Development Studies Network

Development Bulletin

No. 51 March 2000

Gender and governance

- **Features**

  Gender and governance in international law; criminal law and gender in Pacific Island jurisdictions; gender and reform in Vanuatu and Solomon Islands; training women for elections in Vietnam; gender and economic governance; transformative politics in Asia–Pacific

- **Gender and governance in Melanesia**

  Christian women's groups in Solomon Islands; Kastom in Vanuatu; literacy programmes for women in Vanuatu; Christianity and women in Bougainville

- **Viewpoint**

  ICPD goals and thresholds in the Pacific; the Gender Empowerment Measure and West Java; gender and ethnicity in Nepal; gender equality in organisations

- **From the field**

  Gender and livelihood in an upland community forestry project; working conditions of garment workers in Bangladesh

- **ACFOA Briefing**

The differential impact of criminal law on males and females in Pacific Island jurisdictions

Tess Newton, School of Law, University of the South Pacific

Introduction

Among the independent island states of the South Pacific region, a codified approach to criminal law and procedure is favoured. In each jurisdiction, two significant pieces of legislation are the primary sources of law relating to criminal law and procedure. The first takes the form of a crimes act or penal code.[1] This sets out the principal offences in the jurisdiction and the penalties that apply to such offences. It also includes statements of principles relating to issues of criminal capacity, causation, defences, and so on. The second occurs in the form of a criminal procedure code (in some jurisdictions, the nomenclature may differ; for example, in Tonga, the relevant legislation is the Police Act (Cap 35)). These pieces of legislation contain the rules regarding police powers of arrest and detention, bail, and other matters of criminal procedure.

Many of these codes were imposed during the colonial period.[2] They have subsequently been continued in force after each of these countries achieved independence (see further Corrin Care et al. 1999). Essentially, therefore, the backbone of the penal legislation of these countries is a body of law which is over 100 years old and which has been reformed very little in that time. As we know, perceptions of morality and the relative status of women and men have undergone vast transformations in the intervening period. It would seem to be undeniable, therefore, that the criminal laws of the South Pacific region, by virtue of their age if nothing else, are problematic in the way in which they affect women rather than men.

Here, I seek to identify examples of how the construction of the criminal laws in this region has differential impacts on males and females. This exposition can be conducted at two distinct, if interrelated, levels. The first is the textual/philosophical level, which examines how the way in which the law is written encapsulates a gendered conceptualisation of the law or gives rise to the possibility of different treatment. The second is at the more practical level, which considers whether the way in which the law is enforced and administered creates problems for females that may not be faced by males. An obvious and significant area to examine is that of sexual offences and this will form a large part of the discussion. However, there is also some consideration of issues of law and procedure that arise in relation to prostitution and 'domestic violence'.

What the law says ... and what this means

The area of sexual offences is one that provides numerous examples of the language of the criminal law operating in a gendered way, which is often (although not always) disadvantageous to females. It is important to remember that the legal provisions that continue to apply in the region are ones that, until relatively recently, were in force in Western jurisdictions such as Australia and the United Kingdom. There are a number of areas where penal legislation is conceptualised and written in a gendered way: rape and prostitution laws are salient examples.

Rape

Rape is treated as a serious offence in the South Pacific region. In many of the countries, it is listed as an 'offence against morality', and in most it is an indictable offence. However, unlike in other common law jurisdictions (for example, the United Kingdom and Australia), the law relating to the crime of rape is gender-specific in nature. It is defined in terms of a crime that is committed by a man against a woman. For example, in Cook Islands, rape is defined in s.141 of the Crimes Act 1969 in the following terms: '(1) Rape is the act of a male person having sexual intercourse with a woman or girl – (a) Without her consent ...' Similar provisions exist in the criminal legislation of other jurisdictions within the region.

This issue has been the subject of consideration by the Fiji Law Reform Commission (FLRC 1999). Its report on sexual offences states that its proposed reforms to this area of the criminal law are guided by the principles encapsulated in the 1997 Constitution of Fiji Islands and by the obligations arising under two international conventions to which Fiji Islands is a signatory: the United Nations Convention on the Rights of the Child (ratified by Fiji in 1992) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, ratified by Fiji in 1995). The report comments in relation to rape:

> There seems no logical reason today for a gender confining approach to rape. Whether inside or outside a prison environment, there are instances which come to light of rape committed on males. What needs to be focused on is the need to prohibit the act of rape, the gravest sexual offence next to a sexual murder. The law presently would appear to allow for a woman to commit rape on a woman but only by aiding a man to commit the act of rape, the penile penetration of the victim. There seems no reason why women also should not be charged with rape of another woman, even when acting alone (FLRC 1999:15).

