Fiji Law Reform Commission

Family Law Reform

Discussion Paper 2-1997

Divorce

PREFACE

The Fiji Law Reform Commission has been given the reference to inquire into and to report on the efficiency and effectiveness of the existing laws relating to family and domestic proceedings, and to make recommendations for the appropriate legislative means of reforming these laws to implement a unified and comprehensive system of family law. The reference was given to the Commission by the Attorney-General & Minister of Justice in October 1996. Ms. P I Jalal is the Commissioner responsible for Family Law Reform.

This paper looks at one area of family law, namely divorce. Papers on other areas of family law will follow this paper.

You are invited to make comments and submissions on the options set out in this paper. Your criticisms and comments will assist us in preparing a final report to the Attorney-General & Minister of Justice on how the law dealing with divorce can be reformed.

Written comments should be sent to:

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Please note that this discussion paper is designed to encourage public participation and debate on divorce. It is not a final report and does not necessarily represent the final views of the Commission

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DATE:

22 July 1997

FAMILY LAW REFORM: DIVORCE

I am pleased to enclosed a copy of Fiji Law Reform Commission's discussion paper on divorce. This discussion paper is the second in a series of papers that will be published by the Commission on different areas of family law.

The paper is divided into two parts. The first highlights the issues and questions surrounding divorce laws while the second part examines the role of mediation in facilitating a divorce proceeding. In particular, the following issues are discussed in more detail in the paper:

- Grounds for Divorce
- Bars to Divorce
- Family Mediation

Upon examination of these issues and comparison with the position in other countries, this paper highlights the problem of obsolescence of family law in Fiji, and puts forwards a number of options and recommendations.

The Fiji Law Reform Commission invites submissions or comments on the issues and proposals discussed in this paper. Please note that the views and options put forward in this discussion paper are intended to encourage community discussion and input, and are not necessarily the final views of the Commission. Comments on this paper should be addressed to the Commission and reach it by 1 September 1997.

Yours sincerely

[Florence T Fenton]
Director - Fiji Law Reform Commission

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Executive Summary

Reforming the divorce law is not meant to suggest that divorce is an easy solution to an unhappy marriage. Reconciliation and compromise should always be initially sought and may solve the problems. However, it is futile to attempt to force people to stay in a marriage from which one or both are determined to escape. Making a divorce difficult to obtain does not force a spouse who is determined to escape from an unhappy marriage to stay with his or her spouse. The consequences of forcing unhappy spouses to remain legally married, results in an increasing number of de facto relationships and illegitimate children in newly created de facto families with few legal protections.

The current divorce regime is based on:

- proving one party is at fault or to blame for the break -up;
- viewing the family as a legal unit rather that a sociological, cultural, psychological and spiritual one;
- litigation;
- pitting one party against each other in a winner-loser situation where the spoils of war appear to be the custody of the children and financial gains and losses; and
- technical rules, and legalistic and considerations inappropriate to the family in the process of breaking up.

Currently divorce laws are based on adversarial and antagonistic process of proving the existence of a matrimonial offence and fighting about each aspect of a marriage break up. The legislation may not have been intended to do this, but that is how it functions. The current divorce legislation is in conflict with itself. On the one hand, it seems to have been passed to permit divorce, but on the other hand, it seems to be designed specifically to prevent divorce. Applicants face enormous obstacles, not only substantively (in the context of the law) but also procedurally and technically.

The current system actually does nothing to save marriages. It requires parties to take up opposing positions from the outset. This escalates conflict and therefore removes any opportunity for the divorcing spouses to carefully consider what has

gone wrong, whether there is any hope of reconciliation or conciliating to achieve a fair solution.

The fault based system of divorce laws and the win-lose ethos upon which it is based has the most disastrous consequences for the children of divorce. Studies show that it is not the actual break-up which has long term negative psychological consequences for the children but the conflict which accompanies it. The lesson for the legal system is that the new divorce regime must be designed to lessen rather than escalate that conflict so that divorcing families can emerge from that conflict with some dignity.

Litigation is only an appropriate solution in any of the following three basic situations, or a combination of situations.

One party is being unreasonable or unfair.
One party is vulnerable and needs help.
A solution through mediation has completely failed.

