

**COMPARATIVE LEGAL REVIEW OF
THE IMPACT
OF GENDER
STEREOTYPING
ON JUDICIAL
DECISIONS**

**IN VIOLENCE AGAINST
WOMEN CASES ACROSS
THE PACIFIC ISLAND REGION**

The Equality & Justice Alliance

**is dedicated to
advancing equality
and promoting equal
protection of the law
for all Commonwealth
citizens regardless of
sex, gender, sexual
orientation, gender
identity or expression.**

1.

Key concepts

2.

International and regional
obligations of states to combat
gender bias and stereotyping

3.

Country reports

This report

This report commissioned by Sisters For Change explores the link between gender bias and stereotyping and violence against women and girls. Gender bias and gender stereotyping constitute forms of gender discrimination prohibited under international law. In recent years, gender stereotyping has come under increased scrutiny from the international legal community and it is now widely recognised that the persistence of gender stereotypes creates a normative framework in which discrimination and violence against women is normalised and perpetuated. The report analyses the development of international and regional standards and jurisprudence on State obligations to eliminate gender bias and stereotyping and identifies case studies of good practice from Commonwealth jurisdictions including Canada, Fiji, Namibia, Australia, New Zealand and the United Kingdom, which have produced pioneering case law and domestic legislation explicitly targeting gender bias.

Women and girls in Pacific Island Countries face the highest rates of violence globally, with 60-80% of women and girls aged 15-49 years experiencing intimate or non-intimate partner violence. Yet perpetrators of domestic and sexual violence often receive disproportionately low sentences or no custodial sentence at all. The report examines the scope of gender-based violence against women and girls in the Pacific Island Region and provides an in-depth analyses of the impact of gender bias and stereotyping on judicial decisions in violence against women cases across seven countries in the Commonwealth Pacific Island Region – Fiji, Vanuatu, Tonga, Samoa, Solomon Islands, Papua New Guinea, and Kiribati.

The purpose of this report is to highlight positive developments in international and regional standards, domestic legislation and case law targeting gender bias and stereotyping to inform and improve judicial decision-making in cases of violence against women and girls across the Pacific Island Region and the wider Commonwealth.



Authors and acknowledgements

This report was commissioned by Sisters For Change, authored by Jaspreet K. Singh, Hansdeep Singh, Erin Thomas and Natalie Druce of the International Center for Advocates Against Discrimination (ICAAD) and edited by Jane Gordon, SFC Legal Director.



About Sisters For Change

Sisters For Change (SFC) is an international NGO working to eliminate discrimination and violence against women and girls worldwide through legal reform, legal empowerment, legal accountability and legal advocacy strategies. SFC works to generate systemic change in how governments combat violence, structural change to give women voice and agency in justice systems and social change to end the social acceptance of violence against women and girls. SFC is active in the UK, India and Indonesia. As a member of the Equality & Justice Alliance, SFC is working to reform laws that discriminate against women and girls and LGBT people across the Commonwealth. SFC is currently working with the governments of Namibia, Saint Lucia and Samoa on technical assistance programmes and is a member of the Southern African Development Community (SADC) Parliamentary Forum's Technical Working Group on the development of a Model Law on Gender-Based Violence.

For more information visit

www.sistersforchange.org.uk

Follow us on  @sisters_4change

Registered Company No. 9136425

Registered Charity No. 1165647

Copyright © Sisters For Change 2020.

This work can be copied, shared and distributed, in whole or in part, for research, educational and public policy purposes subject to the condition that the work is not altered or adapted and the Equality & Justice Alliance is acknowledged as author of the work.

This work has been commissioned by Sisters For Change, a member of the Equality & Justice Alliance, but it has not been approved by, nor does it represent the opinions of, any other member of the Alliance.

Printed in the United Kingdom. First printing 2020.

ISBN No. 978-1-913173-10-4

Design by Bright Design, elaine_craig@hotmail.com

Sisters For Change is grateful to the UK Government Foreign & Commonwealth Office for supporting the work of the Equality & Justice Alliance.



About ICAAD

ICAAD works at the intersection of legal innovation and human-centered design to create evidence-based programs with organisations and communities to combat structural discrimination. By leveraging multidisciplinary teams and taking an integrated approach, we are able to improve resilience, safety and equity across systems.

For more information visit

<https://icaad.ngo/>

Follow us on  @icaadglobal

Contents

04	Focus of review
06	Executive summary
06	Structure of report

1. Key concepts

10	Introduction
11	Key concepts
13	Case studies: The link between discrimination and violence against women
13	A. Fiji: Domestic violence
14	B. Vanuatu: Bride price
15	C. Papua New Guinea: Accusations of sorcery and witchcraft

2. International and regional obligations of states to combat gender bias and stereotyping

18	Introduction
19	A. International legal framework
19	Convention on the Elimination of All Forms of Discrimination Against Women
22	International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights
23	Convention on the rights of Persons with Disabilities
23	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
24	Other UN initiatives: Beijing Platform for Action 1995
25	B. Regional frameworks
25	Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women
26	Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence
27	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
28	Other international and regional instruments addressing gender bias and stereotyping
30	C. Case studies of good practice
30	Judicial decision-making
30	Canada
30	Fiji
31	Mexico
32	Legislation and regulatory developments
32	Namibia
32	Australia and New Zealand
33	United Kingdom

3. Country reports

36	Introduction
37	A. Scope of GBV in the Pacific Island Region
39	B. Analysis of case law of Pacific Island Countries
41	C. Longitudinal study of Fiji GBVAW cases
46	D. Country case studies
46	Fiji
49	Vanuatu
52	Tonga
55	Samoa
59	Solomon Islands
64	Papua New Guinea
66	Kiribati

Focus of review



- 1 Fiji Population of **896,445**
- 2 Kiribati Population of **433,285**
- 3 Papua New Guinea Population of **119,449**
- 4 Samoa Population of **197,097**
- 5 Solomon Islands Population of **686,884**
- 6 Tonga Population of **104,494**
- 7 Vanuatu Population of **299,882**



7
countries
reviewed

5.5m
women

60-80%
of women and girls aged
15-49 experience GBV

Executive summary

One third of all women and girls worldwide face an ongoing epidemic of gender-based violence (GBV). Gender discrimination in the form of GBV, bias/stereotyping, myths, customary practices, patriarchy, and toxic masculinity shapes societal expectations about women's and girls' continued subordination. A clear and direct line can be drawn between gender discrimination and violence, and this report seeks to elucidate this connection by providing an international and regional overview of cases and legislation that have been found to violate human rights norms, and then by focusing our analysis on Pacific Island Countries, where women and girls face the highest rates of violence globally, on average. The analysis shows how the perpetuation of bias/stereotyping that leads to violence is not just confined to the domestic sphere or specific communities, but pervades each and every institution, including those charged with upholding justice.

Part I of the report considers key concepts of gender discrimination and explores three case studies – Fiji, where women's traditional obligations in the domestic sphere lead to domestic violence because of societal conceptions of "ideal behaviour" for women; the practice of "bride price" in Vanuatu, a widespread customary practice where a groom pays money or goods to his bride's family as part of their marriage; and finally, sorcery and witchcraft in Papua New Guinea, which is an all too convenient excuse for violence and even murder of elderly women who are economically dependant on their tribe, or a way to silence and control intimate partners.

Part II of the report conducts an exhaustive analysis on major international and regional human rights instruments and their prohibitions on discrimination against women, including: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, the Convention Against Torture, and the Beijing Platform for Action 1995. In the regional context are the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the Convention of Belém do Pará), Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence 2011 (Istanbul Convention),

and the African Charter on Human and Peoples' Rights and its 2003 Protocol on the Rights of Women in Africa (the Maputo Protocol). All these instruments and related jurisprudence brought before respective regional courts speak to the nuances related to gender stereotyping/bias and violence.

Part II further analyses gender stereotyping, bias, myths and customary practices through the lens of international and regional human rights instruments, by examining formative legal cases and legislation. For example, in *Vertido v The Philippines*, the CEDAW Committee found that the Court violated CEDAW because it sought to impose a duty upon the rape victim to prove resistance. More importantly, the CEDAW Committee made clear that there is no "ideal" rape victim and warned the Court to take caution regarding their preconceived notions of what women should be or want. However, sometimes the international bodies themselves overlook the stereotypes courts relied upon in making their decisions. In *L.N.P v Argentine Republic*, The Human Rights Committee missed an opportunity to dispel gender myths about when consent can be withheld and sexual inexperience as a precondition for a rape conviction.

In contrast, the regional framework of the Inter-American Court of Human Rights specifically recognises gender stereotyping as a cause of violence against women. This finding was made in the context of Mexico's continued lack of response to the death and disappearances of women in Ciudad Juárez, which relied on stereotyped conceptions of why the women went missing. In the context of parental leave, the European Court of Human Rights found that stereotyped perceptions of men as breadwinners and women as caretakers could not justify differential treatment and that such stereotypes undermine women's careers. In addition to judicial decisions being replete with gender bias, the African Court of Human and Peoples' Rights has also found legislation upholding traditions and customary practices to be discriminatory against women and children. What this snapshot reveals is that gender stereotypes, bias, myths and customary practices are globally pervasive and that the institutions charged with upholding justice can undermine the notion of justice through biased decision-making.

Part II concludes with a study of pioneering case law and legislation that target manifestations of gender bias that lead to violence against women from national jurisdictions including: Canada, where the use of the defence of “implied consent” was overturned; Fiji, where the Chief Magistrate issued directives as to correct the misapplication of first-time offender status and caution against requiring complainants to attend joint counselling with offenders; Mexico, where the Supreme Court published a protocol that explains how international human rights treaties are to be implemented as binding law by domestic courts; Namibia, which codified the criminalisation of rape within marriage; Australia and New Zealand, both of which instituted legislation to provide leave from employment for victims of domestic violence; and the United Kingdom, where a rule was issued preventing advertising from including gender stereotypes likely to cause harm.

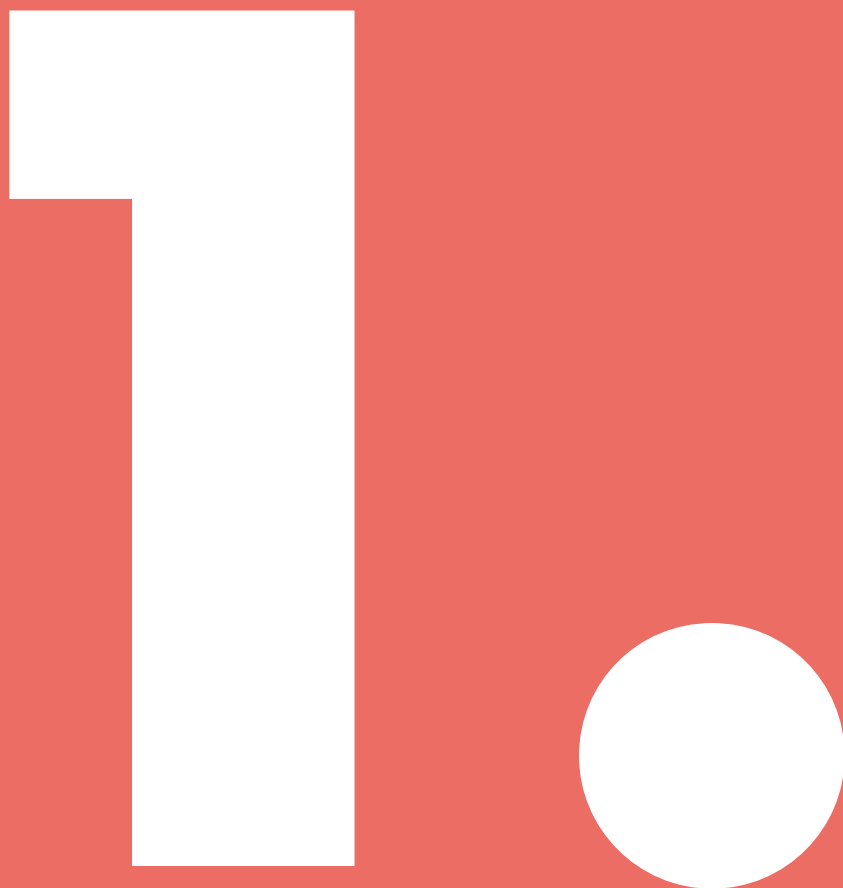
Part III, comprising the bulk of the report, explores the scope of gender-based violence against women and girls in the Pacific Island Region and provides in-depth analyses of cases from seven Commonwealth countries in the Pacific Islands – Fiji, Vanuatu, Tonga, Samoa, Solomon Islands, Papua New Guinea, and Kiribati. The extent of GBV in the Pacific is unprecedented – across the region, 60%-80% of women and girls face violence across the spectrum of intimate and non-intimate partner violence. The rate of violence is shaped by many factors, from socio-economic circumstances and poor enforcement to differences in cultural practices, perceived gender roles, and gender stereotypes. These rates are also compounded by other intersecting discriminatory factors, such as disability, sexual orientation, and gender identity. The analyses of cases from across the Pacific Island Region focus on how customary forms of reconciliation, gender stereotypes, rape myths and other factors are considered in sentence mitigation. This focus resulted from a pilot analysis of randomly selected cases conducted by ICAAD that indicated that gender bias reduced the sentences of perpetrators in 52% of GBV cases across the region. An overarching review of cases from Fiji across an 18-year period highlights the importance of monitoring and evaluating sentencing decisions to assess transparency, consistency, and accountability. This overarching analysis reveals key information in relation to access to justice in courts, including the application of first-time offender status, inclusion of medical reports, age of victims, victim anonymity, and gender bias resulting in reduced sentences.

Part III concludes with an in-depth analyses of GBVAW cases in seven Pacific Island Countries, assessing the impact of gender-bias and stereotyping on jurisprudence, customary reconciliation practices, factors privileging perpetrators (victim-blaming, provocation, rape myths, alcohol as an excuse) and the operation of parallel state and customary legal systems.

Structure of report

This report commissioned by Sisters For Change provides a comprehensive review of the impact of gender bias and stereotyping in judicial decision-making in gender-based violence against women cases in Pacific Island Countries.

- 1. Part I** of the report discusses key concepts of gender discrimination and explores case studies on practices in Fiji, Vanuatu and Papua New Guinea that demonstrate the link between discrimination and violence against women.
- 2. Part II** of the report discusses international and regional legal standards and case law addressing gender bias and stereotyping as a form of discrimination against women and its inter-relationship with gender-based violence against women (GBVAW).
- 3. Part III** of this report discusses first the scope of gender-based violence against women and girls in the Pacific Island Region before providing an in-depth analyses of GBVAW cases across the Pacific Island Region and examining the impact of customary practices on women’s access to justice in GBVAW cases. The report focuses on the following seven Pacific Island Countries: Fiji, Vanuatu, Tonga, Samoa, Solomon Islands, Papua New Guinea, and Kiribati.



Key concepts

Introduction

Gender-based violence (GBV)¹ is an epidemic that affects over a third of women worldwide.² The term epidemic is not lightly used here – GBV is a public health crisis³ as pervasive as a disease and is incredibly difficult to eliminate, despite the many actions and resources dedicated to doing so. These actions are not so dissimilar from those taken to combat disease either; preventative and reactive campaigns have been undertaken to combat GBV that focus on the health, finance, education, and legal consequences of the epidemic. Yet, while progress has been made to reduce the prevalence of GBV, it remains a consistently abhorrent and a persistent global feature of society. This is because GBV is a manifestation of gender discrimination that is deeply rooted in how societies “subordinate and oppress women”.⁴ Only when society works to disrupt the underlying discriminatory norms that fuel GBV will positive measures to prevent GBV be effective.

A UN study⁵ found that pervasive discrimination against women and male privilege and power are the major causes of violence against women: “Violence against women is both a means by which women’s subordination is perpetuated and a consequence of their subordination.”⁶ In addition, male supremacy, gender stereotypes and discrimination against women and girls persist in many societies despite enactment of laws and policies put in place to end them. The outcomes of structural discrimination against women include:

- ↪ restriction of women’s sexuality and reproductive freedom;
- ↪ uncompensated exploitation and control of women’s productive and creative capacities, talents, and skills;

- ↪ cultural practices that entrench a false narrative of women’s inferiority by limiting educational, earning, and entrepreneurial activities as well as property ownership;
- ↪ laws and legal institutions that formalise and perpetuate women’s inferiority; and
- ↪ enforcement through individually and socially accepted subjugation (limited freedom of movement) and violence against women in the home and in the community.⁷

The pervasiveness of GBV can be seen clearly in Pacific Island Countries (PICs)⁸ which have the highest rates of violence against women and girls in the world,⁹ in part because the societal structures that should be providing avenues for justice, redress, and protection for victim/survivors¹⁰ of GBV have not been untangled from the pervasiveness of gender inequality.

1 The international community uses both the terms “sexual and gender-based violence” (SGBV) and “gender-based violence” (GBV). SGBV was used in the earliest humanitarian programmes which primarily addressed violence against conflict-affected women and girls and focused on exposure to sexual violence. More recently, humanitarian groups have been advocating the use of the term GBV to clarify that sexual violence is a component of GBV rather than a separate issue. In some instances, organisations will use the term GBV to refer to violence against men and boys and/or violence against LGBTIQ populations. For the purposes of this report, we use the term GBV unless quoting from a source which uses SGBV; however, we express no preference for either term.

2 WHO, *Global And Regional Estimates Of Violence Against Women: Prevalence And Health Effects Of Intimate Partner Violence And Non-partner Sexual Violence*, 2013, p.1: <https://www.who.int/reproductivehealth/publications/violence/9789241564625/en/>.

3 WHO, *Violence Against Women: A “Global Health Problem Of Epidemic Proportions”*, https://www.who.int/mediacentre/news/releases/2013/violence_against_women_20130620/en/.

4 Office of High Commission for Human Rights (OHCHR), *Launch of CEDAW General Recommendation No. 35 on gender-based violence against women*, updating General Recommendation No. 19, <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/GR35.aspx>. General Recommendation No. 35 is deeply instructive on understanding GBV through the lens of gender discrimination. CEDAW, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, CEDAW/C/GC/35, 14 July 2017: https://treaties.un.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf.

5 United Nations, *Ending Violence Against Women: From Words to Action, Study of the Secretary-General*, October 2006, p.ii: http://www.un.org/womenwatch/daw/public/VAVV_Study/VAVVstudyE.pdf.

6 *Ibid.*, p.29.

7 UN Women, *Progress of the World’s Women 2015-2016: Transforming Economies, Realizing Rights*, 2015.

8 The PICs referenced in this report are Fiji, Kiribati, Marshall Islands, Micronesia, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

9 *Op.cit.* at fn 2, pp.17-20.

10 Victim and survivor are both terms that will be used to describe individuals who have experienced GBV. Victim will be used in the sense that the individual has been subject to a crime, and survivor is used to more broadly emphasise empowerment through recovery. See more at Sexual Assault Kit Initiative, *Victim or Survivor: Terminology from Investigation Through Prosecution*: <https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf>.

This report analyses the impact of gender bias and stereotyping in judicial decision-making in gender-based violence against women cases in Pacific Island Countries. Part I of the report covers key concepts of gender discrimination and explores case studies on practices in Fiji, Vanuatu, and Papua New Guinea that demonstrate the link between discrimination and violence against women. Part II of the report discusses international and regional legal standards and case law, analysing gender bias and stereotyping as a form of discrimination against women and its inter-relationship with gender-based violence against women (GBVAW). Finally, Part III of the report discusses first the scope of gender-based violence against women and girls in the Pacific Island Region before providing in-depth analyses of GBVAW cases across the Pacific Island Region and examining the impact of customary practices on women's access to justice in such cases. The report focuses on the following seven Pacific Island Countries: Fiji, Vanuatu, Tonga, Samoa, Solomon Islands, Papua New Guinea, and Kiribati.

It is important to recognise that while gender bias and stereotyping, and GBV are experienced by people of all genders, the focus of this report is on the direct relationship between gender stereotyping and discrimination and violence against women and girls on the grounds that in Pacific Island Countries – and globally – women and girls are overwhelmingly the victims of GBV and men the perpetrators.¹¹

Key concepts

This section defines important gender discrimination concepts and discusses the social structures that enable gender-based violence against women.

Gender

The World Health Organization (WHO) defines gender as:

“socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men. It varies from society to society and can be changed. While most people are born either male or female, they are taught appropriate norms and behaviours – including how they should interact with others of the same or opposite sex within households, communities and work places. When individuals or groups do not “fit” established gender norms they often face stigma, discriminatory practices or social exclusion – all of which adversely affect health. It is important to be sensitive to different identities that do not necessarily fit into binary male or female sex categories.”¹²

Gender bias and gender stereotypes

Gender bias, whether conscious or unconscious, is a preference or prejudice of one gender over another, and can manifest in ways that are difficult to detect. “A gender stereotype is a generalised view or preconception about attributes or characteristics that are or ought to be possessed by, or the roles that are or should be performed by, men and women.”¹³ Gender bias and gender stereotypes can affect the way family, community members, religious leaders, health professionals, law enforcement, and the judiciary respond to incidents of GBV, which itself is a manifestation of that bias, called gender stereotyping. Gender bias and gender stereotyping constitute a form of gender discrimination and are both a cause and consequence of GBV, as well as an impediment to the legal system's capacity to adequately respond to it.

¹¹ Biersack, A. and Macintyre, M., *Gender Violence & Human Rights: Seeking Justice in Fiji, Papua New Guinea and Vanuatu*, 2016, p.4.

¹² WHO, Gender, equity and human rights: <http://www.who.int/genderequityrights/understanding/gender-definition/en/>.

¹³ See OHCHR Commissioned Report, *Gender Stereotyping as a Human Rights Violation*, October 2013, p.8: <http://www.ohchr.org/Documents/Issues/Women/WRGS/2013-Gender-Stereotyping-as-HR-Violation.docx> citing Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives*, Philadelphia: University of Pennsylvania Press, 2010, p.20.

Key concepts cont

The impact of stereotyping can be clearly observed in the field of access to justice. For example, some judges have been found to exhibit gender bias when influenced by testimony of the past sexual conduct of a victim/survivor of rape, or in other cases, have minimised the severity of an assault because it happened in the home. The result can lead to disbelief or diminishment of a victim/survivor's testimony and experience, leading to a suspended or severely reduced sentence for the perpetrator.¹⁴ The notion that either of these factors can influence a conviction or result in a mitigated or suspended sentence is an illustration of the real-world impact of gender bias.

Gender-based violence

The Declaration on the Elimination of Violence against Women defines "violence against women" as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".¹⁵ Rashida Manjoo, UN Special Rapporteur on Violence Against Women, describes GBV as happening at the intersection of "structural, institutional, interpersonal, and individual factors".¹⁶

GBV myths

GBV myths are widely and persistently held beliefs about the causes of GBV and the nature of victims or perpetrators. Similar to stereotypes, the myths usually serve to justify GBV and male aggression.¹⁷ These myths often originate from traditional gender roles and societal acceptance or promotion of interpersonal violence. Some examples of these myths include: the idea that rape is a crime of passion; that women provoke men to violence; that perpetrators are not responsible for actions they take when drunk; or that if a victim/survivor did not scream, fight or suffer physical injury then rape did not occur.¹⁸ GBV myths encourage victim-

blaming and normalize toxic masculinity,¹⁹ thereby leading to an underreporting of GBV crimes. GBV myths have also permeated judicial decision-making. There are many instances of courts failing to order sentences proportionate to the gravity of a crime or acquitting perpetrators on the basis of GBV myths.

Customary practices

Customary practices are inherited norms and traditions that are valued by members of society as essential features of identity and culture.²⁰ Custom and culture play important roles in societies across the world. However, customary practices often discriminate against women, can violate women's human rights and can undermine women's access to justice and equal protection of the law. Customary practices such as formal or informal reconciliation – usually between the perpetrator and the victim/survivor or their family – regularly occurs outside the formal justice system and often fails to take due consideration of the rights of the victim of violence. Under some domestic laws, reconciliation is taken into account by law enforcement and/or criminal justice officials and used to mitigate (reduce) sentences and/or dismiss cases altogether.²¹

Formal or informal customary practices rooted in stereotypical and hierarchical notions of women and their role in the community perpetuate discrimination and/or subordination of women when they fail to provide reparation and redress to women victims of violence,²² and instead appear to prioritise absolving the perpetrator of violence by way of community apology and compensation (generally money or goods). Certain customary practices, in this context, undermine the rights of women and children to equal treatment before the law and equal protection of the law.

¹⁴ See Department of Justice, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*, 15 December 2015: <https://www.justice.gov/ctt/file/799316/download>.

¹⁵ The Declaration on the Elimination of Violence against Women, UN General Assembly Resolution A/RES/48/104 (1993); UN Women, *Gender Equality Glossary*, available at: <https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36&mode=letter&hook=V&sortkey=&sortorder=>

¹⁶ Human Rights Council, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, UN Doc. A/HRC/20/16, 23 May 2012, p.28 (prepared by Rashida Manjoo: <http://www.ohchr.org/Documents/Issues/Women/A.HRC.20.16.En.pdf>). Rashida Manjoo served as the Special Rapporteur on VAW from July 2009 until July 2015.

¹⁷ See Interagency Gender Working Group, *Myths and Realities of Gender-Based Violence*, available at: <https://www.igwg.org/wp-content/uploads/2017/05/MythsRealitiesGBV.pdf>; see also *Op.cit.* at fn 1, p.3.

¹⁸ For a more complete listing of rape myths, see Singh, H., Singh, J. and Christie, E., *An Analysis of Judicial Sentencing Practices in Sexual & Gender-Based Violence Cases in the Pacific Island Region*, ICAAD & DIA Piper, 2016, pp.89-95.

¹⁹ Toxic masculinity delineates the aspects of stereotypical masculinity that are socially destructive. These proclivities include "extreme competition and greed, insensitivity to or lack of consideration of the experiences and feelings of others, a strong need to dominate and control others, an incapacity to nurture, a dread of dependency, a readiness to resort to violence, and the stigmatization and subjugation of women, gays, and men who exhibit feminine characteristics". Kupers, T. A., *Toxic Masculinity as a Barrier to Mental Health Treatment in Prison*, *J. Clinical Psychol.*, 61(6), 2005, 717.

²⁰ UNESCO, *Convention for the Safeguarding of the Intangible Cultural Heritage*, Article 2, available at: <https://ich.unesco.org/en/convention>.

²¹ *Per Justice Fisher in losu v AG*, 2014, WSCA 5 para 40, in Samoa ifoga (a group activity where typically one group apologises for the conduct of one of its members to another offended group) is taken into account by the court even in cases of rape of young girls (see *Police v PE* [2013] WSSC 10; *Police v Lauvae* [2011] WSSC 75; *Police v Moatoga* [2012] WSSC 61; *Police v Tuifao* [2012] WSSC 6). See also Samoa Office of the Ombudsman National Human Rights Institution, *National Public Inquiry into Family Violence in Samoa* [2018] Inquiry Finding 37, p.186.

²² UN Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, 2009, p.16, available at: <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>

Patriarchy

UN Women defines patriarchy as:

“a traditional form of organising society which often lies at the root of gender inequality. According to this kind of social system, men, or what is considered masculine, is accorded more importance than women, or what is considered feminine. Traditionally, societies have been organized in such a way that property, residence, and descent, as well as decision-making regarding most areas of life, have been the domain of men. This is often based on appeals to biological reasoning (women are more naturally suited to be caregivers, for example) and continues to underlie many kinds of gender discrimination.”²³

This is not to say that patriarchy is the same everywhere, including within the Pacific Island Region. It takes shape through tensions between the political-legal-economic structures and the social-cultural-ideological factors that are context specific.²⁴

Masculinity

Masculinity can be expressed as the societal blueprint for men.²⁵ This blueprint of masculinity is distinguished through power relations, division of labour, and sexuality in a process of social relations.²⁶ Toxic masculinity is not a given nor is it universal. It occurs through continuous restructuring of both the political-legal-economic and social-cultural-ideological processes.²⁷ The dynamics in this restructuring give rise to violence that reinforces the gender hierarchy – most often, violence by men against women to sustain dominance. However, gender politics and violence among men also arise when certain marginalised groups of men fail to fit the social blueprint for masculinity, notably gender and sexual minorities.²⁸ Eminent scholar R.W. Connell argues that GBV signifies that the modern gender order is in crisis because a successful hierarchy would not require violence to uphold it.²⁹

The hierarchy created by patriarchy also impacts men.³⁰ Leading feminist author, Bell Hooks, states it poignantly:

“Learning to wear a mask is the first lesson in patriarchal masculinity that a boy learns. He learns that his core feelings cannot be expressed if they do not conform to the acceptable behaviours sexism defines as male. Asked to give up the true self in order to realise the patriarchal ideal, boys learn self-betrayal early and are rewarded for these acts of soul murder.”³¹

Case studies: The link between discrimination and violence against women



A. Fiji: Domestic violence - women's obligations in the domestic sphere

Traditionally, women in Fiji are primarily responsible for cleaning, cooking, and child rearing, and have additional obligations placed on them by culture and interpretation of religion, while men are the heads of households and “primary breadwinners”. For *iTaukei*, or indigenous Fijians, who make up approximately 56.8% of the population, *vakaturaga* is a “commonly used term for ideal behaviour”, and is used to describe individuals who know their place in society and comply with “traditionally defined obligations and responsibilities”.³² These values “sustain a male hierarchy in which subordinate men (and women) are expected to obey the chiefs, who are considered to represent God’s order”.³³ Furthermore, *vakaturaga* encourages the silence of women “because women are not usually considered to be representatives at any level, a view that is supported in the teachings of a majority of the Christian churches in Fiji”.³⁴

Women facing domestic violence are hindered from accessing justice because there is an expectation that matters should be resolved within the family and in rural areas, by the village head (*turaga ni koro*). The same village head has the authority to refuse police access to a village.³⁵ Furthermore, victim/survivors of violence often seek assistance of their church leaders, who may counsel reconciliation instead of focusing on the violence perpetrated, and who generally avoid involving law enforcement. Many lay preachers focus on the

23 UN Women, *Gender Equality Glossary*, available at: <https://trainingcentre.unwomen.org/mod/glossary/view.php?id=36&mode=letter&hook=P&sortkey=&sortorder>.

24 Hapke, H., *Theorizing Patriarchy: Development Paradoxes and the Geography of Gender in South Asia*, 17 *Gender, Tech, & Dev.* 1, 2013, p.14.

25 UN Women, *Progress of the World's Women 2015-2016: Transforming Economies, Realizing Rights*, 2015.

26 *Ibid.*, p.74.

27 Connell, R.W., *Masculinities*, University of California Press, 2005.

28 *Ibid.*, p.83.

29 *Ibid.*, p.84.

30 Connell, R.W., *Commission on the Status of Women*, 2004, pp.2-3: <https://www.un.org/womenwatch/daw/csw/csw48/PD2-Connell.PDF>.

31 Hooks, B., *The Will to Change: Men, Masculinity, and Love*, Washington Square Press, January 2004.

32 Biersack, A. and Macintyre, M., *Gender Violence & Human Rights: Seeking Justice in Fiji, Papua New Guinea and Vanuatu*, 2016, pp.54-55.

33 *Ibid.*, p.55.

34 *Ibid.*

35 *Ibid.*, pp.56-57.

Key concepts cont

religious aspects of marriage, emphasising traditional roles of men and women, and even espousing the belief that “[m]an represents God in the family”.³⁶ Church leaders are now becoming more active in promoting gender equality through theology,³⁷ declaring that “violence against women and children ‘is a sin’”, but it is unclear how often they continue to counsel reconciliation between victim and abuser.³⁸

Fijians of Indian descent make up approximately 37% of the population of Fiji, and women from this group face violence because of different norms and traditions than *iTaukei* women. Much like in traditional societies in India, from birth girls are considered an economic liability and a financial burden on their families.³⁹ This arises primarily from “the Hindu practice of giving dowry in which the bride’s family transfers property, cash, jewellery, clothing, and other household items to the groom or his family in exchange for his marriage to her”.⁴⁰ Furthermore, men tend to make the most important decisions for the family, such as arranging the marriages of their daughters, and women are expected to be deferential and subordinate to their husbands. Because “control over and regulation of sexuality is central to patriarchy”, young women are often confined to their homes and limited from interacting with males.⁴¹ Violating the rules placed on them comes with grave consequences, with women being ostracised by society and family, disowned by their parents, or facing violence or even death at the hands of family members.⁴²



B. Vanuatu: Bride price

Bride price is a widespread customary practice in the Melanesian region of the PICs (eg: Papua New Guinea, Vanuatu, Solomon Islands), where a groom pays money or goods to his bride’s family as part of their marriage.⁴³ This places women at risk because it reinforces notions of “ownership” and treatment of women as a commodity, in addition to making it difficult for victim/survivors to escape their husbands.⁴⁴ It has been used to “justify forced conjugal sex and gender violence”⁴⁵ and has been attributed to the societal normalisation of domestic violence.⁴⁶

In Vanuatu, the practice of paying a set monetary sum (80,000 Vatu) for “bride price” was repealed in 2005 by the Malvatumauri National Council of Chiefs,⁴⁷ but the practice of providing traditional currency, livestock, mats, and other items continues today. Eliminating a minimum national cash price was described as empowering to women by allowing their worth to be determined by each woman’s family or tribe.⁴⁸ However, eliminating the bride price payment altogether, and allowing women the same freedom as men to enter into or leave a marriage, was not given consideration.

