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**THE FAMILY LAW ACT OF FIJI, 2003: A BRIEF REVIEW
OF SOME PROVISIONS IN THE ACT; THEIR IMPACT
ON THE FAMILY (WITH EMPHASIS ON WOMEN'S
ACCESS TO JUSTICE)**

By

UNAISI Q NARAWA-DAUREWA

A supervised research project submitted
in fulfillment of the
requirements for the degree of
Master of Laws

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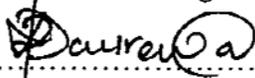
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April, 2010

DECLARATION OF ORIGINALITY

Statement by Author

I, Unaisi Q Narawa-Daurewa, declare that this research project is my own work and that, to the best of my knowledge, it contains no material previously published, or substantially overlapping with material submitted for the award of any other degree at any institution, except where due acknowledgment and footnotes are given within the text of this paper and acknowledged in the bibliography.

Signature.......... Date..... 5/03/10.....

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Statement by Supervisor

The research in this supervised research project was performed under my supervision and to the best of my knowledge is the sole work of Unaisi Q Narawa-Daurewa.

Signature.......... Date:....23 February 2010.....

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Designation: Supervisor.....

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ABSTRACT

This explorative and descriptive research explores aspects of the problems associated with the development and implementation of the new *Family Law Act* (FLA) of Fiji. The FLA was drafted, publicly consulted, lobbied and debated in the Houses of Fiji's Parliament for over ten years. It was imperative that the new law be passed because Fiji was at a cross road where the country needed to amend the existing family legislation in order to accommodate changing social and family structures and also to comply with international standards. This study provides an analysis of the provisions of the FLA and their impact on Fijian society generally, but more specifically on the women of Fiji and their access to justice. The term "Fijian society" as and where mentioned in this thesis, refers to all societies living in Fiji.

This paper identifies the new processes and facilities designed to encourage families to actively participate in finding solutions to their problems and the trend in family law to be more child-centered. The aim of the research was to also explore the experiences of a relatively small group and to identify strategies that the Justice Department of Fiji may be able to adopt in order to further improve access to justice. The research was carried out with the provisions of the FLA in mind and the result is a systematic examination of these provisions from within the legislation. They include provisions on the dissolution of marriage, counselling provisions, maintenance provisions, property settlement, the best interests of the child, the facilitators of the law and the new features of the Family Law Court.

The discussions revealed that whilst proceedings under the new law are more effective in identifying problems and resolving them through pre-trial procedures such as case assessment conferences and conciliation conferences, heavy workloads in the Court system, the acceptance of the new intervention strategies by some, posed difficulties. The need for resources to provide support, especially to unrepresented litigants, most of whom are women, is part of the recommendation. The recommendations formulated relate to entrenched issues such as budgets, the rules and procedures. The research on

the FLA shows that it is an innovative law that has already brought major changes to the administration of the family law in Fiji. The Act is clearly a visionary piece of legislation, peculiarly adapted to Fiji society.

ABBREVIATIONS

ADR – Alternative Dispute Resolution

CAC – Case Assessment Conference

CEDAW - Convention on the Elimination of All Forms of Discrimination Against Women

CMO - Child Maintenance Order

CRC – Convention on the Rights of the Child

DNA - Deoxyribonucleic acid

FCWG – Family Court Working Group

FLA – Family Law Act

FCOSS - Fiji Council of Social Services

FLC – Family Law Council

FLR – Family Law Regulations

FLRC – Fiji Law Reform Commission

FWRM – Fiji Women’s Rights Movement

ICCPR - United Nations Covenant on Civil and Political Rights

PJSC – Parliamentary Joint Sector Standing Committee on Justice Law and Order and on Social Services

LAC – Legal Aid Commission

NGO – Non Government Organization

RRRT – Pacific Regional Rights Resource Team

RCN – Reconciliation Counselling Network

UNDP – United Nations Development Program

PART I

1.1 INTRODUCTION

The Pacific family, My wife and I; our children; my parents; my wife's parents; my brothers and sisters and their husbands and wives and children; my aunts and uncles and their children; my cousins' children...and the list goes on.

Lionel Aingimea¹

What is the family and why is it so important? Article 23 of the United Nations Covenant on Civil and Political Rights (ICCPR) states that the family is;

*The natural and fundamental group unit of society and is entitled to protection by society and the state.*²

Fiji is a country filled with many cultures and customs, but the common factor among all of these is family and family units. Being a communal society the old saying, “it takes a village to raise a child” rings true in this country of over 300 islands. But for many reasons family units sometimes break down and there is always a need for a system in place to cater for these breakdowns. Fiji has developed tremendously in terms of economic, legal, political and social awareness among the people, but there are still glimmers of the past that exist alongside the modern forms of government and governance. ‘*Custom did regulate family life before adopted legislation...Our understanding of what constitutes a family and the significance of family rituals depends on cultural context and also on whether we take an historical or modern perspective.*’³

The Parliamentary Joint Sector Standing Committee on Justice Law and Order and on Social Services (PJSC) on the Family Law Bill in its report to Parliament, gave consideration to the existing laws governing the family. The fact was that the laws were

¹ Former Law Lecturer, University of the South Pacific, School of Law, Laucala Campus, Suva, Fiji.

²International Covenant on Civil and Political Rights, 23 March 1976, 164, Article 23.

³ University of the South Pacific (2003) Topic 1 Introduction to Family Law ‘*LA306 Family Law*’ at http://www.vanuatu.usp.ac.fj/courses/LA306_Family_Law/LA306_topic1.html (accessed: 4/04/09)

*'in dire need of change so that they can properly reflect the lives and culture of modern day Fiji Islanders. These changes are also said to be in line with current global trends to amend all family laws inherited from the common law system, in recognition that many of these laws are outdated.'*⁴

The reform of family law in Fiji came at a time when Fijian society was changing and the existing laws were inconsistent with these changes and those taking place across the globe. One of the most innovative features introduced by the FLA was the establishment of specialist Family Divisions of the High Court and Magistrates Court. The Family Divisions have jurisdiction over dissolution of marriage, child custody, spousal and child support, and related matters, as well as jurisdiction to make orders relating to the welfare of children.⁵ The Family Court is established by Part IV of the FLA with section 15 establishing a family division of the High Court and section 20 establishing a family division of the Magistrates' Court which is subordinate to the High Court. Section 21 of the FLA states:

The Family Division of the Magistrates' Court has jurisdiction in-

- (a) matrimonial causes and all other matters instituted or continued under this Act;*
- (b) any other matter in respect of which jurisdiction is conferred on it by a written law.*⁶

The jurisdiction of the High Court is very similar to that of the Magistrates' Court with the distinction existing in section 17 (2) and (3) allowing the High Court to exercise its jurisdiction to persons or things outside of the Fiji Islands. Such wide power inevitably changed the face of existing family law in Fiji. Section 17 (2) and (3) states:

- (2) Subject to such restrictions and conditions (if any) as are contained in the regulations, the jurisdiction of the Family Division of the High Court may be exercised*

⁴ Parliament of Fiji, 'Report of the Joint Sector Standing Committee on Justice Law and Order and on Social Services on the Family Law Bill, 2002 (Bill No. 13 of 2002)' (2002) at <http://parliament.gov.fj/parliament/legislative/bills.aspx?billID=252&viewtype=reports&billnav=bill> (accessed: 4/04/09)

⁵ Family Law Act, 2003 (Fiji).

⁶ Ibid, section 21.

in relation to persons or things outside the Fiji Islands.

(3) The Family Division of the High Court has exclusive jurisdiction in relation to applications for orders for nullity of marriage and to applications under section 200 in relation to the Convention on the Civil Aspects of International Child Abduction (1980).

(4) Subject to this Act judges of the Division have all such powers as are bylaw or custom granted to the High Court including hearing of appeals from the Family Division of the Magistrates' Court.⁷

At the opening of the Family Court in Suva, former Vice President Ratu Joni Madraiwiwi said, *'With the opening of the Family Law Court the people of this country can now look forward to being served by an institution that has been established with their needs in mind'*.⁸ Virisila Buadromo of the Fiji Women's Rights Movement (FWRM) went further and stated,

*The new Family Court will allow women and children, especially the poor and marginalized, better access to justice. It is a mechanism that is long overdue. FWRM believes that the establishment of the Family Court will lead to better case management, including more efficient and effective delivery of services.*⁹

The judicial services have over the years undergone many changes and the opening of the Family Court is but one of those changes. Changes also include the fact that more people are becoming aware of their rights under the law and so are making an effort to access the Court system. *'The development of the Family Court; the appointment of a new Master of the High Court; the implementation of case management systems (which was unheard of a decade ago) are other examples of such transformations.'*¹⁰ The transformations have been done in an *'effort to respond more appropriately to changes*

⁷Ibid.

⁸ Fiji Government Online Portal, *'Vice President Ratu Joni Opens New Family Court'* (2005) http://www.fiji.gov.fj/publish/page_5678.shtml (accessed: 9/04/09)

⁹ Fiji Government Online Portal, *'FWRM Congratulates Government on Establishment of Family Court'* (2005) http://www.fiji.gov.fj/publish/page_5681.shtml (accessed: 16/04/09)

¹⁰ Fiji Law and Justice, *'Welcome Speech by the Honorable Chief Justice on the*

Official Opening of the Family Court on 31 October 2005' (2005) at <http://www.fljsp.com/news.htm> (accessed: 2/03/09)

*in our society.*¹¹ These changes came about at a time when issues concerning access to justice by women, children and the more vulnerable groups in society needed to be addressed.

According to former Chief Justice, Daniel Fatiaki, the establishment of the Family Court is *'the first time in the history of our Courts that an entirely new division has been created.'*¹² In order to fulfill the promise made to the public of Fiji and to implement this new Act (FLA) nationwide, *'many initiatives have had to be taken from the drafting of the Court Rules and Regulations, the negotiations to develop a counselling service within the Court system, the recruitment of staff, the acquisition of resources including computers, the development of appropriate physical infrastructure and training of all staff appointed to this Division.'*¹³

The FLA also introduced the concept of a Family Law Council (FLC). The Attorney General of Fiji may establish a FLC consisting of persons appointed by the Attorney-General in accordance with subsection 2.¹⁴ The Council is to consist of *'Judge of the Family Court, Magistrates of the Family Court, officers of the Public Service or representatives of organizations that provide pre-marriage education, family and child counselling and other persons as the Attorney-General thinks fit.'*¹⁵ On December 15th 2004, the Fiji Cabinet endorsed the coming into force of section 204 of the FLA. The decision taken by Cabinet was attributed to a submission that had been made by then Attorney-General and Minister for Justice, Qoroniasi Bale. He stated at that time that *'the Council will make recommendations on the implementation of this legislation and related laws, together with the working of the legal aid and any other matters.'*¹⁶

This dissertation will examine the background to the reform of the family law in Fiji, identify challenges in implementing new laws and court processes and explore whether women's access to justice have improved with the new reforms. Given that there has

11 Ibid.

12 Ibid.

13 Ibid.

14 Above, n 5, section 204 (1).

15 Ibid.

16 Fiji Government Online Portal, *'Cabinet Endorses Family Law Council Composition'* (2004) http://www.fiji.gov.fj/publish/page_3787.shtml (accessed: 18/05/09)

been few studies undertaken since the implementation of the FLA, this research aims to fill the gap through exploring, describing and analyzing the innovations in the new law to improve access to justice and the experiences of court users who have been given little opportunity to comment on what they see as problems and solutions. The intended outcome of this study involves making a practical contribution through the development of strategies and recommendations to further improve court users' access to justice in the Family Courts of Fiji.

This research also aims to add significantly to the body of knowledge by amalgamating the information on historical development leading to the reform of family law, the views of those who were instrumental and involved in the reform process, data obtained from various court users, research and conference papers and the views of those who have the experience in implementing the new law over the past four years. This data will lead to the development of a set of recommendations for the Family Court which could be adopted to improve access to justice, especially by the more vulnerable groups in society. There is a limitation to this research paper: readers must bear in mind that while this paper is a response to inequitable access to justice especially in relation to women, it does not offer a critique of feminist theoretical perspective. Furthermore, this research paper avoids foraying into every imaginable issue on family law that has no direct relevance to its topic.

1.2 RESEARCH APPROACHES AND METHODOLOGY

Research for this thesis has been conducted with the knowledge that the FLA has had only four short years since its implementation in 2005. I have chosen to focus my thesis on women's access to justice for reasons that the new family law has embedded a number of relevant key principles. For example, the legislation recognizes the role of homemaker as making a valuable contribution. Intervention strategies such as a dedicated Court counselling service and services at a number of intervention points such as case assessment conferences; property conciliation; conferences and parental planning provides for court users a more participatory process in the resolution of their own problems.

There were three phases to researching materials for this thesis.

Phase 1

During this period, I concentrated on gathering commentary available in journals, books and published reports. The search strategy included literature review from both national and international sources on family and the law. Time was also spent formulating questions and identifying relevant persons for interview purposes.

Phase 2

Research questions focused on the effectiveness of the FLA since its implementation; the process of consultation and lobbying for the FLA; the obstacles faced and how those obstacles were overcome; and whether the FLA has met or fallen short of the promises that had been made by its backers.

This segment of my research was a combination of both analyzing material gathered during phase 1 and contacting relevant stakeholders for interviewing. The interviews were to be conducted with Family Court personnel, Court users and other stakeholders

provided a personalized connection between the FLA and those affected by it. Unfortunately the political upheavals during the time of this research thwarted many attempts to interview relevant stakeholders. Queries and letters sent to the Chief Registrar of the High Court and later to the new Acting Chief Registrar, appointed since the abrogation of the constitution and dismissal of the entire judiciary in April 2009, were not responded to in a reasonable time frame and at times I had to wait weeks for word that I had received permission to access material from the Family Court.

Interview requests with Family Court personnel were refused on the basis that “it was not a good time to be asking questions in Fiji”. These interview requests were made up until the week that this thesis was due for submission and unfortunately the only interview granted was with an acting Court officer via telephone. Attempts to interview a Senior Court Officer of the Family Court failed as he was also engaged in academic studies and could not find sufficient time to address my questions verbally or through emails sent to him. I was also denied photocopies of a report from the Fiji Law Reform Commission (FLRC) with no reasons given. This resulted in many hours of my sitting in the FLRC office reading and writing down relevant information.

Phase 3

Phase 3 was spent analyzing and writing up materials gathered during phase 1 and phase 2. Given the circumstances faced during phase 2, I was able to explore and supplement the data through commentary available in journals, books and published reports and use them as a basis for examining the problems and the development of family law. This period also consisted of many weeks of editing, redrafting and amending sections after considering comments made by my supervisors.

This thesis is presented in four parts. The following parts outline the content of each of the other three parts and thus the structure of this thesis:

Part II provides the background to family law in Fiji prior to the introduction of the Family Law Act 2003 (FLA); the history, the opposition, the perceptions of the customary role of women and the traditional perspectives of gender in Fiji society leading to the eventual drafting of the Family Law Bill.

Part III provides a description and analysis of some of the provisions of the FLA and with comparisons made with the old laws; commentary on the substantial changes brought about by the FLA; the services provided by the Family Court Counselling Services, the Legal Aid Commission and other non-governmental agencies. The views of various stakeholders on the functioning of the Family Court explored through an interview process, provides some assessment of the performance of the Family Court and the new systems brought about by the reforms.

Some statistics have also been included to illustrate the way the FLA has been accessed in Fiji. A case study is provided to illustrate the points of access to the Family Court system.

Part IV concludes discussion and also provides recommendations for changes to areas considered to make further improvements to the Family Court system.

PART II

This part provides a background to the development of the FLA and the challenges faced by those responsible in the development and drafting of a comprehensive family law for Fiji. The discussion includes a background to Fiji's family law prior to the enactment of the FLA; their unsuitability to Fiji's changing society; the discriminatory provisions; the process that was taken to change the law which includes the public consultations and the various objections to the Bill.

2.1 HISTORY OF FAMILY LAW IN FIJI

There are few areas of law with quite such a reputation for acrimony and heartbreak as Family Law.

Barbara Corbett¹⁷

Family law in Fiji has been governed by the following nine pieces of legislation as found in the 1985 Revised Edition of the Laws of Fiji:

- *Marriage Act [Cap 50]*
- *Matrimonial Causes Act[Cap 51]*
- *Maintenance and Affiliation Act[Cap 52]*
- *Maintenance (Prevention of Desertion and Miscellaneous Provisions) Act[Cap 53]*
- *Juvenile Act[Cap 56]*
- *Legitimacy Act[Cap 57]*
- *Adoption of Infant Act[Cap 58]*
- *Married Women Property Act[Cap 37]*
- *Maintenance (Facilities for Enforcement) Act[Cap 54]*
- *Maintenance Orders (Reciprocal Enforcement) Act[Cap 55]*

¹⁷ Barbara Corbett, 'Collaborative Law – How to Have a Good Divorce' (2008) 12 *Jersey and Guernsey Law Review* Feb 2008, 104.

