce Case 57/1990.

5. [1952] AC 716.

6. This section is based on the *Household economic activities survey* and other data cited in *Women of Fiji: a statistical gender profile* (1994):12,15, and in Emberson-Bain and Slatter (1995): 1-4.

7. *Fiji Business Review* (August 1993).

8. Based on the following publications: "The status of women in the Cook Islands." Country overview paper for the *South Pacific Regional Seminar on the United Nations Convention on the Elimination of all Forms of Discrimination against Women*, sponsored by the United Nations, and the Governments of Australia and New Zealand [held in Cook Islands, March 1991] (SPS/CEDAW/1991. WP4: 5-8): 12; and Heather Booth: *Cook Islands: a statistical profile on men, women and children*, prepared for the UNDP/UNIFEM Pacific Mainstreaming Project and the UNICEF Pacific Office. [Suva: UNDP, 1989] (PMI/89/W01): 2-4.

9. Based on the following publications: *Situation of children and women in Kiribati*. [Suva] Govt. of Kiribati and UNICEF, 1991: 35; Jenny Hardy. "The legal status of women in Kiribati." Paper presented to the *Pacific Women and the Law Seminar*, International Commission of Jurists and the Fiji Women's Rights Movement, The Fijian Hotel, April, 1994.

10. "The status of women in Nauru." Country overview paper for the *South Pacific Regional Seminar on the United Nations Convention on the Elimination of all Forms of Discrimination against Women*, (SPS/CEDAW/1991. WP4:5-8): 104-105.

11. "The status of women in Solomon Islands." Country overview paper for the *South Pacific Regional Seminar on the United Nations Convention on the Elimination of all Forms of Discrimination against Women*, (SPS/CEDAW/1991. WP4, draft): 125.

12. [The legal status of women in Tonga] Paper presented to the *Pacific Women and the Law Seminar* (1994).

13. "Education for life: a review of the manpower, education and training needs of Tuvalu." Quoted in Heather Booth. *Tuvalu: a statistical profile on men, women and children*. Prepared for the UNDP/UNIFEM Pacific Mainstreaming Project and the UNICEF Pacific Office. [Suva: UNDP, 1989] Statistics also are from Booth.

14. *Situational analysis of women in Vanuatu*. Suva: Government of Vanuatu and UNICEF, 1991: 52-54.

15. "The status of women in Western Samoa" Country overview paper for the *South Pacific Regional Seminar on the United Nations Convention on the Elimination of all Forms of Discrimination against Women*, (SPS/CEDAW/1991): 208-210.

16. "UNIFEM Pacific Mainstreaming Project." *Fiji Times* (25 November 1992).

17. *Employment Act* (Vanuatu) Cap. 160 ss. 8, 13(1), 22.

18. Emberson-Bain and Slatter (1995).

19. *Employment Act* (Fiji) Cap. 92 ss. 65, 102; *Employment Ordinance* (Kiribati) Cap. 30 ss. 77-79; *Public Service Act 1961 - 1971* (Nauru) s. 61; *Employment Act* (Tuvalu) Cap. 84 Pt. VIII ss. 77-79; *Employment Act* (Vanuatu) Cap. 160 s. 35; *Labour and Employment Act 1972* (Western Samoa) s. 33.

20. Summary of a statement by Taufa Vakatale, Minister of Education, reported by R. Matau and V. Vakalalabure: "Women get okay to work at night." (*Fiji's Daily Post*, May 15, 1996: 2).

21. Within Parliament, Shiu Chand, reported in *Fiji's Daily Post* (15 May 1996):2; outside Parliament, Attar Singh, quoted by Penny Baba, *Fiji Times* (2 June 1996): 2.

22. "Question: should women be allowed to work at night?" *Fiji's Daily Post* (16 May 1996): 8. In a random street interview of five women and three men, seven said no, for the reasons given in the text. The other, a man, said: "Yes: some women go dancing at night and find it's safe. So why not work and make some money?" During the debate, Senator Ro Seinimili Takiveikata is reported to have voted against the bill partly because "young children will not be looked after at night. They will turn to mischief and ... to crime and violence," and partly because going to and from night work would be dangerous for women. Senator Adi Finau Tabakaucoro abstained from voting "because she was in a dilemma." *Fiji Times* (11 June 1996): 4.

23. Senators William Yee and Filipe Bole, reported by Robert Matau in "Worry for women puts skids on work changes." and "Senator: let's work harder". *Fiji's Daily Post* (11 June 1996):3.

24. Emberson-Bain and Slatter (1995): 12-13.

25. *Employment Act* (Fiji) s. 9(1).

26. Personal observations, 1996.

27. Based on K. McNeill and others. "A new phase for equal pay." *Australian Society* (January 1986).

28. Emberson-Bain and Slatter (1995):21-22.

29. Statement by Emma Druavesi, Fiji Trades Union Congress, *Fiji Times* (12 May 1994).

30. "The status of women in Tonga". Country overview paper for the *South Pacific Regional Seminar on the United Nations Convention on the Elimination of all Forms of Discrimination against Women* (SPS/CEDAW/1991. WP4, draft): 157.

31. *Fiji Government Leave Regulations* 1972 s. 18.

32. *Employment Act* (Fiji) Cap. 92 ss. 74-75.

33. Emberson-Bain and Slatter (1995): 72-73; *Employment Act* (Fiji) Cap. 92.

34. *Employment Act* (Tuvalu) Cap. 80 s. 84; *Employment Ordinance* (Kiribati) Cap. 30 s. 80 and Kiribati Government *National Conditions of Service* f. 38-39; *Labour Act* (Solomon Islands) Cap. 75 s. 80.

35. *Civil Service Regulations 1987* (Tonga).

36. *Labour Act* (Solomon Islands) Cap. 75, s. 80(5).

37. Personal communication, 1993-4.

38. Emberson-Bain and Slatter (1995) commenting on the *Workmen's Compensation Act*, Cap. 94.

39. "Status of women in Tonga" (1991): 157.

40. *Public Service Act 1961 - 1971* (Nauru) s. 61.