With the passage of the Family Protection Act 2008, some legal protections around bride price were enacted. Mainly, bride price would no longer be a defence to domestic violence⁴⁹ or be used as a justification to not issue a protection order, temporary protection order, or a breach of a protection order.⁵⁰ Nevertheless, the continuation of bride price in slightly varied forms, through the distribution of gifts rather than only cash, has maintained the pervasive idea that a woman maintains a subordinate role because she has been paid for.

36 *Ibid.*, p.57.

37 Uniting World, *Theology of Gender Equality Making Waves in the Pacific*, December 2018: <https://www.unitingworld.org.au/theology-of-genderequality-making-waves-in-the-pacific/>

38 Anglican Communion News Service, *Fijian churches unite to “Break the Silence” on violence against women*, November 2017:

<https://www.anglicannews.org/news/2017/11/fijian-churches-unite-to-break-the-silence-on-violence-against-women.aspx>

39 Adinkrah, M., *Uxoricide in Fiji: the Sociocultural Context of Husband-Wife Killings*, *Violence Against Women*, Vol. 5, No. 11, November 1999, p.1299.

40 *Ibid.*, p. 1299.

41 *Ibid.*, pp.1300-1302

42 *Ibid.*, pp.1301, 1309

43 Farran, S., *Pigs, mats and feathers: customary marriage in Vanuatu*, *The Journal of Pacific Studies*, Vol. 27, No. 2, 2004, p.245.

44 Kotoisuva, E., *Combating Violence against Indigenous Women and Girls: Article 22 of the UN Declaration on the Rights of Indigenous Peoples*, *Violence Against Women and Girls in the Pacific*, UN Department of Economic and Social Affairs, 18-20 January 2012: http://www.un.org/esa/socdev/unpfii/documents/EGM12_Kotoisuva.pdf.

45 *Op.cit.* at fn 32, p.350.

46 Papua New Guinea Law Reform Commission, *Final Report on Domestic Violence*, Report No. 14, 1992: http://beta.paclii.org/pg/LRC/REP_14.html.

See also, *State v Lom*, 2012, PGNC 63. See also *op. cit.* at fn 32 p.146 and 170.

47 CEDAW, *Responses to List of Issues and Questions with Regard to the Consideration of the Combined Initial, Second, and Third Periodic Reports*, CEDAW/C/VUT/Q/3/Add.1, 12 January 2007, p.7.

48 *Ibid.*, p.6.

49 Family Protection Act 2008 (Vanuatu), Part II, 10(2).

50 Family Protection Act 2008 (Vanuatu), Part III, 11(4), 20(4), and 21(2).

Prior to marriage, women are instructed “about their roles and that they cannot tell what happens at home outside the house. And they believe that is culture.”⁵¹ As a result, many women internalise messages about what is acceptable treatment. UN Women conducted a study in Vanuatu and found that 53% of women believe if a bride price was paid, they are their husband’s (to a larger extent, his family’s) property.⁵² Moreover, 32% of women believe that bride price justifies beating one’s wife.⁵³



C. Papua New Guinea: Accusations of sorcery and witchcraft

In Papua New Guinea (PNG), particularly in the Highlands, it is widely believed that some individuals possess magic powers. Beliefs in sorcery and witchcraft have also been combined with gender discrimination to result in violence against women. In some areas of PNG, sorcery (*puri-puri*) is blamed for illnesses, such as HIV/AIDS, and unexplained deaths.⁵⁴ The women accused of practicing witchcraft are usually elderly women who are economically dependant on their tribe, and therefore perceived to be a financial burden.⁵⁵ In other cases, accusations of sorcery can also be tied to intimate partner violence, “with abusive husbands threatening or using sorcery accusations to silence and control women”.⁵⁶ UN Women identified allegations of sorcery, usually against women, that resulted in violence and the murder of the alleged sorcerer.⁵⁷

Under the Sorcery Act 1971, an act of “forbidden sorcery” was deemed to be a criminal act.⁵⁸ Suspicion that a victim practiced sorcery has been raised as both a justification and mitigating factor in murder/manslaughter cases.⁵⁹ In 2010, the CEDAW committee urged PNG to review its laws relating to sorcery and sorcery-related deaths and to take effective measures to prosecute and punish perpetrators of violence.⁶⁰ In 2013, Papua New Guinea passed the Criminal Code Act (Amendment) 2013 which repeals the Sorcery Act 1971 and treats killings relating to sorcery as willful murder with a maximum penalty of death.⁶¹ Yet, belief in sorcery combined with gender discrimination has continued to fuel violence against women, including immolation and murder, as a method for obtaining property rights, removing older women from society who are deemed to be an “economic” burden,⁶² or blaming them for unforeseen deaths or disease.⁶³

51 Marilyn Tahi, Coordinator of the Vanuatu’s Women’s Center, as quoted in World Bank, *Raising awareness of violence against women in the Pacific*, 25 November 2012: <http://www.worldbank.org/en/news/feature/2012/11/25/raising-awareness-of-violence-against-women-in-the-pacific>.

52 UN Women: Asia and the Pacific, Vanuatu: <http://asiapacific.unwomen.org/en/countries/fiji/co/vanuatu>.

53 *Ibid.*

54 Jalal, I. *Harmful Practices Against Women in Pacific Island Countries: Customary and Conventional Laws*, UN Division for the Advancement of Women, UN Economic Commission for Africa, 2009, p. 19, available at: https://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20Imrana%20Jalal.pdf.

55 *Ibid.*

56 Barr, H., *Bashed Up: Family Violence in Papua New Guinea*, 2015, p. 5, available at: <https://www.hrw.org/report/2015/11/04/bashed-family-violence-papua-new-guinea>.

57 UN Women, *Ending Violence Against Women & Girls, Evidence, Data and Knowledge in the Pacific Island Countries: 2nd Edition*, 2011, p. 7.

58 Sorcery Act 1971 (Papua New Guinea), Part III, s. 7(a).

59 *State v Aiya* [2013] PGNC 102; N5198, 19 April 2013, [violence against aunt, the court considered but rejected killing on suspicion of sorcery as a mitigating factor]; *State v Tayamina* (No. 3) [2013] PGNC 110; N5288, 10 May 2013, [court accepted as a mitigating factor]; *State v Naba* [2013] PGNC 115; N5308, 24 July 2013, [court accepted as a mitigating factor]; *State v Lota* [2007] PGNC 167; N3183, 1 October 2007, [court accepted suspicion of sorcery as a mitigating factor].

60 CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women*, CEDAW/C/PNG/CO/3, 30 July 2010, p. 6.

61 Amnesty International, *Papua New Guinea: Time for a Real Action to Protect Human Rights*, UN Universal Periodic Review, 25th Session of the UPR Working Group, February 2016, pp. 5, 7.

62 UN Office of the High Commissioner on Human Rights, *Women’s Rights are Human Rights*, 2014, p. 76.

63 *Op.cit.* at fn 54.



International and regional
obligations of states to combat

gender bias and stereotyping

Introduction

The international and regional instruments, courts, committees and rapporteurs that comprise the legal and regulatory foundations for women's rights have undergone significant change since the adoption of CEDAW in 1979, the "International Bill of Rights for Women". In recent years, gender stereotyping has come under increased scrutiny from the international legal community and is understood as a cause and consequence of gender discrimination. It is widely recognised that the persistence of gender stereotypes creates a normative framework in which violence against women is both accepted and inevitable.

Over the last decade, international and regional human rights bodies have focused their attention on the impact that gender bias and stereotyping have on judicial decisions relating to gender-based discrimination and violence. In 2014, eminent jurist Navi Pillay, then United Nations High Commissioner for Human Rights, lamented the persistence of harmful gender stereotypes in courtrooms. She observed that states are obligated to dismantle gender stereotypes in judicial processes and in all aspects of the criminal justice system because "when judges make decisions based on harmful gender stereotypes... this is a human rights violation".⁶⁴

The international and regional frameworks discussed below provide insight into the development of jurisprudence regarding gender stereotyping and its relationship to the international and regional obligations of states to combat discrimination and violence against women.

⁶⁴ Pillay, N., *Equality and Justice in the Courtroom*, Huffington Post, May 3 2014: https://www.huffpost.com/entry/equality-and-justice-int_b_4892624.

A. International legal framework



Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the primary international instrument that imposes obligations on State Parties to combat discrimination and violence against women. In broad terms, CEDAW requires states to embody the principle of equality between men and women in their laws and institutions and ensure the practical realisation of that principle; take measures to eliminate discrimination against women; and act to guarantee the civil, political, social, economic and cultural rights of women. Article 17 established the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), which provides valuable guidance in the form of General Recommendations, Concluding Observations, Views on Individual Communications, and Inquiries under CEDAW.⁶⁵

The preamble to CEDAW acknowledges that “a change in the traditional role of men as well as the role of women in society and in the family” is a necessary ingredient in achieving substantive equality between men and women.⁶⁶ CEDAW contains a number of articles that specifically address gender bias and stereotyping. Article 2 sets out the measures to be taken by State Parties to realise their commitment to eradicating discrimination against women. This encompasses measures to dismantle the underlying prejudices and stereotypes that enable GBV, which is accepted as a form of discrimination against women.⁶⁷ Article 5 creates an obligation to eliminate prejudices and practices based on the perceived inferiority or superiority of either sex, as well as stereotyped roles for men and women. Article 10(c) requires States Parties to promote modes of education aimed at abolishing stereotypes in respect of gender roles. The CEDAW Committee has in recent years produced strong decisions in response to individual complaints on gender bias and stereotyping under CEDAW Article 5.

All Pacific Island Countries, with the exception of Tonga and Palau,⁶⁸ have ratified or acceded to CEDAW. Only the Marshall Islands, Solomon Islands and Vanuatu

have ratified or acceded to the Optional Protocol to CEDAW (discussed opposite).⁶⁹ Palau signed CEDAW in 2011 but has so far failed to formally ratify or accede to it. In March 2015, the government of Tonga announced that, subject to some reservations, it intended to ratify CEDAW. However, following public backlash, the government did not do so.⁷⁰ The reversal was predicated on protests that focused on maintaining traditional gender roles, with the former prime minister’s wife saying, “[w]e know our place in our society. Women have a big voice in the running of the family, but the man has to make the final decision. In any other country they will challenge that, but in Tonga we don’t. We were born into it and we know the benefits of just having one master in the household.”⁷¹

The original text of CEDAW does not explicitly address gender-based violence. The CEDAW Committee adopted General Recommendation No. 19 (GR 19) on violence against women in 1992 to remedy this deficit. GR 19 states:

“The Convention in Article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”⁷²

The UN Declaration on the Elimination of Violence Against Women, which was adopted by the UN General Assembly in 1993, specifically addresses violence against women. It creates the following obligation in relation to gender stereotyping:

“Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women.”⁷³

⁶⁵ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), G.A. Res. 34/180 of 18 December 1979, which came into force on 3 September 1981, Art. 17.

⁶⁶ Convention on the Elimination of All Forms of Discrimination Against Women, Preamble, para. 14.

⁶⁷ CEDAW Committee, General Comment No. 35, 2017, paras. 1, 26 and 26(a).

⁶⁸ Lee, H. CEDAW *Smokescreens: Gender Politics in Contemporary Tonga*, The Contemporary Pacific, Vol. 29, No. 1, 2017, p.66.

⁶⁹ United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mdsg_no=IV-8-b&chapter=4&lang=en.

⁷⁰ Lee, H. CEDAW *Smokescreens: Gender Politics in Contemporary Tonga*, The Contemporary Pacific, Vol. 29, No. 1, 2017, p.66.

⁷¹ *Ibid.*, p.68.

⁷² CEDAW General Recommendation No. 19: Violence against women, 1992, para.6.

⁷³ Declaration on the Elimination of Violence Against Women proclaimed by General Assembly Resolution 48/104 of 20 December 1993, at Art. 4(i).

A. International legal framework cont

CEDAW Optional Protocol

The Optional Protocol to CEDAW is a mechanism that establishes complaint and inquiry procedures for violations of women's rights. To date, there have been no complaints filed by individuals or interested parties from Pacific Island Countries to the CEDAW Committee. Surprisingly, only a total of 139 complaints have been submitted to the CEDAW Committee globally over the last two decades.⁷⁴

CEDAW General Recommendations

The CEDAW Committee has adopted a number of General Recommendations that provide specific guidance for states on combating gender stereotyping and bias.

- General Recommendation No. 3 on education and public information campaigns (GR 3)
- General Recommendation No. 19 on violence against women (GR 19)
- General Recommendation No. 35 on gender-based violence against women (updating General Recommendation No. 19) (GR 35)
- General Recommendation No. 23 on political and public life (GR 23)
- General Recommendation No. 25 on achieving *de jure* and *de facto* equality (GR 25)

GR 3 acknowledges the relationship between gender stereotypes and discrimination against women, and points to the role of sociocultural factors in perpetuating harmful stereotypes of women. The CEDAW Committee recommends that states adopt education and public information programmes to “help eliminate prejudices and current practices that hinder the full operation of the principle of the social equality of women”.⁷⁵

GR 19 was adopted by the CEDAW Committee in 1992 and updated in 2017 with the adoption of GR 35. GR 19 identifies gender-based violence as a form of discrimination against women that impairs or nullifies the enjoyment of their fundamental rights and freedoms.⁷⁶ Commenting on Articles 2(f), 5 and 10(c) of CEDAW, the CEDAW Committee refers to gender stereotypes and perceptions of women as subordinate to men as an underlying cause of gender-based violence and other coercive practices targeting women, such as forced marriage and female genital mutilation.⁷⁷ It notes that violence against women is often justified as a form of protection or control, which is rooted in deeply prejudicial ideas about the place of women

in society.⁷⁸ The widespread acceptance of women's supposed natural inferiority seriously impairs their social and political mobility and prevents them from occupying higher positions in government and other organisations, consequently reinforcing existing attitudes.

GR 19 also emphasises the special vulnerability of women in rural areas due to traditional attitudes about the subservient role of women in those communities.⁷⁹ The CEDAW Committee recommends that States Parties “identify the nature and extent of attitudes, customs and practices that perpetuate violence against women, and the kinds of violence that result”.⁸⁰ It referred to GR 3 and reiterated its recommendation that states establish education and public information programs to eliminate prejudicial attitudes and practices.⁸¹

GR 35 seeks to analyse gender-based violence in the context of 21st-century developments, most notably the accelerating pace of globalisation and the erosion of legal frameworks that address gender discrimination and violence. The CEDAW Committee elaborated on state obligations in relation to violence against women, stating that those obligations also require States Parties to adopt and implement measures to eradicate prejudices and stereotypes that constitute the root causes of gender-based violence.⁸²

Crucially, it made several recommendations that draw a connection between gender stereotyping and gender-based violence including, *inter alia*, that States Parties adopt and implement measures to address and eliminate the “stereotypes, prejudices, customs and practices set out in Article 5,” with a focus on educational and awareness-raising programmes.⁸³ The recommendations also focus on the harmful portrayal of women in the media through advertising, online platforms and other digital environments and suggest the creation of self-regulatory mechanisms by media organisations to monitor and police gender stereotyping.⁸⁴

Focusing on women's political life, GR 23 identifies how women are pigeon-holed into political issues around children, environment, and health to the exclusion of other important issues because of stereotyping.⁸⁵ Moreover, the Committee raises a concern that women still do not have full autonomy in their ability to vote because certain norms, traditions, and stereotypes prevent women from voting. For states that have reservations to CEDAW, the Committee recommends that states specifically identify whether the rationale is based on “customary or stereotyped attitudes toward women's role in society...”.⁸⁶

74 OHCHR, *Optional Protocol to the Convention on the Elimination of Discrimination Against Women - Jurisprudence: Statistical Survey on Individual Complaints*: <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Jurisprudence.aspx>.

75 CEDAW Committee, General Recommendation No. 3 on education and public information campaigns, 1987, paras.2 and 3.

76 CEDAW Committee, General Recommendation No. 19 on violence against women, 1992, paras.6, 7.

77 *Ibid.*, para.11.

78 *Ibid.*, para.11.

79 *Ibid.*, para.21.

80 *Ibid.*, para.24(e).

81 *Ibid.*, para.24(f).

82 CEDAW Committee, General Recommendation No. 35 on violence against women, 2017, para. 26.

83 *Ibid.*, para.30(b).

84 *Ibid.*, para.30(d).

85 CEDAW Committee, General Recommendation No. 23 on political and public life, 1997, para.13.

86 CEDAW Committee, General Recommendation No. 25 on achieving *de jure* and *de facto* equality, 2004, paras. 7, 38.

In GR 25, the CEDAW Committee classifies the dismantling of gender stereotypes as one of the central features to the achievement of substantive equality.⁸⁷ Specifically, the Committee highlights the obligations of the state to address both individual acts and structural forms of discrimination that are based on gender stereotypes through the adoption of temporary special measures.⁸⁸

CEDAW Committee decisions on gender bias and stereotyping

There is a body of CEDAW case law that examines the link between prejudicial and paternalistic stereotypes about women and GBV.⁸⁹ Whilst the responses to individual communications consider laws, practices and judicial decisions across a range of jurisdictions and in vastly different cultural contexts, the CEDAW Committee has repeatedly condemned reliance on stereotypes regarding women's sexuality or gender roles that position women as subordinate to men.

The landmark case that addresses gender stereotyping is *Vertido v The Philippines*, in which the CEDAW Committee considered a communication submitted by Ms Vertido, a Filipino national, in accordance with the Optional Protocol to CEDAW.⁹⁰ Ms Vertido's communication related to the eight-year trial of a man accused of raping her, which culminated in his acquittal by the Regional Court of Davao City. Ms Vertido was employed as the Executive Director of the Davao City Chamber of Commerce and Industry in 1996 when she was raped by the former President of the Chamber.⁹¹ The Court took an unfavourable view of Ms Vertido's testimony and expressed doubts as to her credibility based on her failure to avail herself of opportunities to escape. In Ms Vertido's communication to the CEDAW Committee, she alleged that the Court's decision was discriminatory within the meaning of Article 1 and violated Articles 2(c), 2(f) and 5(a) of CEDAW.⁹²

The CEDAW Committee concluded that the Court had based its findings on gender-based myths and misconceptions about rape and rape victims and that this amounted to a contravention of the Philippines' obligations under CEDAW.⁹³ The CEDAW Committee found that the Court had failed to apply guiding principles found in other Filipino decisions that "the law does not impose upon a rape victim the burden of proving resistance" and that "the failure of the victim

to try and escape does not negate the existence of rape" in evaluating Ms Vertido's credibility.⁹⁴ It also found that the Court had relied on stereotypes about the rational and "ideal" rape victim and an expectation that women must physically resist unwanted sexual conduct for it to be considered sexual assault. The Committee noted that the Court had made several references in its decision to stereotypes about male and female sexuality that supported the credibility of the perpetrator over that of the victim.⁹⁵ In this context, the Court had expressed scepticism that a man in his sixties would be able to proceed to ejaculation if the victim had resisted the attack.⁹⁶ The Filipino court had also exhibited gender bias in privileging the offender's version of events over that of the victim's.

In discussing the state's obligations under CEDAW, the Committee stated the following:

"Stereotyping affects women's right to a fair and just trial and... the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general."⁹⁷

The Committee recognised that Ms Vertido had suffered "moral and social damages and prejudices" by reason of the protracted trial proceedings and was revictimised through the gender-based myths that permeated the Court's judgment.⁹⁸ It recommended that the Philippines pay appropriate compensation to Ms Vertido and made a series of more general recommendations aimed at addressing gender biases and stereotypes in cases involving SGBV.

Other views expressed by the CEDAW Committee on individual communications are equally critical of the extent to which the decisions of state courts are influenced by stereotyped perceptions of women. In *R.K.B v Turkey*,⁹⁹ a communication involving the dismissal of a female employee from a hairdresser salon on the basis of alleged "sexually-oriented" relationships with persons of the opposite sex in the workplace, the CEDAW Committee took the view that the proceedings in question had violated Article 5(a) of CEDAW because the state court had relied on stereotypes regarding the gravity of extramarital affairs conducted by women and the perception that extramarital affairs were acceptable

⁸⁷ *Ibid.*, paras. 6, 7.

⁸⁸ *Ibid.*, paras. 7, 38.

⁸⁹ See also *R.P.B. v The Philippines*, UN Doc. CEDAW/C/57/D/34/2011, 12 March 2014; *Fatma Yildirim v Austria*, UN Doc. CEDAW/C/39/D/6/2005, 1 October 2007; *Isatou Jallow v Bulgaria*, UN Doc. CEDAW/C/52/D/32/2011, 28 August 2012; *V.K. v Bulgaria*, UN Doc. CEDAW/C/49/D/20/2008, 27 September 2011; *Shahide Goekce v Austria*, UN Doc. CEDAW/C/39/D/5/2005, 6 August 2007.

⁹⁰ *Karen Tayag Vertido v The Philippines*, UN Doc. CEDAW/C/46/D/18/2008, 1 September 2010.

⁹¹ *Ibid.*, para. 2.1. SSç.

⁹² *Ibid.*, para. 4-5.

⁹³ *Ibid.*, paras. 8.5, 8.6, 8.8 and 8.9.

⁹⁴ *Ibid.*, para. 8.5.

⁹⁵ *Ibid.*, para. 8.6.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, para. 8.4.

⁹⁸ *Ibid.*, para. 8.8.

⁹⁹ *R.K.B. v Turkey*, UN Doc. CEDAW/C/51/D/28/2010, 13 April 2012.

A. International legal framework cont

for men.¹⁰⁰ It observed that CEDAW requires states to “modify and transform gender stereotypes and eliminate wrongful gender stereotyping” that contributes to discrimination against women.¹⁰¹

In *A.T. v Hungary*,¹⁰² the complainant had endured years of domestic violence at the hands of her common-law husband. She had two children, one of whom was severely brain-damaged. After moving out of the apartment they shared, her husband had broken into the apartment several times and beaten his wife to the point that she was hospitalised. In civil proceedings relating to the perpetrator’s use of the residence, a state district and regional court had rendered decisions authorising him to use the apartment. The CEDAW Committee noted that the factual circumstances of the communication revealed troubling features of Hungary’s attitude towards domestic violence in that the complainant had been unable to apply for a restraining or protection order as neither option existed in Hungary, and she could not flee to a shelter as none were equipped to accommodate a child living with serious disabilities.¹⁰³ It recommended that Hungary take urgent measures to guarantee the physical and mental integrity of the complainant and her children, provide her with a safe home and the appropriate financial and legal support, and pay reparations.¹⁰⁴

UN Special Rapporteur on Violence against Women, Its Causes and Consequences (Special Rapporteur on VAW)

Since 2006, the Special Rapporteur on VAW has produced an annual report to the UN Human Rights Council. The reports make frequent reference to the victimisation of women through stereotyped portrayals of women within society and across different cultural mediums, as well as the extent to which gender myths and misconceptions intersect with gender-based violence. In her 2016 report, the Special Rapporteur on VAW noted that stereotyped roles for women can render them more vulnerable to violent behaviour and recommended that states adopt positive measures to combat stereotypes relating to gender roles that are conducive to violence.¹⁰⁵ In her 2018 report on online violence against women and girls, the then Special Rapporteur on VAW discussed the proliferation of harmful stereotypes of women through digital platforms,

noting that online violence against women is often exacerbated by negative gender stereotypes.¹⁰⁶

In 2012, the Special Rapporteur on VAW conducted official missions to two Pacific Island Countries – the Solomon Islands and Papua New Guinea. Both reports, which were added to the 2013 annual report, emphasised the extent to which stereotyped gender roles contribute to public perceptions of women as subordinate to men. The Special Rapporteur on VAW noted that in the Solomon Islands, there is an expectation that women occupy roles as mothers and homemakers, which is informed by the traditional and religious values that shape the community¹⁰⁷ and that intimate partner violence often occurs when women deviate from their role as submissive and obedient wives, with their husbands resorting to violence as a form of discipline.¹⁰⁸ In Papua New Guinea, the Special Rapporteur on VAW observed that “wife beating” is considered a normal part of married life because the dominant perception is that men, as the main breadwinners/heads of the family unit, are entitled to discipline their wives through physical violence.¹⁰⁹

International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the equal enjoyment of economic, social and cultural rights by women and men¹¹⁰ and requires states to embody the concept of non-discrimination in the exercise of those rights protected by ICESCR.¹¹¹ The Committee on Economic, Social and Cultural Rights (CESCR) has examined the extent to which gender-based violence impairs or nullifies the enjoyment by women of their economic, social and cultural rights.¹¹² CESCR has interpreted Article 3, which establishes the right to equality, to imply a requirement that states eliminate practices that “perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women”.¹¹³ CESCR has taken the view that the persistence of gender stereotypes can lead to violence against women.¹¹⁴ In concluding observations on a report submitted to CESCR by Iceland, it recommended that Iceland conduct public information campaigns and encourage a broader public dialogue to address stereotypes that contribute to GBV.¹¹⁵

¹⁰⁰ *Ibid.*, para.8.7.

¹⁰¹ *Ibid.*, para.8.8.

¹⁰² *Ms. A.T. v Hungary*, UN Doc CEDAW/C/36/D/2/2003, 26 January 2005.

¹⁰³ *Ibid.*, para.9.4.

¹⁰⁴ *Ibid.*, para.9.6(i).

¹⁰⁵ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/32/42, pt IV, 19 April 2016, p.71 (prepared by Dubravka Šimonović, in accordance with Human Rights Council Res. 23/25).

¹⁰⁶ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, UN Doc. A/HRC/38/47, pt III, 5 June 2018, p.25 (prepared by Dubravka Šimonović, in accordance with Human Rights Council Res. 32/19).

¹⁰⁷ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to Solomon Islands*, UN Doc. A/HRC/23/49 Add. 1 pt II, 22 February 2013, p.6 (prepared by Rashida Manjoo).

¹⁰⁸ *Ibid.*, p.6.

¹⁰⁹ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to Papua New Guinea*, UN Doc. A/HRC/23/49 Add. 2 pt III, 22 February 2013, p.19.

¹¹⁰ ICESCR, Art. 3.

¹¹¹ ICESCR, Art. 2.2.

¹¹² CESCR, General Comment No. 16 on Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights, 2005, para. 27.

¹¹³ *Ibid.*, para. 19.

¹¹⁴ CESCR, *Concluding Observations: Iceland*, UN Doc. E/C.12/ISL/CO/4, 11 December 2012, 15.

¹¹⁵ *Ibid.*

The International Covenant on Civil and Political Rights (ICCPR), which guarantees the civil and political rights of persons, does not explicitly refer to gender stereotyping but the Human Rights Committee has indicated that States Parties have a responsibility in accordance with ICCPR's non-discrimination obligations contained in Articles 2(1), 3 and 26 to address the subordinate role of women in some countries and traditional attitudes which lead to violations of women's right to equality before the law.¹¹⁶

There have, however, been instances where the Human Rights Committee has failed to address the blatant use of gender stereotyping in judicial decision-making as a violation of ICCPR. *L.N.P. v Argentine Republic*,¹¹⁷ an individual communication submitted under ICCPR's optional protocol, involved the acquittal of three men who had sexually assaulted a young woman belonging to the Qom ethnic group in Argentina. When criminal proceedings were initiated against the accused, the victim was not notified of her right to appear as a plaintiff and the proceedings were conducted entirely in Spanish without any attempt to provide translators for the victim and her family. In concluding that it could not make a finding that the acts took place without the victim's consent, the Court placed reliance on the victim's sexual experience and the question of whether or not she was a "prostitute".¹¹⁸ The Human Rights Committee found that the Argentinian court had discriminated against the victim on the basis of gender and ethnicity, but did not condemn the stereotyped perceptions of sexual assault victims that informed the Court's decision-making process.¹¹⁹ As a result, the Human Rights Committee missed an important opportunity to dispel gender-based myths about the circumstances in which consent can be withheld and the belief that sexual inexperience is a necessary precondition for a finding of rape.

Papua New Guinea, the Marshall Islands and Fiji have acceded to the ICESCR and ICCPR. Vanuatu ratified and Samoa acceded to the ICCPR, and the Solomon Islands has acceded to ICESCR. Palau has signed but not ratified or acceded to both ICESCR and ICCPR.¹²⁰

Convention on the Rights of Persons with Disabilities

Article 8(1)(b) of the Convention on the Rights of Persons with Disabilities (CRPD) requires states to "adopt immediate, effective and appropriate measures to combat stereotypes, prejudices and harmful practices relating to persons with

disabilities, including those based on sex and age, in all areas of life". Article 8(1)(b) is intended to apply at the intersection of disability stereotypes with stereotypes based on other attributes, including gender. All PICs have ratified or acceded to the CRPD, with the exception of the Solomon Islands and Tonga who have signed the Convention but not ratified or acceded to it.¹²¹

Women and girls with disabilities is a subgroup that is particularly vulnerable to physical and emotional violence. A report produced by the United Nations Population Fund in 2013 assessed the challenges faced by women with disabilities living in Kiribati, the Solomon Islands and Tonga in the context of sexual and reproductive health and GBV.¹²² The report found that women in each country were at risk of violence and may be at an increased risk of sexual violence perpetrated by a stranger or acquaintance.¹²³ The report also found that broader community attitudes tended to accord with stereotypical and prejudiced perceptions of women with disabilities.¹²⁴

Women with disabilities are subjected to both negative stereotypes about women and stereotypes about people with disabilities, which can "cultivate a psychological sense of invisibility, self-estrangement, and/or powerlessness."¹²⁵ The compounded effect on women with disabilities is recognised by Article 6 of CRPD.¹²⁶ Stereotypes and biases that dehumanise, infantilise, isolate and exclude women with disabilities can make them a target of violent and discriminatory behaviour.¹²⁷ Women with disabilities often risk having their testimony discounted in cases involving sexual assault due to stereotypes that undermine their capacity.¹²⁸ Stereotypes of women with mental disabilities that paint them as lacking self-control or as hypersexual beings means they can encounter difficulties in reporting instances of sexual assault to the authorities.¹²⁹

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Many types of gender-based violence that take place in the public sphere are recognised as a form of torture or ill-treatment within the meaning of Article 1 the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). These include custodial violence against women (including sexual assault), denial of women's reproductive rights, corporal punishment for

¹¹⁶ Human Rights Committee General Comment No. 28 on the equality of rights between men and women (Article 3), at para.5.

¹¹⁷ *L.N.P. v Argentine Republic*, UN Doc. CEDAW/C/102/D/1610/2007, 16 August 2011.

¹¹⁸ *Ibid.*, para. 13.3.

¹¹⁹ *Ibid.*

¹²⁰ United Nations Treaty Collection: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mdsg_no=IV-3&chapter=4&clang=en and https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-4&chapter=4&clang=en.

¹²¹ United Nations Treaty Collection: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mdsg_no=IV-15&chapter=4.

¹²² Spratt, J. M., *A Deeper Silence: The Unheard Experiences of Women with Disabilities and Their Sexual and Reproductive Health Experiences: Kiribati, the Solomon Islands and Tonga*, United Nations Population Fund Pacific Sub-Regional Office Fiji, 2012, <https://pacific.unfpa.org/sites/default/files/pub-pdf/UNFPAReportADeeperSilenceA4PublicationLR3%283%29.pdf>.

¹²³ *Ibid.*, pp.17, 39.

¹²⁴ *Ibid.*, p.17.

¹²⁵ UN General Assembly, *Report of the Special Rapporteur on violence against women, its causes and consequences on violence against women with disabilities*, UN Doc. A/67/227 pt III, 3 August 2012, p.20 (prepared by Rashida Manjoo in accordance with General Assembly Res. 65/187).

¹²⁶ *Ibid.*, para.76.

¹²⁷ *Ibid.*, para.32.

¹²⁸ *Ibid.*, para.41.