Upon the commencement of the FLA, s. 214(1) authorized the repeal of the following Acts:

- *Matrimonial Causes Act*[Cap.51]
- *Maintenance and Affiliation Act*[Cap.52]
- *Maintenance (Prevention of Desertion and Miscellaneous Provisions) Act*[Cap.53]
- *Maintenance Orders (Facilities for Enforcement) Act*[Cap. 54]
- *Maintenance Orders (Reciprocal Enforcement) Act*[Cap.55]

The main downfall with the above-named legislation was that not only were they outdated, but it was also inefficient to have several pieces of legislation governing one area of law. Sakiusa Rabuka¹⁸ in his article titled '*Innovative Features and Challenges of the Family Law Act*', highlighted several problems regarding family legislation. One such problem was that the '*Courts cannot identify those marriages that can be saved from those that cannot*'.¹⁹ This could have arisen from the fact that the reconciliation provision in the repealed *Matrimonial Causes Act* [Cap 51] did not encourage reconciliation at every stage of the proceedings. The now repealed legislation gave a specific time limit of fourteen days to attempt reconciliation and if unsuccessful the parties were to resume divorce proceedings.²⁰

Another problem contributing to the inadequacy of past legislation was the issue of reconciliation facilities in the Courts as highlighted by Rabuka.²¹ At the time of reviewing the family law, all family law cases were heard in camera but heard in the same Courts as drug, assault and traffic cases. In addition to this, counselling was often passed on to other Departments such as the Department of Social Welfare, where counsellors were often not trained in family counselling.²² Other problems highlighted by Rabuka were '*the limitation in the powers of the Courts, the lack of resources to stop*

18 Former Chief Executive Officer, Ministry of Justice, Fiji Islands. He is also a former lecturer at the University of Fiji Law School at the Samabula Campus in Suva, Fiji.

19 Sakiusa Rabuka 'Innovative Features and Challenges of the Family Law Act' (2004) at <http://documents.ag.gov.fj/FamilyLaw-rabuka.pdf> (accessed: 12/12/08)

20 *Matrimonial Causes Act* [Cap51] (Fiji) Section 14.

21 Ibid.

22 Interview with Aseri Rika, Director, Family Court Counselling Services, Fiji (Suva, 30 March 2009).

*neglectful parents and importantly that the laws did not recognize the important linkages between poverty and those women and children who cannot enforce (among other things) maintenance orders of the Courts’.*²³ One such example is the limitations of the powers of the Magistrates’ Court when it came to imprisoning a person who had breached a Court order and it was also apparent that remedies in the superior Courts were available only to the wealthy because it was the wealthy who could afford to take their cases to the higher Courts and seek remedies from those Courts.²⁴

The ability to enforce maintenance payments is a common problem under the old and new law as essentially this is dependant on whether the person ordered to pay is financially able to do so. It would make no difference to the hardship situation in families if the Court ordered fifty dollars (\$50) to be paid by one party when that person is unemployed. This was an issue highlighted in the Fiji Law Reform Commission Report to Parliament called ‘*Making A Difference To Families*’. With regard to policy implications, the Report stated, ‘*At policy level, policy makers do not take seriously the connection between inadequate family laws and discrimination against women and the welfare of their children*’.²⁵ What was recommended is what is now present in the FLA. For example, maintenance orders made by Courts take into account the financial status of the party making payments. The Court may order a cash payment or non-financial contributions such as providing food or school shoes and bags.

The family law in Fiji at that time was also discriminatory in that it allowed for discrimination against women through prevailing policies and laws. One such example was the interpretation of matrimonial property law which did not take into account women’s non-financial contributions to a marriage, resulting in women receiving close to nothing from the dissolution of marriage.²⁶ This meant that our constitutional provisions of equality before the law as provided by s. 38 of the Fiji Constitution (Amendment) Act 1997 (abrogated on 10 April 2009) and international obligations were not being fulfilled.

²³ Sakiusa Rabuka, above n 19.

²⁴ Fiji Law Reform Commission, ‘*Fiji Law Reform Commission Family Law Report 1999: Making a Difference to Families*’ (1999) 9.

²⁵ Sakiusa Rabuka, above n 19.

²⁶ Above n 24.

Fiji at the time of reforming the family law had ratified two conventions relating to women and children. They were the *Convention on the Rights of the Child* (CRC) ratified in 1993 and the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) in 1995.²⁷ International conventions such as these, impose on member states like Fiji specific obligations for the protection of women and children and by virtue of Fiji being a party to the CRC and CEDAW there is a duty to comply.

Imrana Jalal's main concern with the existing legislation was that they were "*sexist, discriminating against women, and legitimating violence against women, patriarchal and based on rigid concepts of women's roles within the family, including women's lack of autonomy*".²⁸ Jalal's personal experience working as Legal Aid's Public Legal Adviser in the late 1980's was a contributing factor toward her lobbying for changes in Fiji's family law. As an employee of the Crown Law Office (now office of the Attorney General) she was often representing the economically disadvantaged clients mainly in the Domestic Court and;

*Most of my days were spent standing up in Court to represent poor women, dragging their children behind them, whose fathers refused to pay maintenance for them; or women trying to prove that the defendants were the fathers of their children to get their inadequate \$10 per week; or men and women fighting for custody of their children; or neglected children whose parents did not deserve them; or husbands and wives fighting over meager sums of money and property.*²⁹

Jalal writes about the frustration of having to work with laws that did not recognise the humanity of people. Instead, the law dealt with '*women and children like traffic cases, instead of broken human beings*'.³⁰ But the frustration did not belong to her only as the parties to proceedings spent so much time and money fighting each other in Court that when it all ended they were often left physically and emotionally drained. Children

²⁷ Ibid, 16.

²⁸ P. Imrana Jalal '*Rambling Thought About Women, the Coups of Fiji and Me*' (2008) at <http://www.awla.org.nz/Speaking%20Notes/Imrana%20Jalal%20-%20Speaking%20Notes.pdf> (accessed: 13/03/09)

²⁹ P. Imrana Jalal, '*Why Fiji Needs A Family Law Bill*' (2003) at http://www.rrrt.org/page.asp?active_page_id=141 (accessed: 13/12/08)

³⁰ Ibid.

suffered traumatic experiences as well when ‘*confused and broken hearted, watching parents who once loved each other fight over money, houses and other property*’.³¹

But when faced with the question of the relevancy of the law in dealing with Jalal’s clients the response from the Magistrate was that nothing could be done because the law had to be followed.³² The adversarial system utilized in family cases at the time provided that there had to be a winner and a loser and this was often the view that litigants and their counsel had when encountering in Court. That was their view of justice. But Jalal strongly disagreed with this because;

*There is no justice in the current (then) family law system because in a separation or divorce there are really no winners or losers, only losers. The prize of the litigation system, the spoils of war, was the children. Yet the biggest losers were the children. How could any family emerge from such a system with any measure of dignity left intact? How could any member of the family try to reconstruct a new life whether together or apart, in such a system?*³³

Former Solicitor General Nainendra Nand whom Jalal had replaced as Public Legal Advisor stated that at that time his job essentially was to give advice on family law matters and appearance in Court was usually limited to family law.³⁴ Nand felt at the time that the law was limited in providing comprehensive solutions and so prepared a paper on enlarging the legal aid scheme in Fiji which finally found its way into the Report on the Commission of Inquiry on the Courts of Fiji 1994 by Sir David Beattie (Beattie’s Report). Nand echoes Jalal’s sentiments and believed at the time that the only way to change the family law in Fiji was to have a whole scale review rather than concentrating on a single legislation at a time.³⁵

31 Ibid.

32 Ibid.

33 Ibid.

34 Interview with Nainendra Nand, Manager, School of Law, University of the South Pacific, Laucala Campus, Suva (26 March 2009)

35 Ibid.

As a result of recommendations made by Sir David Beattie in the report on the Family Court and family related issues, the government set up a committee to begin the process of implementing parts of the report. The Beattie Report stated:

*Rapid social and economic changes in recent years have exerted additional pressure on marriages and family life as a whole. The Courts have to deal with an ever increasing number of family problems associated with these pressures. There have also been tremendous changes in concepts of marriage and family relationships in all communities in Fiji; and a great and increasing change in the status of women in Fijian society. These changes are simply not addressed by current Fiji law and judicial systems. There is a need for reform in this area to deal with these legal and social problems.*³⁶

A working group had been set up as per recommendations of the Beattie Report and was called the Family Court Working Group (FCWG). The working group was chaired by Jalal and it consisted of representatives from Social Welfare, the Fiji Law Society, the Chief Registrar's Office, Public Legal Advisor, Fiji Council of Social Services (FCOSS), Non Governmental Organisations (NGOs) and various interested agencies.³⁷ During this process, it became clear that the family law as a whole needed to be reviewed. Jalal was appointed Commissioner and the review process began. Together with technical support from the Regional Rights Resource Team (RRRT), FWRM and the Fiji Law Reform Commission (FLRC) the task of consultation, gathering support for the Family Law Bill and drafting the legislation to take into account modern lives of Fiji Islanders and to give women unprecedented equality were put in motion.³⁸

36 Beattie, Sir D., 'Beattie Report (The Commission of Inquiry on the Courts 1994), A Family Court: Children and Young Persons – A Youth Court?' in Fiji Law Reform Commission' *Fiji Law Reform Commission Family Law Report 1999: Making a Difference to Families*' (1999) 18.

37 Above n 24, 18.

38 P. Imrana Jalal, 'Gender Issues in Post Coup D 'Etat Fiji: Snapshots from the Fiji Islands' (2002) at http://www.rrrt.org/page.asp?active_page_id=188 (accessed: 12/12/08)

2.2 THE FAMILY LAW BILL

In 1999 after a series of public consultations lasting 3 years the Fiji Law Reform Commission and Jalal produced a 400 page report title “The Family Report 1999: Making a Difference to Families in Fiji”. Cabinet approved the drafting of a Family Law Bill based on the drafting instructions in Jalal’s report which led to the appointment of Deputy Chief Justice, Alan Barblett, of the Family Court of Western Australia as drafter of the Bill.

P. Imrana Jalal³⁹

Every law begins life as a bill before it is passed through the halls of parliament and becomes law.

Commonly in the South Pacific regions a Bill may be introduced by any elected Member of Parliament. In general terms Bills must undergo three readings in the legislature before they are passed into law. The first reading simply involves a Member of Parliament or Minister introducing it to the legislature by reading the short title with copies of the Bill thus making it public.⁴⁰

During the second and third readings, Members of Parliament are given the opportunity to discuss and debate sections to gain better understanding of the proposed Bill. After the third reading, the Bill is approved and subject to requirements for assent, becomes law.

The Family Law Bill No. 13/2002 was introduced for first reading in the House of Representatives on 8 April 2002. During its second reading the Bill was referred for review to the PJSC who completed its report on 27 April 2003. Additional submissions were made to the Committee before completion of its second reading in the House. Completing the review on 2 October 2003 the Bill was subsequently passed by the House, with amendments, on 14 October 2003. The Bill was introduced for review by the Senate on 20 October and passed by it on 24 October 2003. The Bill was assented to

³⁹ P. Imrana Jalal, ‘A Woman’s Quest For Equality’ (2003) http://www.nrt.org/page.asp?active_page_id=142 (accessed: 24/04/09)

⁴⁰ University of the South Pacific School of Law (2008) ‘Topic 5 Legislation’ LW112 Legislation, Semester 2 2008.

*by his Excellency the President and enacted as the Family Law Act No. 18/2003 on 6 November 2003.*⁴¹

The Family Law Bill was actually presented to Parliament in May 2000 but it was not to become law because of the *coup d'état* staged by George Speight and his men⁴² and the forced incarceration of some of the members of Parliament. Another factor challenging the implementation of the Bill was the opposition from factions of Fijian society. It is at this juncture of my paper that I wish to elaborate on objections to specific provisions of the Bill.

⁴¹ Parliament of Fiji Islands, '*Legislative Brief of the Bill*' (2002) at

<http://parliament.gov.fj/parliament/legislative/bills.aspx?billID=252&viewtype=summary&billnav=bill> (accessed: 23/04/09)

⁴² P. Imrana Jalal, above n 38.

2.3 OBJECTIONS TO THE BILL

Objections to the Family Law Bill centered significantly on three provisions. These objections were directed at the removal of the fault based ground for divorce; the provision regarding same sex marriages; and de-facto relationships. There were further objections including that the Bill '*had not been consulted enough*'.⁴³ Jalal revealed in an interview, that the FLA was more widely consulted when compared to previous legislation passed in the country. The objection that the Bill was '*too "white" and Western*'⁴⁴ appears, in my opinion, a strange objection, since the existing family laws had been adopted from English legislation and in some cases, with minor amendments, were similar to the adopted legislation. For example, the now repealed *Matrimonial Causes Act of Fiji* [Cap 51] was an application in Fiji of the *Matrimonial Causes Act 1857* of England.

In her paper titled *Gender Issues in Post Coup d'état Fiji: Snapshots from the Fiji Islands*, Jalal summarizes the objections to the Bill. Some of the objections were also aimed specifically at women's roles that '*Women are followers of men, the Bible says so. The Bill would upset God's natural order by granting women equality and thereby encouraging them to leave their husbands*'.⁴⁵ Religion (or specifically Christianity) was being used as a weapon against the Bill. Objections also included that '*the Bill was anti-Christian and anti-Fijian*' and '*only adultery was a valid ground for divorce in the Bible if at all, violence certainly was not*'.⁴⁶

Custom and tradition were used as tactics. For example, the Bill '*gave children rights over their parents which was against Fijian tradition*' and '*it would destroy the essential nature of Fijian indigenous society*' and an even more frivolous claim was that '*it was against the chiefly system because illegitimate children would have rights to be*

43 Ibid.

44 Ibid.

45 Ibid.

46 Ibid.

traditional chiefs'.⁴⁷ My opinion is that these claims were made by people who did not truly understand the new law and therefore could not make a proper assessment of it. These objections give the impression that women's rights were a secondary issue by those opposing the Bill. They made outrageous claims and employed various tactics in order to derail the work that had been done.

Jalal herself challenged one such opponent to show the country the provisions in the Bill supporting de-facto marriages or same sex marriages.⁴⁸ One such opponent was Reverend Lasaro of the Methodist Church of Fiji. It seemed that he and certain sectors of the Church believed that the Family Law Bill recognised same sex marriages or de facto relationships.⁴⁹ In a press statement in 2003, Jalal challenged Reverend Lasaro to, '*point to the exact section in the Bill that allows that...and if he could find the section then we'll take it out*'.⁵⁰ Jalal made it clear at that time that the review of family law was not a review of the Marriage Act itself.

At that point in time it seemed that the most opposition came from the Methodist Church which was and is still one of the largest denominations in the country. Jalal found herself accused of being an evil force in society and of trying to destroy the institution of marriage.⁵¹ The Methodist Church consists of the largest majority of indigenous Fijians (In 1986, close to 75 percent of the indigenous Fijian population belonged to the Methodist Church⁵²) and it may have misconstrued the FLA as being a threat to religion. Many indigenous Fijian women are still stuck in the stranglehold of custom which does at times compel them into being submissive. The Methodist Church was selling the idea that the Bill was challenging indigenous rights and would destroy (indigenous) Fijian society.⁵³

47 Ibid.

48 Ibid.

49 Ibid.

50 Ibid.

51 Ibid.

52 World Council of Churches, '*Methodist Church in Fiji and Rotuma*' (2006) <http://www.oikoumene.org/en/member-churches/regions/pacific/fiji/methodist-church-in-fiji-and-rotuma.html> (accessed: 12/05/09)

53 Women Living Under Muslim Laws, '*Fiji: Family Law Bill Passed*' (2003) at [http://www.wluml.org/english/newsfulltxt.shtml?cmdf\[157\]=x-157-23006](http://www.wluml.org/english/newsfulltxt.shtml?cmdf[157]=x-157-23006) (accessed: 23/04/09)

An internal debate in the working group also took place during the lobbying process of the Bill.

