

Tensions between Global Law and Local Social Justice:

CEDAW and the problem of Rape in Fiji

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The expanding human rights regime is contributing to the creation of a global level of legality. While this legality articulates general principles, it cannot recognize the complexity of local practices. In particular, it is unable to consider the contexts within which local practices are carried out, contexts that determine the meaning and implication of these practices. The particular inevitably requires contextual understanding, while the general tends to subtract context in order to establish global principles. This gap between global visions of justice and the way local contexts shape that vision creates a fundamental dilemma for human rights practice. There is an inevitable struggle between the generalizing strategies of the transnational elites who construct a global law and the particularities of situations in which this law is applied. This tension is a fundamental characteristic of the contemporary legal pluralism emerging through the creation of a global human rights regime and its effort to construct general, transnational standards. How to negotiate this divide is a key human rights problem. It is grounded in a legal rationality that insists on equal application of the law.

Let me illustrate this tension with a story. In January 2002, as part of my ethnographic study of the way the human rights system works, I watched hearings of the committee monitoring the Women's Convention, or CEDAW: the Convention on the Elimination of all Forms of Discrimination against Women. One of the countries reporting on its compliance with the terms of the convention was Fiji. This was its first report, and the Assistant Minister for Women and two other people had traveled all the way from Fiji. In addition, three NGO representatives attended. Although the convention covers economic, political, educational, and legal dimensions of women's lives, violence against women has

increasingly become an issue of concern to the committee of 23 experts empowered to monitor compliance with the convention.

One of the striking moments in the presentation of Fiji's report was the discussion of the use of *bulubulu*, a traditional, village-based form of reconciliation, for cases of rape. The government's official report raised *bulubulu* in the context of a critique of the courts' failure to intervene firmly in sexual assault and violence cases. "The prevalent attitudes about gender-based violence are reflected in the relatively lenient penalties imposed on offenders. For example, rape is a form of violence that is particularly directed against women. Despite the serious nature of this crime, Fiji's courts tend to treat rape and indecent assault as reconcilable in the same way as common assault and it is currently the only form of serious crime that can be reconciled. Furthermore, the Fijian custom of *bulubulu* (apology and recompense/reconciliation) is accepted by the courts as a reason not to impose a charge or custodial sentence on a convicted rapist. In some cases, the victim's father accepts the apology and the victim has little say in the outcome. This situation is changing, largely as a result of active lobbying by women's organizations. This is evident from a recent judgment by a magistrate for the award of the maximum sentence. The magistrate commented:

'Women are your equal and therefore must not be discriminated on the basis of gender. Men should be aware of the provisions of the CEDAW, which our country had [sic] ratified.

Under the Convention, the State shall ensure that all forms of discrimination against women must be eliminated at all costs. The courts shall be the watch dog with the obligation. The old school of thought, that women were inferior to men or part of your personal property that can be discarded or treated unfairly at will, is now obsolete and no longer accepted by our society. I hope that this sentence imposed on you shall be a deterrent to all those who

are still practicing this outmoded, evil, and cruel behaviour (from Fiji Daily Post, Jan 20, 2000). 'Offenses against property are, however, still more likely to attract custodial and lengthier sentences than rape, even though rape is a felony for which the maximum sentence is life imprisonment.' (CEDAW/C/Fiji/1, 14 March 2000: 11) It is important to notice that this statement is a critique of the legal system and its ineffectiveness in dealing with rape. Recourse to *bulubulu* is presented as one reason the legal system is not more effective.

In the questions they posed to the Fiji government, the CEDAW committee challenged the custom itself. I took detailed notes on the questions, which are also available as press releases. One expert said that it sounded like *bulubulu* was a very old and very patriarchal custom and asked, "Have you provided to eliminate that custom? What has your ministry done to abolish this practice?" Another said it provided an escape route for people who commit crimes against women to avoid punishment. At least two experts asked, "When will this practice be made illegal?" One said, "While acknowledging the importance of cultural practices, and even the importance of reconciliation, we think it is important that the requirements of the convention be attended to, especially in the case of sexual violence. Thus it is important to the committee that you increase awareness of practices such as *bulubulu*, and of rape, because sometimes the impact of rape comes years after negotiation takes place" (quotations based on my notes). According to the UN press release from 16/01/2002 "A question was asked about the custom of 'bulu-bulu,' which imposed only a custodial sentence on the convicted rapists. The victim's father had a right to accept an apology from him, and the victim herself had no say in that situation. What was being done to abolish such practices?" These questions reveal the slippage between condemning the use of *bulubulu* for rape and condemning the practice altogether.

