

# LAW AND PROMOTING HUMAN RIGHTS FOR WOMEN AND GIRLS

## PAPER DELIVERED AT THE VANUATU WOMEN'S PEACE TABLE, 21 OCTOBER 2016, PORT VILA, VANUATU

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I would like to thank the organisers for inviting the University of the South Pacific (USP) School of Law to be part of this important event, the Women's Peace Table: Promoting Peace and Justice in Vanuatu.<sup>1</sup> I was asked to talk on the theme of 'law and promoting human rights for women and girls'. Unfortunately when I think about law and human rights for women and girls in Vanuatu I do not feel very peaceful, and that is because there is still immense injustice. But, before considering injustice, we should look at the positive things that we find in Vanuatu's law.

First, Vanuatu does recognise human rights for women and girls. Article 5 of Vanuatu's *Constitution* recognises that all persons are entitled to a range of 'fundamental rights and freedoms of the individual without discrimination on the grounds of... sex'. Article 5(1)(k) also recognises that affirmative action is not a breach of the right to equal treatment under the law if it 'makes provision for the special benefit, welfare, protection or advancement of females, children and... [other] members of under-privileged groups...'<sup>2</sup>

Vanuatu is also a party to major international human rights Conventions including the *Convention on the Rights of the Child*, which was ratified by Vanuatu in 1992, and the

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\* Senior Lecturer, University of the South Pacific School of Law and Director of the Pacific Legal Information Institute (PacLII). Comments can be directed to [Jowitt\\_a@vanuatu.usp.ac.fj](mailto:Jowitt_a@vanuatu.usp.ac.fj). As an invited presentation at an activist conference the piece is necessarily polemical. Additional comments from matters that arose in discussion are included in footnotes. Thank you to Miranda Forsyth and Lee-Anne Sackett for reviewing a draft prior to submission, as well as to the anonymous reviewers for helpful suggestions. Particular acknowledgement should go to Jenny Ligo and the others of WACC (Vanuatu Women Against Crime and Corruption), who organised the event.

<sup>1</sup> The Women's Peace Table is a global initiative of PeaceWomen Across the Globe (PWAG). The Peace Table concept emphasises achieving implementation UN Security Council Resolution 1325, which focuses on women in armed conflict and post-armed conflict situations. (Peace Women Across the Globe, *Newsletter 2/2106* [http://www.1000peacewomen.org/admin/data/files/page\\_section\\_file/file\\_en/150/pwag\\_newsletter\\_1602\\_en.pdf?lm=1472459431](http://www.1000peacewomen.org/admin/data/files/page_section_file/file_en/150/pwag_newsletter_1602_en.pdf?lm=1472459431) (Accessed 1 December 2016). For an overview of UN Security Council Resolution 1325 see UN Women, *Women at the Forefront of Peacebuilding* <http://www.unwomen.org/en/news/in-focus/women-peace-security> (Accessed 1 December 2016).) PWAG has broader goals of promoting the participation of women in decision making, reducing violence against women and increasing women's involvement in peace work. (PWAG, *Our Goals and Approaches* <http://www.1000peacewomen.org/en/who-we-are/goals-3.html> (Accessed 1 December 2016)).

<sup>2</sup> It is certainly arguable that this provision allows the Vanuatu government to introduce temporary special measures (such as a quota system) to increase the number of women in Parliament. It can be noted that there is also a view, held by the current government, that introducing a quota system requires a constitutional amendment, supported by 2/3 of the (currently all-male) members of Parliament and a national referendum. (See, for example Michael Walsh, 'Vanuatu to Reserve Seats for Women' *Pacific Beat* 21 May 2016 <http://www.abc.net.au/news/2016-05-21/vanuatu-paves-way-for-womens-seats-in-parliament/7434720> (Accessed 1 December 2016).) It is not clear to the author why Article 5(1)(k) of the *Constitution* which allows for affirmative action and Article 17(1) of the *Constitution* which provides for 'an electoral system which includes an element of proportional representation so as to ensure fair representation of different political groups and opinions', does not already establish a constitutional framework that permits Parliament to pass laws introducing quotas to ensure a degree of proportional representation of women.

