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WOMEN IN PAPUA NEW GUINEA'S VILLAGE COURTS

Recently, claims have been made in academic literature that women are disadvantaged, or mistreated, in Papua New Guinea's village courts. These claims have the common theme that the male-dominated courts, particularly in the highlands, apply "custom" or "customary law" which discriminates against women. Reviewing research-based studies, other literature and my own research findings, I suggest herein that, to the contrary, village courts are an important resource for aggrieved women with limited avenues for seeking justice and recompense.

Village courts in PNG were established by the Village Courts Act of 1973, at the end of the colonial era. The legislation provided for magistrates, untrained in law, to be selected by the local community on the criteria of their integrity as adjudicators and good knowledge of local customs (Village Court Secretariat 1975: 1). Despite overwhelming support among Melanesian parliamentarians and progressive legal advisers for the establishment of village courts, there were fears among conservative jurists and other Europeans that these courts would be legally or otherwise corrupt and that village court officials' ignorance of the law would result in the application of anachronistic customs. Consequently, when village courts began to be proclaimed in 1975 after a trial period, they

became the focus of European officials who were anxious to observe their practice. Some of the first village courts proclaimed were in the Mendi district of the Southern Highlands, and these were almost immediately visited by concerned European officials.

VARYING REPORTS

The first published mention of allegedly discriminatory practices in village courts was made by Oram in 1979, citing unpublished notes by a white official who visited Mendi village courts in 1975 (Martin 1975). A woman had been found guilty of infringing a "resurrected or invented customary ban against smoking by women". Local white officials appealed as a test case. The district supervising magistrate granted the appeal on jurisdictional grounds, but upheld the right of the village court to interpret local custom (Oram 1979: 73). No rigorous analysis of the cultural background to the case was offered. Magistrates in these first courts had no handbooks to guide them, and had not been properly informed about the limits of their jurisdiction. The *Village Court Handbook*, issued to all existing village courts of its time, was not published until 1976.

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The contribution of AusAID to this series is acknowledged with appreciation.

Subsequently, Paliwala (1982), citing the same incidents at Mendi, argued that village courts were agents of the state applying both custom and law oppressively to the political economic ends of a dominant class (1982: 192-201). More specifically, Paliwala argued that the courts were applying oppressive customs more strictly than they had previously been applied, in the interests of maintaining social control over women as the most important source of rural labour power (1982: 221-222).

A legalist commentary (Mitchell 1985: 88) claimed that the PNG Constitution contained a contradiction, promoting women's equality and the Melanesian family at the same time, and that the latter reinforced customary attitudes subordinating women. Mitchell believed the directives that village courts apply custom were bound to result in discrimination against women (1985: 88). She tried to achieve a balanced view of what she saw as customary law and its application in village courts. Noticeably, she avoided simply categorizing village courts as misogynist, blaming instead what she saw as the discriminatory customs which village courts inevitably apply under the directives of the Village Courts Act, and the contradictions in the Constitution (Mitchell 1985: 89).

A contrasting view was offered by Westermark (1985), based on fieldwork in the Kainantu District of the Eastern Highlands, who provided an important indication of the wider context in which individual disputes occur (1985: 114-117). He noted that the most frequently contested family issues in the courts were marital problems and assaults, the most frequent complainants being women asking for divorces, which magistrates were reluctant to approve (1985: 112). Westermark described the village court's reluctance to grant divorces in the context of the local issues of the time, particularly the social and economic pressures causing conflict and family instability (1985: 118). He omitted to mention that village courts are not authorised to grant divorces (a matter to which I will return below). Significantly, though, he noted magistrates' severity with *male* defendants in cases of marital violence (1985: 114), and the high number of women using village courts, which suggested that they viewed the courts as effective for their concerns (1985: 114).

