



**United Nations Human Rights Council
Universal Periodic Review: Federated States of Micronesia (FSM)**

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ICAAD combats structural discrimination and promotes human rights norms consistent with public international law. Structural discrimination refers to systems of inequality that provide a social, political, cultural, or economic advantage to a dominant group while furthering barriers of exclusion that make marginalized communities more susceptible to violence and indignity. Structural discrimination is often operationally reliant on unresolved vestiges of direct discrimination in past eras, and may include direct discrimination in the law. By leveraging partnerships, ICAAD brings together passionate multidisciplinary teams of lawyers, data scientists, and design strategists to improve access to justice for women, girls, and other vulnerable groups while strengthening the capacity of civil society.

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Introduction

The FSM delegation indicated to the United Nations Human Rights Council Working Group on the Universal Periodic Review that FSM was a “very peaceful society and that violence against women and children were rare and isolated”.¹ Since the first UPR review, not enough empirical studies have been conducted on sexual and gender based violence (SGBV) in FSM, but anecdotal evidence suggests that domestic and sexual violence is prevalent.² Addressing violence against women in FSM will require a combination of legal, political, and cultural-based efforts.

I. Women’s Rights

A. Violence Against Women

1. Legislation & Domestic Policies that Address Violence Against Women with Recommendations for Improvement

(1) **Sexual Offenses, Including Rape:** FSM’s national laws do not appear to legislate with regard to sexual offenses, but the laws of the four states laws acknowledge sexual assault as a crime. There are two categories of sexual assault offenses. The first category is sexual assault by penetration. In all four states, sexual penetration includes both penile and non-penile penetration to anus, vagina and mouth. The second category is sexual assault involving a dangerous weapon or serious physical or psychological harm to the victim, which is punishable by up to nine years’ imprisonment in Chuuk and 10 years’ imprisonment in the other three states, and a fine of up to USD \$20,000 in Kosrae. If neither a dangerous weapon nor serious physical harm is involved, the assault is punishable in all states by up to five years’ imprisonment or a fine.³

(2) The sentences for these sexual offenses are relatively light, which implies that sexual assault is not considered a serious criminal offense. In particular, five years for a rape that does not cause serious injury in many jurisdictions would be considered an insufficient punishment and deterrent. Regardless of the level of injury, rape is a violation of personal integrity which should be punished in accordance with norms found in other jurisdictions. Penal sanctions should be incorporated into domestic legislation to punish and redress the wrongs caused to women subjected to gender based violence. Also, women and girls can be sexually violated in a range of ways and all unwanted sexual contact should be unlawful. To effectively redress and punish the sexual violations experienced by women, it is essential to incorporate into the criminal law an appropriate range of sexual assault offences, graded to reflect the seriousness of the invasion of personal integrity.⁴

(3) **Marital Rape:** Marital rape is not expressly prohibited in FSM. In Pohnpei, an offender cannot be charged with sexual assault and sexual abuse if the complainant cohabits with the offender in an ongoing voluntary sexual relationship or if the offender is married to the complainant.⁵ FSM has accepted France’s recommendation to address marital violence, yet, a comprehensive (all 4 States) and clear prohibition does not yet exist.

(4) **Consent:** One category of sexual abuse in all four states is the intentional sexual contact with a person who is under the age of 13, and in the case of Pohnpei the age of 15, with the result that it is lawful to have sexual contact with girls aged 13 (or aged 15 in the case of Pohnpei) and under.⁶ In all states except Pohnpei,

there is a defense with respect to sexual contact where the offender can claim that he did not know the victim was under the age of thirteen. This erroneously places the burden on the minor to reveal her age rather than upon the offender to ascertain her age.⁷

(5) **Domestic Violence:** Outside of Kosrae State, there is no mandatory prosecution of domestic violence in FSM, nor a specific domestic violence offense. Domestic violence offenses are prosecuted under general assault laws. The general assault laws are overly narrow in the definition of the applicable offense and do not include psychological or economic violence. Further, the general assault laws do not consider the unique nature of domestic violence due to the intimate relationship between the perpetrator and the victim. These provisions do not embrace the variety of situations that constitute domestic violence.⁸

