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ONE REGION, TWO REGIMES: AN ANALYSIS OF CROSS-NATIONAL CONTRASTS AMONGST LEGAL APPROACHES TO DISSOLUTION OF MARRIAGE IN THE SOUTH PACIFIC

by

Aniketh Adarsh Rao

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

School of Law and Social Sciences
Faculty of Arts, Law and Education
The University of the South Pacific

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Student ID No. S11111996

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Signature..... Date 25/1/21

Name Anuleshini Neelta

Designation Lecturer

ABSTRACT

The two distinct categories of legal dissolution of marriage in the South Pacific countries namely are the fault theory and the no-fault principle of dissolution of marriage. In the South Pacific context, reference to eight sovereign Pacific Island states such as Fiji, Samoa, Nauru, Tuvalu, Tonga, Vanuatu, Solomon Islands and Kiribati, produces legal illustrations of an assortment of statutory approaches to the dissolution of marriage with similarities and contrasts. This is either a mechanism that follows the fault philosophy or a no-fault approach. Elements of international human rights, feminism as an extension of human rights, Pacific regionalism as encompassing human rights system for the region and the Pacific socio-cultural context serves the purpose of a contemporary South Pacific legal perspective for assaying the two different mechanisms. The examination demonstrates the relevance of each perspective to dissolution of marriage laws through implications that relate to inequities between women and men involved, and culturally related contextual influences in the marriage, its breakdown and dissolution in the fault against the no-fault legal mechanisms of dissolution of marriage. Thus, concluding the rationale of the contrarily existing legal mechanisms of dissolution of marriage in the South Pacific countries. Consequently, the four perspectives give some criteria to positions for reform as suggestive of recommendations for a legal position of dissolution of marriage in the South Pacific with regional and contextual relevance, and conformity to human rights standards that principally suggest the no-fault principle.

ABBREVIATIONS

In this paper:

1. CEDAW means: Convention on the Elimination of All Forms of Discrimination Against Women.
2. ICCPR means: International Covenant on Civil and Political Rights.

DEFINITIONS

In this paper:

1. Dissolution of marriage also means: divorce.

2. Pacific Society stands for: Pacific island countries of Fiji, Samoa, Tonga, Vanuatu, Kiribati, Solomon Islands, Nauru and Tuvalu.

3. South Pacific stands for: Pacific island countries of Fiji, Samoa, Tonga, Vanuatu, Kiribati, Solomon Islands, Nauru and Tuvalu.

TABLE OF CONTENTS

Chapter 4

Chapter 1

This chapter is in three Parts as A, B, and C.
Part A is the Introduction, including context; statement of research problem; research aim and objectives; and limitations of the research.
Part B is the Literature Review.
Part C is the Research Method.

A. INTRODUCTION

The statement of introduction is in four parts and comprises of the context of the paper; description of the research problem; the aim and objectives of the research; and the limitations of the research.

I. Context

Generally, two distinct categories of legal methods for divorce in existence across the globe are the fault and no-fault principles. In a fault system of divorce, one party to the marriage is required to prove the fault of another in order to obtain a divorce.[1] In contrast, under the no-fault system, there is no requirement of attribution of the fault of another or blame but rather citation of irretrievable breakdown of the marriage as where it is stipulated by statute.[2] In the legal context of the South Pacific region, the term *dissolution of marriage* is often, mainly and commonly, interchangeably used with divorce. The legal approaches to the dissolution of a marriage in the South Pacific countries are a demonstration of a diverse intra-regional perspective to divorce. In addition, the transition of dissolution of marriage regimes of some Pacific Island countries from the fault system to the no-fault system does exemplify a democratic step of universalism. Under the statutory frameworks of South Pacific countries, two opposing mechanisms within which, grounds for dissolution of marriage in the region

[1] Legal Information Institute – Cornell University, 'Fault Divorce' (2020) https://www.law.cornell.edu/wex/fault_divorce (Accessed 12 April 2020).
[2] The Law Society UK, 'No-fault divorce' (2019) https://www.lawsociety.org.uk/policy-campaigns/articles/no-fault-divorce/ (Accessed 12 April 2020).

are categorised are: fault-based and no-fault based.[3] In most Pacific Island states, adultery is commonly a fault basis for the petition of the dissolution of marriage. The countries that at present statutorily recognise adultery as a ground for divorce are Tonga[4], Vanuatu[5], Solomon Islands[6] and Kiribati[7].