In every other situation assisting divorcing spouses compromise and negotiate their own solutions is the ethos which new divorce laws should be based.

But whatever way it happens, divorce is a painful and emotionally disturbing process for the parties and for the children. Despite this, both the legislation and the common law still make it extremely difficult for a person to obtain a divorce. The difficulties weigh particularly on women who have to face both economic and legal discrimination.

Although the legislation appears to make divorce available to both men and women on equal terms, (ie, the legislation appears gender-neutral); it appears not to affect both men and women similarly. The reality is that divorce laws have a significantly more discriminatory and disadvantageous effect on women and their children than on men.

The key aspects of the FLRC proposals are that they will:

- examine how spouses with marital problems can be encouraged to ask for help as early as possible;

- set up a mediation system or utilise an existing one as an essential element of the new legal regime;
- require spouses to attend reconciliation or conciliation sessions where it is reasonable;
- remove or partially remove fault or blame as the basis for divorce so that the parties do not view divorce, custody or access as a win-lose situation;
- require parties to think through and face the consequences of divorce before it happens;
- require parties as much as possible to make their own decisions with the assistance of mediators; and
- encourage litigation only as a last resort.

The benefits of the FLRC proposals are that they will:

- remove the acrimony, bitterness and hostility that is an inherent part of the divorce process;
- make available every opportunity to explore reconciliation where it is reasonable to do so even after the divorce process has begun;
- encourage spouses to meet the responsibilities of marriage and parenthood before the marriage is dissolved;
- allow and encourage families to make their own workable and practical arrangements through family mediation about their living arrangements, their home, maintenance, custody and access and other matters following separation or divorce;
- reduce conflict and thereby reduce the worst effects if separation and divorce on children; and
- set up a new legal regime for divorce which will allow the divorcing family to better reconstitute itself within new families.

1.0 Introduction

Marriage is a fundamental social and economic institution in all societies. The law that governs the rights, duties and obligations arising from marriage affects us all. It is an expression of our values about the institution of the family, the relationship between the sexes and the welfare of children[1].

However, desirable it might be for marriages generally not to be dissolved, some do break down. Like marriage, the laws and procedures for divorce can and do have a major impact on the way people approach divorce, on the way divorces themselves are conducted and consequently on the way divorce affects those involved[2].

1.1.1 What is a Divorce?

A divorce or dissolution of marriage is a legal declaration or notice that a legal marriage has come to an end. When the court grants a divorce, the divorced couple no longer owe each other the legal duties of spouses, but it has no bearing on personal relationships.

1.1.2 Divorce Rate

Statistics compiled by the Suva Magistrate's Court reveal that the number of divorce applications between 1985 and 1989 experienced a significant increase of 149%.

It is argued that this significant increase can be attributed to women not only improving their economic and social status but becoming more aware of their rights.

1.1.3 Origins of Divorce

In England, the English Matrimonial Causes Act of 1857 enabled the newly created divorce court to grant a "true divorce", that is, one entitling the parties to remarry.

Notions of matrimonial misconduct underpinned the court's powers, where the court construed one spouse as "the guilty party" and the other spouse as "the innocent party".

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[1] Lord Chancellor's report, Looking into the future - Mediation and the ground for divorce.

[2] Ibid

The dominance of matrimonial fault as the basis for divorce reflected conditions and beliefs of the time. Principles which underlined the conduct of the court were:

- the wife was legally dependent on the husband;
- she had no power to enter into contracts;
- she had no power to sue in her own name; and
- the law effectively transferred ownership and control of any wealth she might have had to her husband

In other words, she was only able to enjoy such security by virtue of her husband's legal obligations to support her. These obligations would be destroyed if the wife committed a matrimonial offence.

The English divorce laws experienced two important transitions.

(i) Matrimonial fault came to be determined not only by reference to the formal decree of dissolution, but also on the basis of the court's view of which party bore the major responsibility for the marriage breakdown;

(ii) More recently, fault has diminished in significance in comparison to other factors, especially in relation to the needs of the parties and more importantly the welfare of the child.