(6) **Sexual Harassment:** FSM law does not prohibit sexual harassment, and anecdotal reports suggested it is pervasive.⁹

(7) **Incest:** Historically, the offense of incest was never intended as a means of protecting children, young persons, and women from sexual assault by family members. However, research shows that incest is primarily perpetrated in the context of unequal power relations between men and women/girls in the family. Criminalizing all parties to an incestuous sexual encounter may dissuade a victim of an incestuous sexual assault from reporting the offense due to the knowledge that she may be charged with an offense.¹⁰

(8) The state codes of Chuuk, Pohnpei and Yap contain an offense of incest that does not specify age, which means that women and girls under 18 can be charged with incest. Incest is typically perpetrated by men against girls and women in non-consensual coercive circumstances. Charging women and girls with incest fails to recognize the power imbalance between girls and women and male relatives.¹¹ Moreover, in Chuuk the burden of proof regarding the incestuous relationship falls on the prosecutor, which may further dissuade a victim to report the offense.¹²

2. Evidence Rules: Ensuring Gender Equality in Rule Making

(9) **Proof of Physical Resistance in Sexual Assault Cases:** Proof of resistance is a common law rule used to determine consent. It requires victims to establish that they physically resisted the perpetrator otherwise consent may be inferred. It is discriminatory because it places an unrealistic expectation that physical resistance against a strong or armed perpetrator is possible and ignores the reality that fear and lack of power may immobilize a victim, and it places an onus on women to do more than say no.¹³ None of the FSM states have legislated against the requirement for proof of resistance by a victim of sexual assault.¹⁴ In all four states, sexual assault is described as the perpetrator intentionally forcing himself on the victim under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting. Such provisions imply that physical resistance is expected.¹⁵

(10) **Corroboration:** None of the FSM states have legislated against the necessity for corroboration in sexual offense prosecutions. Corroboration is difficult for sexual assault victims to establish as there are rarely witnesses; thus in order to provide effective complaints procedures and remedies, a legislative prohibition on the requirement for corroboration is necessary.¹⁶

(11) **Admission of Prior Sexual History:** The admission of the prior sexual history of a victim in order to establish that she consented to the sexual act in question is a discriminatory common law rule which perpetuates several myths: (1) that a victim's previous relationship with the accused or other person(s)

makes it more likely she consented; and (2) that promiscuous women or sex workers are more likely to have consented to the act in question. The use of such stereotyped and traditional views of sexual roles can influence the finding of whether a woman consented to sex.¹⁷

(12) All of the states except Pohnpei have legislated against the use of evidence of a victim's prior sexual conduct with persons other than the accused offender, although evidence of sexual conduct with the accused can still be admitted if such evidence is offered to prove consent.¹⁸ In Pohnpei, an offender cannot be charged with sexual assault and sexual abuse if the complainant cohabits with the offender in an ongoing voluntary sexual relationship.¹⁹

3. Sentencing: Consistency and Capturing the Gravity of the Crime

(13) **Mandatory Prosecution & Minimum Sentencing:** None of the FSM states have mandatory prosecution or minimum sentences for sexual offense or domestic violence offences. Bail, which should not be granted if there is any risk to a sexual assault victim, is available in all states as a matter of entitlement unless the charge is murder.²⁰

(14) **Customs and Traditions Affecting Sentencing:** The Kosrae State Code specifically provides for custom and tradition to affect criminal sentencing.²¹ It must be noted, however, that the availability of case law for the FSM is very limited on Pacific Islands Legal Information Institute (PacLii). Most of the accessible information comes from the National Supreme Court, with only a few cases available from the four State Courts. It would appear that the vast majority of the crimes related to sexual and gender based violence are heard in the lower State District Courts, for which the reports are not readily accessible. For these reasons our case study only identified twenty-one cases with distinct sets of facts involving assault and domestic violence.