Conversely, Fiji[8] is the first Pacific Island country that adopted the no-fault ground – or in other words – *irretrievable breakdown of marriage* as a single position of such dissolution of marriage law with no statutorily prescribed faults pertaining to the said irretrievable breakdown. This was followed by Samoa from the region. In addition to either, there are countries in the region that have adopted the sole ground of complete marital breakdown for the petition of a dissolution of marriage subject to evincing statutorily specified faults leading to the complete breakdown as being conclusive. For example, in countries like Nauru[9] and Tuvalu[10] in the region. The Pacific Island states have one absolute ground and those regimes with fault grounds that either vary or match amongst the nations respecting their statutory framework for dissolution of marriage. At present in the South Pacific region, fault grounds are given absolutely to restrictive legitimacy in different nations. In contrast, the no-fault ground of an irretrievable breakdown of a marriage is represented by Fiji and Samoa, that is, without having the onus of proving the fault for the said breakdown.[11]

A diverse construction can be put upon the legal approaches to the dissolution of marriage. The diversity comes to being through frames of reference that embody perspectives of values of equality that affect each party as an individual entity to a marriage, human beings of dignity and respect before the law, and those making a Pacific community exhibit the said values. It begins with finding the relevance of each perspective to key features of the dissolution of marriage and its concerning parties. The perspectives that entail the implementation of international human rights

[3] Jennifer Corrin Care and Donald Edgar Patterson, *Introduction to South Pacific Law* (2nd ed, 2007).
[4] *Divorce Act* [Cap 29] (Tonga).
[5] *Matrimonial Causes Act* [Cap 192] (Vanuatu).
[6] *Matrimonial Causes Act 1950* (UK).
[7] *Matrimonial Causes Act 1950* (UK).
[8] *Family Law Act 2003* (Fiji).
[9] *Matrimonial Causes Act 1973* (Nauru).
[10] *Matrimonial Proceedings Act* [Cap 21] (Tuvalu).
[11] *Family Law Act 2003* (Fiji).

standards and non-discriminatory principles in domestic laws, with efforts of cultural considerations for a democratically evolving Pacific community. Such as the perspective of rights-based approach[12]; feminism[13]; and regionalism and human rights[14] along with a distinct contextual perspective considering Pacific values and cultural beliefs in respecting family structures[15].

II. Statement of Research Problem

The post-independence and contemporary Pacific island society, which exists with a vast distinct cultural diversity, diverse polities and with constant efforts of conformity to human rights standards, currently appears to have inconsistency in its varied approaches to dealing with a delicate issue[16] such as a marital breakdown. Within the context of this paper, the Pacific island society will comprise Fiji, Samoa, Nauru, Tuvalu, Tonga, Vanuatu, the Solomon Islands and Kiribati. The legal framework for governance and political structures in the said Pacific island society exhibits aspects of self-governance. The full to partial democratic governance in the Pacific region nations is a meld of the English system and local values.[17] The political framework in some nations exists either with absolute (Western) or without absolute elements of democracy.[18] For example, the framework for political and governing structures of Tonga and Vanuatu is still debatable to be of a complete democracy.[19] In light of, the approaches to the dissolution of marriage laws also differ within the Pacific region as indicating inconsistency. These are: absolutely no-fault approach where the irretrievable breakdown of a marriage is recognised as the sole ground; approach of a complete breakdown of the marriage conditional on the determination of faults