Fiji, being a former British colony inherited its divorce laws from the United Kingdom. However, codification of divorce laws under the Matrimonial Causes Act (Cap.51) was based on the Australian legislation which itself was based on the UK legislation.

1.2 Development of Family Law in the International Arena

Family law in our neighbouring Pacific island countries like Nauru, Tuvalu, Kiribati and Tonga and in developed countries like Australia and New Zealand has undergone considerable development so as to reflect the objectives of modern family law and international standards.

They are four:

(i) promote future harmony;

(ii) reduce bitterness and humiliation when marriages breakdown;

(iii) reduce the negative psychological effect on children; and

(iv) allow the marriage of parties who have separated and have had their children born out of marriage to marry and legitimise their children

The current divorce regime is based on proving fault and only serves to escalate fighting and conflict between the spouses. Studies have shown that conflict between warring parents heightens the negative pyschological effects on children. However, as will be discussed later in this discussion paper, the no-fault divorce regime lessens conflict and forces families to focus on important ancillary matters such as custody, property and any other related matters. According to Justice Lindemeyer, at the Fiji Legal Intensive in April 1995, the no fault regime reduces court work substantially (by 95%) and thereby encourages compromise between the spouses.[3]

A further justification for reform in this area is that making divorce more difficult does not force spouses to live together. If a spouse wishes to separate they can do so notwithstanding the legal regime in place.

1.3 Fiji's International Obligations

1.3.1 Convention on the Rights of the Child - (CRC)

In 1993, Fiji ratified the United Nations Convention on the Rights of the Child.

This important document while acknowledging the importance of the family proclaims the child as entitled to special care and assistance.

For the purposes of discussion on Fiji's divorce regime, relevant articles in the Convention include Article 3 (Best interests of the

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[3] Justice Lindemeyer's paper: "The Australian Family Court discussion at the 2nd Fiji Legal Intensive, Queensland Law Society, 1995, Coral Coast, Fiji.

child); Article 5 (Parental guidance and the child's evolving capacities) and Article 9 (Separation from parents).

These rights are governed by the principle of the child's best interests.

1.3.2 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Fiji ratified the United Nations Convention on the Elimination of All Forms of Discrimination against Women in August 1995.
The Convention underlines the equal responsibilities of women and men in the context of family law.

The relevant articles are Article 15 which states that women and men are equal before the law; and Article 16 which seeks to put in place appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

1.4 This discussion paper is concerned with the current status of divorce law in Fiji and its shortcomings. It will consider the position in other jurisdictions, it will then canvass options and proposals for reform that could be considered when reforming divorce laws in Fiji.

2.0 Issues for Reform

Divorce law in Fiji is governed by Part V of the Matrimonial Causes Act (Cap.51) (MCA).

2.1 Grounds for Divorce

Under section 14 of the MCA, there are fourteen grounds for divorce, most of which if not all are based on establishing or proving a matrimonial offence or misconduct of some kind. Under this regime, parties are required to establish that one party's actions falls under one of the grounds stated in this section, in order that a spouse be granted a divorce.

According to this section, a petition under this Act by a party to a marriage for a decree of dissolution of marriage may be based on one or more of the following grounds:

(a) adultery;

(b) desertion for two (2) years;

(c) wilful refusal to consummate marriage;

(d) habitual cruelty;

(e) rape, sodomy or bestiality;

(f) habitual drunkard or has been habitually intoxicated by reason of taking or using excessively any sedative, narcotic or stimulating drugs;

(g) frequent convictions;

(h) imprisonment;

(i) attempted to murder, or unlawfully kill the petitioner, or inflict grievous bodily harm or commit an offence with the intention to inflict grievous bodily harm;

(j) failure to pay maintenance

(k) non compliance with a restitution decree;

(l) insanity;

(m) separation of five (5) years; and

(n) presumption of death

Family case statistics compiled by the Suva Magistrate's Court, reveal that the grounds commonly used in the filing of a divorce application are:

(i) 5 years separation;

(ii) 2 years desertion;

(iii) adultery; and

(iv) habitual cruelty.

Therefore discussion on common law practice will be confined to these four grounds.

2.1.1 Adultery

Judicial interpretation of 'adultery' can only be described as falling well outside reality. In *Frow v Frow,*[4] the court was of the view that only actual vaginal penetration with the penis amounts to adultery.