41. Supreme Court of Nauru Civil Action 2/1993.

42. E. C. Landau: "Conciliation as a mode of settlement of discrimination complaints." *Adelaide Law Review*, 11(1988): 257. Cited by Beth Gaze and Melinda Jones: *Law, liberty and democracy in Australia*. North Ryde: Law Book Co., 1990:402.

43. Based on the editor's public service experience, 1953-1970.

44. Jocelyn Scutt. *Women and the law: commentary and materials*. Sydney: Law Book Co., 1990.

45. EOC 92-002, cited in Scutt (1990): 45.

46. Scutt (1990): 50.

47. Cited by Scutt (1990).

48. *Sex Discrimination Act 1984* (Australia).

49. Based on the editor's experience, South Australia, early 1950s.

50. Cited by Scutt (1990): 61. For the unsuccessful appeals see *Australian Iron and Steel v Najdovska (1988)* 12 NSWLR 587, and a similar case *Australian Iron and Steel v Banovic (1990)* 64 AJLR 53.

51. C. Carter. *Sexual harassment*. Suva: Fiji Women's Crisis Centre, 1992: 1-2.

52. Praveen Sharma. *Sexual harassment*. Suva: Fiji Women's Rights Movement, 1995, reproduced in *The Fiji Times* (23, 30 March 1995).

53. Sharma (1995); the following analysis and recommendations are also based on that material.

54. *Agender*, the Australian Sex Discrimination newsletter, noted in *The Fiji Times* (19 May 1994).

55. Sharma (1995).

56. An edited version of material from the *Affirmative action handbook* (Sydney: Government Printer, 1980) cited by Scutt (1990).

Chapter 14 – Women lawyers and legal aid for women

1. "Flotsam and Jetsam". *Fiji Times* (11 June 1996): 4.
2. Remark made to the author by a senior male lawyer in our region.
3. David Weisbrot. *Australian lawyers*. Melbourne: Longman Cheshire, 1990: 488.
4. See for example, Roman Tomasic: "Social organisation among Australian lawyers". *Australian and New Zealand Journal of Sociology*, 19 (1983): 447. More than a third of New South Wales and Victorian lawyers "reported that their fathers were also professionals," and about a third of lawyers had "legally qualified relatives". Cited by Julian Disney and others. *Lawyers*. 2nd ed. London: Sweet & Maxwell, 1986: 69-70.
5. J. A. Scutt. *Women and the law*. North Ryde: Law Book Co, 1990: 8. The case is noted also as *Bradwell v Illinois* 83 U.S.(16 Wall.) 130(1873) by Beth Gaze and M. Jones. *Law, liberty and Australian democracy*. North Ryde: Law Book Co., 1990: 399.
6. (1904) 6 WALR 209 at 213-214.
7. [1914] 1 Ch 286; (1913) 29 TLR 634.
8. Gaze and Jones (1990): 399.
9. Judge Jane Mathews: "The changing profile of women in the law". *Australian Law Journal*, 56(1982): 634. Cited by Disney and others (1986): 175-176.
10. In these discussions, we rely heavily on the following material (listed in chronological order).

    Julian Disney and others. *Lawyers*. 2nd ed. North Ryde: Law Book Co., 1986; Beth Gaze and Melinda Jones. *Law, liberty and Australian democracy*. North Ryde: Law Book Co., 1990; J. A. Scutt. *Women and the law*. North Ryde: Law Book Co., 1990; David Weisbrot. *Australian lawyers*. Melbourne: Longman Cheshire, 1990; Patricia Imrana Jalal. *Women in the legal profession in Sydney*. Unpublished research paper, Sydney University of Technology, 1991; Marlene Le Brun and Richard Johnstone. *The quiet (r)evolution: improving student learning in law*. North Ryde: Law Book Co., 1994.
11. Weisbrot (1990): 83-90.
12. Mathews (1982): 634.
13. Louise Steer. "Women in partnership". *Young Lawyers' News: Newsletter/Magazine of the Young Lawyers' Association* (1990): 1, 6-7.
14. Disney and others (1986): 30.
15. Mathews (1982) 634. How true is this prediction?
16. Cited by Weisbrot (1990): 90.
17. Weisbrot (1990): 80.
18. Faith A. Seidenberg. "The bifurcated woman: problems of women lawyers in the courtroom". *Canadian Journal of Women and the Law* (1985): 219-255.
19. Jalal (1991).
20. Marlene Le Brun in Le Brun and Johnstone (1994): 38.
21. Lynne Spender. *Intruders on the rights of men: women's unpublished heritage*. London: Routledge & Kegan Paul, 1983: 2.
22. Le Brun and Johnstone (1994):65 citing M. Thornton: "Women and legal hierarchy". *Legal Education Review* 1(1989): 97. They argue that traditional classroom styles may be inappropriate for students from non-European cultures.

23. Tables supporting the article "Chiefs to discuss education funding". *Fiji's Daily Post* (29 May 1966) 5.

24. These and the following figures were supplied by the University of the South Pacific's Law Department and Planning Office, June 1996.

25. Summarised conversations between the Foundation Professor of Law and the editor, 1996.

26. Notes on commentaries on Mathews (1982) summarised by Disney and others (1986): 180.

27. *An Act to Provide for a System of Legal Aid in Fiji*, Act 10/1996, 28 August 1996. Short title: *Legal Aid Act 1996* (Fiji).

28. *Public Solicitors Act 1987* (Solomon Islands) s. 92 (4) Legal Notice 30/1989.

29. [1988/1989] SILR 50, High Court.

30. *An Act to Make Better Provision for the Grant of Legal Aid to Poor Persons*. Short title *Legal Aid Act 1968* (Fiji) Cap. 15.

31. Disney and others (1986): 39-42.

32. *Commission of Inquiry on the Courts, 1994 (Beattie Commission)* [Suva: Govt. Printer, 1994] ; this covers all submissions discussed here. The report of the Great Council of Chiefs meeting is noted separately.

33. "Chiefs call for FAB legal unit". *Fiji Times* (31 May 1966): 2.