¹²⁹ *Ibid.*

A. International legal framework cont

adultery and similar crimes. General Comment No. 2, issued by the UN Committee Against Torture (CAT Committee) in 2008, was significant in that it brought violence perpetrated by private actors within the scope of CAT.¹³⁰ This means that states bear a responsibility under CAT to protect women from intimate partner violence and other forms of privately-inflicted violence such as human trafficking and female genital mutilation. Fiji, Vanuatu, Nauru, the Marshall Islands and Samoa have ratified or acceded to CAT. Palau has signed but not ratified or acceded to CAT.¹³¹

While CAT does not impose explicit obligations on states to address gender stereotyping and bias, the CAT Committee has referred to “actual or perceived non-conformity with socially determined gender roles” as the basis for torture, ill-treatment and other contraventions of CAT.¹³² The CAT Committee has also pointed to gender (and in particular its intersection with other identifying characteristics) as a key factor that determines the way that women and girls are at risk of torture, which can assume a variety of forms including domestic violence, deprivation of liberty and the delivery of healthcare, particularly reproductive healthcare.¹³³

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Special Rapporteur on torture) has defined violence that is gender-specific in its form or purpose as inclusive of violence that is “aimed at ‘correcting’ behaviour perceived as non-consonant with gender roles and stereotypes or at asserting or perpetuating male domination over women”.¹³⁴ In 2016, the Special Rapporteur on torture observed that states cannot fulfill their obligation to protect against torture and ill-treatment when their laws, policies and practices “perpetuate harmful gender stereotypes in a manner that enables or authorises, explicitly or implicitly, prohibited acts to be performed with impunity”.¹³⁵ In identifying the types of conditions that foster this culture of impunity, the Special Rapporteur on torture noted the following:

“Prohibited conduct is often accepted by communities due to entrenched discriminatory perceptions while victims’ marginalised status tends to render them less

able to seek accountability from perpetrators, thereby fostering impunity. Gender stereotypes play a role in downplaying the pain and suffering that certain practices inflict on women, girls, and lesbian, gay, bisexual and transgender persons.”¹³⁶

Ill-treatment in the delivery of healthcare can be motivated by stereotypes regarding women’s childbearing roles. Gender stereotypes that are prevalent during peacetime can also be a root cause of sexual violence during conflict and the reason that women are subjected to harmful practices like female genital mutilation and child marriage.¹³⁷

Other UN initiatives: Beijing Platform for Action 1995

The Fourth World Conference on Women was held in Beijing in 1995 and culminated in the Beijing Declaration and Platform for Action (Beijing Platform for Action), which established a framework for advancing women’s rights. The discussion of gender stereotyping in the Beijing Platform for Action cut across the 12 areas of concern identified by the conference participants. It addressed the spread of stereotyped and demeaning images of women via global communication networks and called for measures that would allow for the meaningful participation of women in all areas of communications and the mass media, including the arts.¹³⁸

In the context of education, the Beijing Platform for Action emphasised the need for educational resources that promote non-stereotyped images of women and men, which would help to reduce discrimination against women.¹³⁹ Gender stereotyping was discussed in relation to health and the provision of health services for women, noting that many health policies and programmes perpetuate gender stereotypes and fail to account for the obstacles women encounter in exercising autonomy with respect to their health.¹⁴⁰ The Beijing Platform for Action drew a connection between gender role stereotypes proliferated by commercial advertisements and violence against women.¹⁴¹ Gender stereotyping also arose in the context of women’s representation in government and decision-making roles,¹⁴² as well as in the media.¹⁴³

130 CAT Committee, General Comment No. 2 on implementation of Article 2 by State Parties, 2008, paras. 15, 18, 22, 25.

131 UN Treaty Collection: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mdsg_no=IV-9&chapter=4&lang=en.

132 *Op.cit.* at fn 130.

133 *Ibid.*

134 UN Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/7/3, 15 January 2008, para. 30, footnote 7 (prepared by Manfred Nowak).

135 UN Human Rights Council, *Gender perspectives on torture and other cruel, inhuman and degrading treatment or punishment: Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/31/57, 5 January 2016, para. 10 (prepared by Juan E. Méndez in accordance with Res. 25/13).

136 *Ibid.*, para. 9.

137 *Ibid.*, para. 58.

138 United Nations, *Beijing Declaration and Platform for Action*, adopted at the Fourth World Conference on Women, 27 October 1995, para. 33 (Beijing PFA), available at: http://beijing20.unwomen.org/~media/headquarters/attachments/sections/csw/pla_e_final_web.pdf.

139 *Ibid.*, para. 72.

140 *Ibid.*, para. 90.

141 *Ibid.*, para. 129(d).

142 *Ibid.*, para. 183.

143 *Ibid.*, para. 235.

B. Regional frameworks



The key regional human rights conventions specifically focused on obligations on states to combat violence against women (VAW) are discussed below.

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) was adopted at the 24th session of the General Assembly to the Organization of American States on 9 June 1994. It condemned VAW as a human rights violation and an offence against human dignity, and recognised that VAW is a “manifestation of the historically unequal power relations between women and men”. In addition to defining VAW to include physical, sexual, and psychological violence, the Convention distinguishes the spheres in which VAW can occur, including: family and interpersonal relationships; communal, workplace, educational institutions and healthcare settings; and where “perpetrated or condoned by the state or its agents”. The Convention outlines a number of obligations of States Parties to eradicate VAW, including applying due diligence in preventing, investigating and imposing penalties, updating laws and administrative mechanisms, undertaking educational campaigns, and providing services to women subjected to violence.

The Convention makes explicit the relationship between violence against women and stereotypes based on women’s perceived inferiority. Article 6(b) of the Convention extends the concept of the right of women to be free from violence to include the right of women to be “valued and educated free of stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority or subordination”. Article 8(b) imposes an obligation on States Parties to enact measures that modify social and cultural patterns of conduct, including educational programmes that challenge ideas about the inferiority or subordination of women and stereotyped gender roles underlying certain practices, customs and traditions that normalise violence against women. Similar obligations relating to gender stereotyping can be found in both the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence,¹⁴⁴ and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (page 27).¹⁴⁵

¹⁴⁴ See Articles 12(1) and 14(1).

¹⁴⁵ See Articles 2(2), 4(2)(d) and 12(1)(b).

¹⁴⁶ *González et al. (“Cotton Field”) v Mexico*, IACtHR, 16 November 2009.

¹⁴⁷ *Ibid.*, para. 151.

¹⁴⁸ *Ibid.*, paras. 153-154.

¹⁴⁹ *Ibid.*, para. 198.

Inter-American Court of Human Rights’ jurisprudence on gender stereotyping and VAW

The Inter-American Court of Human Rights (IACtHR) is the human rights arm of the Organization of American States. Decisions published by the IACtHR contain valuable insights into judicial interpretations of states’ international, regional and domestic obligations to combat violence and discrimination against women, including by addressing socially dominant gender stereotypes.

In *González et al. (“Cotton Field”) v Mexico* (2009), the IACtHR identified gender stereotyping and discrimination as a cause and consequence of violence against women.¹⁴⁶ The case concerned the response of state authorities to the disappearance and subsequent deaths of three women in Ciudad Juárez in 2001. Law enforcement officials were repeatedly contacted by the families of the victims but refused to conduct any serious investigations into their disappearances, telling the families that the women were likely with their boyfriends. The bodies of the victims, along with the bodies of five other women, were eventually found in a cotton field showing signs of torture, sexual abuse and mutilation. The ensuing police investigation was riddled with inadequacies, with police failing to properly document the victims’ injuries and detaining and forcing confessions from two innocent men. The Inter-American Commission on Human Rights (Commission) submitted a claim to the IACtHR that alleged violations of Mexico’s obligations under the Convention of Belém do Pará as a result of widespread discrimination against women and gender-based violence.

The Commission argued that the response of state authorities to the deaths and disappearances of the victims relied upon stereotyped conceptions of missing women.¹⁴⁷ In a judgment handed down by the IACtHR on 16 November 2009, the Court found that the evidence established that the relevant state authorities had engaged in gender discrimination and victim blaming.¹⁴⁸ In testimony provided by the mother of one of the victims, a state official reportedly responded to the information that her daughter was missing by stating that “if anything happened to her, it was because she was looking for it, because a good girl, a good woman, stays at home”.¹⁴⁹ The IACtHR observed that such

B. Regional frameworks cont

comments amounted to stereotyping,¹⁵⁰ which can be associated with attitudes and practices that subordinate women, particularly when reflected in the lexicon of state authorities.¹⁵¹ To address gender stereotyping and discrimination, the IACtHR made orders emphasising the importance of education and training for public officials that adopts a gender-sensitive lens.¹⁵²

The IACtHR has continued to build on its body of jurisprudence concerning GBV. Recent decisions have sought to give further guidance to states' due diligence obligations in respect of gender-based violence carried out by both state officials and private individuals. *Lopez Soto and Others v Venezuela* (2018), which involved the abduction and sexual torture of an 18-year-old Venezuelan woman, was the first IACtHR decision to assign responsibility to a state for violence perpetrated by a private actor.¹⁵³ The response of Venezuelan officials to reports that the woman was missing mirrored the attitude of the Mexican authorities in the case discussed on page 25. Similarly, in *Women Victims of Sexual Torture in Atenco v Mexico* (2018), the IACtHR observed that assaults against women protesters by state security forces were partially motivated by stereotyped conceptions that women should be at home cooking and caring for their children.¹⁵⁴ In both cases, the IACtHR found that state obligations under international law with respect to eradicating violence against women comprise a positive duty to identify and tackle gender stereotyping.¹⁵⁵

Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence

The Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) was drafted by the Ad Hoc Committee for preventing and combating violence against women and domestic violence, an expert committee established by the Council of Europe, and entered into force on 1 August 2014. The Convention recognises VAW not only as a human rights violation but also as a form of discrimination against women. Article 4 of the Convention condemns all forms of discrimination against women, and requires that parties take legislative measures to prevent it, furthermore authorising the use of sanctions where appropriate. It also emphasises that measures to protect the rights of victims apply without discrimination on any ground (including birth, national origin, gender identity, sexual orientation,

age, migration status, etc.). The Convention also imposes obligations on states to exercise due diligence to "prevent, investigate, punish and provide reparation for acts of violence", and emphasises additional prevention measures to be undertaken, such as awareness raising, education, preventive intervention and treatment measures, and participation of the private sector and media.

European Court of Human Rights' jurisprudence on gender stereotyping and VAW

There are a number of key decisions of the European Court of Human Rights (ECtHR) that illustrate how gender discrimination is underpinned by the persistence of stereotyped ideas about the societal roles that women and men are expected to perform. These cases also highlight instances where gender stereotypes have infected judicial reasoning or where judges "facilitate the perpetuation of stereotypes by failing to challenge stereotyping"¹⁵⁶ resulting in judgments that discriminate against women.

The ECtHR has been very clear to expose and dispel gender myths in the context of sexual violence. In the seminal case of *M.C. v Bulgaria* (2003), the ECtHR observed that the prosecution and penalisation of any non-consensual act irrespective of whether there are any signs of resistance is necessary to protect women from violence.¹⁵⁷ It criticised the Bulgarian authorities in this case for "practically elevating 'resistance' to the status of [a] defining element of the offence".¹⁵⁸ The judgment also highlighted the problems that can arise when making an assessment as to the existence or absence of consent where the prosecutors place undue emphasis on the use of force and physical violence.¹⁵⁹

In *Konstantin Markin v Russia* (2012), the ECtHR identified gender stereotyping within judicial decision-making in an application brought by a male applicant alleging sex discrimination.¹⁶⁰ The case involved the dismissal of the applicant's claim for parental leave by a Russian military court at first instance and on appeal, and a finding by the Constitutional Court that the legislative provisions granting parental leave only to women were not incompatible with the Constitution. The ECtHR rejected the state's assertion that the refusal to grant parental leave to men amounted to positive discrimination as it was clearly not intended to remediate a disadvantage suffered by women.¹⁶¹

¹⁵⁰ *Ibid.*, para.208.

¹⁵¹ *Ibid.*, para.401.

¹⁵² *Ibid.*, paras.540, 541, order 22.

¹⁵³ *Lopez Soto and Others v Venezuela*, IACtHR, 26 September 2018.

¹⁵⁴ *Women Victims of Sexual Torture in Atenco v Mexico*, IACtHR, 28 November 2018, p.216.

¹⁵⁵ *Lopez Soto and Others v Venezuela*, IACtHR, 26 September 2018, pp.235-240; *Women Victims of Sexual Torture in Atenco v Mexico*, IACtHR, 28 November 2018, p.215.

¹⁵⁶ Cusack, S. *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases* at 3.2 (submitted to the Office of the High Commissioner for Human Rights on 9 June 2014: <https://rm.coe.int/1680597b20>).

¹⁵⁷ *M.C. v Bulgaria* [39272/98] [2003] ECHR 646, 4 December 2003, pp.154-166.

¹⁵⁸ *Ibid.*, para.182.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Konstantin Markin v Russia* [30078/06] [2010] ECHR 1435, 7 October 2010.

¹⁶¹ *Ibid.*, p.141.

Moreover, the ECtHR found that the proliferation of stereotyped perceptions of men as breadwinners and women as caretakers could not justify differential treatment in the context of parental leave¹⁶² and that the imposition of such gender stereotypes by the state is harmful to women's careers and a violation of international law.¹⁶³

The reliance by domestic courts on gender stereotypes arose again in a 2017 decision of the ECtHR that concerned the reduction of damages awarded to a woman for injuries she suffered as a result of medical malpractice.¹⁶⁴ The woman underwent surgery for a gynaecological disorder after which she experienced a number of serious and painful side effects, including loss of vaginal sensation, lack of mobility and inability to have sexual intercourse.¹⁶⁵ On appeal, the domestic court reduced the pecuniary and non-pecuniary damages awarded to the woman. The reduction in damages was based in part on the court's view that, given the woman's children were grown, she would not require household assistance in the form of a maid as she only had to take care of her husband and that sexuality was of little importance for a 50-year-old woman with two children.¹⁶⁶ The ECtHR held that the diminished importance attributed to the woman's sexuality by the appellate court "reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people".¹⁶⁷ In Judge Yudkivska's concurring judgment, she identified this as a case where prejudicial stereotypes had undermined the judicial assessment of evidence.¹⁶⁸

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) was made pursuant to Article 66 of the African Charter on Human and Peoples' Rights (African Charter), which provides for special protocols or agreements to supplement the African Charter. To date, 40 African states have signed and ratified the Maputo Protocol. Article 2 of the Protocol focuses on elimination of discrimination against women; Article 3, on the right to dignity and protection of women from all forms of violence; and Article 4, on the rights to life, integrity, and security of women. More specifically,

Article 4 imposes obligations on States Parties to adopt legislative, administrative, social, and economic measures to prevent, punish, and eradicate violence against women, including eradicating "elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women". In addition to these provisions, the Protocol also enumerates other important measures for women, such as equal protection before the law, prohibiting harmful practices such as female genital mutilation, guaranteeing equal marital and divorce rights, protection in armed conflicts, right to participate in elections, and prohibiting child marriage.

African Court on Human and Peoples' Rights' jurisprudence on gender stereotyping and VAW

APDF and IHRDA v Republic of Mali (2018), was the first decision of the African Court on Human and Peoples' Rights (ACtHPR) to uphold the violation of women's rights as a violation of international law.¹⁶⁹ This landmark decision considered the compatibility of Law No. 2011-87 establishing the Persons and Family Code (Family Code) with international human rights principles. The applicants in the case asserted that the Family Code violated Articles 2(2), 6(a) and (b) and 21(2) of the Maputo Protocol, Articles 3 and 4 of the Children's Charter, and Articles 1(3) and 5(a) of CEDAW.¹⁷⁰ The applicants argued that the Family Code contravened the provisions in these instruments by: a. setting the minimum age of marriage at 16 years for girls and 18 for boys (and 15 years for girls with the father's consent);¹⁷¹ b. failing to provide for the verification of parties' consent to marriage in ceremonies involving religious ministers;¹⁷² c. enshrining religious and customary law as the applicable regime in matters of inheritance, profoundly disadvantaging women;¹⁷³ and d. refusing to eliminate practices or traditions harmful toward women and children.¹⁷⁴

The ACtHPR found these provisions of the Family Code to be in breach of the international human rights instruments identified by the applicants.¹⁷⁵ While the judgment did not explicitly address gender stereotyping, the ACtHPR did express agreement with the applicants' submissions that the impugned provisions of the Family Code constituted harmful traditions and discriminatory customary practices that undermined the rights of women and children.¹⁷⁶ This case was also significant to the extent that it recognised certain types of customary practices affecting women and children as a form of gender discrimination that violated international law.

¹⁶² *Ibid.*, p.143.

¹⁶³ *Ibid.*, pp.141-142.

¹⁶⁴ *Carvalho Pinto de Sousa Morais v Portugal* (17484/15) [2017] ECHR 719, 25 July 2017.

¹⁶⁵ *Ibid.*, pp.6-19.

¹⁶⁶ *Ibid.*, p.16.

¹⁶⁷ *Ibid.*, p.52.

¹⁶⁸ *Ibid.*, p.22.

¹⁶⁹ *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali* (046/2016) [2018] AFCHPR 15, 11 May 2018.

¹⁷⁰ *Ibid.*, para.58.

¹⁷¹ *Ibid.*, paras.59-60.

¹⁷² *Ibid.*, para.79.

¹⁷³ *Ibid.*, para.96.

¹⁷⁴ *Ibid.*, para.116.

¹⁷⁵ *Ibid.*, paras.78, 94, 95, 115, 124, 125.

¹⁷⁶ *Ibid.*, para.124.

B. Regional frameworks cont

Other international and regional instruments addressing gender bias and stereotyping

Overview	Key stereotyping provisions
 Colombo Declaration on the Role of the Judiciary in Advancing Women's Right to Equality in Marriage and Family Relations <p>The Colombo Declaration was adopted in April 2019 by participants¹⁷⁷ in the International Women's Rights Action Watch (IWRAP) Asia Pacific regional judicial colloquium on access to justice for women's right to equality in the context of the family.¹⁷⁸ The adoption of the Declaration by participants was driven in part by a recognition that Article 16 of CEDAW, which deals with discrimination against women relating to marriage and family relations, is the subject of the majority of reservations entered by States Parties.</p>	<p>The preamble to the Colombo Declaration points to the role of patriarchal social mores and traditional, religious and cultural values in further entrenching already deeply embedded gender stereotypes that act as an impediment to women's equality.¹⁷⁹</p> <p>The Colombo Declaration calls on the judiciary to implement human rights norms that support equality between men and women in the family unit and do not rely on discrimination and gender stereotyping.¹⁸⁰</p>
 Association of Southeast Asian Nations (ASEAN) Regional Plan of Action (RPA) on the Elimination of Violence Against Women (EVAW) <p>The ASEAN RPA on EVAW is a policy¹⁸¹ which sets out eight actions that form part of a broader strategic framework for eradicating violence against women. In it, ASEAN member states recognise that they:</p> <p>"shall take all appropriate measures to promote and protect human rights and fundamental freedom and to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."¹⁸²</p> <p>Dismantling gender norms and stereotypes that condone violence against women is identified as an area that requires further attention from member states.¹⁸³</p>	<p>Gender stereotyping is discussed in the context of:</p> <ul style="list-style-type: none"> Prevention (action 1), which requires member states to develop gender responsive regulatory mechanisms, codes of conduct and guidelines for the media to tackle harmful gender stereotypes and the objectification of women and girls in popular culture;¹⁸⁴ and Legal framework, prosecution and justice system (action 3), which requires member states to develop jurisprudence to eliminate gender stereotyping in judicial decision-making.¹⁸⁵
 The Pacific Platform for Action on Gender Equality and Women's Human Rights 2018-2030 (PPA) <p>The PPA provides a roadmap for the advancement of women's rights in the Pacific. The original PPA was adopted in 1994 and has been revised several times since then, most recently in 2017.¹⁸⁶</p> <p>The Pacific Partnership to End Violence Against Women and Girls,¹⁸⁷ which was launched in January 2018, is intended to support the implementation of the PPA, as well as the Pacific Leaders Gender Equality Declaration 2012, the Pacific Roadmap for Sustainable Development and Sustainable Development Goal 5.</p>	<p>The PPA identifies key priority areas for addressing gender equality contained in the international and regional instruments concerned with the rights of women. Sex role stereotyping and prejudice is one of the issues drawn from PIC obligations under CEDAW.¹⁸⁸ Stereotyping is also discussed in the context of measures taken to ensure gender parity in education delivery. Specifically, reforming primary and secondary education curricula to challenge stereotypes is listed as a means of implementation.¹⁸⁹ The PPA also consistently refers to transforming harmful social norms that perpetuate violence against women as an integral measure that cuts across all of the key areas of concern.¹⁹⁰</p>

177 Participants included judicial officers, lawyers and women's rights experts from South and South-East Asia. For a complete list of participants see: <https://www.iwrawap.org/wp-content/uploads/2019/04/TheColomboDeclaration.pdf>.

178 IWRAP Asia Pacific, *Colombo Declaration on the role of the judiciary in advancing women's right to equality in marriage and family relations*, April 2019: <https://www.iwrawap.org/wp-content/uploads/2019/04/TheColomboDeclaration.pdf>.

179 *Ibid.*, Preamble, paras.1, 2.

180 *Ibid.*, para.3.

181 The member states of ASEAN are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam: <https://asean.org/wp-content/uploads/2018/01/48-December2017-ASEAN-RPA-on-EVAW-2nd-Print.pdf>.

182 *Ibid.*, p.iii.

183 *Ibid.*, p.8.

184 *Ibid.*, p.18[6].

185 *Ibid.*, p.22 [29].

186 *Pacific Platform for Action on Gender Equality and Women's Human Rights 2018 - 2030*: <https://www.spc.int/sites/default/files/wordpresscontent/wp-content/uploads/2017/10/PPA-Gender-Equality-Womens-Human-Rights.pdf>.

187 The Pacific Partnership to End Violence Against Women and Girls is a five-year joint initiative of UN Women Fiji Multi-Country Office, Pacific Community Regional Rights Resource Team and Pacific Islands Forum Secretariat to combat gender-based violence in PICs. It receives funding from the European Union and Australian government, with cost-sharing from UN Women: <http://asiapacific.unwomen.org/en/countries/fiji/ending-violence-against-women/pacific-partnership>.

188 *Pacific Platform for Action on Gender Equality and Women's Human Rights 2018-2030*, p.5: <https://www.spc.int/sites/default/files/wordpresscontent/wp-content/uploads/2017/10/PPA-Gender-Equality-Womens-Human-Rights.pdf>.

189 *Ibid.*, p.18.

190 *Ibid.*, pp.7, 10, 12, 17 and 18.

Overview	Key stereotyping provisions
----------	-----------------------------

European Union General Data Protection Regulation (GDPR)

Algorithms have been found to amplify existing stereotypes, including gender stereotypes, by making decisions that are the product of biased datasets.¹⁹¹

The GDPR, which entered into force on 25 May 2018, regulates data protection and privacy in the European Union. It is the first regulatory framework that attempts to respond to algorithmic bias and discrimination, particularly in the context of “profiling”.

Profiling is “any form of automated processing of personal data evaluating the person aspects relating to a natural person, in particular to analyse or predict aspects concerning the data subject’s performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, where it produces legal effects concerning him or her or similarly significantly affects him or her”.¹⁹²

Article 22 of the GDPR creates a due diligence obligation in respect to automated decision-making, including profiling, which has a legal or otherwise significant effect on an individual.¹⁹³ It provides an accountability mechanism by allowing a data subject the right to human intervention, to express his or her point of view, to obtain an explanation of a decision and to challenge the decision.

Sub-article 22(4) prohibits decision-making on the basis of “special categories of personal data referred to in Article 9(1)”, subject to certain exceptions. These special categories of data include personal data that reveals racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership, and data concerning a person’s sex life or sexual orientation.¹⁹⁴

Recital 71 to the GDPR, which provides additional guidance regarding the interpretation of Article 22, stipulates that a data controller is under an obligation to implement measures that prevent discriminatory effects on individuals on the basis of various personal attributes, although interestingly gender is not explicitly referred to in this context.

Declaration on the Elimination of Violence Against Women A/RES/48/104

The Declaration on the Elimination of Violence Against Women was adopted by the United Nations General Assembly on 20 December 1993.

It was adopted because there was a “need for a clear and comprehensive definition of violence against women, a clear statement of the rights to be applied to ensure the elimination of violence against women in all its forms, a commitment by States in respect of their responsibilities, and a commitment by the international community at large to the elimination of violence against women”.¹⁹⁵

Article 4(j): “Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women...”¹⁹⁶

¹⁹¹ An algorithm used by Amazon in hiring was found to perpetuate bias against women in the tech industry. See Dustin, J., *Amazon scraps secret AI recruiting tool that showed bias against women*, Reuters, 9 October 2018: <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scrap-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G>.

¹⁹² EU General Data Protection Regulation 2018, recital 71.

¹⁹³ Article 22(3) requires the “data controller” to “implement suitable measures to safeguard the data subject’s rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision”.

¹⁹⁴ *Op.cit.* at fn 192, Art. 9(1).

¹⁹⁵ *The Declaration on the Elimination of Violence against Women*, UN General Assembly Resolution A/RES/48/104, 1993.

¹⁹⁶ *Ibid.*, Article 4(j).

C. Case studies of good practice



Case studies of good practice on a national level are a critical source of guidance for the international community in developing strategies to tackle gender stereotyping and bias. A key obstacle to addressing stereotyping is the lack of research undertaken by UN bodies and mechanisms into examples of good practice.¹⁹⁷ There are, however, jurisdictions in the Commonwealth that have produced pioneering case law and legislation that explicitly target manifestations of gender bias that lead to violence against women. We discuss a number of these positive case studies below.

Judicial decision-making



Canada: Supreme Court decision on gender stereotyping

The Canadian Supreme Court decision of *R v Ewanchuk*¹⁹⁸ was a landmark sexual assault decision that considered the nature of consent and the question of whether “implied consent” was a defence under Canadian law. The 17-year-old complainant in the case alleged that the accused had made persistent and unwanted sexual advances toward her in his trailer following a job interview. The trial judge acquitted the accused on the basis that he had established a defence of “implied consent”. The original decision was upheld on appeal.

The Court held that the trial judge had erred in concluding that the complainant’s conduct raised reasonable doubt regarding consent, despite accepting the complainant’s testimony that she did not want to be touched by the accused. The Court found that no such defence of “implied consent” exists under Canadian law.

In a separate concurring judgment, L’Heureux-Dubé J expounded upon the archaic myths and stereotypes at the heart of the case. She held that the trial judge’s error did not “derive from the findings of facts but from mythical assumptions that when a woman says ‘no’ she is really saying ‘yes’, ‘try again’, or ‘persuade me’” and that it denied “women’s sexual autonomy and implie[d] that women are in a state of constant consent to sexual activity”.¹⁹⁹ In finding that the Court of Appeal had also relied on stereotyped assumptions about women, she

emphasised that “complainants should be able to rely on a system free from such myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions”.²⁰⁰ L’Heureux-Dubé J also condemned the inappropriate use of rape myths by the judiciary, such as the notion that women should use physical force to respond to sexual assaults for there to be a finding of non-consent.²⁰¹ Her Honor found that it was the role of the courts to denounce the type of language found in the Court of Appeal’s judgment that relies on stereotypes about rape.²⁰² She applied not only Canadian law in making these findings but also considered Canada’s obligations to address gender stereotyping under international law, including CEDAW.

L’Heureux-Dubé J’s powerful concurring judgment was referred to with approval by Gabriela Knaul, the then Special Rapporteur on the Independence of Judges and Lawyers, in an interim report submitted to the General Assembly in 2011.²⁰³ Knaul cited the case as an example of a domestic decision where CEDAW and GR 19 had been effectively applied to support a finding that violence against women is a matter of inequality and a violation of human rights.



Fiji: Judicial directives on sexual assault and domestic violence

In 2018, the Chief Magistrate of Fiji issued a series of directives to all Resident Magistrates that provided guidance on sentencing considerations in domestic violence and sexual assault cases. The directives focused on three key areas: 1. defining first-time offender status; 2. joint counselling and reconciliation; and 3. information regarding Legal Aid.

ICAAD’s preliminary analysis of previous sentencing decisions in domestic violence and sexual assault cases found that offenders classified as first-time offenders received mitigated sentences despite records indicating a history of violence.²⁰⁴ For example, in *State v Cokanauto*, the court found the perpetrator guilty of sexual violence over several years against several victims. Yet, when considering mitigation, the court deducted almost two years for being a “first-

¹⁹⁷ OHCHR, *Gender Stereotyping as a Human Rights Violation* [OHCHR Commissioned Report, October 2013, p.5.3.

¹⁹⁸ *R v Ewanchuk* [1999] 1 SCR 330.

¹⁹⁹ *Ibid.*, p.87.

²⁰⁰ *Ibid.*, p.95.

²⁰¹ *Ibid.*, p.93.

²⁰² *Ibid.*, p.95.

²⁰³ *Report of the Special Rapporteur on the independence of judges and lawyers*, UN Doc.A/66/289, 10 August 2011, p.40, prepared by Gabriella Knaul in accordance with Human Rights Council Res. 17/2.

²⁰⁴ *Sexual and Gender-Based Violence in the Pacific Islands: Handbook on Judicial Sentencing Practices*, ICAAD & Clifford Chance, 2018, pp.68, 77.

time offender” because of a lack of previous criminal convictions.²⁰⁵ ICAAD shared its findings with the Chief Magistrate. The Chief Magistrate’s directives instructed Resident Magistrates to “stay true to the spirit of the law when using their discretion”, in other words, to consider evidence of past violent conduct and any previous criminal convictions of a different nature in deciding whether to mitigate a sentence on the grounds that it was a first-time offence.

The directives also cautioned against requiring complainants to attend joint counselling with offenders and reiterated that, in accordance with the Domestic Violence Act 2009, there was a presumption against reconciliation in civil proceedings involving domestic violence. In relation to Legal Aid services, the directives noted that there was a practice amongst some magistrates to inform only the offender of their right to seek assistance from Legal Aid, and requested that magistrates inform both parties separately of their right to access Legal Aid.



Mexico: Protocol on judicial decision-making with a gender perspective

Mexico has been the subject of criticism in a number of IACtHR decisions for failing to comply with its obligations under international human rights law.²⁰⁶ Specifically, the IACtHR found that the Mexican courts had violated the provisions of regional and international instruments that address discrimination and violence against women. Between 2002 and 2005, the CEDAW Committee conducted an inquiry in regard to Mexico in relation to the abduction, rape and murder of women in the Ciudad Juárez area of Chihuahua, Mexico.²⁰⁷

In 2013, the Office of the President of the Supreme Court of Mexico published a protocol that explains how international human rights treaties are to be implemented as binding law by domestic courts.²⁰⁸

The Protocol is intended to assist judges, magistrates and justices to adopt a gender perspective in judicial decision-making by identifying and evaluating:

- Disparate impacts of laws and norms;
- When gender stereotypes inform the interpretation or application of laws or norms;
- How binary constructions of sex and gender lead to the legal exclusion or disenfranchisement of certain persons;
- How inequitable distributions of resources lead to unequal distributions of power; and
- The legitimacy of using differentiated treatment in laws and judicial decisions.²⁰⁹

The Protocol examines the relationship between gender stereotyping and the societal obstacles faced by women, noting that the consequence of the judiciary’s failure to interrogate prejudices underlying dominant ideologies is that such stereotypes are replicated and amplified:

“The persistence of laws and jurisprudential practices that diminish women’s sexual and reproductive autonomy, that devalue – when compared to men – the work that women do and the roles to which they have traditionally been assigned; the behavior expected of women within society, the family and at work; the negation of the myriad possible configurations of families, and domestic violence are all based on a social ideology rooted in stereotypes, which, when not detected and questioned by those who administer and impart justice, are instead reproduced.”²¹⁰

The Protocol sets out Mexico’s obligations under international law and provides a comprehensive overview of regional and international jurisprudence regarding gender stereotyping. It refers to a series of examples that situate gender stereotyping within judicial decision-making and provide important context for the more abstract obligations contained in international treaties and regional agreements. The Protocol also contains a detailed roadmap for applying a gender lens in judicial analysis.²¹¹

205 *State v Cokanautu*, Sentence [2017] FJHC 445; HAC327.2016S, 27 June 2017.

206 *González et al. (“Cotton Field”) v Mexico*, IACtHR (Nov. 16, 2009); *Fernández Ortega et al. v Mexico*, IACtHR, 30 August 2010; *Rosendo Cantú et al. v Mexico*, IACtHR, 31 August 2010. CEDAW Committee, *Report on Mexico produced by the Committee on the Elimination of Discrimination Against Women under Article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico*, CEDAW/C/2005/OP.8/MEXICO, 27 January 2005.

