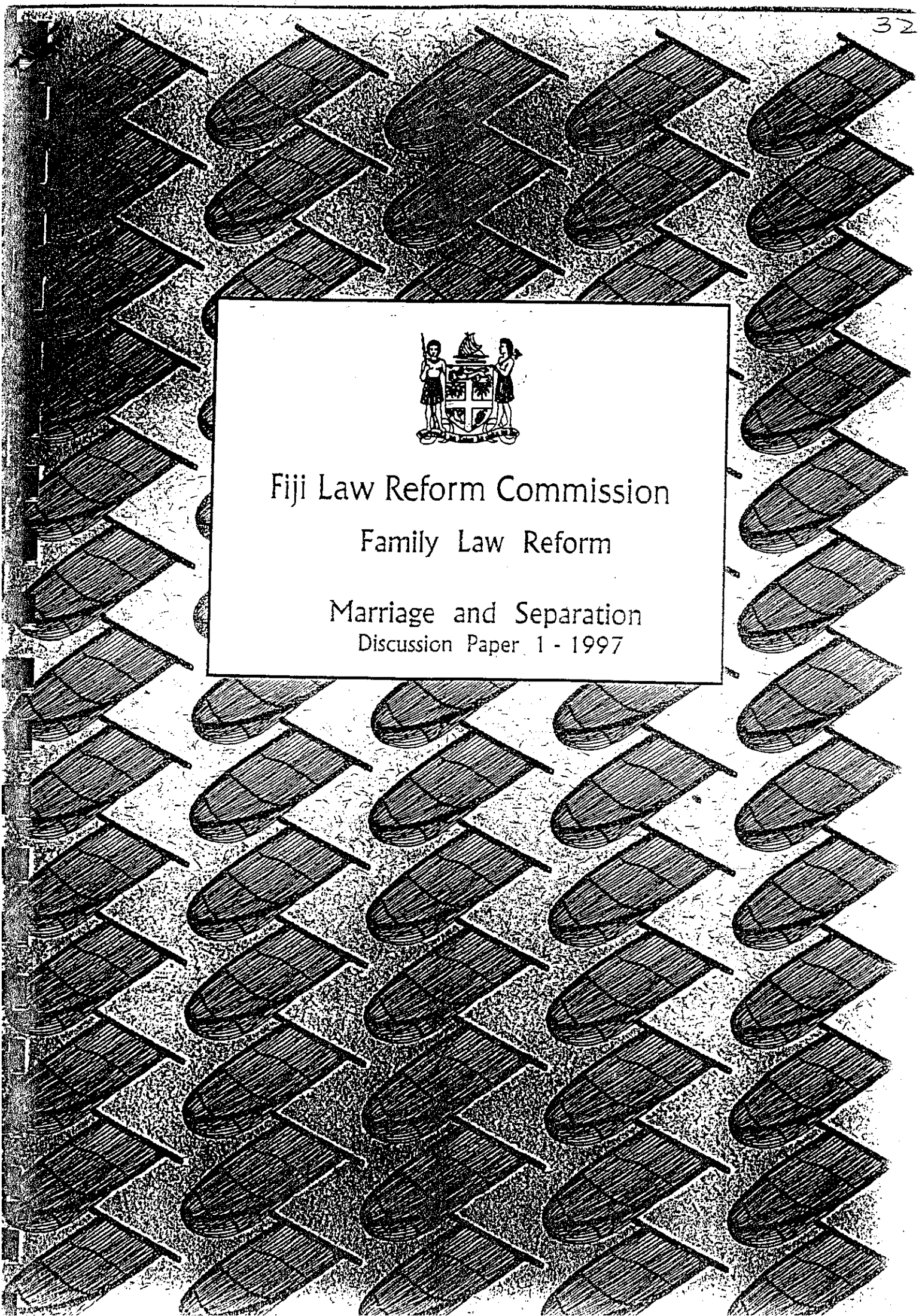

Fiji Law Reform Commission

Family Law Reform

Marriage and Separation

Discussion Paper 1 - 1997

PREFACE

The Fiji Law Reform Commission has been given the reference to enquire 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 two areas of family law, namely marriage and separation. Papers on other areas of family law will follow this paper.

You are invited to make comments and submission on the options and proposals set out in this paper. Your criticism and comments will assist us in preparing a final report to the Attorney-General and Minister for Justice on how the law dealing with marriage and separation can be reformed.

