ASPECTS OF THE LEGAL STATUS OF WOMEN IN PAPUA NEW GUINEA : A WORKING PAPER*

BY Dianne D. Johnson**

I. *Introduction.*

It is important to stress at the outset that discussion is confined to the legal status of women. It is not the purpose of this paper to canvas the fundamental dimensions of a society under the pervasive ideology of patriarchy. Rather the focus will be on those laws which restrict the capacity for women in Papua New Guinea for self-actualisation and which serve to buttress, reinforce and perpetuate their existing roles. It is not intended to suggest that upon alteration of the legal status of women the imbalance of power will evaporate. The purpose is to identify, collect and highlight legal restrictions (and in some cases policies) which substantially hinder that emancipation.

In Papua New Guinea it is crucial to recognise the legacy of colonialism, the extent to which the rights of men and women were undermined, and the upheaval that this era caused in the political, social and economic life of this country. Equally, any evaluation of the current position must be made in the light of the neo-colonial phase which has now been entered and the dominant interests served by the post-Independence reshuffle of power.

Finally, it should be emphasised that this is a working paper. It seeks to raise important issues for discussion in a wide range of areas and does not purport to deal comprehensively with all relevant concerns.

II. *The Constitution.*

The Constitution of a State is, not surprisingly, part of the ideological matrix of that State's political, economic and social organisation. It would be fruitless to rely on the Constitution for the assertion of rights which are an anathema to, for example, the economic base of that State unless there are concomitant fundamental changes in that economic base. In Papua New Guinea, as has already been observed, an era of neo-colonialism has been entered in which the interests of international capital will play a dominant role.

The following analysis of the *Constitution* from the perspective of women in Papua New Guinea is not exhaustive. It examines certain aspects of it (as the apex of the formal legal structure) which purport to enhance the rights of women as a prelude to consideration of more detailed aspects of the legal status of women.

Statements attesting the equality of men and women are a

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* The author wishes to acknowledge the hospitality and facilities afforded to her by the Faculty of Law, University of Papua New Guinea, during the preparation of this article.

** B.A.(hons)(Syd.), Dip. K.T.C.(Syd.).

familiar refrain in international treaties, covenants, declarations of rights, and national constitutions.[1] The efficacy of such provisions is, however, always open to question. Frequently they have been revealed to be no more than symbolic affirmations, incapable of enforcement or implementation. The compilation of national constitutions of the 'Western, Communist and Third Worlds' by Duchacek[2] illustrates the recent proliferation of new constitutions throughout the world. Duchacek also points to the general practice of frequent violation of constitutional rights and liberties. Very often governments or their opponents believe that rights are subservient to might, which better serves their political ends.

Constitutions, he suggests,[3] with their emotional preambles, are both a message and a framework for future messages about the political system. They are an official collection of major principles and rules which identify the sources, uses, provisions and restraints on public power. As digests of the political autobiographies of national elites and of power distribution, they 'may be expected to contain erroneous interpretations of past experience, false analyses of existing national and international realities, faulty estimates of future developments and some deliberate deception'.[4]

Duchacek claims[5] that most modern constitutions and their bills of rights accord women equal political and economic status. However, several bills of rights add special guarantees, advantages and privileges such as the right of compensation during pregnancy and exemption from combatant duties.[6]

Accordingly it is appropriate to scrutinise the terms of the constitutional provisions conferring or purporting to confer equality on women in Papua New Guinea.

Discrimination against persons in Papua New Guinea due to their sex is unconstitutional. Section 55(1) of the PNG *Constitution* states that 'all citizens have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex.' Under s.50 of the *Constitution*, women have full franchise, can take part in the conduct of public

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1. For example, Charter of the United Nations, European Convention for the Protection of Human Rights and Fundamental Freedoms, International Covenant on Civil and Political Rights and the Declaration of Human Rights,

2. Ivo D. Duchacek, *Rights and Liberties in the World Today: Constitutional Promise and Reality* (ABC-Cleo Press) 1973.

3. *Ibid*, 27.

4. *Ibid*, 29.

5. *Ibid*, 89.

6. For example, the Soviet Constitution of 1946 (Article 122) and the Polish Constitution of 1952 (Article 66).

affairs, and hold public office.

Broad guidelines for the rights of women are more specifically addressed by the National Goals and Directive Principles which underlie the *Constitution*:

> 1. Integral human development.
>
> We declare our first goal to be for every person to be dynamically involved in the process of freeing himself or herself from every form of domination or oppression so that each man or woman will have the opportunity to develop as a whole person in relationship with others.

and

> 2. Equality and participation.
>
> We declare our second goal to be for all citizens to have an equal opportunity to participate in, and benefit from, the development of our country.
>
> We accordingly call for....
>
> (5) Equal participation by women citizens in all political, economic, social and religious activities.

The logical starting point for an examination of these provisions is the background to the drafting of the *Constitution*. The establishment of a Constitutional Planning Committee (hereafter CPC) was approved by the House of Assembly in June 1972. The CPC consisted of 15 members of the House 'representative of all parties and most areas of the country'[7] and the exofficio Chairperson Michael Somare. It is important to note that *no women were on the CPC*. The CPC was assisted by a staff whose major role was to provide information. *Staff officers were all men*. Women filled the positions of Assistant to the Executive Officer and secretarial assistants (7 positions).[8] These were not decision-making positions. The CPC also employed *visiting external consultants none of whom were females*.[9] The legislative draftsperson was also a man.

It is apparent that no women took part in the drafting of the Papua New Guinea *Constitution* at the policy-making level. Surprisingly there was not even a gesture of tokenism. However, two women were members of staff of the Prime Minister's Department which was consulted by the CPC.

Many submissions were made to the CPC. Altogether 947 groups

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7. John Goldring, *The Constitution of Papua New Guinea*, (Law Book Co., Sydney, 1978), 19.

8. *Final Report of the CPC 1974, Part II* (Hereafter *Final Report of CPC, II*).

9. *Ibid.*

or individuals[10] made submissions numbering over 2,000.[11] The CPC received submissions from Official Discussion Groups, various organisations, educational institutions, churches, missions and individuals.

Of the 437 Official Discussion Groups and District Organisations established by the Division of District Administration in conjunction with a general programme of 'political education', 3 groups had a female chairperson, 126 groups had a male chairperson and in 106 groups, no chairperson was named, usually indicating 'a rotating chairman'.[12] Each of the Discussion Groups of which women were chairpersons, were women's groups (Lae Women's Discussion Group, Morobe District, Tikana Rural (Female) Discussion Group, New Ireland District, and Kavieng Town (Female) Discussion Group, New Ireland District) and are the only women's groups recorded as having made submissions. In addition, one woman was a representative on the Milne Bay District Liaison Committee. The total female component of the Official Discussion Groups (as distinct from the chairpersons) is not documented, but the trend is clear.

Three hundred and seventy-seven individuals, organisations and institutions (other than Official Discussion Groups) made submissions. Of these only 13 were from female individuals.[13]

Submissions from students and staff of educational institutions (28), from other rural youth groups (94) and from churches and missions (12)[14] do not give any indication of male/female involvement, though where individuals are named (mostly churches and missions) they are all male.

From these figures it can be concluded that women's involvement at all stages and levels, both official and unofficial, in their *Constitution* was absolutely minimal. From the small number of submissions made by women's groups and female individuals, women either did not feel they had anything to contribute, or were not specifically encouraged to take a part in the major political event which the drafting of the Constitution for Independence so clearly was.[15]

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10. Calculated from Appendix B of *Final Report of CPC, II*, A/5-A/28.

11. Goldring, *op. cit.*, 21.

12. *Final Report of the CPC, II, op. cit.*, A/5. All 27 of the government liaison officers of the Discussion Groups were male.

13. From the Districts of Southern Highlands, Madang, Western Highlands, Northern, Morobe, Bougainville, Manus, East New Britain (2), New Ireland (2) and Central (2).

14. *Final Report of the CPC, II, op. cit.*, A/25-A/28.

15. Duchacek, *op. cit.*, 27, suggests that 'national discussion concerning the new constitution may, and often does, represent a more powerful tool of political socialisation than does the finished document'.

Even the acknowledgments in the *CPC Final Report* place the few women who were involved (as chairpersons of Discussion Groups (3), and as secretaries, stenographers and typists (7) for the CPC) squarely in their supportive secondary roles.[16]

However, the CPC concluded that their process of consultation[17] 'gave its proposals a legitimacy which they otherwise might have lacked'.[18]

The *Final Report of the CPC* articulated its objectives behind the constitutional provisions dealing with women's status, in paragraph 59, as follows:

> Equal Status and Opportunity for Women
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> We have also emphasised the importance of women being able to make their full contribution to the welfare of the country, on an equal footing with men. In recent years women have played a significantly greater part in the cultural activities. But more effort should be made by government to hasten this development. Obstacles to education and other opportunities which face women at present should be removed, and insofar as it is in the power of the Government to do so, the difficulties facing women who wish to involve themselves in the affairs of the nation should be reduced.

When one examines closely the precise formulation adopted it is apparent: (a) that government initiative in the area is acknowledged to be circumscribed, (b) that efforts will be directed to *reduction* of difficulties (not removal) and only then for the benefit of 'women who *wish* to involve themselves in the affairs of the nation' (emphasis added). The thrust of the statement is not geared towards affirmative action (positive discrimination) to redress the admitted imbalance of power. The issue of the subjugation of women (as distinct from benevolent concern for their welfare) is not addressed.

One could be forgiven for thinking that the actual substantial exclusion of women from the consultation process coupled with the amorphous terms of paragraph 59 of the *CPC Report*, would not augur well for the fruits of the Committee's deliberations. Nonetheless, the yardstick must be the conclusions reached and embodied in the *Constitution*. It is to an examination of these terms which we must now turn.

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16. *CPC Final Report, I, op. cit.*, 15/8, 9.

17. Through Official Discussion Groups, co-ordinating committees through which distribution of the 6 discussion papers was handled, visits into nearly every sub-district of the country by the CPC (divided into 2 groups, in 1973), and public meetings held by the CPC attended by an estimated 60,000 people. See *Goldring, op. cit*, 21.

18. *Ibid*, 21.

At the outset it should be observed that s.55 of the Constitution and the National Goals and Directive Principles do not have the same status.

A. The National Goals and Directive Principles.

The National Goals and Directive Principles underlie the *Constitution* and are relevant to its interpretation. However, under s.25(1) the National Goals and Directive Principles are non-justiciable.[19] As a result, 'questions arising from the National Goals and Directive Principles may not be heard or determined by any court or tribunal'.[20] Significantly, the judiciary are excluded from a decision-making role in this area. It is left to the parliament and its statutory creatures to monitor and implement the National Goals and Directive Principles: 'it is the duty of all governmental bodies to apply and give effect to them as far as lies within their respective powers'.[21]

So the actual enforcement of the National Goal and Directive Principle 2(5) calling for 'equal participation by women citizens in all political, economic, social and religious activities' is not possible. It is simply left to the discretion of governmental bodies to use their best endeavours. This represents an appeal to benevolence, a sense of fair play and enlightenment on the question of female equality. On the other hand, inertia and indifference to this exhortation can attract no greater sanction than moral opprobrium. How women can attain full and equal participation in 'political, economic, social and religious activities' as outlined in the National Goal and Directive Principle 2(5), given that the latter is to be applied by thoroughly male-dominated

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19. Except to the extent provided in s.25(3), (4) which provides as follows:

> (3) Where any law, or any power conferred by any law (whether the power be of a legislative, judicial, executive, administrative or other kind), can reasonably be understood, applied, exercised or enforced, without failing to give effect to the intention of the Parliament or to this Constitution in such a way as to give effect to the National Goals and Directive Principles, or at least not to derogate them, it is to be understood, applied or exercised, and shall be enforced, in that way.
>
> (4) Subsection (1) does not apply to the jurisdiction of the Ombudsman Commission or of any other body prescribed for the purposes of Div III.2 (leadership code...).

20. *Constitution*, Sched. 1.7.

21. *Constitution*, s.25(2).

government bodies is never made clear. Dobunaba et al [22] write that only 30 out of 557 (5.4%) public servants above Level 8 in decision-making positions are women.

It could be argued that in fact National Goal and Directive Principle 2(5) is redundant, given the National Goal and Directive Principle 2(1), 'We accordingly call for an equal opportunity for *every citizen* to take part in the political, economic, social, religious and cultural life of the country' (emphasis added). Given the explicit recognition of female inequality, however, one can only speculate as to the reasons which led to the omission of equal participation for women in the cultural sphere.[23]

B. Constitution, s.55.

The rights guaranteed under s.55 of the *Constitution* are enforceable in the Supreme Court or the National Court (s.57) and compensation can be awarded to persons injured by breaches of their guaranteed rights (s.58). Goldring comments that s.55 is expressed in very general terms and because of this may only rarely create enforceable rights despite the provisions of s.57 and s.58:

> ...In both the United Kingdom and Australia it has been found necessary to enact specific and extremely detailed legislation for the prevention of racial discrimination [and discrimination on the grounds of sex.] ...the complexity of the United Kingdom and Australian legislation is largely due to the difficulties of establishing a case of unequal treatment especially where the discrimination is of the 'indirect type'.[24]

Given the Anglo-Australian legal heritage of avoiding the prescription of statutory or constitutional civil rights it is unlikely that the tradition will be departed from in Papua New Guinea until the judiciary, (currently dominated by Australian trained judges) is replaced by national judges.[25] Unfortunately their creativity will be fettered in the immediate future insofar as their training and socialisation is drawn from the same tradition.

The scope of s.55 is limited:

1) Section 55(2). Section 55(2) states that despite the fact that all citizens have the same rights irrespective of sex, this 'does not prevent the making of laws for the special benefit, welfare, protection

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22. F. Dobunaba, R. Launch, J. Cory, H. Barnes, *The Present Status of Women in Papua New Guinea, Constraints and Goals for the Future: a Papua New Guinea Country Paper for the Regional Preparatory Conference for the World Conference on the U.N. Decade for Women* (November, 1979) 27.

23. Compare National Goals and Directive Principles 2(1) and 2(5).

24. Goldring, *op. cit.*, 244.

25. S.D. Ross, *A Review of the Judiciary in Papua New Guinea,* (1977) 5 Mel. L.J. 226.

or advancement of females, children and young persons, members of under-privileged or less advanced groups or residents of less advanced areas.'

This section no doubt purports to allow for affirmative action (positive discrimination) and is a statutory recognition of inequality. However, there is no protection without equality. To 'protect' women is most often to handicap them. In the area of the workforce the thrust of the application of protective legislation should be based on the nature of the work and not upon the sex of the workers. Women should be free to work and to be protected as workers on the same basis as men, in relation, for example, to legislation and regulations dealing with conditions and hours, entry and training.

Section 55(2) legitimises and entrenches potential inequality while it advocates the 'protection' of this strange conjunction of groups lumped together and singled out for special legislative treatment. If the concern is really with positive discrimination because of disadvanvantaged status, then one would expect to find an exhortation to enact legislation aimed at the removal of existing disadvantages. Now the impetus for change must come from the legislature. Any law reform process is slow, but in the area of anti-discrimination it is notorious. This section of the *Constitution* is evidence of only symbolic concern.

2) Section 55(3). Section 55(3) states that 'Subsection (1) [all citizens have the same rights...irrespective of...sex] does not affect the operation of a Pre-Independence law'. Again, if the real concern is with positive discrimination then one would not expect to find subsection (3) at all or at least for it to have only temporary status (for example by the setting out transitional provisions). Obviously discriminatory pre-Independence laws could be gradually phased out.

Arguably discriminatory pre-Independence laws are unconstitutional under s.11 which states that 'this Constitution and the Organic Laws are the Supreme Laws of Papua New Guinea and... all acts (whether legislative, executive or judicial) that are inconsistent with them are, to the extent of the inconsistency invalid and ineffective.' The contention would be that constitutional provisions should normally prevail over conflicting prior statutes and that there is clear evidence of an intention at the constitutional level to confer equality on women and to eliminate sex discrimination. However, on closer analysis s.55(3) proves to be a stumbling block. This is a *constitutional* preservation of discriminatory pre-Independence legislation and hence is unaffected by s.11. There is some suggestion that the rationale for s.55(3) was to preserve legislation which discriminated in favour of Papua New Guineans.[26]

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26. Goldring, *op. cit.*, 69, claims that the policies of the Somare government since 1972 have been in some ways concerned with 'reverse' or 'benign' discrimination, especially in areas which are presumed to lead to the flourishing of economic activities for Papua New Guineans. Prior to Independence, according to Goldring, there was a high degree of racial discrimination in Papua New Guinea and legislation of the late 1960's and early 1970's was enacted to eliminate it, though it was not entirely successful. The spirit of s.55(3) was to keep in force such pre-Independence laws as would discriminate positively in favour of Papua New Guineans, for example, the *Discriminatory Practices Act* 1963 (No. 33 of 1963).

However, given the general terms of s.55(3), the legislative draftsperson went well beyond this objective. The issue of pre-Independence legislation discriminating on the basis of sex seems not to have been addressed at all.

An alternative method of attack would be to argue for the reduction of the ambit of the derogation contained in s.55(3). It is arguable that the spirit of the *Constitution* is to confer equality of women and therefore any qualification on this should be given a strictly limited meaning. In interpreting situations of ambiguity the court should place reliance on the National Goals and Directive Principles, in particular 2(5). Although it is substantially a mandate directed to parliament, a court is entitled to take into account the terms of paragraph 122 of the *Final Report of the CPC*:

> ...it is important that any pre-existing legislation or policies which are in conflict with these new constitutional provisions should be altered as soon as possible, in order that our people may immediately benefit from the standards set in the new Constitution.

A further possible argument as to the limited effect of the derogation contained in s.55(3) is based upon its location in the overall structure of the *Constitution*. Section 55(1) is 'subject to the Constitution' and s.55(3) says that 'subsection (1) does not affect the operation of a pre-Independence law'. It is suggested that independently guaranteed rights such as the right to freedom of choice of employment (s.48) should extend fully to men and women equally and should not be subject to the s.55(3) preservation of pre-Independence discriminatory laws.[27] In other words, s.55(1) is a residual category to be taken into account *after and in addition to* the exhaustion of constitutional rights elsewhere conferred upon men and women. Section 55(3) is, accordingly, only a limitation on the ambit of these additional guarantees. Thus, for example, a discriminatory pre-Independence law which infringed the provisions of s.48 by curtailing the capacity of women to freedom of choice of employment could not be rescued from unconstitutionality by reliance on s.55(3). Such an approach would accord with the National Goals and Directive Principles.

Finally, it may be possible to exploit the ambiguity contained in the word 'operation' in s.55(3). It would be difficult to attack the *validity* of those laws which survive the arguments enumerated above. Clearly some discriminatory pre-Independence laws (and at least some relating to discrimination based on the grounds of sex) will be so preserved. However, even these laws need to be carefully scrutinised for the *limits* of their constitutional validity. Thus, for example, where a law confers a power to be exercised (as distinct from mandatory directives, obligations etc) by subordinate executive officials it is at least arguable that the implementation of these discretionary powers are caught by, and must be read subject to, the terms of s.55(1). This would have

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27. Other constitutional rights which fall into this category include the basic right to freedom (s.32); the fundamental rights contained in ss.35, 36 and 37; the qualified rights of all persons contained in ss.42-49; and special rights of citizens contained in ss.50-53.

the effect of paring down the scope of s.55(3) to the bone.

If a court is not prepared to accept any of these approaches there is no recourse (as far as general change is concerned) other than parliamentary intervention.

3) Section 38. Section 55 of the *Constitution* must be read in conjunction with s.38 in which all qualified rights and freedoms referred to in the *Constitution* can be (under s.38(1)(a)) regulated or restricted by the State (taking account of the National Goals and Directive Principles and the Basic Social Obligations) for reasons of defence, public safety, public order, public welfare, public health, protection of children and persons under disability (whether legal or practical), or the development of under-privileged or less advanced groups or areas, or to protect the exercise of the rights and freedoms of others; or (under s.38(1)(b)) in order to concede priority of one conflicting right ove another.

The implications of s.38 are clear. Even assuming a modest interpretation of each limb of s.38, the cumulative inroads made by the section are extensive. Any rights accorded women under s.55(1) can be qualified or limited when it is deemed necessary by Parliament. Potentially the operation of s.38 could have devastating effects on the rights of women (and men). Let us imagine a time of economic crisis and rampant unemployment: legislation could be enacted qualifying the rights of women by prohibiting married women from taking employment. This could be sought to be justified as necessary 'for the purpose of giving effect to the public interest in...public welfare' under s.38(a)(i)(D).

Goldring[28] comments that:

> ...only the right to life, the freedom from cruel or inhuman treatment and to protection of the law are expressed in absolute terms. All other rights guaranteed by the Constitution may be qualified or limited by a law which is passed by an absolute majority of the Parliament and certified according to the Speaker under s.110 of the Constitution.