34. Fiji Women's Rights Movement, Women's Crisis Centre and Fiji Association of Women Graduates: Submission no 8 to the *Commission of Inquiry on the Courts, 1994 (Beattie Commission)* [Suva: Govt. Printer, 1994].

35. *Legal Aid Act 1996* (Fiji); the following sections, in this order: 4, 5, 6, 7, 13, 8.

Chapter 15 – Strategies for change

1. Hosted by the International Commission of Jurists and the Fiji Women's Rights Movement, and held at the Fijian Hotel, Fiji, April 1994.

2. Salma Sobhan. "Legal literacy and community development in Bangladesh: Bangladesh Rural Advancement Committee." in M. Schuler and S. Kadirgamar-Rajasingham (eds) *Legal literacy: a tool for women's empowerment*. UNIFEM Widbooks, 1992: 229.

3. M. Schuler (ed) *Empowerment and the law: strategies for Third World women*. Washington: OEF International, 1986: 21.

4. Schuler and Kadirgamar-Rajasingham (1992): 2.

5. " Women and the law". *International Women's Tribune Centre Newsletter*, 45 (July 1990).

6. Lynne Spender. *Intruders on the rights of men*. London: Routledge & Kegan Paul, 1983: 1-2.

7. "Women and the law." (July 1990).

8. ESCAP (United Nations Economic and Social Commission for Asia and the Pacific). *Guidelines on upgrading the legal status of women*. Bangkok, 1989.

9. Marlene Le Brun and Richard Johnstone. *The quiet (r)evolution: improving student learning in law*. North Ryde: Law Book Co., 1994: 227-11, offer practical advice on the use of "devices, computers and materials", as well as on "teaching methods which promote student learning." Although Le Brun and Johnstone are writing for teachers of formal law, their advice will be useful in informal legal literacy programmes.

10. Resource materials:

Cassidy, Rosemary (editor). *A Pacific directory of videos: women, fisheries, the environment*. Noumea: SPC, 1992. Lists pre-1992 Pacific videos on health, marriage, domestic violence and rape as well as on women in education, fisheries, agriculture, paid work and rural development.

Commonwealth Secretariat. *Training skills for women: tutors' manual*. London: Commonwealth Secretariat, 1984. A "how to teach it" manual focusing on leadership and communications skills.

Hill, Helen (compiler). *A reading guide on youth and development*. Suva: Commonwealth Youth Programme South Pacific Regional Centre, USP, [1988?] Lists books, reports and articles on Pacific development issues. Covers roles, community education techniques and communication techniques.

Jones, Adele M. E. *Developing materials with a Pacific focus for adult literacy projects*. Suva: Institute of Education, USP. 1991. Using newspapers, cartoons, comics, board games, drama and puppetry in projects to teach literacy in the English language, the language of formal law in our region.

Le Brun, Marlene and Richard Johnstone. *The quiet (r)evolution: improving student learning in law*. North Ryde, NSW: Law Book Co., 1994. Analyses defects in formal teaching of the law. Its extensive bibliography includes many references to race, class, gender and language issues in law teaching and practice.

Rokotuivuna, Amelia. *Working with women: a community development handbook for Pacific women*. Noumea: SPC, 1988 (SPC Handbook No. 29) Includes exercises on community organisations; community and personal attitudes; group dynamics; role, image and status of women; communication methods and devices.

South Pacific Commission. *Principles of extension and communication skills: a manual for fisheries extension officers of the Pacific Islands*. Noumea: SPC and ICOD, 1991 (SPC Handbook No. 30) Based on a training course attended mostly by men and produced mostly for male extension officers; includes adult education; public speaking; difficult situations; group dynamics; selling ideas; mass communication and visual aids; programme planning ; problem solving; surveys and reports.

South Pacific Community Nutrition Training Project. *Developing community nutrition programmes*. [by] Jacqui Badcock [and others]. Suva: [University Extension], USP, 1990. Section One: "Assessing, planning and developing a community programme" covers how to identify needs, set objectives, plan and carry out projects and evaluate results.

South Pacific Community Nutrition Training Project. *Making and using training materials*. [by] Diane Goodwillie [and others]. Suva: [University Extension], USP, 1990. Concentrates on devices for communicating ideas: identifying, selecting, preparing, testing, storing and use.

South Pacific Community Nutrition Training Project. Teaching *and learning about food and nutrition*. [by] Diane Goodwillie [and others]. Suva: [University Extension], USP, 1990. Concentrates on methods of communicating ideas. The section "community workers and change" includes hints on communicating with people who may resist change or new ideas.

Williams, Suzanne and others. *Oxfam gender training manual*. Oxfam, 1994.

11. D. J. Ravindran (ed) *A handbook on training paralegals.* (Report of a seminar on training of paralegals, held in TagaTay City, Philippines, 5-9 December 1988, International Commission of Jurists).

12. Salote Malo, the illustrator of this book.

13. "Women and the law." (July 1990).

14. Williams and others (1994): 4.

15. Conclusions of the *Asia/Pacific Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms relevant to Women's Human Rights, Hong Kong, 20-22 May 1996.*

16. *Women's Watch: International Women's Rights Action Watch,* 3 (2) October 1989: 1.

17. Wendy Poussard. *Dances with whales,* unpublished paper, Suva, 1992.

18. We are grateful to the University of the South Pacific for allowing us to use this extract and illustration from the South Pacific Community Nutrition Training Project. *Teaching and learning about food and nutrition.* [by] Diane Goodwillie [and others]. Suva: [University Extension], USP, 1990: 37-39.

19. Extracts were published on 28 August 1996 both in *Fiji's Daily Post* and *The Fiji Times.*

20. Reported by Bernadette Hussein. "Adi Finau [Tabakaucoro] defends Bill defeat." *Fiji Times* (18 December 1995).

21. For a more detailed treatment of the "adoption" and "transformation" approaches see Anne F. Bayefsky. "General approaches to the domestic application of women's international human rights law." in Rebecca J. Cook (ed) *Human rights of women: national and international perspectives.* University of Pennsylvania Pr., 1994: 351.