Written comments should be sent to:

The Director
Fiji Law Reform Commission
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SUVA

Phone No: (679) 303-900, (679) 303-895 Fax No: (679) 303 646

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

Executive Summary

The Fiji Law Reform Commission's discussion paper, **"Marriage and Separation"** discusses the law as it relates to marriage and separation under the Marriage Act (Cap.50) and Matrimonial Causes Act (Cap.51) respectively. It contains options for change and recommendations which necessitate public input and finally legislative change and reform.

In this regard, the most notable recommendations are:

- the abolishing of the concepts of judicial separation, restitution of conjugal rights and 'jactitation of marriage' as provided for in the Matrimonial Causes Act (Cap.51)

- the setting of a marriage age which is equitable and consistent with Fiji's international and constitutional obligations

A summary of recommendations appear at the end of this report

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REF. NO.: FLRC.
DATE: 09/06/97

FAMILY LAW REFORM : MARRIAGE AND SEPARATION

I am pleased to enclose a copy of Fiji Law Reform Commission's discussion paper on marriage and separation. This discussion paper is the first 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 marriage laws, while the second part examines the laws of separation in Fiji. In particular, the following issues are discussed in more detail in the paper:

- Jactitation of marriage
- Marriageable age
- Restitution of conjugal rights
- Decree of judicial separation

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 forward 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 30 July 1997.

Yours sincerely

for [Florence T Fenton]
Director - Fiji Law Reform Commission

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Part I - MARRIAGE

1. INTRODUCTION

1.1. Marriage plays an important role in every society in the world. It is often looked upon as sacred custom, and a cornerstone to the building of better families and upbringing of children. Fiji, being a former British colony, inherited its laws on marriage from United Kingdom. However, this changed in the 1968, when Fiji codified its marriage laws and enacted the Marriage Act cap 50 and the Matrimonial Causes Act cap 51. These acts were largely based on the Australian Marriage legislation.

1.2. Although United Kingdom, Australia and New Zealand have recently reformed their marriage laws, Fiji has as yet not made any improvements or amendments to its laws. It is therefore important to review the marriage laws in order to highlight whether there is a need for reform of our marriage laws. Such a review is also important to ensure that our laws reflect the international trends and local demands.

1.3. This discussion paper looks at Fiji's marriage laws provided under the Marriage Act cap 50, the Matrimonial Causes Act cap 51 and the Maintenance and Affiliation Act cap 52. In particular, this paper looks at the issues arising from marriageable age and jactitation of marriages. After a comparison with the position in other jurisdictions, this paper questions whether there is a need for change and then puts forward some options and proposals that could be considered when reforming the marriage laws in Fiji.

2. HISTORY OF MARRIAGE LAW

2.1. The English common law describes marriage as a union that makes husband and wife united for life. The famous jurist, Sir William Blackstone defined marriage as follows, - 'The husband and wife are one person in law ... By marriage, the very being or legal existence of a woman is incorporated into that of the husband, under whose protection and cover she performs everything..'[1]

2.2. The individuality and identity of a woman would blend into that of her husband at marriage. She would come under the protection, care and control of her husband. The following legal principles applied to women at the English common law:

- a wife could not sue or be sued in her own right. (She had no separate identity in the law).
- a wife could not hold property in her own name.
- If married couple separated, the husband has absolute rights to custody of the children.
- A husband was responsible for all contracts and debts entered into by the wife.
- Although a husband could sue another man for having sexual relations with his wife, the wife could not sue her husband's sexual partner.
- A husband could not be charged with rape of his wife.

2.3. Like many other former British Colonies, Fiji inherited the English common law on marriages. However in 1969, Fiji enacted its own Marriage Act, breaking away from the English common law.

[1] Quoted from Sir William Blackstone in Graycar, R & Morgan, J *The Hidden Gender of Law* at p. 14.

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3. DEFINITION OF MARRIAGE

3.1. Marriage is defined under section 15 of the Marriage Act as being a voluntary union of one man to one woman to the exclusion of all others. A marriage would therefore would only be valid if it is between two persons of opposite sex and if it is conducted voluntarily. Since marriage is a union to the exclusion of all others, polygamous or polyandrous relationships would not qualify as a valid legal marriage.