[12] UNICEF, 'Human Rights-based Approach to Programming' (2016) https://www.unicef.org/policyanalysis/rights/index_62012.html (Accessed 13 February 2020).
[13] Britannica, 'Feminism' (2020) https://www.britannica.com/topic/feminism (Accessed 15 March 2020).
[14] Josephina Syssna, 'Conceptualizations of Culture and Identity in Regional Policy' (2009) 19 *Regional & Federal Studies* 3 https://doi.org/10.1080/13597560902957518 *(Accessed 10 February 2020).*
[15] Pasefika Proud. 'Culture and Values informing strong Pacific families by Dr Konai Helu Thaman' (2019) https://www.pasefikaproud.co.nz/stories/culture-and-values-informing-strong-pacific-families/ (Accessed 15 April 2020).
[16] Adrian James, *Couples, Conflict and Change: Social Work with Marital Relationships* (2002).
[17] Te'o Fairbairn, *The Pacific Islands: Politics, Economics, and International Relations* (1991).
[18] Te'o Fairbairn, *The Pacific Islands: Politics, Economics, and International Relations* (1991).
[19] Pacific Regional Rights Resource Team, *Supplement to Law for Pacific Women: A Legal Rights Handbook* (2013).

recognised under relevant statutes; and the fault approach to divorce where statutorily prescribed faults are given legitimacy with petitions. The presence of inconsistency in the Pacific island region's legal position to divorce can be sourced from the multiple mechanisms for dissolution of marriage in existence in each country.

III. Research Aim and Objectives

Considering the significance of the family culture within the Pacific communities[20], be it a for celebration or any type of socio-cultural gathering, a marital breakdown or dissolved marriage of a couple is as delicate as it affects the family unit wholly and so the community setting. The delicate concern of a fair mechanism to deal with the dissolution of marriage goes beyond regional cultural relevance. It should also relate to a democratised regime that will not merely alleviate discriminatory attributes from some of the present mechanisms, but also warrant protective avenues for the rights of women, men and women as individual entities, and promotion of a cooperative method of marital dissolution.

It, therefore, becomes, and also conceives the main aim of this research project to analyse the existing legal mechanisms of dissolution of marriage in the South Pacific countries that can be grouped in two main and distinct systems as the fault oriented and no-fault. Accordingly, the objectives of the research were as follows:

- To give a detailed account of the statutory approaches to the dissolution of marriage with grounds of the same in the South Pacific states of Fiji, Samoa, Nauru, Tuvalu, Tonga, Vanuatu, Solomon Islands, and Kiribati.
- To draw inferences of similarities and differences between the countries' dissolution of marriage mechanisms and categorise those into two main contrasting systems of fault philosophy and no-fault principle.

[20] Sue Farran, 'Goodhew v Goodhew [2007] SBHC 140: Towards a South Pacific Jurisprudence' (2008) 12 *Journal of the South Pacific Law* 1 http://www.paclii.org/journals/fJSPL/vol12no1/pdf/farran.pdf (Accessed 12 March 2020).

- To analyse the relevance of four perspectives including principles of human rights, feminism, human rights in a regional framework, and the Pacific socio-cultural context, to each type of dissolution in the South Pacific region.
- To infer the significance of the fault divorce incorporating common faults of adultery and cruelty and no-fault divorce in the implementation of human rights standards and non-discriminatory principles in domestic laws such as the dissolution of marriage laws for both men and women.
- To infer the contribution of the two contrasting approaches of dissolution of marriage to the implementation of a Pacific regional human rights mechanism.
- To conclude, and recommend accordingly, in light of the criteria encompassing the four relevant perspectives, whether a single position of law out of the two categorised, is more needful in order to allow democratisation from the 'blame game'[21]. That is, in the contemporary Pacific Island society as to further recognise Pacific peace and harmony when dealing with issues concerning the family as a social unit of cultural relevance whilst also embracing principles of human rights and freedoms.