(15) The failure to find additional references to custom may be due to an overall underreporting of cases or the fact that, at least since the second constitutional convention, such cases are generally dealt with at the lower court level. This means that many of the cases available are appellate decisions which often deal with technical questions of law and do not delve into the facts of the case. It may also be that, even where such crimes are reported, complaints are often withdrawn, the victim indicates that the matter has been resolved or there is little desire to prosecute, potentially due to a customary reconciliation between the parties or the fact that the perpetrator has already been subjected to some form of customary punishment.²²

(16) Although there is evidence from our case law analysis that courts will take into account reconciliation initiated by the perpetrator,²³ there is insufficient data to make any informed conclusion about the true impact of custom on sentencing. The U.S. Department of State notes that except in major criminal cases such as murder or rape, if a perpetrator apologizes, the families involved can determine an appropriate punishment.²⁴

4. Legal Representation: Ensuring Women's Access to Justice

(17) **Absence of Free & Independent Legal Representation for SGBV Survivors:** Legal representation is necessary to file a claim and obtain legal remedies for safety, at restraining or protection order; restitution for physical injuries and property damage, and payment of legal fees and medical bills. At time of writing, no information was found as to the availability or quality of free and independent legal representation in FSM for SGBV survivors.

5. Employment: Workplace Discrimination and Protections

(18) **Discrimination By Employers:** None of FSM or its island states have enacted legislation or mechanisms to protect the employment and labor rights of workers other than in the public service and the judiciary. There are no anti-discrimination provisions, no sexual harassment protection, no breaks for mothers to enable them to nurse young children during work hours, and no equal pay provisions except in Pohnpei, and limited maternity leave.²⁵

(19) **Sexual Harassment:** There is anecdotal evidence that in FSM sexual harassment in the community and workplace is pervasive²⁶ but protection in the laws from sexual harassment is absent in FSM.²⁷

6. Family Law

(20) **Presumptive Post-nuptial Custody:** All FSM states include “the best interests of all” in determining custody. This does not place the child’s interests as paramount and therefore violates the best interest of the child standard required under Article 16(f) of CEDAW.²⁸

(21) **Fault Based Divorce:** Divorce in FSM is permitted either on fault based criteria (e.g. adultery, desertion and cruelty) or on the basis that there has been a two year separation. Fault-based divorces require proof of a matrimonial offense such as habitual rape or desertion placing women in the difficult position of having to proffer evidence that is often humiliating and affronting to her dignity. Consequently, women may choose not to attend a proceeding thereby increasing the difficulty of proving fault.²⁹ The FSM court will not issue a decree of divorce if the injured party has forgiven the ground of divorce.³⁰ Forgiveness, which can include restoration of marital rights, may prevent divorces from moving forward and can fail to account for possible power imbalances between spouses.³¹ In addition, the FSM Code allows for customary marriages to fall outside divorce provisions.³²

B. Law Enforcement Policy & Existing Gaps

(22) The FSM Strategic Development Plan recognizes that “Domestic violence, abuse of children and discrimination perpetrated within the homes and in intimate relationships do not receive proper attention by the police and the law enforcement agencies due to prevailing cultural, religious and social stigmas or “taboos”. Often the “rule of law” does not apply in these cases. Adoption of anti-domestic violence laws and application of “No Drop” Policy will be welcome safety measures for those at risk for abuse and violence.³³

(23) According to the 2012 State Department Report, the police academy curriculum includes programs to train police officers to recognize SGBV.³⁴ The FSM Strategic Development Plan suggests measures to adopt anti-domestic violence laws including a “No Drop” policy which would ensure that the legal systems continues to process allegations of abuse regardless of whether the victim drops the charges, for this often happens under duress.³⁵ The state of Pohnpei has implemented such a “no-drop” policy with respect to violence against women and children.³⁶

(24) The FSM National Police Academy has tried to address capacity gaps that are crucial in dealing with domestic and sexual violence. The Pohnpei Department of Public Safety has a program of domestic violence education that included a hotline and training of its officers to handle domestic violence situations.³⁷ Moreover, training courses and funding support for FSM police officers to improve capacity

and understanding of domestic violence have been provided by the Governments of Australia and New Zealand.³⁸