22. Justice Elizabeth Evatt (Australian Law Reform Commission) "United Nations mechanisms on women's rights." Paper presented to the *Seminar on Women and the Law in the Pacific Islands,* held at the Fijian Hotel, Fiji April 1994 hosted by the International Commission of Jurists in collaboration with the Fiji Women's Rights Movement.

23. Tipota is the Pacific Island country invented by Epeli Hau'ofa: *Kisses in the nederends.* North American ed., Honululu: University of Hawaii Pr., 1995.

24. ESCAP (1989):1-5.

25. *Fiji Times* (16 January 1996).

26. For example *Ansett v Wardley (1980)* 210 ALJR 4; *Australian Iron and Steel v Najdovska (1988)* 12 NSWLR 587. See Chapter 13 for discussions of the Tribunal cases: *Wardley v Ansett; Najdovska v Australian Iron and Steel.*

27. See Chapter 12 for a detailed discussion of this case.

28. See Chapter 13 for details.

29. Conclusions of the *Asia/Pacific Regional Judicial Colloquium* ... (1996).

30. (1992)1 SA 513 discussed at the *Asia/Pacific Regional Judicial Colloquium* ... (1996).

31. [1988-1994] 2 VanL R 661; Criminal Case 58/1993.

32. [1994] 1 LRC 343; [1995] 2 SA 182[1994] 1; discussed in detail in Chapter 2, and by the *Asia/Pacific Regional Judicial Colloquium* ... (1996).

33. [1994] 2 HKLR 99.

34. *Unity Dow v the Attorney-General,* [1992] LRC 673 reported in *MS Magazine* (November/December 1991). This was one of the precedents used in the Zimbabwe case of *Rattigan and Ors v Chief Immigration Officer.*

35. Bajefsky (1994): 364-365.
36. (1994) 128 ALR 353.
37. R. B. Lussick. "Litigation raising issues relating to women's human rights in the Asia Pacific region." [Paper prepared for the] *Asia/Pacific Regional Judicial Colloquium* ... (1996).
38. Bajefsky (1994): 361, 365.
39. Conclusions of the *Asia/Pacific Regional Judicial Colloquium* ... (1996).

GLOSSARY

Meanings of legal words and phrases as used in this book.

Absconding debtor A person who is trying to leave the country while owing money to someone.

Access right The right of a child to spend time with the parent with whom it does not live following separation or divorce.

Access parent The non-custodial parent, the parent to whom the child has access rights but with whom it does not normally live when parents are divorced or separated.

Accused, the A person charged with a criminal offence. See also Defendant.

Acquit, to In a criminal court, to find or decide that the accused is not guilty of the crime for which he or she is charged. The finding is called an acquittal.

Act of Parliament A law passed by Parliament; when the Act is drafted and until it is passed by Parliament it is called a Bill. When it is passed by Parliament, the Act becomes part of the country's legislation.

Action Any legal proceeding (for example a civil or criminal case) taken to court. In criminal actions, the State is responsible for the proceedings, but in civil actions the person who brought the action is responsible. A class action is a case brought by a group of people with some common aim or grievance. A test case is an action brought with the aim of challenging an interpretation of a particular law.

Activist A person who does human rights work and/or works with NGOs to promote human rights.

Adjourn, to To put off a court hearing until a later date.

Adjudicate, to To preside over a case and to make a judgment about it.

Adultery Sexual intercourse between a married person and a person to whom he or she is not married.

Affidavit A written statement to be used as evidence in a case. The person making the statement goes before a qualified witness such as a Justice of the Peace, a Commissioner of Oaths, a solicitor, or a court official and swears or affirms that the written statement is true. The statement is then signed by the person who makes it and by the qualified witness, who may ask to be shown a passport or other proof of identity.

Affidavit of means An affidavit setting out a person's financial and property status.

Affiliation case and order An affiliation case is an action brought by a single or separated woman to prove that a particular man is the father of her child. If she proves it, the court will state that the man is the putative father of the child and may make an affiliation order stating the amount of maintenance that he must pay for the support of his child.

Affirm See Oath.

Alien A foreigner, a person who is not a citizen of the country in question.

Amend To make written changes to a document, for example to a piece of legislation.

amicus curiae Latin phrase meaning "friend of the court", a lay person who is allowed to appear in court on behalf of another.

Ancillary action See Principal claim and ancillary relief.

Annulment See Nullity, null and void.

api kolo Town allotment of land (Tonga).

api 'uta Tax allotment of land (Tonga).

Appeal, to To ask a court to decide that a lower court's decision is wrong.

Applicant A person who starts an action by submitting to the court the written document called an application.

ariki High chief or chiefs (Cook Islands).

Arrears In maintenance cases, money that has not been paid under a maintenance order.

Bail A person charged with an offence does not necessarily have to be locked up until the trial. He or she may stay out of prison by applying for bail. If the court agrees to grant bail, it will order a sum of money to be deposited as security, and will lay down any other conditions. If the person does not appear at the set time, or does not fulfil the other conditions, the court will keep the security bond, which is often called "bail money."

Bailiff A court official who serves legal documents telling a person that he or she is required to by law to do something.

Bar The Bar is the collective word used to describe all the barristers who work in any one country.

Barrister A lawyer who represents clients in court.

Bestiality Sexual intercourse between a human being and an animal.

Bill for an Act See Act of Parliament.

Bind over, to To make a court order obliging a convicted person to do or not to do something, usually for a specified time; for example a convicted person may be bound over to behave properly towards those whom he or she has offended.

Binding See Precedence.

Bond A written promise to do something or not do something, for example to promise in court to repay a debt or to be "of good behaviour".

Breach, to To disobey a court order or agreement.

i-bulubulu Traditional ceremony asking for forgiveness in indigenous Fijian communities.

Burden of proof The legal obligation or duty of proving a case before the courts. Civil cases and criminal cases have different standards for the burden of proof. The civil standard is "on the balance of probabilities" but the criminal standard is "beyond all reasonable doubt" which is much stricter.

