

LITIGATION RAISING ISSUES RELATING TO
WOMEN'S HUMAN RIGHTS:
INTERNATIONAL AND REGIONAL STANDARDS
— THE PAPUA NEW GUINEA EXPERIENCE



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Papua New Guinea is a party to several international conventions dealing with human rights including a number particularly relevant to women's rights.¹ Obviously it is also a signatory to various important maritime treaties and other international conventions. Papua New Guinea was a recent signatory to the Lomé Convention in the Pacific and the most relevant recent convention dealing with the status of women it has ratified or acceded to is the Convention on the Elimination of All Forms of Discrimination against Women 1979 (Women's Convention).² Pacific nations including Papua New Guinea participated in a United Nations sponsored regional meeting on Status of Women at Rarotonga in 1991 to discuss the Convention.³ Most were slow in signing after that meeting and Papua New Guinea did not accede until 1995, in contrast to many European countries which became parties more than a decade ago. However to many women leaders in Papua New Guinea this was a welcome development. Although it has been ratified, the Women's Convention has not as yet been implemented as part of the domestic law.

To fully appreciate the adoption of international and regional standards within Papua New Guinea's judicial system, it may be easiest to outline the constitutional and legal provisions which provide for domestic human rights.

Prior to independence in September 1975 the former House of Assembly had set up a Constitutional Planning Committee. At a recent

¹ These include: Convention Concerning Employment Policy (ILO No 122), 569 UNTS 65, adopted on 9 July 1964, entered into force 15 July 1966 (ratified by Papua New Guinea on 1 May 1976); Convention Concerning the Abolition of Forced Labour (ILO No 105), 320 UNTS 291, adopted on 25 June 1957, entered into force 17 January 1959 (ratified by Papua New Guinea on 1 May 1976); Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (ILO No 98), 96 UNTS 257, adopted on 1 July 1949, entered into force 18 July 1951 (ratified by Papua New Guinea on 1 May 1976); Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds (ILO No 45), 40 UNTS 63, adopted on 21 June 1935, entered into force 30 May 1937 (ratified by Papua New Guinea on 1 May 1976); Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, adopted on 9 December 1948, entered into force 12 January 1951 (accession by Papua New Guinea on 27 January 1982); Convention on the Political Rights of Women, 193 UNTS 135, adopted on 20 December 1952, entered into force 7 July 1954 (accession by Papua New Guinea on 27 January 1982); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), 75 UNTS 287, adopted on 12 August 1949, entered into force 21 October 1950 (succession by Papua New Guinea on 26 May 1976).

² 1249 UNTS 13. Papua New Guinea acceded to the Convention on 12 January 1995.

³ *South Pacific Regional Seminar on the United Nations Convention on the Elimination of All Forms of Discrimination against Women*, held at Cook Islands on 18-21 March 1991.

constitutional seminar to mark the 20th Anniversary of the Constitution, Sir Michael Somare, a former Prime Minister and Chief Minister prior to independence, spoke of the work of the Committee.⁴ They held face-to-face discussions with hundreds of discussion groups involving thousands of people. They also travelled to every subdistrict in the country and talked face-to-face with the population about what they wanted in their constitution. As he said in the seminar, “it was definitely not a constitution thrust upon us by Marlborough House or Canberra”. As a result, Papua New Guinea has a very detailed constitution setting up various arms of government — legislative, executive and judicial — and declaring the human and civil rights of its citizens and of all persons within its boundaries.

At the time of independence the Government made a decision not to become a signatory to the United Nations Universal Declaration of Human Rights. The Constitutional Planning Committee noted [that] the Universal Declaration of Human Rights was a statement of accepted rights and freedoms. “The rights and freedoms it sets out are not unlimited — that the protection of the human rights of individuals and groups must be balanced against the interest of the people of a country as a whole” and they considered that the Declaration “makes no reference to the universally recognised distinction between the rights of the citizens of a country as opposed to those of foreign citizens within that country.” Applying these considerations, the Constitution made a distinction between basic and qualified rights, which require different percentages of votes in Parliament to be changed or amended. The Committee particularly noted some of the rights in the Universal Declaration of Human Rights and other well-known declarations, citing among others the right to life, the right not to be tortured or made a slave, the right not to be imprisoned without a fair trial, the right to privacy, the right to take part in government and to have an adequate standard of living, health and well-being of the person, and the right to education. When the Constitution was finally drafted and passed, such matters as the rights to education and to marry and form a family were not actually included or referred to.⁵

There has been little debate as to why the right to form a family was not included. Some persons suggest that it may have been to avoid people alleging that it gives a right to polygamous marriages, however there is no real research or information available on this particular point.