The proviso to all these potential restrictions under s.38(1), namely, 'to the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind'[29] would require a novel interpretation to effectively limit s.38. If this proviso were interpreted by traditional western norms, women's position and status would not be salvaged from any further restrictions imposed by virtue of s.38. According to Goldring[30] 'the phrase "reasonably justifiable in a democratic society" ...was used because of the view of the government at the time that certain of the rights and freedoms guaranteed by that Act, would have to be restricted in order to

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28. *Op. cit.*, 223.

29. Sexist language is enshrined in the Papua New Guinea *Constitution* by Sched. 1.8(a) which states that 'words importing the masculine gender include females'.

30. *Op. cit.*, 224.

preserve the structure of the State and public order.' Chalmers[31] considered the ambit of the expression sufficiently wide to legitimate any law that the incumbent government sought to introduce for reasons of political expediency.

C. Non-Constitutional Avenues of Redress.

Apart from the sanctions available in s.57 and s.58 of the *Constitution* discussed above, women may resort to other means of redress for discriminatory practices.

1) The Ombudsman Commission. The Ombudsman Commission has extremely wide powers under s.219 of the *Constitution*. It is empowered under s.13 of the *Organic Law on the Ombudsman Commission* 1975:

> ...to investigate, on its own initiative or on the complaint by a person affected, any conduct on the part of:
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> (a) any State Service or a member of any State Service; or
>
> (b) any governmental body, or an officer or employee of a governmental body; or
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> (c) any other service or body referred to in s.219(a) of the Constitution that the Head of State, acting with and in accordance with, the advice of the National Executive Council, by notice in the National Gazette, declares to be a service or body for the purposes of this section.

The declarations of services and bodies for the purposes of s.13 was made on the 15th December 1977:

> 1. All local government bodies and provincial government bodies and officers and employees of any such body.
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> 2. All bodies set up by statute:
>
> (a) that are wholly or mainly supported out of public monies of Papua New Guinea; or
>
> (b) all of, or the majority of, which are appointed by the National Executive.
>
> 3. All members of the personal staff of:
>
> (a) the Governor-General; or

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31. Donald Chalmers, *Human Rights and What is Reasonably Justifiable in a Democratic Society*, (1975) 3 Mel. L.J. 92.

(b) Ministers; and

(c) the Leader of the Opposition; and

(d) the Deputy Leader of the Opposition.

The only jurisdictional limitation is that the conduct in question must fall into one of the enumerated categories. While this excludes the discriminatory activities of private enterprise (a serious omission) it allows scrutiny of governmental and quasi-governmental activity in this area at national, provincial and local level.

The Ombudsman Commission is empowered under s.219(1) of the *Constitution* 'to investigate any defects in any law or administrative practice appearing from any such investigation'; and under s.219(1)(c) 'to investigate either on its own initiative or on complaint by a person affected, any case of an alleged or suspected discriminatory practice within the meaning of a law prohibiting such practices.' Conduct which is 'unreasonable, unjust, oppressive, or improperly discriminatory, whether or not it is in accordance with law or practice' under s.219(2)(b) can be investigated by the Ombudsman Commission, subject to s.219(2), (4) and (5).

Clearly then, the Ombudsman Commission is a body to which women can appeal if discrimination because of their sex occurs. Although the Commission is empowered to initiate investigation into 'an alleged or suspected discriminatory practice' under s.219(1)(c), in general they investigate only on complaint by a person.[32]

After investigation the Ombudsman Commission can decide that the particular conduct of the agency under investigation is wrong, that the law or administrative practice under investigation (or any other law or administrative practice) is defective, or that the particular practice under investigation is discriminatory (within the meaning of any law prohibiting such practices). Once an opinion is taken by the Commission, it is obliged to convey that opinion together with the reasons supporting the view to the relevant Minister and to the Permanent Head (or statutory head) responsible for the service, body or person. The matter may be referred to the Public Prosecutor if this type of action is believed to be warranted. If it is the opinion of the Commission that 'administrative action has produced unfair or objectionable results, and that that action was caused wholly or partly by legislation' the Commission is obliged to report on the matter to; (a) the Parliament in the case of National legislation, (b) the relevant provincial government body in the case of legislation of a provincial government body, (c) the relevant local government body in the case of local government legislation.[33]

No court can challenge, review, quash or call into question (except on the ground of lack of jurisdiction) any proceeding or decision of the Commission.[34]

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32. Personal communication with Ombudsman Andrew Maino, 6 February 1980.

33. See *The Organic Law on the Ombudsman Commission* 1975, s.22.

34. *Ibid*, s.24.

Clearly then, women who experience discrimination or unfairness due to their sexual status from any of the agencies enumerated have recourse to the Commission. However, as the Commission has no jurisdiction over private enterprise, many women are obliged to rely solely on s.55(1) of the *Constitution*.

The wide powers of the Commission must be viewed in the context of their actual operation. The Commission's twin responsibilities - monitoring of the Leadership Code and investigation of general complaints - immediately impose severe practical limitations on restricted resources. Accordingly, policies have been adopted which are at least partially explicable as an accommodation of this problem. The Leadership Code has been given high priority. The abandonment of complaint initiation by the Commission in practice has already been mentioned. This policy is also attributable to the politically sensitive nature of such a stance and the prospect of allegations that particular departments or agencies have been singled out for special treatment. A further restraint on the complaints procedure is the defacto requirement of exhaustion of alternative remedies. Thus a complaint may simply lapse by a process of attrition as the complainant is rejected by a series of other agencies. The net result is that one of the few potentially powerful agencies for women is seriously circumscribed in practice.

2) The Law Reform Commission. Unlike the Ombudsman Commission, the Law Reform Commission is not a grievance mechanism directly available to the public for the resolution of individual problems. It would be more accurate to describe the institution as an agent of change, whereas the Ombudsman Commission has both a complaint resolution jurisdiction and power to recommend change.

The Papua New Guinea Law Reform Commission consisting of 7 Papua New Guineans, takes its briefs from the government and the research and timetable to be undertaken is determined by the Minister.[35] References are given to the Commission from time to time. Accordingly, women who wish to use this vehicle to secure general change are obliged to use lobbying tactics.

The functions of the Commission are broad and can include review of laws with a view to their systematic development and/or reform, consolidation or elimination. In keeping with the changing needs of Papua New Guinean society, they are expected to assist in the development of an indigenous jurisprudence.[36]

A law reform body has basically two options. It can be extremely pragmatic, at all times aware that recommendations made will only be enacted when and if they are politically expedient. On the other hand it can take a long-term perspective, recommend radical change and increase the risk of non-implementation.

The practical implications for women seeking to rely on this body for removal of discriminatory provisions are that Law Reform Commission proposals are ultimately contingent on government acceptance. While

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35. *Law Reform Commission Act* 1975 (No. 5 of 1975), s.9.

36. *Ibid.*

energy, resourcefulness and creativity can be invested in suggested changes and Law Reform Commissioners persuaded to accept the merits of such proposals, the latter will be shelved in the absence of government sponsorship.

III. *Employment.*

A. Anti-Discrimination Legislation.

Under s.48 of the *Constitution* 'every person has the right to freedom of choice of employment in any calling for which he has the qualifications...' Nonetheless, women face a number of obstacles in attaining the objective of equality of opportunity in the workforce.

There are a number of pre-Independence statutes which discriminate against women in employment situations. If the argument referred to above - that s.48 of the *Constitution* (and similar constitutional rights) prevails over s.55(3) - is accepted, then this discrimination can be overcome.

However, the scope to be given to the phrase 'freedom of choice of employment' remains to be tested in the courts. It could, for example, be argued that it is applicable only to recruitment situations and not to dismissals. Such a view would, of course, seriously erode the right. Being a qualified right, s.48 is subject to the terms of s.38 which, as we have seen, allows very broad restrictions to be imposed.

Moreover, a hurdle will remain as to the practical ability of women to obtain the qualifications 'lawfully required'.

The United Nations *Convention on the Elimination of All Forms of Discrimination against Women* on December 18, 1979, agreed to the following resolution:

> States Parties condemn discrimination against women in all its forms, agree to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women and, to this end, undertake:
>
> ...(b) to adopt appropriate legislation and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
>
> ...(f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
>
> (g) to repeal all national provisions which constitute discrimination against women.[37]

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37. Article 2. Papua New Guinea was unfortunately absent at the vote on the Resolutions. In the recorded vote, 130 countries voted in favour of the Resolutions, no countries voted against, 10 countries abstained, 11 countries were absent, 2 of these latter countries later advising the Secretariat that they had intended to vote in favour of the Resolutions.

When the *Employment Act* 1978 comes into force,[38] it will be an offence under s.97(a) for an employer to discriminate 'against a female person on account of her sex'. Despite this provision, the sections of the *Act* which immediately follow it discriminate against women simply on the basis of their status as females in the guise of protective legislation.

Within the Public Service, women, particularly married women, are disadvantaged and discriminatory provisions in the *Public Service (Interim Arrangements) Act* 1973 (No. 81 of 1973) legally entrench the situation.

A reminder of the chattel status of female employees lingers on in the preservation of the archaic tort of seduction. The 'service' relationship of a daughter to her father is preserved under the *Law Reform (Miscellaneous Provisions) Act* 1962 (No. 15 of 1962). An employer/father may sue a person who seduces his female employee/daughter for damages for loss of services. The proof of this claim by the plaintiff is facilitated by s.7 of the *Act*. The woman concerned has no redress.

A further illustration of the commodity status of women is to be found in new tax rules reportedly introduced by the Baiyer-Lumusa Local Government Council which 'provide for a man's pigs or wife to be put on the market' if he does not pay the appropriate local taxes.[39]

The *Employment Act* 1978 was introduced 'to repeal the *Native Employment Act* 1958, which is not only offensive in some of its terms, but is long out of date and generally an unsuitable piece of legislation'.[40]

The extent to which the *Employment Act* 1978, when enacted, will confer benefits upon women (such as maternity benefits) or prohibit discriminatory practices in employment, will of course be limited to those situations to which the *Act* applies. Specifically excluded from its operation under s.3(b) are those employment situations governed by 'any other law in force in the country'. Accordingly, persons employed under legislation such as the *Public Service (Interim Arrangements) Act*

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38. At the time of writing this *Act* has been passed but not proclaimed, proclamation being imminently anticipated.

39. *Post-Courier*, 21 March 1980.

40. See explanatory notes to *Employment Bill* 1976. For example, s.74 states that:

    a female native may be employed as an agreement worker for a period not exceeding two years:

    (a) as a nurse, wardsmaid or hospital cook,

    (b) as a school-teacher, or

    (c) in domestic service.

    Since the *Native Employment Act* 1958 is to be superseded in the near future, it will not be considered in any detail.

1973, the *Teaching Service Act* 1971 (No. 9 of 1972), the *Apprenticeship Act* 1967 (No. 3 of 1968), or the *Local Government Service Act* 1971 (No. 95 of 1971) cannot rely on its terms and will be governed by the particular provisions of the legislation applicable to them. The net result, in practical terms, is that the *Employment Act* 1978 applies to that part of the private sector which is unregulated by statute.[41]

Accordingly, there is still no universally applicable legislation which prohibits discriminatory practices in employment on the basis of sex, as mandated by s.55(1) of the *Constitution*.

B. Equal Pay.

When the *Employment Act* 1978 comes into force it will be an offence under s.97 to fail 'to pay a female employee the same wages as a male employee employed at the same level in the same work'.

Within the Public Service, elimination of salary differences between the sexes in certain areas was approved in 1969 but 'areas where the designation applied to only females were not varied in terms of salaries or provisions relating to salaries, higher duties and overtime'.[42] Equal pay laws can only work to eliminate discrimination if both men and women share the same jobs. If, for example, a job is reclassified or the terms of the job are changed so that women are removed or on the other hand, specifically designated, then women can legally be paid less. Thus, according to Siaguru, categories unaffected by the 1969 decision were Pre-School Officer, Teacher's Assistant, Accounting Machinist, Steno-Secretary, Stenographer and Typist. Towards the end of 1969 this system was reviewed and salaries were adjusted on a 'point to point' basis.[43]

The situation prior to 1969, was one of extreme inequality, and was a clear index not only of sexual discrimination but also of racial discrimination. In 1964, for example, a Papua New Guinea female in the Public Service earned 43% of the overseas male salary (a female overseas officer earning less than her male overseas counterpart, but more than a Papua New Guinea male counterpart). By 1967 the proportion of a male overseas officer's salary that a female Papua New Guinean earned in the Public Service had dropped to approximately 41% and by 1968 it had further fallen to 40%.[44]

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41. A further restriction was to have been imposed by s.3(a) which provides that, 'except where it is specifically provided otherwise, this Act does not apply to or in relation to the employment of a person (a) by the State in carrying in the vicinity of his village from day to day.' It appears that there has been a typographical error which renders interpretation of this provision difficult if not impossible even after the normal canons of statutory interpretation have been exhausted.

42. Mina Siaguru, 'Women in the National Public Service - Terms and Conditions of Employment' in *Administration for Development*, 5 October 1975, 13.

43. *Ibid.*

44. Calculated using figures given in the *Public Service (Papua and New Guinea) Regulations* 1964 as amended.

Within just over ten years then, there have been significant changes. However 'equal pay for equal work' has a very hollow ring and in practical terms is impossible until women have equal opportunity to education and training for 'equal work'.

The National Minimum Awards and Wages in Papua New Guinea are determined by the Minimum Wages Board and are binding on the employers and employees to whom they relate. Awards and Minimum Wage standards are fixed according to age, job classification relating to skill and place where the work is carried out. Sex is not a criterion. Thus the National Minimum Wage as at March 1, 1980[45] in Urban Level 1 Centres (Alotau, Arawa, Goroka, Kavieng, Kieta, Lae, Madang, Mount Hagen, Popondetta, Port Moresby, Rabaul and Wewak) varies from between K25.29 to K51.22 per week depending on age and job classification. In Urban Level 2 Centres (Bulolo, Bwagaoia, Daru, Kainantu, Kerema, Lorengau, Samarai, Vanimo, Wau, Mendi, Kimbe and Kundiawa) the minimum wage varies from K23.74 to K51.22 weekly, again depending on age and job classification. The Rural Minimum Wage is K12.40 per week.

Thus in Papua New Guinea different pay rates are permitted provided they are based on a seniority system, a merit system, a system that measures earnings by quantity or quality of production or the urban or rural location of work.

C. Maternity Rights.

The need to protect the health of women workers, as well as their employment rights during their maternity period, while at the same time relieving them of any financial worries, has been recognised by many national constitutions and has also been embodied, in general terms, in the *Universal Declaration of Human Rights*.[46]

Article 11(2) of the United Nations *Convention on the Elimination of All Forms of Discrimination against Women*, (December 18, 1979) states that:

> In order to prevent discrimination against women on the grounds of... maternity and to ensure their effective right to work, States Parties should take appropriate measures:
>
> (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
>
> (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
>
> (c) To encourage the provision of the necessary

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45. Department of Labour circular.

46. Article 25, paragraph 2.

supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

Article 12(2) further provides that:

...States Parties shall ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

The International Labour Conference has adopted several resolutions on maternity protection. In its 48th Session in 1964, a resolution was adopted in which it was stated that 'maternity protection was an obligation on society'.[47] A recommendation adopted at the 1952 Convention, provided for maternity leave of 14 weeks, payment of cash benefits to compensate for lost earnings at a rate of at least two-thirds of previous earnings, comprehensive medical care, supplementary benefits, facilities for nursing, job security greater than the actual maternity leave and certain safeguards designed to protect women's health during this period.[48] This provision applies to women employed in industrial undertakings as well as to non-industrial and agricultural work, domestic service and wage-earning employment in the home.

In Papua New Guinea, maternity leave in some form, with job security, provided full-time employment has not been for less than 90 days, is a right of all women workers[49] National or Non-National, whether single or married. Under current Public Service policy[50] woman may take a maternity leave entitlement of up to 12 weeks, 6 weeks of this leave being optional before birth and 6 weeks being obligatory after birth. This leave, however, is unpaid and there are no cash benefits. The maternity leave must come out of already-accrued sick, recreation, special leave or furlough. By taking maternity leave a woman, then, can potentially (and in fact usually does) lose other leave entitlements. In the case of a woman not having enough leave credits or where a woman makes a specific request, the period or balance of a period can be taken as leave without pay, to count as service for all purposes.

If a baby is born earlier than the expected date, the maximum

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47. International Labor Organisation *Maternity Protection: a World Survey of National Laws and Practices* Geneva 1965, 184.

48. *Ibid*, 184.

49. Subject to the provisions of the *Employment Act* 1978.

50. As set out in the Department of Public Services Commission *Circular Instruction* No. 18 of 1977 on Maternity Leave.

period of maternity leave will be less than 12 weeks. It is clearly stated that 'maternity leave is *not* an automatic right to 12 weeks sick leave to be utilised between dates selected by the officer or employee'.[51]

Extension of leave may be granted to a woman by using recreational leave or furlough accrued. Sick leave beyond the period of maternity leave will not be granted unless complications or illness arise out of pregnancy or confinement.

Officers are not compelled to take maternity leave during the 6 weeks prior to the expected date of birth, but Departmental Heads are exhorted to encourage female officers to take the full period of leave available. Extreme paternalism is well illustrated in the justification given: '...It is not in her (the pregnant officer or employee) interests, or those of the child, for her to work until the date of the birth.'[52] Given the punitive leave entitlements, many women would argue that on financial grounds alone, it is in their very *best* interests to work for as long as possible before birth. If concern was really for the health of mother and child, then in the case of women who are normally employed in jobs which are recognised to be dangerous to health, legislation could be enacted to specifically entitle them to be transferred for a period without loss of pay, to other jobs involving no danger.[53]

Within the Papua New Guinea Public Service, because maternity leave is a departmental policy directive, rather than a statutory right, it is vulnerable, and can technically be modified at the discretion of the department head. In the case of the Teaching Service, where under the *Teaching Service Act* 1971 (No. 9 of 1972), s.117, maternity leave may be granted to a woman 'for such period and on such terms and conditions as are determined by the Commission', the practical result is the same. The discretion is, however, vested in a different body, the Teaching Service Commission. What must be emphasised is that existing policy directives may be modified without intervention by Parliament.

When the *Employment Act* 1978 comes into force, an employer of a pregnant woman must agree, if the woman so desires, to the termination of employment without penalty under s.100. A woman is assured of job security if she decides to continue employment, unless she has been employed less than 90 days. Maternity leave must be granted to the woman, provided she has worked for the employer for either, not less than 108 days within the 12 month period, or not less than 90 days within the period of 6 months, immediately preceding the granting of leave. Maternity leave without cash benefits granted to women employees consists of the period necessary for hospitalisation prior to confinement, and the following 6 weeks, except in cases where sickness arises from confinement, when additional maternity leave of not more than 4 weeks to count as service, can be granted without wages. The woman employee can elect to

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51. *Ibid*, 3.

52. *Ibid*, 3.

53. As in, for example, Hungary, Japan, USSR and Argentina: ILO *op. cit.*, 253.

convert recreation leave or sick leave credits accrued into maternity leave. A woman can resume employment at any time during the maternity leave period, provided she produces a medical certificate to the employer attesting to her fitness to work. Nursing breaks of at least two half-hour periods daily during working hours are to be permitted under s.101 of the *Act*, and these periods are to be counted as working hours for wage purposes.

In Papua New Guinea then, women's rights to maternity benefits and facilities, such as cash benefits to compensate for loss of earnings, nursing premises and a network of supervised nurseries situated close to workplaces, for mothers resuming employment[54] are not available at present, unless contractual arrangements to this effect are privately negotiated. There are some child-minding centres and pre-schools available, but these are expensive and fees paid are not tax deductible.

The physical act of bearing a child must be distinguished from the constellation of roles surrounding that act, for example, nurturing and domestic labour. In very many societies throughout the world, these roles coalesce. What needs to be addressed in the context of employment are: (a) the manner of giving due credit for the act of child-bearing, by not only retaining employment with all generally applicable benefits (such as sick leave, recreation leave etc.), but also by granting full wages for the support of the positive contribution thus made; (b) modes of providing suitable facilities in the workplace and elsewhere to allow breastfeeding and properly supervised childcare; and (c) women should not be restricted in any way from performing any work role. Protective legislation as to health and safety of workers should apply to men and women equally, the focus being on the nature of the work to be performed, rather than the sex of the worker. It is suggested that the only appropriate exception to this principle is the situation of a pregnant woman.

D. Protective Legislation.

Papua New Guinea legislation has placed some restrictions on the employment of women in the guise of 'protecting' them. As suggested above, the ability to bear children is the only significant difference between women and men, and thus, in the employment context, only the child-bearing function (pregnancy, childbirth and the post-partum period) should be taken into consideration. Laws placing special restrictions on women's employment hamper women's job opportunities and prohibit the taking of 'benefits' afforded men such as overtime. Where a job is dangerous to the health of workers, then all workers should have protection, rather than the 'protection' being directed to one sex.