IV. Limitations of the Research

The Pacific Island countries are constantly making efforts for their national laws to comply with international human rights standards in order to fulfil their State party obligations under international human rights treaties.[22] These efforts also often exist in conjunction with the protection of cultural and societal concerns.[23] Therefore, the factors that this research had based its analysis upon were mainly international human rights standards, feminism as a driver of non-discriminatory human rights standards, the regional mechanism for human rights, and a Pacific socio-cultural context.

[21] The Conversation, 'Unhappily Married: it's time to end the blame game and allow no fault divorce' (2018) https://theconversation.com/unhappily-married-its-time-to-end-the-blame-game-and-allow-no-fault-divorce-100561 (Accessed 20 February 2020).
[22] Pacific Community Regional Rights Resource Team, 'Human Rights in the Pacific: A Situational Analysis' (2016) https://www.spc.int/sites/default/files/resources/2018-05/Human-right-Pacific.pdf (Accessed 8 June 2020).
[23] Laitia Tamata, 'Application of Human Rights Standards in the Pacific Island Courts' (2000) 4 *Journal of South Pacific Law* https://www.usp.ac.fj/index.php?id=13205 (Accessed 7 June 2020).

Particularly, the study considered human rights principles that relate to marriage and its dissolution, and non-discrimination and equality before the law for women and men. In addition, the analysis of the two dissolution of marriage mechanisms was carried out with relevant international instruments, domestic divorce statutes, and cases in the South Pacific countries of Fiji, Samoa, Nauru, Tuvalu, Tonga, Vanuatu, Solomon Islands and Kiribati. For this, the paper only considered those family law cases that were relevant and for public access. Lastly, the objectives of the paper do not imply demonization of any social and cultural considerations, nor principles of rights and freedoms, in relation to any changes in the law or suggestive reforms. Rather demonstrate a balanced significance of the relevant notions in both perspectives to democratise the dissolution of marriage laws.

B. LITERATURE REVIEW

There are various literary texts in the family law research areas that exist as studies on marriage and its dissolution laws contextualised at the national, regional, or global level. The literature holds wide perspectives of research based on cross-national studies and commentaries on the distinguished grounds of divorce and their implications. In the South Pacific literary field, there are few yet historically comprehensive narratives of marriage and divorce laws enlightening on certain legal elements of each area and its dispute resolution in both, from either a historical or customary point of view, or both.[24] However, there has not been any study primarily done in the contemporary Pacific regional context on laws relating to the existing distinct state legal grounds for dissolution of marriage in the South Pacific and so contextually analyse either their promotion as they are or further reform. Hence, this review did not delve into marriage laws or its nullity, but its dissolution in principle.

This review of the literature was focused on concepts deduced from studies based on the legal methods of dissolution of marriage and its principles in the South Pacific and international settings. The four main concepts were: a historical account of divorce in

[24] Jennifer Corrin and Clare L. Cappa, 'Resolution of Family Disputes in Fiji and Samoa' in Bill Atkin (ed), *The International Survey of Family Law* (2015) 75-94.

the South Pacific region[25]; adultery as a principle in the South Pacific customary and legal contexts[26]; a no-fault system that created an evolutionary trend in divorce regimes from the traditionally legal identity of men and women to the contemporary non-discriminatory position[27]; and significance of gender neutrality in, and feminist perspective of the no-fault system[28]. Even though the themes from the literature have been produced with diversely perceived contexts and frames of reference of divorce laws and grounds, the main focus of this research paper was in an analytical sense for the distinct mechanisms of dissolution of marriage in the South Pacific region.