*Convention on the Elimination of Discrimination Against Women*, which was ratified in 1995. Vanuatu continues to make progress on joining other core international human rights instruments, as defined by the United Nations Office for the High Commissioner on Human Rights. Most recently, in 2011 the *Convention Against Torture* was ratified.<sup>3</sup>

Domestic laws furthering the human rights of women and girls have also been passed. Most obviously, in 2006 sexual offences laws were revised,<sup>4</sup> in 2008 the *Family Protection Act*, which addresses domestic violence, was passed<sup>5</sup> and in 2013 and 2015 the *Municipalities Act* was amended to introduce reserved seats for women, thereby increasing women's political representation at the municipal councils area. There have been advances in other, less obvious, areas as well. Just looking at laws from the past three years we can see, for instance, the *Decentralisation Amendment Act 2013* allowed for the appointment of women to local area councils, ensuring better women's political representation,<sup>6</sup> the *Education Act 2014* makes allowance for a representative of the Vanuatu National Council of Women to be appointed to the national Education Advisory Council<sup>7</sup> and the *Public Land Transport Act 2015* contains provisions prohibiting sexual harassment of passengers by drivers.<sup>8</sup> A Bill to increase sentencing for certain sexual offences was passed in the second extraordinary session of Parliament in November 2016.<sup>9</sup> All of these law reforms further the goals of PeaceWomen Across the Globe (PWAG) relating to promoting the participation of women in decision making or reducing violence against women.<sup>10</sup>

Now to the less positive. Even when laws respecting human rights and the equality of women and girls exist on paper, a complex mix of cultural factors means that women are, often, not afforded the same opportunities to exercise their rights to equal treatment. Some of these factors may relate to *kastom*, or traditional indigenous practices as interpreted, constructed or reconstructed in contemporary times. The practice of bride price, where men pay the woman's family in order to marry her is a frequently used example of such *kastom*. The *Vanuatu National Survey on Women's Lives and Family Relationships 2011* (the Vanuatu Women's Lives Survey) reported that 'over half the respondents believe a woman becomes the husband's property after payment of bride price'.<sup>11</sup> *Kastom* has been influenced by Western culture through things such as the introduction of Christianity, the cash economy and education, with 19<sup>th</sup> century Christianity having been particularly singled out by some

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<sup>3</sup> Vanuatu's ratification of international human rights treaties can be found on the website of the United Nations Office of the High Commissioner for Human Rights [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=190&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=190&Lang=EN) (Accessed 1 December 2016).

<sup>4</sup> *Penal Code (Amendment) Act 2006*, sections 3 – 16. It can be observed that sexual offences laws are gender neutral, but that sexual offending is a gendered crime, with a disproportionately high number of female victims.

<sup>5</sup> It can be observed that the *Family Protection Act 2008* is gender neutral and protects both male and female victims of domestic violence.

<sup>6</sup> Section 4AB(2)(b) *Decentralisation (Amendment) Act 2013*.

<sup>7</sup> Section 58(1)(e) *Education Act 2014*. Section 8(1) also prohibits discrimination against children 'on account of his or her gender, religion, nationality, race, language or disability.'

<sup>8</sup> Section 38(1)(e) *Public Land Transport Act 2015*.

<sup>9</sup> The Bill for the Penal Code (Amendment) Act 2016 is located at <https://parliament.gov.vu/index.php/icons/bills> (Accessed 6 December 2016).

<sup>10</sup> See PWAG, *Our Goals and Approaches* <http://www.1000peacewomen.org/en/who-we-are/goals-3.html> (Accessed 1 December 2016).

<sup>11</sup> Vanuatu Women's Centre in partnership with the Vanuatu National Statistic Office, *Vanuatu National Survey on Women's Lives and Family Relationships* (2011), 93 – 94. It can be observed that '[Vanuatu Women's Centre] staff believe that women were not traditionally seen as the property of men and that the extensive control that men have over women in intimate relationships is also not based on traditional custom' (at 94).

commentators as introducing patriarchal norms into Vanuatu culture.<sup>12</sup> There is no clear line between *kastom* and the globalised patriarchal culture. For example, the globalised phenomenon of men assuming public roles and acting as spokespeople is also found in Vanuatu's culture, with survey data indicating that women attend community meetings and speak at community meetings with less frequency.<sup>13</sup> Lower participation rates in education and paid employment are other globalised experiences of women that relate to a broader culture that is impacted by, but not solely defined by, *kastom*, and cultural factors should not be equated simply with *kastom*.

I want to share a simple example from this morning, which relates to women's experiences in relation to equal access to security of livelihoods,<sup>14</sup> that are, in my experience, vastly different to men's experiences. This experience is not about *kastom per se*, but is about cultural expectations that many of us from different cultures can relate to. A female student asked me for an extension on submitting her assignment because her child was sick and she had to look after the child. I have never once in 19 years of teaching received a similar request from a male student. How does this impact upon her security of livelihood? Female students may receive lower grades because their time and attention is split between childcare and study. This in turn can reduce their employment opportunities when they graduate.