The Fiji government objected to this critique of *bulubulu*. In an official reply to the CEDAW committee delivered in New York in January 2002, Losena Salabula, Assistant Minister of Fiji's Ministry for Women, Social Welfare and Poverty Alleviation, reportedly called *bulubulu* "a vital custom of the indigenous Fijian community for reconciliation and cementing kinship ties" and said the Fijian government "was addressing its recurrent abuse in relation to modern court processes and the legal system in handling sexual offences such as rape." (UN Press Release 22/01/2002) Salabula said the acceptance of *bulubulu* often led women victims not to report crimes and that offenders were discharged and sentences mitigated, though improved awareness of the practice had allowed the law to take its course on sexual offences. In some cases, families had declined the offer of *bulubulu*; in other cases, families had accepted it but agreed that the law should take its course. The reform of the sentencing law, which was at an advanced phase, was aimed at codifying sentencing options and guidelines.

In response to this report, the Committee's Chairperson, Charlotte Abaka of Ghana, said that while acknowledging the importance of national traditions, especially the practice of reconciliation, it was important to do away with traditions discriminating against women, especially in the case of domestic violence. The country should pay more attention to such negative aspects of the problem as the practice of *bulubulu*, she said. Measures were needed to increase public awareness of the issues involved. It was also disturbing that some cases of violence were referred to as "family discipline" in Fiji. (UN Press Release 22/01/2002).

The Committee's concluding comments criticized *bulubulu* for providing legitimacy to rape. After stating the committee's concern about the high incidence of ethnic and gender-based violence in civil unrest and about domestic violence and sexual abuse of girls and

women, the comments say, “The Committee is also concerned that the social customs on the husband’s right of chastisement, and ‘*bulu bulu*’, give social legitimacy to violence (para 58).” It requests the State party to strengthen its initiatives against gender-based violence and to adopt proposed laws on domestic violence and sexual offenses. “In particular, it calls on the State party to reinforce its ‘no drop’ policy by prohibiting the reconciliation of cases of rape and sexual assault on the basis of the ‘*bulu bulu*’ custom (para. 59).” (A/57/38(Part I): 12).

When I interviewed the Assistant Minister for Women a few weeks later in Suva, the capital of Fiji, she said that the CEDAW committee didn’t understand *bulubulu* and how important it is, and she noted that there have already been legal decisions that define it as inappropriate for rape. The problem is not the custom but its use for rape, which has already been judicially ruled inappropriate, although in all likelihood the practice continues. She said that eliminating *bulubulu* was impossible since it was the basis of village life. The custom was used for a wide range of conflicts and disputes as well as for arranging marriages. Without it, the village could not function. She said that the people who wrote the report didn’t know Fijian custom. “The Fijian people won’t let this go, this custom. If they don’t have it, society will fall apart.” Changing *bulubulu*, she said “... is very contradictory with our culture. When the family wants a girl, they will plant for her for three or four years, and present things for her. It is an investment. But now, with women’s rights, you can marry anyone you want, and forget about this custom.” Here she refers to the use of elopement as a way of marrying instead of the protracted marriage arrangements and exchanges normally expected. It is typically followed by a gesture of reconciliation by the family of the groom to the family of the bride in the form of a *bulubulu* ceremony.

In response to the critique of *bulubulu* as well as criticism of racial policies and affirmative action for Fijians from this and other UN treaty bodies, she said that if the international community did not like what Fiji did, Fiji would go its own way. She felt that the committee did not understand *bulubulu*, and the formal nature of the setting prevented her from explaining it to them.

Her comments reflect contemporary Fiji politics: a nationalist ethnic Fijian movement is asserting the centrality of Fijian village life to the nation. The Women's Minister did not defend the use of *bulubulu* for rape, but she did insist on the importance of *bulubulu* for village conflict resolution. At the end of our meeting, the minister gave an impassioned plea for Fijian tradition, which she says this individualist human rights system is disrupting. Her central concern was that the Fijian culture and its conditions were not understood, that the "expert" label of the CEDAW committee members sounded intimidating, and that they did not appreciate the particularities and specific features of Fiji.

How did this discussion go wrong? I felt that both the Fiji government representatives and the CEDAW experts shared a concern about an overly lenient treatment for rape. Yet, they seem to have spoken past each other. It certainly seemed to me that using village reconciliation for rape could fail to protect a victim, but it was also clear that the courts were not working effectively either. Perhaps it depended on how *bulubulu* actually functioned in different contexts.