In the same year as Westermark's study was published, an article by Scaglione and Whittingham used country-wide statistical analysis to show that women used village courts more than any other forum to settle grievances (Scaglione and Whittingham 1985: 132). In 1986,

a series of short reports provided by Papua New Guineans on marriage and violence in their own areas included occasional references to village courts in highland provinces, and gave brief examples demonstrating even-handed decisions toward male and female disputants (Warus 1986: 61, Tua 1986: 67-68, Asea 1986: 80, Kakaboi 1986 89), as well as decisions in favour of women disputants against men (Wain 1986: 45, Tua 1986: 72). In 1990, Scaglione used statistics gathered by himself over ten years from Balupwine village court, in East Sepik Province, to suggest that Abelam women were using village courts positively (Scaglione 1990: 29). He added that, contrary to arguments of the sort made by Paliwala (see above), women in the Balupwine area won more cases than men (1990: 30).

In 1989, newspaper publicity surrounded the release of a woman from Baisu gaol in the Western Highlands by a National Court judge after she was imprisoned for non-payment of compensation ordered by a village court (e.g., *Post-Courier* 1989). The judge ruled that the village court had been in breach of the Constitution. No publicity was given to the subsequent finding of the Supreme Court that the Constitution had not, in fact, been breached by the village court (see Jessep 1991). In 1991, other imprisonments of women for up to four months received widespread publicity when the Chief Justice said village courts had misused their powers and done grave injustice to the women (e.g., *Post Courier* 1991, cf. *Times of PNG* 1991, 1992).

Similar newspaper coverage was given to the 1990 "Judges Report", a judicial assessment of the PNG legal system, in which it was reported that during 1990 more than 50 complaints were made to the National Court in Mount Hagen of women being unfairly gaoled for essentially marital problems (Independent State of PNG 1990: 7). The National Court found 44 of the complaints to be legally justified (1990: 7). No comparative figures for men were given. The report interpreted the cases as evidence of conflicts between custom and the rights guaranteed under the Constitution, and the judges clearly saw what they understood as custom to be archaic and oppressive of women (1990: 8). They exhibited the same basic perspective on the relationship between custom and human rights as Mitchell, though with a more condemnatory attitude toward village courts and males.

A discussion by a legal scholar of some of the 1989 and 1991 gaolings (Jessep 1991), while providing no cultural context to the cases involved, critically evaluated the village court decisions in terms of the Village Court Act and

the Constitution. It made the point that the cases contrasted with reports from other parts of the country in respect of the treatment of women, and considered the remedy for unjust treatment in fundamentally legal terms: better legal training and more attention to the constitutional dimension of family law at the village court level (Jessep 1991: 75-77).

It should be noted that village courts cannot actually gaoil anyone. They can write an "imprisonment order", but this has to be vetted by a district court judge, who actually makes the decision whether or not to gaoil the offender. Thus legally, immediate responsibility for a gaoling lies with district, rather than village, courts. In 1992, in respect of these publicised cases, I investigated the writing of imprisonment orders for what appeared to be unusually long periods after women failed to pay ordered compensation.

I found that the "harsh" imprisonment of the women resulted from the careful application by the village court magistrates of the rules in their, by then outdated, 1976 *Village Court Handbook*, for fear of not applying "the law" correctly. The highland magistrates used a Tokpisin version of the handbook in which the note on the optional maximum gaoil term for non-payment of fines or compensation (one week per ten kina) was less clear than in the English language version. The book also gave examples of filled-out imprisonment orders showing the application of the full sentence. The magistrates, of poor literacy, found the examples clearer than the textual instructions, and followed them carefully.

Their rigid application of the law (not "custom" as the judges claimed) reflected a basic paradox in the policy that generated the village courts system. Elected as "customary" experts untrained in law, village court magistrates are constrained by many rules and by the law itself. Magistrates consulted during periodic reviews of the village court system commonly express concern about their lack of expertise in law, seeing themselves as part of a legal system rather than as an essentially customary institution (Goddard 1992: 90-91).

Specific reports of unfair or excessive imprisonment of women by the village courts disappeared from the media after the 1991 publicity. In fact, a judge reported that of 41 women gaoled in Baisu (Western Highlands Province) in August 1992, 35 were from national court convictions, five from district court convictions, and only one from a village court conviction (Doherty 1992: 5-6). She nevertheless opined that women, youth and the less educated

members of society seemed to fare worse in the lower courts than in the higher courts (1992: 1) and offered a set of conclusions -- which she qualified as being personal and unresearched -- about village courts which were similar to those offered by Mitchell (Doherty 1992: 4-13).