Beginning with the article of Hicks[29], it aimed to comment on divorce laws in the South Pacific with a detailed description of all the divorce statutes that existed in the region in the twentieth century. That is also after the twelve South Pacific nations gained independence. These were mainly those that were modelled from the matrimonial and divorce laws from the United Kingdom since independence. It is one of the earliest commentaries in the literature on the dissolution of marriage laws in the South Pacific region, that is when all the South Pacific states enforced the dissolution of marriage grounds within the fault spectrum. Using relevant statutes and legal cases to compose a descriptive commentary the author defined the South Pacific perspective to divorce that was solely based on fault principles. The concluding thought contributed to the understanding of my paper that divorce laws in the region needs to be analysed with socially relevant perspectives with consideration of fundamental customary principles for reform. It also confirms that legislation that was adopted from the United Kingdom for divorce in the region was reflective of an era and culture that mostly did not question the roles of men and women. Although historically in its

[25] Nena Hicks, 'Divorce in Paradise - A South Pacific Perspective' (1997) 379 *International Survey of Family Law* https://heinonline.org/HOL/LandingPage?handle=hein.journals/intsfal4&div=29&id=&page= (Accessed 13 June 2020).
[26] Jennifer Corrin, 'It Takes Two To Tango, but Three To Commit Adultery: A Survey of the Law on Adultery in Post-Colonial South Pacific States' (2012) 26 *International Journal of Law, Policy and the Family* 2 http://lawfam.oxfordjournals.org/content/26/2/187.short (Accessed 12 June 2020).
[27] Sanford N. Katz, 'Historical Perspective and Current Trends in the Legal Process of Divorce' (1994) 4 *The Future of Children* 1, 44-62 doi:10.2307/1602477 (Accessed 4 February 2020).
[28] Erin R. Melnick, 'Reaffirming No-Fault Divorce: Supplementing Formal Equality with Substantive Change' (2000) 75 *Indiana Law Journal* 2 https://www.repository.law.indiana.edu/ilj/vol75/iss2/22 (Accessed 8 February 2020).
[29] Nena Hicks, 'Divorce in Paradise - A South Pacific Perspective' (1997) 379 *International Survey of Family Law* https://heinonline.org/HOL/LandingPage?handle=hein.journals/intsfal4&div=29&id=&page= (Accessed 13 June 2020).

archival form in the present-day, however, the article accommodates a historical record of the South Pacific literary field with early divorce laws in the region. That is to say those laws that were adopted from the United Kingdom, with an expansive description of the grounds for divorce that existed before any substantial reforms were done, as in Fiji and Samoa today.

Furthermore, Corrin[30] in her study on adultery laws in the South Pacific States explored the different statuses of adultery that existed under dissolution of marriage, compensation and criminal laws. It added to the body of literature which houses scholarly commentary on South Pacific jurisprudence respecting both common laws and customary laws, specifically with regard to adultery as a legal principle. Corrin made references to secondary recorded data such as existing legal scholarships and papers, and legal instruments relevant to the South Pacific nations with acknowledgement of pluralism in the laws within the narrative. Primarily, the conceptualisation of adultery in customary law and common laws variations under divorce, compensation and criminal laws is a key demonstration in the article. Additionally, Corrin brought to attention that a contextual concept that adultery as an offence in divorce and criminal regimes aligns with the views of church under customs, and therefore the said offence is still enforced in some South Pacific states. For example, when the fault system of divorce along with adultery was abolished in Fiji, the Bill for the same was largely criticised and cited as 'anti-Fijian' and contradictory to Christianity whilst stressing on adultery as the only valid ground for dissolution of marriage.[31] In spite of being a 2012 narrative as composed in light of self-governing South Pacific states and their national regimes, it does not describe relevant rights and freedoms in principle, nonetheless, the article signals the importance of examining adultery laws. This is in order to consider positions of reform for matrimonial laws such as the dissolution of marriage encompassing adultery provisions under fault system in the developing Pacific islands nations with contextual relevance. Of course, reforms should guarantee the pursuit of commitment to

[30] Jennifer Corrin, 'It Takes Two To Tango, but Three To Commit Adultery: A Survey of the Law on Adultery in Post-Colonial South Pacific States' (2012) 26 *International Journal of Law, Policy and the Family* 2 http://lawfam.oxfordjournals.org/content/26/2/187.short (Accessed 12 June 2020).