207 CEDAW Committee, *Report on Mexico produced by the Committee on the Elimination of Discrimination Against Women under Article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico*, CEDAW/C/2005/OP.8/MEXICO, 27 January 2005.

208 Suprema Corte de Justicia de la Nación, *Judicial Decision-Making with a Gender Perspective: A Protocol*, 2013: <https://www.buscadth.bjdh.org.mx/Protocolos/JudicialDecisionMakingwithaGenderPerspectiveAProtocolMakingEqualRightsReal.pdf>.

209 *Ibid.*, p.8.

210 *Ibid.*, p.13.

211 *Ibid.*, pp.71-139.

C. Case studies of good practice cont

Legislation and regulatory developments



Namibia: criminalisation of marital rape

The codification of marital rape exceptions in Commonwealth sexual assault legislation is an unfortunate vestige of colonialism that has persisted in many states.²¹² It is underpinned by stereotyped perceptions regarding the inferior and subordinate role assumed by a woman in marriage. To date, 20 Commonwealth countries have failed to remove the marital rape exception from the definition of rape in clear violation of international law.

One piece of domestic legislation often cited as an example of good practice in relation to the criminalisation of marital rape is Namibia's Combatting of Rape Act, No. 8 of 2000, which defines rape as follows:

"(1) Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances -(a) commits or continues to commit a sexual act with another person; or (b) causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape."

Section 2(3) of the Act makes clear that "no marriage or other relationship shall constitute a defence to a charge of rape under this Act".

The UN Handbook for Legislation on Violence Against Women makes a series of recommendations regarding the legislative definition of sexual assault. It recommends that legislation should, amongst other things:

- ✓ define sexual assault as a violation of bodily integrity and sexual autonomy;
- ✓ incorporate a broad offence of sexual assault graded based on harm;
- ✓ provide for aggravating circumstances;
- ✓ remove any requirement that there be force or violence;
- ✓ specifically criminalise sexual assault within a relationship.²¹³

While the Namibian legislation does not incorporate all of the elements set out in the handbook, it adopts a definition of rape that encompasses a broad range of sexual acts not limited to sexual intercourse; recognises rape often takes place in "coercive circumstances" and, importantly, avoids ambiguity by explicitly excluding any exemption on the basis of marriage or any other relationship.



Australia and New Zealand: domestic violence leave

Domestic violence remains a prevalent form of violence against women. In part, this is because it is informed by stereotypes regarding the subordinate position of women in the family unit and traditional attitudes towards household gender roles. A 2019 report published by the Australian government found that 1.6 million women in Australia (17% of the population) have experienced physical or sexual violence by a current or previous partner since the age of 15.²¹⁴ The report identified adherence to traditional gender roles as a factor contributing to the likelihood of a person becoming a perpetrator of domestic violence.²¹⁵ It found that, although fewer people agreed that intimate partner violence is a private, family matter, 32% believed that a female victim who does not leave an abusive partner is partly responsible for the abuse continuing.²¹⁶ This attitude stems from gender myths relating to how victims of abuse should behave.

In 2018, the Australia Federal Parliament introduced legislative changes that amended the Fair Work Act 2009 to provide for an entitlement to five days' unpaid family and domestic violence leave in a 12-month period.²¹⁷ The new provision extends to persons who have close relatives that are experiencing domestic violence.²¹⁸ The New Zealand legislature went a step further and recently passed legislation²¹⁹ which amended the Employment Relations Act 2000 and allows victims of domestic violence to take 10 days of paid domestic violence leave, regardless of when the violence occurred.²²⁰ Persons applying for domestic violence leave are eligible for flexible working conditions for up to two months to protect their safety.²²¹

²¹² For a comprehensive review of criminalisation of marital rape across the Commonwealth, see Equality & Justice Alliance, *The Criminalisation of Marital Rape and Intimate Partner Sexual Violence across the Commonwealth*, November 2019, available at: <https://www.sistersforchange.org.uk/2019/12/13/the-criminalisation-of-marital-rape-and-intimate-partner-sexual-violence-across-the-commonwealth/>.

²¹³ UN *Handbook for Legislation on Violence Against Women*, 2009, 3.4.3.1, available at: <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>.

²¹⁴ Australian Institute of Health and Welfare 2019, *Family, domestic and sexual violence in Australia: continuing the national story*, 2019, Cat. no. FDV 3. Canberra: AIHW, p.vii: <https://www.aihw.gov.au/getmedia/b0037b2da6514abf9f7b00a85e3de528/aihw-fdv3-FDSVinAustralia-2019.pdf.aspx?inline=true>.

²¹⁵ *Ibid.*, p.56.

²¹⁶ *Ibid.*, p.61.

²¹⁷ *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* [Cth].

²¹⁸ *Fair Work Act 2009* [Cth], s.106B.

²¹⁹ *Domestic Violence - Victims' Protection Act 2018*.

²²⁰ *Employment Relations Act 2000*, ss.72C(a) and 72H(a).

²²¹ *Ibid.*, pt 6AB.

The legislation also protects victims of domestic violence from adverse action on the basis that they might have experienced discrimination.²²² The Philippines is the only other country in the world to legislatively guarantee paid domestic violence leave on a national level.²²³

This example of domestic law recognises the devastating and disruptive impact that domestic violence can have on an employee's life. It also acknowledges that women sometimes stay in abusive relationships because of economic instability and fear of losing their job. The legislation represents a shift in perceptions of domestic violence as belonging only to the private sphere, which began with the criminalisation of marital rape in the late 20th century, but has finally started to see traction globally.



UK: ban on harmful gender stereotypes in advertisements

On 14 June 2019, a new rule took effect in the United Kingdom preventing advertisers from including gender stereotypes likely to cause harm. The rule was issued by the Committee of Advertising Practice (CAP) and Broadcast Committee of Advertising Practice (BCAP) following the publication of a report by the Advertising Standards Authority (ASA) that examined gender stereotypes in advertising, which found that gender stereotypes in ads "have the potential to cause harm by contributing to unequal gender outcomes."²²⁴

The rule in the Advertising Codes states:
"[Advertisements] must not include gender stereotypes that are likely to cause harm, or serious or widespread offence."²²⁵ In guidance published by CAP, they warn against ads featuring people undertaking gender-stereotypical roles which suggest that those roles are

always uniquely associated with one gender²²⁶ and children's ads that target a specific gender but explicitly convey that a particular product, activity, etc. is inappropriate for one or another gender.²²⁷ The regulator also advised that ads should take care to avoid suggesting that individuals should conform to an idealised gender-stereotypical body shape or physical features, that they should be sensitive to the wellbeing of vulnerable groups under pressure to conform to particular gender stereotypes and that they avoid mocking people for not conforming to gender stereotypes.²²⁸

In a regulatory statement released on 14 December 2018, CAP and BCAP considered that perpetuating gender stereotypes was a factor that contributed to violence against women and girls. They acknowledged that some respondents in the consultation process did not feel that the proposed guidance went far enough in addressing gender stereotyping that facilitates violence against women but took the view that a targeted intervention to prevent harmful stereotypes was an appropriate response, given advertising is one of many factors that influences real-world gender inequalities.²²⁹ The examples of gender stereotyping provided by CAP and BCAP are certainly not comprehensive, however, the relevant guidance and regulatory statements provide the scaffolding for further regulatory developments in this area.

²²² *Ibid.*, s.108A.

²²³ Graham-McLay, C., *New Zealand Grants Domestic Violence Victims Paid Leave*, *New York Times*, 26 July 2018, available at: <https://www.nytimes.com/2018/07/26/world/asia/new-zealand-domestic-violence-leave.html>.

²²⁴ Advertising Standards Authority, *Depictions, Perceptions and Harm: A report on gender stereotypes in advertising*, July 2017, p.61, available at: <https://www.asa.org.uk/assets/2DF6E028-9C47-4944-850D00DAC5ECB45B.C3A4D948-B739-4AE4-9F17CA2110264347/>.

²²⁵ UK Code of Non-broadcast Advertising, *Sales Promotion and Direct Marketing*, Rule 4.9 and UK Code of Broadcast Advertising, Rule 4.14.

²²⁶ CAP and BCAP, *Advertising guidance on depicting gender stereotypes likely to cause harm or serious or widespread offence*, 14 December 2018, p.4, available at: <https://www.asa.org.uk/uploads/assets/uploaded/139a8811-d8c9-4534-95f180d1bfe7b953.pdf>.

²²⁷ *Ibid.*, p.6.

²²⁸ *Ibid.*, pp.5, 7, 8.

²²⁹ *Ibid.*, p.5.



Country reports

Introduction

In many Pacific Island Countries, perpetrators of domestic violence and sexual offences often receive disproportionately low sentences or no custodial sentence at all. The driving force behind this discriminatory response to gender-based violence against women (GBVAW) includes gender bias, which incorporates pervasive gender stereotyping, rape myths and customary reconciliation practices. The impact of weakened accountability in GBVAW cases and reinforcement of gendered norms in judicial decision is gender discrimination. The presence of these factors evidencing gender bias in sentencing decisions is a clear violation of international law. By allowing gender bias to play a role in decision-making, judges are creating present and future barriers for women to access justice, privileging the interests of perpetrators over victims/survivors.

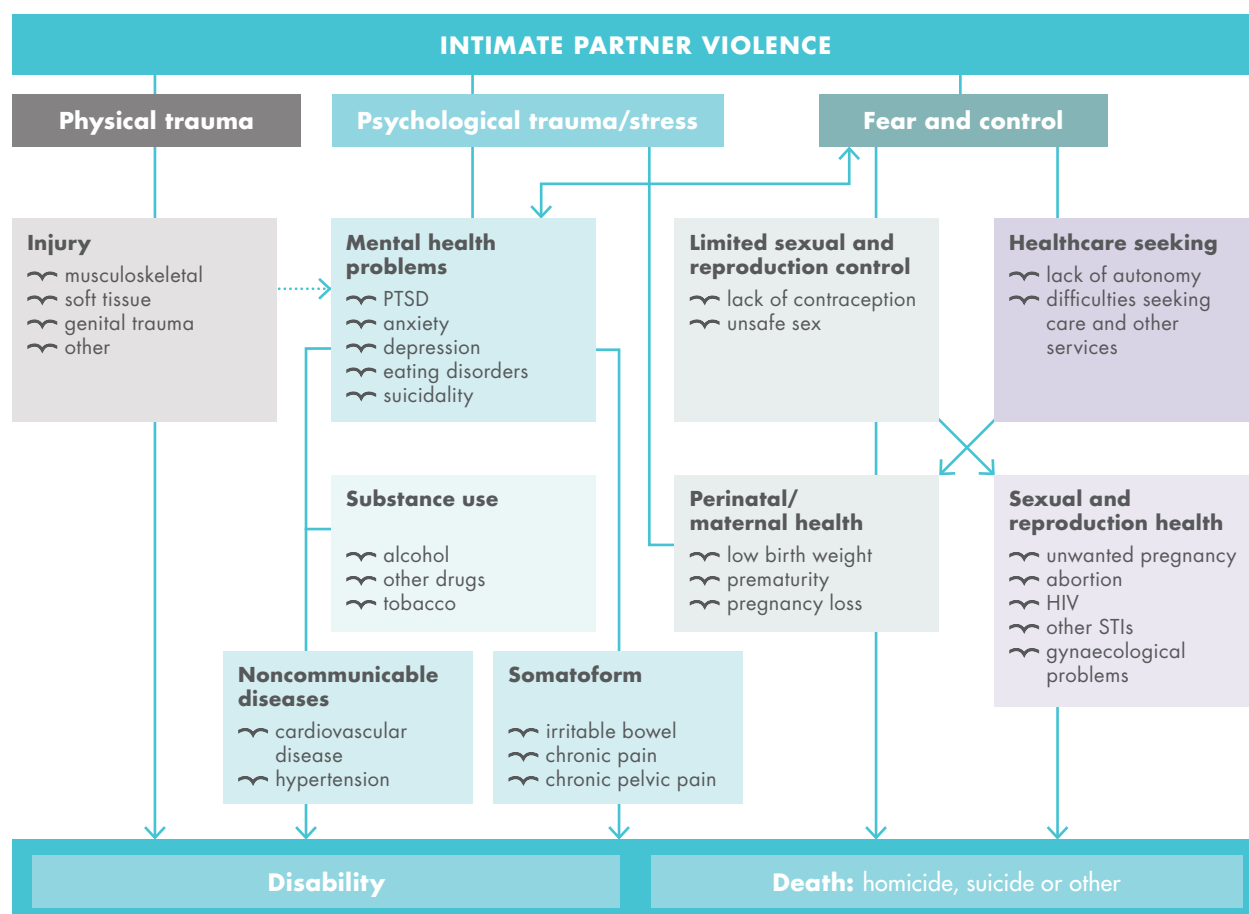
ICAAD has been assessing the level of gender bias within GBVAW cases across the Pacific Island Region for six years. Part III of this report discusses first the scope of gender-based violence against women and girls in the Pacific Island Region before providing an in-depth analysis of cases on GBVAW and examining the impact of customary practices on women's access to justice in such cases. In this report, we focus on the following seven Commonwealth countries in the Pacific Islands – Fiji, Vanuatu, Tonga, Samoa, Solomon Islands, Papua New Guinea, and Kiribati.

A. Scope of GBV in the Pacific Island Region

Population-level surveys are one of the most accurate ways to estimate the prevalence of GBV. In 2013, WHO conducted an extensive analysis of over 80 countries and found that 35% of women globally experience GBV (intimate partner or non-partner violence).²³⁰ The report emphasised that women facing violence were at greater risk for a number of health problems, including physical and psychological trauma. For example, survivors of intimate partner violence experience depression at more than twice the rate of those who do not suffer violence; for non-partner violence survivors, they are 2.6 times more likely to.²³¹ Figure 1 below shows the multitude of health effects of intimate partner violence.²³²

Prevalence studies conducted in Pacific Island Countries (PIC) using the WHO methodology show much higher prevalence rates of GBV, with 60-80% of women facing violence when looking across both intimate and non-intimate partner violence.²³³ It is important to note that many of the WHO prevalence studies cover women who are 15-49 years of age; as such, these figures do not account for violence and abuse faced by girls under the age of 15, nor do they account for other forms of harassment and the impact of GBV on others within a family.²³⁴ This presents a gap that needs to be addressed, specifically designing and conducting surveys intended to reach minors aged 15 and under.

Figure 1: Pathways and health effects on intimate partner violence



There are multiple pathways through which intimate partner violence can lead to adverse health outcomes. This figure highlights three key mechanisms and pathways that can explain many of these outcomes. Mental health problems and substance use might result directly from any of the three mechanisms, which might, in turn, increase health risks. However, mental health problems and substance use are not necessarily a precondition for subsequent health effects, and will not always lie in the pathway to adverse health.

²³⁰ *Op.cit.* at fn 2, pp.31-32.

²³¹ *Ibid.*

²³² *Op. cit.* at fn 2, p.8, (reproduced with permission).

²³³ UNFPA, *Responding to Intimate Partner Violence and Sexual Violence against Women and Girls*, 2015, p.7.

²³⁴ CARE, *Counting the Cost: The Price Society Pays for Violence Against Women*, 26 March 2018: https://www.care-international.org/files/files/Counting_the_costofViolence.pdf.

A. Scope of GBV in the Pacific Island Region cont

Figure 2: Intimate partner violence among ever-partnered women and non-violence among all women

	Intimate partner violence among ever-partnered women								Non-partner violence since age 15 among all women			
	Psychological violence		Physical violence		Sexual violence		Physical or sexual violence		Physical violence by non-partner		Sexual violence by non-partner	
	Lifetime	Last 12 months	Lifetime	Last 12 months	Lifetime	Last 12 months	Lifetime	Last 12 months	Lifetime	Last 12 months	Lifetime	Last 12 months
Fiji	58.3	28.8	61.1	19.4	33.9	14.2	64.1	23.7	26.9	N/A	8.5	N/A
Kiribati	47.1	30.1	60.0	32.4	64.4	33.7	67.6	36.1	11.0	N/A	9.8	N/A
Marshall islands	47.6	22.1	48.1	16.2	20.6	5.9	50.9	18.2	33.0	3.5	13.0	0.8
Micronesia	32.8	24.6	28.6	19.4	18.1	12.9	32.8	24.1	9.6	3.0	8.0	2.7
Nauru	N/A	N/A	46.6	20.6	20.6	9.9	48.1	22.1	N/A	N/A	47.3	12.2
Palau	23.0	9.1	23.0	6.5	10.3	3.5	25.2	8.4	13.9	2.5	15.1	3.4
Papua New Guinea	69.0	28.3	51.5	21.9	58.1	13.4	67.5	32.9	N/A	N/A	N/A	N/A
Samoa	19.6	12.3	40.5	17.9	19.5	11.5	46.1	22.4	62.0	N/A	10.6	N/A
Solomon Islands	56.1	42.6	45.5	N/A	54.7	N/A	63.5	41.8	18.2	N/A	18.0	N/A
Tonga	24.0	13.0	33.4	12.5	16.5	11.0	39.6	18.9	67.8	N/A	6.3	N/A
Tuvalu	28.1	23.1	33.3	23.8	10.0	5.1	36.8	25.0	N/A	N/A	N/A	N/A
Vanuatu	68.0	54.0	51.0	33.0	44.0	33.0	60.0	44.0	28.0	N/A	33.0	N/A

Rates of GBV and the kinds of violence women face are not uniform throughout the Pacific, and are shaped by many factors, from socio-economic circumstances and poor enforcement to differences in cultural practices, perceived gender roles, and gender stereotypes. For example, rates of intimate partner violence in comparison to other PICs are generally lower in Tonga²³⁵ and Palau, which have cultural practices giving women some authority when it comes to land tenure and certain family decisions.²³⁶ Matrilineal practices also exist in some parts of the Solomon Islands, Marshall Islands, Papua New Guinea (PNG), Samoa, and Vanuatu, among other areas, but “[d]uring contact, missionary and colonial times some matrilineal areas gradually became patrilineal in terms of title inheritance and/or land ownership and transmission”.²³⁷ Currently, 63.5% of women in the Solomon Islands and 50.9% in the Marshall Islands experience physical and/or sexual intimate partner violence.²³⁸ Shockingly, one study found 60% of men in PNG reported participating in at least one gang rape.²³⁹ Though it is clear that women who are marginalised are at a higher risk for GBV, such as those who are homeless, living with HIV, disabled, trans women, or are sex workers, there is a dearth of data examining these intersecting layers of discrimination.

²³⁵ Tonga has some of the highest rates in the region overall because of high rates of non-intimate partner violence.

²³⁶ Stege, K., et. al. *Land and Women: The Matrilineal Factor*, 2008: <http://rmicourts.org/wp-content/uploads/PIFS-Land-and-Women.pdf>.

²³⁷ *Ibid.*, p.ix.

²³⁸ UNFPA, 2016 *Regional Snapshot: UNFPA Asia and the Pacific Region*: <https://asiapacific.unfpa.org/sites/default/files/pub-pdf/VAW%20Map%20September%2014%202017.pdf>, accessed 28 May 2019; *Op. cit.* at fn 57, pp.20-22.

²³⁹ Jewkes R., Fulu E., Roselli T., Garcia-Moreno C., *Prevalence of and factors associated with non-partner rape perpetration: findings from the UN Multi-country Cross-sectional Study on Men and Violence in Asia and the Pacific*, Lancet Global Health, 2013, p.208-218.

B. Analysis of case law of Pacific Island Countries

In 2015, ICAAD completed a pilot analysis of 908 randomly selected domestic violence and sexual offence cases from 2000 to 2014 in seven PICs²⁴⁰ within the Commonwealth and found that gender bias (“contentious factors”)²⁴¹ reduced the sentences of perpetrators in 52% of GBV cases across the region.²⁴² The analysis focused on whether customary forms of reconciliation, gender stereotypes, rape myths, or other factors were considered in sentence mitigation. Capturing 26 variables, each case was reviewed to break down what type of contentious factor(s) were raised, whether they led to a sentence reduction, and by how much.²⁴³

Of the cases analysed, contentious factors were raised in 75% of them: 90% of all domestic violence cases, 76% of murder cases and 73% of all sexual violence cases.²⁴⁴ Contentious factors led to a sentence reduction in 52% of all cases.²⁴⁵ Average final sentences were substantially lower in cases in which contentious factors were considered. Further, the perpetrator was four times more likely to receive a non-custodial sentence (no prison) when the judicial officer took into account a combination of contentious factors compared to when no contentious factors were considered.²⁴⁶

Figure 3: Impact of contentious factors on GBV cases across the Pacific Island Region

	% of cases in which contentious factors were raised	% of cases in which contentious factors led to a sentence reduction	Average sentence reduction after consideration of contentious factors
Domestic violence	90%	66%	60%
Sexual violence	73%	50%	40%
All cases	75%	52%	

This pilot also highlighted the vulnerability of girls under the age of 15 as they accounted for 40% of victims.²⁴⁷ Qualitative analysis found that charges of statutory rape or incest²⁴⁸ were used in many cases with young girls where rape was clearly present.²⁴⁹ Since the establishment of consent is not required for these charges, they are used more often by police and prosecutors, and have a lower starting sentence.

Customary reconciliation and gender stereotypes also impacted girls differently. In cases involving child victims, customary reconciliation led to a sentence reduction in 23% of cases. In many cases, the age of the victim did

not matter to the judicial approach even if the victim did not understand the nature or impact of reconciliation. Gender stereotypes of the characteristics and actions of the victims resulting in mitigation and sentence reduction persisted even for young girls.²⁵⁰

Methodology of case selection and analysis

In determining the types of cases to review, the following criteria was used to determine the scope of the analysis:

1. actions of the perpetrator included elements of domestic and/or sexual violence as defined previously;
2. victim identified as female; and 3. the case involved the sentencing of the perpetrator.

²⁴⁰ Fiji, Samoa, Solomon Islands, Tonga, PNG, Kiribati and Vanuatu.

²⁴¹ Those factors which, when used in mitigation by the court, discriminate against the victim/survivor on the basis of her gender. This may be through gender stereotyping and rape myths, the consideration of customary practices which may be imbued with gender discrimination (such as forgiveness ceremonies) or other factors which unjustly privilege the interests of the perpetrator over the interests of the victim/survivor. The problematic factors have been separated into three categories: Gender Stereotypes, Customary Practices and Other Factors. See Singh, H., Singh, J. and Christie, E., *An Analysis of Judicial Sentencing Practices in Sexual & Gender-Based Violence Cases in the Pacific Island Region*, ICAAD & DLA Piper, 2016, p.2: <http://www.paclii.org/other/general-materials/ICAAD-Analysis-of-Judicial-Sentencing-Practices-in-SGBV-Cases.pdf>.

²⁴² *Ibid.*, p.6.

²⁴³ *Ibid.*, p.11.

²⁴⁴ *Ibid.*, p.22.

²⁴⁵ *Ibid.*, p.6.

²⁴⁶ *Ibid.*

²⁴⁷ Studies have found that in Fiji, 30% of all female rape victims/survivors were between 11 and 15 years of age. In Kiribati, 20% of women reported being sexually abused before the age of 15 and in the Solomon Islands 37% of women reported that they had been sexually abused before the age of 15. In all cases, the most common perpetrator was a male in their immediate or extended family, or a boyfriend. *Op. cit.* at fn 57.

²⁴⁸ Statutory Rape refers to cases of sexual intercourse with a person under the legal age of consent. Consent is not a factor in statutory rape cases as a person under the legal age of consent cannot consent to sexual intercourse. The element of consent in these cases does not need to be established.

²⁴⁹ *Op.cit.* at fn 241, p.17.

²⁵⁰ *Ibid.*, p.31.

B. Analysis of case law of Pacific island countries cont

Since the initial pilot findings were published at the end of 2015, ICAAD has been working to develop a database of GBV cases using machine learning techniques to identify and pull relevant GBV sentencing decisions from the Paclli database (<http://paclli.org>) that followed the above criteria, and by obtaining cases directly from courts in the region.²⁵¹ As of August 2019, over 1,500 cases have been analysed.

The central thrust of the case law analysis is determining whether or not gender bias influenced the final sentence received by the perpetrator. The “**contentious factors**” being reviewed are broken down into three main categories:

- 1 **Gender stereotyping:** “Stereotypical attitudes and beliefs regarding gender and the way in which men and women should interact within society... ‘Gender stereotypes’ also includes rape myths: prejudicial, stereotypical or false beliefs regarding rape, and characteristics of rape victims and rapists.”²⁵²
- 2 **Customary practices:**²⁵³ This includes forms of out-of-court justice and reparation including payment of compensation, formal apology, and reconciliation. It also includes where customary practices are used as justification for criminal acts which undermine equal protection under the law for female victims/survivors (eg: accusations of witchcraft, or bride price).
- 3 **Other factors:** This includes any other factors which unjustly privilege the interests of the perpetrator over the interests of the victims/survivors. For example, considering the fact that the perpetrator participated in church activities as a mitigating factor.²⁵⁴

The case studies that follow highlight the extent to which contentious factors identified in PIC sentencing decisions overlap with the examples of gender bias that lead to GBV discussed previously. These examples demonstrate how such displays of gender discrimination not only serve to perpetuate violence against women

and children, but also create a culture of impunity for perpetrators of violence. The case studies illuminate the types of contentious factors that are prevalent throughout the region, what contentious factors may have persisted over the last 20 years, and those that are now being challenged by the courts.

Before discussing the case law analysis from individual Pacific Island countries, a longitudinal study of Fiji GBVAW cases from 2000-2018 is provided to highlight the importance of monitoring and evaluating sentencing decisions to assess transparency, consistency, and accountability in the judiciary. By 2022, similar longitudinal studies for all countries analysed in the case studies below will be completed. The Fiji data trends that extend to other Pacific Island Countries (based on our preliminary analysis of those countries) include the following:

- Reconciliation practices (either formal or informal) are the most significant contentious factor that leads to sentence reductions and suspended sentences.
- A greater number of GBVAW cases are being made public, however, access to magistrate or lower court decisions still remain limited (this is critical because there tends to be higher rates of bias in lower court decisions).
- Average sentence lengths for GBVAW cases are becoming more proportional to the gravity of the crime, especially in sexual violence cases.
- The greatest concentration of victims of GBVAW cases are girls (<18 years of age).
- There is limited reliance on medical evidence, specifically in sentencing decisions.
- Limited confidentiality of victims, including children, in GBVAW cases still persists.

²⁵¹ By building a dictionary of relevant search terms for each jurisdiction, ICAAD, in collaboration with data scientists from Conduent, created an algorithm that seamlessly distinguishes domestic violence and sexual violence cases from other cases, while identifying only sentencing decisions. Once the algorithm performed at a high level of precision and accuracy, data capture and transfer to the TrackGBV database began. Next, attorneys from three law firms (Manatt, Linklaters, and Clifford Chance) began the analysis of 5,000 cases from 12 PICs. As detailed in the ICAAD Handbook, the number of variables identified in each case expanded from 26 during the pilot to 51 in the current phase.

²⁵² *Op. cit.* at fn 241, p.2.

²⁵³ It is important to note that the use of customary forms of reconciliation (apology, forgiveness, *bulubulu*, *ifoga*, *ta kabara bure*, etc.) in some PICs is mandated by legislation and/or the Constitution. However, for reasons we will discuss shortly, we are advocating against the use of cultural forms of reconciliation as a factor in mitigation because they function in a discriminatory manner, in the specific context of GBV cases and in contravention of CEDAW.

²⁵⁴ *Op. cit.* at fn 241, p.35.

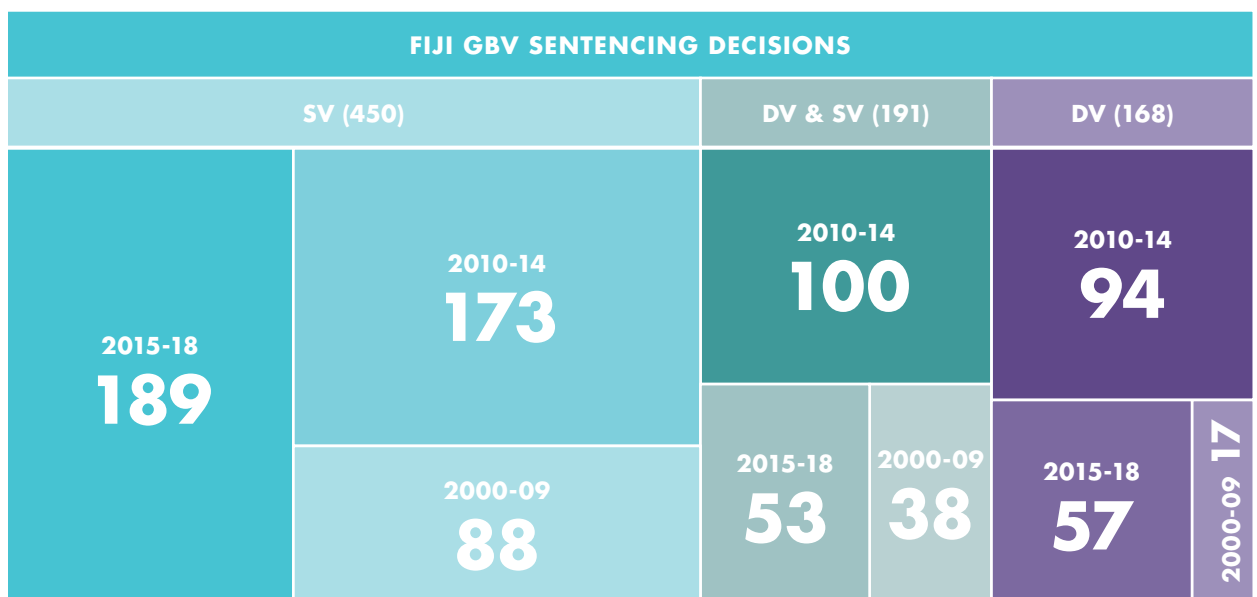
C. Longitudinal study of Fiji GBVAW cases

The 809 GBVAW cases analysed for Fiji comprised:

- ~ 143 from 2000-2009;
- ~ 367 from 2010-2014 following the 2009 adoption of the Domestic Violence Act, Crimes Act, and Criminal Procedure Act; and
- ~ 299 from 2015-2018 (following ICAAD's engagement in training stakeholders on its case law analysis).

Figure 4 provides the breakdown of the cases analysed between 2000-2018, categorised as sexual violence (SV) cases, domestic violence (DV) cases, and cases involving both domestic and sexual violence (DV and SV).

Figure 4: Breakdown of Fiji GBVAW cases by date and type of violence



The number of relevant GBV sentencing decisions available from 2000-2009 versus the following years shows a significant increase of cases being transferred to PacLII, the primary public legal research database. Prior to 2010, courts were not providing as many cases to PacLII, and the decisions were predominantly appellate cases, with very few decisions from the lower courts. For example, from 2000-2009, only 25 relevant GBV sentencing decisions were identified on PacLII coming from magistrate courts. However, from 2010-2018, this increased to 487, including only a partial set of 2018 cases.

First-time Offender Status in Fiji

A recent study by Fiji Women's Rights Movement (FWRM) found that for domestic violence in Fiji, women "experienced violence for an average of 868 days before they went to the police or courts".²⁵⁵ The previous Good Practice section discusses the danger of judges not adhering to the spirit of the law when granting leniency to perpetrators on the basis of first-time offender status, where there is evidence of past violence, though the perpetrators were never prosecuted and convicted. The reason to focus on the frequency and level at which judges mitigate (reduce) sentences of first-time offenders is that the designation generally garners a large sentence reduction.

²⁵⁵ Sumner, C. & Lister, L., *Balancing the Scales: Improving Fijian Women's Access to Justice*, Fiji Women's Rights Movement, 2017, p.23: http://www.fwrmm.org.fj/images/fwrmm2017/publications/analysis/Balancing-the-Scales-Report_FINAL-Digital.pdf.