⁴ Rt Hon Sir Michael Somare, a keynote address at the conference *Twenty Years of the Constitution*, held at Port Moresby, Papua New Guinea, March 1996.

⁵ For reference, see Brian Brunton and Duncan Colquhoun-Kerr, *The Annotated Constitution of Papua New Guinea* (Port Moresby, University of Papua New Guinea Press, 1984) at 93-96, citing the *Final Report of the Constitutional Planning Committee* (1974), Part 1, Chapter 5, at paras 6-26.

The Constitution particularly notes, in section 55, the right to equality regardless of tribe or ethnic background, religion or sex.⁶

Despite this and the implementation of the Convention on the Political Rights of Women,⁷ Papua New Guinea does not at present have any elected women members of Parliament. Three women members were elected in the first Parliamentary elections after independence; one became a Minister. No women have been elected subsequently. There has been some media publicity and debate proposing a woman be nominated under a provision in the Constitution which allows for a nominated member, but this has not been implemented and it has not been subject of any litigation before the courts nor has the idea of litigation been mooted. There is no doubt that women stand for elections and do so openly. Women also cast their votes openly. In one disputed return case I heard, more women voted than men in the relevant electorate. The National Court, sitting in its capacity as court of disputed returns, has heard a very large number of cases disputing elections, but it has never been alleged nor inferred that a woman was prevented from voting or ordered to vote in a particular way solely because she was a woman. Similarly it has not been suggested that a woman was prevented from standing merely because she was a woman.

Mrs Josepha Kanawi, formerly the Secretary of the Law Reform Commission and presently the Land Title Commissioner, a senior woman lawyer, stated in a paper presented to the 20th Waigani Seminar and subsequently at the Beijing Forum that the concept of the equality of women was not traditional in most Papua New Guinea societies and that women had a different traditional role, which was recognised and respected.⁸ Of course Papua New Guinea is not at all unique in this particular attitude. The concept of equality is comparatively new but then it is only a recent concept in many other jurisdictions also.

Our Constitution has an unusual provision in section 57, stating

“a right or freedom referred to in this division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully

⁶ Section 55 is on equality of citizens. It states:

“(1) Subject to this Constitution, all citizens have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex.

(2) Subsection (1) does not prevent the making of laws for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged or less advanced groups or residents of less advanced areas.

(3) Subsection (1) does not affect the operation of a pre-Independence law.”

⁷ 193 UNTS 135, adopted on 20 December 1952, entered into force 7 July 1954. Papua New Guinea acceded to the Convention on 27 January 1982.

⁸ Josepha N Kanawi, “Rights of Women in Papua New Guinea”.

and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.”

This section has been used to make many applications to the National Court; a simple form has been prepared to initiate applications. To the best of my knowledge, and I have recently reviewed most of our files, none allege a breach of the equality provisions in section 55, although the section has been considered when reviewing imprisonment by village courts for what were, essentially, breaches of custom that might apply only to women.

Of the international conventions and standards to which Papua New Guinea is party, most have been implemented by way of domestic legislation. Sections 97-102 of the Employment Act relate to employment of women and children. Discrimination on the basis of sex and failing to pay a woman employee the same wages as a male employee at the same level are criminal offences. Women are not allowed to be employed underground or in heavy labour, and they may not be employed during the night unless they are in health, welfare or managerial positions. There are provisions for maternity leave and protection of employment during maternity leave and for time off during working hours to feed a nursing baby.