(25) In addition, there are no governmental facilities to shelter and support women in abusive situations. In Chuuk there is a private multi-purpose facility funded by the Government of Japan in connection with an initiative of the Chuuk Women's Association. Such multi-purpose women's center was established to house women's activities and raise awareness about women's issues, including domestic and sexual violence, but it does not include a shelter.³⁹

C. Women's Voices in FSM's Government

(26) Cultural factors in the male-dominated society limit women's representation in government and politics. Women are represented in the middle and lower ranks of government, at both the national and state level, but participation of women at the highest levels of decision making remains very limited.

(27) The FSM National Congress is composed of fourteen seats and none has ever been filled by a woman. According to the FSM delegation's report to the Human Rights Council, as of 2011, there was a bill pending before Congress that examined the possibility of allocating reserved seats for women in the FSM National Congress per the FSM Strategic Development Plan. Though this had not yet materialized, FSM saw it as a significant temporary special measure to address the issue of women in decision-making positions.⁴⁰

(28) The lack of women's participation in the highest level of government decision-making is largely attributed to the cultural stereotyping of men's and women's roles based on traditional social hierarchies.⁴¹

D. Structural Discrimination in the Constitution

(29) The national and state governments of FSM guarantee equal protection of the law regardless of gender.⁴² The national and state governments of FSM also give constitutional status to customary laws. For example, the FSM Constitution states that "nothing in the Constitution takes away the functions of traditional leaders as recognized by custom and tradition".⁴³ Additionally, the FSM Constitution states that "the traditions of the people of the Federated States of Micronesia may be protected by statute".⁴⁴ A challenge cannot be made to such a statute on the basis that it is in violation of Article IV (Declaration of Rights).⁴⁵ Finally, the FSM Constitution empowers Congress to establish a Chamber of Chiefs consisting of traditional leaders from each state.⁴⁶

(30) However, such constitutional authority for legislation that protects customary law expressly enables such customary law to take precedence over the fundamental rights and freedoms in FSM's Bill of Rights.⁴⁷ The effect of constitutional status being given to customary law throughout FSM, coupled with the absence of a provision that guarantees the precedence of equality law over customary law, leaves women with uncertain legal recourse and redress against discriminatory customary practices.⁴⁸

(31) On a final note, it is important to highlight that FSM did not submit a follow-up Report to the Human Rights Council, and therefore, discussion on the implementation of the recommendations FSM accepted during the first review is limited.

¹ United States Department of State, 2012 Country Reports on Human Rights Practices - Federated States of Micronesia, April 2013, 8-9, *available at* <http://www.state.gov/j/drl/rls/hrrpt/2012/eap/204220.htm> (last visited May 19, 2014) (hereinafter “2012 State Department Report”).

² An article highlighting one FSM woman’s work in domestic violence advocacy provides some anecdotal stories that may serve as useful examples: “One female doctor shared the story of a man who beat his wife to death, while one man spoke of how he witnessed a father attacking his child with a machete. One after another they spoke, with several witnesses emphasizing that often people who want to help find themselves helpless because there is no law to guide them on what to do when they witness such violence.” From American Bar Association. A Micronesian Advocate Helps to Create Safer Environment for Women (December 2013), *available at*

http://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/regional_pacific/news/news_asia_pacific_advocate_create_safer_environments_for_women_1213.html (last visited May 19, 2014) (hereinafter “ABA Article”).

³ Chuuk State Code. Title 12, Part I, Cap 4, s 2053(1) (2001).

⁴ Jivan, Vedna and Wallace, Christine, UNDP UNIFEM, Translating CEDAW into Law: CEDAW Legislative Compliance in Nine Pacific Countries, 14-15 (2006), *available at* <http://www.unrol.org/doc.aspx?d=2894CEDAW> (last visited May 19, 2014) (hereinafter “CEDAW”).

⁵ Pohnpei State Code Title 61, Cap 5, s .141(2) and s 5.142 (2006).

⁶ CEDAW, *supra* note 4, at 53.