The impact of culture and notions of criminality can be attributed to the absurd interpretation of 'adultery' by the judiciary. Case law shows that women face significant disadvantages in comparison to men in proving adultery. Moreover women face severe social consequences even if an allegation of adultery against them is not proven. Men do not suffer similar problems.

From a human rights perspective, the whole notion of adultery is offensive. Very few people want to have intimate details of their sexual relationships discussed in public. The current court process perpetuates the myth that adultery is a criminal matter.

2.1.2 Desertion and Separation

In order to bring an action for divorce under the ground of desertion, the petitioner must be able to establish that the desertion was not accidental or unintentional. There are two types of

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[4] (1961) 7 FLR 177

desertion: simple desertion and constructive desertion. Constructive desertion is difficult to prove. Nainendra Nand, the then Deputy Solicitor-General in his paper on Family Law "Reforms and Change in the Nineties" stated:

> "Proving construction desertion poses evidential difficulties where the wife is forced to leave the matrimonial home. For instance in most Indian families in Fiji, upon marriage the woman lives with the husband and his other relatives. Once circumstances force her to leave the husband, she often has difficulty gathering evidence to satisfy the court that the circumstances were such that she had no option but to leave the matrimonial home.[5]"

The courts narrowly define separation as physical separation. For more discussion on this issue, refer to the Discussion paper on Marriage and Separation.

2.1.3 Cruelty

The courts narrow interpretation of habitual 'cruelty' is coloured by legal and cultural beliefs. For example, the court in *Alka Ben v Jogia*[6] was of the view that despite the wife's physical injuries, this was insufficient to constitute 'habitual cruelty'. This case demonstrates the unrealistic approach taken by the court in determining what constitutes 'habitual cruelty.'

2.1.4 Analysis

The current divorce regime is characterised by bitterness, humiliation and hostility. The substantive law governing divorce law is clearly outdated and does not reflect trends in modern family law.

The present system is not designed to facilitate access to justice. Moreover, the fragmented and disorganised procedures have failed to address real human and social problems. It is couched in confrontational and adversarial language and the court procedure underpins this.

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[5] Nainendra Nand, Family Law, Reform and Change in the Nineties, 1995, Department of Justice, Fiji.

[6] Supreme Court Civil Appeal 7/1985

2.1.5 The Need for Reform

The criticisms mentioned above warrant reform in this area. Sir David Beattie in his report, "*Commission of Inquiry on the Courts*" of 1994 reiterated some of the criticisms mentioned above and stressed that the procedure for divorce should be markedly simplified. In this regard, there are two options for reform.

2.1.6 The No Fault System

Under Australia's Family Law Act 1975 (FLA) and New Zealand's Family Proceedings Act 1980 (FPA), the concept of matrimonial offence has been abolished. The courts allow for divorce on the basis of irretrievable breakdown evidenced by one year's separation under the FLA and two years under the FPA.

Similar laws exist in Kiribati and Tonga but without having to live apart for a defined period. In Kiribati this is based on the ground of incompatibility while in Tonga this is based on the ground of unreasonable behaviour upon establishing the fact of separation.

2.1.6.1 Arguments for a No Fault system

(i) It will eliminate the present system of problems namely of bitterness and mudslinging in having to prove that a spouse has committed a matrimonial offence;

(ii) It works to the benefit of a spouse who is involved in a domestic violence situation;

(iii) It reduces conflict which has significant negative psychological effects on children;

(iii) It will give parties the opportunity to settle arrangements before the divorce is granted. This requirement would emphasise the responsibilities of marriage and parenthood which are in line with the Convention on the Rights of the Child.

2.1.6.2 Arguments against a No Fault System

The major drawback is that it may be seen as undermining the institution of marriage. However, statistics reveal that in Tonga and Kiribati there was a marked increase in the divorce rate for only 1 to 2 years immediately following the introduction of the no-fault provision. This is because people who had been waiting for the 5

year separation period were able to immediately use the new ground for divorce which was simpler to prove. The rates for divorce settled down thereafter to the same rates preceding the introduction of the no-fault provision. This new provision may well render useless the other grounds for divorce[7].