In order to answer this question, I scoured the anthropological literature for descriptions of *bulubulu* and in 2003 returned to Fiji to interview the activists in the anti-rape movement who had complained about the practice as well as magistrates, police, and religious leaders. Two critically important points emerged. First, *bulubulu* can to some

extent to redeem a woman's honor and punish the offender, but only if there are powerful kin groups and strong leaders. It is an ancient practice in Fiji, often used by subordinates to deflect the wrath of their superiors in a hierarchical system. It is a way of making peace and avoiding vengeance between two kin groups, usually *matagali*, after there has been an injury. It is used to resolve many conflicts in villages but not often rape. When it is used for rape, it is typically a strategy for apologizing to the family of the victim and sometimes offering restitution such as arable land. The apology is delivered to senior males in the family, and the victim is rarely consulted about whether she wishes to accept it. It is possible for this ceremony to enable her to marry, however, and somewhat diminish the stigma of sexual violation. Moreover, in some cases, the senior males of the offender's kin group hold the offender accountable, reprimanding him or punishing him with violence.

However, the nature of village life has changed dramatically during 150 years of contact with Europeans, colonialism, and since independence in 1970. The country is now about half people of Indian ancestry, brought to work the sugar fields by the British colonial government and Australian sugar plantations. The population is now largely literate and increasingly urban. By 2000, about 40% of the ethnic Fijian population lived in urban or peri-urban settings (Lal 2002: 155). As village life has changed, so has the practice of *bulubulu*. When I talked to a variety of people in the urban areas, some reported that ceremonies were not taken seriously and offenders were barely reprimanded. Others regretted the change in marriage practices so that couples eloped without the ritual exchanges formerly fundamental to the process.

Some urbanites have begun to redefine the custom itself. For example, I spoke to one powerful woman who was highly placed in the Methodist church. This woman described

how she responded when an abusive husband arrived with a whale's tooth and sought to use *bulubulu* to reconcile with his wife. As a widow and independent urban dweller, she had no male kinsmen to help but instead relied on her adult son, a lawyer. She received the request, but instead of granting it for the woman, insisted that the husband speak to his wife directly and ask her if she wanted to reconcile. When the wife refused, she did not insist. The husband tried again several times, and finally after a year of living with her cousin in the city, the wife accepted the *bulubulu* and agreed to go home. Thus, this independent, powerful woman redesigned *bulubulu* to give the victim greater control over the process.

In village practice, the girl was not asked her opinion about accepting the apology, and the apology was delivered to the kin group, not to the victim. Within close-knit villages, this custom could reinstate a woman's virtue and punish the offender, but it was basically designed to prevent killing between the kin groups. The gift of a tabua or whale's tooth provided a way to make peace within villages. As the nature of Fijian society has changed, the custom itself has begun to shift from a practice that focuses on preventing vengeance between clans to one that supports a victim and holds the offender accountable.

A second important point I discovered is that the real grievance of the women's groups was not the use of *bulubulu* for rape cases, but the use of *bulubulu* to persuade prosecutors to drop charges and magistrates to mitigate sentences. In other words, their complaint was not the use of *bulubulu* itself but the way it was being used to undermine the legal process. They were concerned about the legal system's willingness to be deterred by assertions that *bulubulu* had been done. Indeed, the anti-rape campaign criticizing *bulubulu* began in the late 1980s after a judge issued more stringent guidelines for rape cases and defendants began to search out alternatives for escaping these new, more severe penalties.

The mounting enthusiasm for *bulubulu* was to some extent fostered by a growing Fijian nationalism in the 1980s that sought to exclude Indo-Fijians from political power and celebrate Fijian village life as the essence of the nation. Coups in 1987 and 2000 underscored the unwillingness of some Fijian political leaders to share power with Indo-Fijians, although the issues are more complicated than any simple ethnic conflict. One of the demands of Fijian nationalists was for the creation of traditional Fijian courts. Although there were efforts to create such courts in the 1990s, and substantial funds were dedicated to this project, my research assistant, Eleanor Kleiber, was unable to find any indication that these courts were operating when she interviewed the person theoretically running them in 2003. High-ranking lawyers and prosecutors told me that despite a substantial expenditure of government funds over the last decade, there were in fact no Fijian courts in operation.

Indeed, when I reread the country report to CEDAW, I realized that the report itself complained about the use of *bulubulu* to diminish the effectiveness of the courts, not about the custom itself. Even the leader of the anti-rape campaign said she had no objection to the use of *bulubulu* in parallel with the courts; she just did not want it to replace the courts. The critique of the Fiji feminists, then, was not about the use of a traditional reconciliation procedure for rape, but about the way the modern courts were allowing *bulubulu* to diminish their effectiveness. It seems likely that this was an issue in urban and peri-urban areas, not in the rural villages.