⁷ CEDAW, *supra* note 4, at 53.

⁸ CEDAW, *supra* note 4, at 61.

⁹ 2012 State Department Report, *supra* note 1, at 8.

¹⁰ CEDAW, *supra* note 4, at 14.

¹¹ CEDAW, *supra* note 4, at 81.

¹² Chuuk State Code Title 12, Part I, Cap 4, s 2055 (2001).

¹³ CEDAW, *supra* note 4, at 15.

¹⁴ CEDAW, *supra* note 4, at 53.

¹⁵ CEDAW, *supra* note 4, at 104.

¹⁶ CEDAW, *supra* note 4, at 15.

¹⁷ CEDAW, *supra* note 4, at 15.

¹⁸ CEDAW, *supra* note 4, at 53.

¹⁹ Pohnpei State Code Title 61, Cap 5, s 5.141(2) (2006).

²⁰ CEDAW, *supra* note 4, at 53.

²¹ Kosrae State Code Title 6, Part IV, Cap 49, s 6.4901 (1997).

²² Francis X. Hezel, 'Settling Disputes', (2002) 39 *Micronesian Counselor* 1, 2.

²³ *Kosraw v Nena*, 12 FSM Intrm 20.

²⁴ United States Department of State, *Micronesia* (5 April 2011) US Department of State <<http://www.state.gov/documents/organization/160093.pdf>>.

²⁵ CEDAW, *supra* note 4, at 56.

²⁶ 2012 State Department Report, *supra* note 1, at 19.

²⁷ CEDAW, *supra* note 4, at 56.

²⁸ CEDAW, *supra* note 4, at 58.

²⁹ CEDAW, *supra* note 4, at 57.

³⁰ FSM Code, Title 6, cap 16, subcp 2, s 1628 (1997).

³¹ CEDAW, *supra* note 4, at 57.

³² FSM Code, Title 6, cap 16, subcp 2, s 1614 (1997).

³³ Federated State of Micronesia’s Strategic Development Plan (2004-2023): The Next 20 Years: Achieving Economic Growth & Self-Reliance, Vol I: Policies and Strategies for Development, 455-456, *available at*: <https://www.sprep.org/att/IRC/eCOPIES/Countries/FSM/21.pdf>. (last visited May 19, 2014) (hereinafter “FSM Strategic Development Plan”).

³⁴ 2012 State Department Report, *supra* note 1, at 7-8.

³⁵ *See generally* Government of the Federated States of Micronesia with the assistance of UNICEF, *Federated States of Micronesia: A Situation Analysis of Children, Women & Youth* (2004), 53, *available at* http://www.unicef.org/pacificislands/FSM_Situation_Analysis_Report.pdf (last visited May 19, 2014) (hereinafter “FSM Situation Analysis”).

³⁶ U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Federated States of Micronesia, U.N. Doc. A/HRC/16/16 (January 4, 2011), 9 (hereinafter “UNHRC Report”).

³⁷ 2012 State Department Report, *supra* note 1, at 7-8.

³⁸ UNHRC Report, *supra* note 36, at 4.

³⁹ *Id.*, at 4-5; also, 2012 State Department Report, *supra* note 1, at 8.

⁴⁰ UNHRC Report, *supra* note 36, at 11.

⁴¹ Braun, Treva, Gender Equality Adviser at the Secretariat of the Pacific Community, *Stocktake of the Gender Mainstreaming Capacity of Pacific Island Governments – Federated States of Micronesia* (2012), 7 (hereinafter “SPC Stocktake Report”).

⁴² FSM Constitution, Article IV, Sections 3 and 4; FSM Code Title 1, Cap 1, s 107 (1997); and Constitution of Pohnpei Article 4, s.3 (1984).

⁴³ FSM Constitution, Article V Section 1.

⁴⁴ FSM Constitution, Article V Section 2.

⁴⁵ *Id.*

⁴⁶ FSM Constitution, Article V Section 3.

⁴⁷ CEDAW, *supra* note 4, at 64.

⁴⁸ CEDAW, *supra* note 4, at 53.