In Papua New Guinea, under the *Industrial Safety, Health and Welfare Act* 1961 (No. 54 of 1961), the body in authority is empowered under s.40(p) to make regulations prescribing 'restrictions necessary on the employment of young persons and females in certain trades, occupations or processes'. This is an extremely wide provision and potentially, under the guise of 'protecting' women (like children!) makes serious inroads on their right to 'freedom of choice of employment' guaranteed

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54. As laid down in the I.L.O. Convention.

under s.48 of the *Constitution*.

When the *Employment Act* 1978 comes into force,[55] women will be prohibited from being employed in heavy labour under s.98(a). The list of jobs restricted is extensive since 'heavy labour' under the *Act* includes employment in quarries, as divers, as fishers of pearl shell or any other sea products which are not fish, loading or unloading ships' cargo (other than cargo that is the produce of, or intended for use at a plantation where the person is employed), mining or carrying, pit-sawing, logging or sawing, or any other kind of work declared to be heavy labour by the Minister.

Under s.98(b) of the *Act*, women will also be restricted from working underground in mines except where they hold responsible positions and provided they are not employed in manual work.

Unless they hold 'responsible positions at a managerial or technical level', or are 'employed in health and welfare services' or are employed in a family enterprise, women are prevented by s.99 from taking employment in any 'industrial undertaking' between the hours of 6 p.m. and 6 a.m. The Minister can in the situation of a national emergency, suspend the operation of this provision if 'it is in the national interest to do so.' One wonders why it is not in the 'national interest' to accord women full choice of employment and full benefits as workers as mandated by the *Consitution*.

This provision effectively excludes women from night work or night overtime in:

> a) mines, quarries and other works for the extraction of minerals and other materials from the earth and b) industries where goods are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or where goods are transformed, including ship-building, and the transmission of electricity and other motive power and c) construction, reconstruction, maintenance, repair, alteration or demolition of any building, railway, harbour, dock, pier, canal, inland waterway, road tunnel, bridge, viaduct, sewer, drain, well, telegraphic or telephonic installation, electrical undertaking, gas-work, water-work or other work of construction, or preparation for or laying foundations of any work or structure; and d) transport of passengers or goods by road, rail or inland waterway, including the handling of goods at docks, quays, wharves and wharehouses, but not including transport by land.

If women in Papua New Guinea are to take their place as equal citizens in the economic development of their country, 'protective' legislation, whatever the rationale, clearly undermines their capacity to do so.

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55. Restrictions are extensive under the *Native Employment Act* 1958, but as these are to be superseded in the near future, they are not discussed.

E. Marital Status.

Under the *Public Service (Interim Arrangements) Act* 1973 ss.125-129, the *Local Government Service Act* 1971 and the *Teaching Service Act* 1971 s.143 and s.145, women are subjected to different terms and conditions of employment upon marriage. While it is now possible for a women upon marriage (unless 'there are special circumstances that make her appointment undesirable' under the *Public Service (Interim Arrangements) Act* 1973 s.125) to continue to work in the same capacity in the Public Service,[56] they forfeit many benefits which are afforded all other sections of the work force. In other words, this legislation does not view the wife as an equal partner in a marriage, as mandated in the *Constitution* by the National Goal and Directive Principle 2(12). She is at best only the husband's helpmate.

1) Head of Family. If a married woman can satisfy the relevant authority, the Public Service Commission, the Teaching Service Commission or the Local Government Service Commission, that she is a 'Head of Family', that she is supporting her husband or her family, or both, then benefits are not forfeited. The fact that the wife has higher job status, earns more, and/or takes full responsibility for payment of household expenses, is not automatically acceptable as a reason for becoming 'Head of Family'. A man is presumed 'Head of Family' and is not required to prove this status. A woman bears the onus of proof and the *standard* of proof is not readily ascertainable. Married (or single) men without dependents still receive their full entitlements.

2) Redundancy. Married women (unless 'Head of Family'), under the three *Acts* referred to above, can be, and are the first to be retrenched in a situation of over-supply. This retrenchment of married women is to be carried out progressively from the lowest-classified class of positions to the highest-classified class, and within each class retrenchment is to take place in the reverse order of their respective lengths of service. 'Last hired, first fired' practices place married women in an extremely vulnerable position. Married women's contribution to the workforce is clearly debased under the law.

3) Superannuation and Retirement Benefits. When a women employed by the Public Service marries (unless she can prove she is 'Head of Family'), she is no longer entitled to contribute to superannuation under s.5 of the *Public Officers Superannuation Act* 1973. She is in fact 'deemed to have resigned on the date of her marriage', under s.11(2) of the *Public Officers Superannuation Act* 1971.

A female officer who marries is also not entitled to contribute to retirement benefits under s.4 of the *Papua New Guinea Retirement Benefits Act* 1960.[57]

4) Fares and Removal Expenses. A married female officer who is not a 'Head of Family', is not entitled to fares and removal expenses for her

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56. Before 1969, married women were forced to accept continuation of their employment on a temporary basis.

57. Women must retire at 55 years whilst men are permitted to stay until 60 years.

family under s.129(2) of the *Public Service (Interim Arrangements) Act* 1973. A female married teacher however, can be granted fares and removal expenses where her husband has not been granted fares and removal expenses within the preceding 12 months.

5) Further Restrictions. Sexual discrimination transcends racial boundaries. In an Employment Agreement examined by the author, between the Public Service Commission and an unmarried female overseas staff member of a Public Service Training College signed in June 1979, it was clearly stated that on marriage, unless she could prove she was 'Head of Family', she was not entitled to; (a) gratuity, (b) leave fares, (c) fares on repatriation as specified in the Terms and Conditions, (d) settling-in or settling-out allowances, (e) education subsidy and fares, or (f) accommodation. Moreover, the Public Service Commission had the discretion to terminate her employment within 2 months of the marriage.

Married women are also discriminated against in obtaining part-time work in the Public Service (see below).

Under the United Nations *Convention on the Elimination of All Forms of Discrimination against Women* (1979) Article 11, it is agreed that discrimination against women on the grounds of marriage be eliminated. Clearly then Papua New Guinea laws in this area are outmoded and expressly deny the spirit of the *Constitution*.

F. Recruitment.

Recruitment policies affect the availability of work to women. The Public Service Commission can under s.39 of the *Public Service (Interim Arrangements) Act* 1973 specify that a vacant position is to be filled by only males or only females. Further, the Commission can specify 'that males or females will be appointed, promoted or transferred in particular proportions.' This provision could be used as positive discrimination to enhance women's position in the Public Service but given the many other restrictions placed on women in the Public Service, one is entitled to speculate that this has not been the case.

Job advertisements requesting applicants of one sex or the other, for a particular position are regular features of the *Post Courier*. For example in the *Post Courier* 27 March 1980, there were two positions advertised by Queensland Insurance (Papua New Guinea) Ltd. for 'Male Insurance Officers'. When the *Employment Act* 1978 comes into effect this type of advertising will constitute an offence under s.97(a).

G. Part-Time and Casual Conditions.

For many mothers part-time or casual employment is a viable compromise between unpaid family obligations and domestic labour, and their need or choice to seek employment beyond the home.

For part-time workers within the Public Service, according to Siaguru[58] 'salary increases are gained at an equivalent rate to that applying to full-time employment'. However, as she points out, part-time work confers only temporary status involving a loss of significant benefits. Since January 1975, Siaguru claims, a part-time employee can

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58. *Op. cit.*, 14.

work an unlimited number of hours and is paid for that number of hours.

However, under the *Public Service Regulations* 1964, reg. 86, a married woman 'shall not be temporarily employed... unless the desired assistance is not otherwise available and the Commission certifies that there are special circumstances that make her employment desirable'.

When the *Employment Act* 1978 comes into force, casual and part-time workers will not be entitled to recreation or sick-leave.

H. Conclusion.

At the time of writing a group of women are meeting and planning a submission to the Prime Minister concerning the discriminatory provisions of the *Public Service (Interim Arrangements) Act* 1973. The fact that many of these provisions have been retained in proposed legislation (namely the *Public Employment (Conditions of Service) Bill* and the *National Public Service Bill)* is of extreme concern to these women.[59]

That there should be a legacy of discriminatory legislation from the colonial era is sufficient cause for concern. That the problem persists in 1980, five years after Independence and half-way through the Decade of Women when three important pieces of legislation directly concerned with these issues are being considered by parliament does not augur well for the future. This opportunity lost, it will be some time before the momentum for change is generated again.

IV. *Education.*

In order that women participate equally in the development of Papua New Guinea, within the workforce in particular, access to education and training is an important consideration. This is recognised in the *Final Report* of the CPC[60], which urges that '...obstacles to education and other opportunities which face women at present be removed...'.

Government policy since Independence has been specifically 'directed towards equalising the numbers of girls and boys in school and towards making greater use of the talents and skills of women in general in developing Papua New Guinea'.[61] According to Palmer[62], all the major political parties have announced their commitment to the increased participation of women in all levels of national development. Within the Education Department itself, policy has not only been directed to the greater encouragement of girls into secondary education, but also towards higher recruitment of women into teacher training.

Within the primary field of education, it is reported[63] that in

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59. Personal communication.

60. *Op. cit.*, paragraph 59.

61. Penny Palmer, *Girls in High Schools in Papua New Guinea: Problems of the Past, Present and Future*, E.R.U. *Research Report* No. 23, U.P.N.G. 1978, 81.

62. *Ibid*, 12.

63. *Ibid*, 81.

nine of the 20 provinces of Papua New Guinea, there are as many girls as boys attending primary schools. In the other 11 provinces, improvements in equalising the situation are indicated, although prejudice against girls attending school is apparent, particularly in the highlands areas. Overall, however, despite the fact that 'primary school enrolments of each sex have more than doubled between 1961 and 1976, girls' share of places is today worse than in 1961'.[64]

Enrolment at secondary schools shows a serious disproportion between males and females. The entry into secondary education according to Palmer[65] 'is a very real cut off point for girls'. This is particularly so in the highlands areas. In six provinces, there is a proportion of one female to every four males.[66]

At the tertiary level of education, women are again under-represented. In 1976, 10% of the student body at the University of Papua New Guinea was female.[67]

Weeks[68] suggests that it is easier for students, particularly female students, to receive a tertiary education 'if they are not from villages, or if fathers have had more than primary education themselves and have wage jobs'. The impact of the university experience on women is well-documented by Shea and Still, who write:

> Male drunkenness, threat of physical aggression and pregnancy are the most serious problems facing women students. The first two place considerable limits on females' freedom of movement and their sense of security. [The response of the university authorities was to exacerbate the restrictions already placed on women (but not men) by] the increased use of barbed wire and security guards. There seems to be no administrational consideration of what such measures convey about the administration's opinion of male students' ability to follow rules and female students' right to freedom of movement. It would not be an exaggeration to say that some female students have concluded Luavi [the female hall of residence] is prison-like.[69]

Grieve[70] says that in interviews for a study given by a large

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64. *Ibid*, 22.

65. *Ibid*, 12.

66. *Ibid*, 25.

67. Kathy Still and John Shea, *Something's Got to be done so we can survive in this place: The Problems of Women Students at U.P.N.G.*, E.R.U. *Research Report* No. 20, U.P.N.G. 1976, 6.

68. In Palmer, *op. cit.*, 14.

69. Shea and Still, *op. cit.*, 64.

70. In 'Decentralisation of Education in the Northern Province', E.R.U. *Research Report* No. 29 (1979) 58.

number of teachers, planners and politicians, views about women in the educational system were:

> divided largely on the basis of sex - that is, the women who were interviewed expressed concern at their lack of status in society, whereas the men, with one exception, believed that the education of women was a major factor in the breakdown of Papuan culture.

Grieve comments[71] that little has been done in regard to womens' disadvantaged status and suggests that a major change in attitude towards women is necessary before women can attain equality in the education system. However Grieve's notion of 'educated women' and the extent to which the process of education enables achievement of active and equal participation by them is at least an ambiguous one. This is illustrated by the remarkable comment with which Grieve concludes his remarks on the disadvantaged position of women in education:

> Perhaps when more and more men require an educated women (sic) for a wife there will be a corresponding increase in bride price for an educated girl and such a situation may cause parents to reconsider withdrawing their daughters from school in order to do the chores around the home. Until something of this nature occurs, it seems to me that women in Papua New Guinea will have to accept their present status in society.[72]

It is not only the attitudes of 'society' which requires change but those of education researchers as well!

The net effect of the minority status of female tertiary students, the male aggression faced by them and the unsympathetic response to these difficulties must undoubtedly be to impede the effective pursuit of their studies. Women who survive the university experience do so not because of any encouragement to them to participate equally at this level of education but despite the considerable odds against them.

Both the University of Papua New Guinea in Port Moresby and the University of Technology at Lae are bound by specific legislation prohibiting sexual discrimination in recruitment policy of students and officers, and in graduation. The denial of any benefits and privileges within the institution due to a person's sex is also prohibited.[73]

However attitudinal change cannot be legislatively induced. For example, the following item[74] appeared in *The University This Week* (7 September 34/79) under the heading 'Discriminatory Language in

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71. *Ibid*, 58.

72. *Ibid*, 59.

73. *University of Papua New Guinea Act* 1965 (No. 16 of 1965) s.39 and *Institute of Higher Technical Education Act* 1965 (No. 17 of 1965) s.34.

74. Signed B. McFadden, Law Faculty.

University Job Announcements':

> The University Secretary has requested that all University advertisements for vacant positions be directed to the Staff Office prior to publication. It should be noted that, for the past several weeks, an advertisement for the position of University Publications Officer has appeared in the Post Courier. The language of this advertisement refers throughout to the potential Publications Officer as "he", giving the impression to this reader that only men would be considered for the position.
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> As one of PNG's national goals is to assure that women participate equally with men in all aspects of national life, it would appear important for the University to take the lead in eliminating even the appearance of discrimination against women in employment by insuring that all its job advertisements encourage all qualified applicants, male and female, to apply for consideration.
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> To this end, I would urge all those responsible for drafting job announcements to avoid the unnecessary use of gender-specific terms.

Domination of the education system by males inevitably lends to domination of the workforce by men. Bernard Narakobi writes: 'Melanesian women today do not have the same educational opportunities which results in less women than men being in places of high learning and employment'.[75]

V. *Marriage.*

Any analysis of women's legal status in marriage must transcend the false choice dichotomy of opting for the mores and values of western-style marriage or customary marriage. Neither is sacrosanct. Each embodies the imbalance of power between the sexes although the manner in which this is achieved varies.

The family unit is clearly viewed by the *Constitution* of Papua New Guinea as the cornerstone of Papua New Guinean society. In *National Goal and Directive Principle* 1(5):

> The family unit [is] to be recognised as the fundamental basis of our society and ...every step [is] to be taken to promote the moral, cultural, economic and social standing of the Melanesian family.

Marriage is one of the major legal regulators of this family unit and equality between marriage partners is viewed as essential for a 'complete marriage relationship'. *National Goal and Directive Principle* 2(12) calls for:

> Recognition of the principles that a complete relation-

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75. 'Melanesian Voice', *Post-Courier* 12 January 1977.

ship in marriage rests upon equality of rights and duties of the partners and that responsible parenthood is based on that equality.

Since 1964, people in Papua New Guinea have had the choice of entering marriage according to custom under s.55 of the *Marriage Act* 1963 (No. 84 of 1964), or by a non-customary western-style ceremony as set out in Part IV of the *Marriage Act* 1963, ss.28-54. Both forms of marriage are equally valid and effectual under s.55(2) of the *Marriage Act* 1963.

A. Customary and Non-Customary Marriage.

1) Customary Marriage. A customary marriage must be entered 'in accordance with the custom prevailing in the tribe or group of natives to which the parties to the marriage or either of them belong or belongs', under s.55 of the *Marriage Act* 1963. There is much variation in the procedures used to signify entry into marriage throughout Papua New Guinea, and there is much variation within any given society as shown by the cases reported in Barnett:

> The cases reported... are not carefully selected "trouble cases", they are the histories of a cross-section of the small communities studied. Most of the parties concerned are now accepted by their peers as respectably married persons but a study of the variety of procedures (or lack of procedures) by which they achieved this status demonstrates the futility of courts trying to find rules about formation of marriage by reference to obligatory procedures. In some villages about the only common denominator between the informants is that their union is accepted by the community as a marriage.[76]

However the most widely practised features of customary marriage procedures are:[77]

(i) the payment of bridewealth

(ii) the betrothal and engagement

(iii) the wedding ceremony

(iv) the delivery of the bride

(v) cohabitation

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76. T.E. Barnett (ed.) *Casebook on the Formation of the Customary Marriage in Selected Areas of Papua New Guinea* (Administrative College of Papua New Guinea n.d.), 3-4.

77. See cl. 5 of the *Family Law Bill* incorporated in the Law Reform Commission of Papua New Guinea's Working Paper No. 9, *Family Law* (March 1978).

(vi) birth of a child

(vii) acceptance by the community to which each of the parties belongs that the parties are married according to custom.

The courts have wide powers to obtain evidence of custom under s.5 of the *Native Customs (Recognition) Act* 1963 (No. 28 of 1963) though McRae[78] suggests that the cases indicate that full use is not made of their powers. If the parties to a marriage have no common custom, if they come from different areas, or if one or both have lost their affiliation with a particular customary group, they can enter a marriage in accordance with the custom of the group of either party under s.55(1) of the *Marriage Act* 1963.[79]

2) Western-style or Non-Customary Marriage. A western-style marriage is often referred to as a 'Part IV marriage' because the formalities for entering this kind of marriage are set out in Part IV of the *Marriage Act* 1963. Western-style marriage was introduced to Papua New Guinea by the colonial administration. The ease of entry into this kind of marriage (merely requiring a short civil or religious ceremony), and the fact that registration is compulsory, makes it easy to prove the existence of a Part IV marriage - in marked contrast to the difficulty of proving customary marriage.

Papua New Guinea's dual system of marriage means that many of the practices and rituals which surround customary marriage are protected and recognised in the eyes of the law. Many of these practices, it could (indeed has been) argued, do not enhance the status of women, in fact they deny women equal rights and are discriminatory.

B. Bride Wealth.

Much controversy has surrounded the institution of bride wealth in recent years. Bride wealth is a widespread institution throughout Papua New Guinea, occurring in most societies, though it is by no means universal.

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78. Heather McRae, *Cases and Materials on Family Law in Papua New Guinea, Part I: Entry Into Marriage,* (University of Papua New Guinea, 1978) 60.

79. Interestingly, the Law Reform Commission's *Family Law Bill* (*op. cit.*) cl. 5(3) suggests that 'where there is a conflict between the custom of the husband and the custom of the wife with respect to the requirement of a valid customary marriage, in the absence of any agreement between the parties, the custom of the wife shall determine the validity of the marriage'. The commentary to the Bill, according to McRae (*op. cit.*, 75) gives no reason for giving preference to the custom of the wife, and could be a breach of the Constitutional provisions prohibiting discrimination on the ground of sex.

Traditionally:

> the form, scale and importance of marriage payments show a wide and apparently random diversity; and it seems they do not have the same function and are not viewed in the same way in every society... by far the commonest rationale of bride price by peoples who practise it is that any marriage means the loss by the woman's family or kin or local group of a useful and valuable member and a potential bearer of children, with a corresponding gain by the man's group. It is thought therefore just to restore the balance by the gainers compensating the losers, in conformity with general principles of economic reciprocity.[80]

This view of compensation for loss of economic and social services, Ryan argues, would be consistent with virilocal residence where wives move (theoretically and usually in practice) to the husband's group.

However there is evidence that bride wealth payments take place in societies which have uxorilocal and avunculo-virilocal residence. In many societies the underlying principle of marriage is the exchange of women between groups. Yet even where there is strict reciprocal exchange, payments are still in order. Marriage exchange and bride wealth, it could be argued, are the foundation for the establishment and maintenance of social relationships and are an essential aspect of the traditional Melanesian way of life.

On the other hand, the quantity of goods exchanged has increased noticeably in recent years. A report in the *Post-Courier*[81] documents what is believed to be the highest bride price yet known in Papua New Guinea. The total, at that date, was K10,027 in cash, 1,994 armshells, 183 bags of rice, 103 bales of sugar, 100 bags of flour, 2 pigs, and other foodstuffs. The effect of inflation on bride wealth has meant that for a young man payment and contributions to his own and to his relatives' bride wealth can become a heavy burden. Huge bride price payments, given over in one transaction, have produced the arguments that women should not be bought and sold like commodities and that bride wealth is demeaning to women.[82]

No matter which rationalisation is relied upon, payment of bride wealth (either by one man to a woman's family, by one kin group to another, or by reciprocal exchange between kin groups) symbolises woman's *passivity*. It clearly acknowledges her servicing role, her commodity status, her role as a preserver of wider group affiliations and in some

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80. P. Ryan, (Ed.) *Encyclopaedia of Papua New Guinea* Vol. 11 (Melbourne University Press, 1972), 705.

81. 21 November 1979.