[31] Imrana Jalal, 'Keynote Address' (Paper presented at Townsville International Women's Conference, Queensland Australia, July 2002).

international standards of governance in the South Pacific legislations. Yet, legitimacy in domestic laws is obtained from not being ignorant of the societal attitudes of the community concerned. This formed the rationale for the present project to conceive the socio-cultural perspective in the examination of the fault divorce and the no-fault divorce in principles co-existing in the South Pacific with the international human rights standards.

Moreover, the article of Katz was focused on the legal equality and autonomy of parties to a marriage which was deemed to be influential in the evolution of divorce procedures over the years.[32] Katz highlighted the concept of independent legal identities of a husband and a wife in relation to divorce policies that transpired statutory changes in America and many parts of the world. Substantially, this was the shift from the lengthy adversarial model as under fault principle, to no-fault divorce. The author evinced this through the use of secondary documentary data and a contextual framework for analysis that aided in producing the trends in the history of divorce procedures and methods. The study concluded that even though no-fault divorce is the future of divorce as a form of evolution from those methods that were reflective of culture and customs encompassing inequality, from the United Kingdom, the area is still in need of reform. This is to say that the social ills associated with a marital breakdown as those scarring a husband, wife and children, should be dealt with a fairer approach, as it is experientially emotional for the concerned parties at large. The strength of the article is that it brings about an overarching background of trends and phenomena that influenced the fashion in which divorce methods gained a progressive shift. While the relevance of the study may be impeded in the present-day for its span of publication, yet its significance lies in the thorough historical account of, and evolutionary steps from fault to no-fault, as well the identification of English traditions in these. As also relating to the knowledge that most of the South Pacific domestic laws including the dissolution of marriage laws, were adopted from the English laws.[33] Lastly, it highlighted a shift from methods driven by English cultural

[32] Sanford N. Katz, 'Historical Perspective and Current Trends in the Legal Process of Divorce' (1994) 4 *The Future of Children* 1, 44-62 doi:10.2307/1602477 (Accessed 4 February 2020).
[33] Jennifer Corrin, 'It Takes Two To Tango, but Three To Commit Adultery: A Survey of the Law on Adultery in Post-Colonial South Pacific States' (2012) 26 *International Journal of Law, Policy and the Family* 2 http://lawfam.oxfordjournals.org/content/26/2/187.short (Accessed 12 June 2020).

norms that rather exhibited gender inequities to those that exhibit gender equality. This was contributory to the argument in light of international human rights and contemporary notions of equality in legal divorce methods in my paper.

Finally, Melnick's addition to literature was embodied in the focus of his article on the relationship between formal and substantive equality, and women in the no-fault divorce model.[34] The three elemental perspectives to this main argument that the paper demonstrated were: an archaic construction of no-fault divorce, preservation of no-fault divorce through implications of substantive equality; and gender neutrality in the no-fault system. Melnick based his analysis mostly on secondary documentary data. The research applied established frameworks for analysis such as the theories of feminism, and notions of gender equality and anti-discrimination. The study concluded that a woman's role and status in marriage and familial relations should be considered more equitably as even at the cost of a regime that warrants an incapability to preserve fault-based divorce that largely exhibits traditional views. However, the article gained its disadvantage owing to a lack of detailed discussion on the critique of the fault divorce as a traditional regime in comparison to reasoning the strengths of the no-fault system. Nevertheless, it subscribed to existing recognition of the concerns of women at the conclusion of a dissolved marriage with freedom from gender discrimination and in that strengthened the study's literary value. The demonstration of a key perception in the article in relation to women, equality, and especially, substantive equality in no-fault divorce system, aided in the discussion of a similar perspective and to consider the feminist view in a likewise fashion in my paper.