RECENT CLAIMS

Considering the contradictions in the foregoing accounts, no general inference can be made as to whether or not women are mistreated in village courts compared to men. However, a body of writing has developed in which the village courts are positioned as oppressive of women, and in which the aforementioned literature has been used selectively.

For example, Macintyre (1998) claims, despite a considerable body of literature to the contrary,¹ that women are often unaware of their rights, lack rights according to "customary law", and rarely initiate legal action (Macintyre 1998: 218). She cites the original 1975 report from Mendi as an illustration of village courts' complicity in the oppression of women, citing the smoking case, and another in which a magistrate thought women should be punished for not going into menstrual seclusion, as evidence of the maintenance of "reactionary and discriminatory ideologies" (Macintyre 1998: 218). In respect of the menstruation case her condemnation seems unusually reductionist considering that many ethnographic examinations of the cultural context of such taboos indicate that their enforcement reflects more than simply male oppression of women.² She mentions no other literature on village courts.

Subsequently O'Collins (2000) has claimed that village court officials often favour harsh penalties. She reports witnessing an incident in 1976 in Pangia, Southern Highlands, in which a supervising magistrate overturned a decision by village court magistrates to gaoil several women who had been found smoking "store-bought" cigarettes on the rationale "that this was prima facie evidence of adultery, as husbands would not have given their wives such cigarettes" (O'Collins 2000: 6). No village courts were proclaimed in the Pangia region until 1978.³ Perhaps O'Collins has misremembered the date of her visit, or perhaps the place. Or perhaps this is a modified recycling of the 1975 Mendi material previously revisited by Macintyre. Again, there is no mention of any later literature on women in village courts.

An influential publication by Garap in 2000 contained a section about women and village courts in Simbu Province (Garap 2000: 162-168). The first part of her discussion of village courts is a series of criticisms reminiscent of Doherty's unresearched conclusions of 1992 (see above), but unqualified and more polemical. This is followed by a list of complaints which the author reports were made by Simbu women to a visiting judge in 1993, and an (unreferenced) reproduction of part of the 1990 "Judges Report" (see above). Nine cases exemplifying the sufferings of women are then listed. Of these, only two mention the village courts at all. One relates a woman's experience of a violent marriage, which she unsuccessfully attempted to have dissolved by a village court. The other tells of a woman's unsuccessful attempt to have a village court punish her husband's polygamy (Garap 2000: 167).

While village courts can hear disputes about bride price, custody of children and matters relating to so-called domestic problems, they are not authorised to dissolve marriages. While this may be frustrating to a suffering wife and cause resentment toward the court, it is not ground for a condemnation of the court itself as misogynist. Similarly, village courts cannot act against polygyny *per se* as it is legal in Papua New Guinea. Similar misconceptions about the function and jurisdiction of the village courts can be found in the reported complaints of the women to the judge in 1993 (Garap 2000: 164-165). Heartfelt though Garap's criticisms may be, there is not enough research-based evidence in her discussion to support her polemical criticisms of village courts' treatment of women.⁴

Nevertheless, Garap's article is becoming a touchstone for other writers discussing women's inequality. Garap's dim view of village courts is (understandably) contrasted by Jolly (2000: 319-320) to my benign comparison, in the same volume, of the operational styles of three village courts (Goddard 2000: 241-253). In a later publication Jolly recounts Garap's claims in a discussion of gender and justice, this time with no comparison with or contrast to any other discussions of village courts (Jolly 2003: 272). Ongoing citations suggest that Garap's account is displacing all others as a citation for authors making passing references to women and village courts (e.g., Dinnen 2001: 109, Lipset 2004: 66, Parker 2002).⁵

RECENT RESEARCH FINDINGS

I have been engaged in research on village courts since the early 1990s, travelling to various parts of the country including the highlands, talking to village court officials and disputants and monitoring cases. Below I produce some findings of my own. I am particularly familiar with three village courts in the National Capital District. Two periods of intensive fieldwork in 1994 and 1999, resulting in transcripts of several hundred cases, inform what I will present here. It is a limited sample, considering that there are about 1100 village courts in PNG, and it is therefore nationally unrepresentative, but I suggest that the research is at least reliable. I am drawing only on cases which I witnessed from beginning to end in "full court", that is, hearings formally constituted in a public place with five to seven magistrates in attendance.