Thus, the FLRC has recommended that the offence of rape be formulated in gender-neutral terms in line with the law as it now stands elsewhere, such as in the United Kingdom (s.1 of

the Sexual Offences Act 1956 as amended by s.142 of the Criminal Justice and Public Order Act 1994), in Australia (for example, s.611 of the Crimes Act 1900 of New South Wales) and in New Zealand (s.128 of the Crimes Act 1961).

In addition, the FLRC has recommended that the definition of rape be extended to cover penetration of bodily orifices other than the vagina. Again, this is a legal development that has already been enacted in other jurisdictions. However, within the region, the definition continues to be limited to penile penetration of the vagina. A further recommendation is that rape should be deemed to include non-penile acts. The report refers to the Fiji Islands case of *Mavui Melinioba v. R.*[3] In this case, the victim was raped and subsequently the accused penetrated her vagina with a piece of wood. If the victim had suffered only the non-penile penetration, it would not have been possible to charge the perpetrator with rape. It has long been argued that violation with non-penile objects can be at least as traumatic as penile penetration. This has been recognised by the FLRC (1999:16): 'It is recommended that it should be possible to charge rape for such an act and not leave the prosecution with difficulties over proof of the requisite intent for charging another offence such as act [*sic*] with intent to cause grievous bodily harm'. This type of approach has been taken in other jurisdictions. However, in the South Pacific region, a limited definition of rape still prevails. Non-penile penetrations would constitute aggravated assaults but not rape.

The issue of consent or, rather, lack of consent in relation to the law of rape is one that raises many concerns. The laws of the countries of the South Pacific region identify rape as sexual intercourse that takes place without the consent of the (female) victim. However, the legislation does not provide any definition of consent or its absence and it has been left to the courts to attempt to make such determinations. This has led in some cases to judicial statements that operate to the disadvantage of victims of rape.

The FLRC report notes a concern over the way in which the courts of the region have defined the lack of consent as something more than a distinction between a person saying 'yes' and a person saying 'no'. It cites the case of *R. v. Alfred Saolo and others,*[4] in which the court looked to the level of resistance of the complainant in order to determine whether there was a lack of consent. The report is critical of this sort of judicial approach:

> The 'resistance requirement' fails to take into account cultural and social conditions of victims particularly in the Pacific. In many situations, it is easy for the rapist to overpower a child or woman. To expect a female victim, or a child to resist a physically powerful attacker is unrealistic. She may be too frightened to resist and she may have pretended to go along with his violent overtures and to look for a means of escape later. Sometimes too much emphasis is placed on resistance and shouting for help. A court may need to place in a proper perspective such criticisms made by defence counsel. Unfortunately, there is sometimes insufficient appreciation of this factor and the result is that where there is little evidence of resistance or none at all the matter may weigh against the complainant (FLRC 1999:18).

On this basis, the FLRC has recommended that a statutory definition of consent be formulated and it refers to s.38 of the Crimes Act 1958 (Victoria) as a useful model.

Prostitution

As elsewhere, it is not a criminal offence in any of the jurisdictions of the South Pacific region for a person (whether male or female) to have sexual intercourse for payment. However, the law creates several offences which effectively criminalise the means by which sex workers facilitate their activities. Again, it is often the case that such offences are listed in the penal codes as 'offences against morality'. An example is s.168 of the Penal Code of Fiji (Cap 17): 'Loitering or soliciting for the purposes of prostitution'. According to subsections (1) and (2), '(1) Any common prostitute who loiters or solicits in any public place shall be guilty of an offence; (2) Any person who, in any public place, solicits for immoral purposes shall be guilty of an offence'.

It is significant that this provision appears to be framed in gender-neutral terms, although the term 'common prostitute' is not defined in the legislation. This is not the case in legislation that applies elsewhere in the region; often, the law is based on prostitution being a female occupation. So, for example, s.58K of the Crimes Act 1961 of Samoa, which is concerned with brothel-keeping, interprets brothel as 'any house, room, set of rooms, or place of any kind whatever used for the purposes of prostitution, *whether by one woman or more*' (emphasis added). Similarly, s.162 of the Crimes Act 1969 of Cook Islands, which creates the offence of 'procuring sexual intercourse', is written in such a way as to criminalise the procuring of females for sex but not the procuring of males.