This analysis raises the question: why did the experts misinterpret the use of *bulubulu*? And what does this tell us about the tensions between global law and local situations? The UN discussion did not deal with the complexity of the custom or its use, but focused on the problem of the custom itself. The experts discussed not only taking rape out

of *bulubulu* into the courts, but also eliminating *bulubulu* itself. Neither the report, nor the NGO representatives, nor the government representative made clear how fundamental and widespread the practice is, nor how often or how long it had been used for rape. Obviously, they did not have the time to read the anthropological literature and visit Fiji and interview leaders about the practice. This lack of detailed, specific knowledge is an inevitable feature of such transnational forums. Yet, there are at least two other explanations as well. The first is a cultural, interpretive one, the second a more structural one linked to the nature of law itself.

First, I think the committee moved quickly from condemning the use of the custom for rape to a condemnation of the custom altogether because many of the CEDAW committee members assumed that the problem they confronted was one of a “custom” embedded in “traditional culture.” They were inclined to condemn the entire practice, not just its use for rape. They talked about *bulubulu* as a barbaric custom of handling rape by compensation, an example of a harmful traditional cultural practice that needs to be changed to improve the status of women. The custom was defined as a violation in and of itself rather than as one inappropriately applied to a particular kind of offense and used to derail more severe legal penalties.

The experts hearing these reports bring to their work a concept of culture which shapes the way they interpret what they hear. Having listened to reports and discussions for five sessions, over a period of two and a half years, it is clear to me that the term culture is used to describe the way of life of people in rural villages, remote valleys and mountaintops, and isolated islands. Culture is not found in the UN or among transnational elites, but only among those still living in what is often referred to as traditional society. This particular

usage of the term assumes that people with culture live in circumscribed and unchanging ways governed by strict traditions and share the same set of values and practices. FGC is the model for this understanding of culture, since it is widely seen as a barbaric practice embedded in culture and very difficult to root out. FGC is an example of the well-established category of harmful traditional practices. Such a perspective on culture is reinforced by human rights documents about women that repeatedly insist that no cultural, religious, or traditional practice should undermine women's rights. As experts listen to one country report after another, they often hear about customs that violate the terms of the convention and undermine women's rights. They share the widespread opinion that customs are a remnant of the past that must be changed to accommodate modernity. Thus, they are predisposed to see customs such as *bulubulu* as violating women's rights.

Second, the experts are applying the law. They are acting as a legal body to enforce compliance with the terms of a treaty ratified by the country. The human rights system is a legal system committed to the universal application of a code of conduct and to finding ways to apply this code to myriad particular situations. Its documents spell out this shared code, one legitimated by the process of consensual document production and ratification that produced it. The legal rationality at the heart of the process does not accept the existence of alternative normative codes as justification to withdraw its scrutiny. Within the logic of legal rationality, there is no space to adjust the law to particular situations. Of course, this universalizing approach is structured by the Convention itself and the committee's mandate to apply it to all countries equally. Countries that ratify it assume the burden of conforming to its requirements, regardless of their specific cultural attributes.

The CEDAW committee is not deliberately promoting a universalistic transnational modernity, but is part of a process in which the convention itself is the moving force toward transnational modernity. Indeed, the whole human rights process is based on the assumption that local features of culture, history, and context should not override universal principles. Human rights documents create a universal vision of a just society in which local differences are not important. Cultural difference is respected, but only within limits: it does not justify assaults on the bodily integrity of vulnerable populations. The human rights process is based on the assumption that local features of culture and history should not override universal principles concerning how societies should be organized. The goal of the human rights system is to create a universal vision of a just society in which local differences are not important.

The particularities of local practices and the contexts within which they operate are often thought of as falling in the domain of culture. Demands to recognize specific features of context usually appear as demands to recognize culture. Yet, culture is most often raised in international forums as an excuse by governments that fail to act energetically to promote gender equality and the values of autonomy and choice that are at the heart of the human rights system. Consequently, transnational women's human rights activists see claims to respect the particularities of local cultures, traditions, or religious practices as forms of resistance to their efforts to promote women's equality. They undermine the universality of women's human rights.

This position has significant implications for the practice of human rights. It means that there is little sympathy for societies that have separate personal laws for different religious communities or that practice customs that violate the terms of the international

covenants. This is a fundamental tension within the structure of global reformism and human rights: the contradiction between the desire to maintain cultural diversity and at the same time to achieve progress in terms of equality, rights, and universality. These two sets of goals are in conflict: applying a universalistic framework obscures local particularities, but emphasizing local situations impedes applying universal categories for reform. Rather than understanding how the practice of *bulubulu* meshes with a complex set of kinship interventions, police and court actions, and village hierarchies to affect women's protection from rape and appreciating the variety of local village and town situations in which this takes place, the human rights intervention must settle for a critique of the practice itself, feeding into a resistant ethnic nationalism that attributes its problems to human rights.