I imagine every woman in this room could share many personal stories of how our roles as mother/wife/daughter affect employment in ways that many men do not have to consider. The fact<sup>15</sup> that in many households childcare is seen as being women's work, has a number of flow on effects for the security of livelihoods for women, even for the admittedly privileged woman in the example, who is the recipient of tertiary education. I should emphasise that for everyone, male and female, having children comes with opportunity costs, and these costs are often voluntarily and happily borne. However, the opportunity costs in terms of security of livelihoods are different for men and for women, and these differences lead to unequal outcomes in terms of achieving the right to a secure livelihoods.

How then do we deal with these unequal outcomes? Even if law guarantees equal pay for equal work, as Vanuatu's *Employment Act* does,<sup>16</sup> many women's responsibilities for childcare (leaving aside the myriad of other reasons why women and men may be perceived or treated differently) mean that they are not on an entirely equal footing with men. The solutions to these issues are not primarily legal. Solutions might relate to better support

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<sup>12</sup> See, for example, Roslyn Tor and Anthea Toka, *Gender, kastom and domestic violence : a research on the historical trend, extent and impact of domestic violence in Vanuatu* (2005). Claire Slatter discusses Christianity as a double-edged sword for gender relations in the Pacific (Claire Slatter, 'Gender and custom in the South Pacific' (2010-2011) 13-14 *Yearbook of New Zealand Jurisprudence* <http://www.nzlii.org/nz/journals/NZYbkNZJur/2011/11.html> (Accessed 16 January 2016).

<sup>13</sup> Vanuatu National Statistics Office and Malvatumauri National Council of Chiefs, *Alternative Indicators of Wellbeing for Melanesia, Vanuatu Pilot Study Report 2012* (2012) 56 – 57.

<sup>14</sup> PWAG's definition of peace is not merely an absence of war, but, more broadly, human security 'which doesn't only include physical security, but is also based on social and economic justice... ecological security [and] the right to a secured livelihood.' (PeaceWomen Across the Globe, *Our Understanding of Peace* [http://www.1000peacewomen.org/admin/data/files/page\\_section\\_file/file\\_en/35/pwag\\_our-understanding-of-peace.pdf?lm=1399470628](http://www.1000peacewomen.org/admin/data/files/page_section_file/file_en/35/pwag_our-understanding-of-peace.pdf?lm=1399470628) (Accessed 6 December 2016).)

<sup>15</sup> It is, of course, acknowledged, that 1 anecdote does not establish a social fact. It is, however, a fact supported by census data that in Australia 'of full-time working fathers, 76 per cent of them have a spouse who is either not employed at all or employed part-time. Of full-time working mothers, only about 16 per cent have that arrangement.' (Leigh Sales, 'Annabel Crabb Explores The Wife Drought' *The Saturday Paper* (Australia) 7 December 2016 <https://www.thesaturdaypaper.com.au/news/politics/2014/10/11/annabel-crabb-explores-the-wife-drought/14129831741107> (Accessed 7 December 2016).

<sup>16</sup> Section 8 *Employment Act* [Cap 160].

services for child care, changes to work culture that recognise more flexibility for family responsibilities, and/or changes to social culture that recognise that childcare is not the exclusive domain of women. It can be observed that the example possible solutions are also more complex than seeking equality, and instead need clear conceptualisations of what equitable treatment might entail, given biologically and socio-culturally defined differences in gender roles. All of these ideas are much more difficult to implement than simply changing a law.<sup>17</sup>

Another example of the difficult interaction between law and the human rights of women and girls is that we know that few women in Vanuatu choose to exercise their legal rights by reporting crimes to the police when they are the victims of violence and/or leaving family situations that are unsafe.<sup>18</sup> We also know that there are many reasons for this. One of the reasons is that women may feel that State actors are not actually able to actually protect and help them.<sup>19</sup>

In 2015 I wrote a piece on sentencing in sexual offences, based on a Vanuatu case, *Wenu v Public Prosecutor*.<sup>20</sup> This case involved indecent assault. The Supreme Court judge used the Vanuatu Women's Lives Survey which indicates that 48% of women have experienced physical or sexual non-partner violence since the age of 15, as grounds for saying that sexual offending is prevalent and that sentencing must be increased. This survey was part of a global study, and used an internationally established and validated methodology. The Court of Appeal rejected this argument, on the grounds that 'departure from guidelines based on prevalence must be supported by some evidence',<sup>21</sup> despite the evidence from the Vanuatu Women's Lives Survey.