To conclude, different grounds of divorce, mainly within the two opposing, such as adultery in the fault bracket, and the no-fault ground, coexist in a cultural society that is in an ongoing process of democratisation with efforts for preservation of cultural values warrants an analysis. To illustrate, the implementation of progressive steps in the dissolution of marriage laws in the South Pacific countries can be associated with Western theories of governance for most countries that have adopted legal frameworks

[34] Erin R. Melnick, 'Reaffirming No-Fault Divorce: Supplementing Formal Equality with Substantive Change' (2000) 75 *Indiana Law Journal* 2 https://www.repository.law.indiana.edu/ilj/vol75/iss2/22 (Accessed 8 February 2020).

in line with international human rights laws. However, there are also South Pacific countries that have cultural nuances embedded in their dissolution of marriage laws, for example, those who have entirely adopted the no-fault regime and those that still preserve principles of the fault system. Therefore, this research proposed to examine in its study, the two systems existing in the Pacific Island countries in light of frameworks of non-discriminatory principles, equality, and feminism by way of international human rights, as well as a combination of social and cultural contexts. This paper aimed to add to and update the body of literature with an analysis of positions of the law that the contemporary South Pacific nations should adopt by way of international human rights standards, the same as a promotion of feminist voices, regional adoption of these standards in dealing with divorce cases that are referred to in courts across the South Pacific jurisdictions, and taking into account the relevant Pacific socio-cultural context.

C. RESEARCH METHOD

The research method was centrally focused on the two systems of divorce laws, such as that of the fault and no-fault theories. The focus of the collection of recorded data for the paper was the area of family law, dissolution of marriage laws and relevant cases, international human rights laws, and contextual data from and cultural values incorporated in the South Pacific socio-cultural context. The most relevant data were the primary legal sources gathered from the Pacific Islands Legal Information Institute website. These were domestic statutes providing grounds for dissolution of marriage in Fiji, Samoa, Nauru, Tuvalu, Tonga, Vanuatu, Kiribati and Solomon Islands, and relevant family law cases. International human rights instruments were also used for the analysis of the enforcement of the current no-fault and fault systems of dissolution of marriage laws in these South Pacific countries. The selection of relevant provisions from the said instruments were based on marriage and its dissolution, and non-discriminatory principles of rights and freedoms. An extension of data considering the relevant international human rights were collected from reports from the websites of relevant United Nations human rights bodies. In addition, secondary sources such as books and journal articles with voices: against discriminatory dissolution of marriage

laws, adultery laws; adoption of a feminist perspective to divorce regimes; commentary and those texts that are in the South Pacific legal and customary contexts were used to fulfil the objectives of analysis of the two main contrasting types of dissolution of marriage mechanisms.

Chapter 2

This chapter is in two Parts as A and B.

Part A describes the substantive provisions for dissolution of marriage contained under the relevant statutes in Fiji, Samoa, Nauru, Tuvalu, Tonga, Vanuatu, Solomon Islands and Kiribati in detail.

Part B categorically summarises the statutory approaches in these South Pacific countries with elements of the fault system and the no-fault system.

A. DISSOLUTION OF MARRIAGE REGIMES IN THE REGION

I. No-Fault in The Region: Fiji and Samoa

In 2003, Fiji became the first South Pacific country to recognise the no-fault dissolution of marriage through the sole ground of irretrievable breakdown of marriage for its legal dissolution. It was a shift for Fiji from the fault principle for divorce to the no-fault mechanism. That is to say, without statutorily recognising any faults to the complete breakdown, nor any prescribed conditions relating to a 'fault' for the determination of the same. In Fiji, the *Family Law Act 2003* (Fiji) covers the statutory requirements for the dissolution of marriage. Under section 30 of the *Family Law Act* it is mandated that –

> *"30. –*
> *(1) 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.*
> *(2) Subject to subsection (3), in a proceeding instituted by an application, the ground will be held to have been established, and an order for dissolution of the marriage must be made, if, and only if, the court is satisfied that the parties have separated and have thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of*

the application for dissolution of marriage.

(3) An order for dissolution of marriage will not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed."[35]

The *Family Law Act* expressly provides that in Fiji a marriage is only legally dissolved when in the view of the court the sole ground of irretrievable breakdown of that marriage can be established. The dissolution of marriage laws in Fiji has the requirement of twelve consecutive months of separate living by the parties. Following this, upon evincing an absolute likelihood of no return to cohabitation, the marriage is legally dissolved by order. Accordingly, the legal framework for dissolution of marriage in Fiji demonstrates an absolute no-fault regime.