3.2. For a marriage to be legal in Fiji, it must be solemnised or conducted in a defined procedure in the presence of witnesses and marriage officers authorised by the Government. Under section 17 of the Marriage Act, all marriages must be recorded in the register of marriages.

3.3. Custom marriages, de facto marriages, common law marriages and other religious marriages are not recognised in Fiji. Religious marriages are very common in Indo-Fijian, as well as Fijian communities. However, unless they are registered in the correct manner specified in the legislation, the formal law would not recognise them. This means that upon break-up of marriage, the wife would not be entitled to claim maintenance.

3.4. **Grounds that nullify the marriage**

3.4.1. Certain events or instances may make marriages invalid or unlawful from the very beginning. These include:

3.4.1.1. Under section 6 (a) of the Matrimonial Causes Act, a marriage would be void if one of the parties, at the time of the marriage, is lawfully married to some other person.

3.4.1.2. If the parties are too closely related to each other, the marriage would be void. The schedule to the Matrimonial Causes Act outlines all relationships that fall within the prohibited degrees. Immediate full blood relatives are not allowed to marry.

3.4.1.3. Under section 6 (d) of the Matrimonial Causes Act, consent of a party to marriage is not a real consent where the consent is obtained by duress or fraud. If a person has been forced to marry against her will, the marriage could be declared invalid.

3.4.1.4. A marriage would also be void where the correct procedures are not followed. If parties knowingly and wilfully fail to comply with the requirements of the law with respect to the form of the solemnisation.

3.4.1.5. Consent of parties to a marriage shall not be real consent if the parties are mistaken as to the identity of the other party or as to the nature of the ceremony being performed. A marriage would also be nullified where a party is mentally incapable of understanding the nature of the marriage contract.

3.4.1.6. A marriage would also be void where the parties do not have a marriageable age or where proper consent of parents or guardians is not given in relation to marriage of minors. Marriageable age is examined in detail in following section.

4. MARRIAGEABLE AGE

4.1. The law in Fiji

4.1.1. In every country, parties to a marriage must attain a certain minimum age before they are regarded by law to be old enough to understand and acknowledge what they are doing by consenting to the marriage.

4.1.2. Section 12 of the Marriage Act provides that the minimum legal age for marriage in Fiji is 18 years for males and 16 for females. Under section 13, they can only marry at this age if they have prior consent of their parents or guardians. Once the parties have reached the age of 21, then consent of parents is not required.

4.1.3. Where a parent or a guardian refuses to give consent to the marriage of minors, the parties can, under section 13(2), seek a permission to marry from the Magistrate's Court, provided that the parties can establish that the parental approval is being withheld unreasonably.

4.2. The Law in Other Countries

4.2.1. Australia

4.2.2. The Australian marriage law is contained in the Marriage Act 1961. Under Section 11, a person is of a marriageable age once he or she has reached 18 years of age. A party may be able to legally marry at the minimum age of 16 if the parents or the guardians have duly consented to the marriage under section 12 and 13. A magistrate has the powers to grant consent to parties intending to marry below at an age below 18, where parental or guardian consent has been refused unreasonably.

4.2.3. **New Zealand**

4.2.3.1. The New Zealand marriage law is provided under the Marriage Act 1955. The marriageable age in New Zealand without the consent of parents is 21 years. However, where the consent of parents or guardians is present, parties who have reached the age of 16 are allowed to legally marry. If the parental consent is unreasonably withheld, then the parties can apply to the Family Court for permission to marry.

4.3. **The Need for Change**

4.3.1. The area of concern in the marriage laws in Fiji is the difference in age at which a male and female minor could marry with parental consent. In a number of communities, especially Indo-Fijian community, girls are thought of as a burden to the parents .The parents therefore try to marry their daughters at a very early age. A marriage at an early age of 16 deprives the girl of an opportunity to complete her education and build a career for herself.

4.3.2. Moreover, when a marriage is arranged by the parents, the girl rarely has any input as to who she wants to marry. At the age of 16, she clearly lacks the maturity to decide whether her arranged partner is appropriate for her. Another concern is that a girl of sixteen is not prepared to take all the responsibilities that are associated with a marriage. Therefore, there is a need to change the law to obtain parity between the minimum legal age for male and female.

Recommendation

It is recommended that the minimum legal age of marriage with parental consent should be raised from 16 to 18 years.