My article went on to examine how human rights instruments were used by the courts in sentencing. The picture was not reassuring. The *Convention on the Rights of the Child* (CRC) contains provisions in respect of imprisoning youth offenders<sup>22</sup> but also requires states to 'protect the child from all forms of sexual exploitation and sexual abuse'.<sup>23</sup> Vanuatu courts, and courts across the Pacific, consistently use the CRC to uphold the rights of male offenders, but very rarely use the CRC where the victim is a child, usually a girl child, as an aggravating factor to increase sentencing.<sup>24</sup> This, I would suggest, is an example of an environment in

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<sup>17</sup> It can also be observed that well-meaning but poorly designed laws aiming for equitable outcomes can have unintended negative consequences. For example, whilst the International Labour Organisation does not recommend that employers directly bear maternity leave costs, these are directly borne by employers in Vanuatu. When maternity leave changes that were intended to benefit women by increasing maternity leave payments were introduced in 2008-2009 the consequences were to push more women into precarious employment. (See Anita Jowitt, *VCCI Position Paper on Leave Entitlements for Employees* (2015) <http://vcci.com.vu/wp-content/uploads/2013/04/final-leave-paper.pdf> (Accessed 4 December 2016).)

<sup>18</sup> Only 10% of respondents experiencing violence in the Vanuatu Women's Lives Survey reported violence to the police (Vanuatu Women's Centre in partnership with the Vanuatu National Statistic Office, *Vanuatu National Survey on Women's Lives and Family Relationships* (2011) 152; but cf data on page 149.)

<sup>19</sup> *Ibid*, 153.

<sup>20</sup> Anita Jowitt, 'Sentencing for Sexual Offences: A comment on *Wenu v Public Prosecutor* [2015] VUCA 51' 2015 (2) *Journal of South Pacific Law*

[http://www.usp.ac.fj/fileadmin/random\\_images/home\\_middle\\_banners/emalus/JSPL/2015/Issue\\_2/Increasing\\_sentencing\\_for\\_sexual\\_offences\\_JSPL.docx](http://www.usp.ac.fj/fileadmin/random_images/home_middle_banners/emalus/JSPL/2015/Issue_2/Increasing_sentencing_for_sexual_offences_JSPL.docx) (Accessed 6 December 2016).

<sup>21</sup> *Wenu v Public Prosecutor* [2015] VUCA 51 [14].

<sup>22</sup> Article 37(b) CRC.

<sup>23</sup> Article 34 CRC. See also Article 19(1) of the CRC which requires States to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.'

<sup>24</sup> Jowitt. Above n 17, 10-11.

which women feel that State actors (in this case the courts) do not take their human rights seriously. It can also be noted that the *Convention on the Elimination of Discrimination Against Women* (CEDAW) creates obligations on States to modify prejudicial cultural or social patterns.<sup>25</sup> This sentencing example in relation to the use of international human rights can, I think, be argued to be an example of (unconscious) prejudicial patterns that Vanuatu has an existing legal obligation to address. Again this example indicates that the problem is not just about making the laws, but it is about translating what the law says on paper to meaningful attitudinal and behavioural change in society.

I could continue on with examples of how human rights that exist on paper are not being translated into human rights in practice. Sexual and reproductive rights,<sup>26</sup> economic rights,<sup>27</sup> political rights<sup>28</sup> et cetera... All are areas with many examples of failures<sup>29</sup> to recognize the rights of women and girls.

The problem, I would suggest, is not a shortage of ideas on how to improve the realisation of human rights for women in practice. I recently read a report on support for victims of crime in Vanuatu.<sup>30</sup> This report identified a number of previous reports from 2008 - 2011 that contained recommendations. It concluded that, of the 46 recommendations made, only 1 had been implemented. 35 had not been implemented and the remainder had only been partially implemented. Instead the problem is more about the will to take action.

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<sup>25</sup> Article 5(a) CEDAW.

<sup>26</sup> Using control of contraception as an example of lack of realisation of sexual and reproductive rights, a recent report found that 'a woman's decision to use family planning and contraceptives is often made under the real fear of physical and/or sexual violence from her partner.' UNFPA, *Vanuatu Sexual and Reproductive Health Rights Needs Assessment* (April 2015) <http://countryoffice.unfpa.org/pacific/drive/4.VanuatuSexualandReproductiveHealthRightsNeedsAssessmentReportLRv1.pdf> (Accessed 7 December 2016) 8).