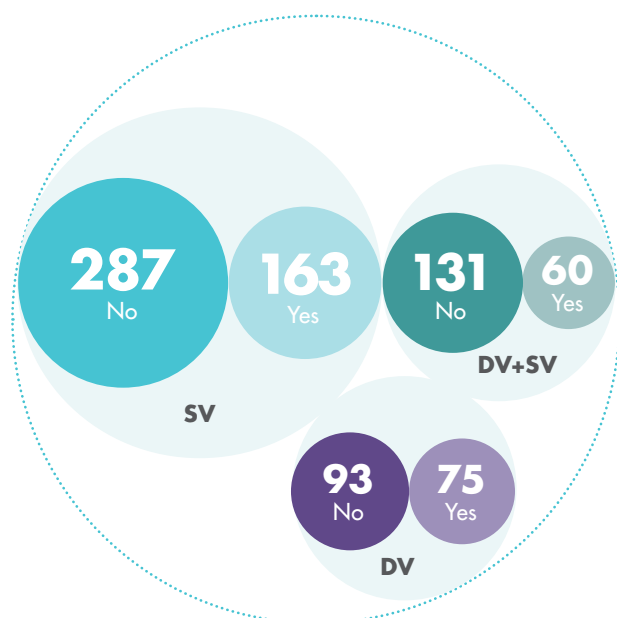
C. Longitudinal study of Fiji GBVAW cases cont

In the current analysis, the perpetrator was determined to be a first-time offender in 444 cases (54.8%) of the 809 sentencing decisions reviewed. In those 444 cases, there was a misapplication of first-time offender status in 9.8% of cases (2000-2009), 4.6% of cases (2010-2014), and 4.0% of cases (2009-2018). Furthermore, there are both 2018 and 2019 decisions that echo the judicial directives on first-time offender status discussed in the Fiji good practice case study (pp. 30-31).

Medical Reports Included in Fiji GBV Cases

The importance of medical reports in GBV cases cannot be understated and goes directly to preserving evidence of the severity of a crime, which would likely influence sentencing outcomes. Moreover, medical reports are essential in documenting prior incidences of violence, which can impact whether the court views a perpetrator as a first-time offender. In the 809 sentencing decisions, medical reports were mentioned in only 36.8% of cases, with the reports coming up in 44.6% of domestic violence cases, 36.2% of sexual violence cases, and 31.4% of cases involving both sexual and domestic violence. The data provided does not mean that medical reports were not available or considered during the case, only that the reports were not cited by the judge in making their sentencing determination.

Figure 5: References to medical reports in sentencing decisions in 809 GBVAW cases in Fiji (2000-2018)



Age Breakdown of Victims in Fiji

Focusing on the age categories of victims/survivors is important because it provides some information on overall vulnerability. In the analysis, 55.2% of all cases reviewed involved children (447 of 809 cases). In cases involving both domestic and sexual violence (SV in the home) 77.7% of victims were children. In cases involving only sexual violence, 67.5% of victims were children. Adults were the victims in 90.4% in cases involving domestic violence only. This echoes the prior Phase I analysis conducted by ICAAD on 145 randomly selected cases from Fiji from 2000-2014, wherein 58% of cases involved victims under 18 years of age. It also echoes the 2016 data of the Office of the Director of Public Prosecutions (ODPP), that 64% of victims in sexual offence cases prosecuted in Fiji are children.²⁵⁶ Recognising the “prevalence of child rape”,²⁵⁷ in November 2018, the Fiji Supreme Court issued a ruling increasing the sentencing tariff for rape against children to be between 11 and 20 years.²⁵⁸ It is important to note that more cases concerning girls coming before the court does not necessarily mean that the greatest prevalence of violence is of girls under the age of 18. There could be several factors that influence this number, including: 1. greater reporting of violence against children; 2. prosecutors taking more seriously violence against children; 3. less societal pressure for children to reconcile with the perpetrator of the violence; and 4. significant underreporting of violence against women. These are all areas that require further research.

²⁵⁶ Ibid., p.45.

²⁵⁷ ODPP Media Update, *Supreme Court increases sentencing tariff for Child Rape*:

<http://odpp.com.fj/wp-content/uploads/2018/12/ODPP-Media-Update-Supreme-Court-increases-sentence-for-child-rape-4.12.18.pdf>

²⁵⁸ *Gordon Aitcheson v State* [2018] FJSC 29.

The age distribution of victims in the cases shows that younger children (ages 4+) are most vulnerable to sexual violence in the home, and that children become more vulnerable to sexual violence outside the home around the age of 9. In the cases involving domestic violence only, the age of victims varies much more widely.

Figure 6: Victim age spectrum - Cases involving both domestic and sexual violence

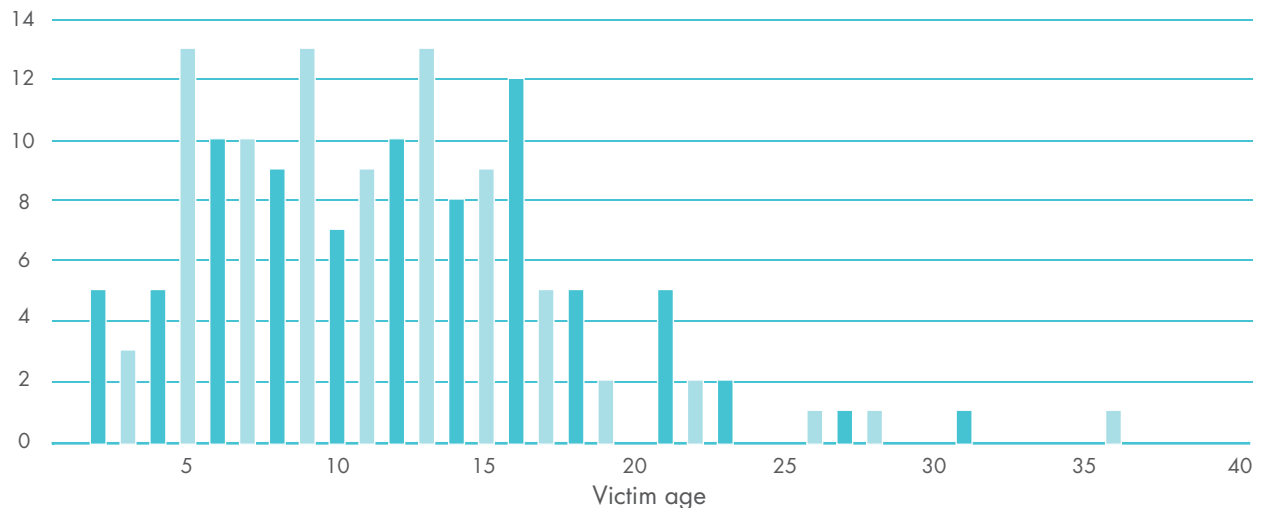


Figure 7: Victim age spectrum - Cases involving sexual violence only

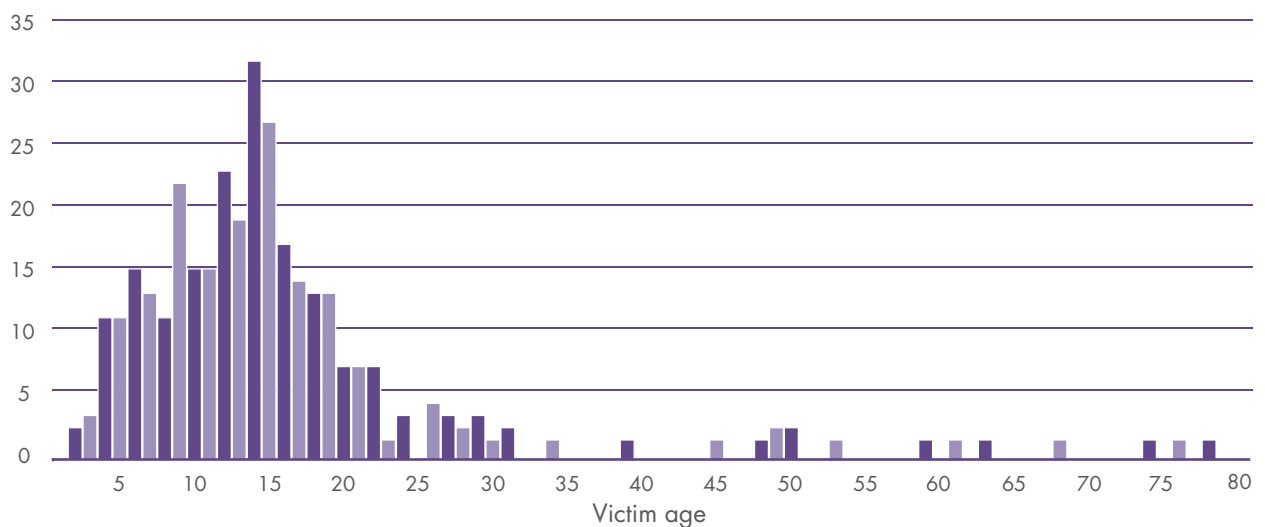
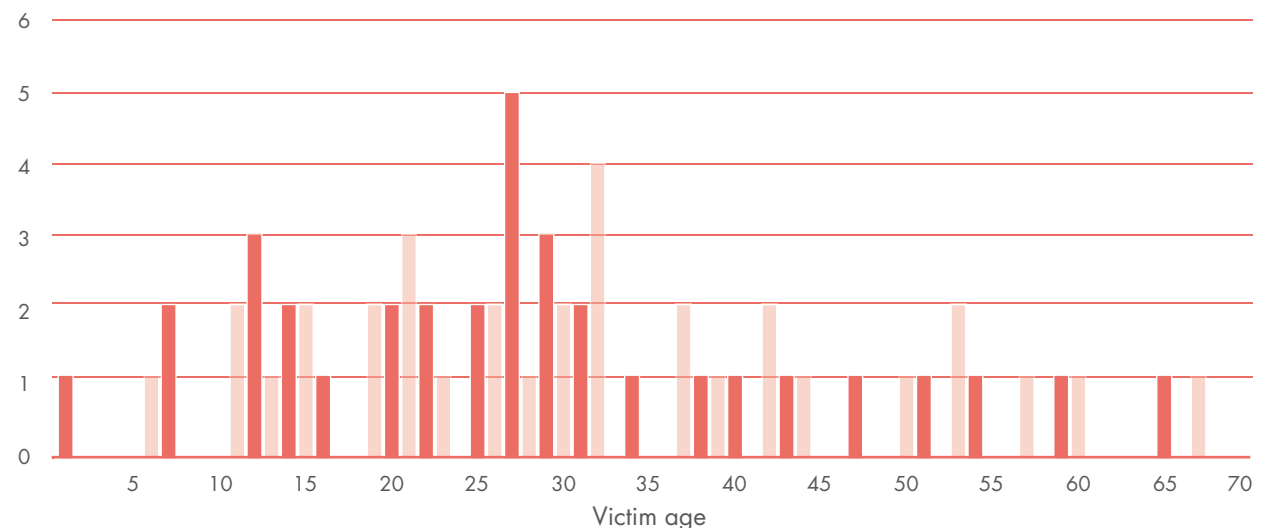


Figure 8: Victim age spectrum - Cases involving domestic violence only



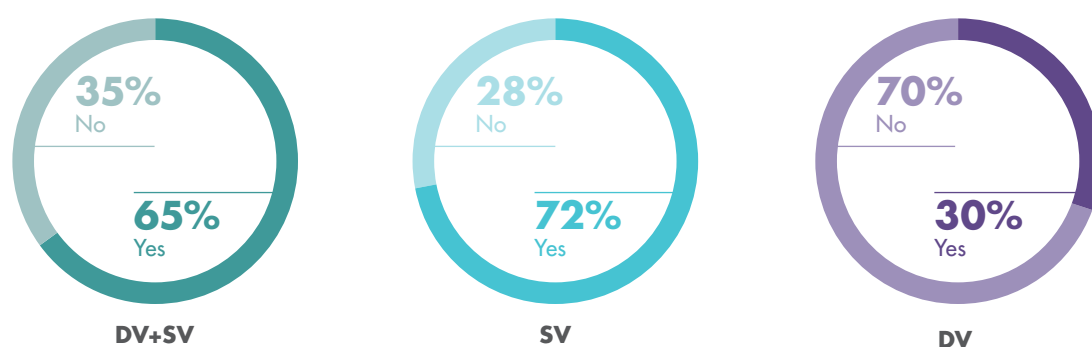
C. Longitudinal study of Fiji GBVAW cases cont

Victim/Survivor Confidentiality in Fiji

Victim anonymity or confidentiality should always be provided for in GBV cases, and especially in those cases involving minors. Most national laws have provisions for protecting confidentiality of children, which is considered standard good practice.²⁵⁹ Many domestic violence organisations and advocates have also stressed the importance of confidentiality for adult victims/survivors of GBV.²⁶⁰ For example, Anne Stenhammer, Regional Programme Director for UN Women South Asia, declares that “confidentiality is a human right when it comes to the victim”.²⁶¹ Fiji’s ODPP Prosecution Code 2003 generally states for all victims that prosecutors must “respect the victims’ privacy and confidentiality”.²⁶²

Anonymity is important for victims/survivors who may hesitate to use the courts to access justice otherwise. The need for victim confidentiality has led courts to anonymise cases placed online, and in some jurisdictions, to provide separate waiting areas for victims of GBV and escorts in and out of the courts.²⁶³ Anonymity has always been a challenge for victims in PICs because communities are much smaller and people often find out about private matters. Additionally, victims have to seek assistance at police stations or to attend court, which are often public settings. Victim anonymity has become even more challenging due to the internet, and the risk the internet brings in amplifying the details of private matters.²⁶⁴ In terms of court records in Fiji, according to FWRM, the Fiji Courts have yet to publish family law judgments on PacLII because they have not been redacted or anonymised to remove parties’ names.²⁶⁵

Figure 9: Anonymity of victims in sentencing decisions



In Fiji’s sentencing decisions reviewed, adult victims’ identities were not kept confidential in 57.6% of cases (185 of 321). For child victims, identities were not kept confidential in 24.2% of cases (108 of 447).

Contentious factors raised by judicial officers

As explained above, contentious factors, such as gender stereotypes or customary reconciliation practices, are those elements of gender bias that can, whether raised by the defence or judicial officer, affect the outcome of a case.

As Figure 9 on page 45 indicates, of the sentencing decisions reviewed, contentious factors as a whole were raised by judicial officers in 45.1% of cases. Customary reconciliation practices were raised by judicial officers in 42.8% of DV cases, but less frequently in SV cases – 11.7%. Gender stereotypes were raised by judicial officers in 27.4% of all GBV cases: on average 36.3%

of the time in domestic violence cases, and 22% in cases involving sexual violence only. In the cases where gender stereotypes were raised, judges raised the issue of the perpetrator being the sole breadwinner 61.5% of the time (187 of 304).

Other factors (ie: perpetrator’s church attendance, coming from an impoverished background, or having a father who abandoned them) were raised by judicial officers in 23% of cases, with no significant deviation between the factors being raised in domestic violence or sexual violence cases. A combination of two or more contentious factors were raised by judicial officers in 22.6% of all GBV cases. Fijian courts are making progress in reducing how often judges are raising contentious factors. From 2010 to 2014, judges raised contentious factors in 59.1% of sentencing decisions, whereas from 2015 to 2018, they raised them in 35.4%.

259 UNODC and UNICEF, *Justice in Matters Involving Child Victims and Witnesses of Crime*, 2009, p.7, 38:

https://www.unodc.org/documents/justice-and-prison-reform/justice_in_matters.pdf.

260 Women’s Legal Defense and Education Fund, *State Confidentiality Statutes*, p.1:

<https://www.lsc.gov/sites/default/files/LSC/pdfs/8.%20%20Appendix%20VI%20%20Handout%2030%20State%20Confidentiality%20Chart%207-20.pdf>.

261 Mahr, K., *Should the Indian Gang-Rape Victim Remain Anonymous?*, Time, 2013: <http://world.time.com/2013/01/04/should-the-indian-gangrape-victim-remain-anonymous/>.

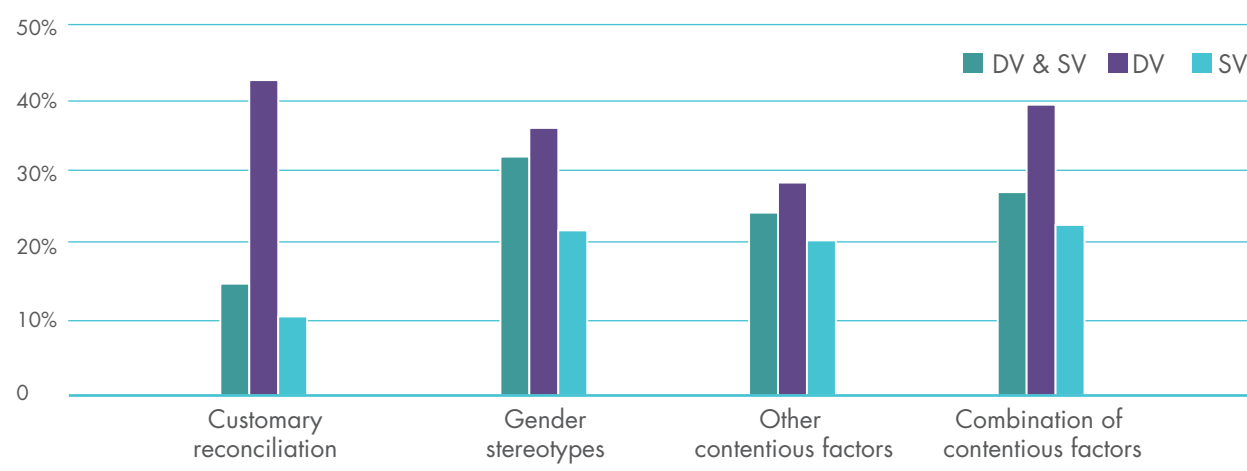
262 Prosecution Code 2003: <http://odpp.com.fj/wp-content/uploads/2015/03/The-ODPP-Prosecution-Code-2003-Office-of-the-Director-of-Public-Prosecutions-Republic-of-Fiji.pdf>.

263 Green, R., *Privacy and Domestic Violence in Court*, 16 Wm. & Mary J. Women & L. 237, 2010, p.251: <https://scholarship.law.wm.edu/wmjwl/vol16/iss2/2>.

264 National Network to End Domestic Violence, *Why Privacy and Confidentiality Matters for Victims of Domestic & Sexual Violence*, <https://www.techsafety.org/privacymatters>;

Green, R., *Privacy and Domestic Violence in Court*, 16 Wm. & Mary J. Women & L. 237, 2010, p.250: <https://scholarship.law.wm.edu/wmjwl/vol16/iss2/2>.

265 Op.cit. at fn 255, p.21.

Figure 9: Contentious factors raised by the judicial officer

Contentious factors resulting in reduced sentences

Contentious factors were used to justify the reduction in sentences in 32.3% of all cases. This occurred most frequently in DV cases, with 45.2% of cases having sentences reduced. In cases involving both DV and SV violence, contentious factors were used to reduce sentences in 39.8% of cases. In SV cases, contentious factors were used to reduce sentences in 24.2% of cases. The average reduction in sentence for DV cases was 0.78 years, for DV and SV cases was 2.5 years, and in SV cases was 2.17 years.

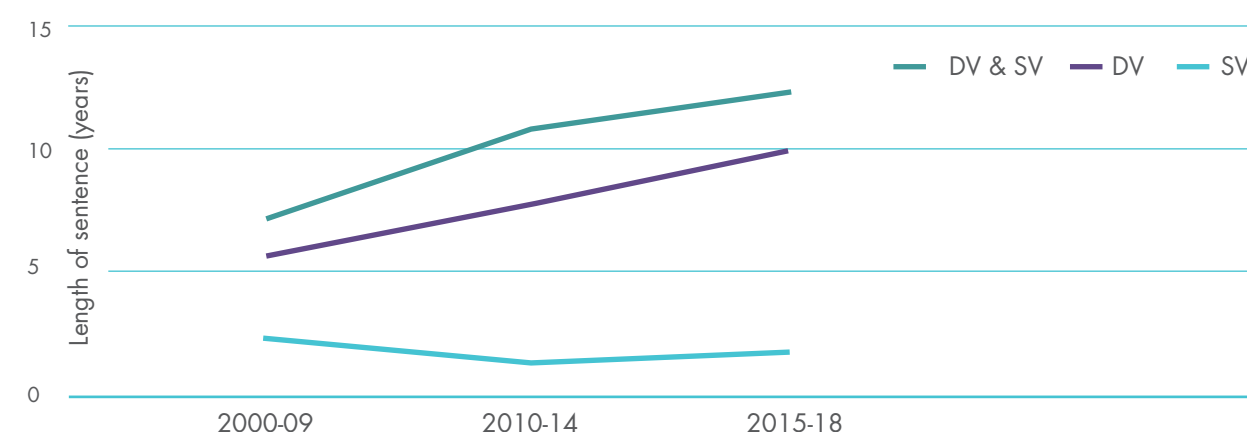
Again, it is important to point to the immense progress made by Fijian courts; this time for reducing the frequency of which contentious factors are being used to mitigate sentences. From 2010 to 2014, contentious factors were used to reduce sentences in 46% of cases; from 2015 to 2018, that number dropped to 21%.

Suspended sentences

After the delivery of a sentence, a court may, for a variety of reasons, choose to fully or partially suspend a sentence. This is problematic, given the frequency of gender bias in GBV cases. In the decisions reviewed, 15.5% of cases had fully or partially suspended sentences. The rates are much higher in DV cases, where 46.4% of sentences are fully or partially suspended. Even though there was a significant reduction in the full suspension of sentences between 2010 to 2014 (50% fully suspended) and 2015 to 2018 (28.1% fully suspended), the rate of suspension of sentences is still quite high.

Custodial sentences in GBVAW cases in Fiji

Custodial (prison) sentences were not given in 40.5% of DV cases, 6.7% of SV cases, and 4.7% of DV and SV cases.

Figure 10: Average final sentence in GBV cases 2000-2018

The average length of sentence for DV and SV cases was 7.32 years between 2000 to 2009, 10.8 years between 2010 to 2014, and 12.41 years between 2015 to 2018. The average length of sentence for DV cases was 2.3 years between 2000 to 2009, 1.34 years between 2010 to 2014, and 1.68 years between 2015 to 2018. The average length of sentence for SV cases was 5.53 years between 2000 to 2009, 7.76 years between 2010 to 2014, and 9.88 years between 2015 to 2018.

D. Country case studies



FIJI

This case study considers two specific cultural practices that have historically had a significant impact on access to justice for women in Fiji and explores the recent shift that has taken place within the Fijian judiciary and the extent to which judges are now pushing back against cultural norms that were once given credence in judicial decisions.

In Fijian culture, *bulubulu* – a custom for reconciling differences – is an essential part of traditional village life. Disputes are settled with the offer of a whale's tooth *tabua*, a gift or compensation, and asking for forgiveness.²⁶⁶ There is social pressure to accept this apology because in the past, the outcome of accepting *bulubulu* was to break the cycle of vengeance between families. The offer is generally directed to the senior male member of the family and not the victim.²⁶⁷ As the population has begun to move from rural to urban locations, however, the "custom itself is being redefined".²⁶⁸

It is important to note that whilst traditional reconciliation *bulubulu* is still practiced by the indigenous population *i-Taukei*, the more commonly understood definition of "reconciliation" is frequently used by both indigenous and non-indigenous populations in GBV cases. Reconciliation (both in the traditional and informal sense) has been used by perpetrators of GBV to have sexual assault and domestic violence cases dropped by police officers and prosecutors, to receive a reduced sentence, and to deny redress to survivors of GBV.

In the past, legislation gave judges discretion to use reconciliation as a means to mitigate and even suspend sentences. During this time, judges also expanded the applicability of reconciliation to sexual assault cases, even though the legislation only provided for reconciliation in cases involving common assault.²⁶⁹ With the passage of both the Domestic Violence Act and Criminal Procedure Act of 2009, that discretion was

severely curtailed.²⁷⁰ Yet, it has taken years for judges in GBVAW cases to consider whether reconciliation is safe or appropriate. More recently (2018-2019), judges are actively opposing reconciliation as a mitigating factor.

Case Law Analysis

Reconciliation/ Domestic Violence

For almost two decades, the concepts around *bulubulu* and informal reconciliation have been identified by both advocates and the CEDAW Committee as violating the rights of women and girls in the context of GBV cases.²⁷¹ There are three primary issues of concern when it comes to using reconciliation in GBV cases: 1. it sometimes allows perpetrators to escape or face limited accountability, signaling to the broader society that these crimes are not serious (eg: fully suspended sentences in domestic violence cases); 2. it creates sentences that are not proportional to the gravity of crimes; and 3. it perpetuates a system of societal and economic power imbalances which create an overwhelming burden on victims/survivors to accept reconciliation.

These issues have been addressed in legislation, in case law and through directives issued by the courts. Preliminary TrackGBV analysis shows that reconciliation was raised by judicial officers in Fiji in 24.2% of 2010-2014 cases, and 12.4% of 2015-2018 cases. It played a role in reducing sentences in 19% of 2010-2014 cases and 7% of 2015-2018 cases. This means that its use has become more limited over time.

Criminal Procedure Act 2009, Part 12, s.154

Promotion of reconciliation 154 (1). In the case of any charge for an offence of common assault or assault occasioning actual bodily harm or criminal trespass or damaging property the court may... promote reconciliation and encourage the settlement of the proceedings in an amicable way...

(6) This section does not apply to offences of domestic violence, as defined by the Domestic Violence Decree 2009.

266 Merry, S. E., *Tensions Between Global Law and Local Social Justice: CEDAW and the Problem of Rape in Fiji*, 2004, p.9:

https://www.brandeis.edu/ethics/pdfs/internationaljustice/otheractivities/IAC_Merry.pdf.

267 *Ibid.*, p.8.

268 Merry, S. E., *Human Rights and Gender Violence: Translating International Law into Local Justice*, University of Chicago Press, 2009, p.118.

269 Criminal Procedure Code [Cap 21], 1978, Part V, s.163 ("the court may, in such cases which are substantially of a person [sic] or private nature and which are not aggravated in degree, promote reconciliation...").

270 Domestic Violence Act 2009, Part I, s.11: http://www.pacilii.org/fj/promu/promu_dec/dvd2009191/; Criminal Procedure Act 2009, Part 12, s.154 (1) (Fiji): <https://laws.gov.fj/Acts/DisplayAct/799#>.

271 CEDAW, *Concluding observations on the fifth periodic report of Fiji*, March 2018, p.6; CEDAW/C/FJ/CO/5.; Coalition of Women's NGOs for the CEDAW Shadow Report, *3rd and 4th Combined Periodic Report to the Committee on the Elimination of Discrimination Against Women*, (2010) p.7: <https://icaad.ngo/womensrights/promote-access-to-justice/combating-vaw-in-pics-reports/report-sets-off-flurry-questions-womens-rights-review/>.

Domestic Violence Act 2009, Part I, s.11 Matters to be considered by the Court

11. Notwithstanding sections 28 and 29 of the Magistrates Court Act (Cap. 14), and any other law that would require a Court, when exercising jurisdiction under this Decree, to promote reconciliation between the parties, the Court must, in making any decisions or order under this Decree, regard the safety and wellbeing of the victim to be of the utmost and paramount importance in weighing factors that need to be taken into account.

In *State v Valaibulu* [2017],²⁷² reconciliation was used as a mitigating factor and contributed to a suspended sentence for a police officer convicted of domestic violence. To summarise the violent incident: the perpetrator told his wife (the victim) to have lunch, and after she told him she would have lunch later, the perpetrator became angry. During a heated argument where the victim made a comment about giving up their children because of the perpetrator's infidelity, the perpetrator punched his wife, broke bottles on the porch, and damaged the interior of their home.

In the magistrate's court where the case was first heard, the perpetrator pleaded guilty but a conviction was not recorded and the perpetrator was released on the condition that he must not reoffend, and must attend counselling at his job with the police within 12 months. The rationale for non-conviction was predicated on both customary practice and gender stereotypes. First, the magistrate in issuing the sentence relied on the perpetrator's "effort at reconciliation". Second, part of what was animating the magistrate's decision was his belief that the wife was to blame. In making a determination that deviated from the tariff (9-12 month sentence), the magistrate added that he believed the perpetrator was "provoked" by the wife's behaviour, which "led to the offence" and praised the perpetrator for not blaming his wife. Even with the leniency granted by the magistrate, the perpetrator appealed the ruling.

During the appeal, the judge agreed in part with the magistrate that there was "a little provocation", however, also cited previous case law and the Domestic Violence Act of 2009 as justifying a custodial sentence. The Court recognised the standard sentence was between 9-12 months, but imposed a 6-month sentence because the "[r]espondent had entered a plea of guilty to the offence at the first available opportunity, he was a first offender, he had reconciled with the victim and he was relatively young".²⁷³ The judge went on to find that the mitigating factors justified suspending the sentence in full. By giving some weight to the provocation argument, the Court gave judicial force to a rationale steeped in toxic masculinity. Moreover, in recognising reconciliation as a mitigating factor, the Court failed to recognise the power imbalance that plagues most relationships where domestic violence is present.

Similarly, in *State v Pickering* [2017],²⁷⁴ reconciliation played a strong role in the lower court. The perpetrator in the case was charged with assault causing actual bodily harm and with damaging the victim's property. Here, the magistrate was insistent on promoting reconciliation between the perpetrator and victim and discharged the case without a conviction. By doing so in this matter, the magistrate abdicated his/her responsibility and ignored the Office of the Director of Public Prosecution (ODPP) who identified that the Criminal Procedure Act 2009²⁷⁵ did not allow for the promotion of reconciliation in domestic violence cases.

On appeal by the ODPP, the Appellate Court found that: "the discretion to promote reconciliation is unavailable in domestic violence cases. The rationale for the caveat is clear. The process of reconciliation has the potential to place the victims of domestic violence who are mostly women under considerable financial, social and emotional pressure to reconcile with their perpetrators despite the violence."²⁷⁶ The discharge order was set aside and the case was sent back to the magistrate's court for further action.

²⁷² *State v Valaibulu* [2017] FJHC 41.

²⁷³ *Ibid.*

²⁷⁴ *State v Pickering* [2017] FJHC 143.

²⁷⁵ Criminal Procedure Decree 2009, Part XII, s.154 (6) (Fiji):

https://sherloc.unodc.org/res/cld/document/fiji/2009/criminal_procedure_decree_2009.html/Fiji_Criminal_Procedure_Decree_2009.pdf.

²⁷⁶ *Op.cit.* at fn 274.

More recently, a clear trend in the case law has emerged moving away from relying on reconciliation as a mitigating factor or reason to give a non-custodial sentence. In *State v Kumar* [2019],²⁷⁷ the perpetrator and victim were at their place of residence when a former roommate called. The perpetrator accused the victim of having an affair and proceeded to slap and punch her and then used a stick and USB cable to injure her hands and face. In considering various mitigating circumstances, the Court highlighted the grave problem of domestic violence in Fiji and noted that:

“A reconciliation deal struck in unequal bargaining conditions will be seen by the courts with a degree of scepticism unless there is strong evidence of a solid basis for true and genuine reconciliation. The Complainant said that she is worried that she is in a helpless and dependent situation without your support. A situation such as this is liable to be exploited by the strong against the weak. Therefore, having accepted your remorse in mitigation as being genuine, I am not inclined to give full credit to the so called reconciliation.”²⁷⁸

The Court, taking other factors into consideration, sentenced the perpetrator to 12-months imprisonment, with a six month suspended sentence because of the prospect for rehabilitation.

Taking an even stronger position on reconciliation, in *State v Tagi* [2019],²⁷⁹ the judge explicitly stated: “reconciliation has no role to play in domestic violence offences in the court and it has little value as a mitigating factor.” Furthermore, reliance on reconciliation to mitigate or suspend sentences has not been taken into account in the vast majority of 2018 and 2019 domestic violence cases despite being raised by the defence.²⁸⁰

Sole breadwinner

The sole breadwinner argument in GBV cases is an example of a common gender stereotype used to justify mitigating and/or suspending sentences. Although some judges have recognised the harmful attitudes behind the sole breadwinner argument, many continue to use it to mitigate sentences in both sexual and domestic violence cases.

Sole breadwinner argument

The notion that the perpetrator’s sentence warrants reduction on the grounds of his family’s economic dependence upon him as the sole or main source of income for the family, and without which, the family may become destitute.

The sole breadwinner argument is a particularly powerful mitigating factor in Fijian case law. It is often paired with the perpetrator’s status as a father, husband, or head of household which posit traditional and stereotypical assumptions that marital, parental, or income-providing status is indicative of moral character. It presents a moral conundrum because the economic damage of depriving the perpetrator’s family of its main source of income is weighed against the perpetrator’s violence towards women in his own family or the wider community. The preliminary TrackGBV analysis conducted for Fiji shows that sole breadwinner argument was raised in 19.7% of GBV sentencing decisions from 2015 to 2018.