*Should they openly promote the Bill as a woman's equal rights Bill or use the family and children's rights to "sell" the Bill? As feminists they felt that they should openly flaunt and celebrate the Bill but as political strategists they also knew that to do so might jeopardize the Bill. The decision was made to be strategic.*⁵⁴

Flaunting the Bill as feminists may have been a problem because of the conservative nature of a society that was still in the early stages of encouraging the empowerment of women. How far they could have gone at the time with this attitude and also addressing the challenging issues of sexual orientation and de facto relationships were causes for some concern.⁵⁵

The parliamentary debate on the Bill weighed the option of including provisions on de facto relationships. The following is an excerpt from the report of the PJSC on the Family Law Bill, 2002:

*The Family Law Report 1999 had mentioned that men and women involved in de facto relationships, have no legal rights regarding each other, and their children have only a few of the legal protection offered to children born of a legal marriage. Partners in de facto relationships cannot, amongst other things, claim maintenance for themselves; claim shared property acquired by the partner during de facto relationship; claim pension or seek a protection order against family violence. The 1999 Report had therefore concluded that when formulating the Bill, attempts be made where possible to grant ex-nuptial children (including those from a de facto relationship), the same rights.*⁵⁶

54 P. Imrana Jalal, 'The Campaign For Gender Equality in Family Law: The Passage of the Controversial Fiji Family Law Act 2003 Into Law' (2005) at [http://www.wluml.org/english/pubsfulltxt.shtml?cmd\[87\]=i-87-531764](http://www.wluml.org/english/pubsfulltxt.shtml?cmd[87]=i-87-531764) (accessed: 15/04/09)

55 Ibid.

56 Parliament of Fiji, above n 4.

The PJSC had put some thought into the issue of de facto relationships and more importantly the plight and rights of children of these relationships, generally referred to as ex nuptial children. It was also apparent from deliberations and consultations, the public were more against this provision than for it. *‘The Committee also realized that consultations undertaken by the FLRC, when drawing up the Family Law Report in 1999, indicated an overwhelming vote against the inclusion of the de facto relationship issue in a new family-law related legislation’.*⁵⁷ The PJSC did acknowledge that the Bill will contain provisions on the welfare of children specifically in terms of child maintenance which is now provided in the FLA, Division 8, Subdivision A which states that a *‘Father is liable to contribute towards child bearing expenses if not married to the mother’*. What was not considered by the Committee was the issue of children who are born to homosexual couples due to the negative views of Fijian society.

The PJSC, amongst other issues, deliberated on same sex marriages.

*A same sex or gay marriage is a marriage between partners of the same sex. The Committee was informed that only one country, (the Netherlands) had extended marriage rights to homosexuals. Other jurisdictions however have granted some legal privileges to same sex couples, often referred to as partnerships, civil unions and domestic partnerships. However, this is still a controversial subject in most countries. It is illegal and not recognised in Fiji under Section 15 of the Marriage Act (Cap. 50).*⁵⁸

Submissions made to the Committee included the view that the only category that could really recognise same sex marriages would be that it could fall under de facto relationships and since the Bill did not recognise that, there was no other way that same sex marriages could be included in the Bill.⁵⁹ The deliberations over section 38(2) (a) of the Constitution which provides that no person could be discriminated against based on their sexual orientation, the Committee was of the view that the understanding in Fijian society was that marriages are between a man and a woman only.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

Some of the submissions also came from the various provinces.

The submissions made by the provinces were that some provisions of the act was against Christian principles. One province even suggested the deletion of Section 38(2) of the Constitution because it is providing rights to homosexuals (gays and lesbians). There was also a suggestion that Government should look into the matter and put necessary laws into place preventing these practices from spreading and taking root in Fiji...The Committee in noting these views recommends that Same-sex marriage should not be allowed.⁶⁰

There seemed more was to be lost than gained if the provisions regarding same-sex marriages and de-facto relationships were to be included in the Bill. According to Jalal, the public consultations had overwhelmingly stated their opposition to the inclusion of these advanced rights.⁶¹ What occurred then was the painful decision to exclude the provisions relating to same sex and de-facto relationships because to include them it would surely result in the other also very important provisions not being passed as law.

⁶⁰ Parliament of Fiji, above n 4.

⁶¹ P. Imrana Jalal, above n 28.

PART III

This part explores and discusses the various innovative provisions of the FLA and the supportive services provided by the Family Court and other agencies. The provisions included in this discussion are those governing the dissolution of marriage; counselling at the Family Court; maintenance; property settlement; and the best interests of the child. The new features of the Family Court and the role of various stakeholders in the implementation of the FLA are also highlighted.

3.1 DISSOLUTION OF MARRIAGE

Divorce is the psychological equivalent of a triple coronary by-pass. After such a monumental assault on the heart, it takes years to amend all the habits and attitudes that led up to it.

Mary Kay Blakely⁶²

Section 30 (1) of the FLA states,

An application under this Act by a party to a marriage for an order for dissolution of the marriage must be based on the ground that the marriage has broken down irretrievably.⁶³

Divorce⁶⁴ is a sensitive topic when it comes to women. The overall belief is that a woman must remain with her husband no matter the circumstances. After all, when taking matrimonial vows one often hears the words “for better for worse, for richer for poorer, in sickness and in health, till death do us part”. Why then should a woman want to leave her husband if she had made these commitments to him? The unfortunate reality is that fairytales often do not last. The same man that may have at one time committed himself to one woman is now the monster that she never thought he could or would

⁶² Think Exist.Com at http://thinkexist.com/quotation/divorce_is_the_psychological_equivalent_of_a/215270.html (accessed: 3/06/09)

⁶³ Above n 5.

⁶⁴ This term is no longer used in the Family Law Act. The more appropriate term today is dissolution of marriage.

become. That original ‘*belief that a woman should remain married to her husband, can bind a woman to a dangerous man*’.⁶⁵

Section 30 of the FLA has changed what previously existed for parties seeking a divorce in Fiji. Prior to the FLA, Fiji had divorce laws that were pretty much archaic and discriminatory. Fiji’s divorce laws were fault based. In simple terms having a fault based system means that one of the parties must prove that the other party had committed some form of matrimonial wrong as prescribed by law. Previously, Fiji’s *Matrimonial Causes Act* [Cap 51. s 14] listed 14 grounds for divorce which included adultery, desertion or refusal to pay maintenance for a period of not less than two years; refusal to consummate; habitual cruelty; rape; sodomy or bestiality; habitual drunkenness and drug use for a period of not less than two years; the husband being frequently convicted for crimes and leaving the wife with no means of support; imprisonment for an offence punishable by death or life imprisonment; having attempted murder and causing grievous bodily harm on the petitioner; failure to comply with a decree of restitution of conjugal rights; being of unsound mind; separation for a period of five years or more and no likelihood of cohabitation being resumed; and presumption of death. Jalal’s example below highlights the processes taken under the old law.

*If both the respondent and co-respondent admit adultery, the Court will select a date on which the petitioner filing for divorce has to provide formal proof of the allegation. If the petitioner can bring at least one witness who can say that the respondent and the co-respondent have had a sexual relationship, the divorce is granted automatically...The petitioner must prove that the other party, the respondent, committed adultery with the co-respondent. It is not enough for her to claim that her husband had committed adultery; the allegation must be corroborated.*⁶⁶

This made the divorce process lengthy, costly and draining on parties and with no regard to children who are often forgotten as also being affected by this fault based system.

⁶⁵ P. Imrana Jalal, ‘*Law For Pacific Women: A Legal Rights Handbook*’ (1998) 218.

⁶⁶ *Ibid*, 234.

They would have had to endure the horror of watching their parents play the ‘blame game’.

The focus of the FLA, however, is a no-fault based regime. This means that all of these grounds will be removed and replaced with one single ground – “that the marriage has broken down irretrievably”. Irretrievable breakdown of marriage means that the marriage is beyond rescue and saving and therefore must legally end.⁶⁷

This does make the divorce process procedurally simpler especially for women who do not have the financial resources to be fighting their case in Court. The conditions though placed on section 30 (1) of the FLA by section 30 (2) and (3) where Courts will not make an order for the dissolution of marriage unless satisfied that the parties have lived separately and apart for a period of twelve months and are unlikely to resume cohabitation. The twelve months separation alone cannot be relied upon to dissolve a marriage as an applicant must also prove that the marriage has broken down irretrievably. According to section 31 (1) of the FLA;

For the purposes of proceedings for dissolution of marriage, where, after the parties to the marriage separated, they resumed cohabitation on one occasion but, within a period of 3 months after the resumption of cohabitation, they again separated and thereafter lived separately and apart up to the date of the filing of the application, the periods of living separately and apart before and after the period of cohabitation may be treated as if they were one continuous period, but the period of cohabitation will not be deemed to be part of the period of living separately and apart.⁶⁸

Section 31 of the FLA allows parties time to really gauge whether they do in fact want to dissolve their marriage or whether they feel that they can work through their problems and keep their marriage intact. However, s. 31(1) provides that if there is just one period of resumption of cohabitation which lasts for less than three months, the periods of separation preceding and following that resumption can be added together for the purposes of the twelve months requirement.

⁶⁷ Apolosi Bose, ‘Dissolution of Marriage’ (2003) at http://www.rprt.org/page.asp?active_page_id=145 (accessed: 12/ 12/08)

⁶⁸ Above n 5.

Critics of this law had stated that the provisions in the FLA would make the divorce process easier and encourage divorce.⁶⁹ This is rather contradictory because the FLA has provisions which encourage reconciliation counselling which is provided for under Part III of the Act and which will be discussed in section 3.2 of this paper. The possibility of reconciliation of the parties must be given consideration by the judge, the magistrate and the legal practitioner representing the parties. Therefore, it does not in any way encourage divorce. Divorce is, and always will be a traumatic experience for all those involved and minimizing this trauma is not something that the FLA (or any legislation) can eliminate. What the FLA has done, is eliminate the issue of blame from the process so that parties are less inclined to view their divorce proceedings as a battle ground.

69 P. Imrana Jalal, 'Show Me the Sections, We'll Take Them Out' (Press Statement, 2003) <http://www.wlumi.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-23006> (accessed: 7/04/09)

3.2 COUNSELLING

He that gives good advice, builds with one hand; he that gives good counsel and example, builds with both; but he that gives good admonition and bad example, builds with one hand and pulls down with the other.

Francis Bacon, Snr.⁷⁰

One of the key strategies in the FLA to provide support to troubled families is to make available within the Family Court an on-site counselling service. There is statutory requirement under s.11 of the FLA for the Director of Counselling to ‘*advertise the existence and availability of the counselling and welfare facilities of the respective Family Division*’ and as far as practicable, to make those facilities available to those seeking such services.

There are three different types of counselling that are provided for in the FLA and these are marriage reconciliation, family and child counselling, and financial and property conciliation. As mentioned in an earlier segment of this paper, the FLA provides for counselling for those parties that, although are applying for dissolution of marriage, may have marriages that can still be saved. Therefore, contrary to opposing views that the FLA will promote and increase divorce it actually provides for the opposite.

⁷⁰ Francis Bacon Quotes at <http://www.wow4u.com/francis-bacon/index.html> (accessed: 3/06/09)

3.2.1 SERVICES PROVIDED BY THE COURT COUNSELLING SERVICES

(a) MARRIAGE RECONCILIATION

The Interpretation section of the FLA provides,

*marriage counselling" includes the counselling of a person in relation to-
... (b) reconciliation of the parties to a marriage;
... (ii) the counselling is provided to the person individually or as a member of
a group of persons.⁷¹*

Part III, section 9 of the FLA provides for counselling and reconciliation in situations where the Court feels that although dissolution of marriage proceedings have been instituted there is a possibility of the parties reconciling and the judge or magistrate if they think it desirable, may nominate counselling under section 9(2)(c);

*(i) a marriage counsellor or an approved marriage education and counselling organisation; or
(ii) in special circumstances, some other suitable person or organisation, to assist those parties in considering reconciliation.⁷²*

The initial idea regarding marriage reconciliation counselling was that couples can either go to a lawyer or to the Family Division of the Courts where a referral may be made to a Reconciliation Counselling Network (RCN). If reconciliation happens, then the parties exit the system. Where reconciliation is unsuccessful, the RCN refers the parties to the Court and advising the Court of that fact and may also provide a recommendation. The Court may then refer the parties to the Family Court Counselling Services for further attempts at reconciliation.

⁷¹ Above n 5.

⁷² Ibid, section 9.

Marriage counselling in Fiji is based on the counsellors being facilitators to the couples themselves. *‘The basic tenet of counselling is to facilitate whatever the clients want so if parties say, “I still have strong feelings for my wife and I would like make it up, I would like to commit some time to repair our marriage”’. If the wife says “No, I can’t do that because I’m living with another man and we’ve been living together one year’, then that is where reconciliation stops because the woman really just wants to settle matters concerning property, custody of children and other matters.*⁷³ There may be circumstances where one party admits that there have been problems but for the sake of the children they would like to repair and save their marriage, then in such situations, counsellors will step in to help parties come to a resolution.

The commitment though has to come from the parties themselves who must make the effort to work on differences and commit to repairing the marriage. When this happens then the success rate of the counselling services would be placed between seventy to eighty percent (70% & 80%).⁷⁴ But this rate is purely dependant on whether parties are willing to put in the effort. According to statistics from the Family Court Counselling Services, there is an average of four cases for counselling and four Court reports per day being referred to the Department. This is an indication that clients are utilising the services offered by the Family Court. Rika emphasizes that the commitment must come from the parties and only then can there be a movement forward toward reconciliation.

⁷³ Above n 22.

⁷⁴ Ibid.

(b) FAMILY AND CHILD COUNSELLING

Section 50 of the FLA states;

(1) A party to proceedings under this Part, or a person representing a child under an order made under section 125 may file in the Family Division of the High Court or of the Magistrates' Court a notice stating that he or she wishes to have the assistance of the counselling facilities of that Court.

(2) On the filing of the notice, the Director of Counselling must arrange for parties to the proceedings (with or without the child) to be interviewed by a family and child counsellor or welfare officer to assess whether counselling is appropriate in all the circumstances, and if it is-

(a) to discuss the care, welfare and development of the child; and

(b) if there are differences between the parties in relation to matters affecting the care, welfare and development of the child-to try to resolve those differences.⁷⁵

Section 51 further states;

A person may at any time request a family and child counsellor to provide counselling about a matter relating to a child.⁷⁶

The focus of child counselling is for the parents (with the assistance of the counsellor) to come to an agreement about issues pertaining to residence and contact between the parents and the child and each parent over such issues as schooling, who will care for the child, and maybe what church the child should go to once the marriage has been dissolved. *'The new process is based on the idea that parents and not Courts and lawyers, are the best persons to make decisions about their children'.⁷⁷*

⁷⁵ Above n 5.

⁷⁶ Above n 5.

⁷⁷ P. Imrana Jalal, 'Children and the Family Law' (2003) at http://www.rrt.org/page.asp?active_page_id=144 (accessed: 12/12/08)

Parenting Plan

There may be times when the Court will allow members of the extended family to contribute to the discussions on child residence and care because it is often the case in Fiji (and the Pacific) that the raising of a child is done not only by biological parents but by members of the extended family. The main reason for this is that the Court prefers that parents make the decisions concerning their children on their own rather than having a Court order issued. Parental counselling, if successful, often results in a parenting plan being drawn up by the parties.

A parenting plan is an agreement made in writing between the parents on a range of matters concerning the welfare of the child.⁷⁸ A parenting plan may deal firstly with the person or persons with whom the child is to reside.⁷⁹ Counselling done at this stage will allow each parent to evaluate the interests of their child and take into account the effect of re-locating a child from a familiar environment which may affect them psychologically. Consistency creates a sense of security for a child of any age. The plan will also address the issue of contact between the child and the non-custodial parent and other persons, the maintenance of a child and any other aspect of parental responsibility towards the child.⁸⁰

The Association of Family and Conciliation Courts (AFCC) of Massachusetts provide a helpful guide for questions that parents should consider in order to focus on the family's circumstances and their responsibilities for the child. They are as follows:

- What responsibilities have each of you assumed for childcare prior to separation? For example, who has taken the children to school; helped with homework; scheduled and/or taken children to medical appointments?
- How has each of you been involved in each child's recreational activities such as sports, music, dance, or after school clubs?

⁷⁸ Above n 5, Section 56 (1).

⁷⁹ Ibid, section 56 (2) (a).

⁸⁰ Ibid, section 56 (2) (b).

- What are the most important issues for each of your children; what do you believe are their individual needs?
- What do you see as each of your strengths as a parent?
- How do you want to share parental responsibilities for your children?
- How do your children get along with each other? Should you consider spending some separate time with each of them?
- Have you thought about your children's preferences?
- What will you have to do to put your children's needs ahead of your own?
- Can you protect your children from your own conflicts, disappointments and adult concerns?
- Have you discussed with each other how and when to tell the children the details of your parenting plan?⁸¹

The Guide may also be used as a more comprehensive guide for Fiji's Counselling Services as it provides more information for parents who are looking at separating legally and need time to look into the options available for their children without removing them completely from a familiar environment. Taking into account the best interests of the child, there are greater benefits for the child where a plan is drawn up as communication and cooperation between the parents will allow the child to maintain a positive relationship, a structured routine and each parent will have the opportunity to make valuable contributions to the development of their child. Adjustments in parenting plans are made over time to allow for changes in schedules and circumstances.