Although I have not been able to find any specific reference to the Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds,⁹ it appears to me the Employment Act implements the convention in our domestic law. To the best of my knowledge we have not had any case law relating to these or related sections. Legislation in the former Public Service Acts allowing for retrenchment of female married employees before other employees was repealed immediately after independence.

There are no criminal sanctions that provide different scales of punishment for men and women for the same offence (compare with the Philippines' adultery legislation)¹⁰ and a difference allowing women prisoners more remission than their male counterparts was changed to increase remission for men to the same level.

The Constitution does allow for reference to international conventions and standards when the Supreme Court is “determining whether or not any law, matter or thing is reasonably justified in a democratic

⁹ ILO No 45, 40 UNTS 63, adopted on 21 June 1935, entered into force 30 May 1937. Papua New Guinea ratified the Convention on 1 May 1976.

¹⁰ Adultery and Enticement Act 1988 (No 5 of 1988) of Papua New Guinea. For details, see Hon Leticia Ramos Shahani, “Women Migrant Workers” in *Proceedings of the Third Biennial Conference: Equality through Law - Commitments to Keep* (Manila, Philippine Women Judges Association, 1996).

society that has a proper regard for the rights and dignity of mankind.”¹¹ In past cases the Supreme Court has considered many different charters and conventions, such as the European Convention for Protection of Human Rights and Fundamental Freedoms,¹² the decisions of the International Court of Justice and the United Nations Charter among others (see for example *Re Minimum Penalties*¹³ arguing the constitutionality of the Criminal Code (Amendment) 1983).

However, I have been able to find only one case where an international convention was directly used in interpreting and applying a constitutional provision and enforcing a right. This was in *State v Kule*¹⁴ (a case over which I presided) where a custom of compensation was argued. There a custom of giving a daughter in compensation and reparation for murder to the family of the person murdered was held not enforceable and could not be recognised as it was an institution or practice similar to slavery and therefore contrary to section 253 of the Constitution.¹⁵

In interpreting the word “slavery” in the Constitution I applied the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,¹⁶ the Slavery Convention¹⁷ and the amending Protocol.¹⁸ I applied that Convention because I considered that Papua New Guinea had signed, ratified and

¹¹ Section 39(3) specifically states “for the purposes of determining whether or not any law, matter or thing is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, a court may have regard to -

- (a) the provisions of this Constitution generally, and especially the National Goals and Directive Principles and the Basic Social Obligations; and
- (b) the Charter of the United Nations; and
- (c) the Universal Declaration of Human Rights and any other declaration, recommendation or decision of the General Assembly of the United Nations concerning human rights and fundamental freedoms; and
- (d) the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and any other international conventions, agreements or declarations concerning human rights and fundamental freedoms; and
- (e) judgements, reports and opinions of the International Court of Justice, the European Commission of Human Rights, the European Court of Human Rights and other international courts and tribunals dealing with human rights and fundamental freedoms; and
- (f) previous laws, practices and judicial decisions and opinions in the country; and
- (g) laws, practices and judicial decisions and opinions in other countries; and
- (h) the Final Report of the pre-Independence Constitutional Planning Committee dated 13 August 1974 and presented to the pre-Independence House of Assembly on 16 August 1974, as affected by decisions of that House on the report and by decisions of the Constituent Assembly on the draft of this Constitution; and
- (i) declarations by the International Commission of Jurists and other similar organizations; and
- (j) any other material that the court considers relevant.”

¹² 213 UNTS 221 (1950).

¹³ [1984] PNGLR 314.

¹⁴ [1991] PNGLR 404.

¹⁵ Section 253 provides that “slavery, and the slave trade in all their forms, and all similar institutions and practices, are strictly prohibited.”

¹⁶ 266 UNTS 3, concluded on 7 September 1956, entered into force 30 April 1957.

¹⁷ 60 LNTS 253, concluded on 25 September 1926, entered into force 9 March 1927. Papua New Guinea acceded to the Convention on 27 January 1982.

¹⁸ Protocol Amending the Slavery Convention of September 25, 1926, 212 UNTS 17, concluded on 7 December 1953, entered into force 7 July 1955.

implemented the Convention (by virtue of section 253 of the Constitution) and that the courts were entitled to have regard to the Conventions which the country had ratified or acceded in deciding the meaning of words and expressions used in legislation and in implementing the legislation.