In *Narayan v State* [2018],²⁸¹ though the Court of Appeals set aside the High Court’s sentence, in establishing its own sentence, it accepted the lower court’s justification for mitigation based on the sole breadwinner argument for the crimes of rape and sexual assault: “[y]ou are 41 years old; you are the sole breadwinner of your family; and you support your parents who are having medical conditions.”²⁸² The lower court reduced the sentence by 4 years, which was affirmed by the Court of Appeals.²⁸³ The final sentence was 14 years.

Even in cases where the perpetrator directly harmed a family member, his status as the sole breadwinner is privileged by reducing his sentence through mitigation.²⁸⁴ However, in other recent cases, the defence has raised the perpetrator’s status as a sole breadwinner, but the judge has not considered it to be a mitigating factor.²⁸⁵ In *Rokolaba v State* [2018],²⁸⁶ the perpetrator was convicted of three counts of rape against his 16-year-old niece. In response to the defence’s call for mitigation for sole breadwinner status, Chief Justice Gates responded:

“In these serious cases of sexual offending very little mitigation can be derived from being “married with children” and “sole breadwinner”. For a crime as serious as this, imprisonment must necessarily be imposed for a substantial period. Families invariably suffer greatly when the supporting member is to be imprisoned. In the absence of strong social security support, vulnerable relatives of the Accused, elderly or sickly parents, children at school, and overworked wives and mothers have to endure harsh misfortune as a result of the Accused person’s serious offending.”²⁸⁷

²⁷⁷ *State v Kumar - Sentence* [2019] FJHC 544.

²⁷⁸ *Ibid.*

²⁷⁹ *State v Tagi - Sentence* [2019] FJMC 71.

²⁸⁰ *State v Sakiusa - Sentence* [2018] FJHC 1243; *State v Tuimoola - Sentence* [2018] FJHC 1242; *Khan v State* [2017] FJHC 746; *State v Rabuli - Sentence* [2019] FJMC 72; *State v Kumar - Sentence* [2019] FJHC 544; *State v Sade - Sentence* [2018] FJMC 82.

²⁸¹ *Narayan v State* [2018] FJCA 200.

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *State v Kubukawa - Sentence* [2018] FJHC 1151; *State v Eranavula - Sentence* [2018] FJMC 131; *State v Naiviti - Sentence* [2019] FJMC 8; *State v Khan - Sentence* [2018] FJHC 1136.

²⁸⁵ *State v Taloga - Sentence* [2019] FJMC 79; *State v Kale - Sentence* [2019] FJHC 253; *State v Gaqaturaga - Sentence* [2018] FJHC 1208; *State v Mawi - Sentence* [2019] FJHC 324.

²⁸⁶ *Rokolaba v State* [2018] FJSC 12.

²⁸⁷ *Ibid.*

Notwithstanding, the prevalence of the sole breadwinner argument demonstrates the need for broader solutions from both the state and civil society to increase women's economic empowerment, and to provide support to survivors of GBV. A woman's bodily integrity is a fundamental right which is absolute and cannot be outweighed by consideration of the perpetrator's economic advantage. Further, a woman's relative economic disadvantage can reduce her ability to report or seek help for GBV. The court should not privilege a family's economic dependence on one individual over a vulnerable person's safety, given the likelihood that the perpetrator will commit further abuse.



VANUATU

In Vanuatu, the Constitution recognises customary law as a source of law and makes it clear that custom will determine the basis for the ownership and use of land. Apart from land use, however, the Constitution does not indicate to what matters or what persons customary law is to apply. While customary laws are expressly recognised by the Constitution and the *Malvatumarui* (Chiefs - customary leaders) may be consulted by the Parliament in connection with legislation relating to land ownership, the *Malvatumarui* has no official powers in the modern legal system.²⁸⁸

The customary legal system (the *kastom* system) plays a primary role in every village in Vanuatu. Chiefs mediate a dispute by holding a public meeting with the parties to the dispute. The chief then decides which of the parties are responsible for making amends, usually by the party at fault making a *kastom* payment to the other party.²⁸⁹ The core principles of *kastom* are restoring relationships, taking a holistic approach to conflict, and engaging the participation of the community into each dispute with the goal of restoring balance to the greater community. There are no formal rules of procedure or statutory rules that determine who is at fault or how reconciliation should be achieved. In practice, customary law does not treat women equally.²⁹⁰ While the Constitution and Vanuatu's National Agenda support equal protection for women's rights, lack of consistency and uniformity between the modern and customary legal systems prevents Vanuatu from achieving its gender equality goals and hinders the government's ability to effectively address GBV in Vanuatu.²⁹¹

Case Law Analysis

Kastom

In GBV cases, *kastom* is commonly practiced through some form of reconciliation. It is explicitly promoted in the Penal Code Amendment Act No. 25 of 2006²⁹² and Family Protection Act of 2008, which govern domestic violence cases.²⁹³ Legislation also allows for the court to take customary compensation into account in sentencing.²⁹⁴

Penal Code (Amendment) Act No. 25 of 2006, Part IA, s.38

PROMOTION OF RECONCILIATION

38. Notwithstanding the provisions in this Act or any other Act, a court may in criminal proceedings, promote reconciliation and encourage and facilitate the settlement according to custom or otherwise, for an offence, on terms of payment of compensation or other terms approved by the court.

39. Nothing in this section limits the court's power to impose a penalty it deems appropriate for the relevant offence.

Family Protection Act No. 28 of 2008, Part 2, s.10

10. Domestic Violence Offence

(5) If a person is convicted of an offence against this section, a court may, in determining the penalty to be imposed on the person, take into account any compensation or reparation made or due by the person under custom.

(6) If under custom such compensation or reparation has not been determined and a court is satisfied that a determination is likely to be made without undue delay, the court may postpone sentencing pending the determination.

In *Public Prosecutor v Garae* [2017],²⁹⁵ the perpetrator raped his adopted relative with "some force" while under the influence of kava and alcohol in 2012. The victim has a mental disability and unconfirmed physical disabilities. The perpetrator made threats and told the victim not to tell anyone. During sentencing, the perpetrator was given a starting point of 5 years which was increased to 7 years because of the existence of aggravating factors, including the use of force and breach of trust (the victim and perpetrator lived in the

288 Amnesty International, *Vanuatu: Amnesty International Submission To The UN Universal Periodic Review: Fifth Session Of The UPR Working Group Of The Human Rights Council*, May 2009, p.5: <https://www.amnesty.org/download/Documents/52000/asa440012008en.pdf>.

289 Dinnen, S., *Traditional Justice Systems in the Pacific, Indonesia, and Timor Leste*, UNICEF Papua New Guinea, 2009, pp.13-14: https://www.unicef.org/tdad/index_56512.html.

290 *Op.cit.* at fn 288, p.4.

291 *Ibid.*, p.5.

292 Penal Code (Amendment) Act No. 25 of 2006, Part 1A, s.38 and 39 (Vanuatu): https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=88515&p_classification=01_04.

293 Family Protection Act No. 28 2008, Part 2, s.10 (5), 10 (6) (Vanuatu): <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/88503/101220/F1853954544/VUT88503.pdf>.

294 Penal Code (Amendment) Act No. 25 of 2006, Part 1A, s.40 (Vanuatu): https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=88515&p_classification=01_04.

295 *Public Prosecutor v Garae* [2017] VUSC 30.

same house). The judge gave weight to the perpetrator's leadership roles in the community stating that, "[w]hilst it could be said his position in the community makes his offending even worse, on balance he should be given some credit for his previous good character".

In addition to his good character, the judge described that, in mitigation, "[t]here is evidence that the perpetrator was remorseful to a degree (in his interview with the police he seems to blame the victim) but he did initiate a custom reconciliation ceremony with his wife and the victim. He will be given credit for these matters and his sentence will be reduced by 18 months."²⁹⁶ Victims and their families can be under pressure from different actors in their communities to participate in and accept a reconciliation ceremony. Genuine consent and acceptance of reconciliation ceremonies is difficult to ensure or even identify. This is especially true for children and persons with disabilities. As such, the Vanuatu Law Commission has specifically recommended that customary reconciliation is not taken into account by the courts in cases involving sexual offences against children under 12 years old or persons with a mental or physical disability.²⁹⁷

Customary reconciliation is used as a mitigating factor even in cases in which there are multiple counts of sexual violence.²⁹⁸ In another case, *Public Prosecutor v Keimit* [2017], the perpetrator had a previous conviction for rape and pled not guilty, yet "his involvement in a customary reconciliation ceremony" led to a 6-month reduction in his sentence.²⁹⁹ In *Public Prosecutor v Tevi* [2018], the judge recognised that the victim/survivor did not attend the reconciliation ceremony and that

the perpetrator showed no remorse, yet still used his involvement in the ceremony in mitigation.³⁰⁰ Further, judges have taken it into account when the perpetrator simply demonstrates a willingness to participate in a customary reconciliation ceremony.³⁰¹

Referring back to *Public Prosecutor v Garae* [2017],³⁰² the perpetrator was also given a further reduction of 18 months for the delay in prosecution and a reduction by a third of the total sentence for his guilty plea at the earliest opportunity, resulting in a sentence of 2 years and 8 months. The sentence reduction of 18-months for delay in prosecution raises an issue of gender stereotyping. Although the offence occurred in 2012 and a customary reconciliation ceremony was held then, the reasons for bringing the case in 2016 were unclear. The judge gave weight to this lack of an explanation and did not take into consideration that rape victims may not come forward immediately, or that this particular victim/survivor suffered from a mental disability.

This is an example of a rape myth which assumes that there is a correct and predictable way for victims/survivors to report. There are many reasons victims/survivors of rape do not report immediately, including guilt and shame as a response to trauma, lack of faith in the justice system, and a lack of safety, especially if the perpetrator remains in their lives.³⁰³ The result in this case is a lenient sentence for a serious, aggravated sexual offence. Another example of this rape myth can be found in *Public Prosecutor v Langa* [2018], where the perpetrator's sentence of 3 years and 8 months was fully suspended because of the victim's 8-year delay in reporting the offence.³⁰⁴

Figure 11: Rape Myths and Facts

Myth ³⁰⁵	Assumption	Implications/Consequences	Facts
If the victim did not complain immediately, it was not rape.	Assumes victims act in a certain predictable way when raped.	<ul style="list-style-type: none"> Sheds doubt on survivors' credibility and re-traumatises the victim. Invalidates and dismisses the experience of the victim. Discourages her from seeking help. 	<ul style="list-style-type: none"> The trauma of rape can cause feelings of shame and guilt which might inhibit a victim from making a complaint. The victim may not feel safe to report the rape straight away. The victim may not want their loved ones or community to know about the rape. Child victims may not understand that their ordeal is a reportable offence. The victim may not have faith in the justice system and so may not report the rape.

²⁹⁶ Ibid.

²⁹⁷ Vire, P., Aron, S., Clarke, B., and Robert, N., *Penal Code: Sexual Offences & Customary Reconciliation Legislative Review no. 5/14*, June 2014, p. 18: https://lawcommission.gov.vu/images/pdf/Sexual_Offences_Final_Report.pdf.

²⁹⁸ *Public Prosecutor v Keimit* [2017] VUSC 49; *Public Prosecutor v Sairus* [2018] VUSC 127; *Public Prosecutor v Simon* [2018] VUSC 191.

²⁹⁹ *Public Prosecutor v Keimit* [2017] VUSC 49.

³⁰⁰ *Public Prosecutor v Tevi* [2018] VUSC 132.

³⁰¹ *Public Prosecutor v Simon* [2018] VUSC 191.

³⁰² Op.cit. at fn 295.

³⁰³ *Sexual and Gender-Based Violence in the Pacific Islands: Handbook on Judicial Sentencing Practices*, ICAAD & Clifford Chance, 2018, p.92, <https://icaad.ngo/wp-content/uploads/2019/01/ICAAD-SGBV-Sentencing-Handbook-1.19.pdf>.

³⁰⁴ *Public Prosecutor v Langa* [2018] VUSC 258.

³⁰⁵ Op.cit. at fn 303.

First-time Offender

Another factor prevalent in Vanuatu is the misapplication of first-time offender status for perpetrators. This can be contentious due to the perpetrator's historic behaviour and how the court perceives and identifies past offences. For example, an individual may have exhibited a history of violent conduct, including prior domestic violence, which was not the subject of a criminal conviction. Without a prior conviction, a court might consider the perpetrator to be a first-time offender notwithstanding that prior violent conduct is evidenced by doctors' reports or witness evidence. Similarly, where the facts indicate that the perpetrator has committed serious criminal acts in the past of a different type (ie: not GBV in nature), the perpetrator may be classified as a first-time offender in a GBV matter.

The case of *Public Prosecutor v Taserei* [2018]³⁰⁶ demonstrates how this occurs in practice in a domestic violence case. The perpetrator and victim were in a *de facto* relationship with a child. In 2016, they became estranged, and the victim and her mother (also a complainant) filed a police report. On 14 December 2016, the perpetrator attempted to force them to withdraw the police report, loudly threatened to kill them, and threw stones at the mother's house breaking several windows. On 16 December 2016, the perpetrator entered the compound where the victim was staying and threw stones at the house in an attempt to get his *de facto* partner and child to return to him. On 21 December 2016, the perpetrator broke into the house where the victim was staying and assaulted her.

In sentencing, the judge included the throwing of stones as an aggravating factor and stated, "[t]his was repetitive, indiscriminate, and persistent offending by the defendant against weaker defenceless victims".³⁰⁷ For the offences of extortion, threats to kill, and unlawful entry of a dwelling, the judge adopted a starting sentence of 4 years. For the offences of criminal trespassing and malicious property damage, a sentence of 6 months imprisonment to be served concurrently was adopted. In mitigation, the judge recognised the perpetrator's clean record, the performance of a customary reconciliation ceremony, and the delay in finalising the case, resulting in a reduction of 1 year. All three of these mitigating factors are contentious. The perpetrator's pattern of offending does not amount to a clean record. In this case, the weight attributed to the delay in finalising the case is another example of gender stereotyping in relation to how and when the victim reported. The facts of the case established that the victim had filed a police report in 2016, which sparked the perpetrator's retaliatory behaviour. Yet, the judge determined:

"In assessing what is the appropriate sentence in this case I am mindful of the numerous charges against the defendant and the aggravating factors as well as the need for deterrence and the protection of women from domestic violence. But having said that, I cannot ignore the significant changes that have occurred since the commission of the offences almost two years ago, in the defendant and the complainant's personal relationship which is, perhaps, reflected in the absence of any repetition of offending by the defendant."³⁰⁸

Further, the sentence was reduced by a third for the perpetrator's early guilty pleas resulting in a sentence of 2 years. The judge then considered suspension of the sentence:

"I turn finally to consider the question of suspension and whilst the need for punishment and general deterrence are important considerations in sentencing of violent offenders in a domestic situation, I am satisfied given the fact that both the defendant and the complainant are now happily engaged to different partners, that there is little likelihood of repetition of the offences. In my view, the existing status quo should not be disturbed as the parties move on with their separate lives. Additionally, the entry of convictions against the defendant is a real punishment in itself."³⁰⁹

The perpetrator's 2-year sentence was fully suspended. He was sentenced to 12 months of supervision during which he was not to consume alcohol and had to participate in anger management and counselling. He was also sentenced to 100 hours of community work. Despite the established pattern of offending with five offences committed on three different dates, the perpetrator was given credit for his clean record.

Whilst first-time offender status has often been used inappropriately,³¹⁰ an appellate case from 2019 demonstrates how a judge considered a pattern of offending, even with no previous convictions, in rejecting first-time offender status. In *Buletare v Public Prosecutor* [2019],³¹¹ the perpetrator sought to appeal his conviction and sentence for two charges of indecent acts without consent. One of the grounds for appeal was the refusal of the judge to suspend his sentence despite the personal circumstances presented by the defence that:

- a. The appellant was a first-time offender;
- b. The appellant had a good reputation in the community;
- c. He had already suffered a loss of employment;
- d. He had a large dependent family to support including children, grandchildren, a wife and elderly parents. He was the only breadwinner.³¹²

³⁰⁶ *Public Prosecutor v Taserei* [2018] VUSC 167.

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ *Public Prosecutor v Simon* [2018] VUSC 191; *Public Prosecutor v Tevi* [2018] VUSC 132; *Public Prosecutor v Langa* [2018] VUSC 258; *Public Prosecutor v Charley* [2019] VUSC 31.

³¹¹ *Buletare v Public Prosecutor* [2019] VUCA 38.

³¹² *Ibid.*

Tonga

These personal circumstances were not taken into account for mitigation during the initial sentencing.³¹³ The judge in the initial sentencing also refused to suspend the perpetrator's sentence because he appeared unremorseful and had not participated in a customary reconciliation ceremony.³¹⁴ The Appellate judge agreed that all of these circumstances should not be considered and also agreed with the initial custodial sentence due to evidence of serious and repeat offending.³¹⁵ In this case, the perpetrator was given no credit for first-time offender status.



TONGA

Core Tongan cultural values include: *faka'apa'apa* (respect), *feveitokai'aki* (reciprocity), *'ofa* (love) and *loto fakatokilalo* (humility).³¹⁶ At least 95% of Tonga's population identifies as Christian, with the largest congregation being the Free Wesleyan/Methodist Church of Tonga, followed by Catholics, Latter Day Saints, Seventh Day Adventists and others. The Church plays a fundamental role in socialisation and culture in Tonga.

Tongans deeply value their family and community.³¹⁷ Within an extended family, it is believed the eldest son and eldest daughter should share a unique partnership in leading the extended family. It is said that women should be highly regarded within a family and society, under the *fahu* system, where women are valued as sisters.³¹⁸ However, the authority figure for each family remains the eldest father figure and many customary beliefs continue to view women as subservient to men.

Some Tongans believe that a husband is allowed to engage in extra-marital affairs and commit violence against his wife because men have authority in a family, and supposedly own their wives.³¹⁹ In relation to domestic violence, in Tonga 56% of women surveyed by *Ma'a Fafine mo e Famili* believed that a man was justified in beating up his wife if she was unfaithful and 39% of women surveyed believed they could not refuse sex with their husband if they did not want to have sex.³²⁰

Some social networks in Tonga reinforce the stigma surrounding victims of domestic violence, resulting in victim-blaming and acceptance by the victim of their

situation. A large portion of women who have been sexually or physically abused by their husbands or partners have never communicated this experience to anyone before.³²¹ As domestic violence is viewed as a private matter, village justice systems *Fono* have rarely been used to seek redress. Generally, it is left to the family, sometimes assisted by the church, to resolve these issues.³²² Conflicts and disputes, including domestic violence, are often subject to traditional reconciliation practices that stay within or between families.³²³

In 2011, around 20% of police officers believed that reconciliation between spouses obviates the need to go to court, and many police officers agreed that hitting one's wife once was insufficient to warrant going to court.³²⁴ The same review, however, indicated that attitudes had changed significantly with police more likely to prosecute perpetrators, including high ranking officials.

When GBV cases are reported and brought to court, reconciliation and other customary practices are often referenced to reduce or suspend sentences. Although the Tongan Constitution is the only constitution in the Pacific Island Region that does not expressly provide for the application of customary law, Tongan courts regularly apply customary laws, such as reconciliation and payment of compensation, when considering criminal cases (see further below).

Some progress has been made in recent years. In 2013, Tonga introduced the Family Protection Act which applies to acts of domestic violence. Section 28 of the Act notes that it is not a defence to a domestic violence offence that the respondent has paid compensation or reparation to the victim or to the victim's family.³²⁵ The legislation covers domestic abuse amounting to sexual, physical and mental abuse, however, for a perpetrator's first offence, there is a maximum sentence of 12 months. In Tonga, while there are examples of progress, there remain also persistent challenges in GBV sentencing.

Family Protection Act No. 19 of 2013, Part 6, s.28 (3)

Section 28. Domestic violence offence and breach of protection order

(3) It is not a defence to a domestic violence offence that the respondent has paid compensation or reparation to the complainant or to the complainant's family.

³¹³ *Public Prosecutor v Buletare* [2019] VJSC 21.

³¹⁴ *Ibid.*

³¹⁵ *Op.cit.* at fn 311.

³¹⁶ Jansen, H., Johansson-Fua, S., Hafoka-Blake, B., and 'Ilolahia, G. R., *National Study on Domestic Violence against Women in Tonga: Nofu 'A Kainga*, 2009, p.xv:

<https://pacific.unfpa.org/sites/default/files/pub-pdf/tonga-vaw-report-final2012.pdf>.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *Ibid.*, p.216.

³²¹ *Ibid.*, p.94.

³²² Roguski, M. and Kingi, V., *Pacific Prevention of Domestic Violence Programme: Update of Baseline In-Country Review, Tonga Report*, Victoria University of Wellington, 2011, p.28.

³²³ *Ibid.*, p.7.

³²⁴ *Ibid.*, p.24.

³²⁵ Family Protection Act, 2013, Part 6, s.28 (3) [Tonga]: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/98651/117466/F750788472/TON98651.pdf>.

Case Law Analysis

Reconciliation

Case law in Tonga indicates that Tongan courts have valued reconciliation processes, the dependency of families on male figureheads, and the disobedience of women as valid cultural reasons for dismissal of cases or sentencing reductions. While the applicable legislation disallows the use of customs of forgiveness and reconciliation as a defence, particularly in domestic violence cases, they are encouraged in practice by “[p]olice and community members”.³²⁶

In *Rex v Naufahu* [2016],³²⁷ reconciliation was used as a mitigating factor in combination with other contentious factors. The victim was on her laptop while she waited for her children’s breakfast and lunch to finish cooking. The perpetrator, her husband of 30 years, entered the kitchen and started to boil a pot of water on the stove. The victim had gone to the bathroom, and as she was leaving the bathroom, the perpetrator threw the boiling water on her upper body. The perpetrator walked away, and a relative took the victim to the hospital. She had burns on 30-45% of her body, permanent scars to her hand and eye, and was in intensive care with mechanical ventilation for five days.

The judge accepted that it was deliberate and premeditated, but also stated:

“It seems plain that this marriage was unhappy and at times violent. Alcohol seems to have played a part and no doubt any marital affairs that the complainant became involved with contributed also to this discord. Mr Tu’utafaiva [defence counsel] stated that the prisoner [perpetrator] had arisen to find an email to a male friend of the complainant which he asserted was the trigger for the events of that morning.”³²⁸

Provocation was not explicitly referred to as a mitigating factor, but it is clear that the judge believed the victim provoked the violence through her extramarital affairs. Yet, he also stated with regard to sentencing that, “I do not think, and Mr Tu’utafaiva did not press this, that any marital infidelity or suggestion of this on the part of the complainant, reduces the objective seriousness of the offending, and I do not take this into account in reducing the starting point.”³²⁹

The judge gave a starting point of 8 years for causing grievous bodily harm and considered several contentious factors in mitigation. The judge considered the perpetrator a first-time offender despite stating that he had no doubt been involved in “occasions of domestic

violence over the years”.³³⁰ The judge also detailed the perpetrator’s roles in the community including his service in the armed forces and involvement in the Church. In terms of reconciliation, the judge considered the following: “He has, it is said, in the probation report made an apology which has been accepted, although I rather doubt, having read the victim impact report, that this is really so. His wife seems to be very scared of him and has sought protection.” The apology, regardless of whether or not it was accepted, was still a part of the judge’s mitigating factors.³³¹ For all of these factors, the judge allowed 2 years and 6 months in mitigation.

Due to his age, early plea, and first-time offender status, the judge partially suspended the perpetrator’s sentence reducing it further by 18 months. He was also sentenced to a 10-month sentence for domestic violence to be served concurrently with his total sentence of 4 years. In 2018, the perpetrator appealed this sentence in *Naufahu v R* [2018]³³² on the grounds of provocation by adultery, personal circumstances, and discount of guilty plea. Chief Justice Paulsen rejected all three of these grounds and responded to the perpetrator’s claim of an excessive sentence by describing the significance of the mitigating factors: “The discount represented over 30% of the starting point and was in my view extremely generous in the circumstances, particularly given the attempts by the appellant to portray his actions as accidental and when combined with the suspension of the last 18 months of the sentence.”³³³

In *Rex v Naufahu* [2016], undue weight was given to contentious factors including an apology that the judge was not convinced the victim had accepted. Apologies and compensation have been taken into account in several recent cases,³³⁴ and in some cases,³³⁵ they are taken to be synonymous with remorse despite the fact that the motivation for reconciliation is often to encourage victims to withdraw their complaints.

The judge explicitly acknowledged this motivation in *R v Tu’ifua* [2018]. In the instant case, the perpetrator raped the victim while she was unconscious. Both the perpetrator and victim lived in the same village, and the perpetrator claimed he had made a formal apology which was accepted. The victim had a different version of events:

“She says that she and her family have been shamed and hurt by what happened. She said that the offender’s family have sought to have the charges withdrawn and apologised and offered money but she refused to withdraw the charge or accept any money so that the truth could be told. The victim also reports that the offender’s mother has become aggressive and demanding that the charge be withdrawn even though she has refused to do this. She said there have been rumours that she was lying about the whole ordeal

³²⁶ *Op.cit.* at fn 316, p.11.

³²⁷ *Rex v Naufahu* [2016] TOSC 18.

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ *Ibid.*, para. 6.

³³² *Naufahu v R* [2018] TOCA 16.

³³³ *Ibid.*

³³⁴ *Rex v Sa* [2016] TOSC 25.

³³⁵ *R v Manu* [2019] TOSC 11; *R v Valele* [2019] TOSC 6.

which has been upsetting but that the verdict of the Court has relieved her of a huge burden as the village has come to realize she was telling the truth. This has given her and the family some peace. She now feels she can move on with her life.”³³⁶

These details revealed the true nature of the apology, which led the judge to state: “I do not give the accused any credit either for the apology and offer of money made by the offender’s parents which was rejected and not made in the spirit of penitence but in the hope that the charge would be withdrawn.”³³⁷ In another rape case where the apology was motivated by seeking withdrawal of the case, “[t]he pastor apologised for the accused’s stupidity and the father [of the victim] said not to worry they would withdraw the complaint.” Fortunately, the officer on the case said it was in the state’s interests to pursue such cases and refused to withdraw the complaint.³³⁸

Other contentious factors privileging the perpetrator

There are other factors often used in sentencing that operate in favour of the perpetrator, but which are not strictly customary practices or gender stereotypes. These factors are used inconsistently and, in some cases, given undue weight. In Tonga, such factors include the perpetrator’s involvement in church or the community, employment or career prospects, and level of intoxication at the time of the offending. More recently, there are examples of judges challenging the application or relevance of these contentious factors. This is critical because consistent sentencing builds faith in the justice system and ensures that the interests of perpetrators are not privileged over those of victims/survivors.

Other contentious factors

- ✎ Excessive consideration of the educational and career prospects of the individual
- ✎ That the perpetrator attended church regularly, or that he was to be baptised
- ✎ That the perpetrator did not infect the victim with an STD
- ✎ That the perpetrator did not inflict further injury on the victim, cause physical harm, or torture the victim
- ✎ That the perpetrator was drunk (although this argument is frequently rejected by the reviewing judicial officer)
- ✎ That the victim did not become pregnant
- ✎ Blaming the parents of the victim for not looking after their children and failing to prevent the crime

In *Rex v Holani* [2016],³³⁹ the perpetrator broke into the victim’s house, forced her onto the bed and raped her. She escaped to her neighbour’s house to call the police. The judge included the aggravating factor of the perpetrator breaking into the victim’s home and gave a starting sentence of 7 years. In discussing mitigation, the judge relied on the perpetrator’s good character, namely his engagement with the community, including sports and church. He also raised the point that the perpetrator’s family provided the victim’s mother money and a large pig, and his parents attributed the actions of the perpetrator to alcohol.

The judge reduced the sentence by 2 years and 3 months for an early guilty plea, previous good character, and the compensation paid by the perpetrator’s family to the victim’s mother. The final year of the sentence was suspended because of the perpetrator’s remorse, first-time offender status, and cooperation. He was also sentenced to 3 years for housebreaking to be served concurrently. The final sentence was 3 years and 9 months for rape.

In this case, the perpetrator’s role in the community, his parent’s attributing his offending to drunkenness, and customary payment were given undue weight in mitigation. These other contentious factors are applied inconsistently despite precedent clarifying the role they should not play in sentencing.

In a Court of Appeals case, *Rex v Vake* [2012], the judge stated: “The glowing testimonials are entitled to little weight and cannot justify the suspension of these sentences because regrettably offences involving sexual abuse within the family are all too frequently committed by people of otherwise good character.”³⁴⁰ In another case, *Rex v Fainga’anuku* [2018],³⁴¹ the judge explicitly rejected the application of these other factors being raised by the defence. The perpetrator (70-years old) enticed the victim (his 8-year-old cousin) with the promise of money to come behind a tree with him. The perpetrator took off his and her clothes and laid on top of her while covering her mouth. The perpetrator moved back and forth on top of her and touched her inappropriately while she cried and felt as though she could not breathe. The victim’s friend saw what was happening and called for help. The perpetrator left. The victim told her mother what had happened and a complaint was made to the police. The perpetrator was charged with attempted carnal knowledge of a child.

Defence counsel raised several factors in mitigation including the perpetrator’s service in the military and his role as an Assistant Pastor at his local church. Defence also submitted the sole breadwinner argument which was rejected by the judge. Further, defence raised,

336 *R v Tu’ifua* [2018] TOSC 73.

337 *Ibid.*

338 *Rex v Fainu* [2018] TOSC 15.

339 *Rex v Holani - Sentence* [2016] TOSC 8.

340 *Rex v Vake* [2012] TOCA 7.

341 *Rex v Fainga’anuku* [2018] TOSC 16.

"[w]hilst describing the accused's conduct as 'outrageous' and 'obviously serious' he submits that there was not a high level of violence and that S was not physically harmed." The judge rejected the defence's submissions in mitigation and refused to suspend the perpetrator's sentence.

Although there are positive cases³⁴² that push back against contentious factors, they predominantly occur at the Supreme Court level for Tonga. There continue to be inconsistent approaches to sentencing in the lower courts, and unfortunately, there are no magistrate-level decisions available for review because they are not on PaCII, nor are they being anonymised and made available by the courts. Consistent sentencing is necessary to ensure a fair, equitable, and effective judicial system, and to ensure that penalties are commensurate with the gravity of the crime. Legal precedent has been ignored or applied inconsistently, and clear and detailed guidelines as to what is an appropriate and inappropriate mitigating factor are required to ensure the factors detailed above are not given undue weight in court.



SAMOA

In Samoa, many women continue to be treated unequally in aspects of private and public life. Discriminatory treatment arises because of entrenched cultural, religious, and patriarchal traditions. In a report in 2011, UN Women noted that Samoan men are very much regarded as the head of households, superior to their wives, "irrespective of their education or economic status compared to their wives".³⁴³ A 2017 Family Safety Study found that, "90% of female respondents believe a good wife obeys her husband... [and] 79% of non-victims of abuse and 87% of victims believed a man should show her partner who is boss."³⁴⁴ Further, "97% of men believed women should obey" them.³⁴⁵

The 2011 UN Women report noted that, "[a]bout half of men consider that beating a partner is sometimes justified, with the most accepted reasons being: she

offended his family by being disrespectful (46%) and if their spouse has an affair (31%)."³⁴⁶ Correspondingly, the same report identified a concerning snapshot of the way in which Samoan women view themselves: "[a]bout 70% of women think that men sometimes have a good reason to beat their wives, including if she is unfaithful, does not do the the housework well or disobeys him."³⁴⁷

However, Samoan culture also reflects that women are often the decision-makers and controllers of household resources and deserve respect as individual members of the community.³⁴⁸ There are a number of important cultural norms that explain the way in which civil and criminal matters are dealt with by the judiciary, particularly those pertaining to criminal GBV cases. Here, our focus is on four key terms/practices: *'aiga* (extended family), *matai* (chiefs), *fono* (village councils) and *ifoga* (reconciliation), the latter two practices being the most relevant to the way in which perpetrators are prosecuted and sentenced under the criminal justice system.

The *'aiga* constitutes the means by which all Samoans relate to their ancestors, their *matai*, their land, and their descendants.³⁴⁹ As Professor Sinclair Dinnen explains:

"Traditional political organisation is founded upon the *matai* system. The *matai*, holders of chiefly titles, are the heads of the *'aiga* groups, which have rights in respect of both the title and the area of land associated with it. The basic unit of traditional Samoan politics is the village, to which the chiefly titles of the constituent family descent groups belong."³⁵⁰

In Samoa, individual rights are subordinate to the rights of the *'aiga* as a whole with the result that there may be conflicts between collective village rights and the rights of the individual. In addition, there may be conflicts between customary law as administered by the village and Samoan statutory law.³⁵¹

The *matai* meet regularly in *fono*, where every title has its rank. As a traditional arm of government, the village *fono* functions as the executive, legislative, and judiciary branches. According to Dinnen, around 250 village *fono* remain active in Samoa.³⁵² As he observes, "[f]or many Samoans, traditional justice practices through, for example, the *fono*, remain much more real

342 *Rex v Pale* [2016] TOSC 11.