<sup>27</sup> Using equality in employment as an example of lack of realisation of economic rights, statistics indicate that women have a lower labour force participation rate than men. In 2006 the employment to population ratio was 76.1 for men and 66 for women between the ages of 15 - 64. Between 1999 and 2006 the urban male employment to population ratio increased by 1.5% whilst the urban female employment to population ratio decreased by 5.5%. As well as differences in participation, there is a wage gap. In 2006 the average wage of urban males was 49,100 vatu whilst the average wage of urban females was 38,800 vatu. The difference was not so large in rural areas with the average wage of males being 33,400 vatu and the average wage of females being 31,600 vatu. (Vanuatu Prime Minister's Office, *Millennium Development Goals 2010 Report for Vanuatu* (September 2010) 10, 34.) In the public sector women 'on average earn only 80% of male public service employees.' (Chakriya Bowman, Amanda Ellis, Jozefina Cutura, Clare Manuel, *Women in Vanuatu: analyzing challenges to economic participation* (2009) 72.)

<sup>28</sup> Using political representation as an example of lack of realisation of political rights, it has been over 10 years since there has been a women in Vanuatu's parliament. (Michael Walsh, 'Vanuatu to Reserve Seats for Women' *Pacific Beat* 21 May 2016 <http://www.abc.net.au/news/2016-05-21/vanuatu-paves-way-for-womens-seats-in-parliament/7434720> (Accessed 1 December 2016).)

<sup>29</sup> A question may be raised as to whether it is the legal system that is failing, or whether the causes for failure fall elsewhere. As discussed above the complex mix of cultural factors affect the operation of the system, particularly where there is a gap between the values and desirable behaviours found in law and the values and desirable behaviours found in social practice. It should also be remembered that Vanuatu is a post colonial State, with a legal system that was adopted from the colonising authorities on Independence. This may contribute to a lack of familiarity with how to use State systems or lack of trust in State systems. The fact that Vanuatu is a developing country with limited resources also hinders the implementation of laws. Resources issues are compounded by the fact that the population is spread over about 60 inhabited islands, and in some places there is very little presence of State agencies. These issues are discussed in the Vanuatu Women's Lives Survey. See also, Anita Jowitt, 'The Nature and Functioning of Pacific Legal Systems' (2009) 13(1) *Journal of South Pacific Law* 1 for a more general discussion of issues to do with the operation of the State legal system.

<sup>30</sup> Heads of Agency Group Report, 'Victim Support' (6 October 2016) unpublished.

I would suggest that right now, whilst law plays a critical part, in order to realise the rights of women and girls in Vanuatu, action should not be focused on creating yet more new laws. Nor do we simply need legal literacy that only builds knowledge. It is very frustrating to be told that you have rights, and then, when you try to exercise them, find that all manner of practical barriers exist to actually having your rights recognised. Instead we need action to address the cultural and social factors that are preventing the law and legal system from being fully effective in recognising and enforcing the human rights of women and girls.<sup>31</sup>

What then might the University of the South Pacific's School of Law's role or the Pacific Legal Information Institute's (PacLII's) role in helping to create action for change? Maybe as a start the School of Law should be ensuring law students are aware of how unconscious attitudes and thoughtless behaviours can impact on the realisation of rights. It should also be seen as an in-country resource for Vanuatu to draw on when developing initiatives. PacLII is a platform for legal information, but it could be doing much more. Simply publishing the "raw data" of the laws does not help non-lawyers to understand what the law means. Developing legal literacy material on PacLII, but doing in a way that creation of the material includes a range of people who could potentially (unconsciously) act as barriers to the realisation of rights could possibly be a way of addressing unconscious behaviours. Going beyond creating literacy material, which is knowledge building, to creating advocacy material, which is change demanding is also possible, and is an important part of empowerment.<sup>32</sup> Whilst it is for NGOs, activist groups and the government to drive the agenda, USP and PacLII should be seen as partners in helping to develop a future Vanuatu where giving a talk on law and promoting human rights for women and girls is an opportunity to share with pride how much we have managed to achieve. Thank you.

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<sup>31</sup> It is unfortunate that the lack of action by people in positions of authority makes this oft-repeated statement something of a platitude.

<sup>32</sup> PacLII has begun to use Facebook to both share information about the content of laws and to generate discussion. It is also considering how implement a virtual community legal information centre. However, providing information is not necessarily empowering; a better model for empowerment may be to get affected communities to produce material. A funding proposal about disability law awareness that has been submitted (although not yet funded) suggests a possible model for direct community engagement in rights based activities. The proposal involved the formation of working groups of persons with disabilities to come into the PacLII office once a week to first develop legal literacy material. This process should result in a community of people with good knowledge of law, which is a necessary pre-cursor to legal advocacy work. Once knowledge of law is built the proposal involved continuing to work on legal advocacy material and activities. This model could be transferred to other areas, such as women's rights, children's rights and environmental rights.