At present Papua New Guinea does not have any legislation directly prohibiting sexual harassment in the workplace or elsewhere. It is only very recently that we have seen any publicity concerning sexual harassment or misuse of sexual favours in the workplace. There were, of course, stories that circulated privately but none were actually the subject of litigation and have only recently been the subject of media reports.

When and how the Women's Convention will be implemented with particular reference to sexual harassment is a political decision which has yet to be made.

I think that I can safely say the greatest concerns to ordinary women in Papua New Guinea are the issues of domestic violence, adultery and polygamy (the line between the latter two is frequently blurred). They are common media subjects but none was alluded to in the Constitution nor specifically referred to in the conventions that we have adopted and actually implemented. A detailed report on domestic violence by the Law Reform Commission was presented to Parliament with recommendations for clearer legislation, easier access to the courts and other remedies sought, but as yet without result despite pressure from women's groups.¹⁹

Dr Brunton (a former National and Supreme Court Judge) referred to this situation in a paper "Human Rights in Papua New Guinea in 1996" quoting the 1995 *United States Department of State Country Reports on Human Rights Practices on Papua New Guinea*:

"Violence against women, including domestic violence and gang rape, is a serious and prevalent problem. While ostensibly protected by their families and clans, women are nonetheless often the victims of violence and force. Traditional village deterrents are breaking down, and the number of reported cases of rape in some areas is rising. Although rape is punishable by imprisonment, and sentences are handed out when assailants are found guilty, few assailants are apprehended. Domestic violence such as wife-beating is also common, but is usually viewed by police and citizenry alike as a private family matter."²⁰

¹⁹ "Domestic Violence" in Susan Toft (ed) *Papua New Guinea Law Reform Commission Monograph No 3* (1985).

²⁰ United States Department of State, *Country Reports on Human Rights Practices for 1995*, Papua New Guinea, Section 5.

Dr Brunton went on to say:

“The law and the court system still need to provide effective remedies for beaten women; the family courts are ineffective; the Port Moresby Family Court is in particular need of attention and institutional renovation. Although National Court judges on circuit do what they can to review Village Court anomalies, most of the worst misery is hidden for the superior courts.

Because we have a Parliament in which all members are male, there is a need for the superior courts to show leadership and to address women's rights; most women's marriages are not legally defined, the concept of customary marriage is unclear and particularly so if parties have different customs. Sentencing patterns would suggest that the judges need to reflect on their policy on battered women syndrome, particularly with the variation we have in Papua New Guinea of deaths arising in the context of polygamous marriages.”²¹

There is legislation to restrain aggressive individuals but in general terms and is not directed to the domestic situation, and there is no simple straightforward procedure enabling a woman to quickly seek non-molestation or protection orders for herself and her children. Similarly, there are no provisions in our legislation giving a woman a right to remain in the matrimonial home if she has been the subject of physical or other abuse. This is a particularly difficult situation for women who leave traditional societies to live in the urban area. Similarly there is no legal provision allowing for customary land to be divided on the breakdown of a marriage. Since 97% of all land in Papua New Guinea is subject to customary tenure, this creates great problems for women whose unions come to an end for any reason.

In a report to Parliament the Minister for Justice and State Minister assisting the Prime Minister reported on the agenda of the United Nations Human Rights Commission and a commitment made at the Vienna World Conference in June 1993 by the former Minister of Justice with an undertaking to establish a Human Rights Commission responding to concerns about Papua New Guinea raised by the Commission. That legislation has been drafted and intends to set up a commission so implementing the undertaking to the 51st session of the United Nations Commission on Human Rights in Geneva. Until it is passed and implemented it will not be possible to say if it makes any specific reference to women and their rights and status.²²

²¹ B D Brunton, “Human Rights in Papua New Guinea” in the Conference *Twenty Years of the Constitution* held at Port Moresby, Papua New Guinea in March 1996.

²² The report is not published. For details, see *Drafting Instructions for the Establishment of a Human Rights Commission for Papua New Guinea*.