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5. JACTITATION OF MARRIAGE

5.1. Description

5.1.1. A petition for jactitation of marriage is brought where a person falsely asserts that he/she is married to petitioner. The purpose of a petition for jactitation of marriage is to prevent that person from making such unjustifiable assertions of marriage against the petitioner. If the petition is successful, the court will grant a declaration that the parties are not married and an injunction forbidding the respondent from claiming to be married to the petitioner. If a valid marriage is found to exist, the court will grant a declaration as to the validity of the marriage which, apparently, would be binding, *in rem*.

5.1.2. The action for jactitation of marriage originated in England where, until 1857, the proceedings were instituted in the ecclesiastical courts. Before 1753, proceedings for jactitation of marriage were commonly used to resolve doubt whether a marriage had taken place. In 1753, The English parliament passed Lord Hardwicke's Marriage Act. That Act was designed to prevent clandestine marriages by imposing a legal requirement for a formal ceremony of marriage. According to the Law Commission of England,[2] until the Act of 1753, a suit for jactitation was the usual mode by which question as to the validity of a marriage was determined.

5.1.3. With the requirement of a formal ceremony in order to constitute a marriage, proof of such ceremony was all that was needed to establish a marriage and necessity for frequent resort to the Court for this purpose disappeared. By 1820, jactitation of marriage was

[2] Law Commission (England), Law Com. No. 132, *Family Law - Declarations in Family Matters*, February 22, 1984, Para 4.2

already a very unfamiliar proceeding in the courts of England.[3] Actions for jactitation of marriage are extremely rare today. In Canada, there does not exist any reported instance of the bringing of an action of jactitation of marriage.[4]

5.2. The Position in Fiji

5.2.1. Fiji is one of the very few former British colonies that still has available the decree of jactitation of marriage. Under Part IX of the Matrimonial Causes Act, a decree for jactitation of marriage may be granted where the respondent has falsely boasted and persistently asserted that a marriage has taken place between the respondent and the petitioner.

5.3. The Law in other Jurisdictions

5.3.1. Jactitation of marriage survived as a cause of action in England until 1986, when it was statutorily abolished by section 61 of the Family Law Act (England) 1986. The right of action has also been abolished by Australia under section 2 of the Family Law Act 1975. New Zealand and most provinces of Canada have also abolished the action for jactitation of marriage.

5.4. The Need for Change

5.4.1. **Argument for Retention** - The English Law Commission concluded in their report that the only remaining purpose of a jactitation suit is to restrain a party from repeating an embarrassing falsehood about the existence of a marriage. Even for this purpose, the remedy is limited in that it can only be used by one party to the alleged marriage against the other and it cannot be used to restrain

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[3] Ibid at para 4.3

[4] Davies, C *Family Law in Canada*, Carswell, 1984 at 152.

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a third party, for example a newspaper, from repeating the false allegation.

5.4.2. **Arguments for Abolition** - There are a number of reasons that support the abolition of the action for jactitation of marriage in Fiji.

5.4.2.1. Firstly, actions for jactitation of marriage are very rare and have clearly outlived their usefulness.

5.4.2.2. Secondly, the petition is limited since it can only be used against the person who claims that the petitioner is married to him or her. The current provisions cannot be used against a third party who makes the false allegation. The false allegation may be spread around by other individuals and media. The jactitation suit however cannot be used to impose any restrictions on them.

5.4.2.3. Thirdly, a more adequate action to prevent the spreading of false allegation is provided under the action for defamation under the Defamation Act cap 34. Under an action for defamation, the petitioner could sue anyone who spreads the false allegation. In addition, the remedies available under an action for defamation is much wider than those provided under a jactitation suit.

RECOMMENDATION

It is recommended that the action for jactitation of marriage be abolished and that Part IX of the Matrimonial Causes Act be abolished.

6. SUMMARY OF RECOMMENDATIONS.

- It is recommended that the minimum legal age of marriage for female with parental consent should be raised from 16 to 18 years.
- It is recommended that the action for jactitation of marriage be abolished and that Part IX of the Matrimonial Causes Act be abolished.