The first findings are from Erima Village Court, which serves settlement communities in the north-eastern suburbs of Port Moresby. The settlements in this part of the city are densely populated and volatile and inhabited by migrants from all over the country (see Goddard 2000). The number of disputes are very high, compared to other village court areas around the capital. A total of 185 cases fully monitored during two four-month periods, in 1994 and 1999,⁶ is represented in Table 1. The sex of plaintiffs and respondents is distinguished and decisions are classified according to whether they favoured the plaintiff, the respondent, or neither.

The overall number of complaints brought to the full court by women exceeds the number brought by men and that the women receive far more decisions in their favour than men. This indicates that women are relatively successful users of the village court, compared to men. Few decisions are made in favour of respondents. It should further be noted that the majority of the cases brought by women singly are against a male respondent, and that in such cases there was never a decision in favour of the male respondent. This compares positively with cases brought by males singly against a woman. Overall the data suggests that women are not disadvantaged in Erima Village Court, compared to men.

The second court I monitored in the same period was Konedobu Village Court. This serves a small group of long-established settlements in the downtown area with an overall population much smaller than that served by Erima court. The settlements are inhabited overwhelmingly by people from the Eastern Gulf region. They

Table 1: Dispute outcomes by sex of plaintiffs and respondents in 185 cases monitored at Erima Village Court, 1994 & 1999.

Disputant sex/no.		No. of disputes	Decision in favour of Pl'tiff	Decision in favour of Resp't	Other outcome#
Pl'tiff	Resp'nt				
1 M*	1 M	36	17	2	17
1 M	1 F	24	11	2	11
1 M	2< F/M	19	11	0	8
1 F	1 M	60	43	0	17
1 F	1 F	17	10	0	7
1 F	2< F/M	19	16	0	3
2< M	2< F/M	1	0	0	1
2< F	1 M	2	2	0	0
2< F	1 F	1	0	0	1
2< F&M	1 M	4	4	0	0
2< F&M	1 F	2	1	0	1
Total		185	115	4	66

* M = Male, F = Female, F/M = Female or Male, F&M = Female and Male, 2< = Two or more.

"Other outcomes" can include transfer of disputes to another court, settlements which favour neither disputant, mediation or the withdrawal of the complaint.

are close-knit, with extensive kinship ties through long intermarriage, and they are very peaceful compared to the volatile settlements in the north-eastern city area. Disputes here are mostly about insults, or imagined insults, friction within extended families, and threats or accusations of sorcery (see Goddard 1998, 2000). The majority of disputes are resolved or managed through mediation. Very few disputes come to full court and even these are often resolved through formal mediation or arbitration rather than adjudication.

At Konedobu Village Court more women brought complaints to full court than men. Complaints brought by women singly against a male were the most frequent type of complaint, and no decisions were made in favour of respondents. Despite the small sample available here, I suggest that this is evidence that women are not disadvantaged in Konedobu village court, compared to men.

The third court monitored was in Pari, a Motu-Koita village on the edge of Port Moresby.

The Motu-Koita are the traditional inhabitants of the land which Port Moresby now occupies. Pari was Christianised in the 1870s, and church activities are a major part of its social life. The majority of disputes are intra-family problems and are dealt with by church committees. There is also a strong emphasis placed on a mediation-style of dispute management, so only a few disputes come to a full court hearing. Pari village court pursues non-punitive approaches to dispute settlement as far as it can, using a strategy of reintegrative shaming and moral lectures toward offenders, and imposing only nominal fines (see Goddard 2003).

Complaints from single plaintiffs are few in Pari, as Table 3 indicates. Male single plaintiffs brought a total of eleven complaints to full court, and women eight. Of the single male complaints three were against women, but none were marital. Of the female complaints five were against a male, and three were marital. The main disruptive problem in Pari is weekend drunkenness, involving excessive noise and

Table 2: Dispute outcomes by sex of plaintiffs and respondents in 36 cases monitored at Konedobu Village Court, 1994 & 1999.