Care and control Day-to-day responsibility for children. In separation, the parent with whom the children live has care and control.

Carnal knowledge Sexual intercourse; see also Defilement.

Case See Action.

Case law See Common law.

Cause list A list of cases awaiting a hearing in court.

Chaste Sexually virtuous; usually applied to a "good" woman.

Children's interview Private discussions between a judge or magistrate and the children involved in a custody and/or access case.

Civil action, civil court, civil wrong, civil law A civil wrong is a non-criminal wrong done by one person against another, for example by negligence, nuisance, personal injury or in company and commercial matters, family matters and disputes about wills and property. The wronged person himself or herself is responsible for taking an action in a civil (non-criminal) court to ask for compensation. Such actions are called civil actions. Civil law is the branch of law that deals with these actions. See also Tort.

Class action See Action.

Collude, to; collusion To secretly agree to do something illegal. The agreement is called collusion.

Committal hearing, preliminary inquiry, P.I. Three terms meaning the first court hearing of a criminal case. All the evidence is given, usually by witnesses. The magistrate then decides if there is enough evidence for the accused to stand trial.

Common law The body of law made by the decisions of courts in the United Kingdom and in countries basing their legal systems on the British system. Sometimes called "case law" or "judge-made law" to distinguish it from legislated law.

Compel, to To make someone do something. See also Witness.

Compensation Money paid by one person to another under a court order to pay for loss or damage.

Competent witness, competent to give evidence See Witness.

Complainant A person who starts legal proceedings by stating that he or she has suffered a criminal or civil wrong; someone who reports a crime to the police or makes a claim in the domestic court, for example for an affiliation order. The statement is called a complaint.

Comply with, to To obey a court order or act in accordance with an agreement.

Conciliation, reconciliation Settling disputes by discussion between the parties, not by fighting the cases in court. In disputes between spouses, reconciliation means that the spouses agree to try to live together.

Condone to; condonation To approve of or at least not to openly condemn something that is wrong. The approval or lack of condemnation is called condonation.

Conjugal rights Rights of spouses over each other, sometimes called marital rights.

Connive, to; connivance To secretly help someone do something wrong, usually by not opposing the wrongdoing. The secret help is called connivance.

Consensus The agreement of all persons concerned.

Consent, to; age of consent To agree to do something, for example to have sexual intercourse. The age of consent is the age at which a person may legally agree to have sexual intercourse or to marry.

Consortium The duties and obligations owed by one spouse to another.

Consummate, to ; non-consummation To have sexual intercourse for the first time in a marriage. Failure to have the first sexual intercourse is called non-consummation.

Contempt of court Disregard or disobedience of a court order, or showing disrespect to a judge within the court room. Contempt can be a criminal offence.

Contested action In divorce law, an action by one spouse against all or part of the action started by the other spouse.

Convict, to; conviction To find an accused guilty of a crime; the accused then has a conviction against him or her.

Co-respondent See Petitioner, plaintiff.

Corroborate to; corroboration To supply independent evidence that supports the truth of a statement made by another person. This evidence is called corroboration.

Counsel The person or persons defending or prosecuting a defendant in court. The defending barrister will be referred to as "Counsel for the defence" and the prosecuting barrister will be "Counsel for the prosecution."

Court marriage A legally registered marriage (Indo-Fijian term). If a couple are married in a religious ceremony but do not register the marriage, the marriage is not legally recognised. See also Custom marriages; *Nikah*.

Crime An act or default that the State recognises as an offence against public welfare and liable to punishment under criminal law. A crime has two elements: *mens rea*, the intention to commit a crime, and the act itself, *actus reus*.

Criminal law The body of law dealing with offences against public welfare and thus against the State. The State is responsible for creating the laws, for prosecuting offenders, for establishing guilt or innocence, for setting punishments and for seeing that the punishments are carried out.

Cross examination After a witness has given evidence in court, the counsel for the other side may question him or her to see whether the story is true and/or to convince the court that the story is not true. This practice is called "cross examination."

Cross petition See Petition.

Custody, custody order, custodial parent In family law, custody is the right of one or both parents to have care and control of their children. In a custody dispute, the court may make a custody order. This defines the conditions under which custody is granted. It usually names the custodial parent, who has care and control of the child, and the access parent, the parent to whom the child has rights of access.

Custody, to be in In criminal law, to be in prison or elsewhere under police control.

Custom, customary law custom courts, custom marriage and divorce Generally, the traditional practices of indigenous Pacific Islanders. Customary law is the body of largely unwritten traditional law that governs these practices and is administered in custom courts by elders, and in formal courts authorised to apply customary law. Custom marriages and divorces are recognised as legal in Solomon Islands and Vanuatu.

Damages In a civil action, a court order to one party to pay money to another in compensation for a wrong.

de facto, de iure Latin phrases meaning "in fact" and "in law".

***de facto* marriage** A relationship in which a couple live together as husband and wife but are not married to each other.

Decree, decree *nisi*, decree absolute In divorce actions the court order granting a divorce. The decree *nisi*, in which the Family Court approves the divorce application, is followed three months later (unless there are special circumstances) by the decree absolute, which makes the divorce final.

Decriminalise, to To make a criminal offence into a civil wrong.

Defence The case put forward by the defendant or on the defendant's behalf by the counsel or other legal representative.

Defendant General term for the person against whom court proceedings are brought. In criminal proceedings, the specific term is "the accused".

Defilement Sexual relations with a girl below the age at which such relations are considered lawful. The age may vary from country to country. The offence may be known also as unlawful carnal knowledge of a minor, unlawful sexual intercourse with a minor or statututory rape.

Delict A civil wrong or tort in Roman Law.

Desert to; desertion In divorce law, to leave a husband or wife without just cause or excuse. Desertion is a ground for divorce in countries with fault-based divorce laws.

Discretionary decision In court, a decision in which a court does not have to follow a particular practice but may do as it thinks fit under the circumstances. Mandatory decisions are those in which a court does have to follow a particular practice.

Discriminate, to To treat people differently because of their gender, political opinion, race, religion and so on.