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Part II - SEPARATION

7. INTRODUCTION

In almost every society, breakdown of marriages are common. Marital break-up is often a serious matter that gives rise to a number of issues such as custody/access of children, matrimonial property and maintenance. This segment of the discussion paper looks at the law of separation in Fiji. In particular, this paper addresses the issues arising out of the decree of judicial separation provided in Part VII of the Matrimonial Causes Act cap. 51, and the remedy of restitution of conjugal rights covered under Part VIII of the Matrimonial Causes Act.

8. THE DECREE OF JUDICIAL SEPARATION

8.1. Introduction

8.1.1. An action for a decree of judicial separation is brought to release the applicant from the duty of cohabiting with the other spouse. The decree does not terminate the marriage and for this reason, it is often characterised broadly as divorce without the right to remarry.

8.1.2. The origins of a decree of judicial separation can be traced back to early English law. Prior to 1857, divorce as we know it today was unavailable in England, but a judgement for judicial separation could be obtained from the ecclesiastical courts. The judgment was granted on grounds of adultery, cruelty or unnatural offences, and released the applicant from the duty of cohabiting with the other spouse. The Matrimonial Causes Act 1857 gave the Secular courts in England jurisdiction to issue judgements of divorce and judicial separation.

8.2. The Law in Fiji

8.2.1. A formal decree of judicial separation can be obtained under section 39 of the Matrimonial Causes Act by either party to a marriage. The effect of such a decree relieves the petitioner from the obligation to cohabit with his or her spouse.

8.2.2. **Grounds** - The grounds for obtaining a decree of judicial separation is provided under section 14, which are the same grounds upon which an application for a dissolution of marriage may be made. The section 14 grounds are based upon a finding of 'fault' in the spouse, such as adultery, willful desertion and habitual cruelty.[5]

8.2.3. However, a decree of judicial separation is not necessary for parties to separate. For maintenance and divorce, physical separation is enough to form a legal separation. Section 4 (a) of the Maintenance and Affiliation Act cap. 52 states that an application for maintenance can include the order that the applicant is not longer bound to cohabit with the husband. Likewise, section 14 (m) of the Matrimonial Causes Act states that an application for a divorce can be made where the parties have physically separated and have lived apart for 5 years. In addition, an application for custody under section 85 of the Matrimonial Causes Act does not require a decree of judicial separation. Therefore, all that is required is that the parties are physically separated. This usually means that they no longer live in the same household.

[5] Section 14 grounds for dissolution of marriage are discussed in much greater detail in a forthcoming discussion paper on divorce.

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8.3. Law in other Countries

8.3.1. Judicial separation continues to be available in the United Kingdom where the remedy originated. Three commissions have reviewed the remedy over the past eighty years.[6] All these commissions have recommended that the remedy of judicial separation be retained as an alternative to divorce.

8.3.2. The Scottish Law Commission has concluded in its report that judicial separation has outlived its usefulness and recommended that that the remedy be abolished.[7] Australia has abolished the remedy of judicial separation under section 2 of the Family Law Act 1975.

8.3.3. New Zealand still has the remedy of separation orders. However, these orders have been reformed and are substantially different from the English decree of judicial separation. Section 20 of the Family Proceedings Act 1980 allows a party to a marriage to apply for a separation order from the Family Court. The Family Court would only make a separation order if it is satisfied that there is a state of disharmony in the marriage of a nature that it is unreasonable to require the parties to cohabit. It is clear that this ground for a separation order is not based on finding of fault in the spouse.

8.3.4. Although physical separation is enough to form a legal separation, applications for separation orders are common in New Zealand. This maybe due to the fact that a separation order is often used as evidence of living apart, when ascertaining the period of separation for divorce.

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[6] *Report of the Royal Commission of Divorce and Matrimonial Causes* (England) 1909-1912, Cmd. 6479 (1912); *Report of the Royal Commission of Marriage and Divorce* (England) 1951-55, Cmd. 9678 (1956); Law Commission (England), Law Com. No. 192 *Family Law - The Ground of Divorce*, October 31, 1990.

8.4. The Need for Change

8.4.1. Arguments for Retention

8.4.1.1.A number of arguments can be made in support of retaining the remedy of judicial separation. The first argument hinges on religious, conscientious or other objection to divorce. As stated by the Law Commission of England,[8] most religions which are opposed to divorce and if the decree of judicial separation is abolished, then couples who neither wanted nor needed to divorce in order to rearrange their lives would be obliged to do so because there would be no other choice available..