82. Under the present law, Local Government Councils may make rules regulating bride wealth rates under s.35 of the *Local Government Act*, 1963 (No. 16 of 1964) but McRae (*op. cit.*, 94) indicates that Councils which have set limits have found them difficult to enforce.

cases her role in enhancing male prestige.

This is borne out by a case in Hohola.[83] Informally arranged adoption of children has been a common practice in Hohola. However in one case the biological parents wished to take their daughter back after many years 'adoption' to receive the bridewealth payment. The adoptive parents felt they should receive part of the bridewealth but had no legal rights as no agreement had originally been drawn up.

A further consequence of bridewealth is the effect it has on young women's education. Matane[84] discusses his experiences as an Area Education Officer at Minj in the Western Highlands. In trying to convince parents and relatives of the need to educate their girls as well as their boys, he met considerable opposition. These parents and relatives opposed the further education of their girls since it necessitated the girls going to another area of the country. This increased the possibility of the girls marrying men from other areas and expected bride prices would be lost.

C. Consent.

Ryan[85] has assembled material on marriage regulation, consent being a largely irrelevant issue for the people actually involved in the marital alliances.

In traditional societies of Papua New Guinea the degree of restriction upon arrangement of unions is variable. Every society however recognises, and for the most part observes, incest and exogamy prohibitions. There are varying and many prescriptive rules. In those societies with a pronounced unilineal bias, the lineage is invariably exogamous,[86] the clan nearly always so and the phratry usually. On the East coast and islands, there is also some degree of local exogamy,[87] and the attitude that marriage is improper between people who were reared and live together, is general even when it is not made explicit. In societies of non-unilineal descent, marriage is forbidden between categories of specified cognates and affines. Where there is totemism,

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83. Lynn Oeser, 'Hohola: the Significance of Social Networks in Urban Adoption of Women in Papua New Guinea's First Low-Cost Housing Estate' *New Guinea Research Bulletin* No. 29 (1969), 78.

84. Paulius Matane, 'Bride Price versus Education for Girls in the Highlands of New Guinea' *Journal of Papua and New Guinea Society* 1:1 Summer 1966-67, 58-60.

85. *Op. cit.*, 709.

86. With one possible exception in North New Britain, see A. Chowning, 'Lakalai Kinship' *Anthropological Forum* Vol. I 1963-66.

87. C.S. Belshaw, *The Great Village* (Routledge & Kegan Paul, London 1957); A. Capell, 'Notes on the Islands of Choiseul and New Georgia, Solomon Islands' *Oceania* 14:1943-4; H.I. Hogbin 'Marriage in Wogeo, New Guinea' *Oceania* 15:1944-5.

people of the same totem may not marry[88] and moieties are also exogamous. The prescriptions upon marriage arrangements are complex, widespread and render consent largely irrelevant. Marriage rules are more strictly adhered to in some societies than others, while men of higher status can often exert their influence to 'bend' them.

Apart from general prescriptive rules, in some areas, the choice of spouse is further circumscribed by preference ' rules'.[89] Difficulties in arranging these preferred unions mean that the majority of marriages do not follow the expressed ideal. Genealogies are very often falsified.

Child betrothals, in which the child involved cannot give informed consent, also occur in many societies, as does polygyny in which consent by the first wife or wives is largely irrelevant.

Some societies allow courting and a certain amount of choice, but even in such relative freedom parental pressure can be exerted and for economic and political reasons men may push for an alliance between their children despite the wishes of those children. Resistance can and does occur. Ryan[90] suggests that boys can resist more easily than girls. A man's first marriage is more likely to be controlled by a kin group than his subsequent marriages. Arrangements of payment for subsequent marriages become largely his responsibility.

Under s.6 of the *Native Customs (Recognition) Act* 1963 or s.57 of the *Marriage Act* 1963, the courts may refuse to recognise a customary marriage where either party has not given full and free consent. According to McRae[91] 's.6(I) of the *Native Customs (Recognition) Act* 1963 has never been invoked by the courts to invalidate a customary marriage and the circumstances in which it could be invoked are not clear'. As to s.57 of the *Marriage Act* 1963 McRae[92] again comments that 's.57 has been invoked in none of the reported cases and is of little practical effect because women forced to marry against their will are unlikely to bring proceedings under the section'.

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88. D.L. Oliver, *A Solomon Island Society* (Harvard Uni. Press Cambridge, Mass. 1955); B. Malinowski *The Sexual Life of Savages in Northwestern Melanesia* (Routledge & Kegan Paul, London, 1932).

89. Thus a patrilateral cross-cousin is the preferred wife in parts of the Eastern Highlands (R.F. Salisbury, *From Stone to Steel* Melbourne Uni. Press, Melbourne, 1962) and in the Trobriands, (Malinowski, *op. cit.*,) but she is forbidden as a spouse in Dobu (R.F. Fortune, *Sorcerers of Dobu* Routledge & Kegan Paul, 1963). Bilateral cross-cousin marriage is common in some of the islands (D.L. Oliver, *op. cit.*, 1955; A. Chowning, *op. cit.*, 1966) but in at least one district of Bougainville, Ogan (in E. Ogan, 'Nasiroi Marriage' *Southwestern Journal of Anthropology* 22:1966) reports that there is a change in marriage preference to matrilateral cross-cousins.

90. *Op. cit.*, 704.

91. *Op. cit.*, 56.

92. *Op. cit*, 108.

Western law has superimposed consent as a pre-requisite for a valid customary marriage. That this imperative has no more than symbolic value is manifest given the disparity between the rules and the actual practice described above. Full and free consent by women (and men) before entering any marriage is essential for equality within the relationship.

Strathern[93] has taken issue with this perspective:

> In the case of rights over mature but unmarried girls, there is likely to be legal ambiguity for some time. On the one hand, just recognition must be given to the values of those communities which practice betrothal, or where a girl's parents or other guardians are in authority over her and/or have rights to dispose of her in marriage. On the other hand, under the present conditions of social change, it is also desirable that girls who wish to exercise autonomy as citizens, which may include marrying contrary to such customs, shall be free to do so. Such a desire is likely to arise mainly with women who have had higher education or who are living away from their home area. This is a difficult matter, however, and *it would be unfortunate to encourage a single-stranded set of values* (e.g. girls have the "right" to marry where they want). In many rural communities still, marriages are of great social importance and the rights of men in relation to them must be respected. Indeed, in some parts local people identify a breakdown in law and order with a breakdown in control over their women. This is an area which calls for extreme judicial sensitivity. It is possibly necessary to emphasise the desirability of a balanced viewpoint here, for if women are at an undue disadvantage in local dispute-settlement processes, they may also be at an undue advantage in official courts which adopt a western viewpoint about female culpability and autonomy.

The attempt to be even-handed about the merits of customary values and personal autonomy for women bedevils this discussion. The totally understandable empathy with the social upheaval which is undoubtedly occurring and which often amounts to an agonising personal struggle in the lives of Papua New Guinean women becomes the justification for *not* making a value judgment about women's autonomy. These two aspects can and should be separately analysed. Strathern implies that a desire for autonomy in female citizens (as illustrated by freedom of choice of marriage partner) is a likely consequence of higher education or removal from the influence of the village environment. Her view seems to be that if such a desire arises under those conditions it is 'legitimate'. However, the remainder of the passage quoted seriously erodes this acknowledgment of partial autonomy for a select group of women. Strathern explicitly denies the majority of women in rural

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93. Marilyn Strathern, *Report on Questionnaire Relating to Sexual Offences as defined in the Criminal Code* (Department of Law, Port Moresby, 1975), 89.

communities the right to self-determination, as far as a marriage relationship is concerned. To assert that 'marriages are of great social importance' does not address the issue of freedom of choice and certainly does not lead to the conclusion that 'the rights of men in relation to them must be respected'. To argue further that the loss of control of women is sometimes perceived as a 'breakdown in law and order' to justify the retention of such control is at least highly questionable. It is riddled with assumptions as to law and order, what constitutes a 'breakdown', the legitimacy of a particular perception, the nexus between loss of control of women and the so-called breakdown in law and order, and the impropriety of the status quo being dislocated by the assertion by women of their autonomy in this sphere.

Finally, it is somewhat remarkable to see an assertion that women may have 'an undue advantage' in western courts. To the very limited extent to which there is positive discrimination in western courts, it can be said with confidence that this is the very least to be expected given the legacy of the past and the fact that only marginal improvement can be achieved through court processes.

D. Polygamy.

Polygyny (a form of polygamy in which one man has several wives) is a form of marriage which is traditionally quite common throughout Papua New Guinea. In many societies a man's status was related to the number of wives he could acquire, the number of children they bore him and the gardens and pigs they could tend for him. Wives could potentially increase affinal kin to assist him economically and to give him political support.

However, in societies which condone polygynous marriages, women do not enjoy the reciprocal right of marrying several men.[94] Under polygyny, co-wives are usually seen as rivals and always their relations are a potential source of conflict.[95] Among the Siuai 'from the women's viewpoint a polygynous marriage is unsatisfactory, most women preferring to be the only or at least the first, wife of a man... Even a first wife does not favour polygyny. Her work burden might be eased somewhat but at the same time she acquires a rival. Nor is her prestige enhanced or her authority respected...'[96]

In Papua New Guinea, customary polygamous marriages are valid under s.55 of the *Marriage Act* 1963.[97] While the colonial administration

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94. Polyandry has been reported in Papua New Guinea, but it is not widespread and little about it has been documented. H. Powdermaker, *Life in Lesu; the study of a Melanesian society in New Ireland*, 227, indicates that it occurred in New Ireland.

95. M. Strathern, *Women in Between* (Seminar Press London 1972), 50-55; D.L. Oliver, *op. cit.*, 233-236; K.E. Read, *The High Valley* (Allen-Unwin, London, 1966).

96. Oliver, *op. cit.*, 226.

97. Section 20(1)(a) of the *Marriage Act* 1963 does not apply, and they are expressly exempted from the provisions relating to bigamy under s.64(5) of the *Marriage Act* 1963 and s.371(8) of the *Criminal Code Act* 1974.

made little attempt to suppress polygamy, the Christian missions in Papua New Guinea were vigorous in their discouragement and in some areas have almost succeeded in suppressing the practice entirely.

The Law Reform Commission:[98]

> recognises the fact that there are societies in which polygamy is accepted and, to a lesser extent practised. It is not intended to force polygamous marriages underground, but to discourage the practice by requiring the consent of the wife or wives before a polygamous marriage may be entered. If all parties are in agreement, then we believe the parties should be free to marry polygamously.[99]

McRae comments:

> It is difficult to see how to ensure that the consent of the existing wife or wives is not coerced by threats of physical violence or of divorce. If a wife refused to consent to her husband's marriage, it is likely that he would simply divorce her and then marry the new wife.[1]

When a western-style marriage is contracted, a second marriage whether customary or non-customary is void under s.20(I)(a) of the *Marriage Act* 1963, and the offence of bigamy committed. McRae[2] writes that 'no statistics are available, but it seems that many Papua New Guineans deliberately or inadvertently breach the laws which prohibit bigamy... Prosecutions for bigamy are infrequent. It appears that the police refrain from taking active measures to enforce the law in this area and any such attempt would lead to a serious social disruption'.

It is not intended here to engage in a protracted discussion of the even more greatly attenuated rights of a woman who is one of a group of co-wives. For example, under the *Public Service (Interim Arrangements) Act* 1973, the *Teaching Service Act* 1971, and the *Workers Compensation Act* 1958, a 'wife' of an officer does not include a wife of a customary polygamous marriage entered after the date of appointment by the officer. Under the *Retirement Benefits Act* 1960 a 'wife' of a contributor does not include a wife of a polygamous marriage entered upon after the date of the appointment of the contributor. Moreover, if the contributor dies and has more than one wife (prior to his appointment), under s.34 the pension is to be paid to the wives in equal proportion. Under the *Public Officers Superannuation Act* 1971, s.45(5), if a married male pensioner dies and is survived by more than one wife,

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98. Working Paper No. 9 *Family Law* (March 1978), 8.

99. There seems to be some confusion in this statement between polygamy, which they claim to be addressing, and polygyny, which is what they are in fact addressing.

1. McRae, *op. cit.*, 138.

2. McRae, *op. cit.*, 133-4.

the amount of pension payable to a single wife is to be paid to each wife in equal proportions.

Despite the possibility of shared domestic labour, the overwhelming feature of such relationships is the potential alienation of built-in threat of tension and conflict ever-present in the lives of these women.

The above critique of customary marriage and practices may appear to lend some credence to the notion that western marriages come closer to a realisation of equal partnership. The simplicity and apparent procedural fairness of Part IV marriages belie the actual power relationship and inequality. Inevitably, any purely legalistic analysis is an arid exercise unless one takes the next step of analysing women's subservient role in the marriage. The power imbalance is directly attributable to economic and social factors. The literature in this area is extensive and it is not the purpose of this paper to address the oppression of women under monogamous western unions.[3]

Thus women are constrained in differing ways according to the particular system of marriage that governs their union. However, there are also principles of western law which treat Papua New Guinean and expatriate married women differently. A recent graphic example of this is to be found in *Mary Gugi v. Stol Commuters Pty Ltd* (S.C. 52, 1973). Mary Gugi, a Papua New Guinean, appealed against the award of damages arising out of the death of her husband in the crash of a plane belonging to the respondent. She had been awarded $10,000, about one quarter of the amount usually awarded by Australian courts to young working class widows according to Kaipu,[4] by the trial court. In concurring with the trial court that Papua New Guinean wives should not be treated by the courts like Australian wives, Williams and Prentice JJ. took into consideration a number of aspects of Papua New Guinean life, including the appellant's freedom to remarry, the financial obligations of the deceased to extended family members, to his son, and to other potential children had they been born. In this way they justified the diminution of damages. The Full Court allowed the appeal, raising the damages slightly, disagreeing with the trial court as to particular details of Papua New Guinea life which were relevant in the case.

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3. For a wider discussion, see E. Zaretsky, *Capitalism, the Family and Personal Life* (Pluto Press, London, 1976); Simone de Beauvoir, *The Second Sex* (Jonathon Cape, London, reprinted 1972); Juliet Mitchell, *Psychoanalysis and Feminism* (A. Lane, London, 1974); Juliet Mitchell, *Women's Estate* (Pantheon Books, New York, 1972); Germaine Greer, *The Female Eunuch* (Penguin, 1971); Maxine Nunes and Deanna White, *The Lace Ghetto* (New Press, Toronto, 1972); Sue Sharpe, 'The Role of the Nuclear Family in the Oppression of Women' in Wandor, M.(ed.) *The Body Politic* (Stage 1, London, 1972).

4. Samson Kaipu, 'Are Papua New Guinean Wives Like Australian Wives?' (1974) *Mel. L.J.* 274-5.

VI. *Dissolution of Marriage.*

Due to the dual system of marriage in Papua New Guinea, there is also a dual system of divorce. However the individuals are not at liberty to choose the form of divorce. Parties to a customary marriage must obtain a customary dissolution and parties to a non-customary marriage must obtain dissolution under the *Matrimonial Causes Act* 1963.

According to McRae,[5] 'the overwhelming majority of Papua New Guinean's conduct their matrimonial affairs in accordance with customary law'.

A. Dissolution of Customary Marriage in Accordance with Custom.

The customary laws and attitudes to dissolution of marriage throughout the country are extremely disparate. Divorce is a matter affecting the whole community, not just the two individuals who were party to the original marriage, since divorce can also dissolve the relationships between two kin groups.

Since there is often no formal ceremony associated with divorce, and given that it may be a gradual process, there is often great difficulty in deciding when separation in fact becomes divorce. The problems involved in establishing whether a customary divorce has been obtained are as complex as those in proving customary marriage.

The reasons for customary divorce are many. The main reasons according to McRae,[6] seem to be:

1) Mistreatment. Political disjunction between affines, desire for another or further partner, or lack of consent over the original alliance give rise to marital disputes, during which physical violence is not uncommon. In general 'the wife is more likely to suffer from beatings. The husband and his kin may inflict brutal punishment on the wife for misconduct'.[7] Wives often retaliate by sorcery, poisoning, breach of menstrual taboos or by refusal to carry out domestic duties or refusal to have sexual intercourse with their husbands.[8]

2) Wife Returning To Kin. This often precipitates divorce proceedings and kin will support the woman if her viewpoint is believed or if they want a divorce to eventuate. If she receives no support, her position in her natal village is untenable and she is obliged to return to her husband.

3) Friction Between Co-Wives. This is a common cause of divorce where polygyny is practised.

4) Adultery. Ryan[9] suggests that adultery is a major source of

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5. *Cases and Materials on Family Law in Papua New Guinea, Part II: Dissolution of Marriage* (University of Papua New Guinea 1978), 171.

6. *Ibid*, 185-188.

7. *Ibid*, 188.

8. *Ibid.*

9. *Op. cit.*, 708.

serious conflict throughout Papua New Guinea. He further comments that women can do relatively little about adultery by their husbands. Only with the support of powerful kin can a woman leave her husband. Her only weapon very often is through public humiliation which in turn may invoke the powerful sanction of shame. Men, in all but a few societies, are in a much stronger position. At one extreme are those Highland societies in which a woman caught in adultery might be drowned,[10] maimed for life by having her nose lopped off or leg tendons cut, or have heated stones thrust into her vagina.[11] The right to kill both wife and lover is preserved in some societies, though in practice the husband usually satisfies his honour by physical violence upon the woman or less commonly, divorce. Compensation can be demanded of the male adulterer and sometimes his kinsmen. The husband's kinsmen are also likely to involve themselves in the general identification of the offence as a challenge to their group, and thus demand compensation from the male adulterer's group.[12] The offence generally has much wider social repercussions and considerable public significance than it does in western societies.

The Law Reform Commission claims that in Papua New Guinea the 'essence of adultery is the usurpation of the husband's right to his wife's sexuality by the male adulterer'.[13] Complicating the issue is the fact that adultery is a criminal offence,[14] subject to fine, six months imprisonment or both. Proceedings may be initiated only by the wronged spouse or his/her nearest relatives and only against the person with whom the guilty spouse had sexual intercourse.[15] The New Guinea law differs from the Papuan law on one important point. In Papua, adultery is a crime only when both parties are Papua New Guineans. In New Guinea, adultery may be an offence even where one of the people involved is an expatriate.[16]

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10. D. Ryan 'Marriage in Mendi' in *Pigs, Pearlshells and Women*, Glasse and Meggitt (eds.) (Prentice-Hall 1969), 174.

11. M.J. Meggitt, *The Lineage System of the Mae Enga of New Guinea* (Oliver and Boyd 1965), 143; R.N.H. Bulmer 'Karam of Kaironk Valley, Schader Range' n.d.

12. Marilyn Strathern, *op. cit.*

13. Law Reform Commission of Papua New Guinea, Report No. 5, *Adultery* (February 1977), 1.

14. *Native Regulations (Papua)* 1939 84(1) and (2); *Native Administration Regulations (New Guinea)* 1924 84(2) and 84(5).

15. *Native Regulations (Papua)* 84(3); *Native Administration Regulations (New Guinea)* 84(3).

16. It is also an offence for a person to abduct or entice (in Papua) or to induce or compel (in Papua and New Guinea) a female to have sexual intercourse with a person other than her husband. Note that provisions relating to enticement apply only to females: *Native Regulations (Papua)* 84(5); *Native Administration Regulations (New Guinea)* 84(1), 85. In Papua, women but not men may be charged with being 'abandoned and dissolute' under reg. 84(7), clearly a discriminatory provision, but allowed under s.55(3) of the *Constitution* upholding the validity of pre-Independence laws even if they are discriminatory.

The Working Paper on adultery[17] recommends that Village and Local Courts should have civil jurisdiction over adultery cases and should be able to award compensation, yet in practice the tendency of the courts is to treat adultery as a criminal matter. The Commission recommends that adultery be made a civil rather than a criminal matter given that the law should 'reflect our people's prevailing moral values'.[18] It also recommends that instead of limiting the action for adultery to those who have an action according to their customary law (usually the husband), the action should be extended to everyone irrespective of their rights according to custom. However McRae[19] comments:

> This appears at first glance a desirable development, consistent with the Constitutional prohibition on discrimination on the grounds of...sex. But it must be emphasised that the action for adultery is based on the notion that one spouse (usually the husband) has proprietary rights over the sexuality and services of the other spouse. This is inconsistent with the spirit of the constitutional directive that "every person be dynamically involved in the process of freeing himself or herself from every form of domination or oppression so that each man or woman will have the opportunity to develop as a whole person in relationship with others".

The present law provides for very harsh treatment of adultery. For example, from May to August 1979 in Popondetta, one reserve District Court magistrate convicted and sentenced a total of 29 adulterers to four months jail each. Prior to May 1979, a fine of K6 had been imposed for the offence. Fourteen of the offenders were women. The magistrate said that due to the Higaturu oil palm project, the population of the area had increased and as a consequence many single and unemployed girls had come to town and were 'running around' with married men. He added that men were also involved. The magistrate sought to justify his harsh sentences by saying that 'adultery was a very serious problem and that imprisonment of girls was aimed at bringing back the men to their families and to prevent the break-up of families'.[20]

Adultery may well have been one of the social consequences of the establishment of a corporation such as Higaturu oil palm project, but hardly the primary cause of social disruption. Women being singled out for blame in adulterous relationships is indicative of male paternalism.