Dissolve a marriage, to See Divorce.

Divorce, to To end a legal marriage.When a couple is divorced, their marriage is said to be "dissolved" and the process is sometimes called "dissolution of marriage". A "fault-based" divorce is a divorce granted because one spouse has done something recognised as wrong by divorce law; in a " no fault " divorce, neither spouse has to prove that the other is at fault.

Entrench, to To make secure.

Equitable, equitable right Fair, just, non-discriminatory. An equitable right is a right due in fairness to someone; it is not necessarily a legal right, a right that is recognised by law.

Estate, estate holder An interest in land; the person who holds the land is an estate holder.

Evidence The statements. exhibits and so on produced to support a legal action.

Evidentiary requirements The body of rules governing how evidence may be produced in court; also known as "rules of evidence".

ex parte In the absence of the other party (Latin). An *ex parte* application is an application that one party in a proceeding makes to the court without the other party being present. An *ex parte* order is an order given by the court to one party before the other party has had an opportunity to put his or her case to the court.

Examination In court, the practice of questioning and cross-questioning by both sides in a case.

Exclusion order, occupation order An order expelling someone from a house, flat, land or an apartment; also called "occupation order" and "ouster order"; "oust" means "expel".

Fabricate to, fabrication To make or to make up, to tell a lie; a fabrication is a lie.

fahu The traditional duties owed by a brother to a sister (Tonga).

Fault-based, no fault divorce See Divorce.

Find, to To pronounce a judgment , for example to state in court that an accused is guilty or not guilty.

Felony A very serious crime. Rape and murder are felonies.

fono Village council of elders (*matai*) authorised by legislation to deal with custom matters and minor offences (Western Samoa).

Formal law, general law The body of law modelled on the English legal system, as distinct from customary law.

Fornication Voluntary sexual intercourse between unmarried persons, as distinct from adultery, which involves at least one married person.

Gender Sex roles created by culture rather than by one's biological sex.

Gender neutral Not distinguishing between men and women.

Gestation The period of pregnancy.

Ground See Matrimonial offence or ground.

Guardian, guardianship A person who has the lawful power and duty of caring for and managing the property and rights of another person, usually a child, considered incapable of doing so himself or herself. Guardianship is the office, duty or authority of a guardian.

Guilty, to find To decide that an accused has broken the law.

***habeas corpus* order** Literally "let's have the body" (Latin). If a court thinks that a person (for example a child) is being kept somewhere illegally, the court may order that the person be brought before it. Only superior courts may make *habeas corpus* orders.

Hearing, mention The actual court case; the proceedings taking place in court. At a full hearing all evidence is given and the court may make a decision. If the case cannot be heard in full at one time, the court will set a time in which to start, continue or finish the hearing. These partial hearings are called "mentions". A mention may be very short, just to set another time for the next mention, or it may involve taking evidence or making an order.

Hearsay evidence Evidence given by one person about what another person saw or heard; hearsay evidence is not accepted in court .

Hold, to In court, to state a conclusion or decision about a legal principle.

Hereditary Inherited.

Homicide Killing a person or causing a person's death. Manslaughter is unintentional, involuntary homicide. Murder is intentional, voluntary homicide.

Illegitimate See Legitimate, illegitimate.

in camera In a closed court (Latin), a court case that members of the public cannot attend. When members of the public may attend, the court is said to be hearing the matter in "open court."

in loco parentis In the place of a parent (Latin); having a parent's rights, duties and responsibilities.

***in re;* in the matter of** About, or concerning (*in re* Latin); used in civil cases concerning what a court should do, for example, about the custody of a child or the disposal of a property,

Incest Sexual intercourse between close relatives, for example with a mother, father, son, daughter, sister, brother, uncle or aunt or with another relative as defined and forbidden by formal or customary law.

Incidence of The number of times something occurs, usually in a particular place and over a stated time.

Infanticide Killing a child under the age of 12 months or under another age specified by law.

Injunction, restraining order, non-molestation order A court order requiring someone to do something or not do to something, more usually not to do something. A restraining order is always an order requiring someone not to do something; a non-molestation order is a restraining order requiring a person to stop harassing or molesting another.

inter alia Among other things(Latin).

inter se Between them (Latin).

Interdiction A prohibition or injunction.

Interest A right to, or share in, land property or business.

Interim Temporary; in a court case an interim order may be made before the full hearing, when a final order will be made. A court may make an interim custody order to give temporary custody of a child to a parent while waiting for separation or divorce proceedings to be completed.

Intestate, to die See Will.

Invalid Unlawful.

Joint custody Custody shared by both parents.

Joint tenancy See Tenancy in common, joint tenancy.

Judge (person) The person in charge of a High Court, Court of Appeal or Supreme Court trial, responsible for establishing judgments and ensuring that the trial is run fairly and according to the rules for conducting trials. See also Common law.

Judgments Decisions of the court.

Judicial officers Judges and magistrates.

Judicial separation See Separation.

Jurisdiction The power of a court to hear and decide a case or to make an order. May also be used to denote the geographical area in which a particular court has this power.

Jury, jury trial In a court trial, a group of lay persons chosen from the electoral rolls to make a legal finding of guilt or liability. Not all trials have juries; a trial that does so is called a jury trial.

Justice (person) May be part of the formal title of a judge ("the Chief Justice" or "Mr or Madam Justice X"). In some countries, a justice may also be a lay magistrate in a lower court. A Justice of the Peace is a person, not necessarily a lawyer, appointed by the State to carry out some legal duties, like witnessing affidavits and other documents, in a particular area.

kaitasi "eat together"; said of land shared under custom (Tuvalu).

Law A set of principles and regulations made by Government legislation or by courts or by custom and affecting the daily lives of the people of a country; may also mean the profession and practice of law.

Lawyer, solicitor A person who is qualified to practice law as a solicitor and/ or barrister. A solicitor gives legal advice; a barrister represents clients in court. In some countries, a lawyer may do the work of a solictor and a barrister. In others, the lawyer must specialise in one or the other.