2.1.7 A Partial No fault system

This is a half way house between irretrievable breakdown or no fault and the concept of a matrimonial offence. The United Kingdom Matrimonial Causes Act 1973 provides for only one ground for divorce, that is, irretrievable breakdown. However, the person who wishes to obtain a divorce can only satisfy the court that the marriage has broken down irretrievably by showing one of the following, namely that:

(i) the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(ii) the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(iii) the respondent has deserted the petitioner for at least two years;

(iv) the parties have lived apart for at least two years and the respondent consents to a divorce; or

(v) the parties have lived apart for at least five years.

Nauru has the above regime in place.

2.1.7.1 Arguments for a partial no fault

(i) Given the resource implications, this system would mean making maximum use of the existing resources with greater emphasis on family mediation.

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[7] Patricia Imrana Jalal, Law for Pacific Women: A Legal Rights Handbook to be published in 1997p.41

2.1.7.2 Arguments against a partial no fault system

The Lord Chancellor's report titled, "*Looking to the future - Mediation and the ground for divorce*" highlighted these criticisms of the partial no fault system in England:

(i) The partial no-fault system causes confusion. This confusion stems from combining a ground for divorce which apparently does not require evidence of fault with the need to establish the irretrievable breakdown by reference to at least one of five specified facts; and

(ii) it is discriminatory in that the option of separation before divorce is dependent on the couple having the means to set up two households; and

(iii) it distorts parties' bargaining positions by allowing the party who is less willing to divorce to extract concessions as a condition of agreeing to a divorce.

The Commission recommends that one of two systems be adopted:

(i) a no fault system or irretrievable breakdown

OR

(ii) a partial no fault system where the petitioner must establish a ground of unreasonable behaviour after:-

- **(i) One year separation, on one party's application where there are no children involved;**
- **(ii) Two years separation, both parties agree to a divorce and there are no children; or**
- **(iii) The married couple have separated for three years.**

BARS TO DIVORCE

2.2 The three (3) year Bar

2.2.1 The Law in Fiji

Section 15 of the MCA states that divorce proceedings may not be started within the first three (3) years of marriage. Exceptions to this requirement include petitions on the grounds alleging adultery, wilful refusal to consummate the marriage, rape, sodomy or bestiality.

2.2.2 The Law Elsewhere

2.2.2.1 Australia and New Zealand

Section 48(2) of the FLA requires that parties to a divorce be married for period of twelve months, in before divorce proceedings can be initiated. This is compared to section 39(2) of the FPA where the couple must be married for a period of two years. In Kiribati and Tonga there is no time limitation because the no-fault system renders the time limitation futile.

2.2.3 Arguments for retention of the three year requirement

(1) This three year restriction allows the married couple to reflect and consider how their marriage can be saved and reconciliation is always an option.

2.2.4 Arguments against retention of the three year requirement

(1) The introduction of either a partial no-fault system or no fault system would automatically render futile the three year bar; and

(2) It would place a spouse involved in a domestic violence situation in a more "safe" position;

(3) Although early establishment of incompatibility has been made, the parties to a marriage would have to wait for three years which is the same period for establishing the grounds of desertion or separation.

In the event of the introduction of a no fault or partial no fault system, the Commission recommends that this three year bar be reduced using either the Australian or New Zealand models.

2.3 Courts' duty to promote reconciliation

2.3.1 The Law in Fiji

Section 4(1) of the MCA requires the court to promote reconciliation between the parties before hearing an application for divorce. Failure by the court to explore the possibility of reconciliation, acts as a bar to divorce.

2.3.2 The Law Elsewhere

2.3.2.1 Australia:

Sections 14(C), (F) and (G) of the Family Law Reform Act 1995 (FLRA) imposes a statutory duty on judges, courts and legal practitioners to consider at all times reconciliation of the parties.

2.3.2.2 New Zealand

Section 8 of the FPA imposes a duty on legal advisors to ensure that both parties to the marriage are aware of facilities that exist for promoting reconciliation. Also to take further steps to assist in promoting reconciliation or, if reconciliation is not possible, conciliation.