The Court will respect the decisions made by the parents. However, if the Court finds that a certain decision is not made in the best interests of the child, then it can make the necessary changes to ensure that the child is protected.⁸² Also, if there is some evidence that the husband or wife had forced the other to agree to something that they did not want, then the Court can reject or set aside that parenting plan.

⁸¹ Source: Association of Family and Conciliation Courts (AFCC) of Massachusetts, '*Planning for Shared Parenting: A Guide for Parents Living Apart*' <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/afccsharedparenting.pdf> (accessed: 6/06/09)

⁸² Above n 5, section 60.

3.2.2 FINANCIAL AND PROPERTY CONCILIATION

At the breakdown of marriage, disputes between parties often arises as to title or entitlement to property obtained or inherited before or after marriage. In practice, the Family Court generally lists the application for property settlement before the Family Court Registrar, who is empowered by **Order 9 of the Family Law Rules (FLR)** to hold a conference and make directions to facilitate the progress of the matter, as the first Court event.

Under **Order 9**, the proceedings are presided over by a Registrar. Parties are to attend in person and if represented by a lawyer then the lawyer must also attend.⁸³ It is at this conference where parties must provide all relevant information regarding property and financial matters. Property acquisition or dealings by one spouse/partner without the knowledge of the other is not uncommon. The Registrar will discover the nature of the properties and financial resources of the parties and the disputed matters and will try to resolve the proceedings by agreement between the parties. If agreement cannot be reached, then the Registrar will make appropriate directions to facilitate the progress of the matter.⁸⁴ The Registrar may also list the case before the Court for procedural orders at any time considered appropriate.⁸⁵ The Registrar may list the matter again for a follow up conference and may make further directions for the parties to be referred to a conciliation conference with the Family Court Counsellors. These pre-trial procedures are an effective mechanism to discover the nature of the entire properties and financial resources held by each and by both parties, the matters in dispute and the nature of their claims.

Counselling offered for property and financial matters by the Counselling Services is very similar to the processes adopted for child counselling in that it provides for parties to first settle property matters on their own rather than the Court making a decision on who is entitled to what property and how it should be distributed or sold. Upon referral

⁸³ *Family Law Rules 2005 (Fiji)* Order 9.01.

⁸⁴ *Ibid*, Order 9.05.

⁸⁵ *Ibid*, Order 9.06.

by the Registrar a counsellor is assigned to help the parties come to an agreement about property and financial matters.⁸⁶ According to Jalal, a conciliator's qualifications and scope of work involves the following:

*The conciliator will be a qualified lawyer who will receive training in conciliation and alternative dispute resolution skills. They will discuss who will live in the matrimonial home or whether it should be sold; whether payments are to be made to the Bank for loans; how much maintenance is to be paid for the children or the other spouse if relevant; how income once going into one family will be shared between two homes; their various financial commitments to the Bank or other debtors and any other financial matters.*⁸⁷

Case Assessment Conferences

Another new feature in the Family Court is the scheduling of case assessment conferences (CAC) to be held by the Registrar, court counsellor or both, as provided by Order 9.07 of the Family Law Rules. The purpose of the CAC is for an assessment to be made especially in complex cases as a first court event and for recommendations directed towards the future conduct of the case. This is an important step as it will enable the parties to attempt to resolve their case or any part of it by agreement.⁸⁸ The CAC in the Court Counselling Services have been suspended indefinitely pending the recruitment of more counsellors.⁸⁹ A review of CACs may have to be done before re-implementation of this process as Rika highlights that past experiences have shown that parties do not value this form of alternative dispute resolution (ADR) and parties usually only respond to an order by the Court before engaging in ADR.⁹⁰

This is an interesting observation as such conferences enable parties to explore issues, alternatives and options, focus more on the problems and with the assistance of professionals, to find solutions. There are an increasing number of self represented

⁸⁶ P. Imrana Jalal, above n 77.

⁸⁷ Ibid.

⁸⁸ Above, n 83. Order 9.07.

⁸⁹ Aseri Rika, Family Court Counselling Service, 2008 Report (January – October) (2008).

⁹⁰ Ibid.

litigants in the Family Court and a CAC would enable such litigants to explore better options for them in such a participatory process. ADR is not new concept in Fiji as disputes and “wrongs” within communities are often resolved with the traditional protocol and presentations signifying apology and sorrow. Rika’s observations highlight the need for further funding to increase the number of counsellors and public awareness programmes explaining the value of CAC processes.

The Family Court Counselling Services has certainly had its fair share of set backs due to budget constraints and the overall political strife in Fiji. This though has not deterred a few such as Aseri Rika and Deepika Devi, who have remained with the Family Court.

3.3 MAINTENANCE

Inevitably the process of providing for two households out of one can lead to unpleasantness and bitterness, and the current Court based resolutions, no matter how sensitively dealt with, can leave parties feeling aggrieved.

Barbara Corbett⁹¹

3.3.1 A CASE STUDY

The following is an account from an acquaintance who relates her experiences within the Family Court system and who wishes to remain anonymous. Sala's (not her real name) experiences spans the old legislation on family law and the new FLA. She highlights also that she was satisfied with her experiences within the Court system and did not find any pressure from the Court staff who she states were very helpful and at the same time sensitive to her problem.⁹² She also makes the following distinction regarding the enforcement of maintenance payments. With her first partner it was quite difficult to enforce maintenance as he was unemployed and the Court did not seem to push the issue enough. The father of her third child on the other hand was employed by the Police Force which made the situation somewhat easier for her as maintenance was paid by the regular deduction of his salary.

THE STORY OF SALA

Sala is a thirty one year old woman residing in Tacirua and has four children. She was very cooperative and understood the purposes of the interview and agreed that if there was a topic she felt was too sensitive she would decline to answer. She and her children currently live with her parents and younger siblings in the family home at Tacirua. She has recently gained employment in the civil service but is currently at home on maternity leave after the birth of her fourth child.

⁹¹ Above, n 17.

⁹² Also supported by Acting Senior Officer Frances Prasad who maintains that court staff must be sensitive to issues but not overly emotional.

Her first contact with the family law system in Fiji was in 2003 when she applied to the Court for maintenance for her son. At that time she and her husband were still legally married but neither party had applied for dissolution of marriage. The process started at the Court registry with her name being taken down, a folder prepared by the Court staff for her and then it took a period of two weeks for a summons to be prepared which was to be served on the father of her son. One of the important things that she pointed out was the advice that was given to her not to serve him herself but to take a law enforcement officer or someone who was over the age of twenty one.

The parties were also informed of the date that they were to appear in Court for their hearing and at the hearing the Magistrate ordered her husband to pay maintenance for the child. There was no mention of the possibility of non-financial contributions to be paid by her husband. According to Sala her Court experience was not one that she felt intimidated by because she had previously been advised by Court officers to be cautious on the hearing date and not allow her husband to influence what she was to say and do on the set date. This proved to be good advice which she utilized during the hearing. She often had to return to the Court and apply for a number of summonses in order for him to appear in Court to answer questions from the Court as to why he had not been paying child maintenance.

In 2006 her husband filed for divorce and that point in their relationship the couple had two children. Sala stated that she did not have to apply for custody of her children because they were both infants at the time and staying with her. The Court ultimately gave her custody of the children for these reasons. Her husband though applied for custody but was only granted access rights (weekend visitation) to his children. A contributing factor was the fact that at that time Sala has just started a new job but her now ex husband was unemployed. The Court asked the couple if there was a chance of reconciliation and advised the couple to attend counselling sessions with the Court counsellor. Unfortunately, the husband did not attend the

sessions. Sala though went to the sessions and she stated that they were quite helpful.

Sala was fortunate to have had the help of her parents in bringing up her children and she found that the children were not affected by the whole scenario of regular Court appearances. She maintains that her parents support helped her through her ordeal. There was an issue that she wished to make known and that was the issue of enforcement within the Court system especially when it came to the paying of maintenance. Her husband has not paid maintenance since 2007 and every Court appearance has resulted in the Court only asking him to pay up without any further action taken. This according to Sala is the same story every time she obtains a summons for him to appear in Court regarding unpaid maintenance. Her opinion was that the Court should threaten those who don't pay up with jail time.

She has had more luck with her third child whose father is employed in the police force. The process with this child is quite different from her other children because in this case the money is deducted directly from her son's father's salary. She initially filed for maintenance in the Family Court and the Court gave the form to the Police Department and the Department made the arrangements for direct deduction. She has had less heartache with this current arrangement.

The above case illustrates the difficulties with enforcing maintenance particularly where the party ordered to pay maintenance is unemployed. This is a complication faced mostly by women in trying to obtain relief from the Court. In such situations, women generally cannot access government support under the welfare system as financial support budgeted is simply insufficient to support the numbers that apply each year.⁹³

93 At the time this research paper went for examination, Sala's situation was made even more complicated when she went to her place of employment (Ministry of Finance) and was told that she had been replaced. The fact that she was offered no explanation or compensation is an indication of the workings of the current regime. She is currently unemployed and remains at home caring for her young with no financial support.

3.3.2 CHILD MAINTENANCE

Section 86 of the FLA states,

(1) The parents of a child have, subject to this Division, the primary duty to maintain the child.

(2) Without limiting subsection (1), the duty of a parent to maintain a child-

(a) is not of lower priority than the duty of the parent to maintain any other child or another person.⁹⁴

Section 87 of the FLA stipulates the duty of step parents in maintaining their step-children and it makes clear that this duty is a secondary duty to that of the child's biological parents. Apolosi Bose, formerly of RRRT, had stated that the FLA is a means of ensuring that parents become more accountable for their children.⁹⁵ Child Maintenance Orders (CMO) are important in that they ensure that the person who has the responsibility of looking after the child has the proper resources whether in cash or kind. A CMO can be applied for by the parents of a child or any other person who has an interest in the welfare of the child, for example, aunts, uncles, guardians, grandparents etc.⁹⁶ The Court in this regard must give consideration to financial as well as non-financial help that can be given by the party who is being ordered to pay maintenance.

One of the significant implications of the FLA is that a father can also apply for maintenance from a wife, if he is looking after their children and if the wife is earning an income.⁹⁷

This is one of the ways the FLA recognises that society and gender roles have changed. Women are now becoming the breadwinners whilst the fathers may remain at home as caregivers. There are principles that the Court will look at when calculating how much maintenance is to be paid by a party. These principles are provided for in section 90 of

⁹⁴ Above n 5.

⁹⁵ Apolosi Bose, 'Act looks to Accountability' (2003) at http://www.rrrt.org/page.asp?active_page_id=153 (accessed: 12/12/08)

⁹⁶ Ibid.

⁹⁷ Ibid.

the FLA. The important matters to be considered by the Court are firstly those mentioned in section 91 where the liable parent's income, earning capacity, financial resources, commitments and special circumstances are taken into account.⁹⁸ The second matter that the Court must take into account when determining necessary maintenance of a child is the proper needs of the child. This second matter has important conditions attached to it which assists the Court in ascertaining the proper needs of a child. These include:

*The age of the child, the manner in which the child is being educated and which the parents expect the child to be educated, any special needs of the child and the Court may also have regard for to the extent to which the Court considers appropriate in the circumstances of the case, to any relevant findings of published research in relation to the maintenance of children.*⁹⁹

The age of the child also could mean that very small children who may still be breastfeeding would remain with their mother because to remove the child would not only be traumatic but also affect the nutritional needs of the child. Special needs of the child may include medication if the child is one that needs a constant supply of a certain medication, but this is only one out of the many things that a child could need. The last factor relating to published research on the maintenance of children is interesting because it is really a discretionary matter for the Court to decide upon.

Section 90 (1) (c) provides that the Court must also take into account the '*income, earning capacity and financial resources of the child*'.¹⁰⁰ The Court must in this regard take into account further factors such as has been discussed above with relation to the proper needs of the child. In this case, the Court must take into account the ability of the child to earn or derive income which includes any assets of the child that is being controlled by another person and although he or she may not be producing income the

98 Above n 5, section 91.

99 Ibid, section 90 (2)

100 Ibid, section 90 (1) (c).

assets are capable of doing so.¹⁰¹ This provision could refer to assets such as shares in a company or trust money that could be invested so to generate an income. The Court in such cases will disregard the income, earning capacity, property and financial resources of another person unless it finds it appropriate to have regard to them.¹⁰²

Section 91 of the FLA is quite similar to the above discussed section (90) but the difference is that it relates to the party who is actually going to make the payments whereas section 90 is concerned with the amount of maintenance that would be appropriate for a child. Section 91 allows the Court to again give consideration to the matters in section 90 in addition to the income, earning capacity, property and financial resources and also the commitment of the party to maintain them and any other person or child.¹⁰³ There are also direct and indirect costs that will be incurred by the person providing care for the child and any other special circumstances which need to be taken into account so to avoid any injustice or undue hardship to any person.¹⁰⁴ This could relate to those women mentioned by Jalal in the introductory paragraphs as women who look after grandchildren with no support from the parents of the children. This provision in the FLA leaves room for them to also apply for child maintenance for the children under their care.¹⁰⁵

The FLA in fact looks at the issue of child maintenance in a very practical way. Courts must consider situations where one party may not be able to make such payments or that they can only make payments that are non-financial in nature. This is very important considering the local circumstances where not everyone has a job that pays a salary/wage. Some may survive by other means such as sourcing food from a dalo or cassava plantation which the Courts will consider when making child maintenance orders.

101 Ibid, section 90 (3) (a).

102 Ibid, section 90 (3) (b).

103 Ibid, section 91 (1).

104 Ibid, section 91 (1) (e & f).

105 Telephone interview with Frances Prasad, Acting Senior Court Officer, Family Court of Fiji (8 June 2009) who confirmed this but could not provide a case example in support.

A child who has turned 18 years of age will normally stop receiving maintenance but maintenance may be continued if it is to enable the child to complete his or her education or the child is mentally or physically disabled.¹⁰⁶ According to statistics obtained from the Family Court registry in Suva, the applications for child maintenance consist of the second highest number of applications made following divorce applications. For example, in the year 2007 the national total for child maintenance applications was 1144 with more than half (624) of these applications made in the Central Division.¹⁰⁷ These statistics indicate that women and children are able to access the law.

Accessing justice is more problematical and challenging when spouses/partners abandon their children and move to other countries as it makes enforcement of maintenance even more difficult. The *Family Law Regulations* (FLR) of Fiji, 2005 lists countries which have reciprocal enforcement arrangements with Fiji. These countries are known as “reciprocating jurisdictions”.¹⁰⁸ Regulation 9 allows maintenance orders made in Fiji to be enforced in countries listed under Schedule 2 of the FLR and orders made in those “reciprocating jurisdictions” to be enforced in Fiji after the required procedures have been fulfilled.¹⁰⁹ The problem would arise when the spouse/partner has moved to a country that is not defined by the FLR as a “reciprocating jurisdiction” and is not a party to the Convention on the Recovery Abroad of Maintenance and this means that enforcement orders cannot be made. Enlarging the scope of reciprocating jurisdictions and encouraging countries to ratify the Convention on the Recovery of Maintenance Abroad would improve better access to the justice system.

Proving Parentage

An issue often faced by women claiming child maintenance is proving that the person named is the father of the child. The issue of proving parentage is important but can be a very costly process. For example, take a couple who have been seeing each other for a

¹⁰⁶ Above n 5, section 92 (1) (a) and (b).

¹⁰⁷ Above, n 105.

¹⁰⁸ *Family Law Regulations* 2005 (Fiji) Schedule 2.

¹⁰⁹ *Ibid*, Regulation 34 and 35.

number of years but remain unmarried. The woman becomes pregnant and claims that the father of the child is her partner but he denies this in order to avoid paying her any child maintenance. If he refuses to take a test to determine parentage, then the Court cannot order him to but will draw conclusions from his refusal to do so.

Section 137 of the FLA states;

*If the parentage of a child is a question in issue in proceedings under this Act, the Court may make an order requiring any person to give such evidence as is material to the question.*¹¹⁰

The laws that existed prior to the FLA revolved around the woman being able to corroborate her evidence that the man she claims is the father of her child is indeed the father. Gina Houg Lee discusses affiliation cases and defines an affiliation case as ‘when a single woman seeks maintenance from the father of her child’.¹¹¹ The old law required the man and woman to appear in Court with their witnesses and provide evidence. It is only if the Court is satisfied that the mother’s evidence is corroborated then an affiliation order will be made confirming the alleged defendant as the child’s “putative father” and award maintenance.¹¹²

The issue of corroboration has always been one that has been discriminatory against women especially when it comes to sexual offences. The case of *Balelala v State*¹¹³ was a landmark ruling that abolished the truly archaic requirement that women were to provide hard evidence that they were indeed sexually assaulted. The case involved the appellant who had held prisoner and raped the complainant at a popular nature reserve. He was found guilty on all three counts of rape but appealed his conviction and sentence (eleven years). He also argued that it was dangerous to convict him on the complainant’s words alone as per the corroboration warning.