Lay person A person is not formally qualified in a particular profession; for example, a lay preacher is a person who preaches religion but has no formal qualifications in religion.

Legal right Right recognised by law; often as distinct from an equitable right.

Legal separation See Separation.

Legislation The body of written law made by Parliament through the parliamentary process or other legislative bodies; individual laws are also called Statutes or Acts of Parliament.

Legitimate, illegitimate Lawful; used of a child whose parents are legally married. Illegitimate means unlawful; an illegitimate child is a child born outside legal marriage. An illegitimate child is also known as a "natural child".

Lenient sentence A light punishment for a convicted offender.

Liable for, liability for Legally responsible; legal responsibility.

Litigant, litigation A litigant is a person involved in litigation, which means court actions or proceedings.

Magistrate, Magistrate's Court A magistrate hears action and makes decisions in the lower courts, often called Magistrates' Courts.

Maintenance, maintenance order Money paid for the support of children or of a spouse. Legal proceedings may be needed to get a court to issue a maintenance order, an order to the person responsible to pay a specified sum for a specified time.

Mandatory See Discretionary.

Manslaughter See Homicide.

matai Noble/s, high chief/s (Western Samoa).

mataqali The land owning unit in custom land (Fiji).

Matrilineal Inherited through the female line; in some communities rights to land are inherited through women.

Matrimonial offence or ground A wrong recognised in fault-based divorce law as being reason for divorce.

Matrimonial property Property jointly acquired by marriage partners.

Matter Statement or allegation, something for a court to discuss and decide.

Mediation, mediator A conciliation process by which disputes are resolved by agreement; a mediator is a person who helps the process.

mens rea See Crime.

Mention See Hearing, mention.

Minor Small or not very important; when used of a person, it means that the person is under the age legally required for a particular act, for example having sexual intercourse or voting.

Mitigate to, mitigation To make less severe. In a trial, after finding an accused guilty, the court allows counsel for defence, or the accused, to say something " in mitigation". Defence counsel or the accused may then give the court reasons why the sentence should be made less severe.

Mortgage In finance, security (often property or goods) promised to a money-lender by a borrower. If the borrower does not repay the lender within a set time, the lender is entitled to the security.

nakamal A meeting place, a place where custom matters are discussed; sometimes simply a place to drink kava with friends(Vanuatu).

Natural child See Legitimate, illegitimate.

nikah Ceremony of marriage in the Muslim (Islamic) religion; in our region, to be recognised as a legal, the marriage must also be registered.

Non-molestation order See Injunction, restraining order.

Notice Document providing information about a court or legal action.

Nullity, null and void, annulment Not existing. If there is a legal defect in a marriage, a spouse may ask the court to annul the marriage by declaring that the marriage is a nullity (or "null and void".) Annulments may be granted for legal defects such as being under the legal age for marriage. Annulment, which declares that a marriage never really existed, is different from divorce, which declares that the marriage did exist but is finished.

Oath, affirmation An oath is a solemn appeal to a sacred being or object to witness that a statement is true or that a promise is being made; sometimes also the statement or promise itself. Witnesses in court are required to swear on oath that their statements are true. If a witness has moral or religious objections to swearing on oath, the court may allow him or her to "affirm," to make a solemn and binding declaration that the statement is true.

obiter dictum, ratio decidendi A judgment contains reasons and explanations for the decisions made. Statements not directly relevant to the case are called *obiter dicta*, a Latin phrase which means roughly "an aside." The *rationes decidendi* (in Latin, reasons for deciding) are the statements that do explain reasons for legal opinions and decisions in a particular case. Lawyers are taught how to distinguish *obiter dicta* from *ratio decidendi* in long and complex judgment.

Occupation order, ouster order See Exclusion order.

Offence, offender An offence may be a crime or a civil wrong. An offender is a person who commits either.

Over-ride or prevail over, to To have more authority than. If a higher court decides that a lower court's decision is wrong, the higher court's decision over-rides the lower court's.

Paralegal (person) Someone who is not a fully qualified lawyer but is specially trained to work in the field of law.

Parens patriae The parent of the country (Latin). The highest court of a country fulfils the role and responsibility of parent of its country by taking legal action regarding the welfare of its citizens or of any particular citizen (for example a minor who is too young to make decisions).

Party, parties A general term used of any person or persons who take part in an action or undertaking.

Paternal "of the father."

Patriarchy; patriarchal The rule of the fathers; controlled and defined by men.

Patrilineal Inherited through the male line; in many communities land rights are inherited through fathers.

Perjury The crime of making a false statement under oath, or affirmation, during a trial.

Permanent custody order An order that one parent shall have responsibility for the daily care and control of a child, awarded by a court parents at the final custody hearing. as distinct from the interim order made before the case is complete. A court may change a permanent order if a parent's circumstances change.

Personal property In matrimonial property law, something that is owned by one of the spouses but not the other.

Persuasive authority See Precedent.

Petition, cross petition A legal document requesting a civil court to make a court order or a ruling on a case. A cross petition is a petition in reply to a previous petition. For example, in a country with fault-based divorce, the petitioner (spouse X) may petition for a divorce from Spouse Y because of Y's desertion. Y, the respondent, may reply by cross-petitioning to divorce X because of X's adultery with A.

Petitioner, plaintiff, respondent, co-respondent, person cited Plaintiff is the general term for a person who sues another person, makes a petition or takes a civil claim to court. A person who presents a petition for divorce is usually called the petitioner. The person sued is called the respondent. In a divorce case involving adultery, the co-respondent is the person with whom the respondent is said to have committed adultery; in a cross-petition, the respondent may say that the petitioner committed adultery with the person cited.

Plenishings Improvements to property.

Polyandry, polygamy In a polyandrous marriage, one woman has more than one husband at the same time; in a polygamous marriage, one man has more than one wife at the same time.

Post-natal Something that happens after a birth; for example, post-natal depression is a recognised illness in which, in the months following the birth of a baby, the mother feels unable to cope with the baby or with life in general.