Dissolution of marriages by custom can take many forms depending on the society involved. The wife may simply return to her natal village and, gaining the support of her kinsmen, stay there. Parents or kin may

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17. Law Reform Commission of Papua New Guinea Working Paper, *Adultery* (October 1975), 3.

18. Report No. 5, *Adultery, op. cit.*, 1.

19. Heather McRae, 'Note on The Law Reform Commission's Report on Adultery' (1977) 5 *Mel. L.J.*, 115, 137.

20. *Post-Courier*, 31 August 1979.

intervene to mediate between marital partners or interfere to bring about friction and ultimately divorce, or the village *Komiti* may set up informal prceedings to decide whether a marriage should be dissolved or not.

B. Customary Divorce and Women's Status.

Womens' status in customary divorce proceedings is very tenuous. Strathern[21] claims that women in the Hagen area are often scapegoated when marriage breaks down:

> Divorce is regarded as "helping women"; at the same time it is an affront to male solidarity to let women have their own way. Thus females are seen to be hostile to male interests. Frustration and dissatisfaction over the marital alliance may lie with men, but it is the women they accuse of wrecking the system...

In customary divorce proceedings (in societies where this is the manner of dissolving marriages), the 'hearings' are almost always public and conducted by men, during which men make speeches. Public oratory is a powerful political skill in Papua New Guinea, used to persuade, harangue or demonstrate influence over others. It is a skill vested in men. Holloway[22] says that 'in Papua New Guinea it is generally accepted that a woman does not speak in public. She endeavours not to offend her male partner or companion by being more knowledgeable and she is inclined to conform'. Strathern supports this view, commenting that in Hagen:

> women rarely offer unsolicited comments. They have little experience in speech-making and often appear reticent when asked to talk as principal defendant... They are well known to be less effective in argument than men... Inarticulateness on public occasions is encouraged by the very limited participation demanded of them, usually restricted to a direct response following questions. No one expects women to contribute to the general discussion. They thus both lack skill at public speaking and would receive little serious attention if they attempted it. Women in short, cannot conduct any but the most minor settlements of grievances themselves. They have to persuade others... to heed their complaints.[23]

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21. *Op. cit.*, 238-9.

22. Ikini Holloway, 'The Situation of Women in Papua New Guinea' in *Papua New Guinea Medical Journal* 19(2), June 1976:74.

23. Strathern, *op. cit.*, 266-7. There are, of course, cases in which individual women in Papua New Guinea societies prove to be skilled at oratory and can hold their own in the public domain. K.E. Read, *The High Valley* (George Allen & Unwin London 1965) 226-7 cites a case involving a young man and an elderly widow which was heard before a magistrate's court in the Asaro Valley, Eastern Highlands. The elderly widow had the support of her own people as well as being thoroughly incorporated into her husband's group with whom she resided. She had achieved the 'highest status available *continued*

Men then mostly control the actual proceedings, furthering this control by restricting information in using a language form which is purely theirs. Kaplan asserts that:

> Control of high language is a crucial part of the power of dominant groups, and... refusal of access is one of the major forms of oppression of women within a social class as well as in trans-class situations.[24]

Thus the manner in which women receive treatment in customary divorce proceedings stems partly from their relations with the rest of the social system.

Customary divorce proceedings (like magistrates' courts) involve 'the ritualistic control of situation; the convoluted control of information; and the suppression of the alternative performances evocative of unpermitted social worlds'.[25]

Divorce then is a group concern since for most societies a woman is fundamentally clan property.[26] Many social changes flow from divorce including disruption of affinal relationships and disputes over the return of bridewealth, custody of children, property settlement and maintenance arrangements are common.

C. Dissolution of Customary Marriage by the Courts.

Although most people in Papua New Guinea dissolve marriages in accordance with customary practices, they have access to the Village Courts which can hear divorce applications provided they arise within their jurisdiction. The elected magistrate ideally mediates between the parties to reach a decision. Bridewealth returns of unlimited amounts can be awarded under s.24(3) of the *Village Courts Act* 1973. Local Courts can only recognise, and issue a certificate attesting that, a pre-existing divorce has been obtained according to custom. They cannot dissolve a customary marriage under s.17 of the *Local Courts Act* 1963. Trying to establish whether a customary divorce has been obtained can be very difficult, and the legislation, according to McRae[27] provides little guidance for the courts. Whether a kin acceptance test of divorce or a

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23. *continuation* ...to women' by being the mother of a grown man in the group. She impressed Read 'as a person of some determination, ready to insist on her rights and to exploit the situation to her own advantage'. During the court proceedings the woman proved to be an extremely formidable and shrewd adversary and the young man received three months imprisonment and was deprived of the office of *tul-tul*.

24. Cora Kaplan, 'Language and Gender' in *Papers on Patriarchy* (London Conference, Women's Publishing Collective 1976), 21.

25. Pat Carlen, *Magistrates' Justice* (Martin Robertson, 1976), 12.

26. L.L. Langness, 'Marriage in Bena Bena' in Glasse and Meggitt (eds.), *op. cit.*, 48.

27. McRae, *op. cit.*, 214.

customary procedure test should be applied by the courts is unclear.[28]

D. Dissolution of Non-Customary Marriage.

In 1964, the *Matrimonial Causes Act* 1963 came into force repealing all former Papuan and New Guinea statutes on divorce. Section 8 provides that the Act does not apply to customary marriage. With a few modifications, the Act is based on the Australian *Matrimonial Causes Act* 1959. Thus, divorce law in Papua New Guinea is based on the 'matrimonial fault' theory.[29]

Divorce laws based solely on 'matrimonial offence' theory lead to undesirable social consequences since consensual withdrawal from an untenable relationship is not possible and parties are forced by virtue of the grounds upon which they rely to become adversaries, thus artificially distorting the process of the termination of their marriage. The very existence of fault as a theme running through 17 out of the 19 grounds for dissolution of marriage under s.21 of the *Matrimonial Causes Act* 1963, inevitably results in an attempt to allocate blame with the accompanying bitterness and retribution that ensues.

The extremely high cost of divorce under the present law makes divorce an impossibility for many Papua New Guineans married under Part IV of the *Marriage Act*. McRae[30] claims that an undefended divorce which involves no dispute over ancillary matters costs a minimum of K500. Where the divorce is defended and disputes arise over ancillary matters, costs of thousands of kina are incurred. Legal Aid is available from the Public Solicitor where a means test is imposed, but as they have an enormous caseload, they are not always willing to give priority to divorce cases.

Marriages under Part IV of the *Marriage Act* 1963 can only be dissolved by proceedings heard in the National Court under the *Matrimonial Causes Act* 1963.[31] In the majority of cases the petition for divorce is dealt with quickly, the court usually devoting much more time to the decisions involving ancillary matters - maintenance, custody and settlement of matrimonial property.

Clearly the western-derived divorce laws are premised on the basis of a right of state intervention in the control and regulation of female and male sexuality and the consequent entrenchment of sexual proprietary rights that this entails.

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28. Sections 20 and 25 of the *Marriage Act* 1963, which deal with nullity are not applicable to customary marriages, since they are overridden by s.55 of the *Act*.

29. The ground of irretrievable breakdown of marriage evidenced by one year's separation under the Australian *Family Law Act* 1975 is not available in Papua New Guinea.

30. *Op. cit.*, 253.

31. Under s.21 of the *Matrimonial Causes Act* 1963 the grounds for divorce include adultery, desertion, constructive desertion, refusal to consummate, habitual cruelty, separation, habitual drunkenness and insanity.

The Papua New Guinea Law Reform Commission proposes the retention of the dual system of divorce.[32] However it recommends a change in the grounds on which a marriage is void, so that involuntary unions (ones not based on consent) and alliances where one or both parties is under marriageable age (18 for a male, 16 for a female) are void.[33] It is curious that there is no correspondence between sexual maturity which is accorded to 16 year old women and political maturity which apparently begins at 18. The two-year age difference is based on a traditionally and socially entrenched concept that a woman more than a man is ready for the responsibility of family life at a much younger age. This is reinforced by the notion that women are sexually mature at an earlier age. The focus is on reproduction as the primary function. Implicit in the potential adoption of child-bearing and family support responsibilities which the statutory age endorses is the idea that the inevitable contraction of educational and career opportunities is an acceptable phenomenon. One wonders whether, in the context of the *Constitution*, such a distinction made by the law does not run counter to the aims of national development which is also dependent upon women's active participation in the political, economic and social mainstreams of society. A less obvious consequence in the tacit encouragement of early marriage for women is its counterproductive effect on the aims of the family programmes in reducing the birth rate and thus population growth.

The Law Reform Commission has suggested five alternative formulations for dissolving Part IV marriages.[34] Regrettably, three of the suggested formulations still incorporate a reference to fault-based criteria. While this is a commendable initiative it does not go far enough nor does it consider those problems which particularly affect women referred to in the earlier discussion of the customary dissolution of marriage.

VII *Ancillary Matters Arising From Dissolution of Marriage.*

According to McRae[35] 'little has been written about the social, economic and emotional problems suffered before, during and after divorce by the parties to the divorce and their children in Papua New Guinea'.

The effects of urbanisation place extra stresses on marriage,[36]

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32. Law Reform Commission of Papua New Guinea, Working Paper No. 9, *Family Law, op. cit.*

33. *Family Law Bill, op. cit.*, cl. 4(1), 13(3)(a).

34. *Family Law Bill*, cl. 17.

35. *Op. cit.*, 330.

36. See Lynn Oeser, 'Hohola: The Significance of Social Networks in Urban Adaption of Women in Papua New Guinea's First Low Cost Housing Estate', *N.G.R.U. Bulletin*, No. 29, 1969; Marilyn Strathern, 'No Money on our Skins: Hagen Migrants in Port Moresby', *N.G.R.U. Bulletin*, No. 61; Josephine Whiteman, 'Chimbu Family Relationships in Port Moresby', *N.G.R.U. Bulletin*, No. 52.

not the least of which involves the absence of customary marriage dispute resolution and extended family support networks. Moreover, when a divorce occurs, ancillary proceedings can become protracted and expensive.

A. Matters Arising out of the Dissolution of a Non-Customary Marriage.

Non-customary marriages can only be dissolved under the *Matrimonial Causes Act* 1963, and under s.78 of the *Act*, the Court can award maintenance to either party irrespective of fault, and to the children of the marriage. Custody of and access to children of the marriage, the best interests of the children being paramount, are determined by s.79 of the *Act*. Settlement of matrimonial property, having regard to its equitable distribution is determined under s.80. The proceedings can be extremely costly and the problem of enforcement in such matters as maintenance remains.

Under present law, when a maintenance order made by a court in Papua New Guinea needs to be enforced in another country, the order may be registered and 'enforced' in that country, under the *Maintenance Orders Enforcement Act* 1970. The country must be prescribed under the *Act*, before the order can be transferred. Similarly, a maintenance order made in a prescribed overseas country may be registered in Papua New Guinea under the same *Act*. The Law Reform Commission Working Paper No. 9, *Family Law*[37] has recommended that orders for maintenance be enforceable as debts, using existing statutory provisions.

The *Matrimonial Causes Act* 1963 basically assumes that the wife is always the financially dependent partner. It also does not recognise unpaid domestic labour such as child-care, housework and home-making as generating an equitable interest in the matrimonial property. According to the Law Reform Commission:

> The law should ensure that economic adjustment at the end of a marriage are (sic) the same as those of other forms of joint economic activities. The law should recognise all types of work performed by the partners as real contributions.[38]

They recommend the repeal of the *Married Women's Property Act* 1953, arguing that the autonomy granted to women in that *Act* is superseded by the wider provisions in the proposed Family Law Bill, notably in allowing 'personal contribution to a marriage partnership to take forms other than economic contribution'.[39]

B. Matters Arising Out of the Dissolution of a Customary Marriage.

At the outset it is important to note, that under s.8 the *Matrimonial Causes Act* 1964 does not apply to a customary marriage. Thus it is not possible for a divorced woman to apply to a court for maintenance if she had been married under customary law. However, if a woman who

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37. *Op. cit.*, 35.

38. *Op. cit.*, 30.

39. *Op. cit.*, 32.

has contracted a customary marriage can prove that she has been 'unlawfully' deserted by her husband and left without means of support, she can apply for maintenance under s.5 of the *Deserted Wives and Children's Act* 1961. In *Darusila Kuang v. Eliab Tovival* [1969-70] PNGLR 24 the Supreme Court held that s.55(2) of the *Marriage Act* 1963 extends the provisions of the *Deserted Wives and Children's Act* 1961 to customary marriages.

C. Custody of Children.

Customary laws and attitudes affecting custody of children after customary dissolution of marriage vary throughout Papua New Guinea, depending on factors such as rules of descent and affiliation, residence patterns, cause of divorce, number, sex and age of the children involved. Kaipu[40] claims that 'children in patrilineal societies are generally retained by the husband following divorce. They belong to him and his lineage, sub-clan and so forth'. However, according to Ryan,[41] if at the time of the divorce children are too young to be deprived of their mother's care they are often taken with her, on the understanding that when old enough the choice of future affiliation is theirs, affiliation being bound up with such factors as the relationships between maternal and paternal kin groups and supply of land.

In matrilineal societies, the children generally stay with their mother since their future security depends on identification with her kin group. According to Ryan there are two exceptions, the Siuai from South Bougainville, where children remain with their father, and in South New Britain, where they are divided equally between the parents. In cognatic societies Ryan suggests that children normally stay with the father's local group.[42] There are, however, many marginal departures from these general practices.

Among the patrilineal Chimbu societies, custody is affected by public opinion as to who was responsible for the breakdown of the marriage. The children are retained by the father unless he is blamed for the dissolution. In the customary courts controlled mostly by married men the general trend has been to try and blame women for the breakdown of marriage.[43] Whiteman, however, comments that by 1967 women had become aware that the sub-district office gave them a more sympathetic hearing than their traditional courts of married men.[44]

Among the matrilineal Solos of Buka, North Solomons Province, children legally belong to the mother/wife, her brother and her relatives.

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40. Samson Kaipu, 'Customary Marriage and Divorce in Papua New Guinea' in David Weisbrot, *Materials on Customary Law* (University of Papua New Guinea, 1977), 206.

41. *Op. cit.*, 708.

42. *Ibid.*

43. See Law Reform Commission of Papua New Guinea, Occasional Paper No. 5, *Customary Marriage and Divorce in Selected Areas of Papua New Guinea* 1977, 48.

44. *Ibid.*

The father/husband is in a very weak position, although Sarei[45] claims that nowadays the Solos father is increasingly asserting rights to his children. Among the matrilineal Nasioi of Central Bougainville, the abandoned spouse retains the children, though they are often subsequently fostered out in order to render remarriage feasible, especially if there is a prospect of producing children in the new marriage.[46] However in a dispute over custody, the husband would be on less firm ground than the wife since all Nasioi claim affiliation with their mothers' named clans.

Among the Motu people of the Central Province children primarily belong to their father and his group, having complementary affiliations with their mother and her group. When a marriage breaks down, the father generally takes custody of the children, particularly sons.[47] There is evidence to suggest, however, that children can reside alternately in the houses of both parents.[48]

When a marriage contracted under customary law breaks down in an urban setting, or when the parties to the customary marriage come from completely different groups with differing customary laws, ancillary matters arising out of the dissolution, such as custody are more problematic. *Hevago Koto v. Sui-Sibi* [1965-6] PNGLR 59 involved a custody dispute between a man from the Southern Highlands and a woman who was related to people from western and eastern Papua now leading an urbanised life. The mother was awarded custody, this being considered overall in the best interests of the child.

The Law Reform Commission has recommended[49] that the courts be permitted to make custody orders over any child under 18 years whether or not parents are parties to a customary or a non-customary marriage.[50] It also recommends that the mother and the father should have equal rights to guardianship of their children. The Commission claims that there is a 'growing trend in many overseas jurisdictions away from the rigid adherence to the "mother principle" which favours the mother as naturally the best equipped party to provide care and control of the child'. It further suggests that 'the concept of the "psychological parent", the person (not necessarily the biological parent or mother) to whom the child has formed the strongest emotional bonds may be more useful'.

The Commission has made several proposals concerning custody of children:

> (1) The mother and father of a child will be presumed to be equally entitled to custody and guardianship of a child in the absence of any other evidence.

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45. *Ibid*, 43.

46. Ogan, *ibid*, 44.

47. *Ibid*, 5.

48. Barnett, *op. cit.*

49. Working Paper No. 9, *op. cit.*, 25.

50. When parents are not married, at present proceedings can only be brought under the *Infants Act* 1956 in the National Court.

(2) If it is shown that custom favours a particular parent being the guardian of the child, that parent is presumed to be entitled to custody of the child in the absence of any other evidence.

(3) If the court is satisfied that the best interests of the child would best be served by ordering custody of the child contrary to prescriptions in (1) and (2) above then it may make an order to that effect.

(4) In all custody proceedings, the best interests of the child shall override all other considerations.

(5) A court can enforce a custody order by issuing warrants, imposing fines or gaol sentences or making any other orders as it sees fit.[51]

D. Settlement of Matrimonial Property.

The notion of common matrimonial property occurs in some Papua New Guinea societies, but can only be applied to goods acquired jointly by the husband and wife during the course of the marriage.[52]

Land and most property in almost all Papua New Guinea is vested in a group of people and individuals can only acquire interest, authority or rights in the land, these being dictated by descent, residence and marriage rules.

In Papua New Guinea societies Kaipu[53] claims that there is a general distinction between the wife's right as a user and what actually belongs to the husband and his group. In matrilineal societies, Kaipu adds, the same could be said of the husband. In very many societies however, property acquired together by husband and wife in the course of a marriage does not constitute common matrimonial property,[54] though the wife can often claim ownership over her personal valuables and domestic equipment.[55] Certainly in strongly matrilineal societies,[56] women enjoy

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51. Working Paper No. 9, *op. cit.*, 23.

52. For example, there is a notion of joint matrimonial property amongst the Toaripi (Law Reform Commission Occasional Paper No. 5, *op. cit.*, 14), pigs form common matrimonial property amongst the Kunimaipa (*ibid*, 8) and in the Trobriands pigs, coconut and betel-nut palms can be regarded as joint matrimonial property.

53. In Weisbrot, *op. cit.*, 206.

54. For example, the Mekeo (Law Reform Commission Occasional Paper No. 5, *op. cit.*, 10), the Nagovisi (*ibid*, 44) and the Goodenough Islanders (*ibid*, 76).

55. For example, the Kunimaipa (*ibid*, 8), the Toaripi (*ibid*, 14) and the Motu (*ibid*, 5).

56. For example, the Nagovisi (*ibid*, 44), Nasioi (*ibid*, 44) and the Dobu (*ibid*, 19).

stronger rights as users of land than do their husbands. The Nagovisi husband, for example, has very little that he could claim as his own. Mother and daughter pairs with their respective husbands often own pigs and sell them for cash and shells. Moreover, a man after marriage is not entitled to keep the cash earnings of his labour - they are the property of his wife and children.

Many rights afforded a woman to use land are contingent upon marriage so that when it terminates she loses her rights and must leave, returning to her natal village, unless she remarries.[57]

The Law Reform Commission has suggested proposals which are not intended to 'displace custom where it operates effectively to protect a divorced or deserted person'.[58] In essence, the proposals concerning maintenance and property have the following effect:

> (1) A court may order one party to pay maintenance by lump sum or periodic payments to the dependents of a customary or a non-customary marriage or a de-facto relationship recognised by the court.
>
> (2) Children under 18 years are automatically considered dependents. Persons over this age who are children of the relationship must establish their dependent status.
>
> (3) Proof of dependency is necessary for an application for maintenance by either partner, considerations such as earning capacity and income from other sources being taken into account.
>
> (4) The court has a general power to alter the property interests of the parties as it sees fit. In making such orders the court shall have regard to the extent to which parties to the relationship contributed to the property.

E. Bridewealth.

Disputes over bridewealth return are very common. In most areas of Papua New Guinea, divorce or subsequent remarriage entails the return of bridewealth,[59] and disputes typically involve questions such as whether the bride price should be repaid, what proportion should be repaid, what time period should be extended to repay. These questions in turn depend on considerations such as blame for the failure of the marriage, and the number of children produced.

Bridewealth disputes are typically resolved by customary proceedings and negotiations which take place within a framework of certain broadly accepted principles which are, however, influenced by various ad

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57. For example, the Motu (*ibid*, 5) and the Mekeo (*ibid*, 10).

58. Working Paper No. 9, *op. cit.*, 27.

59. McRae, *op. cit.*, 206.

hoc personal and political factors.