2.3.3 The Need for Reform

Reconciliation will and always will continue to play an integral role in divorce proceedings. However, the reconciliation provision under MCA must be strengthened by imposing a statutory duty on the judiciary, legal practitioners and court staff to ensure that their clients are fully informed of reconciliation and conciliation facilities.

The system should be better suited to identifying those marriages which can be saved and should provide realistic opportunities for couples to seek appropriate professional help

through marriage guidance or counselling, in order that they might re-negotiate an amicable agreement.

It is well acknowledged that litigation and arms length negotiation can heighten conflict, reduce communication and exacerbate the stress and hostility arising from marriage breakdown.

For a more detailed discussion on this issue, refer to the Chapter on Family Mediation.

The Commission recommends that the reconciliation provisions be strengthened and that Australia's Family Law Reform Act 1995 provisions on the imposition of a statutory duty on the legal profession be considered as a useful model.

2.4 Connivance, condonation; collusion

Fiji, is one of the few countries where the concepts of collusion, condonation and connivance form part of divorce proceedings.

2.4.1 The Law in Fiji

Section 25 of the MCA provides for condonation or connivance and refers to situations where the petitioner forgives, approves or turns a blind eye to the other party's adulterous behaviour. On the other hand, collusion presumes that a couple may conspire to manufacture a divorce for mutual benefit.

2.4.2 The Need for Reform

In practice, collusion happens anyway. Both parties may wish to obtain their divorce after separation in order to remarry their respective new partners. Ultimately uncontested proceedings of this nature should be encouraged, and facilitated where the parties have sorted out their parenting responsibilities and obligations.

The concepts of collusion, condonation and connivance are irrelevant and archaic features of the divorce law. It is practical and sensible to repeal these bars to divorce. The introduction of a no-fault regime of divorce would make such rules irrelevant.

The Commission recommends that the concepts of collusion, condonation and connivance be abolished.

2.5 Conduct of the petitioner

2.5.1 The Law in Fiji

Section 27 states that a petitioner may not be granted a divorce if the petitioner has behaved badly towards the respondent. In *Gavin v Small*[8], the Court of Appeal upheld the decision of the Magistrate's Court and granted the divorce. The Court qualified this decision by arguing that the husband's adultery should not be held against him so long as the wife's maintenance was secured. The conduct of the petitioner will prevent the court from granting a decree absolute divorce particularly if the children's welfare has not been settled.

2.5.2 The Law Elsewhere

2.5.2.1 Papua New Guinea

A number of factors listed in section 25(6) and s29 of the Matrimonial Causes Act 1963 are likely to be relevant in granting a divorce, one of which is the conduct and interests of the respective parties.

2.5.2.2 Australia

The conduct of the parties is one of the guidelines used by the courts when granting interim and urgent maintenance.

2.5.3 Arguments for Retention

The major argument in favour of retaining such a provision is that the respondent is not taken advantage of by a spouse who is in a better financial bargaining position.

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[8] (1982) 8 FLR 41

2.5.4 Arguments against Retention

The major argument against the retention of such a provision is that the introduction of a no-fault system will not require the looking into the actions of the respective parties. Therefore, this provision will serve no purpose.

The Commission recommends that the conduct of the petitioner only be considered if relevant to the issue before the court.

2.6 Effect of co-habitation

2.6.1 The Law in Fiji

Under section 28 of the MCA, if the parties to a marriage reconcile for more than three months than they will lose their right to petition for divorce on the grounds of continuous separation or desertion.

2.6.2 The Law Elsewhere

2.6.2.1 New Zealand and Australia

Both New Zealand and Australia Family Law legislation contain similar provisions to section 28 of the MCA. However, the New Zealand co-habitation provisions have gone a step further by stating in section 41 that sexual intercourse between the parties shall not be taken as a presumption of cohabitation unless it can be shown that the principle motive of these sexual incidents was reconciliation.

2.6.3 Arguments for Retention

It allows for spouses to a marriage to reflect and consider whether their marriage is capable of being saved.

2.6.4 Arguments against Retention

Three months may not be a sufficient time to fully consider whether the marriage should be dissolved or saved.

The Commission recommends that the three month reconciliation period be retained and that section 41 of the New Zealand Family Proceedings Act be adopted.