8.4.1.2. The second argument is that judicial separation leaves the door open for reconciliation and that this is desirable because society wishes to preserve rather than terminate marriages.

8.4.1.3. Another argument for retaining the remedy is that judicial separation acts as a preserve of matrimonial relief for spouses who do not have grounds for divorce, for example, spouses who have been separated for less that five years.[9]

8.4.2. Arguments for Abolition

8.4.2.1. Several arguments can also be noted for abolition of the remedy of judicial separation. The first argument is that judicial separation is undesirable because it places the spouses in an unsatisfactory limbo between marriage and divorce. Judicial separation orders parties to separate but

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[7] Scottish Law Commission, No. 135, *Report on Family Law*, January 27, 1992, para. 12.19.
[8] Law Commission (England) No. 192 *Family law - The Ground for Divorce*. at para. 4.10
[9] Alberta Law Reform Institute *Domestic Relations Act 1927 - Family Relationships: Obsolete Actions* Report no. 65, March 1993 at p. 24.

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does not terminate the marriage. It creates a divergence between the social position and the legal position.

8.4.2.2. A second argument is that the remedy of judicial separation is unnecessary. For the most part, the reasons that supported the legal need for the remedy in England in 1857 do not exist in Fiji today. More importantly, a decree of judicial separation is unnecessary as it is rarely used. For all family proceedings such as maintenance, divorce and custody, a physical separation is sufficient and a decree of judicial separation is not required. Proceedings for divorce would take precedence over an application for a decree of judicial separation.

8.4.2.3. There is therefore no need for a remedy of separation order. All that is required at most is a physical separation. Clearly, it is a lot easier to physically separate than to make an application for a decree of judicial separation, which would only be made where the spouse has successfully established a fault on the part of his or her partner.[10]

8.4.2.4. A third argument is that judicial separation causes hardship for the respondent spouse. That is because an applicant spouse can keep the respondent spouse tied to the marriage and at the same time refuse any genuine offer to resume married life.

8.4.2.5. A decree of judicial separation in Fiji is based on fault. Most countries have moved away from the fault based grounds for separation. It is practically hard to provide evidence in the court that the spouse is at fault. One

[10] Ibid at p. 25.

example is adultery. A spouse who knows that his/her partner is committing adultery would have to prove adultery to be able to obtain a separation order. The present provisions make it difficult for spouses to obtain such an order. Section 14 of the Matrimonial Causes Act and fault-based grounds for separation will be discussed in greater detail in a forthcoming discussion paper on divorce.

8.4.2.6. A decree of judicial separation is not conducive to reconciliation between the parties as the grounds of a decree of separation is fault based. Divorce proceedings which is more common has provisions to promote reconciliation under section 28 of the Matrimonial Causes Act.

8.5. Recommendation for Abolition

8.5.1. We recommend the abolition of decree of judicial separation. Physical separation is sufficient to constitute separation for the purposes of divorce and maintenance. It is however important to clarify what constitutes physical separation. Under section 6 of the Maintenance and Affiliation Act, a maintenance or a custody order shall not be made where parties continue to reside together. This poses problems for spouses who are more or less separated, but still live under one roof. They may be living in different rooms and not having any sexual relationship. Many spouses remain with their partners because they have no other place to go to, not because they want to continue living with their partners.

8.5.2. The legislation assumes that when parties are living together, the spouse is supporting the children and his/her partner. However, this is not usually the case. There is therefore a clear need for a

legislative amendment which states that parties are separate regardless of where they live, and which gives maintenance rights to spouses who are unable to leave the matrimonial home and yet are not being supported by their partners.

8.5.3. One attractive overseas example of a clear definition of separation or 'living apart' is provided in the Australian Family Law Act 1975. Under section 49, parties would still be held to be separated even though they have continued to live in the same residence or that either party has rendered some household service to the other spouse. Under section 49 (1), the parties may be held to have separated notwithstanding that the cohabitation was brought to an end by actions of only one party.

Recommendations

It is recommended that the action for a judgement of judicial separation be abolished and that Part VII of the Matrimonial Causes Act be repealed.

In addition, we recommend that a more clearer definition of physical separation or 'living apart' be introduced to the family law legislation of Fiji. The Australian Family Law Act 1975 definition of 'living apart' should be adopted for Fiji.