Under the *Village Courts Act* 1973, Village Courts are empowered to decide on bridewealth disputes. Local Courts have a similar jurisdiction under s.13(1)(c) of the *Local Courts Act* 1963 and bride price arbitration is one of the major workloads of the Local Courts. District Courts also have jurisdiction to decide disputes over the return of bridewealth under s.29(1) of the *District Courts Act* 1963.

F. Conclusion.

The unsatisfactory features of the current legal position of women in relation to ancillary proceedings have been briefly discussed. The inability of divorced women who were married according to custom to claim maintenance for themselves and their children, and the failure to take domestic labour into account in computing settlements of property on the breakdown of relationships, are particularly important areas of discrimination. The adoption of the Law Reform Commission's proposals in this area would go a considerable distance towards removing these problems as well as introducing more equitable criteria for the resolution of custody disputes.

VII. *Mothers.*

Mothering generally in Papua New Guinea is considered part of a woman's traditional role. The raising of children to adulthood, particularly sons in many societies, assures many women within a group status respect and protection.

As there are no unemployment benefits, maternity payments or child endowment payments available in Papua New Guinea, married mothers are forced to rely on themselves, their husbands or their relatives for support unless they fall into one of the categories discussed below.[60]

A. Mothers Without Husbands.

A mother bringing up children without the support of a husband can be granted an allowance from the State for the support of her children up to the age of 16 years under s.20 of the *Child Welfare Act* 1961 (No. 34 of 1961). The mother must have the child living with her and fall into one of the enumerated categories: widow; deserted wife; a wife whose husband is incapacitated and unable to follow his usual occupation; a wife whose husband is in gaol; a single woman; a woman living apart from her husband, under a decree of judicial separation, under a deed of separation, or where a decree nisi in divorce has been made (only applicable to non-customary marriages); a woman whose marriage has been dissolved by a decree absolute in divorce (only applicable to non-customary marriages); a woman whose marriage is void or has been annulled by the court; a single woman with an adopted child.

Section 20 of the *Child Welfare Act* however, does not apply to a divorced woman who contracted a customary marriage and is supporting

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60. Under the *Vagrancy Act* 1977 (No. 16 of 1977) s.3, when a person is brought before a court and cannot show sufficient lawful means of support, the court can require that person to leave the town, the province or the district.

children.

An 'unlawfully' deserted mother/wife left by her husband without support has another recourse, since under s.5 of the *Deserted Wives and Children's Act* a court may order an allowance to be paid for the support of the child though this order does not continue once the child reaches 16 years of age. If the father/husband can show reasonable cause for desertion or for leaving his wife and child without support, the court can decline from making an order (s.6(4)). Section 5 of the *Deserted Wives and Children's Act* 1961 applies to wives of both Part IV and customary marriages.[61] However, under s.15 of the *Act*, if the wife commits adultery while in receipt of the allowance, upon application by the husband the order can be discharged. Effectively then, a man paying an allowance to a woman to support his child maintains sexual control over her despite the fact that he is not living with her and deserted her without cause as determined by the court.

Under the *Child Welfare Act* 1961, single pregnant women can obtain an order through the court that the father of the child pay confinement expenses at birth (s.54) and after the child is born, the father can be ordered to pay maintenance for the child's support until the child is 16 years old (s.59), unless it can be proved that at the time the child was conceived the mother was a 'common prostitute' (s.57(2)(b), s.59(3)(b)). If the child of a single mother dies, or the mother herself dies before or during childbirth, the father can be ordered by the court to contribute towards funeral expenses (s.64). A married woman having an illegitimate child cannot proceed against the father of the child under this *Act*. If a mother of a child is not married, proceedings for custody can be brought under s.7 of the *Infants Act* 1956 (s.7) in the National Court. The mother or guardian of an illegitimate child must give permission for adoption of the child under s.18(3) of the *Adoption of Children Act* 1968 (No. 8 of 1969).

B. Maintenance Orders.

Maintenance orders (other than those obtained under the *Matrimonial Causes Act* 1963) can be enforced within Papua New Guinea by a District Court under the *Maintenance Orders Enforcement Act* 1970 (No. 23 of 1970) by imprisoning the male defendant (s.8), making an attachment of earnings order (s.16), requiring an employer to make out the earnings or part of the earnings of the defendant to the Collector of Maintenance, or seizing and selling any goods, chattels and securities belonging to the defendant to the extent necessary to satisfy the order (s.14).

Income received by a woman from her husband or former husband as maintenance is exempt from income tax (under s.30 of the *Income Tax Act* 1959 (No. 26 of 1959).

C. Legitimacy of Children.

The child of a mother who is not legally married is regarded as illegitimate. The present law distinguishes between legitimate and illegitimate children usually in order to confer equivalent rights on each, while maintaining a definitional distinction. The Law Reform

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61. *Darusila Kuang v. Eliab Tovival* [1969-70] PNGLR 24.

Commission[62] proposes that this distinction be abolished and that 'the relationship between a child and his parents shall be determined without regard as to whether or not the parents are married'.[63]

D. Working Mothers.

See sections on Maternity Rights and Part-time and Casual Conditions in Employment, above.

E. Birth.

At the last census in Papua New Guinea (1971), each woman had 'an average of six babies, 10% dying by the age of five'.[64] In October 1972, the Department of Public Health figures[65] showed that the average woman had seven children. In rural areas, 19.4% of the children did not live longer than five years, and in towns 11.6% died before five years. In the Highlands 21% of the children died before five years, and in the Islands 11% of the children died before five years.[66] The National Health Plan claims that each year mothers have more children and fewer of these children die, due to a breakdown in traditional practices of spacing children, better health services and other changes. Women's health is very often affected by too frequent child-bearing.[67]

According to Johnson,[68] 85% of all confinements occur in villages, unattended by trained staff. Muirden however[69] claims that 25% of births are in hospital. Clearly, accurate evidence about the location of births is difficult to obtain. There are very few areas, it is suggested[70] where a birth attendant forms part of a cultural pattern and little attempt has been made to train village women to fulfil this role.

The majority of women will not attend village clinics unless

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62. Working Paper No. 9 *op. cit.*, 41.

63. *Family Law Bill, op. cit.*, cl. 55.

64. N. Muirden 'Family Planning', in C.O. Bell (Ed.), *The Diseases and Health Services of Papua New Guinea* (Department of Public Health, Port Moresby 1973), 484.

65. In *Papua New Guinea National Health Plan: Summary 1974-78*, 7.

66. *Ibid*, 5.

67. *Ibid*, 7.

68. D.J. Johnson, 'Obstetric Services in Papua New Guinea' in Bell (Ed.), *op. cit.*, 486.

69. *Op. cit.*, 482.

70. Johnson, *op. cit.*, 486.

there is some privacy provided for examination.[71] Others do not consider antenatal examinations serve any useful purposes and 'it is not the policy of the Department to encourage all pregnant women to be delivered in hospital'.[72] However, patients considered 'at risk' are encouraged to have their babies in hospitals or health centres, though most village women prefer to have their babies in the village.[73] Maternal deaths are less common nowadays, the major causes when they do occur being postpartum haemorrhage and puerperal infection.[74]

F. Breastfeeding.

The right of mothers to breastfeed their children, so severely undermined in western societies, is fiercely guarded attitudinally and legally in Papua New Guinea. Under a refreshingly progressive piece of legislation, the *Baby Feed Supplies (Control) Act* 1977 (No. 21 of 1977), it is an offence to supply a baby's feed bottle, a bottle teat or a dummy (s.2), unless an authorised person (medical practitioner etc) issues a written prescription to a pharmacist. It is not an offence for a mother or another person to soothe or feed an infant if in the opinion of that person, there exist circumstances in which the infant would suffer harm if such an article was not used (s.2(4)(c)). An authorisation to obtain a bottle, a teat or a dummy cannot be given unless the medical practitioner is satisfied that it would be in the best interest of the child (s.3). The medical practitioner must, under the *Act*, give prescribed instructions to the person who will be feeding or soothing the child and must make sure the instructions are understood.

The *Act* goes even further, in prohibiting advertising which has the intention, or likely result of encouraging the bottle-feeding of babies, the purchase or use of a baby's bottle, teat or dummy or the purchase or use of milk or other products in connection with these items (s.4). A pharmacist may display within the pharmacy a prescribed advertisement to the extent that it is necessary to enable a person to choose a bottle, teat or dummy in accordance with the *Act*.

The effects of massive advertising of artificial milk and baby foods in, for example, Australia has undermined the confidence of many women creating anxieties about their ability to breastfeed, the quality of their milk etc. Freedom from anxiety is extremely important for successful breastfeeding.

This piece of legislation is extremely significant for Papua New Guinea, for, not only does it give positive encouragement to breastfeeding, but it also has the effect of reducing the very grave risk of dangers to child-health arising from the use of unhygienic or unsterilised bottles and malnutrition caused by inadequate (or complete lack of)

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71. C.O. Bell, V.B. Bignold and R. Mercardo, 'The Maternal and Child Health Services' in Bell (Ed.), *op. cit.*, 466.

72. *Ibid*, 467.

73. *Ibid*, 467.

74. *Ibid*, 487.

artificial milk preparations, problems common to Third World countries.

IX. *Regulation of Women's Reproductivity.*

In order for women to participate fully in 'all political, economic, social and religious activities' as directed by the *Constitution*, control over their own bodies and reproductive functions is absolutely essential. When a woman is unable to control her own fertility, her active participation is severely restricted.

Traditionally, women in Papua New Guinea attempted to control this aspect of their lives by methods such as ingestion of plant substances, vaginal insertions, observance of sexual taboos, abortion and infanticide. However, under the imposition of colonialism and neo-colonialism, with its accompanying traumatic social disruption attributable in part to the introduction of western law and medicine as controlling agencies for the development of capitalism, there has been a shift in the control and regulation of female fertility. Due to the overwhelming dominance of men in government, in most policy-making areas, and in the legal and medical professions backed up by a firmly entrenched ideology, men have wrested this control from women, and the resulting constraints are considerable. Ehrenreich and English have carefully and forcefully documented this destruction of women's informal mutual-help and healing networks by the male professional hoarding up his often dubious expertise 'as a kind of property to be dispensed to wealthy patrons or sold on the market as a commodity'.[75]

The right of couples and individuals to decide on the number and spacing of their children (together with access to the knowledge, and means of doing so) was recognised by unanimous vote of the United Nations Conference on Human Rights at Teheran in 1968.[76] That this should be put into effect by member countries by 1980 was urged by the Economic and Social Countril in 1971.[77] In 1980 in Papua New Guinea the laws on fertility control are at least ambiguous if not restrictive.

A. Traditional Fertility Control.

Little research has been done into this area so information is sketchy. Bulmer asserts that populations use both direct and indirect methods to regulate reproduction. The direct methods include: Institutionalised restrictions on sexual intercourse; knowledge and deliberate use of techniques to reduce the probability of conception when intercourse takes place; knowledge and deliberate use of techniques to terminate pregnancies by abortion and infanticide. The indirect methods include: culture preferred nutritional patterns which affect biological fertility; culture preferred or permitted practices which favour the

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75. Barbara Ehrenreich and Deirdre English, *For Her Own Sake: 150 Years of the Experts' Advice to Women* (Pluto Press Ltd., London, 1979), 30.

76. Resolution XVIII on Human Rights Aspects of Family Planning; *Declaration on Social Progress and Development:* General Assembly Resolution 2542(XXIV) of 11 December 1969.

77. Resolution 1672(LII) on *Population and Development* (1971).

transmission of diseases which affect biological fertility or survival of infants; cultural conditioning of individuals of either or both sexes to reduce their preparedness to have intercourse even where this is institutionally legitimate; cultural conditioning of women to reduce their preparedness to conceive or bear children or let children survive; cultural conditioning of men to permit women to conceive or bear children or let children survive; cultural practices affecting pregnant and parturient women, nursing mothers and young infants which affect live birth rates; infant survival rates; life expectancies for women up to and during their reproductive periods.[78]

I shall confine my discussion to the direct method of fertility regulation over which Papua New Guinean women have been exercising some control.

Generally, the bearing of children by unmarried women has not been condoned and non-marriage by women very rare.[79] Widowhood during a woman's childbearing period, with its accompanying and varying customs, including restriction on remarriage, long mourning periods and in some cases the killing of the widow[80] has not been an uncommon phenomenon in Papua New Guinea. Thus children in Papua New Guinea have been mostly conceived while a woman is married. However there is evidence that individual women have been concerned not merely to space their children but to restrict their total number.[81] Reproductivity has been regulated whether a woman is married or not, by:

1) Sexual Taboos. In some societies (notably the Kayaka Enga, Lakalai of New Britain and Molima of Fergusson Island[82]) sexual taboos were enforced in the early period of the marriage. The widespread practice throughout Papua New Guinea of observing a sexual taboo after the birth of a child varies from a period of a few months to over three years. Sexual taboos usually accompany the performance of major cult cycles and during ritual preparation for war, hunting, fishing or ceremonial trade voyaging. Menstrual taboos are also widespread but do not affect conception.

2) Contraception. Chowning has noted that in all the New Guinean societies with which she is familiar[83] except the Trobriands, women are thought to be able to produce sterility, temporary or permanent, by ingesting plant substances. Ritual practices alone, without the ingestion of plant substances are also often believed to produce female sterility. Vaginal insertions have also been used as has coitus inter-

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78. R.N.H. Bulmer, 'Traditional Forms of Family Limitation in New Guinea' in Heather McRae (ed.), *Materials on the Laws Relating to Fertility Control and Family Planning in Papua New Guinea* (U.P.N.G. 1978, revised 1979), 23.

79. *Ibid*, 24.

80. *Ibid*, 26.

81. *Ibid*, 44.

82. *Ibid*, 30.

83. *Ibid*, 37.

ruptus, though Bulmer says[84] this is not a widespread practice.

Oeser reports that some women experiencing the process of urbanisation in Hohola, Port Moresby, were still using various kinds of traditional contraception methods with varying success rates, and are frequently reluctant to adopt western methods believing consultation with a male doctor would cause them shame. The post-partum taboo on intercourse was widespread usually until weaning began. Some women are reported as saying that they tried to delay weaning as they did not want any more children for a while. The most common means of birth control in Hohola seemed to be a wife and husband sleeping separately. 'Women's reactions to news of a pregnancy were either those of pity or glee, depending on whether the woman concerned was a friend or enemy and the size of her family already'.[85]

3) Abortion. Bulmer claims[86] that in all traditional New Guinean societies abortion was a recognised, if often strongly disapproved, method of preventing childbirth. Abortion attempts were mostly crude and extremely dangerous and, though often strongly disapproved, gave no rise to customary proceedings apart from divorce.

4) Infanticide. This probably occurred in every traditional society, usually on the occasion of the birth of deformed infants, the birth of twins and the birth of illegitimate children.[87] Female infanticide seemed to have occurred more commonly than male infanticide. Among the Seng Seng of West New Britain, relatively frequent infanticide was the main deliberate means of spacing children, in the absence of a long post-partum taboo.[88] The incidence of infanticide is not really known, since the birthing process usually occurs in seclusion and only the mother could really know whether death of the child resulted from her own hand. In general infanticide was regarded as a woman's matter[89] and if immediately carried out after birth rarely gave rise to legal proceedings.[90]

B. Western Fertility Control.

The major resource in this area is McRae's article.[91]

1) Contraception. Contraceptives (most commonly oral pills, IUDS

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84. *Ibid*, 36.

85. See Oeser, *op. cit.*, 81-2.

86. In McRae (ed.) *op. cit.*, 38.

87. Bulmer, in McRae (ed.) *op. cit.*, 39.

88. Bulmer, in McRae (ed.) *op. cit.*, 40.

89. Strathern, *op. cit.*, 43.

90. Bulmer, in McRae (ed.) *op. cit.*, 40.

91. 'Laws Relating to Direct Fertility Control Measures' in Heather McRae (ed.) *Materials on the Laws Relating to Fertility Control and Family Planning in Papua New Guinea* (U.P.N.G. 1978 (Rev. 1979)).

and condoms) are available in Papua New Guinea and use of them is encouraged by the government in its family planning programmes.[92] However, oral contraceptive pills and the insertion of IUDS require medical supervision[93] about which many Papua New Guinean women feel intimidated especially if the doctor is male. Since contraceptive pills are classified as 'dangerous substances' under sections 11 and 12 of the *Poisons and Dangerous Substances Act* 1952, they may not be sold by vending machines (s.19) hawkers (s.16) or to persons aged under 18 years (s.18). This legislation has no application to condoms which are sold at pharmacies, trade stores and through the press. The availability and advertising of contraceptive information, McRae argues,[94] is not restricted by the general legal restrictions on advertising under s.232 of the *Criminal Code Act* 1974, s.24 of the *Summary Offences Act* 1977 or s.12(1) of the *Pharmacy Act* 1952.

Attitudes to contraceptives in Papua New Guinea limits their use by women - Catholicism and male paternalism are particularly important. Catholic missionaries have had a persuasive influence in Papua New Guinea. The effects of their ideology in relation to birth control is even significant on the University of Papua New Guinea campus where presumably access to information on birth control and sexuality would be relatively easy to obtain. Pregnancy has been one of the major problems for women to contend with on the University of Papua New Guinea campus (along with male drunkenness and threats of physical aggression).[95] Forty per cent of all UPNG women students become pregnant at some time during their university experience. While there has been wide support for the idea of making birth control information more accessible to students, few students seem to actually use it. A number of women students suggested that religious opposition hinders communication about birth control: 'They don't realise about pregnancy. They face temptations. If religion forbids birth control, not much can be done'. And: 'The older students tell new students about birth control information and they don't always really understand. The most effective are discussions. But it's hard for the Catholics. They get bogged down on this'.[96] Male paternalism is illustrated by an incident which occurred towards the end of 1979. Mr Doa, the then Health Minister made a public statement that he was considering legislation to stop the use of contraceptives by single women and women who did not have their husband's approval.[97] He claimed he was considering the legislation 'because women were misusing contraceptive pills'. A *Post-Courier* editorial[98] reports that Mr Doa

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92. See Maev O'Collins, extracts from 'Social Welfare Aspects of Family Planning Programmes in Rural Areas of Papua New Guinea' in McRae (ed.) *op. cit.*, 96.

93. Two brands of contraceptive pill are now available 'over the counter'.

94. McRae in McRae (ed.), *op. cit.*, 16-17.

95. Still and Shea, *op. cit.*

96. *Ibid*, 26-27.

97. *Post-Courier*, 27 September 1979.

98. 18 September 1979.

believed that 'women are meant to look after their homes and children'. His paternalism was only matched by his insensitivity. Women's groups in Port Moresby reacted very strongly to Mr Doa's proposal, threatening him with, among other things, a countrywide women's campaign to remove him as Minister of Health.[99]

2) Abortion. Present legislation on abortion leads to ambiguity in interpretation. Under s.295 of the *Criminal Code Act* 1974, abortion applies when the foetus is expelled from the uterus before it becomes 'a person capable of being killed'. A woman who unlawfully aborts herself is liable to 7 years imprisonment and any other person who performs an unlawful abortion is liable to 14 years imprisonment under s.228 and s.229 of the *Criminal Code Act*. Just precisely what 'unlawful' means is vague. Section 285 of the *Criminal Code* states that there is no offence if an abortion is carried out 'for the preservation of the mother's life'. The phrase has not yet been judicially construed in Papua New Guinea but no doubt the Anglo-Australian approaches to interpretation will be revelant. Since there is no jury system in Papua New Guinea it will probably be up to the all-male judiciary to decide precisely how 'for the preservation of the mother's life' is to be interpreted. The present status of the law on abortion is uncertain until a case arises for decision or until new legislation is passed.[1] Doctors are certainly intimidated by the present uncertainties of the law and general feeling among urban women is that abortions are difficult to obtain. The actual availability of abortions from 'unqualified' backstreet abortionists, customary specialists[2] and the medical profession, is unknown. Women sometimes travel to Australia and other countries where abortions are available but financial considerations mean that this is a 'privilege' reserved for very few women.

A woman's right to choose if and when she shall bear children is certainly a de facto right under custom, and the Papua New Guinea *Constitution* hints that female reproductive control is a desired goal. It is arguable that the National Goal and Directive Principle 2(5) that all women citizens should participate equally in all social, economic, political and religious activities, assumes female reproductive control. It is impossible for a woman to participate actively in all these areas if her fertility is not under her control. Until freely available, safe, completely effective contraception is developed, unwanted pregnancy will be a continuing reality for women, despite their best intentions. Abortion should be available to women (even as a last resort) to control their fertility.

Suggestions that the 'right to life' provisions under s.35 of the *Constitution* ('no person shall be deprived of his life intentionally except...') indicate a prohibition on abortion are, according to Weisbrot

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99. *Post-Courier* 1 October 1979.

1. McRae in McRae (ed.), *op. cit.*, 9.

2. These people are prohibited from carrying out abortions despite any expertise they may have, under s.11 of the *Pharmacy Act* 1952. The sole right to perform abortions is vested in the male-dominated medical profession.

and Ottley unfounded.[3] Having referred to the background report of the CPC,[4] they claim that there are no grounds for assuming that the word 'person' should be construed beyond the broad meaning of the word, to include a foetus.