2.7 Claims for damages

2.7.1 The Law in Fiji

Section 31 of the MCA provides that either a husband or wife can claim damages from the spouse that has allegedly committed adultery. This is based on the notion that human beings are the property of their spouses. This notion is against internationally accepted human rights principles.

2.7.2 The Law Elsewhere

2.7.2.1 Pacific Island Countries

This legislative right to damages exists in the Solomon Islands, Tonga and Vanuatu.

2.7.2.2 Hong Kong

The Hong Kong Law Reform Commission recommended abolishing a similar provision contained in section 50 of the Matrimonial Causes Ordinance (Cap 179) and questioned whether in the context of modern family law, such a cause of action remains appropriate at all.

2.7.2.3 England

In 1970 by virtue of the Law Reform (Miscellaneous Provisions) Act 1970, the claim to damages for adultery was abolished.

2.7.3 The Need for Reform

The Hong Kong Law Reform Commission considered that once divorce was based on irretrievable breakdown, the notion of "stealing" the husband's property or the wife's protector, made any action for damages a curious anomaly in the law.[9]

The Commission recommends that the claim for damages be abolished as it is against human rights principles.

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[9]Report on Grounds for Divorce and the Time Restriction on Petitions for Divorce within three years of Marriage (Topic 29), Hong Kong Law Reform Commission at page 50.

2.8 Ancillary matters - Maintenance, Custody and Access

2.8.1 The Law in Fiji

Maintenance, custody and access and property are subordinate issues to the main issue of divorce, in a divorce proceeding.

The lower courts in Fiji appear to apply the principle that if the court dismisses the main application of divorce, then all ancillary matters will be dismissed as well. This is so despite the fact that the higher courts have attempted to apply the rules more liberally. For instance, in matrimonial property cases, occupation orders are granted but the disposal of the property will not be dealt with until the final settlement of the case.

2.8.2 The Law Elsewhere

2.8.2.1 New Zealand

Section 38(d)(ii) of the FPA 1980 states that an order dissolving a marriage (divorce) will not be granted unless all arrangements relating to the welfare of children has been settled between the parties.

2.8.3 The Need for Reform

The present system is 'adult-focused', paying particular regard to the interests of the adults, often to the detriment of the children's welfare.

The Commission recommends that two (2) options be considered:

(i) the requirement that all ancillary matters should be settled prior to divorce be codified by statute. The New Zealand model will be useful.

OR

(ii) that orders (be they interim or final) on ancillary matters should be made regardless of the divorce proceedings.

3.0 Family Mediation

3.1 Introduction

Separation and divorce constitutes a painful process for all the family members concerned, but more so for children. Studies show that too little regard is given by our society and the legal system to the needs of the children of divorce.

As well as coping with the emotional stress produced by the breakdown in their marriage, the separating spouses have to make major adjustments in their lives.

The legal process and procedures and the means by which arrangements are concluded can add considerably to the stress and pain suffered by the couple and their children. The way in which these arrangements are negotiated can also affect the financial cost of the divorce to the divorcing spouses.

The Commission recommends the introduction of a compulsory mediation/conciliation process prior to divorce, unless the parties have

(i) in the court's view been separated for a long time; and

(ii) reconstituted new families.

The Commission recommends the use of mediation as a means for couples to negotiate their own arrangements regarding their separation and divorce. The Commission views mediation as an important element in the development of a more constructive approach to settling of problems surrounding marital breakdown and divorce.

3.1.1 The Usefulness of Family Mediation

Family mediation is a process where an impartial third person, the mediator, assists and encourages the couple to deal with and make arrangements for the future. Under the present legal system it is difficult to identify those marriages which are capable of being saved.

The objectives of family mediation can be described as three fold:

(i) it encourages couples to seek marital counselling, if it is appropriate, in an attempt to save the marriage;

(ii) accept responsibility for the ending of the marriage, thereby enabling the parties to address issues which may prevent them from negotiating settlements amicably, particularly from focussing on the conduct of one spouse; and

(iii) focus on the needs of their children rather than on their own personal needs.