110 Above n 5.

111 Gina Houg Lee, ‘Sex, Morality and Norms’ (2003) http://www.rrrt.org/page.asp?active_page_id=161 (accessed: 12/12/08)

112 Ibid.

113 [2004] FJCA 49.

The Court held that despite the error in corroboration by the Magistrates' Court, it was not one that involved a substantial miscarriage of justice by application of Article 23(1) of the Constitution of Fiji. ..In a new groundbreaking precedent the Court removed the corroboration practice ("the rule") after examining the legal basis of it, the rationale behind the rule, the laws of Fiji and other jurisdictions on the rule.¹¹⁴

The Court used CEDAW to remove the corroboration warning requirement for evidence of victims of sexual violence on the ground of gender discrimination.

Section 138 of the FLA allows the Court to make a parentage testing order based either on *'its own initiative or on application by a party to the proceedings; or a person representing the child under an order made under section 125'*.¹¹⁵ The order can be made in relation to the child, the person known to be the mother of the child or any other person if the Court is of the opinion that, if the parentage testing procedures were to be carried out in relation to the person, the information that could be obtained might assist in determining the parentage of the child.¹¹⁶ Testing can be done either through a blood test or a DNA (deoxyribonucleic acid) test.

DNA (deoxyribonucleic acid) is the genetic blueprint that determines a person's biological characteristics. DNA is located in the cell of the human body. Upon conception, a child inherits one half of its DNA from its mother and one half from its father. This unique combination of DNA will match that of the biological parents of the child. For the test to take place, cheek cells are removed with a swab from the mouth of the mother, the child and the alleged father. In the laboratory, these cells are removed from the swab and tested. When a child's DNA does not match that of the alleged father, he is excluded 100% as the biological father of the child. When the child's DNA does match that of the alleged father, this means that the alleged father "could be" the father of the child, but it does not prove that he "is" the only possible father, since related individuals, such as brothers, can share

114 Pacific Regional Rights Resource Team, 'Balelala v State' (2005)1 *Pacific Human Rights Law Digest*, 14.

115 Above n 5, Section 138.

116 Gina Houg Lee, above n 115 and section 138 (3) of the Family Law Act of Fiji.

*DNA characteristics. However, a DNA test can prove a probability of 99% or greater for paternity.*¹¹⁷

A blood test involves the testing of a sample of blood from the parties and it is much cheaper than a DNA test. According to Houg-Lee, '*the possible maximum cost of a blood test is \$62.50. This is still cheaper than a DNA test, which could cost up to \$400 per person – therefore approximately \$1200 for a 3-way test*'.¹¹⁸ Section 140 of the FLA states,

*If a person who is aged 18 or over fails to comply with a parentage testing order or an order under section 139, the person is not liable to any penalty in relation to the contravention, but the Court may draw such inferences from the failure as appear just in the circumstances.*¹¹⁹

It was only right then that legislation be amended to suit the changing common law which is exactly what the FLA did when it came into effect. Under the FLA, it is unnecessary for a mother to give evidence in any paternity action. Section 131 to 135 of the FLA lists areas in which parentage is presumed. They are:

- *Children born from a marriage,*
- *Children born from a couple who are living together,*
- *If a person's name is entered as a parent of a child in a register of births or parentage information,*
- *If a Court has already found someone to be the parent of a child,*
- *If a parent has executed an instrument acknowledging that he is the father of a specified child (for example in a will).*¹²⁰

There are cases in the Family Court on matters of proving parentage and many of the applications are made by women who want to prove that the man in a brief encounter or

117 Adoption.Com, '*DNA testing*' (2009) <http://glossary.adoption.com/dna-testing.html> (accessed: 16/04/09)

118 Gina Houg Lee, above n 115.

119 Above n 5.

120 Gina Houg Lee, above n 115.

their partner is the father of their baby.¹²¹ Many of these opt to have a blood test which is provided free by the public hospitals in Fiji.¹²²

¹²¹ Above n 105.

¹²² *Ibid.*

3.3.3 SPOUSAL MAINTENANCE

Part VII of the FLA provides for spousal maintenance under section 155 states,

A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately, whether-

- (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;*
- (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or*
- (c) for any other adequate reason,*

having regard to any relevant matter referred to in section 157.

An important point to consider is that the FLA takes into account the financial ability of the party who is to pay maintenance and secondly, whether the party to receive maintenance is able (or unable) to support himself/herself. It is noted that the FLA does not make any reference to gender which is in stark contrast to previous law such as the *Matrimonial Causes Act [Cap 51]* section 42(3) which provides:

Where upon, or in consequence of, the making of a decree of judicial separation a husband is ordered to pay maintenance to his wife, and the maintenance is not duly paid, the husband is liable for necessaries supplied for the wife's use.¹²³

Section 157 of the FLA sets out the factors that the Court must take into account in determining spousal maintenance. Again these are similar to those that have been discussed in the above section pertaining to child maintenance. In carrying out the provisions of section 155 which provides the right to spousal maintenance, the Court may take only the following matters into account ‘the age and state of health of each of the parties, the income, property and financial resources and the physical and mental capacity of each of them for appropriate gainful employment, if either party is caring for

¹²³ Above n 20.

a child who is not yet 18 years, and the commitment of each of them to maintain them and any other person or child'.¹²⁴

Section 157 (f) sets out factors relating to any pension, benefit or allowance under Fiji laws or laws of another country and superannuation schemes operating in Fiji or in another country. This provision allows the jurisdiction of the Family Court of Fiji to extend wider than before. It ensures that the Court takes into account all the financial benefits that a person may receive which help the Court to come to a decision about how much should be paid to the other party. It also ensures that one party only receives what he or she really needs rather than unfairly burdening one party when the other party can very well take care of their own needs.

Courts also try to ensure that after parties have dissolved their marriage that living standards are not drastically changed and this relates to both children and former spouses. This is done through section 157 (h) of the FLA which allows the Court to take into account a standard of living that in all the circumstances is reasonable. The following is section 157 (i – m) which will be followed by a brief discussion to better clarify the provisions. Section 157 (i –m) states:

- (i) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earnings capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;*
- (j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;*
- (k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;*
- (l) if either party is cohabitating with another person - the financial circumstances relating to the cohabitation;*
- (m) the terms of any order made or proposed to be made under section 161 in relation to the property of the parties.*

The above sections will be discussed in the context of personal circumstances, future obligations to others and past circumstances of the marriage,

¹²⁴ Above, n 5, Section 157 (a-d).

Personal Circumstances

Section 157 of the FLA allows the Family Court to compare the current financial standing of the parties to proceedings within the Family Court. This is an important aspect of the FLA because Courts will not and should not allow judgments to be made in favour of one party when ultimately it will be detrimental to the other. Personal circumstances also refer to the age and health of the parties. Another interesting aspect of this section is that it specifically refers to ‘the payment of maintenance to one party which would increase the earning capacity of the party by enabling them to undertake a course of education or training or to establish a business or some other venture in order to obtain an adequate income’.¹²⁵ Although this may seem harsh at the initial stage it actually is quite an ingenious provision because it would actually allow the party receiving the maintenance payments to eventually become financially stable and rely less on the other party for payments. This transitional support provision enables an unemployed spouse, in a majority of cases these would involve women who stay at home to care for children, to gradually re-enter the work force. Therefore, parties eventually stop making payments and receiving payments because the party that was disadvantaged has become financially stable.

Future obligations to others

Fiji is a country where most families are extended in the sense that a person may live in one house with a mother-in-law and a father-in-law and maybe a cousin from the outer islands who is attending university. The person who is employed could provide for all members of the household by paying bus fares and fees for the university student, medical bills for the elderly in-laws and food for the whole family. Section 157 (c), (d)(ii), and (e) of the FLA takes account of the fact that a party will have substantial future obligations not only for children under 18 years but also for others as described in the scenario above. The Court will take future obligations into account when considering the amount to be awarded for spousal maintenance.

¹²⁵ Mere Pulea, ‘Brief Overview of Aspects of the Family Law Act’ *Legal Lali* (Fiji) December 2004, 32.

Past circumstances of the marriage

Section 157 (j) gives recognition to the contributions made by the applicant to the marriage and is the only provision that looks to past contributions which could include financial contributions made by one spouse to the earning capacity of the other perhaps through higher education, income, financial resources and property of the other party.¹²⁶ This section is limited by section 155 of the FLA which provides that a party is only liable to maintain the other if he or she is reasonably able to do so.

Urgent orders for maintenance have been made possible by section 158 which provides:

Where, in proceedings with respect to the maintenance of a party to a marriage, it appears to the Court that the party is in immediate need of financial assistance, but it is not practicable in the circumstances to determine immediately what order, if any, should be made, the Court may order the payment, pending the disposal of the proceedings, of such periodic sum or other sums as the Court considers reasonable.

Section 165 (1 & 2) makes specific provision for cessation of maintenance orders and it provides that maintenance orders cease to have effect once one of the parties, either receiving or making the payments, passes away; or in special circumstances, the Court orders the continuation of maintenance.

A maintenance order does not automatically cease to have effect upon re-marriage or upon the commencement of a de-facto relationship as under s. 165 (2) the Court has powers to consider the continuation of maintenance if “special circumstances” can be proved to exist. Research with the Family Court, Acting Senior Court Officer did not indicate whether relevant “special circumstances” have been determined by the Family Court in Fiji.¹²⁷

Section 26 of the FLA contains principles that are to be applied by the Courts when exercising their jurisdiction. The Court must have regard to the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of

¹²⁶ Ibid.

¹²⁷ Above n 105.

all others voluntarily entered into for life.¹²⁸ This provision reinforces the notion of a legal marriage as being the union of a man and a woman which is also contained in the Marriage Act [Cap 50] of Fiji under section 15.

In exercising its jurisdiction the Court must also have regard to the need to give the widest possible assistance to the family as the natural and fundamental group unit of society, particularly while the family is responsible for the care and education of dependent children.¹²⁹ This provision indirectly encourages reconciliation between the parties in an attempt to preserve the basic family unit. In addition to the two principles the Court must also consider the need to protect the rights of the children and to promote their welfare.¹³⁰ Children are the most vulnerable members of society and through the FLA they have been granted protection that ensures their best interests are considered.

The Court must also consider the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage.¹³¹ This provision again promotes reconciliation between the parties. An important principle for the Court to consider is the CRC (1989) and the CEDAW (1979).¹³² Becoming a party to these international treaties places an obligation on government to ensure that its laws, administrative decisions and policies conform to the norms and standards which are stated in these treaties. The FLA in essence provides for this.¹³³

Women and children have by far been the most marginalized members of society and the inclusion of section 26(e) is a truly revolutionary move for the country. The two Conventions were signed and ratified in 1993 and 1995 respectively.

These two conventions form the framework for the protection and promotion of the rights of children and women...Becoming a party to these international treaties places an obligation on

128 Above n 5, section 26 (a).

129 Ibid, (b).

130 Ibid, (c)

131 Ibid, (d).

132 Ibid, (e)

133 Apolosi Ranawai Bose, 'Guiding Principles for the Courts' (2004) http://www.rrrt.org/page.asp?active_page_id=146 (accessed: 12/12/08).

*government to ensure that its laws, administrative decisions and policies conform to the norms and standards which are stated in these treaties. The FLA in essence provides for this.*¹³⁴

*Balelala v State*¹³⁵ has demonstrated the ability of Fijian Courts to apply provisions in international conventions. This was done even though there is no specific legislation in place to domesticate the Convention. The importance of this provision in the FLA is that it allows the Family Court room to apply these international conventions directly rather than regarding them as just being persuasive in nature. The effect of section 26(e) on the decisions of the Courts is very significant. If Fiji wishes to remain a part of the international arena then we are to ensure that we also adhere to the international standards that have been set.

The United Nations Development Programme (UNDP) undertook a review of the legislative compliance of states who are party to CEDAW and the review assessed the legislative compliance with CEDAW of Fiji (and other member countries). The following are some of the results of that review:

- Under the FLA restraining orders are available for a range of circumstances but they are only available to married people.¹³⁶ Therefore, unmarried women are still discriminated against in the area of trying to get a restraining order in situations of domestic violence.
- The FLA provides a legislative guarantee for entry into marriage with full and free consent and also for the nullification of marriage if it took place under force, duress or undue influence.¹³⁷ A provision complying with this is section 32 (2) (d) (i).
- The FLA provides for a no-fault divorce¹³⁸ which is also a requirement under CEDAW.

¹³⁴ Ibid.

¹³⁵ [2004] FJCA 49.

¹³⁶ United Nations Development Programme, 'CEDAW Legislative Compliance Indicators' (2008) 174.

¹³⁷ Ibid, 189.

¹³⁸ Above n 5, section 30 (1).

- The FLA also provides for an equal division of property after divorce¹³⁹ as required by CEDAW but this excludes the division of native land which the Court can always compensate the parties affected.

The developments in the FLA are not only positive for family law but additionally they highlight the importance and emerging need for countries to comply with international conventions.

¹³⁹ Ibid, section 162.

3.3.4 PARENTAL MAINTENANCE

Section 159 of the FLA states,

(1) A person is liable to maintain his or her parent to the extent that the person is reasonably able to do so if and only the parent is unable to support herself or himself adequately whether-

(a) by reason of age or physical or mental incapacity for inappropriate gainful employment;

(b) for any other adequate reason having regard to any relevant matter referred to in section 157.

(2) Section 157 applies to parental maintenance so far as it is relevant.

(3) In proceedings with respect to the maintenance of a parent the Court may make any order it considers proper for the provision of parental maintenance in accordance with this Part.

(4) In this section "parent" includes the parent of an ex-nuptial child.

(5) The Attorney-General may, after consultation with the Family Law Council, prescribed by regulations the procedures for application for the purposes of implementing and giving effect to this section.¹⁴⁰

The consultation period of the FLA brought out both supporters and opponents of this provision of the FLA. ‘Supporters of parental maintenance say the responsibility of looking after parents should rest on the children, not on government. They argue that ensuring children look after their parents will ease the burden on the State and the taxpayer’.¹⁴¹ On the other hand, opponents say ‘support of parents should be a moral obligation rather than a legal one. They say that the issue of financially supporting a parent is complex, and the total costs uncertain’.¹⁴²

So how then did the drafters of the Bill think up such an innovative provision to be included in the FLA? Jalal admits that through her research and consultations she did find that although this practice of looking after parents is still present, there is a huge sector of women who are looking after other people’s children and no one is providing

¹⁴⁰ Above n 5.

¹⁴¹ Filipo Masarua, ‘Children and Parent Support’ (2004) http://www.rrrt.org/page.asp?active_page_id=169 (accessed: 12/12/08)

¹⁴² Ibid.

for them financially.¹⁴³ This provision was partly designed for this group of people as Jalal explained. Another important group of people that were kept in mind during the formulation of this provision was the women who were burdened with looking after their children's children.

Jalal explains that she had encountered many Fijian women (mainly older women) who complained that their children would go off to the city, get married and when they had children they would dump these children on their mothers to look after without much financial support.¹⁴⁴ Another interesting reason for the inclusion of parental maintenance was with regard to solo-mothers. According to Jalal this provision was also designed to protect them because many of these women complained that they had worked on their own to provide for their children and the children were off in the city not providing for them and thus ending up in old people's homes.¹⁴⁵

Again the Court in parental maintenance matters is given the discretion on deciding the amount and form of the maintenance to be paid. An important point to note with parental maintenance as with the other types of maintenance within the legislation, monetary assistance is not the only thing that is sought. If a person cannot give money because of unemployment but has other means of support like a vegetable garden or dalo plantation then this is what the Court will consider. Existing circumstances are important also. It is interesting to note that with regard to parental maintenance, section 159 (4) allows the parents of an ex-nuptial child to also apply for maintenance. Although the law does not allow the recognition of a de-facto relationship it allows parents (and children) from these relationships to be protected by providing them with the opportunity to apply for maintenance.

The inclusion of this provision in Fiji's Family Law Act is a milestone for family law in Fiji because not only are there significant changes from previous legislation it is a re-enforcement of cultural and customary obligations. According to Jalal, "*whether or not*

143 Interview with Imrana Jalal, Human Rights Advisor, Regional Rights Resource Team (RRRT), Fiji (Suva, 13 May, 2009)

144 Ibid.

145 Ibid.

the provision is used is irrelevant, the fact that it is there is an incentive".¹⁴⁶ What this means is this provision opens up possibilities for people to utilize the law and that is exactly what is happening with the maintenance provision of the FLA. I am able to provide statistics from the Family Court showing that many have applied for parental maintenance under the FLA. The following are statistics which have been amended to only indicate the number of applications made for parental maintenance.