It could be argued that the sections of the *Criminal Code Act* 1974 relating to abortion violate s.49 of the *Constitution* which states that 'every person has the right to reasonable privacy in respect of his private and family life...'. This right to privacy McRae argues[5] could be interpreted broadly enough to encompass a woman's decision whether or not to terminate her pregnancy.

Given that resort to abortion has been a widespread customary method of dealing with unwanted pregnancy by individual women, it could also be argued that under Sch. 2.1(1) of the *Constitution*, this custom should be 'recognised applied and enforced as part of underlying law'. A woman's right to choose if and when she shall bear a child could be dignified by this recognition of custom.

3) Infanticide. Infanticide is regarded as wilful murder, murder or manslaughter under the *Criminal Code Act* 1974 ss.295, 297, 303-307, 319, and subject to life imprisonment. The fact that the killing of the child is not an offence under custom, or that the child is defective, is an untenable defence.

4) Sterilisation. Present legislation in Papua New Guinea does not address itself directly to the issues involved in sterilisation. McRae[6] argues that the present law poses no barriers to use of sterilisation (ie., male vasectomy and female tubal ligation) as a method of fertility control provided there is full and informed consent by the patient and reasonable care and skill by the medical practitioner. However in Papua New Guinea, as elsewhere, the mere absence of legal barriers does not automatically grant access to suitable sterilisation procedures. Leaving aside the question of financial difficulties, additional possible hurdles are posed by the attitudes of hospital authorities and sections of the medical profession.

C. Conclusion.

It will be apparent that contraception is largely a female responsibility in Papua New Guinea. As the country is experiencing a rapidly increasing rate of survival for infants,[7] the problems of limiting family size in the future will assume greater proportions.

The theoretical availability of a limited number of contraceptive techniques and sterilisation methods is substantially inhibited by

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3. D. Weisbrot and B.L. Ottley 'Law and Medicine in Papua New Guinea; Licensing and Liability of Practitioners' (1977) 5 *Mel. L.J.* 220.

4. *Op. cit.*

5. McRae in McRae (ed.) *op. cit.*, 6; *Roe v. Wade* 410 U.S. 113 (1973) and *Doe v. Bolton* 410 U.S. 179 (1973).

6. McRae in McRae (ed.) *op. cit.*, 12.

7. O'Collins in McRae (ed.) *op. cit.*, 97.

attitudinal constraints. A cloud of uncertainty hangs over the legitimate scope of abortion practices under the imposed western law and there is no immediate prospect of removing legal and practical obstacles.

In essence, then, the control which women have over their reproduction is severely curtailed both at the legal and practical levels, whether the situation is examined from the perspective of western or customary law.

'Without the full capacity to limit her own reproduction, a woman's other "freedoms" are tantalising mockeries that cannot be exercised'.[8] With control over her own reproductivity, a woman's other rights cannot long be denied, since the chief rationale for denial disappears.

X. *Regulation of Sexual Conduct.*

One of the principal criticisms of the *Criminal Code Act* 1974 is that as a basically foreign law it does not reflect the general attitudes of Papua New Guineans towards public morality.[9] With a view to reform Dr. Marilyn Strathern of the then New Guinea Research Unit prepared a *Report on Questionnaire relating to Sexual Offences as defined in the Criminal Code* based on responses by anthropologists working throughout the country in 1973.

There are many possible sexual offences against women as defined by the *Criminal Code Act* 1974.

A. Sexual Intercourse With An Underaged Girl.

Under s.216, attempting or having intercourse with a girl under 12 years is an offence; and under s.219 a person who has or attempts to have intercourse with a girl under 16 years, or with a woman or girl 'known to be an idiot or an imbecile' is guilty of offence, attracting lesser penalties.

Strathern claims that in Papua New Guinean societies, there is a widespread distinction between intercourse with a sexually immature girl (nearly everywhere a serious offence) and intercourse with a sexually mature but as yet unmarried girl (towards which there is a greater variation in attitudes). Sexual acts with a sexually immature girl are generally overlooked if the other party is female, or if the male involved is also sexually immature. Intercourse between an immature female and a mature male is singled out as a grave offence.[10]

The age criterion in traditional Papua New Guinean societies,

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8. Lucinda Cisler, 'Unfinished Business: Birth Control and Women's Liberation' in Robyn Morgan (ed.) *Sisterhood is Powerful* (Vintage Books New York 1970), 246.

9. See for example, John Gawi 'Customs and Criminal Law and Punishment' in Jean Zorn and Peter Bayne (eds.) *Lo Bilong Ol Manmeri* (University of Papua New Guinea 1975).

10. Strathern, *op. cit.*, 23-25.

argues Strathern, as to whether a girl is sexually mature ranges from 11 to 16, although there are societies in which girls do not reach puberty until 19 or so, and each case it considered within each society on its merits. The act itself is held to be thoroughly improper and the question of the girl's consent is irrelevant.[11]

B. Indecent Dealing With Underage Girls.

It is interesting to note that 'interference' with a girl under s.220 of the *Code* is assumed to be heterosexual, and with a boy homosexual. Homosexual 'dealings' with a girl and heterosexual 'dealings' with a boy are not addressed by the *Code*.

Strathern's questionnaire revealed that many respondents thought that 'indecent handling' for example, removal of clothing, handling of genitals of either boys or girls was not singled out for legal treatment except in the case where force was used. 'Interference' with a girl is taken seriously only if it is part of attempted intercourse.[12]

C. Indecent Assault on a Woman or Girl.

Strathern comments that generally throughout Papua New Guinea, this offence does not exist in its own right. Acts which comprise 'indecent assault' are usually considered a prelude to sexual intercourse and depending on their context are regarded as inoffensive or not. Indecency is not a very relevant concept and is best applied to those acts which are judged to be in some way inhuman or unnatural.[13]

D. Rape.

Under s.357 of the *Code* 'any person who has carnal knowledge of a woman or girl not his wife, 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 or fraudulent representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of a crime which is called rape'. As a general rule, a man cannot be convicted of rape for having sexual intercourse with his wife against her will. By marriage a wife is considered to give a blanket consent to sexual intercourse with her husband and cannot withdraw that consent at will. This law clearly views wives as the sexual property of husbands and denies women the rights they would otherwise have if not 'owned'. The theoretical availability to the wife of an assault charge under s.344 of the *Code* does little to redress the situation given the attitude of the police to domestic assault. Sexual intercourse without consent by a woman, as long as it takes place within the sanctity of marriage, cannot as a matter of law be the subject of a prosecution for rape.

In traditional societies Strathern found that among the offences

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11. *Ibid*, 24.

12. *Ibid*, 31-32.

13. *Ibid*, 32-34.

for which a woman might be 'punished' by rape were 'repeated adultery, excessive promiscuity and such as well as trespass or thieving'.[14] A husband might also repudiate his wife by inviting others to rape her. There may or may not be general acquiescence in the act, says Strathern, depending on whether or not the punishment is judged as fit. There is some indication, according to Strathern, that where men today imagine that there is an increasing promiscuity on the part of women, they may force their attentions with less inhibition. This is part of the punishment syndrome - the individual woman is getting what she deserves.

For several societies it appears rape as defined in the criminal code has been virtually non-existent or at least very rare. Strathern indicates that in these societies forcible intercourse with a woman would be unthinkable.[15] Forcing his attentions on a woman in these societies would bring shame on the man and the informal sanctions operating are very powerful.

In societies where rape more commonly occurs it seems associated with warfare, or the meting out of violent punishment, and the crucial aspect according to Strathern[16] is violence rather than sexuality. In these societies it was reported that rape became rare following the cessation of warfare. Reaction to rape perpetrated by an enemy would be the same mixture of outrage and desire for revenge as an injurious assault on a man. Rape of any enemy was deliberate provocation of the males who had sexual rights or other interests in the woman involved. However, sometimes the injury done to the woman may be overlooked in the turmoil which breaks out between the men on each side.

Generally, then, where sexual intercourse is forced on a woman, the sexual component of the offence is treated according to the prevailing circumstances of the case including features such as adultery and incest. The use of force is an element which either makes the act more serious, or constitutes a separate offence.

In all societies where rape occurs it operates at several levels as a force controlling women. The criminal law pinpoints the ultimate act of physical violation as the conduct which requires a sanction. For a number of reasons the criminal law is essentially ineffective in achieving its objective of preventing such conduct. A major factor is that most rapes are not reported.[17] The inability to achieve any real redress (other than revenge) contributes to the low reporting rate. There is no prospect of recovering dignity coupled with the inevitability of a re-enactment of the ordeal because of the rules of evidence relating to rape.[18]

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14. *Ibid*, 39.

15. *Ibid*, 38.

16. *Ibid*, 38-9.

17. See R. Hood and R. Sparks, *Issues in Criminology* (Weidenfeld and Nicolson London) 1970.

18. The current rules enable counsel for the accused to cross-examine the rape victim at length about her prior sexual history in an attempt to establish consent in relation to the incident in question.

An equally important feature of rape which is not addressed by the criminal law, is the fear engendered by the possibility of rape. The territorial restrictions self-imposed by women for pragmatic reasons tellingly illustrate the constraints imposed.

While women live in an unequal power relationship with men, of which rape is the extreme manifestation of women as sexual property, the criminal law on the subject will be largely irrelevant.

E. Incestuous Unions and 'Unnatural' Sexual Acts.

It is interesting to note the oversight in the drafting of the *Criminal Code* concerning incest. Under s.226 sexual intercourse between a man and his grandmother is not incestuous, whereas under s.227, sexual relations between a woman and her grandfather are incestuous. The provisions relating to incest have been judicially interpreted to exclude from liability sexual intercourse between a man and his adopted daughter.[19]

Male homosexual acts, sexual acts with animals, and heterosexual sodomy are classified as 'unnatural' acts and prohibited by ss.212-215 of the *Criminal Code*.

Strathern comments that:

> whereas in western thinking, insofar as this is reflected in the present Code, it is considered quite appropriate for public judicial action to be taken in all matters concerning sexual propriety but this view is not shared by all Papua New Guinea societies.[20]

Most of these matters are dealt with privately and the strong sanctions of shame and sometimes banishment or ostracism, are invoked. Recognition by Papua New Guinean societies of some sexual acts as being unnatural does not mean they are offences in a legal sense.

F. Lesbian Relationships.

Lesbian relationships in Papua New Guinea do not constitute any offence unless they occur without consent or in a public place. This does not imply that lesbian relationships are condoned. Prevailing social attitudes mean that the personal freedoms and rights of lesbian women are severely restricted. Female homosexuality in Papua New Guinea societies, according to Strathern, is rarely institutionalised and 'homosexual play among married or unmarried women is generally treated lightly...'.[21]

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19. *The State v. Misimb Kais* (unreported judgment, N157, 1978); *Sangumu Wauta v. The State* (unreported judgment, S.C. 13, 1978).

20. Strathern, *op. cit.*, 46.

21. *Ibid*, 49.

G. Prostitution.

Under the *Summary Offences Act* 1977, s.55(1) 'a person who knowingly lives wholly or in part on the earnings of prostitution is guilty of an offence.'

This section was interpreted on appeal by Wilson J. in *Anna Wemay and Others v. Kepas Tumdual* (unreported judgment, N.C. 138, 1978). It was submitted by the Prosecution that each appellant was knowingly living off the earnings of her own prostitution. The Defence argued that s.55(1) did not apply to a prostitute herself, but was restricted to third parties who derived financial benefit from her activities. Wilson J. upheld the convictions, remarking that:

> ...I am of the opinion that a prostitute herself may fairly be said to be living in whole or part on the earnings of prostitution if she is paid money for services rendered by her as a prostitute which money she would not otherwise receive and have available to her for living purposes but for the fact that she was a prostitute...the prostitute herself may be just as much a "person" for the purposes of s.55(1) as the madam, the tout, the bully, the protector or the pimp.

In adopting this interpretation of the new legislation, the judge turned the clock back to the situation which prevailed before the *Summary Offences Act* 1977. The Law Reform Commission's Report which led to the passing of the new *Act* recommended the abolition of the offence of soliciting and, by implication, that 'living off the earnings' should be given a narrow interpretation.[22] Moreover, similar legislation in other jurisdictions has been given the narrower interpretation.

Men who participate equally in the transaction are exempted from any legal sanction. While it is not suggested that this discrimination be cured by extending punishment to the male participant, this is a clear example of the double standard adopted by the law.

A prostitute's child by definition is 'neglected'. Under s.5(c) of the *Child Welfare Act* 1961, a child 'who resides in a reputed brothel or associates or dwells with a person known to the police to be, or reputed to be, a prostitute, whether that person is the mother of the child or not' is regarded as 'neglected'. To discriminate against women by criminalising sexual transactions is sufficient cause for concern. To stigmatise automatically the child nurtured by that woman as neglected, with the potentially severe consequences that can flow from that process, is simply a case of derivative punishment which cannot be justified.

Prostitutes who are unmarried and pregnant are expressly deprived of the right to take affiliation proceedings against the father of the child for confinement expenses and/or maintenance of the child after birth under the *Child Welfare Act* 1961, ss.57, 59.

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22. Law Reform Commission of Papua New Guinea Report No. 1, *Summary Offences* (September, 1975).

Prostitution in some areas of Papua New Guinea is accepted as a way of life, while in other areas it plays no role at all in the lives of the people.[23] The act of prostitution itself, the Commission maintains, has never been an offence in any part of Papua New Guinea.

H. Adultery.

Adultery is a criminal offence under the *Native Regulations* (Papua) 1939 84(1) and (2), and under the *Native Administration Regulations* (New Guinea) 1924 84(2) and (5). This subject has been dealt with in the section on dissolution of marriage, above.

I. Conclusion.

The definition of sexual offences is often an expression of rights over female sexuality. The sexual vulnerability of women due their psychological and economic dependency on men transcends societal differences.[24]

In many Papua New Guinea societies, women implicated in sexual offences are often the subject of physical punishment themselves. Strathern[25] suggests that there are various aspects to this violence. In cases where women are legal minors (in the sense that they are unable, like men, to compensate for their offences) they are chastised by those with authority and power over them. Supporting such behaviour towards women is an ideology of male domination, and in some societies, this ideology endorses sexual aggression towards women, including rape.

Generally, there are marked differences in responses between the *Criminal Code* and most Papua New Guinea societies to various forms of sexual conduct. The tendency under the *Criminal Code* is to single out for the application of criminal sanctions a wide range of sexual behaviour. In many Papua New Guinean societies there is less concern to punish such a wide range of sexual conduct. Even where the customary practice is to regard certain sexual behaviour as 'unnatural', the nature of the punishment is significantly different. Thus sanctions such as shame are more likely to be invoked. Moreover, the range of responses in Papua New Guinean societies is considerable. Unlike the *Criminal Code*, there is no attempt to legislate for a universal morality.

XI. *Institutions: Prisons and Psychiatric Hospitals.*

Women in prisons, in psychiatric wards of general hospitals and in the one psychiatric hospital in Papua New Guinea, suffer enormous deprivations of their rights.

A. Women in Prisons.

Women who are sent to prison by the courts are held separately

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23. *Ibid*, 22.

24. Ann Oakley, 'Cultural Influences on Female Sexuality' in Sandra Allen, Lee Sanders and Jan Wallace (eds.) *Conditions of Illusion* (Feminist Books, Leeds) 1974.

25. *Op. cit.*, 89.

from men.[26] The *Report of the Committee of Review into Corrective Services in Papua New Guinea*[27] claims that in most corrective institutions female detainees represent a minor proportion of the population. Generally, they are committed for short terms (less than 6 months) for minor offences or for long terms (6 years and more) for serious offences. The *Report* suggests that women are significantly under-represented in the medium-term sentences (6-18 months), although this category accounts for a significant proportion of the male detainees.[28]

This small overall proportion of women in prisons, combined with the fact that many are committed for short periods, results in the women being almost ignored by the authorities. 'Women are in the Institutions because they must be detained somewhere, but the overall impression is that no-one knows what they should be doing.'[29] The officers under whom the women prisoners serve out their sentences can include males and females, although reg. 155 of the *Corrective Institutions Regulations* 1959, requires that there must be at least one female officer or wardress. Routine searches of women prisoners must be carried out by female officers (reg. 156(1)) and medical examinations of women can only take place in the presence of an adult female (reg. 156(2)).

The holding of unauthorised communications between detainees of the opposite sex amounts to an offence under s.25 of the *Corrective Institutions Act* 1957 (No. 67 of 1957) and can lead to an extension of sentence for up to 6 months.

The *Report* claims that in some Institutions in Papua New Guinea, the women 'have adequate sanitary compounds but others, for example, Bui lebi (Mendi) should have been condemned by the Health Inspector'.[30]

How women actually serve out their sentences in prison is variable. The concept of rehabilitation, together with employment with this end in view, is not a predominant theme in prisons.[31] The Committee observed that women were 'usefully employed' in some Institutions (for example Bui lebi (Mendi)) but in others 'the best that most of the women can hope for, is that they are kept occupied'.[32] Tedium, boredom and lassitude are predominant experiences for many women in prison. Under reg. 131, women's role as servicing agents is reinforced: 'A female detainee shall be employed as far as practicable within the institution's premises at sewing and washing and such other work as the Controller may from time to time direct'.

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26. See the *Corrective Institutions Regulations* 1959 (No. 13 of 1960), as amended.

27. April, 1979, 79.

28. *Ibid.*

29. *Ibid.*

30. *Ibid*, 80.

31. *Ibid.*

32. *Ibid.*

Under Schedule 4 of the *Regulations* clothing allowances are stipulated as follows:

Non-native Female	Native Female
2 blouses, khaki	3 blouses
2 skirts, khaki	3 skirts
3 pairs of briefs	
2 pairs sandshoes	
2 nightdresses	
3 handkerchiefs, khaki	
3 calico sheets	
2 calico pillowslips	
1 pillow	
1 hat	
1 mosquito net	1 mosquito net (if directed by the medical officer)
2 towels	1 towel
2 blankets	2 blankets

No reasons are given for the discrepancies between the allowance to expatriate and national women.

The Committee received complaints from detainees of inadequate supplies of clothing to the extent that some women did not have a change of clothes. The women objected in particular to the lack of provision of underwear.[33] Under reg. 112(2), however, a women detainee serving a sentence not exceeding 6 months 'may be permitted by the Officer in Charge, to provide and wear her own night attire, underwear and footwear'.

Sanitary napkins were not provided in the Corrective Institutions, making life for the women detainees 'awkward and embarrassing.[34]

Many women in prison are mothers of young children and sentences given for even minor offences can have devastating and far-reaching consequences on family life, especially on the lives of children involved. The Committee claims that women in jail 'have justifiable worries about the welfare of their children, especially as many suspect the husband will have taken another woman'.[35] While the extended family still operates to care for the children of mothers in prison in many areas, many women, especially in urban areas, do not have this support. The Committee found evidence that young children who accompanied their mothers to prison usually because they were still nursing, were 'grossly neglected'.[36] Clothing and rations for children were not provided by the authorities, so mothers had to share, and the children had no access to health care.

Generally the female detainees were denied regular medical check-ups. This deprivation of medical treatment was particularly significant

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33. Underclothing which was amongst the personal belongings of the women was kept in store and not allowed to be worn, *ibid*, 80.

34. *Ibid.*

35. *Ibid*, 81.

36. *Ibid.*

for the many women prisoners who were pregnant.[37] Arrangements for the birth of babies in many institutions were very haphazard. Given the present diet, pregnant women, nursing mothers and children, were severely disadvantaged.[38]

These conditions prevail despite the fact that under s.11(1) of the *Corrective Institutions Act* 1957, a medical officer of the Department of Public Health can be appointed as a visiting medical officer to a corrective institution.

The Committee claimed that many women were being committed by the Village Court, and with the increase of Village Courts this trend could be assumed to also increase. It commented that 'Village Courts were set up specifically to negotiate settlements at a local level, but the committee is disturbed when they appear to be used to maintain women in an inferior social position'.[39]

The Committee made the following recommendations concerning the detention of women in prisons: that women be employed in gardening, using improved techniques for subsistence gardens with assistance from the Department of Primary Industry; that they be taught to cook any introduced vegetable to integrate them (sic) into the normal village diet with an emphasis on good nutrition as an aid to health; that they learn basic sewing; that women be supplied with suitable materials for making bilums, mats etc, the sale money from which to be used to purchase other materials; that suggestions on education and rehabilitation made in regard to detainees in general be applied with obvious adaptions; that all Institutions be provided with a hand-sewing machine standardised, nation-wide, for use by female detainees; that female detainees be trained to sew their own clothes, at least 2 sets each, including underpants; that all Institutions purchase Modess napkins and belts sufficient to the needs of the female detainees; that fabric be provided by the Service and women be taught to sew suitable clothes for their children; that a small children's clothing pool (especially warm clothes) be established in provinces and distributed to children as required; that part-adult rations be provided for all children over the age of 12 months; that all pregnant and lactating women be provided with extra rations, especially green vegetables; and that all children and pregnant women have regular health checks, either by visiting town clinics or arranging for Maternal and Child Health clinics to visit the Institution.