The law relating to prostitution was also a focus of concern for the FLRC and this part of its report has recently sparked controversy in the Fiji Islands' media. In line with trends elsewhere, the FLRC has taken the view that it is impossible to eradicate prostitution as a social phenomenon. Rather than using the blunt instrument of the criminal law to attempt the impossible, it is more socially beneficial to regulate it in order to promote public health and to protect vulnerable members of society, particularly children. The FLRC has recommended that prostitution and associated offences, such as living on the earnings of prostitution, be decriminalised. The report notes that the policing of prostitution or 'commercial sex work' is problematic and ineffective:

> The CSW [commercial sex worker] would be arrested, spend the night in the cell and upon going to Court, magistrates themselves often took a sympathetic line with CSWs and exercised their discretion to release them or order acquittal. The view of one of the policemen was that 'these females are really doing no harm to anybody compared to those who break and enter, who really give trouble and we have to be on the look out or it will be a waste of time to go after these girls' (FLRC 1999:74).

The FLRC has recommended that commercial sex work be decriminalised and instead be subject to a system of regulation and licensing to prevent the industry becoming a vehicle for public nuisance (such as persistent loitering and soliciting in

residential areas) or criminal activity (such as 'old men being tricked out of their wallets and no services provided' (FLRC 1999:79)). It is interesting, in light of the recent controversy over this issue, to note that in a poll conducted in 1997 by the *Fiji Times*, referred to in the FLRC report, the majority of respondents (68 per cent) were opposed to the idea of legalising prostitution.

This aspect of the report has provoked a great deal of criticism from church leaders in Fiji. The president of the Methodist Church was reported in the *Fiji Sun* (16 January 2000) as saying, 'It [prostitution] is wrong according to our scriptures and ideology. Our scriptures say that we must have family life but prostitution does not support family life. This is one of the problems that the Western society is bringing in'. Similar views have been expressed by spokespeople for the Salvation Army, the then India Sanmarga Ikya Sangam Hindu organisation and the Fiji Muslim League. On the other hand, the vice-president of the Sanatam Dharam Pratindhi Sabha has argued that prostitution should be legalised in the interests of 'night traders'. The commissioner who authored the FLRC report, Justice Anthony Gates, has responded to critics by calling on the churches to lead the community in demonstrating 'compassion' towards those involved in commercial sex work. Justice Gates has called for an in-depth study of community attitudes on issues associated with prostitution. He has maintained his position that prostitution as a social phenomenon cannot be eliminated, whether through the operation of the criminal justice system or any other means.

How the system works ... or doesn't

In many countries of the South Pacific region, it is a concern that women are disadvantaged by the operation of the criminal justice system. It continues to be the case that they are more likely to be involved with the system in the role of victim than of accused. This is particularly so in relation to sexual offences, but it is also true of 'domestic violence' which is endemic throughout the region.

One of the most significant problems faced by women who are victims of 'domestic violence' is getting the police to treat what has happened as something requiring their attention and action. The policing of 'domestic violence' is one area in which the policing organisations of the region are glaringly deficient. Although the current criminal legislation of the countries of the South Pacific region is sufficient to encompass domestic assaults, police officers still fail to deal adequately with the problem. Furthermore, they receive little or no specific training to equip them with the necessary skills and strategies. They may handle reports informally, either by talking to the parties concerned or by referring the matter to be dealt with by a chief or other community elder, including church ministers. It is questionable whether such an approach is fully appropriate, for two reasons. One is that the police forces of the region tend to have very few women officers. For example, in Marshall Islands in 1998, 4 per cent of police officers were women. Tonga has probably one of the largest proportions (18 per cent in 1998). The other reason is that patriarchal structures that prevail in the traditional societies of the region and the churches may not necessarily be conducive to women taking the criminal justice route for dealing with domestic assaults if this is what they choose to do (Jowitt 2000).

Elsewhere in the criminal justice system, different attitudes may prevail. In Vanuatu, the Public Prosecutor's Office (currently headed by a woman) has a policy that, once a complaint of 'domestic violence' has been received in the office, the case will not be dropped even if the complainant requests that it should be. This is because the Public Prosecutor feels that often women are forced or coerced to reconcile in custom with their partners and that has led to women becoming victims of homicide at the hands of persons against whom previous complaints had first been made and then withdrawn. However, in the absence of initial support from the police, it will remain the case that many incidents of 'domestic violence' will not reach the Public Prosecutor. The legislation in several of the countries (for example, Fiji Islands, Vanuatu) includes provisions that seek to promote customary reconciliation (for example, Fiji Islands' Criminal Procedure Code (Cap 21) s.163). However, where these provisions exist, they do not make any reference to offences that would qualify for settlement by way of reconciliation in terms of the nature of the offences and/or the sentences they attract but which should be excluded from the ambit of such provisions by virtue of their social significance. Incidents of 'domestic violence' are very clearly in such a category.