Table 1: TOTAL FAMILY COURT RETURN – NATIONAL TOTAL JANUARY TO DECEMBER 2007¹⁴⁷

Applications	TOTAL NUMBER INITIATED			DISPOSED	PENDING
	FIJIAN	INDIAN	OTHERS		
Maintenance (Parental)	47	22	5	35	75

Table 2: TOTAL FAMILY COURT RETURN – NATIONAL TOTAL JANUARY TO DECEMBER 2008¹⁴⁸

Applications	TOTAL NUMBER INITIATED			DISPOSED	PENDING
	FIJIAN	INDIAN	OTHERS		
Maintenance (Parental)	4	9	0	11	146

The above statistics are evidence that people are accessing the law but it is unclear though as to whether there are more women or men who are making these applications. The statistics indicate that the provision on parental maintenance is being utilized which is important.

¹⁴⁶ Ibid.

¹⁴⁷ Source: Family Court of Fiji, Registry, Suva.

¹⁴⁸ Ibid.

3.3.5 ENFORCEMENT OF MAINTENANCE

The enforcement of maintenance payments is an important issue that is and has always been a problem in the area of family law in Fiji largely due to the fact that women are not always given priority and the effect of this is women's needs taking a backseat to other issues. An example described by Jalal is '*when a woman might go to a police station to ask the police to go to her former spouse and ask him to pay her overdue maintenance. The police will more often than not refuse this because this request is unimportant as compared to robbery or assault. They may also have one vehicle and don't want to waste time and fuel on minute problems relating especially to a woman*'.¹⁴⁹ The case study of Sala provided at the beginning of this Part is a clear illustration of the problems encountered by women with regard to maintenance.

Jalal identified an important provision in the FLA that can be used to address the issue of enforcing maintenance payments. Section 195 of the FLA provides:

The Rules of each Family Division may make provision for and in relation to the enforcement of orders made under this Act, including, in the case of a maintenance order under Part VII, provision for an officer of a Court exercising jurisdiction under this Act or an authority or person specified in the Rules -

- (a) in his or her discretion, to take proceedings on behalf of the person entitled to moneys payable under that order for the purpose of enforcing payment of those moneys;*
- (b) to enforce maintenance orders.*¹⁵⁰

It is important to have such a provision for maintenance officers in the Act because women who are usually the ones trying to enforce the Court orders would often choose not to proceed with the matter if the situation is such that it will take them away from their employment or make them use more money than necessary. This has been supported by Rika in previous discussion relating to women who choose their work and family wellbeing over trying to enforce Court orders.¹⁵¹ What had been initially intended

¹⁴⁹ Above n 143.

¹⁵⁰ Above n 5, section 195.

¹⁵¹ Above n 22.

by Jalal was to have this section say ‘*there shall be maintenance officers who will...*’ rather than leaving it up to the Family Division to decide whether or not to appoint these officers.¹⁵² This unfortunately she was told was not going to be accepted because it was trying to force the provision of a budget to cater for it.¹⁵³

If the resources were to be made available, Fiji would benefit from the creation of a body like the Child Support Agency in Australia which would function in the same way as section 195 of the FLA except in this case there is an actual body in place rather leaving the provision discretionary. But the enforcement of maintenance is a difficult area within the family law. Section 196 of the FLA allows the Magistrates Court to punish a person for contempt or disobedience of any order that has been made by the Court.¹⁵⁴ The Court may commit the person to prison; order them to pay a fine or both.¹⁵⁵ Apart from this section the FLA does not contain any other provisions relating to the enforcement of maintenance.

It is interesting to note that the repealed laws contained tools that could be utilized in the enforcement of Court orders. One example is section 27 of the *Maintenance and Affiliation Act* [Cap 52] which allowed a Magistrate to order a person to be arrested by a warrant for disobeying an order of the Court relating to the payment of money and even order the person be imprisoned until the money is paid.¹⁵⁶ The *Matrimonial Causes Act* [Cap 51] had allowed for enforcement by attachment or by sequestration an order made under this Act for payment of maintenance.¹⁵⁷ A third example is section 12 of the *Maintenance (Prevention of Desertion and Miscellaneous Provisions) Act* [Cap 53] which gave the Court the discretion to make orders attaching earnings of defaulters.¹⁵⁸ This order was made upon the application of a person entitled to receive payments under a maintenance order.¹⁵⁹

152 Above n 143.

153 Ibid.

154 Above n 5, section 196 (1).

155 Ibid, section 196 (3)

156 *Maintenance and Affiliation Act* [Cap 52] (Fiji) section 27 (repealed by Family Law Act 2003 (Fiji)).

157 Above n 20.

158 *Maintenance (Prevention of Desertion and Miscellaneous Provisions) Act* [Cap 53] (Fiji) Part III (Repealed by the Family Law Act 2003 (Fiji))

159 Ibid, section 12 (1).

With the introduction of the FLA, these provisions do not exist nor is there anything similar in the FLA. During her tenure as Family Court Judge, Mere Pulea had made recommendations to the Chief Justice for improvement of enforcement provisions regarding maintenance but this work was halted after the 2006 *coup*. Investigation into this has revealed that there has not been any movement toward the amending of enforcement provisions in the FLA.

What does exist though are the powers that Magistrates derive from other legislation such as the *Magistrates Court Act* [Cap 14] which provides powers under section 16 (1) (g) and (h) for a Magistrate to enforce by attachment any order made by the Court and to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or installment of any debt due from him, in pursuance of any order or judgment of the Court or any other competent Court.¹⁶⁰ The powers of a Magistrate to garnish wages is also not a specific provision in the FLA but they have been ordered under general powers provided by the *Magistrates Courts Act* [Cap 14] and this is being utilized as noted in the Case Study of Sala. Although these powers do not come under the FLA it is important that adjudicators in the Family Court are able to use their other powers to make up for the lack of powers within the FLA.

¹⁶⁰ *Magistrates Courts Act* [Cap 14] (Fiji).

3.4 PROPERTY SETTLEMENT

Divorce is a traumatic event, particularly if children are involved. Disputes over maintenance and how to divide property only add to this distress. The new Family Law Act seeks to ensure all parties to a divorce, whether they are the husband, wife or children, be treated in a fair and equitable way'.¹⁶¹

Apolosi Ranawai Bose¹⁶²

The innovative new provisions in the FLA it gives Courts the power to distribute property or even transfer property regardless of which of the parties owns the property. The FLA even takes into consideration contributions made by parties that are not regarded as financial contributions. The *Matrimonial Causes Act [Cap 51]* did not recognise homemaker responsibilities. When the House of Representatives endorsed the Family Law Bill in 2003, Virisila Buadromo of FWRM commented,

Apart from Fiji's 1997 Constitution, the Family Law Bill is the only proposed legislation which provides a level-playing field for women and men"...It provides for the recognition of women's non-financial contribution to a marriage whereby domestic housewives will be able to claim a share in the matrimonial property should divorce occur – a feature which is not available under the current law.¹⁶³

In considering any orders that are to be made with respect to property, section 162 of the FLA allows the Court to firstly take into account the financial contribution that has been made by the parties toward the acquisition, conservation or improvement of any of the property of the parties to the marriage.¹⁶⁴ These are either direct or indirect contributions. An example of a direct financial contribution is money that is earned through employment and put toward financing the property. An indirect financial

¹⁶¹ Apolosi Ranawai Bose, 'Dividing Family Property' (2004) http://www.rrrt.org/page.asp?active_page_id=165 (accessed: 12/12/08)

¹⁶² Ibid.

¹⁶³ United Nations Economic and Social Commission for Asia and the Pacific. November-December 2003. Population Headlines. <http://www.unescap.org/esid/psis/population/popheadline/297/art9.asp> (accessed: 16/04/09)

¹⁶⁴ Above n 5, section 162 (a).

contribution for example could be the gift of money that was received by one party and again used in the financing of the property.

The Court would also consider non-financial contributions made by either party either directly or indirectly toward any matrimonial property.¹⁶⁵ Direct non-financial contributions may take the form of one party renovating or repairing the matrimonial home during the marriage whereas indirect non-financial contributions may be that one party opted to remain at home and care for the children while the other partner furthered his/her career.

Thirdly, the Court considers the contribution that a party has made to the welfare of the family including any contribution made in the capacity of homemaker or parent.¹⁶⁶ Of relevance here is the contribution that either party has made to rearing of the household and most importantly the children of the marriage. There has often been difficulty in quantifying a contribution made by a homemaker because property really is concerned with physical assets. Australia has a Family Law Act that is much older than Fiji's own but after about twenty five years there is still difficulty in evaluating homemaker contributions.¹⁶⁷ A significant decision regarding the position of homemakers in property settlement was made in 2005 by a New South Wales Supreme Court of Appeal where Three Court of Appeal judges overturned a decision which saw the woman, Ms Linda Jones, awarded \$100,000 from the sale of the couple's property, worth \$610,000, and instead awarded her a half share after taking into account the non-financial contribution she had made by caring for the children and the home while her de facto partner worked.¹⁶⁸

Not only was this a step forward for homemakers it was also significant in that it considered the contributions made by parties who are in de facto relationships. But this area of law in Fiji is still very young and has not had a significant time since its

¹⁶⁵ Ibid, section 162 (b).

¹⁶⁶ Ibid, section 162 (c).

¹⁶⁷ Patrick Parkinson, 'Quantifying the Homemaker Contribution in Family Property Law' (2003) *Federal Law Review* 1, <http://austlii.org/au/journals/FedLRev/2003/1.html> (accessed: 6/06/09)

¹⁶⁸ Cynthia Banham, 'Family Law's Confusion After Homemakers Court Win' (2005) <http://www.vra.com.au/documents/Artical%205.pdf> (accessed: 6/06/09)

implementation for there to be a review undertaken and so it would be premature to make presumptions at this stage. It must be acknowledged though that this provision could not have come at a better time considering that Fiji's situation has many women (and some men) opting to be homemakers rather than earning an income through employment. It is also important to take note of the fact that this provision does not discriminate on the basis of gender.

The final factor for consideration by the Court is the eligibility of either of the party for a pension; allowance or benefit under Fiji's law or laws of another country and also any superannuation funds or scheme whether in Fiji or abroad.¹⁶⁹ This stretches the Court's jurisdiction and allows them to consider property that is not in Fiji. This is important in the sense that it allows for a fair consideration of all property because if a party does not own assets in Fiji but benefits from overseas funds then it is only fair that the Court takes this factor into account.

Section 166 of the FLA prohibits the Court from '*making an order alienating native land or equitable interest in it.*'¹⁷⁰ This is because native land is governed by the *Native Land Trust Act* [Cap 134] which prescribes rights and succession to family land and titles. Section 166 (2) allows the Court though to take into account the other property owned by the parties so to compensate the party who is not entitled to the native land. The section states:

*(2) If a Court is of the opinion that an interest in native land would have influenced or varied an order that the Court would have made had it not been for subsection (1), the Court may make such order affecting other property of the parties or either of them as will compensate a party for the effect of subsection (1).*¹⁷¹

According to Jalal, what this means is that for example if a woman is living in their home in her husband's village but has now been legally separated from her husband she

¹⁶⁹ Above n 5, section 162 (d).

¹⁷⁰ Above n 5, Section 166 (1).

¹⁷¹ Above n 5.

cannot take with her the house nor is she entitled to the land. What the Court will do is take into account any improvements that she may have made to the house and compensate her for that. For example, the Court may order that she is given the fridge, the television, the living room furniture and anything else that is movable and totaling up to the amount that she has put into the house.¹⁷² In my opinion this is justified because she has contributed to the family and it would be unfair for her to leave with nothing just because she is not the native title holder of the land on which her home stands.

There were many submissions regarding native land made during the consultation period of the FLA. They included the following:

*A woman who married and lives in the husbands communally owned land or village has no ownership rights to that land... there are traditional arrangements already in line in regards to marital property sharing. If a marriage should be dissolved, the sharing of property for those in the village, especially the land, should take into account the traditional and cultural practices of sharing property...customary laws should be carefully considered and due care taken to ensure that those laws do not adversely affect the children of the marriage... Another submitter questioned why native land should not be alienated by the Courts in matrimonial property settlement. The submitter believed that this should be left to the Court to determine, even if with some statutory limits.*¹⁷³

With reference to sub clause 2 outlined above the PJSC felt ultimately that when it came to native reserves and native villages the appropriate legislation to deal with it was the *Fijian Affairs Act*, rather than this legislation (the FLA).¹⁷⁴ The Committee recommended that this provision regarding native land remain and it is today part of the FLA. I am of the opinion that the underlying reason why native land could not be included in property settlement was the fact that Fijian native land is communally owned and not by an individual. But an important factor to consider is that regardless of native land not being part of property settlement, children of a marriage and most importantly

¹⁷² Above n 143.

¹⁷³ Above n 4.

¹⁷⁴ Above n 4.

ex nuptial children are always entitled to be “owners” of land owned by their mataqali as provided for by section 21 (1) of the *Native Lands Act* [Cap 133] which states:

*Notwithstanding anything contained in the Legitimacy Act all Fijians of illegitimate birth shall be deemed to be owners of native lands and may be recorded as may seem just and equitable as members of the proprietary units of either their father or mother.*¹⁷⁵

Native land therefore is an issue that has been left untouched by the FLA because of other governing legislation and also because of the sensitivity of this area not only for indigenous Fijians but Fijian society as a whole.

While it's beyond the scope of this paper to discuss this very fraught area of property settlement and gender divisions in the South Pacific, the FLA has gone into untouched territory in terms of giving value to the unpaid work that women do within the family. This is especially groundbreaking for a South Pacific Island nation, seeing as many nations are still entrenched in the notion of women being the lower gender.

¹⁷⁵ The situation in Fiji is that native land passes through the male line and it remains to be seen whether this will change to allow for women to also become heirs to native land.

3.5 THE BEST INTEREST OF THE CHILD

The provisions for the best interests of the child are found in Part VIII, Division 10 of the FLA. Section 121 of the FLA outlines the guidelines that judges and magistrates will use when dealing with matters affecting children. In determining the child's best interests, the Court must consider any views or wishes that the child may have.¹⁷⁶ The maturity of the child is as well as the child's ability to understand the whole processes are taken into consideration. The Court will also take into account the relationship that the child has with his/her parents and with anybody else having an interest in the child's care.¹⁷⁷ This will help the Court come to a decision as to who is the best person to care for the child. Parents are not the only parties who are considered as usually other people like grandparents or other relatives have to a certain point, had a hand in raising the child.

The Court must also consider the effect that any changes will have on the child.¹⁷⁸ This is important because children may have difficulty adjusting to changes in their circumstances as compared to adults. The people whom the child interacts with and the places that they are used to are important in determining their best interests. Even the separation from a friend or another child could be detrimental to the child's personal development and this is something that the Court must also consider.¹⁷⁹

*For example, let us look at the case of Mere and Jone – recently separated after seven years of marriage. The separation could have drastic effects on their six-year-old daughter Fulori who has just started school. If Mere has custody of Fulori and is forced by Jone to move out of their home, she will have to look for a place to stay. Mother and daughter may have to stay with relatives, and this could have a negative effect on Fulori's performance in school and her self-esteem.*¹⁸⁰

176 Above n 5, section 121 (2) (a).

177 Ibid, section 121 (2) (b).

178 Ibid, section 121 (2) (c).

179 Ibid, section 121 (2) (c) (ii).

180 Apolosi R Bose, 'Best Interests of the Child' (2004) http://www.rrrt.org/page.asp?active_page_id=158 (accessed: 12/12/08)

The Court in determining the best interests of a child must also consider the difficulties that a child may have in maintaining contact with one parent and also the capacity of each parent to provide for the needs of the child both emotional and intellectual.¹⁸¹ Every issue that may seem irrelevant is important when it comes to the psychological wellbeing and upbringing of a child. For example, there may be one parent with whom the child is more comfortable to share things with as compared to the other parent. Financial needs are not the only things that a Court considers. The child's maturity, sex and background are also issues for the Court's consideration.¹⁸² Cultural background may also be given consideration by the Court under this section.

*This is the first time that the cultural background of the child has been provided for in an Act for Family Law in Fiji. This is a very practical consideration because cultural traditions play a significant role in the lives of people in Fiji. The FLA acknowledges this fact of life. Cultural traditions are important considerations but are not the only factor – the Courts will consider these along with the other guidelines.*¹⁸³

Protection from harm is also something that the Court must take into account.¹⁸⁴ In this context the Court looks into the presence of any form of violence that the child has been or is likely to be exposed to that will influence the psychological wellbeing of the child. Another important provision addressing the interests of the child when it comes to protection from harm is section 124 of the FLA. It states;

(1) In considering what order to make, the Court must, to the extent that it is possible to do so consistently with the child's best interest being the paramount consideration ensure that the order-

(a) is consistent with any family violence order; and

*(b) does not expose a person to an unacceptable risk of family violence.*¹⁸⁵

181 Above n 5, section 121 (2) (d) and (e).

182 Ibid, section 121 (2) (f).

183 Apolosi R Bose, above n 180.

184 Above n 5, section 121 (2) (g).

185 Above n 5.

The attitude of each parent toward the child is an important consideration for the Court¹⁸⁶ Again the presence of violence is considered as well as any other circumstances that may be relevant. The above described provisions are useful in assisting the Court to come to a decision that will serve not only the parent's interests but also the interests of the child which are paramount.