B. Women in Psychiatric Institutions.

Psychiatric institutions in Papua New Guinea consist of psychiatric wards at large hospitals, major treatment centres being Port Moresby, Lae and Goroka[40] and a mental hospital, Laloki Psychiatric

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37. For example, 7 of the 12 female detainees at Tari were obviously pregnant. *Ibid*, 82.

38. *Ibid*, 81.

39. *Ibid*.

40. R. Robin, 'Mental Health Services in Papua New Guinea: a Critique' (1) in R. Robin (ed.) *Psychopathology in Papua New Guinea* (University of Papua New Guinea, 1979), 33.

Centre, near Port Moresby. Treatment of patients often takes place in isolation from other patients suffering from physical complaints.[41]

Women constitute a relatively small proportion of psychiatric admissions. However, present trends indicate an increase in admissions generally, as well as an increase in the proportion of women.

Up-to-date comprehensive figures are very difficult to obtain, although current research by the Faculty of Medicine at the University of Papua New Guinea will shortly provide information. Patake - Schweizer[42] says that the figures for Ward 6 in Port Moresby General Hospital of 71.4% male and 28.6% female patients reflects the current situation.

Despite ss.29, 38, 40 and 42 of the *Mental Disorders and Treatment Act* 1960 (No. 9 of 1960) the 'screening' system of diagnosing before admission is often faulty. Robin writes:

> As a result of poor screening in the outpatient section, or failure to receive accompanying letters from referral sources, little is known about the patient's antecedent behaviour prior to showing abnormal behaviour. Often the only information available at the time of a patient's admission is his/her state of agitation'.[43]

In mental institutions in Papua New Guinea the predominant system of psychiatric diagnosis and treatment is western-oriented despite its inappropriateness and despite extensive cultural variations within the country. Robin[44] suggests that it is extremely doubtful whether appropriate ethnographic research necessary for soundly based judgments concerning personality disorders is actually carried out. Robin argues that the literature available tends to support the hypothesis that serious mental disorders do not occur as frequently in Papua New Guinea as in more developed countries.[45] However there are predictions that the amount of mental illness will increase rapidly due to the speed with which social and technical change is creating conflicting cultural values and stress.

Robin is extremely critical of treatment methods in Papua New Guinean mental instititutions. He claims that the most widely used treatments are chemotherapy and electro-convulsive therapy.[46]

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41. *Ibid*, 8.

42. Personal communication.

43. Robin, *op. cit*, 17.

44. *Op. cit*, 21.

45. R. Robin 'Psychopathology in Papua New Guinea: a Literature Review' in Robin (ed.) *op. cit.*, 69.

46. In fact, under s.57 of the *Act*, Medical Assistants, Assistant Medical Practitioners and Nurses, provided they are proficient in the administration of electroconvulsive therapy, can administer the treatment for urgent reasons, the assessment of this being left to the individual Assistant or Nurse.

Counselling, if it occurs, is informal and limited to occasional social interchange between nursing staff and patients; occupational therapy is rarely practised; so-called 'industrial therapy' is limited to garden work around the institution; and social work, a potentially important treatment programme in Papua New Guinea, is very deficient.[47]

Papua New Guinea has only one psychiatric hospital designated specifically for psychiatric patients, Laloki Psychiatric Centre. Patients at Laloki are usually chronic long-term patients from other centres, together with patients considered violent or dangerous for whom general hospitals refuse responsibility, and criminal offenders referred by the courts for treatment.[48] By far the majority of patients in Laloki are men and the women in Laloki all reside in Buna Ward, an open ward permitting patients access to the larger hospital complex.[49] Male staff are forbidden entry to the part of the hospital for female patients except in the course of their duties.[50] There are provisions for security in the ward which consist of cell-like rooms with heavy lockable doors. 'While not creatively decorated with paints or pictures' comments Robin[51] this ward, unlike Kokoda Ward, the maximum security unit 'does contain basic equipment such as mattresses and beds'. Nearly every patient in Laloki, regardless of behaviour, is administered sedatives and many patients suffer institutionalisation, having lost contact with their homes.[52]

A rather remarkable restraint on the sexual autonomy of women undergoing treatment in psychiatric institutions is to be found in s.53 of the *Act*. This section makes it an offence to have sexual intercourse with such a woman, both in hospital and on leave. Consent of the woman is no defence under s.53(3). It is doubtless sought to justify the provision on paternalistic grounds but its breadth makes this difficult. No such restriction is placed on the sexual freedom of men being similarly treated.

Most Papua New Guineans view mental illness in terms of sorcery, and traditional healers are highly regarded. The *Public Health Act* 1977 was designed to take account of the important role of these traditional healers. However Robin[53] claims that 'little practical effort has been made to integrate the services of the traditional healer within official health services of Papua New Guinea'.

A preliminary study to determine community attitudes to *long long*

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47. *Op. cit.*, 34-37.

48. *Ibid*, 48.

49. *Ibid*, 50.

50. Reg. 10 of the *Mental Disorders and Treatment Regulations* 1962.

51. *Ibid*, 50.

52. *Ibid*, 52.

53. *Ibid*, 38.

people[54] was carried out by Teachers College students at Goroka.[55] One hundred and fifty-one villages were surveyed throughout Papua New Guinea, from 15 provinces, the Highlands area being somewhat over-represented. Eighteen villages reported no examples of mental illness and in the remaining 133 villages, 283 individual cases of abnormality were described. One hundred and thirty-six of the cases were females, having an average age of 37.5 years.

Village informants tended to ascribe more abnormal behaviour and deviant speech patterns to women than to men. Robin comments:

> Major differences can be seen between males and females on a number of behavioural dimensions of abnormal behaviour. They are behaviours that while sometimes occurring with men, may indicate apparent cultural-specific behaviour for women. While functioning as a long long person, the female may be able to express herself in ways that would otherwise be considered unacceptable to the village community and be met with punitive community sanctions.[56]

According to the village informants women showed a higher incidence of sexually promiscuous or exhibitionist behaviour, manic behaviour (frequently associated with frenetic dancing on non-celebratory occasions), sudden mood changes, self-injury or apparent suicide attempts, and violation of village taboos. Robin suggests that a possible interpretation of some of the apparent differences between men and women may have less to do with actual rates of abnormal behaviour as reported by village members and more to do with attitudes and perceptions of the inhabitants. The village informants were largely male elders and their views must in some way reflect male orientation and values.[57]

Although there was a high degree of tolerance and acceptance of *long long* behaviour at the village level, women were subject to a greater degree of physical restraint than men, and they tended to receive harsher treatment for stealing when *long long*, than men. Robin reports that 7% of the *long long* females were generally ignored and 'used primarily for their child-bearing and sexual intercourse functions.[58]

Sorcery and magic were most commonly believed to be the cause of mental illness, although for 8% of the females, anxiety or worry due to divorce and marital disharmony were considered the cause of their behaviour.

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54. *Long long* is a Neo-Melanesian word meaning madness or insanity.

55. See Robin, 'A Preliminary Investigation of Papua New Guinea Community Norms with a Cross-Section of the National Population; a look at Long Long Behaviour Speech, and Belief', in Robin (ed.) *op. cit.*, 85-112.

56. *Ibid*, 96.

57. *Ibid*, 98.

58. *Ibid*, 103.

C. Conclusion.

Generally, then, institutions for the social control of so-called deviant behaviour whether they be psychiatric hospitals or prisons, are an anathema to Papua New Guinea culture. The resultant effects on both women and men are devastating.

XII. *Property.*

A. Succession.

1) The Dual System. Papua New Guinea has two very different systems of laws governing succession. The *Wills, Probate and Administration Act* 1966 brought foreign laws and principles of succession to Papua New Guinea estates. In August 1970 an amendment revived customary succession for Papua New Guineans. At present, the operation of the succession laws depends upon the race and inheritable possessions of the person who dies, citizenship playing no part. If the person is Papua New Guinean then the relevant customary system applies, and the customs as to succession are very variable throughout the country.

The situation has led to much ambiguity and confusion. Questions arise as to inheritance, for example, of property left by one or both parties to a mixed race marriage; of businesses established on leased land away from the person's village; of land rights of children, in the light of the increasing scarcity of land, whose parents from differing customary groups, spend their lives in towns. According to Kassam '...the law has failed to recognise and to provide for the realities of a multi-racial society where, for certain purposes, members of any race may choose to adopt customs of another ethnic group'.[59] Zorn claims that:

> Up to now, the property of mixed-race people who owned businesses and lived in town or as plantation owners, has been distributed under the Act, as though the person were not a native of Papua New Guinea... In fact, since some mixed-race people are automatic citizens, and thus are defined by the *Interpretation (Interim Provisions) Act* as 'natives', their property should descend according to customary law.[60]

Under the imported law, individual ownership is paramount, spouses and children inheriting upon intestacy the whole deceased estate. Papua New Guineans can make wills under the *Act* covering any non-traditional property they may own, but they may not will customary land.[61]

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59. Kassam 'Laws of Succession in Papua New Guinea: Some Reflections', (1974) 2 *Mel. L.J.* 20.

60. Jean Zorn, 'Draft Paper on Succession Laws in Papua New Guinea' (Law Reform Commission 1976) in Weisbrot (ed.) *Customary Law in Papua New Guinea: A Cases and Materials Source Book, op. cit.*, 227.

61. About 97% of the land in Papua New Guinea is held under customary tenure according to the *Report of the Commission of Enquiry into Land Matters* (Port Moresby October 1973), 17.

Most property belonging to Papua New Guineans is distributed at their death without reference to courts, according to the rules of customary succession. According to Zorn, 'a person's death provides one of the many occasions when the clan expresses its solidarity and its ties with other clans, and the distribution of his property is part of the sustaining ritual'.[62]

2) Customary Regulation. Under customary law in most areas, land cannot be inherited outside the clan or relevant land-owning group. Thus in matrilineal societies, land is passed from a man to his sister's children, since his own children are not members of the clan. 'Ownership' of land in the Papua New Guinea context is a misleading concept. One should really address the question of who has authority, right or interest in land. 'It is my land' expresses these concepts.

Apart from descent rules, interest in and rights to land depend upon such factors as residence, marriage, affiliation, sustained absence from the village, availability, accessibility and productivity of the land in question. In some societies, the rules of succession are rigidly prescribed, whereas in others, a fairly sizeable group of potential heirs is indicated.

Usually, though not always, personal property which can include clothing, armshells, bilums, cooking-pots, fishing and hunting equipment, can be left to whomever a person chooses. Apart from land, things such as trees, crops, houses, rituals, magic, sacred musical instruments, can totems, taboos, personal and clan names, knowledge about medicines and sorcery, are inheritable.

3) Women's Rights. Women in some societies have rights to land. Matrilineal descent is associated with modest property right benefits for women in certain areas. Bramell[63] asserts that among the Motu and Koitapu, 'every person...whether they be male or female, could, even without a comprehensive knowledge of their lineage construction and ancestry, show that they have some rights to share in land'. However 'it is accepted generally that a woman has less right of usufruct and control over land than a male'.[64] Zorn believes that:

> Women's status under customary law left much to be desired. Women were much more likely to be owned than owners. If a woman could leave her property to heirs, she had pitifully little to pass on... and there were few societies in which women could expect to inherit property... Men got the land and its wealth; women were expected to look to men to care for them. In childhood, their fathers would provide; when they grew up, a husband would be found. If the husband should die, the best

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62. Zorn, *op. cit.*, 227.

63. J.B.C. Bramell, *Notes on Native Land Custom: Port Moresby Region* n.d., 10.

64. *Ibid*, 11.

> thing a woman could do would be to find another as quickly as possible, for there were few societies that believed she should inherit a share of the gardens she had toiled in for him or the animals she had raised.[65]

This characterisation of women's position in respect of property and succession rights may not be entirely accurate given the wide diversity of societies within Papua New Guinea. Nonetheless it is reasonable to say that, generally speaking, women are disadvantaged when compared with men in relation to these matters.

Zorn suggests that there are trends in the country that make the devising of a unified law advisable,[66] and claims that the law could provide for both wives and children and for the extended family by distinguishing between traditional and non-traditional property, traditional possessions being inheritable under customary law and non-traditional possessions being passed onto spouses and children primarily.[67]

Griffin[68] says that the cry for a fairer deal for the wife has been the main impetus to change the customary system of succession in Africa.

The impetus in Papua New Guinea for change to succession laws in respect of women may have to come from the *Constitution* which requires that men and women be accorded equal rights and status. The constitutional requirements make it at least theoretically difficult for some customary practices to continue.

4) Undermining of Traditional Rules. Under the influences of western law, economic changes, increased mobility, residence out of villages, marriage unions between people of different groups or countries, Zorn claims[69] that traditional inheritance rules are gradually being undermined in favour of practices which 'emphasise patrilineal inheritance, support of the nuclear family and individualisation'. It could be argued however that individual uncontrolled inheritance rules are the basis of unequal distribution of resources and wealth and therefore contrary to National Goal and Directive Principle 2(3). How property is owned is a basic determinant to a nation's economy. The Papua New Guinea Commission of Enquiry into Land Matters[70] has made recommendations premised upon the basic principles that land policy be concerned with increasing production, that private landlordism be checked, that land policy should be an evolution from a customary base, collective and

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65. Zorn, *op. cit.*, 222.

66. *Op. cit.*, 226.

67. *Op. cit.*, 239.

68. John A. Griffin, "Conflict of Inheritance Law and Custom in Niugini' (1970), 1, *Mel. L.J.* 34.

69. *Op. cit.*, 224.

70. *Op. cit.*, 18.

individualistic extremes being avoided, that very unequal distribution of land be avoided, that those who need land and use it well be favoured under law, and that most land transfer be through the government, though some direct dealing in small lots be allowed. Thus it has been recommended that most of the country's customary land be registered under group titles. This important matter remains unresolved, the tenor of the basic principles referred to above reflecting an uneasy compromise.

B. Civil Capacity of Married Women.

The *Married Women's Property Act* 1953 substantially removes certain disabilities previously imposed on married women. Under s.5 of the *Act* a married woman is capable in her own righ of acquiring, holding and disposing of property; capable of rendering herself and being rendered liable in tort, contract, debt or obligation; capable of suing or being sued in relation to these matters and capable of being bankrupted. A married woman may also effect life insurance (s.14). The *Act* further provides (s.10(1)) that a married woman retains the right to and liability for investments registered in her name.[71] Interestingly however, s.10(2) provides that no corporation is required by virtue of s.10(1) to admit a married woman as a shareholder in conflict with the Articles of Association or other constitutive authority of that corporation. In other words, a company does not have to admit a married woman as a shareholder if its rules stipulate that they need not. It would seem that s.10(2) is a piece of pre-Independence legislation discriminating against women. The question as to whether it is constitutionally valid depends on the scope to be given to s.55(3) of the *Constitution* (see discussion above in the section on the *Constitution*).

The expressed intention of the *Act* was to amend the law relating to the capacity, property and liabilities of married women. The question of the applicability of the legislation is problematic. Kassam[72] argues that once a customary law marriage has been proved valid, it should be subjected to all other family legislation (unless it is expressly excluded as in the *Matrimonial Causes Act* s.8), since under s.55(2) of the *Marriage Act*, customary law marriage is to be regarded as a valid marriage for the purposes of 'any law in force in the Territory'.

Such a construction would have the effect of conferring the autonomy provisions of the *Married Women's Property Act* 1953 on women in customary marriages. Kassam argues however that this interpretation may defeat 'the purpose of the *Native Customs Recognition Act* and perhaps s.55 of the *Marriage Act* if the purpose was not only to pay lip-service to customary law marriage...'.[73] Moreover, universal applicability of the *Married Women's Property Act* 1953 may have curious and unintended consequences. For example the granting of capacity to sue in tort and contract assumes that the relevant rules defining the rights and obliga-

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71. Subject to the usual equitable principles regarding beneficial ownership.

72. F.M. Kassam, 'When is a Customary Law Marriage not Customary in Papua New Guinea?' (1972) 1 *Mel. L.J.* 92.

73. *Ibid*, 97.

tions would be western norms and certainly does not envisage the complications of western 'procedural' rights and customary substantive norms. For this additional reason it is arguable that the *Act* was not intended to apply to customary situations.

C. Conclusion.

The legal capacity of women in civil matters will remain at least ambiguous as far as women who are married according to custom are concerned. However, even if the ambiguity were removed either by judicial adoption of the argument referred to above or by fresh legislation in accordance with Article 15(2) of the United Nations *Convention on the Elimination of All Forms of Discrimination against Women*,[74] this would not resolve the very real problems as to the substantive rights of women in relation to inheritance discussed above.

XIII. *Conclusion.*

The legal position of women in Papua New Guinea is governed in many aspects by a dual system of law - customary and western. These systems are sometimes parallel, sometimes they intersect. What is a consistent theme, however, is that women are generally disadvantaged in terms of power and opportunity under both systems. The exceptions only serve to underline the general situation.

This working paper has attempted to bring together some of the major threads in the two systems so that future research work can examine in greater detail the pervasive legal web in which women are entangled.

An examination of the various areas reveals disparities between the theoretical legal position of women and their practical situation. This is repeatedly illustrated by the comparison of what appear to be legal imperatives favouring women in the *Constitution* with reality. Leaving aside available remedies, it is important to recognise that many of the apparent rights are indeed circumscribed. Often the restrictions imposed (for example by virtue of s.38) are in general terms, but the potential impact on women must be seen in the light of their overall structural position. Further, it is not without significance that even after 1975, pre-Independence statutes which discriminate against women (such as those referred to in the section on Employment) are still preserved by s.55(3). That some of the impact of this derogation from the major 'equal opportunity for women' provision in the *Constitution* (s.55(1)) could be lessened by tortuous legal argument does little to mitigate the position. The situation in regard to women's rights should not be qualified in this way.

There are avenues available to challenge the inequities.

A. The Courts.

The inequitable legal position of women in Papua New Guinea can

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74. The relevant part provides that 'States Parties shall accord to women in civil matters a legal capacity identical to that of men and the same opportunities to exercise that capacity. They shall in particular give women equal rights to conclude contracts and to administer property...'.

be challenged in the courts. Though restricted in a number of ways, the rights conferred on women in the *Constitution* (and the reinforcement provided by the National Goals and Directive Principles) are not insubstantial and afford opportunities for challenge to existing laws and practices. Enforcement machinery is to be found in s.57 and s.58 of the *Constitution* provided the particular problem can be shown to infringe an enforceable right.

A further area which women could consider is the selective encouragement of customary principles which support their position. As far as the implementation of custom is concerned, ample powers exist under the *Constitution*. Schedule 2.1(1) expressly states that 'custom is adopted, and shall be applied and enforced, as part of the underlying law'. Excluded however, are customs which (i) conflict with a Constitutional law (ii) conflict with a statute or (iii) are repugnant to the general principles of humanity (Sch. 2.1(2)). These exclusionary provisions could be relied on to render legally inapplicable customary practices which violated the principles of equality for women to be found in the *Constitution*. On the other hand, customary practices which accorded with those principles could be recognised and developed. An obligation to develop the underlying law (of which adopted custom is part) is imposed on the judicial system (Schedule 2.3, 2.4 and 2.5). It has been suggested that a 'country-wide custom' is required before customary practices can be regarded as part of the underlying law.[75] However this approach is questionable. Reliance appears to have been placed on the ambiguous words 'appropriate to the circumstances of the country from time to time' (in Sch. 2.4). Moreover, the court does not seem to have placed any weight on the definition of custom in Schedule 1.2 which provides that custom shall mean 'the customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when *and the place in relation to which the matter arises...*' (emphasis added). Regional customs, it is suggested, are covered by the *Constitution*.

At a practical level, it is readily appreciated that, generally speaking, women are not accustomed to pursuing test case litigation and, in the absence of voluntary competent legal representation, the financial barriers posed by legal fees may well severely hinder if not bar this approach.

B. The Ombudsman Commission.

A resource which has not yet been fully exploited by women is the Ombudsman Commission. With wide powers to investigate and to attempt the resolution of women's grievances against discriminatory practices by governmental and quasi-governmental bodies, this body will often have jurisdiction where a court cannot assist. It also has power to recommend legislative change and has not been reluctant to exercise this power. However, because the Commission has a policy of acting on complaints, the initiative to use the services offered must come from women affected.

C. Parliament.

The major focus for women in the future must be on the government.

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75. *Poisi Tatut v. Chris Cassimus*, unreported judgment S.C. 131, 1978.

Though the Law Reform Commission and the Constitutional Review Commission are available to be lobbied by individuals and organisations, ultimately they operate only as filtering devices for parliament. A particular responsibility rests on those women who are members of parliament and senior public servants to catalogue systematically, expose and call for positive action to redress the imbalance in the legal status of women in Papua New Guinea as a prelude to the actual assumption of their roles as equal partners in the development of the country.