The reform question

Generally, in the region, law reform issues are not accorded a very high priority. Many of the countries do not have a dedicated law reform body or, if such a body exists, it produces very little. A notable exception is the Fiji Law Reform Commission. The most likely reason for the lack of this type of activity is limited resources. Across the region, several aspects of the public sector, including legal services, survive only because of the injection of significant amounts of aid, notably from Australia and New Zealand.

However, there are examples of reform initiatives aimed at equalising the position of women and men in many areas of law and social policy, including criminal law and justice. Reference has already been made to some of the proposals put forward by the FLRC. In December 1999, a Samoan lawyer called for the country's rape laws to be reformed so that women who are raped by their husbands are able to file charges against them. As the law currently stands in Samoa (as well as in several other Pacific Island states), the offence of rape can only be committed against a person 'to whom he (the offender) is not married'. The FLRC advocates a similar reform in its report. In Vanuatu in 1999, the Family Protection Bill was prepared by the State Law Office after extensive consultation with women's groups, chiefs and other community leaders and representatives. One of its principal aims is to provide mechanisms for women to protect themselves and their children from abuse and violence in the home. This draft legislation has yet to be considered by the parliament.

As can be seen from the recent public controversy in Fiji, proposals for reforming the laws on prostitution have the potential to be extremely problematic. Attempts to introduce similar reforms in other Pacific Island countries are likely to generate similar controversies. Churches and other religious groups are extremely influential in the region. Also, in the realm of sexual offences, a combination of religious teaching and customary taboos can often lead to communities denying that such issues are relevant to them. All of these factors indicate that the process of reform in this area of law is likely to be long and fraught with many difficulties. However, in light of the increased participation of these countries in trans-global activities, including the ratification of international treaties and directives such as CEDAW, it seems undeniable that law reform must be undertaken sooner rather than later.

Conclusion

As can be seen from this brief consideration, the criminal justice arena is another locus in which the structure, enforcement and application of the law can operate differentially depending on gender. It is not surprising, given the longstanding dominance of law making, teaching, enforcing and interpreting by males, that this differential impact is disadvantageous to women more often than it is to men. This is true in the countries of the South Pacific region, just as it was previously and often continues to be in other parts of the world. What is evident from the dual approach that has been taken here is that attempts to rectify this imbalance must go beyond simply changing the words that the law uses in order to replace gender-specific terms, such as 'wife', with those that are considered more gender-neutral, such as 'spouse'. Indeed, this type of linguistic reform has already been undertaken in Solomon Islands. But this is a first step which, while being significant in symbolic terms, is unlikely to be meaningful otherwise. Beyond this, law reformers need to examine conceptualisations of the relative positions of women and men that are promulgated in penal legislation, policing and prosecutorial decisions, court procedures and judicial determinations. And, at the practical level, those responsible for the enforcement and application of the criminal law need to look to recruitment policies, training programmes and work practices to identify and then address issues of bias, prejudice and discrimination, whether on the basis of gender or some other characteristic.

Notes

1. For example, Penal Code of Fiji Islands (Cap 17); Crimes Act 1969 of Cook Islands.
2. An exception is the Penal Code of Vanuatu (Cap 135) which was enacted by Vanuatu in 1981, following independence in 1980.
3. Unreported, High Court of Fiji, Criminal Appellate Jurisdiction, No. 38 of 1982.
4. Unreported, Supreme Court of Western Samoa, 1978.

References

Corrin Care, J., T. Newton and D. Paterson 1999, *Introduction to South Pacific law*, Cavendish, London.

FLRC (Fiji Law Reform Commission) 1999, *Reform of the penal code and criminal procedure code: The sexual offences report*, FLRC, Suva.

Jowitt, A. 2000, 'Women's access to justice in Vanuatu', in T. Newton (ed.), *Legal developments in the Pacific Island region: Proceedings of the 1999 conference,* held at the University of the South Pacific, Emalus Campus, Port Vila, 6–7 September 1999.