Disputant sex/no.		No. of disputes	Decision in favour of Pl'tiff	Decision in favour of Resp'nt	Other outcome
Pl'tiff	Resp'nt				
1 M	1 M	5	2	0	3
1 M	1 F	3	3	0	0
1 M	2< F/M	5	5	0	0
1 F	1 M	9	7	0	2
1 F	1 F	6	1	0	5
1 F	2< F/M	4	2	0	2
2< F&M	2< F&M	4	3	0	1
Total		36	23	0	13

Table 3: Dispute outcomes by sex of plaintiffs and respondents in 50 cases monitored at Pari Village Court, 1994 & 1999

Disputant sex/no.		No. of disputes	Decision in favour of Pl'tiff	Decision in favour of Resp't	Other outcome
Pl'tiff	Resp't				
1 M	1 M	5	3	0	2
1 M	1 F	3	2	0	1
1 M	2< F/M	3	2	0	1
1 F	1 M	5	2	0	3
1 F	1 F	1	1	0	0
1 F	2< F/M	2	2	0	0
2< F/M	1 M	20	19	0	1
2< F/M	2<M	9	9	0	0
2< F&M	2<F/M	2	2	0	0
Total		50	42	0	8

obscene language by young men. Complaints from the community at large, including outraged women, against young men are reflected in Table 3, with 20 complaints against single males and nine against groups of males. These are usually dealt with by lengthy public shaming, a nominal fine and ritual handshakes with the aggrieved women and everyone else present – a reintegrative process. I think these brief details indicate that women are not discriminated against in Pari village court.

CONCLUSIONS

The findings from Erima, Konedobu and Pari village courts resonate with Scaglione, Whittingham and Westermark's findings that women are confident and successful users of observed village courts. I am not prepared to generalise from this to the country as a whole, much more research is needed in this respect. What can be seen from the examples from village courts in the National Capital District is that the profile of disputes in each community is different, and that the practice of each village court needs to be seen in the context of the sociality of the community it serves. An understanding of social context is possibly more useful in understanding their treatment of disputes than conventional notions of "custom" or "customary law" (cf. Goddard 1996, 2000, Zorn 1991). Judgments about the attitudes or biases of village courts in respect of disputants, whatever their gender, should be made with great caution.

The recent literature criticising village courts for their treatment of women appears to be driven not by rigorous research but by an *a priori* position that the male-dominated courts necessarily impose indigenous patriarchal forms of social control. It arguably does less than justice

to grassroots women in Papua New Guinea by portraying them as relatively passive victims of village courts, against evidence that they are confident and reasonably successful disputants. Furthermore, these attacks on the village courts vilify a community-level resource which appears, on the same evidence, to be increasingly useful for women. On the basis of the relatively reliable evidence I have cited, I remain unconvinced that women are not generally confident and reasonably successful users of village courts. It is to be hoped that further rigorous research, rather than polemic and recycled anecdotes, will better inform us on the matter.

AUTHOR NOTE

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ENDNOTES

- ¹ For example, Bradley (1998: 362 - in the same volume as Macintyre), Brown (1995: 184), Brown Glick (1987: 21), Pflanz-Cook (1993), Scaglione (1990: 29-30), Scaglione and Whittington (1985: 132) and Westermark (1985: 114).
- ² For example, Barth (1975: 162-171, 234-238), Brown and Buchbinder (1976), Herdt (1982), Kyakas and Weissner (1992: 82-91), Lutkehaus (1995), Meggitt (1964, 1965), Poole (1981), Schieffelin (1977: 46-72), Sexton (1995), Stephen (1995: 48-49).
- ³ Seven village courts were proclaimed in Pangia on 19 August 1978.
- ⁴ Simbu Province has eight districts and a total of 79 village courts. It is not clear which, or how many, of these Garap is referring to in her criticism.
- ⁵ I have omitted many other sources with completely unqualified statements about village courts' discrimination against women, such as human rights organizations which publish unreferenced general commentaries on Third World Countries, and similar other summaries of crime, corruption and law and order issues in Papua New Guinea. It is not clear how much field research, if any, has informed these kinds of reports.
- ⁶ This is not the total number of cases witnessed at Erima during either period or at other times, which is considerably more than 185. I have omitted full-court cases for which I do not have complete records and, of course, no mediations are included here.

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