9. RESTITUTION OF CONJUGAL RIGHTS

9.1. Introduction

9.1.1. An action for a judgement for restitution of conjugal rights is brought to restore the marital relationship. Conjugal rights are rights 'which both husband and wife have to each other's society and marital intercourse.'[11] The relief is premised on the principle that married persons are under a legally enforceable duty to live together unless there is a legally acceptable reason for refusing to do so. The order, if granted, requires the spouse who has abandoned the relationship to resume living with the spouse who brought the action.

9.1.2. The remedy of restitution of conjugal rights was instituted in the ecclesiastical courts of England. Because ecclesiastical courts did not recognise desertion as a matrimonial offence, they provided no remedy for it. Restitution of conjugal rights was therefore the only form of matrimonial relief available to a deserted spouse. The decree required the 'errant spouse to return to cohabitation, and to render in presumably open-hearted fashion the conjugal duties incumbent on him or her.'[12] The Matrimonial Causes Act of 1857 gave jurisdiction to grant the remedy of restitution of conjugal rights to the secular courts.

9.1.3. Non-compliance with the decree was punishable by excommunication. In 1813, imprisonment not exceeding six months was substituted as the sanction. However the Matrimonial Causes Act eliminated the sanction of imprisonment in 1884.

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[11] Fumerton v Fumerton (1970) 12 DLR (3d) 504.
[12] Ibid at 505

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9.2. The Law in Fiji

9.2.1. Under section 47 of the Matrimonial Causes Act, a party to a marriage is allowed to sue for an order that the spouse return to the matrimonial home. A court has the powers under the Act to order that a spouse return with his/her partner to the matrimonial home and be subject to marital rights. If however, the spouse does not follow the court order, a legal action for damages could ensue and the applicant can apply for a divorce under grounds of desertion.

9.3. The Law in Other Countries

9.3.1. The remedy was abolished in England by the Matrimonial Proceedings and Property Act 1970, pursuant to the recommendations of the Law Commission in 1969.[13] This remedy has also been abolished in Australia, New Zealand, Scotland and in most states of Canada.

9.4. The Need for Change

9.4.1. There are a number of reasons that support the abolition of the action for a judgment of restitution of conjugal rights. Firstly, a willingness to resume married life may be demonstrated by more appropriate means by the petitioner that the institution of proceedings for the restitution of conjugal rights.[14]

9.4.2. Secondly, there is no evidence that the institution of proceedings for restitution of conjugal rights promotes reconciliation of the spouses. Thirdly, a court order directing the spouses to cohabit is an inappropriate method of attempting to effect a reconciliation.

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[13] Law Commission No. 23 *Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights*, July 24, 1969. at p.5 para.7

[14] supra no. 9 at p. 16.

9.4.3. The judgment for restitution of conjugal rights is futile since few, if any, judgments are obeyed and this brings the law in disrepute. In addition, actions for restitution of conjugal rights are rarely brought and this of itself shows that the remedy is ineffective. Retention of an ineffective, unnecessary and obsolete remedy is undesirable because it complicates the law.

9.4.4. The remedy is also a clear denial of human rights where parties are forced to live with a person that they do not want to. Domestic violence would also be likely where a spouse is forced to go and live with his/her partner.[15]

9.5. There is no apparent reason to preserve the remedy of restitution of conjugal rights. The arguments for abolishing the action for a judgment of restitution of conjugal rights are extremely persuasive and we therefore recommend this course of action to the legislature of Fiji.

Recommendation

We recommend that the action for a judgment of restitution of conjugal rights be abolished and that Part VIII of the Matrimonial Causes Act be repealed.

[15]Ibid at p. 17.

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10. SUMMARY OF RECOMMENDATIONS

10.1. It is recommended that the decree of judicial separation should be abolished and that Part VII of the Matrimonial Causes Act be repealed.

10.2. The Matrimonial Causes Act should provide for a more clearer definition of the terms 'living apart' for the purposes of divorce or desertion. For this, the definition equivalent to that provided in the Australian Family Law Act 1975 should be adopted.

10.3. The Maintenance and Affiliation Act should incorporate a more clearer definition of 'living apart'. Parties may be held to be separate (thus having the ability to claim maintenance) notwithstanding that they have continued to reside in the same residence or that either party has rendered some household services to the other.

10.4. We recommend that the action for a judgment of restitution of conjugal rights be abolished and that Part VIII of the Matrimonial Causes Act be repealed