343 UN Women, *Ending Violence Against Women and Girls: Evidence, Data and Knowledge in the Pacific Islands Countries*, July 2011, p.8:

<http://www2.unwomen.org/-/media/field%20office%20easia/docs/publications/2011/ending%20violence%20against%20women%20and%20girls.pdf?la=en>.

344 Samoa Office of the Ombudsman/ National Human Rights Institution, *National Public Inquiry into Family Violence in Samoa*, 2018, (Samoa Ombudsman Report 2018) p.22: <https://ombudsman.gov.ws/wp-content/uploads/2018/09/National-Inquiry-Report-into-Family-Violence-State-of-Human-Rights-Report-2018-SUMMARY-English.pdf>.

345 *Ibid.*

346 SPC, *The Samoa Family Health and Safety Study*, 2006, pp.48-49, 64, available at: <https://pacific.unfpa.org/sites/default/files/pub-pdf/SamoaFamilyHealthandSafetyStudy.pdf>. As cited in UN Women, *Ending Violence Against Women and Girls: Evidence, Data and Knowledge in the Pacific Islands Countries*, July 2011, p.8:

<http://www2.unwomen.org/-/media/field%20office%20easia/docs/publications/2011/ending%20violence%20against%20women%20and%20girls.pdf?la=en>.

347 *Ibid.*

348 Martin, P., *Implementing women's and children's rights: The case of domestic violence in Samoa*, 27 *Alt. L. J.* 5, 2002, p.229.

349 Dinnen, S., *Traditional Justice Systems in the Pacific, Indonesia, and Timor Leste*, UNICEF Papua New Guinea, 2009, p.16, available at: https://www.unicef.org/tdad/index_56512.html.

350 *Ibid.*

351 Tuala-Warren, L., *A Study in Ifoga: Samoa's Answer to Dispute Healing*, University of Waikato (2002) p.26, <http://lianz.waikato.ac.nz/PAPERS/Occasional%20Papers/TMOP4.pdf>.

352 *Op.cit.* at fn 349, p.17.

and legitimate than do those of state justice.”³⁵³ In Samoan culture, *ifoga* is a custom for reconciling differences that is an essential part of traditional village life.

The use of *ifoga* (reconciliation) and *fono* (village councils) in GBVAW cases raises distinct issues regarding the equal treatment and equal protection of women victims of violence. Historically, *ifoga* was used to settle crimes between families and even villages and was generally determined by the *fono*. In current day Samoa, *ifoga* is applied by judges to mitigate sentences in criminal GBV cases that are prosecuted through the Samoan courts.³⁵⁴

Case Law Analysis

Ifoga

In Samoan culture, *ifoga* remains an essential part of traditional village life. A Pacific Community (SPC) report in July 2013 noted that, “some cases of VAW continue to be dealt with through customary law procedures and measures, such as the provision of compensation to the family or community of the survivor, and customary reconciliation practices.” Importantly, the report adds, “[c]ustomary law does not provide redress to the survivor and, in many instances, the use of customary law inhibits or precludes the survivor from seeking redress within the formal justice system. Sometimes, survivors are discouraged from seeking relief from the courts for fear of further violence and shame.”³⁵⁵

The Law Commission of New Zealand has emphasised that *ifoga* in Samoa involves families or communities as opposed to individuals.³⁵⁶ According to the University of Waikato, “it is a display of collective responsibility by an aiga or village that stems from culture. The Court system in Samoa that is largely premised on individual rights, takes note of this custom and pays it due regard...”³⁵⁷ Domestic violence is still considered a private matter, and traditional reconciliation, forgiveness practices, gifts, and ceremonies remain highly influential in resolving conflicts. As Pacific Community (SPC) has observed, “In small, close-knit island communities, reconciliation promotes harmony within the community and between families. Compensation is often paid to the family wronged, but rarely to a victim of domestic violence.”³⁵⁸

It is worth noting the Alternative Dispute Resolution Act 2007, s.15 (opposite) promotes reconciliation and conciliation. With the consent of the complainant, the court may promote reconciliation and encourage settlement in an amicable way in such cases which are: a. substantially of a personal or private nature; or b. not aggravated in degree.

Alternative Dispute Resolution Act 2007, Part 5, s.15

15. Promotion of reconciliation or conciliation –

- (1) In proceedings relating to an offence to which this Part applies, a court may, with the consent of the complainant, promote reconciliation or conciliation and encourage the settlement of the proceedings in an amicable way in such cases which are:
 - (a) substantially of a personal or private nature; and
 - (b) not aggravated in degree.
- (2) The reconciliation or conciliation of any proceedings under this section may be on terms of payment of compensation or on other terms approved by the court, which may involve:
 - (a) the giving of an apology in an appropriate manner; or
 - (b) the giving of a promise or undertaking not to re-offend, or to respect the rights and interests of any victim; or
 - (c) mandatory attendance at any counselling or other program aimed at rehabilitation; or
 - (d) a promise or undertaking to alter any habits or conduct, such as the consumption of alcohol or the use of drugs.

The case of *Police v Misipati* [2017] illustrates how *ifoga* is used in sentencing. The victim, 17 years old, was home alone when her relative, the perpetrator, came over with a plate of food. She did not open the door, and he left the food by the door and told her to open the door the next time he came over. He returned in the evening, and when the victim saw him outside, she went into her bedroom. She was still home alone and the only light in the house was coming from the TV. The perpetrator entered the house, undressed the victim, and sexually assaulted her. Her younger brother came to the door, and the perpetrator let go of the victim and left.

The victim has a severe mental disability which the perpetrator knew about. The perpetrator was charged with one count of indecent assault and one count of unlawful sexual connection. The judge set a starting point of 8 years considering the breach of trust and the vulnerability of the victim. The judge considered the mitigating factors of the perpetrator’s village punishment and *ifoga*. He had two previous convictions and was

353 *Op.cit.* at fn 349.

354 Alternative Dispute Resolution Act 2007, Part 5 (Samoa): http://www.pacii.org/ws/legis/consol_act/adra2007362/index.html#p5.

355 SPC & Pacific Regional Rights Resource Team, *Samoa: Legal Analysis on Violence Against Women*, July 2013, p.62, https://rrrt.spc.int/sites/default/files/resources/201901/Samoa_28329.pdf.

356 Law Commission of New Zealand, *Converging Currents: Custom and Human Rights in the Pacific*, Study Paper 17, September 2006, p.282: <https://ir.canterbury.ac.nz/handle/10092/3372>.

357 *Op.cit.* at fn 349, p.26.

358 *Op.cit.* at fn 356, p.22.

ineligible for first offender status or any sentence reduction for good character. The perpetrator was banished from his village of birth, for which the judge reduced his sentence by 6 months. The judge then described the reduction for the *ifoga*:

"A traditional apology ifoga has already been conducted. Although it is apparent from the victim's father [sic] victim impact report the defendant did not personally take part in this, I will nevertheless accord the formal custom the recognition it deserves and in acknowledgment of the actions of the family on your behalf. For that I deduct 6 months..."³⁵⁹

The judge's remarks recognise two important factors in considering the *ifoga*. Earlier in the case, he explicitly noted that the victim had a severe mental disability. For both young survivors and survivors with disabilities, it is difficult to ensure that the survivor participated and accepted the apology genuinely. This is particularly apparent considering how the interests of the family can supersede that of the victim/survivor. In this case, the perpetrator did not even participate in the *ifoga*, and his family offered the apology on his behalf. There are other recent examples of the family participating instead of either the perpetrator or victim/survivor in the *ifoga*.³⁶⁰

Village Fono Act 1990, ss.6-8

6. Punishments - Without limiting the power of Village Fono preserved by this Act to impose punishments for village misconduct, the powers of every Village Fono to impose punishment under the custom and usage of its village are deemed to include the following powers of punishments:
 - (a) the power to impose a fine in money, fine mats, animals or food; or partly in one or partly in others of those things;
 - (b) the power to order the offender to undertake any work on village land.
8. Courts to take account of penalty imposed by Village Fono - Where punishment has been imposed by a Village Fono in respect of village misconduct by any person and that person is convicted by a Court of a crime or offence in respect of the same matter the Court shall take into account in mitigation of sentence the punishment imposed by that Village Fono.

Village Fono

The Constitution of Samoa recognises custom as a source of law through *matais* and *fono*.³⁶¹ The Samoan Government decided in 1990 to provide statutory support for the traditional authority of the village *fono*, through the Village Fono Act 1990. For the very first-time in Samoa's history, the concept of *fono* was incorporated into the formal structure of local government and the administration of justice.³⁶²

Under s.8 of the Village Fono Act, Samoan courts are now required to take into account in mitigating a sentence (or in the case of a civil dispute, the award/order), the punishment imposed by a village *fono* in respect to village misconduct by any person. This has a particular relevance to criminal cases where sentences are reduced (often significantly) where this process has occurred. However, as Dinnen explains, "a determination of guilt or innocence by a *fono* does not bar action by a state court in respect of the same behaviour. Similarly, the formal acceptance of the customary ritualised public apology – *ifoga* – does not preclude a civil action for damages under common law."

Locally prescribed village rules enable the *fono* to deal with disputes and other actions that threaten village harmony. According to Samoan Supreme Court Judge Tuala-Warren, "The authority of the village *fono* takes the form of decision-making on all civil disputes and offences within their respective villages. *Fono* enforce minor sanctions on a range of offences. Punishment by the village *fono* range from fines in terms of foodstuffs to absolute banishment of the offender from the village."³⁶³ But critics have observed, "the *fono* often do not punish the offenders, they fail to prevent continuing abuse (hence, allowing it to become more severe) or may choose to counsel the victim, rather than the perpetrator. They often prevent victims from reporting matters to the police. Further, *fono* is not required to make written records of its proceedings."³⁶⁴

In *Police v Masina* [2017],³⁶⁵ the perpetrator was given a reduced sentence for village punishments already imposed. The perpetrator, the victim's social studies teacher, asked her to stay after school. On five separate occasions over the course of three months he raped her. The judge considered the aggravating factors of premeditation, the perpetrator's position of power, and the impact on the victim and gave a starting point of 15 years.

³⁵⁹ *Police v Misipati* [2017] WSSC 102.

³⁶⁰ *Police v Crichton* [2019] WSSC 33; *Police v Uliiao* [2017] WSSC 129; *Police v Sione* [2018] WSSC 89; *Police v Laki* [2018] WSSC 65.

³⁶¹ In the Constitution of Samoa, the definition of "law" includes "any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction." Article 3 of the Constitution provides that "the State" includes "all local and other authorities established under any law" and article 111(1) provides that "the Law" includes "any custom or usage that has acquired the force of law...under the provisions of any Act or under a judgment of a court of competent jurisdiction". As a part of the State, *fono* are also bound by CEDAW and CRC. Further, *Selo v The Attorney-General SC*, 12 July 2000, established that, "the *fono* cannot act (or fail to act) contrary to the fundamental rights set down in the Constitution." See Martin, P., *Implementing women's and children's rights: The case of domestic violence in Samoa*, 27 Alt. L. J. 5, 2002, p.227.

³⁶² *Op.cit.* at fn 349, p.17.

³⁶³ *Op.cit.* at fn 349, p.10.

³⁶⁴ Martin, P., *Implementing women's and children's rights: The case of domestic violence in Samoa*, 27 Alt. L. J. 5, (2002), p.230.

³⁶⁵ *Police v Masina* [2017] WSSC 143.

The judge accepted the mitigating factors of the perpetrator's previous good character (1-year reduction), the fact that he is married with children (6-month reduction), and the village penalty already imposed (6-month reduction). He stated, "Such village penalty is (in my view) to sanction such behaviour in the villages or for those living in the villages from committing such offences. Village penalties (in my view) in a way are a measure of deterrence."³⁶⁶ It was unclear in the sentencing decision what sort of penalty was imposed by the village council. The final sentence was 13 years with a concurrent sentence of 6 years for the additional charge of indecent assault.

There are several examples of judges reducing sentences for village penalties,³⁶⁷ in some cases by 2 years.³⁶⁸ The 2018 National Inquiry into Family Violence in Samoa reported that in GBV cases, *fono* most commonly impose fines on the perpetrator and his family. *Fono* also facilitate what incidents are reported to the police. According to the report, "In villages which prohibit direct reporting of matters to the police the situation is therefore not uncommon where a victim of family violence would have to seek approval from the very person who carried out the violent act to be able to approach the law enforcement authorities."³⁶⁹ The report also found several opportunities for the *fono* to be used to genuinely protect women, for example, by helping to enforce protection orders, which they are well-positioned to do.³⁷⁰

Alcohol/Drugs and GBV

In sentencing, alcohol can be misattributed as the root cause of GBV when, in fact, it exacerbates rather than causes violence. The danger of describing it as a root cause is that defence attorneys and judicial officers use that reasoning to argue for leniency. The 2018 National Inquiry found that in all GBV cases from 2007 to 2014, alcohol or drugs were present in 24% of cases.³⁷¹ Alcohol can contribute to violent offending, but most offending happens when alcohol is not involved. Further, there are many who consume alcohol and do not commit violence.

In 2016, the Alcohol and Drugs Court (ADC) was established to help perpetrators of various criminal offences prioritise overcoming their addictions. They encourage the use of rehabilitation programmes as a means to prevent reoffending and reduce substance abuse. Some GBV cases with offences likely to result in a sentence of less than 3 years end up in the ADC.³⁷²

Here, we explore the role of the ADC and the potential problems of linking alcohol/drugs with GBV cases.

In *Police v Alapati* [2016], the perpetrator's completion of an ADC rehabilitation programme contributed to a fully suspended sentence. The perpetrator had heard rumours about his wife (the victim) having an affair, and he arrived home intoxicated. He confronted the victim, punched, and strangled her. He then forced himself on her, raped her, and said "this is to pay for what you have done to me".³⁷³ He was charged with one count of causing actual bodily harm with intent and one count of unlawful sexual connection. The judge considered the physical harm to the victim but also identified the rumours of the affair as provocation that was a "weighty mitigating feature in relation to the offending".³⁷⁴ The judge also considered the perpetrator's previous good character, sole breadwinner status, early guilty plea, resolution with the victim, and the victim's request for leniency.

In considering the role of alcohol and the ADC, the judge stated:

"This is a domestic offence. It arose because the accused had heard rumours that the victim was having an affair with another man. The fact that the accused was under the influence of alcohol was not conducive to a peaceful solution of this matter. Anyhow, this matter has been settled and the relationship between the accused and the victim is normal again. The accused has also successfully undertaken the 6 weeks rehabilitative education programme on alcohol consumption provided by the Alcohol and Drugs Court."³⁷⁵

The perpetrator received a fully suspended sentence. In this case, although alcohol is described as a contributing factor, the alcohol rehabilitation programme was presented as the primary remedy for the offending. This is inappropriate, especially because the ADC is not intended for rape cases. Further, it is implied that rumour of the wife's affair was sufficient provocation for the offending when alcohol was involved. Although certainly alcohol and drug rehabilitation programmes are important for reducing addictions and dependency, it cannot come at the cost of justice for victims/survivors. Assigning redress based mainly on substance abuse in GBV cases evades the role of gender hierarchies and toxic masculinity in causing GBV.

³⁶⁶ *Ibid.*

³⁶⁷ *Police v Peni* [2018] WSSC 37; *Police v Faasavalu* [2018] WSSC 34; *Police v Lualua* [2018] WSSC 91.

³⁶⁸ *Police v Lualua* [2018] WSSC 91; *Police v Peni* [2018] WSSC 37.

³⁶⁹ Samoa Office of the Ombudsman National Human Rights Institution, *National Public Inquiry into Family Violence in Samoa, 2018, Inquiry Finding 34*, p.29:

<https://ombudsman.gov.ws/wp-content/uploads/2018/09/NationalInquiry-Report-into-Family-Violence--State-of-Human-Rights-Report-2018-SUMMARY-English.pdf>.

³⁷⁰ *Ibid.*, p.43.

³⁷¹ *Ibid.*, p.30.

³⁷² *Police v Moses* [2017] WSSC 44.

³⁷³ *Police v Alapati* [2016] WSSC 15, at para.3.

³⁷⁴ *Ibid.*, para.9.

³⁷⁵ *Ibid.*

Samoa Crimes Act 2013, Part 7, ss.49-50

49. "Sexual violation" defined –

- (1) Sexual violation is:
 - (a) the act of a male who rapes a female; or
 - (b) the act of a person having unlawful sexual connection with another person.
- (2) A male rapes a female if he has sexual intercourse with that female without her consent freely and voluntarily given.
- (3) A person has unlawful sexual connection with another person if that person has sexual connection with the other person without the consent of that other person freely and voluntarily given.
- (4) A person may be convicted of sexual violation in respect of sexual connection with another person notwithstanding that those persons were married to each other at the time of that sexual connection.

50. "Sexual connection" defined –

Sexual connection means:

- (a) connection occasioned by the penetration of the genitalia or the anus of any person by—
 - (i) any part of the body of any other person; or
 - (ii) any object held or manipulated by any other person; or
- (b) connection between the mouth or tongue or any part of the body of any person and any part of the genitalia or anus of any other person; or
- (c) the continuation of sexual connection, as described in either paragraph (a) or (b).

Other cases highlight the nuances of how the alcohol caused the violence argument influences sentencing. Although s.7(3) of the Sentencing Act 2016 bans the use of alcohol as a mitigating factor in sentencing, in some cases, it is used as a part of the discussion of factors.³⁷⁶ For example, in *Police v Alualu* [2018], the perpetrator entered the victim's house after a night of drinking and attempted to rape her before her family woke up. The judge noted that the use of alcohol is not a mitigating factor but also added:

"This offending was opportunistic at the outset by an intoxicated man. However, once he entered the house of the victim, his intention to commit sexual violation or in other words rape, became apparent by his actions. Too often alcohol has been the cause of sexual offending. Fortunately for this victim, she woke and her father was alerted before anything more sinister occurred. Alcohol is no excuse for this type of blatant home invasion as well as intended sexual offending. The accused got to a point of intoxication whereby he went into the victim's house and into her room, undressed himself, physically restrained the victim, and tried to remove her top. He had no regard for her or for her family." (emphasis added)³⁷⁷

The judge fails to account for the fact that most men consume alcohol without breaking into homes or committing GBV. When GBV is described in this way, it obfuscates the realities of the real root causes of GBV: rigid gender roles, gender hierarchies, and toxic masculinity.



SOLOMON ISLANDS

In the Solomon Islands, patriarchal customs embedded into cultural life, which treat women as socially inferior, justify and propagate discrimination and violence against women.³⁷⁸ Common cultural practices in the Solomon Islands, such as the paying of bride prices and the taboo of women discussing sexual acts, prevents victims from coming forward and fosters justification for violence against women. Furthermore, reconciliation to "solve" disputes also restricts victims/survivors' access to justice and is regularly considered by judges as a mitigating factor in sentencing.

The Constitution of Solomon Islands guarantees equal rights between the sexes and protection from discrimination.³⁷⁹ Regarding customary law, the Solomon Islands possesses a plural legal system – that is, one in which customary law and a formal justice system coexist.³⁸⁰ However, customary law is subordinate to the Constitution and legislation.³⁸¹

Women who are victims of sexual assault specifically face difficulties if they wish to report an incident or speak out. It is taboo in the Solomon Islands to speak about the sexual actions of a woman, even if these actions are against her will.³⁸² In fact, a victim who speaks of being sexually assaulted faces condemnation

376 *Police v Savea* [2017] WSSC 133; *Police v Olo* [2017] WSSC 10; *Police v Moses* [2017] WSSC 44.

377 *Police v Alualu* [2018] WSSC 70.

378 *Op.cit.* at fn 57, p.9.

379 Constitution of Solomon Islands, Chapter 2, Article 3, available at: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/68881/67455/F1106428999/SLB68881.pdf>.

380 CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Solomon Islands*, CEDAW/C/SLB/CO/1-3, 414, November 2014.

381 Constitution of Solomon Islands, Schedules 2 and 3; Care, J.C., *Customary law and women's rights in Solomon Islands*, University of the South Pacific, 2000, pp.20-22.

382 AUSAid, *Violence against women in Melanesia and East Timor: Building on global and regional promising approaches*, 2008, p.137:

https://dfat.gov.au/about-us/publications/Documents/vaw_cs_full_report.pdf.

and the possibility of being the target of more violence.³⁸³ Paradoxically, sexual assault is seen as shameful or reprehensible on the part of the victim, rather than of the perpetrator.³⁸⁴ Combined with the impropriety of speaking about their sexual assault, victims additionally do not report it for fear of bringing shame on themselves and on their family.³⁸⁵ One magistrate commented: “She will be embarrassed all the rest of her life. She may be subject to further assaults. She may be easy prey. It’s best to settle outside the courts so that people don’t have to talk about it.”³⁸⁶

In the Solomon Islands, the paying of a bride price is seen as tantamount to purchasing a property title, essentially giving the groom ownership of the bride.³⁸⁷ A bride price is a sum of money or amount of goods paid by the groom or his family to the bride’s family upon marriage. This is often construed by men as a licence to discipline their wives physically and treat them in any way they wish.³⁸⁸ Not only does the bride price give a husband this perceived unfettered right, but payment is also commonly understood – including by many women – to mean that a wife cannot leave her husband, resulting in enduring abuse and inability to avoid violence.³⁸⁹ In *Regina v Gora* [2016],³⁹⁰ the perpetrator threatened his sister’s husband with a knife because he had not paid her bride price. He demanded that his sister and her husband leave their house and left them homeless.

While bride price and taboo on sexual discourse are relevant factors in the proliferation of GBV in the Solomon Islands, reconciliation is especially pervasive in the legal system and process. In fact, it has been reported that for those women who do choose to report violence to authorities, reconciliation tends to be encouraged by police at the first stage, as opposed to prosecution.³⁹¹ Consequently, prosecution rates are low. The unavailability of police with capacity to deal with gender-sensitive complaints, as well as the lack of legal assistance for women, also causes many instances of GBV to remain unprosecuted.³⁹²

This section explores the contentious factors of reconciliation and victim-blaming in the context of recent case law.

Case Law Analysis

Reconciliation

Reconciliation plays an important role in settling disputes and instances of violence against women. Traditionally, and in some parts still, shell money *tafuliae* was given from the perpetrator’s family to the victim’s family as restitution and to promote future harmonious living.³⁹³ Nowadays, money is more commonly used, yet in both instances, owing to the patriarchal nature of the Solomon Islands society, the victim rarely receives anything. Rather, male family members are generally the recipients and parties to the process.³⁹⁴ Reconciliation serves as a means of fostering community justice and peace rather than formal punishment: implemented to mend relationships rather than punish perpetrators such that “both sides are satisfied and nobody is angry afterwards”.³⁹⁵

However, for victims/survivors, this so-called restitution is demeaning and inadequate as often victims are not active participants in the practice. Women have reported that they do not feel protected under the system since it is operated by men to uphold values and traditions that favour men.³⁹⁶ The CEDAW Committee’s concluding observations on the Solomon Islands noted a concern over the use of community dispute settlement, and especially that settlement proceeds were not directed to the victim. The Committee recommended active discouragement of the use of mediation and monitoring of customary reconciliation.³⁹⁷

383 *Ibid.*

384 *Op.cit.* at fn 57, pp.9-10.

385 Solomon Islands Law Reform Commission, *Review of the Penal Code and Criminal Procedure Code: Sexual Offences - Sentencing: Research Paper*, 2011, p.39, available at: <http://www.lawreform.gov.sb/publications/otherreports/consultationpapers/9-sexual-offences-sentencing-research-report/file.html>.

386 *Op.cit.* at fn 382.

387 Rasanathan, J. J. K. and Bhushan, A., *Gender-based violence in Solomon Islands: Translating research into action on the social determinants of health*, World Health Organisation, October 2011, p.1: https://www.who.int/sdhconference/resources/draft_background_paper4_solomon_islands.pdf.

388 *Op.cit.* at fn 382.

389 SPC, *Solomon Islands family health and safety study: A study on violence against women and children*, [2009] p.10: <https://pacific.unfpa.org/sites/default/files/pub-pdf/SolomonIslandsFamilyHealthandSafetyStudy.pdf>.

390 *Regina v Gora* [2016] SBMC 18.

391 UNICEF, *I feel I can never get infected: Understanding HIV and AIDS risk and vulnerability: Solomon Islands*, 2010, p.115: http://www.unicef.org/pacificislands/Solomon_Is_Part_2.pdf as cited in *op. cit.* at fn 57, p.9.

392 CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Solomon Islands*, CEDAW/C/SLB/CO/1-3, 8, [Nov. 14, 2014].

393 Goodenough, N., *Reconciliation and the criminal process in the Solomon Islands*, 10 J. of South Pacific Law 1, 2006: <https://www.usp.ac.fj/index.php?id=13317>.

394 *Ibid.*

395 Fifi, J. (Roger Keesing, Editor and Translator), *From pig theft to parliament: My life between two worlds*, (1989) p.148, as cited in Goodenough, N., *Reconciliation and the criminal process in the Solomon Islands*, 10 J. of South Pacific Law 1, 2006: <https://www.usp.ac.fj/index.php?id=13317>.

396 *Op. cit.* at fn 382.

397 *Op. cit.* at fn 392.

The Magistrates' Court Act provides that a magistrate may promote reconciliation for common assaults that are private in nature and may "order the proceedings to be stayed or terminated".³⁹⁸ This is reiterated in the Solomon Islands Magistrate Bench Book which also extends reconciliation as a factor to be considered in mitigation.³⁹⁹ The provision tends to be used in domestic violence cases, and can result in the ordering of reconciliation and the absence of a conviction being recorded.⁴⁰⁰

**Magistrates' Court Act 1996,
Part IV, s.35(1)**

35.—(1) In criminal cases a Magistrate's Court **may promote reconciliation** and encourage and facilitate the settlement in an amicable way of proceedings for common assault...

**Magistrate Bench Book 2004,
Part 9, s.5.3**

5.3 Mitigating factors include:

- ~ guilty plea;
- ~ remorse;
- ~ reparation;
- ~ **reconciliation**;
- ~ young offender;
- ~ first offender;
- ~ provocation; and
- ~ no harm or minimal harm to person or property.

**Family Protection Act 2014,
No. 15 of 2014, Part 6, s.58**

- 58.(1) A person commits an offence if the person commits domestic violence.
- (2) The penalty for an offence under subsection (1) is a fine of 30,000 penalty units or imprisonment for 3 years, or both.
- (3) It is not a defence to an offence under subsection (1) that the defendant paid an amount of money as customary compensation for committing the act of domestic violence.

Note: This legislation does not prevent the promotion of reconciliation in domestic violence cases or its use in mitigation.

While a similar legislative provision is not available to the High Court, it has affirmed the importance of the reconciliation process.⁴⁰¹ The High Court regularly takes into account whether reconciliation has occurred for the purposes of sentencing, viewing custom as an act of contrition and for that reason a mitigating factor.⁴⁰² However, it should be noted that the Court has recognised that it must be mindful not to view the compensatory actions of the accused as buying their way out of trouble. Disappointingly, the Court's method of ensuring it is not viewed in such a way is to direct that "payment should be paid to very close relatives and brothers and sisters, in particular those who directly are affected or humiliated by such a perverted act".⁴⁰³

In *Regina v Foster* [2017],⁴⁰⁴ reconciliation was considered as a mitigating factor. The perpetrator was charged with one count of intimidation and two counts of domestic violence against his wife, the victim. In the first incident, during an argument, the perpetrator pulled out a knife and threatened to cut the victim. In the second incident, the perpetrator demanded money from the victim, and upon her denying this demand, he hit her on the hand with a piece of wood. In the third incident, after an argument, the perpetrator punched, kicked, and squeezed his hands around the victim's neck.

Despite the fact that there was a pattern of offending over nearly a year, the judge considered the perpetrator's lack of previous convictions in granting him first-time offender status. He also emphasised the perpetrator's "genuine reconciliation":

"I have the opportunity to read the letter written by your father-in-law. He independently confirmed that you had already reconciled with them and that your relationship with them is now in good terms. He begged the Court to release you since he and his wife found it very hard to look after your children in your absence. The letter is self-explanatory of the difficulties and the hardships they encountered, and the only solution proffered therein is for you to quickly return to your children."⁴⁰⁵

Insistent on reuniting the perpetrator with the victim and the family, the judge sentenced him to 6 months imprisonment. The judge added, "[a]t the end of the day, the fact will always remain that you are a family man who will return to his wife and family with a reformed life and attitude and one that will not entertain again domestic violence."⁴⁰⁶

398 Magistrates' Court Act, 1996, Part IV s.35 (1) [Solomon Islands]:

http://www.pacilii.org/cgi-bin/sinodisp/sb/legis/consol_act/mca232.html?stem=&synonyms=&query=Magistrates%20Court

399 Solomon Islands Magistrates Bench Book 2004, Part 9, s.4.5, 5.3, <http://www.pacilii.org/sb/solomonislands-magistrate-bench-book-2004/>.

400 *Op.cit.* at fn 393.

401 *Op.cit.* at fn 393.

402 *Regina v Melake* [2010] SBHC 34.

403 *Ibid.*

404 *Regina v Foster* [2017] SBMC 58.

405 *Ibid.*

406 *Ibid.*

Solomon Islands cont

Figure 12: Rape Myths and Facts

Myth ⁴⁰⁷	Assumption	Implications/ Consequences	Facts
If the victim did not scream, fight or get injured, it was not rape	<ul style="list-style-type: none"> Assumes that all rape victims react in the same way and will fight back or try to escape Assumes that a victim who does not fight or scream is consenting Assumes that there has to be an element of physical force for the attack to be considered a rape 	<ul style="list-style-type: none"> Disbelieves and re-traumatizes the victim Invalidates the experience of the victim Discourages her/him from seeking help 	<ul style="list-style-type: none"> Victims in rape situations are often legitimately afraid of being killed or seriously injured and so cooperate with the rapist with a view to protecting their lives The victim's perception of threat influences their behaviour Rapists use many manipulative techniques to intimidate and coerce their victims Victims in a rape situation can become physically paralysed with terror or shock and are therefore unable to move or fight Non-consensual intercourse does not always leave visible signs on the body Failure to prevent does not equal victim responsibility Victims may show little physical resistance to the attack Whatever the victim does to survive the assault is appropriate action
You can tell if the victim has "really" been raped by how they act/there is a "right way" to respond to a rape situation	<ul style="list-style-type: none"> Assumes that a victim will try to escape the situation as soon as possible Assumes a raped woman will always be outwardly emotional about her experience Assumes a victim will always report the crime immediately Assumes a victim will remember all the details of the crime 	<ul style="list-style-type: none"> Disbelieves and re-traumatizes the victim Invalidates the victim's experience and individuality Discourages her from seeking help 	<ul style="list-style-type: none"> Reactions to rape are highly varied and individual Many women experience a form of shock after a rape that leaves them emotionally numb or flat – and apparently calm Each rapist has his own pattern, the victim will respond to any cues given by the rapist and follow her instinct in the situation Rape is a form of trauma and trauma can have a significant effect on the memory of a victim, including inability to recall events clearly

⁴⁰⁷ *Sexual and Gender-Based Violence in the Pacific Islands: Handbook on Judicial Sentencing Practices*, ICAAD & Clifford Chance, 2018, p. 91, available at: <https://icaad.ngo/wp-content/uploads/2019/01/ICAAD-SGBV-Sentencing-Handbook-1.19.pdf>.

There are several recent examples of reconciliation and compensation used to reduce sentences.⁴⁰⁸ In domestic violence cases, the courts have used reconciliation as a means to reduce sentences thereby promoting resolution in private.⁴⁰⁹ For example, in *R v Lomulo* [2019], there was no evidence of reconciliation or even expressed interest from the victim in forgiveness. Yet, the judge stated, “I do accept that human beings make mistakes and learn from it plus partners forgive each other. Hence, any sentence imposed must [be] one that pivots on the possibility of restoring your relationship in a much [sic] positive and constructive manner plus to coincide with the need to deter offenders of domestic violence.”⁴¹⁰

Victim-blaming/Lack of resistance

Many sexual crimes, including rape, are premised on a lack of consent – it is this absence of consent which renders otherwise lawful acts unlawful.⁴¹¹ In case law, this has been reflected in the expectation of evidence that the victim/survivor physically resisted in order to prove lack of consent. This is premised on the traditional and discriminatory view that unless a woman struggles and evidences opposition physically, she is consenting by default. It also ignores the reality that women may react in a myriad of ways, including freezing, and prescribes for women a certain way in which they are expected to react when faced with sexual violence. Failure to react in the expected manner may then cause her not to be seen as a “real victim” in the eyes of the legal and judicial authorities, or by her community.⁴¹² The lack of resistance argument is an example of gender stereotypes, specifically rape myths, in sentencing.