Mediation is a flexible process which can take into account the different needs of families and differing views and positions of the parties. It offers a constructive framework for using the period between initiating the divorce process and the making of a final divorce order for meaningful reflection and consideration.

3.1.1.2 Family Mediation as an Integrated Part of the Divorce Process

Greater use of mediation as part of the divorce process will help in achieving the objectives of a good divorce system.

The Law Commission submits that mediation should be conducted at the reasonable discretion of the court. Nevertheless, couples should be better informed about mediation and there should be encouragement to use this means of making arrangements.

3.2 Resource Implications

There are three alternatives regarding the introduction of a family mediation scheme:

(i) a mediation scheme fully-funded by the State;

This would be the most sweeping approach and will demand not only financial resources but also fully trained personnel.

(ii) utilising current informal methods; or

This method would involve working with existing resources namely the appointment of members of the community as marriage counselors.

An encouraging sign was the commitment made by the Department of Social Welfare at its Annual Conference in December 1997. This would involve gender sensitivity training, briefings on conventions and the rights and obligations these conventions impose. It is also noted that the members of the judiciary have recently been involved in gender sensitive training.

(iii) utilising or establishing counselling services.

This method suggests that support and experience be drawn from the community in establishing a mediation centre consisting of a process of reconciliation, mediation and conciliation.

The Fiji Women's Crisis Centre have been successful in establishing this method.

3.3 Australia's Family Law Reform Act 1995: a useful model to consider

Part II and Part III A of the Family Law Act 1975 has been amended. The explanatory notes state that the purpose of the amendments regarding mediation is to encourage the use of non-litigious dispute resolution mechanisms. However this has to be balanced by a recognition that these mechanisms are not appropriate in all circumstances. Where they are used, proper regard must be paid to the protection and safety of the parties.[10]

The amendments also allows for providers of support services to advertise their services in the Family Court Registries.

In relation to family law mediation and counseling, the Commission recommends the following:

(i) that a compulsory family mediation facility be introduced

(ii) that one of three resource avenues be adopted:
(i) a mediation scheme fully-funded by the State;
(ii) utilising current informal avenues; or
(iii) utilising or establishing counselling services

(iii) that the Australian Family Law Reform Act be considered as a useful model

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[10] Australian Family Law Reform Act 1995 Explanatory Memorandum at page 1.

Summary of Recommendations

Chapter 2 Grounds for Divorce

Grounds for Divorce

1. The introduction of one of the following systems as grounds divorce:

(i) a no fault system or irretrievable breakdown

OR

(ii) a partial no fault system where the petitioner must establish a ground of unreasonable behaviour after:

(i) one year separation, on one party's application where there are no children involved;

(ii) two years separation, both parties agree to a divorce and there are no children; or

(iii) the married couple have separated for three years.

Bars to Divorce

The three year bar

2. In the event of the introduction of a no fault or partial no fault system Commission recommends that this three year bar be reduced using either the Australian or New Zealand models.

Courts' duty to promote reconciliation

3. The Commission recommends that the reconciliation provisions be strengthened and that Australia's Family Law Act 1995 provisions on on the imposition of a statutory duty on the legal profession be be considered as a useful model.

Connivance, condonation, collusion

4. The abolishing of the concepts of collusion, condonation and connivance.

Conduct of the Petitioner

5. The conduct of the petitioner only be considered if relevant to the issues before the court.

Effect of Cohabitation

6. The three month reconciliation period be retained and that section 41 of the New Zealand Family Proceedings Act be adopted.

Claims for Damages

7. Claim for damages be abolished as it is against human rights principles.

Ancillary matters - Maintenance, Custody and Access

8. Two options be considered:

(i) the requirement that all ancillary matters should be settled prior to divorce be codified by statute. The New Zealand Zealand will be useful to consider

OR

(ii) that orders (interim or final) on ancillary matters should be made regardless of the divorce proceedings.

Chapter 3 Family Mediation

9. The Commission recommends the following:

(i) that a compulsory family mediation facility be introduced

(ii) that one of three resource avenues be adopted:
(i) a mediation scheme fully funded by the State;
(ii) utilising current informal avenues;
(iii) utilising or establishing counselling centres.

(iii) that the Australian Family Law Reform Act be considered as a useful model.

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