A core influence in the FLA as discussed earlier is the CRC which Fiji became a party to in 1993. Article 3 of the convention states:

*In all actions concerning children, whether undertaken by private or public social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*¹⁸⁷

Through section 121 of the FLA, Fiji fulfills its international obligation to implement the provisions of Article 3 of the CRC. The CRC is '*an important instrument for the protection of children globally and for promoting their rights. Children have the right to be protected from harm and abuse. They have a right to live in a safe environment where their welfare is maintained to the best possible standard*'.¹⁸⁸

Separate child legal representation is an important feature of the FLA and addresses the best interest of the child. The Court may order separate representation for the child if considered necessary. Section 125 states;

(1) This section applies to proceedings under this Act in which a child's best interests are, or a child's welfare is, the paramount, or a relevant, consideration.

(2) If it appears to the Court that the child ought to be separately represented, the Court may order that the child is to be separately represented, and may also make such other orders as it considers necessary to secure separate representation including the party to bear the costs of the child's separate representation if the State does not provide for it.

¹⁸⁶ Above n 5, section 121 (2) (h).

¹⁸⁷ Convention on the Rights of the Child, 20 November 1989, 193.

¹⁸⁸ Apolosi R Bose, above n 180.

(3) A Court may make an order for separate representation on its own initiative or at the request of-

(a) the child;

(b) an organisation concerned with the welfare of children; or

(c) any other person.¹⁸⁹

According to Vaniqi of the Legal Aid Commission (LAC), it is important for a child to have separate representation if there is a lot of animosity between the parents.¹⁹⁰

Parents are usually biased towards their own set of circumstances, and the Court will not get a clear picture of what is best for the child from them, especially when it comes to what they think is best for their child. If the child has its own counsel, this always helps, especially when dealing with infants or young children who cannot speak for themselves. Legal Aid is usually called upon to act as the Child Representative.¹⁹¹

This provision ensures the protection of the child's interests. Section 100 of the FLA provides for women who are not married to the father of their children. The section states;

If the father of a child is not married to the child's mother the father must make a proper contribution towards-

(a) the maintenance of the mother for the childbirth maintenance period in relation to the birth of the child;

(b) the mother's reasonable medical expenses in relation to the pregnancy and birth;

(c) if the mother dies and the death is as a result of the pregnancy or birth - the reasonable expenses of the mother's funeral; and

(d) if the child is stillborn, or dies and the death is related to the birth - the reasonable expenses of the child's funeral.¹⁹²

¹⁸⁹ Above n 5.

¹⁹⁰ Interview with Samanunu Vaniqi, Senior Legal Officer, Legal Aid Commission of Fiji (Suva, 12 May 2009)

¹⁹¹ Ibid.

¹⁹² Above n 5.

This provision protects the interests of children born in a de-facto relationship. Again I must highlight that although the FLA (and other laws) does not give legal recognition to de-facto relationships, it does ensure that children that are the product of such relationships do not suffer and are well provided for.

3.6 FACILITATORS OF THE LAW

3.6.1 FAMILY COURT COUNSELLORS

It is important to note that counselling is not a new concept of family law in Fiji because the now repealed *Matrimonial Causes Act [Cap 51]* also provided for counselling under section 4 which contained very similar provisions to the FLA. The difference between the old law and the FLA is that under the old law, parties for counselling were referred to the Department of Social Welfare. Under the FLA, the Family Court Counselling Service is established within the Justice Department and available within the Family Court buildings.

Another difference is the qualifications that counsellors today are required to have.¹⁹³ The old assumption was that any case worker has background in counselling but with the services provided now by the Family Court a counsellor must have a minimum qualification requirement as listed below:

- *Degree in Social Work, Counselling or Psychology*
- *Accredited member of Fiji Association of Social Workers (FASW) or Oceania Psychology Register (OPR)*
- *Post Graduate Degree in Child and Family counselling or equivalent is an advantage.*¹⁹⁴

There are also additional skills that counsellors must possess and these include having a sound knowledge of counselling theories and experience in the filed of child abuse, risk management and family violence.¹⁹⁵ One of the additional services provided by the Counselling Service is the settlement of maintenance claims which was not intended as a role for Court counsellors. According to Rika, these types of cases are constantly being referred to the counsellors, which is an indication of the success achieved where opportunity is given to parties to settle matters on their own.

¹⁹³ Ibid.

¹⁹⁴ Aseri Rika, Family Court Counselling Service, 2008 Report (January – October) (2008).

¹⁹⁵ Ibid.

The Director of Counselling's position is provided for in section 23 (1) which states;

*The Family Division of the High Court and of the Magistrates' Court must each have a Director of Counselling and such other Court counsellors as are required.*¹⁹⁶

When clients first come to the Family Court, their first encounter is with registry staff. Parties usually come to the registry with some idea as to what they want to achieve. For example, some may want custody of children whereas others may want to apply for dissolution of marriage. These would be simple cases as Court forms are given to applicants to fill out and hand back to the staff. The applicants would then be advised on the next steps to be taken.

The above describes the ideal situation but sad to say that many of the cases which come before the Court are not so simple. There are those that arrive at the registry not really sure as to what they want. This is where the situation may get complicated. Although no interview had been conducted with Court staff on this particular issue, the impression gained from other interview sources that there is a need to improve this service.

*If a woman comes to say something, and even it means something else they get the woman or the man to fill out a form so at the end of it the process gets very confusing for the client. The intention of the forms (twenty six in all) are to say that when parties come, they fill the forms, its dealt with and goes through the Court system and dealt with clear cut. Its main purpose is to make it easy and people friendly but this has not been achieved.*¹⁹⁷

Rika maintains that the reason for this not being achieved is due to the system that they operate because there are civil servants who are not attuned to the application of the FLA which is intended to make Court processes easy for Court users. *'The administration of the Act is as if it is still being dealt with by a criminal Court where*

¹⁹⁶ Above n 5.

¹⁹⁷ Above 22.

*parties often feel that they are coming for help and instead are being grilled as if they are a person who has committed some wrongs’.*¹⁹⁸ When posed with the question as to whether the people involved in the Family Court are still following the same procedures as before Rika maintained that it was in fact the same attitude to administering a new system.

*It has become a real issue especially for us because we are in the counselling side of the Family Court where we try and make it easy for parties to try and settle matters, to assess a situation, to deal with issues that are causing stress to them and what we’ve found is that the system itself is causing a lot of stress to a lot of people.*¹⁹⁹

The following are statistics made available by the Court Counselling Services in Suva.

Table 3: JANUARY – DECEMBER 2008 STATISTICS FOR ANNUAL COURT COUNSELLING²⁰⁰

JURISDICTION	TOTAL
SUVA	289
NASINU	121
NAUSORI	90
NADI	176
LAUTOKA	203
RAKIRAKI	12
TAVUA	11
LABASA	20
SIGATOKA	108
TOTAL	1030

198 Ibid.

199 Ibid.

200 Source: Family Court Counselling Services.

The statistics indicate that although there is a lack of counsellors within the Court system, the counsellors are still ensuring that clients still receive the relevant counselling. Whilst the decrease in the number of counsellors at the beginning of the year (2008) initially raised some concerns, the counselling unit was still able to successfully make its services available.²⁰¹

²⁰¹ Above n 22.

3.6.2 THE LEGAL AID COMMISSION

Legal practitioners often have to take on matters of family law at some point in their legal careers but many family law matters are dealt with by the Legal Aid Commission (LAC). The PJSC had considered that under section 205 of the FLA each party must bear their own costs in proceedings. This would provide a problem when it came to parties who opted for litigation but could not pay costs. The PJSC then considered the LAC and they were informed that:

*That whilst there are provisions in the LAC Act for such funds to be made available for representation costs in criminal matters, there is no provision to bear the costs of representation in civil matters, such as matrimonial cases. A suggestion was made that more funds be allocated to Legal Aid so that it can also cater for this Bill. The Committee was also aware of the offer by the Fiji Law Society to implement a Duty Lawyer Scheme to facilitate representation of members of the public, who may not have legal representation in the family law Courts.*²⁰²

The Committee's recommendation at that stage was that the LACs services be extended to cover proceedings under the FLA. To my knowledge the Fiji Law Society had not at this point provided what they called a Duty Solicitor to deal with family law. This is even less likely to happen in the near future seeing the administration of the Fiji Law Society has been rearranged by the interim regime. The practicing certificates of all lawyers will cease to have effect on 30 June 2009 and anyone wishing to practice will have to make application to the Acting Chief Registrar of the High Court for a practice certificate.²⁰³ The LAC was established in 1998 in order to 'provide legal services to the impoverished and disadvantaged community of Fiji'.²⁰⁴ The following statistics were obtained from the LAC and it identifies the type and number of applications made to the LAC on matters pertaining to family law.

202 Above n 4.

203 Email from Lionel Angimea <aingimea@usp.ac.fj> to Unaisi Narawa-Daurewa narawadaurewa@gmail.com 25 June 2009.

204 Office of the Attorney General, 'Legal Aid' (2005-2008) <http://www.ag.gov.fj/default.aspx?page=legalAid> (accessed: 12/05/09)

Table 4: Statistics on Family Law Applications Received 2008 & 2009²⁰⁵

Type of Matter	2008	2009	TOTAL
Divorce	22	6	28
Adoption	51	17	68
Affiliation	1	0	1
Custody/Residence	48	29	77
Maintenance	124	21	145
Property	20	5	25
Residence/Contact	7	0	7
Unknown	6	3	9
TOTAL (Applications Received)	279	81	360

The table above provides statistics for the years 2008 to April, 2009 and it is clear from the above that the majority of family law cases dealt with by the LAC relates to maintenance. In second place are those cases relating to Custody/ Residence and Adoption. It is likely that the trends revealed by the above statistics will remain for the remainder of the year

All the applications that come to the LAC are assessed in the same way through a system known as the means and merits test which are provided for in the Legal Aid Act, 1996. Translated into layman's terms, applicants are assessed on how much they earn (usually less than \$10,000) and the chances of their case succeeding and if they have good grounds to make the application.²⁰⁶ Interestingly Vaniqi states that the majority of clients coming to the Legal Aid regarding family law matters are 80% women and 20% men with a large majority being referred to the LAC by the Family Court registry.²⁰⁷ I am of the opinion that this referral from the Family Court registry fosters good relationships with clients as legal representation will help in defining legal issues that the ordinary person would not understand.

The most common reasons for clients returning to the LAC is '*variation of orders like increase of maintenance or change custody/access arrangements*'²⁰⁸ and '*some are*

²⁰⁵ Source: Legal Aid Commission.

²⁰⁶ Above 190.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

*under the impression that if you handled one of their cases previously you will continue to be their solicitor*²⁰⁹. An interesting statement made by Vaniqi was with regard to intimidation that may be felt by clients within the Family Court system. Vaniqi states that, *'Any bully tactics are usually done outside the Court room before they enter for hearing... Any nonsense in Court will be dealt with by the Magistrate and may have an adverse effect on the parties case, so any intimidation would be done outside the Court'*²¹⁰.

One issue that has affected the functioning of the Court is the political situation in Fiji which has resulted in the decrease in Magistrates and Judges sitting in the Family Court. The Court would be more effective if it was to sit on more occasions rather than on only two days a week. According to Leweni this affects urgent applications which have to put on hold until there is a Judge or Magistrate presiding. Currently there is only one Magistrate sitting in the Family Court and after the departure of Joselyn Scutt, there is no Judge in the Family High Court.

The political situation has also affected the ability of parties to enforce Court orders such as maintenance orders. With the economy in a slump, it is of little use to order a party to pay \$50.00 a month when that person has been laid off from his employment.²¹¹ The LAC provides information pamphlets for clients that break down the Court process and these are translated in the three major languages in Fiji which are English, Fijian and Hindi. An advantage for the LAC clients is that they are exempt from paying the fees of the Family Court.²¹² Regardless of the crises in Fiji, LAC officers agree that the FLA has brought about changes that were impossible under the old legislation and only time will reveal the true effectiveness of the Act.²¹³

209 Interview with Taina Leweni, Legal Officer, Legal Aid Commission of Fiji (Suva, 12 May 2009)

210 Above n 190.

211 Ibid.

212 Ibid.

213 Ibid.

3.6.3 NON-GOVERNMENT ORGANISATIONS

There are other groups that help to facilitate the law and one such organisation is the Fiji Women's Crisis Centre (FWCC). The Centre had originally began as a rape crisis centre but eventually it grew and now '*provides crisis counselling and legal, medical and other practical support services for women and children who are sufferers and survivors of violence committed against them by men*'.²¹⁴ In dealing with family law, Edwina Kotoisuva of FWCC says that women do come to the Centre for counselling on violence or on an issue relating to the violence such as custody and maintenance. As these women have left the violent relationship and are seeking remedies from the Family Court, there is need for assistance to deal with such matters.²¹⁵

Since the Centre deals with issues relating to family law, the question was posed as to the efforts made to ensure that the staffs were knowledgeable and familiar with the FLA. According to Kotoisuva because the family law is a part of their daily work, they try to make sure that counsellors are up-to-date with the law and the options that are available to the women.²¹⁶ This work is very important and counsellors are often called upon to perform beyond their normal duties. For example, their knowledge of the Family Court forms extends to knowing what documents are to be attached so as to hasten the process. They also have outside contacts with Justices of the Peace (JPs) so to assist women who need documents certified.²¹⁷ This practical experience is vital in assisting women and is an added advantage to knowing the provisions of the law that applies in particular cases.

But how do women come to know of the FWCC and the work that they do? Kotoisuva acknowledges that the media is very much a part of educating women about the Centre and many of the clients at the Centre are women who often come of their own accord.²¹⁸ One of the biggest factors affecting women's access to the Family Court is firstly their

214 Fiji Women's Crisis Centre, '*Fiji Women's Crisis Centre, Headquarters*' (2009) <http://www.fijiwomen.com/index.php/about-us/36-about-us/56-fiji-womens-crisis-centre-suva-office> (accessed: 12/05/09)

215 Interview with Edwina Kotoisuva, Deputy Coordinator, Fiji Women's Crisis Centre (Suva, 6 May 2009)

216 Ibid.

217 Ibid.

218 Ibid.

financial situation which influences their ability to be present in Court for their case.²¹⁹ Secondly, is family pressure which is not uncommon in a communal society like Fiji and with the presence of cultural obligations requiring parties to reconcile rather than embarrass the family name by taking the matter to Court. For example, the Fijian method of *bulubulu* causes a woman to feel obliged to accept the apology and in the process drop her case in the Family Court. Another hindrance to accessing the law by women is the lack of information on the law itself.

The FWCC is assisting in this area by providing pamphlets and information booklets that assist women and the public about specific provisions in the FLA and also information on the Family Court. Providing information is essential in ensuring that the public is well informed of the law. A recommendation made by Kotoisuva that can help ensure the effectiveness of the FLA is more training for those who are involved in facilitating it. One identified group is the police force because in many cases, their lack of knowledge results in Court orders not being complied with, and one party suffers. Another recommendation is for the Family Court to allocate more days to hear cases in order to reduce the huge backlog of cases.²²⁰ Post – constitutional abrogation has resulted in the Court sitting only on Wednesdays and Fridays. Kotoisuva agrees that the FLA is a good piece of legislation that has also assisted them in providing better services for their clients. For example, in cases where restraining orders are needed the Family Court is now more accessible to their clients. The FLA now makes Court processes easier and the system more accessible.

219 Ibid.

220 Ibid.

3.7 NEW FEATURES OF THE FAMILY COURT

3.7.1 THE FAMILY COURT WEBSITE

The Family Court Website was set up in 2005 in order to make the functioning of the Family Court more efficient. It provides people with information about divorce, child issues and financial issues and the workings of the Court.²²¹ The other important thing about the Family Court site is that citizens are able to access the Court Forms and other information that are relevant to the Court proceedings. Other relevant information including maintenance and counselling are available on the website. For example, if I was living in Nasinu and I wanted to apply for custody of my children, I could access the relevant forms online, print them out, have them filled and then take them to the Family Court registry to have them filed.