Precedent A principle established in a judgment in a court of law. A binding principle is one established in a judgment of a higher court of one common law country (and in the United Kingdom under some conditions); lower courts of that country are bound to follow the principle in making judgments in similar cases. Principles established in judgments of higher courts of other common law countries are "of persuasive authority"; the courts of another country do not have to apply them, but should consider them and apply them if they are relevant and do not conflict with local legislation.

Prima facie As it first appears (Latin). A *prima facie* claim is one that appears to be a proper or supportable claim but has not yet been established by detailed examination.

Principal claim or relief Some actions, for example divorce and matrimonial property, are considered in two parts. The part that has priority is called the principal claim or relief. This part must be settled before the lower priority part which is called ancillary relief. In divorce cases the divorce is the principal claim. Matrimonial property is ancillary relief and may be considered only if the divorce is granted.

Privileged evidence Evidence that exists but cannot legally be used in court. Communications between spouses may be regarded as privileged evidence.

Prosecute, to To charge an accused with a crime and to bring him or her to trial in a criminal court. The State has the responsibility of doing this, and the process is called prosecution. Depending on the country concerned, the State body in charge of prosecutions may be the Attorney-General, the Director of Public Prosecutions, the Police or the Public Prosecutor.

Prosecutor, Prosecution The Prosecutor is an official (a lawyer or police officer) who represents the State in a particular trial and has the responsibility of proving beyond reasonable doubt that the accused is guilty of the crime of which he or she is charged. The court may refer to the official as "the Prosecution" or "the Counsel for the Prosecution" and to the official's witnesses as " Witnesses for the Prosecution."

Public Defender A person employed by the State to act as defence counsel. The State has responsibility not only for prosecuting offenders but also for making sure that they have adequate defence in a trial.

Putative father See Affiliation.

Rape, to To have sexual intercourse with someone against his or her will. (In our region, the definition of rape is more restricted and can be carried out only by a male on a female). In most countries of the world, rape is a felony, on the same level as murder.

Rape trauma syndrome A condition in which the rape survivor behaves so calmly that some people may doubt whether she really was raped. In fact, however, she is suffering from a severe form of shock, which may make her physically and emotionally very ill.

ratio decidendi See *obiter dicta, rationes decidendi.*

Re See *In re.*

Recidivism, recidivist The tendency to keep on committing offences; a person who commits the same type of offence time after time.

Re-hearing, re-trial Second consideration of a cause in order to consider an error, omission or oversight during the first consideration.

Remedy The means by which a right is enforced or the violation of a right is prevented, redressed or compensated.

res judicata A matter that has been judged already (Latin) and therefore does not have to be decided again.

Respondent See Petitioner, plaintiff, respondent.

Restitution of conjugal rights order An order requiring a spouse to return to the marital home and to fulfil the duties owed to his or her spouse.

Restraining order See Injunction.

Rules of evidence See Evidentiary requirements.

Self-incrimination Saying something or providing evidence that might show that one is guilty of an offence.

Sentence The punishment given by a court to a convicted offender.

Separation In marriage, a separation occurs when a husband and wife remain married but no longer live together. A spouse may go to court and ask for a legal or judicial separation, which makes both husband and wife single persons again for all legal purposes except remarriage.

Serve documents on, to To present to the parties in a dispute the legal documents that they are required to have.

sine die Indefinitely (Latin); a case put off *sine die* is unlikely to be heard.

Sodomy Anal intercourse or any sexual act that is regarded as unnatural; sometimes called buggery.

Solicitor See Lawyer.

Statute See Legislation.

Statutory rape See Defilement.

Summary court A Magistrate's Court or other lower court.

Summons A court order or document requiring someone to appear in court at a specified place and time, or to bring a document to the court. The term is used both in criminal and civil cases.

Suspect A person suspected of having committed an offence.

Suspended sentence A sentence that allows the offender not to go to prison unless he or she commits a similar offence within a specified period of time.

Tenancy in common, joint tenancy In tenancy in common, two or more people own a distinct, not necessarily equal share of the same property. Any such tenant may make a will leaving his or her share to someone else. In joint tenancy, two or more people have equal shares; if one tenant dies, the share goes to the remaining owner, or is divided equally among owners.

Test case See Action.

Testimony Spoken evidence given under oath, normally in a court.

tofia Hereditary land estate (Tonga).

Tort A civil wrong other than a breach of contract. The law relating to torts is a branch of civil law.

Trial In a criminal case, a hearing to decide whether or not the accused has broken the law. In a civil case, a hearing to decide whether or whether or not the defendant or respondent is legally responsible.

***usufruct* right** The right to use, as distinct from the right of ownership.

Unlawful carnal knowledge, unlawful sexual intercourse See Defilement.

Vicarious liability Liability for the actions of another. For example, employers (including the State as employer) are vicariously liable for the work-related actions of their employees.

Wards of Court Infants, children and persons of unsound mind placed by the court under the care of a guardian.

Warrant A document issued by a magistrate or other legal official, allowing the police to take certain actions. A search warrant enables police to search private property; an arrest warrant enables police to arrest a suspect.

Will A legal declaration of a person's wishes regarding the disposal of his or her worldly goods after his or her death. A person who dies without making a will is said to die "intestate".

Witness A person who gives evidence in a criminal or civil trial about what he or she heard, said or did. Before a person gives evidence, the court must decide whether he or she is a "competent witness" someone who, for example, can understand what he or she is doing. If a competent witness does not want to give evidence, the court must decide whether he or she is "compellable"and can be made to give evidence. A wife, for example, may be a competent witness, but if she cannot be forced to give evidence against her husband, she is not a compellable witness.

Writ A formal court order to commence a legal proceeding.

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LAW FOR PACIFIC WOMEN

Law for Pacific Women is the product of Imrana Jalal's research, experience and commitment to human rights. Much of it applies in any common law country, but it is the first full-length text on women and the law in the South Pacific, and has been specifically written for the region. Real life case reports or stories from the Pacific or other common law countries illustrate particular points, as do extracts from the legislation, statistical and other tables, and cartoons designed as teaching aids or ironic comments. Endnotes, a glossary, a bibliography and indexes are provided as aids to further research and study.

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