In *Alu v Reginam* [2016],⁴¹³ the perpetrator sought to appeal a conviction and sentence for two counts of rape. The main argument against his conviction was the lack of resistance from the victim which implied her consent. The perpetrator took the victim on a boat with several other passengers. After the other passengers left, the perpetrator raped her. She tried to resist by jumping off the boat into the sea, but the perpetrator threatened to drive away and leave her there which coerced her to get back on the boat. He then took her to a market stall and raped her again. The perpetrator’s argument was that the victim did not resist the second rape. The appellate judge quoted the initial sentencing:

“I accept her evidence that on neither occasion before she was raped, was she physically or mentally any longer able to resist the accused. While the evidence indicates far less resistance against the rape in Gizo compared to her rape on the boat, I am satisfied that she had by then been reduced to a state of submission, not consent.”

“A lack of resistance brought about by

- ☞ hours of being held against her will,
- ☞ trying to escape the accused by jumping into the sea at night,
- ☞ a threat to be left to drown in the sea
- ☞ verbal and physical aggression directed towards her when there was no one else present to help and
- ☞ being raped on the deck of the boat all combined to deprive her of her ability to resist and to reduce her to a state of submission.”⁴¹⁴

The judge did not grant appeal for the conviction. However, the language suggests that there is a “right way” to respond to rape, and if a victim’s experience deviates from that, there must be justification. In another rape case, this was apparent when the judge remarked:

“I accept the offending occurred on an isolated part of the bush and road. You took advantage of that to commit the rape. Escaping or resisting would not have been a viable option for the victim. Secondly, it is not disputed that because of the long journey the victim was tired and weak and unable to resist your forceful advances.”⁴¹⁵

These cases highlight where the “lack of resistance” argument comes up in sentencing, and there are several recent examples of this argument being raised in judgments.⁴¹⁶ The case of *R v Vouza* [2018] contains multiple rape myths and resulted in an acquittal. The decision stated:

“Since there was no resistance or struggle during sexual intercourse this shows she decided to agree to the accused’s request. She said she had been hitting the accused hand away when he started touching her, in the circumstances this seem to being playful rather than resisting his advances. If she really did not like what the accused was doing she could shout and ran away, they were only about 100 meters away from the school.”⁴¹⁷

The prevalence of this argument threatens to discourage victims from seeking help because the courts are unable to account for individual reactions to the trauma of sexual violence. Victims in rape situations are often legitimately afraid of being killed or seriously injured and so cooperate with the rapist with a view to protecting their lives. Further, perpetrators use many manipulative techniques to intimidate and coerce victims, and it is the perception of threat that influences the behaviour of victims.

408 *R v Tekau* [2019] SBMC 24; *R v Rivoqani* [2018] SBHC 87; *Regina v Roy - Sentence* [2018] SBHC 23; *Regina v Taosuriola* [2017] SBHC 111; *R v Mola* [2018] SBHC 95.

409 *Op.cit.* at fn 404.

410 *R v Lomulo* [2019] SBMC 19.

411 Hughes, G., *Consent in Sexual Offences*, 25 MLR 672, 1962, p.673.

412 Randall, M., *Sexual Assault Law, Credibility and Ideal Victims: Consent, Resistance, and Victim Blaming*, 22 CJVL, 2010, p.397.

413 *Alu v Reginam* [2016] SBCA 8.

414 *Ibid.*

415 *Regina v D* [2016] SBHC 87.

416 *Magiaro v R* [2017] SBHC 148; *Regina v Meobli* [2016] SBHC 111; *Regina v Hou - Judgment* [2014] SBHC 67; *Regina v Tebaia* [2017] SBCA 7.

417 *R v Vouza* [2018] SBHC 107.

Papua New Guinea



PAPUA NEW GUINEA

Discriminatory treatment of women in Papua New Guinea is present in all spheres of life. Entrenched traditional patriarchal customs and cultural norms are used to justify gendered violence and discrimination. GBV cases demonstrate that cultural norms such as reconciliation and victim-blaming are frequently considered by judges.

According to Amnesty International, in Papua New Guinea, norms and relationships of mutual obligation were previously used to restrain people's behaviour.⁴¹⁸ Changes to the economy and the geographic distribution of the population have created circumstances where traditional patriarchal customs are being "distorted" and used to "justify gender discrimination and subordination".⁴¹⁹ Conversely, many of the protections for women that were afforded by these customs have largely disappeared.⁴²⁰

UN Women reports that domestic violence is seen as inevitable and "a valid way for men to assert authority over partners who are deemed lazy, insubordinate or argumentative."⁴²¹ In terms of case law, the notion that women may be in some way deserving of the domestic abuse is illustrated by the willingness of judges to accept *de facto* provocation by the female victims in assault and murder cases to mitigate a perpetrator's sentence.

The Constitution of Papua New Guinea recognises equality of all.⁴²² Customary law is considered subordinate to the Constitution. However, at the Village Court level it is customary law that is mainly applied. In addition, s.19 of the Criminal Code Act 1974 gives judges an "unfettered discretion"⁴²³ to impose lesser sentences than the maximum specified, and there is no minimum sentencing. Reconciliation or the payment of compensation to the victim's family are often raised in GBV cases⁴²⁴ and used to reduce perpetrators' sentences.

Case Law Analysis

Reconciliation

Reconciliation is traditionally used in Papua New Guinea, as in many PICs, to resolve conflicts between groups and to maintain peace.⁴²⁵ Compensation in particular, is the predominant method of settling problems.⁴²⁶ The injuries of the individual are secondary to that of the group and thus sexual assault and general assault cases are resolved by compensating the victim's family, usually its male leaders.⁴²⁷ The use of restorative justice prioritises the restoring of "harmonious relationships within and between groups dominated by men" at the expense of women's rights to protection from violence.⁴²⁸ This can leave women doubly wronged, firstly by the initial assault and secondly when they do not receive compensation but a male relative does. The CEDAW Committee has identified and called for the abolishment of the use of traditional apologies or reconciliation as a form of resolution of violence against women offences.⁴²⁹

The Criminal Law Compensation Act 1991 allows for a perpetrator to be ordered to pay compensation to victims *in addition* to criminal prosecution. UN Women states that there is evidence that compensation and reconciliation are promoted at the police and Village Court levels.⁴³⁰ Judges at National Court level also frequently take into account whether compensation was paid or reconciliation has taken place to mitigate sentences in sexual assault and domestic violence cases.⁴³¹ In *State v Lahuwe* [2018],⁴³² the victim returned home to her husband, the perpetrator, with her five children after visiting her relatives. Shortly after, an argument ensued, and the perpetrator stabbed the victim in the side. She died shortly after. The perpetrator pled guilty, had no previous convictions, cooperated with the police, and showed sincere remorse. His relatives also paid K7000 (appx. £1700) in compensation to the victim's family. This amount is notably higher than the maximum compensation judges can order of K5000 (appx. £1200). The judge considered these factors in sentencing the perpetrator to 9 years imprisonment, which was on the lower tier of sentences for murder. However, finding that "mitigating and extenuating circumstances" existed, the judge wholly suspended the perpetrator's sentence placing him on probation for 5 years.⁴³³

418 Amnesty International, *Papua New Guinea Violence Against Women: Not Inevitable, Never Acceptable!*, September 2006, p.4: <https://www.amnesty.org/download/Documents/72000/asa340022006en.pdf>.

419 *Ibid.*

420 *Ibid.*

421 *Op. cit.* at fn 57, p.7.

422 Constitution of The Independent State Of Papua New Guinea, Division 3C, s.5: http://www.paclii.org/pg/legis/consol_act/cotisopng534/.

423 *State v Panta* (No.2) [2013] PGNC 111

424 Human Rights Watch (HRW), *Papua New Guinea: Prosecute Domestic Violence - Women Often Ignored, Left Without Services, Pushed to Reconcile With Attacker*, 3 November 2015: <https://www.hrw.org/news/2015/11/03/papua-new-guinea-prosecute-domestic-violence>.

425 It must be noted that the cultural and customary norms of Papua New Guinea vary and are not found universally practised across the country.

426 *Op. cit.* at fn 382, p.112.

427 *Op. cit.* at fn 418.

428 *Op. cit.* at fn 382, p.111.

429 CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women*, CEDAW/C/PNG/CO/3, 30 July 2010, p.7.

430 *Op. cit.* at fn 57, p.35.

431 *State v Babaina* [2018] PGNC 210; *State v Tobby* [2017] PGNC 340;

State v Bonnie [2018] PGNC 206; *State v Kariat* [2017] PGNC 246.

432 *State v Lahuwe* [2018] PGNC 518.

433 *Ibid.*

There are some positive examples of judges not applying compensation to reduce sentences. For example, in *State v Henry* [2019],⁴³⁴ in which the perpetrator murdered his wife, the judge stated:

“Senseless assaults and killings of women in Papua New Guinea in domestic settings have continued to become a common occurrence. And there is also, in my view, a general misconceived view or perception in many societies in the country where compensation payment is seen as an alternative way of dealing with such crimes that are being committed against women or mothers. These perceptions are of course wrong and are contrary to law including the Constitution. Despite our existing laws, women continue to fall victims to senseless assaults and deaths.”⁴³⁵

In another case of manslaughter,⁴³⁶ the perpetrator had paid some compensation, and the victim’s father requested the full amount and a corresponding shorter sentence. The judge denied this in favour of a higher deterrent sentence and argued:

“[L]et me state this – what is money to the value [of] life? No amount of material wealth paid as compensation equates the value of a human life. Similarly, no amount of punishment or remorse expressed in word or deed can restore it if lost. As such the prisoner or his family cannot expect a total expulsion from being imprisoned even if compensation was paid.”⁴³⁷

Provocation

Provocation is recognised as a legal defence in Papua New Guinea. Often, when the court believes provocation exists, it will consider a lower sentencing tier, and thus offence, as the starting point for the sentence prior to consideration of aggravating and mitigating factors. Since 1992, the Village Courts Handbook and public information sheets described the offence of assault or hitting as “hitting without a good reason” but without any definition of a good reason.⁴³⁸ The Papua New Guinea Law Reform Commission found that in the context of patriarchal norms and most village court positions being held by men the result is that “almost anything a wife does which her husband does not like could be considered a good reason”.⁴³⁹ Similarly, case law analysis reveals that the behaviour or conduct that satisfies *de facto* provocation is not clearly articulated.

Criminal Code Act (1974 as Amended 2006), Chapter 262, Division 1, s.303

303. Killing on Provocation

Where a person who unlawfully kills another under circumstances that, but for this section, would constitute wilful murder or murder, does the act that causes death in the heat of passion caused by sudden provocation within the meaning of Section 266 and before there is time for his passion to cool, he is guilty of manslaughter only.

Section 266 defines provocation as a wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relationship or in the relation of master or servant, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered. A lawful act is not provocation.

State v John [2019] is a recent example of *de facto* provocation being used to justify a short sentence for murder. The perpetrator and victim were married, and the perpetrator had been away from home in Port Moresby for two weeks. During that time, the victim left the house and “was seen drinking beer in company [sic] of other men...”.⁴⁴⁰ When the perpetrator returned, they spent an evening with his cousins. He and the victim went to sleep, and he woke up in the middle of the night to find she had left. When she returned, the perpetrator relentlessly assaulted her inflicting serious injuries to her head, face, and legs. She was knocked unconscious and died later at the hospital due to the head injury. In recounting the details of the case, the judge stated, “[s]he returned sometime later and both argued and fought so the deceased’s actions and conduct contributed to the anger and frustration of the prisoner resulting in her assault and consequential death...”.⁴⁴¹ The perpetrator was convicted of unlawful killing.

⁴³⁴ *State v Henry* (No. 4) [2019] PGNC 136.

⁴³⁵ *Ibid.*

⁴³⁶ *State v Uratigal* [2018] PGNC 492.

⁴³⁷ *Ibid.*

⁴³⁸ Law Reform Commission of Papua New Guinea, *Final Report on Domestic Violence, Report Number 14*, 1992.

⁴³⁹ *Ibid.*

⁴⁴⁰ *State v John* [2019] PGNC 166.

⁴⁴¹ *Ibid.*

Nevertheless, the uncorroborated infidelity became the central argument in considering what sentence range the judge would choose. The judge stated:

"The prisoner and deceased were sleeping in their bedroom when the deceased woke up and went outside following her self-fish [sic] desire of the flesh. I pose this question. "What man can accept such rude and self-fish behaviour or conduct of his wife and easily forgive her for her misdeeds?" In my view, most men will not condone such actions of their wives and most will resort to violence as in this case. Such are natural reactions of human beings. The prisoner naturally became very angry and assaulted the victim when she returned to the bedroom sometime later. In view of the prisoner's statement on allocatus, particularly, the "de facto provocation" available in this case, I am of the view that the sentence should commence at the bottom range of the guide line."⁴⁴²

As such, the judge was moved "particularly [by] the *de facto* provocation" and sentenced the perpetrator to 8 years of hard labour. In another case of domestic violence involving aggravated rape,⁴⁴³ the judge considered the impact of *de facto* provocation when considering the victim's infidelity:

"I accepted that he would have been under some emotional stress by having to live with his wife's infidelity. He was therefore provoked in the non-legal sense, which, I take not only to be a mere mitigating factor, but an extenuating circumstance that has the effect of reducing the gravity of the prisoner's offence."⁴⁴⁴

De facto provocation is inconsistently applied. In *State v Barambi* [2017], in arguing against a manslaughter charge where the perpetrator beat his wife to death, the defence counsel raised that there was *de facto* provocation because the victim failed to prepare fish with the perpetrator's rice. The judge denied this claim for the provocation argument. Similarly, in another manslaughter domestic violence case,⁴⁴⁵ the killing following an argument in a domestic setting failed to meet the judge's criteria for *de facto* provocation. Conversely, in *State v Aosa*, the perpetrator stabbed his wife to death, and *de facto* provocation applied because "[t]he killing was in a domestic situation following an argument".⁴⁴⁶

The inconsistent application of provocation argument is problematic, but the fact that it is used to justify toxic masculinity undermines efforts by the judiciary and state to reduce violence against women.



KIRIBATI

Gender-based violence against women is prevalent throughout Kiribati. The 2009 prevalence study in Kiribati found some of the highest rates of intimate partner violence in the Pacific.⁴⁴⁷ Of women aged 15 to 49, 68% had experienced physical and/or sexual violence from an intimate partner.⁴⁴⁸ Traditional views of women's roles in society and customary practices such as apology and forgiveness are contentious factors affecting the way the community and the judicial system respond to such violence. Kiribati society is historically conservative and male-dominated. Women are seen as subordinate to fathers, husbands, and the *te unimane* (male elders).⁴⁴⁹

Traditional culture also has a higher expectation of girls' "moral behaviour". Girls are expected to remain virgins until married and to be subservient to male discipline and control. According to a UNICEF report, "[c]ultural sexual practices emphasize male control over women."⁴⁵⁰ If a girl is sexually abused, she is viewed as spoilt and freely available for sex, to the extent that some end up becoming sex workers.⁴⁵¹ Survivors of rape are often shunned from their community. In Kiribati's Universal Periodic Review, Norway noted that most schools would not accept girls as students once they had become engaged, married, or pregnant.⁴⁵²

A 2005 report by UNICEF revealed that, in Kiribati, "domestic violence is common and most are not reported to proper authority as the practice is still accepted by the community."⁴⁵³ A 2009 survey revealed that over 76% of women believed that a man was justified in beating his wife in certain circumstances, including when she had neglected the children or burnt food.⁴⁵⁴ Interestingly, the same survey asked men their opinions on wife beating: 58% of men believe that wife beating is justified.⁴⁵⁵

⁴⁴² Ibid.

⁴⁴³ *State v Matagewana* [2016] PGNC 225.

⁴⁴⁴ Ibid.

⁴⁴⁵ *State v Vealola* [2019] PGNC 96.

⁴⁴⁶ *State v Aosa* [2017] PGNC 244.

⁴⁴⁷ Op.cit. at fn 57, p.16.

⁴⁴⁸ SPC, *Kiribati Family Health and Support Study: A study on violence against women and children*, 2010, p.79:

https://pacific.unfpa.org/sites/default/files/pub-pdf/Kiribati-Family-Health-and-Support-Study_0.pdf.

⁴⁴⁹ Pacific Prevention of Domestic Violence Programme, *Update of Baseline In-Country Review Kiribati Report*, January 2011, p.vii:

<http://www.ppdvp.org.nz/wp-content/media/2011/03/Final-Kiribati-PPDVP-Baseline-Update-25-February-2011.pdf>.

⁴⁵⁰ UNICEF, *The Commercial Sexual Abuse of Children and Child Sexual Abuse in the Republic of Kiribati: A Situation Analysis*, 2004, p.34.

⁴⁵¹ Ibid.

⁴⁵² UNHRC, *Report of the Working Group on the Universal Periodic Review Kiribati*, A/HRC/15/3, 2010, p.7.

⁴⁵³ Government of Kiribati & Unicef, *A Situation Analysis of Children, Women and Youth*, 2005, p.vi: http://www.unicef.org/pacificislands/Kiribati_Sitan.pdf.

⁴⁵⁴ Kiribati National Statistics Office (KNSO) and SPC, *Kiribati Demographic and Health Survey*, 2009, pp.238-262.

⁴⁵⁵ Ibid.

For domestic violence in particular, case withdrawal is high and prosecution numbers are low. Despite the passage of family violence legislation, the *Te Rau N Te Mwenga* Act (Family Peace Act) in 2014,⁴⁵⁶ which established domestic violence as a crime, there are very few domestic violence cases available on Paclii. According to a report by the New Zealand Police, the high rate of case withdrawal could be a continuation of community perception that the criminal justice system is not an effective means of dealing with domestic violence.⁴⁵⁷ Anecdotal evidence suggests that low levels of reporting are linked to the withdrawal of GBV complaints. Up to 80-90% of women withdraw their complaints, often due to family pressure.⁴⁵⁸ It is not unusual for violence against women and girls to stay unreported due to social and cultural pressures from family members, particularly where there has been an apology and reconciliation.⁴⁵⁹

The Constitution of Kiribati, while it guarantees equality before the law for men and women, doesn't guarantee equal benefits or outcomes. The Constitution's anti-discrimination clause does not list sex or gender as a protected ground.

Sources of law in Kiribati include both formal legislation and customary law, and the latter can be used in the interpretation and application of other sources of law. Customary law "comprises the customs and usages, existing from time to time, of the natives of Kiribati".⁴⁶⁰ In regards to criminal law, customary law, can be considered in regards to sentencing, as well as deciding the reasonableness of an excuse, or the reasonableness of an act, default, or omission by a person.⁴⁶¹ It is also relevant in deciding whether to proceed to the conviction of a guilty party, or where the court thinks that by not taking the customary law into account injustice may be done to a person.

Recently, sentencing practices in the High Court in Kiribati have begun to recognise the contentious factors that discriminate against women. Here, the contentious factors of customary reconciliation and apology and the distinction between married and unmarried women will be discussed through recent case law.

Case Law Analysis

Te Kabara Bure and Apology

Similar to a number of other Pacific Island Countries, Kiribati has a cultural practice of apology and reconciliation under customary law. The practice of apology and seeking forgiveness for a crime *Te Kabara Bure* takes place between families, to compensate one family for a harm or crime committed by another. It is believed that this not only makes the crime public, but serves as a disincentive for committing the crime.⁴⁶² Thus a perpetrator can regain social status simply by making a formal apology, while the victim/survivor must live with the shame and social stigma forever. Reconciliation can, under Kiribati law, be used to reduce sentencing, and so may reduce the deterrent factor of tougher penalties and offenders may well escape punishment.⁴⁶³ *Te Kabara Bure* is not seen as providing redress to the survivor, as it is generally aimed at the family, and may "inhibit or preclude the survivor from seeking redress within the formal justice system."⁴⁶⁴

The former People's Lawyer of Kiribati has suggested that in many cases where there has been an apology, the case doesn't proceed to prosecution. The family or the victim will, in such cases ask the police or the court not to proceed.⁴⁶⁵ Even where a case proceeds to prosecution, reconciliation of the parties is encouraged in both law and customary practice.⁴⁶⁶ The apologies cross a spectrum from personal, between perpetrator and victim, to completely impersonal, for example by a chaplain to the parents or uncles of the victim. There also appears to be a belief by some that the apology has to be accepted, while others do not appear to hold the same belief.

Magistrates Court Ordinance 1977 (Cap 52), Part IV, s.35(1) Reconciliation

35. (1) In criminal cases a magistrates' court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any offence of a personal or private nature not amounting to felony and not aggravated in degree, on terms of payment of compensation or other terms approved by such court, and may thereupon, the proceedings to be stayed or terminated.

456 *Te Rau N Te Mwenga* Act 2014 (Family Peace Act), Part 1, s.4 (Kiribati):

<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/102529/124002/F830436630/KIR102529.pdf>.

457 Pacific Prevention of Domestic Violence Programme, *Update of Baseline In-Country Review Kiribati Report*, (Jan. 2011), p.ix: <https://www.ppdvp.org.nz/wp-content/media/2011/03/Final-Kiribati-PPDVP-Baseline-Update-25-February-2011.pdf>.

458 *Op.cit.* at fn 57, p.33.

459 Pacific Prevention of Domestic Violence Programme, *Update of Baseline In-Country Review Kiribati Report*, January 2011, p.vii: <https://www.ppdvp.org.nz/wp-content/media/2011/03/Final-Kiribati-PPDVP-Baseline-Update-25-February-2011.pdf>.

460 Laws of Kiribati Act 1989, s.5: http://www.paclii.org/ki/legis/num_act/loka1989162/.

461 Magistrates' Court Bench Book (2004), s.1.3, <http://www.paclii.org/ki/other/kiribati-magistrates-bench-book-2004.pdf>.

462 UNICEF, *The Commercial Sexual Abuse of Children and Child Sexual Abuse in the Republic of Kiribati: A Situation Analysis*, 2004, pp.26, 28 and 35.

463 SPC, *Kiribati: Legal Analysis on Violence Against Women, Drafting Options for Legislative Reform*, July 2013, p.59: https://rrt.spc.int/sites/default/files/resources/2019-01/Drafting_Options_Kiribati.pdf.

464 *Ibid.*

465 Conversations in February 2014 between Emily Christie of DIA Piper and Daniel Webb, former People's Lawyer of Kiribati from November 2010 to November 2011.

466 Magistrates Court Ordinance 1977 (Cap 52), Part IV, s.35 (Kiribati): http://www.paclii.org/ki/legis/consol_act/mco285/.

Sexual assault is considered a felony and would not be eligible for reconciliation. Before the 2014 domestic violence legislation, domestic violence would be prosecuted as a misdemeanor and be subject to the promotion of reconciliation under this provision in the magistrates' courts. While sexual assault cases are heard by the High Court, cases of common assault are heard by the local magistrate. The magistrate is often a local male elder *unimane* with little or no legal training and, in some cases, no English, being asked to interpret and apply laws written in English.⁴⁶⁷ There are no magistrates' court cases available on Paclii from Kiribati to be analysed. Review of High Court GBV cases, however, indicate that recently, the practice of reducing sentences for reconciliation has begun to shift.

In *Republic v Irata* [2015], the perpetrator raped the victim who was intoxicated and asleep at a nightclub. She woke up and pushed him away, and the workers at the nightclub were alerted. The perpetrator admitted to the police and apologised to the victim a week later. A 5-year sentence was established as the starting point. In addition to his first-time offender status, early guilty plea, and apology, the judge noted that "[a]s Counsel for the defence pointed out there was no force, threat or any form of violence as is usually the case in rape cases."⁴⁶⁸ The argument of "no force" is often used in rape cases in many PIC jurisdictions and fails to account for the fact that rape in itself is an act of force and violence. Though it's unclear how much weight the judge gave to each mitigating factor, he issued a sentence of 2 years imprisonment and then fully suspended the sentence. In another rape case, *Republic v Henry* [2014],⁴⁶⁹ four male perpetrators took turns raping the victim. The starting point for rape was set at 5 years, and after considering their young ages, first-time offender status, and their apologies to the victim when she visited them in prison, the judge sentenced each of them to only 18 months in prison.⁴⁷⁰

In more recent cases, judges have explicitly not taken apologies into consideration.⁴⁷¹ In a domestic violence case involving attempted murder, the judge highlighted his scepticism about apologies. In *Republic v Taake* [2019],⁴⁷² the perpetrator was living with the victim. While on a walk along the beach to his parent's house, the perpetrator accused the victim of adultery, tied his *lavalava* (skirt) around her neck, punched her, and attempted to drown her to death. There was an apology offered on behalf of the perpetrator, but in response the judge stated:

"Counsel for the prisoner submits that I should consider a customary apology, offered on the prisoner's behalf by his mother to Eretiata and her father, as evidence of remorse. I am ordinarily fairly sceptical of apologies; they tend to be more an expression of regret rather than of remorse. There is no reason to think otherwise in this case."⁴⁷³

The perpetrator was sentenced to 8 years and 6 months in prison. This case, among others,⁴⁷⁴ represents a shift in interpretation of customary apologies at the High Court level. Now, they are considered with more scepticism and reviewed for genuine remorse rather than obligatory customary practice.

Gender stereotypes: married v unmarried

There is a cultural distinction between married and unmarried women which has resulted in gender stereotyping in the sentencing of GBV cases. While married women are often subject to domestic violence, they are also afforded a protected status from perpetrators other than their husbands. For example, in a 2004 case involving the rape of a married woman by a man other than her husband, the fact that the woman was married was an aggravating factor in the judge's sentencing decision.⁴⁷⁵

In another case, a woman was indecently assaulted by a neighbour who snuck into her house and sucked her breast while she was sleeping. The fact that the woman was married was seen as an aggravating factor, with the judge noting "[t]his is very wrong and bad according to Kiribati custom as a married woman is considered a sacred woman who must be protected and guarded against indecent conduct of other men."⁴⁷⁶ The judge also noted that as a result of the assault "the marriage of the complainant had been adversely affected and the husband had become upset and violent about it and had beaten and injured the complainant as the result."⁴⁷⁷ However, there is no mention of any legal action being taken against the husband or any indication that the husband was doing anything wrong.⁴⁷⁸

These practices create impunity for husbands and reinforces the concept of wives as property. Further, the preferred treatment of married women over those who are unmarried creates a hierarchy which can leave unmarried women with less protection under the law. These practices have shifted over time in a positive direction as reflected in the case law analysis.

⁴⁶⁷ Conversations between DLA Piper and Daniel Webb, former People's Lawyer of Kiribati (2010-2011), February 2014.

⁴⁶⁸ *Republic v Irata* [2019] KHC 83.

⁴⁶⁹ *Republic v Henry* [2014] KHC 5.

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Republic v Tabokai* [2019] KHC 34; *Republic v Mikaere* [2018] KHC 46; *Republic v Marewe* [2019] KHC 42.

⁴⁷² *Republic v Taake* [2019] KHC 36.

⁴⁷³ *Republic v Taake - Sentence* [2019] KHC 39.

⁴⁷⁴ *Republic v Tabokai* [2019] KHC 34; *Republic v Mikaere* [2018] KHC 46; *Republic v Marewe* [2019] KHC 42.

⁴⁷⁵ *Republic v Kaurake* [2004] KHC 74.

⁴⁷⁶ *Republic v Teababa* [2005] KHC 16.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

Spousal Rape

The definition of rape in Kiribati does not exclude rape in marriage, however, the concept of spousal rape does not appear to be widely recognised.⁴⁷⁹ According to a 2009 government survey:

- ✧ 30% of women believe a husband is justified in beating his wife if she refuses to have sex with him.⁴⁸⁰
- ✧ Around 10% of men believe that the acceptable response to his wife's refusal to have sex with him is to sleep with other women.⁴⁸¹
- ✧ 41% of women reported having sexual intercourse because they were afraid of what their partner might do.⁴⁸²
- ✧ 31% of women reported being forced to have sex when they did not want to, and 22% reported being forced to do something sexually degrading or humiliating.⁴⁸³

Republic v Uera [2015]⁴⁸⁴ illustrates an example of cultural beliefs around married women in sentencing. In this murder case, the perpetrator was in prison and saw his wife (the victim) wearing a tight dress which prompted him to stab her to death. Although the judge denied the argument for provocation, he also remarked, "Kiribati men are well known to be possessive of their wives and jealous of any other man who may threaten the possession", reinforcing norms that men are justified in their possessiveness over their wives as property. Still, the perpetrator was sentenced to the mandatory life imprisonment for murder.

Kiribati 1977 Consolidated Penal Code, Chapter 67, Part XVI, s.128

Definition of rape

128. Any person who has unlawful sexual intercourse with 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.

Traditional beliefs about married and unmarried women have been challenged in more recent cases. In *Republic v Mikaere* [2018],⁴⁸⁵ the perpetrator pretended to be the victim's husband and raped her. The judge did not use the victim's marital status as an aggravating factor and sentenced the perpetrator to 7 years imprisonment considering other aggravating factors.⁴⁸⁶ In *Republic v Tooma* [2019],⁴⁸⁷ the perpetrator beat the victim (his wife) with a bush knife, with some blows landing on her head. The judge denied the defence counsel's argument for provocation⁴⁸⁸ and made a significant statement relating to the domestic violence offence at hand:

"The fact that this violence occurred in a domestic situation does not in any way reduce its seriousness. Family violence is a major problem in Kiribati. By passage of Te Rau n Te Mweenga Act 2014, the Maneaba ni Maungatabu has sent a clear signal that violence within the family will not be tolerated, and is a matter of grave concern for all of us.

I note that the complainant has asked that I impose a lenient sentence. Such a request is not unusual in cases involving family violence. However, just because the complainant has condoned her husband's violence, that does not mean that this Court should do the same."⁴⁸⁹

This case, among others that have taken domestic violence more seriously, suggests a positive shift in sentencing with regard to the gender stereotypes of marital status. This extends to gender stereotypes of unmarried women as well. In *Republic v Buaka* [2019],⁴⁹⁰ the perpetrator raped his 22-year-old cousin. Prosecution raised the fact that the victim was a virgin as an aggravating factor. In response, the judge acknowledged that "according to custom, virginity is a prized attribute for an unmarried woman in Kiribati,"⁴⁹¹ but rejected it as an aggravating factor.

Elevating a woman's virginity can serve to undermine sexual violence against women with other sexual histories. Women should not be objectified nor valued differently based on their previous sexual history, including virginity or promiscuity. Laws should apply equally to all women irrespective of their sexual history or marital status.

479 Jalal, I., *Supplement to Law for Pacific Women: A Legal Rights Handbook*, Pacific Regional Rights Resource Team and SPC, 2013, p. 14: <http://www.lwrm.org.fj/images/resources/SupplementToLawForPacificWomen-1.23pm-15Oct.pdf>.

480 Kiribati National Statistics Office (KNSO) and SPC, *Kiribati Demographic and Health Survey*, (2009), p. 251.

481 *Ibid.*, p. 256.

482 SPC, *Kiribati Family Health and Support Study: A study on violence against women and children*, 2010, p. 81: https://pacific.unfpa.org/sites/default/files/pub-pdf/KiribatiFamilyHealth-and-SupportStudy_0.pdf.

483 *Ibid.*

484 *Republic v Uera* [2015] KHC 76.

485 *Republic v Mikaere* [2018] KHC 44.

486 *Ibid.*

487 *Republic v Tooma* [2019] KHC 11.

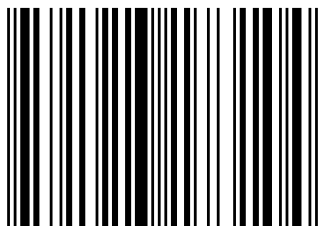
488 *Ibid.*

489 *Ibid.*

490 *Republic v Buaka* [2019] KHC 64.

491 *Ibid.*

ISBN 978-1-913173-10-4



9 781913 173104 >



**SISTERS
FOR CHANGE**

www.sistersforchange.org.uk

[@sisters_4change](https://twitter.com/sisters_4change)

✉ research@sistersforchange.org.uk

MAKING JUSTICE WORK FOR WOMEN