The site also lists the various locations of the Family Courts in Fiji as well as the hearing time of cases. Parties are able to check online for the appropriate Court and times for their Court appearance which saves them time and money if they live some distance from the Court. There has not really been a substantial review of the website since its establishment and Court staffs are unaware as to its effectiveness or the number of people accessing the site.²²² The latest feedback has been through a client who came to the Court and informed them of his inability to access a particular form from the website resulting in his having to physically visit the Family Court to obtain the form.²²³

This lack of feedback on the effectiveness of the website seems to indicate the need for a review. The website is part of the Family Court's case management tool that enables parties who have computers or access to one, to download relevant information without the need to travel to the Courts. It is unknown whether more information on the website will be useful or whether the current information available on the website is not serving its proper purpose. In this regard, the Court might find a review necessary and if found

²²¹ Family Court of the Fiji Islands, Judicial Department (2005) <http://www.familycourt.gov.fj/> (accessed: 16/04/09)

²²² Above n 105.

²²³ Ibid.

not financially viable to maintain the site, the funds could be redirected to areas where it would be better utilized such as in the counselling department.

3.7.2 THE FORMS

The FLA and the Family Law Rules introduced the concept of using forms to commence or respond to Court proceedings. There are twenty six forms and each form addresses a different subject matter as set out below:

- **Form 1** – Application for Dissolution of Marriage (Divorce)
- **Form 2** - Application for Order of Nullity
- **Form 3** – Application for Declaration as to Validity
- **Form 4** – Response (Marital Status Proceedings)
- **Form 5** – Application for Maintenance or Contribution
- **Form 6** – Response to Application for Maintenance or Contribution
- **Form 7** – Application (Contempt)
- **Form 8** – Application for Consent Orders
- **Form 9** – Application for Final Orders
- **Form 10** – Response to Application for Final Orders
- **Form 11** – Reply
- **Form 12** – Application (Interim Orders)
- **Form 13** – Response (Use if opposing orders sought under Form 12 or seeking new orders)
- **Form 14** – Notice Seeking Counselling
- **Form 15** – Notice of Child Abuse or Risk of Child Abuse
- **Form 16** – Application (Parenting Plan)
- **Form 17** – Consent (Parenting Plan)
- **Form 18** – Recovery Order
- **Form 19** – Financial Statement
- **Form 20** – Notice of Address for Service
- **Form 21** – Acknowledgement of Service
- **Form 22** – Affidavit of Service
- **Form 23** – Affidavit (use where no particular form prescribed)
- **Form 24** – Cover Sheet
- **Form 25** – Notice of Discontinuance
- **Form 26** – Notice of Appeal

Section 2.11 of the Family Law Rules 2.11 provides that only a certain number of forms attract a fee and these are filing fees for Forms 1, 2, 3, 4, 9, 10 and 11 for forms filed in the Family Division of the High Court.²²⁴ According to this provision the fee that is to be paid is equal to one payable under the High Court Rules on filing of writs, petitions,

²²⁴ Above n 83 Rule 2.,11 (1) (a).

summons or motions for the commencement of any action. For forms filed in the Magistrates Court the fee payable is \$56.25 and in the High Court it is \$112.50.²²⁵ Hearing fees for defended matters are an additional cost charged on clients. These fees are equal to the fee payable under the High Court Rules on filing a summons to set down for trial by a judge.²²⁶

The Family Law Rules provides for remission and refund of fees under Rule 2.12 which gives the Registrar certain powers to remit the whole or part of a fee, to refund the whole or part of a fee, or authorize the postponement of the payment of the whole or part of a fee until such time and conditions that he/she thinks fit.²²⁷ This provision would cater for parties that have come to the Court for assistance but cannot afford to fulfill their obligations to pay the fees. This provision shows that the drafter of the Rules understood the local environment and the economic struggles that exist. Rika had identified women who could not afford to pay the fees and were also likely to lose their jobs because of their cases in the Family Court. These women are told by the employers that *'they should go home, sort it out and when it's over, come back and see if there is still a job for them'*.²²⁸ The women are given the opportunity to have their fees either refunded in part or whole which could then be redirected to cater for other needs. Prasad is unaware of exactly how many applications for waiver of fees have been received, but he confirms that the Deputy Registrars have granted some parties a waiver or remission.²²⁹

The ease with which these forms are obtained and filled out and filed in Court has significantly improved access to the justice system. Before the FLA 'family' cases were begun by two methods, the first relating to matrimonial cases. In a matrimonial case a spouse files for divorce and may seek other 'ancillary' relief namely custody of/access to children, property or financial claims. S/he is the petitioner, is claiming against the other spouse who is the Respondent, and if relevant a Co-Respondent (where adultery is

225 Ibid, Rule 2.11 (3).

226 Ibid, Rule 2.11 (b).

227 Ibid, Rule 2.12.

228 Above n 22.

229 Above n 105.

alleged).²³⁰ The other method is for maintenance or affiliations cases where the woman is usually the Petitioner seeking a Court order naming the Respondent or the alleged father of the child as the 'putative' father. She may also claim child maintenance.²³¹

This is an indication that family cases were dealt with in the same manner as any other case and they were heard by the same adjudicators that dealt with traffic, larceny and all other criminal and civil cases. These forms now provide a uniform method of dealing with the family law and a more efficient procedure. Although the process is made easier for a client of the Court, it seems that the workload of Court staff has actually increased because now a petitioner could file his petition and include issues on maintenance, access and dissolution of marriage.²³² To rely on information from one person though, would be a grave mistake and proves too unreliable. A balanced view can only be achieved through a review of the functioning of the Family Court.

²³⁰ University of the South Pacific (2003) 'Part 5 Procedural Reforms' *LA306 Family Law*,
http://www.vanuatu.usp.ac.fj/courses/LA306_Family_Law/other_materials/FLRC_7.html (accessed: 2/06/09)

²³¹ Ibid.

²³² Above n 105.

PART IV

This final part brings the thesis to a close by outlining the major conclusions that arise from the findings of this research. Whilst the FLA has incorporated many universally accepted principles and many innovative processes, the lack of resources is a serious obstacle to the full implementation of the FLA. Thus some recommendations have been made. The intention of the recommendations is to improve better access to justice for the people of Fiji and most importantly, women.

4.1 CONCLUSION

Much time and effort has been put into the drafting, lobbying, consulting, and passing of a Bill into law. As has been discussed in the introductory comments of this thesis, the *Family Law Act* took a journey of over ten years before it even reached the door steps of the legislature. Even then, certain forces caused further delay before the Bill became law on the 6th of November 2003. Nicole George in 2001 noted in *Women and Violence in Post Coup Fiji: The Challenge for Donors and NGO Recipients*;

*It would be a grave miscalculation to assume that once a legal framework is established, ratified and publicized all else will fall into place...While there is an expanding body of evidence that suggests that economic, social and political forces increase the likelihood that women will be the victims of violence, there is also plenty to suggest that economic, social and political forces diminish the likelihood that women in Fiji and other parts of the Pacific will have free and equal access to legal frameworks that have been designed to resolve this situation.*²³³

To be legally empowered is to change your expectations of your rights and use the avenues that have been provided in order to enforce your rights. Women today are more empowered than they were ten or twenty years ago. Many of the most vocal people in

233 Nicole George, 'Women and Violence in Post Coup Fiji: The Challenge for Donors and NGO Recipients' (Submission to Senate Inquiry: Australia's Relations with Papua New Guinea and the Islands States of the South West Pacific, 2001) <http://www.peacewomen.org/resources/Fiji/violence.pdf> (accessed: 12/04/09)

the world are women and Fiji is no exception with women like Imrana Jalal, Shameema Ali and Virisila Buadromo making progress for other women in our small island nation. These women were also very instrumental in the lobbying and passing of the Family Law Act of Fiji and without their perseverance in this area, other Fijian women would not have the rights that are accorded to them by the FLA.

The fact is that although many women are becoming legally empowered, there are others who struggle with cultural, economic and political limitations. This paper concerns women's access to justice and the impact that FLA has had on women and children. But is one's access to justice defined by political and economic situation and cultural obligations? This thesis has discussed the new and innovative features of the FLA but importance must also be placed on the limitations that have arisen from the political situation, the economic crisis and the cultural obligations for women in Fiji.

George in her article alludes to the connection between the *coups* of Fiji and the recurring violence against women, the latter often aggravated by the former. The economy has in turn been affected and *'has meant a significant proportion of the country's population are now consumed with the day to day task of simply making ends meet. This has put extraordinary pressures upon the nation's families as they cope with the prospect of job losses and decreasing weekly incomes'*.²³⁴

The link between violence and the political upheavals also has implications for women and their access to justice. We must bear in mind that the FLA was enacted at a time when Fiji was recovering from its third *coup* and the crisis remains to this day. The recent devaluation of the Fiji dollar²³⁵ has caused families to struggle as the cost of living in Fiji has risen considerably. Could these factors be influential in determining a woman's access to justice? Could they determine the ability of separated parties to pay maintenance for the former spouse and children? The answers to these questions would need further research and probably require a whole thesis paper to answer but they are

²³⁴ Ibid.

²³⁵ TVNZ, 'Fiji Dollar Devalued 20% by Interim Government' (2009) <http://tvnz.co.nz/business-news/fiji-dollar-devalued-20-interim-govt-2646868> (accessed: 23/05/09)

questions that need to be asked because they could be the determining factors in how the FLA has functioned.

George found many single women who had children to look after because their *'jobless husbands have walked out on them in shame because they can no longer support their families...In concrete terms this scenario translates into a situation where women make hard choices alone on a daily basis as they attempt to juggle the costs involved with meeting the nutritional, clothing, educational and health needs of their children'*.²³⁶ When discussing women's rights, children's rights or human rights in general it is important to take them in the context of the environment or society that they will be functioning in. *'Talking about issues such as women's rights may seem a little "pie in the sky" for many of Fiji's women in the current context of the cold hard fact of increasing poverty is not also factored into the equation'*.²³⁷ In an attempt to highlight the importance of education and actually providing the services that would be useful for women, she stated;

*Holding a workshop in the settlement of Suva's urban periphery designed to increase women's legal literacy and make them aware of maintenance provisions in the law, or their right to protection from marital assault might seem like a good idea...But what happens if the economic situation of the women who attend means they are unwilling to risk even the bus fare into town to find a solicitor who might represent them, let alone the other costs involved?*²³⁸

Furthermore, *'what is needed first is not legal literacy training but liaison services which put women in touch with social welfare programmes and show them how they can be used to protect their rights and their children's right to a decent standard of living'*.²³⁹ The implementation of a new law does not necessarily mean that all problems are now solved. What it does mean is that the structures in place have to be modified in

²³⁶ Nicole George, above n 233.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

order to accommodate the new structures. George remained doubtful whether ‘*the state would have the capacity to establish and adequately fund the types of broad-reaching institutional frameworks that the new family law bill (currently under debate in Parliament) would require, in order to be effective.*’²⁴⁰

It is important to acknowledge that although freedoms are important for many women, there are women who find that the more pressing issue for them is their economic security. The women in my own village of *Navulivatu*²⁴¹ have little or no idea what the FLA is or even where the Family Court is located. Assistance to them came in the form of two water tanks and these were welcomed with great enthusiasm. But this is only one village out of the many in Fiji and one cannot take this statement to apply to every woman and village in Fiji.

It might also be of importance at this juncture to consider whether cultural obligations are such that they restrict or place a burden on women preventing them from accessing the law. Cultures and traditions have always been part of the way of life for Fiji Islanders.

*It is something sacred that we identify ourselves with and it defines us. In a traditional setting, these are the same values that dictate the ownership of customary land, the division of labour in the family or community and more importantly governs our behaviour and our shared way of life. The roles of women and men are thus defined by these traditional structures that we embrace which in some or most cases are complementary in nature although they may not necessarily uphold the principle of equal sharing of responsibilities that is seen as ideal in its strictest interpretation.*²⁴²

Culture in the concept of Fiji refers not only to Indigenous Fijian culture but of every ethnicity present in Fiji because though some scenarios may differ there is always present some element of cultural influence. Although the positives of cultural influences

240 Ibid.

241 A village in the province of Serua on the Western coast of Viti Levu which is the largest island in the Fiji Group of Islands.

242 Statement by the Director for Women of the Government of the Republic of Fiji, Dr. Tokasa Leweni at the 53rd Session of the Commission on the Status of Women (2009) http://www.fiji.gov.fj/publish/page_14429.shtml (accessed 14/05/09)

have often been discussed, there are some situations where they place a burden on people and most importantly, women. A brief example of this is the indigenous custom of '*bulubulu*' which is a method of traditional reconciliation. This is often used in cases where the wrongdoer needs to seek the forgiveness of the victim. The result of this in most cases is that the issue does not go into the formal Court system because families choose to forgive and forget. Women are especially vulnerable to this because they often are not given the choice of whether they want to forgive the wrongdoer.

But regardless of setbacks, the FLA has altered the face of family law in Fiji. Women have been saved from the undignified rules of the past that required them to provide evidence that their husband had cheated on them or beaten them. They no longer have to provide corroboration in cases which is a breakthrough not only for family law but other areas where women's evidence had never been taken on face value. Both men and women now emerge more satisfied with the system as compared to before because the Courts take into account existing circumstances when considering issues of maintenance, property settlement and child residence and contact.

Children also are now better protected because the Court no longer views them as property and they are provided for regardless of whether they are nuptial or ex nuptial children. The Family Court of Fiji, as a high volume specialist Court provides a more comprehensive and integrated range of services than in the past and makes an important contribution to the administration of family law in the Fiji Islands. The FLA also recognises that there are other types of families existing in Fiji rather than the usual nuclear family. What this law has done is identify that families may consist of children and grandparents, father and children, mother and children and even guardians who are no relation to the children that they care for. The Family Court of Fiji is accessible to the community, sensitive to the community's needs, operates according to simple, appropriate and effective procedures, offers counselling and mediation support services and most importantly it provides services in a user friendly environment.

4.2 RECOMMENDATIONS

4.2.1 The Family Court

The training of Family Court staff must remain a priority. The role of the Family Court in establishing an effective and streamlined approach to family law cannot be overemphasized. In order for the Court to function at its best, specialized training must be provided for all relevant stakeholders – judges, magistrates, state lawyers, police officers, welfare officers, counsellors – and other officials who are involved in the area of family law in Fiji.

There is no doubt that the shortage of funds remains a perennial problem for government ministries, including the Family Court. A viable way to surmount this challenge is to network and establish collaborative strategies with foreign governments and possibly non-government organizations that are active in the promotion of women’s and children’s rights worldwide. This would allow foreign aid donors and international development agencies to be brought on board for training and resource support.

4.2.2 Court Counsellors

A critical issue for the Court counselling services is the lack of trained and qualified court counsellors. It is possible to have qualified volunteer counsellors provide additional counselling services for the Family Court. As the issue of fiscal constraints remains a pressing issue, the use of volunteers could somehow ease the burden currently facing the Family Court. These counsellors can be sought from overseas jurisdictions and the position can be offered as an internship counselling program for those seeking experience after having gained a qualification in the area of counselling.

Having more counsellors might also allow for the Family Court to dispose of cases at a more efficient rate because there would be more counsellors on hand to work in Family Courts outside of Suva.

4.2.3 Volunteer Lawyers

The Fiji Women's Crisis Centre has been considering the establishment of a clinic which will run every weekend and be facilitated by young community minded lawyers in Suva. It is possible for an understanding to be reached between the Family Court and these young lawyers to also volunteer their services at the Court. Volunteers will gain satisfaction from helping people solve their problems and from the knowledge that their contributions aid the development of a fair and accessible legal system.

Low income earning clients also have the benefit of legal representation and advice that they would not otherwise have. If successful, these clinics can then be set up in other parts of Fiji where access to the Courts is difficult due to geographical location. However, rather than depending on these other alternatives, the Fijian government should also be focusing its attention on prioritizing budgetary needs and resource distribution especially in the area of Legal Aid.

4.2.4 Family Court Website

Websites need constant review to ensure that they are up to date and error free. When a link on a website does not work and the information available is not the latest then this causes the site to lose its credibility and the image of the organisation may suffer. One flaw of the Family Court Website is the inability of links to work properly. The website needs to be reviewed and a public consultation undertaken in order to gauge whether the site is serving the intended purpose.

The world is moving toward a more technological era in which the Family Court website will be a valuable tool especially for those who do not have access to the Family Court because of geographical location. Therefore, more resources need to be directed towards improving and maintaining it.

4.2.5 Maintenance, fees and forms

Limitations have been found in the FLA relating to enforcement of maintenance orders, the lack of appointment of enforcement officers, the high fees paid for certain actions and the complexity of some forms act as barriers to women seeking access to the Courts. Access to justice is also hindered by population mobility not only for local circumstances but also internationally. With population mobility, women trying to enforce maintenance orders are further disadvantaged by the limited number of countries in reciprocating jurisdictions and the limited number of countries who are parties to the Convention on Recovery of Maintenance Abroad. Some of these matters are for the Family Law Council to determine and make recommendations to improve better access to justice.

It is highly recommended that all the areas that have been highlighted be reviewed as soon as practicable and financially possible. Only through review can flaws be found, addressed and the true effectiveness of the FLA be ascertained.

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