Furthermore, in 2010, Samoa also introduced a no-fault divorce system via the amendment of the formal written laws within its family legal framework.[36] Following the amendment, according to section 7 of the *Divorce and Matrimonial Causes Ordinance 1961* (Samoa)[37], the ground for divorce is provided as:

"*7. (1) An application under this Ordinance for a decree of divorce in relation to a marriage must be based on the ground that the marriage has broken down irretrievably.*

(2) Subject to subsections (3) and (4), in a proceeding instituted by such an application, the ground is held to have been established, and the divorce order shall be made, if, and only if, the court is satisfied that the parties separated and thereafter lived separately for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order.

(3) Where the court is satisfied that a party to the marriage is the subject of domestic violence, the court may hold that the marriage has broken down irretrievably even if the parties have not separated

[35] *Family Law Act 2003* (Fiji).

[36] Jennifer Clare Corrin & Lalotoa Pulitalo, 'Samoa: reform of maintenance and divorce laws in Samoa: appropriate for the 'Aiga'?' in *The international survey of family law* (2012) 283-298.

[37] *Divorce and Matrimonial Causes Ordinance 1961* (Samoa).

and thereafter lived separately for a continuous period of not less than 24 months.

(4) A decree of divorce is not to be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed."[38]

Under the dissolution of marriage laws in Samoa, a true no-fault ground approach is embodied. This approach relates to the sole ground of irretrievable breakdown of marriage following a continuous separation of not less than 12 months by the spouses in the event of such ground being successfully established. Alternatively, under the same provision, irrespective of separation, a marriage will constitute as have irretrievably broken down if a spouse is found to be a victim of domestic violence during the marriage, and following this, a separation of 24 consecutive months. Hence, the framework in Samoa reflects a complete no-fault mechanism.

II. Proving Marital Breakdown Upon Evidence and Facts in The Region: Nauru and Tuvalu

In the South Pacific, there are two countries whose dissolution of marriage regimes encompass requirement of further proving of facts and fulfilment of conditions in order for the ground of complete breakdown of marriage to succeed. These are: Nauru and Tuvalu.

Firstly, in Nauru, the dissolution of marriage laws is sourced from the *Matrimonial Causes Act 1973* (Nauru) [39]. The said legislation in Nauru permits only one ground for divorce such as that the marriage has irretrievably broken down. For example, section 8 of the *Act* provides that:

"*8. The sole ground on which a petition for divorce may be presented to the Court by either party to a marriage shall be that the marriage*

[38] *Divorce and Matrimonial Causes Ordinance 1961* (Samoa).
[39] *Matrimonial Causes Act 1973* (Nauru).

has broken down irretrievably.''[40]

Nonetheless, further to this, it is provided under section 9 of the same *Act* that;

> "*9. (1) The Court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless - (a) The Court is satisfied of one or more of the following facts -*
> *(i) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;(ii) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;*
> *(iii) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted; or*
> *(iv) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition…*"[41]

The *Matrimonial Causes Act 1973* (Nauru) contains an express provision for the sole ground of dissolution of marriage in Nauru as the irretrievable breakdown of marriage. However, in the view of the court, this ground will only be successful as contingent on facts that must evince: reasonably unexpected behaviour of the responding party; desertion by responding party for minimally two years; and minimally two or five years of separation by mutual consent of the parties. In spite of the existence of any or more of the said circumstances, the conditions of the same must be met as mandated under section 10 of the *Act*:

> "*10. (1) The conditions referred to in paragraph (b) of subsection (1) of section 9 are –*

[40] *Matrimonial Causes Act 1973* (Nauru).
[41] *Matrimonial Causes Act 1973* (Nauru).

(a) that the parties to the marriage are living apart at the time of filing the petition and, subject to the next following subsection, have lived apart continuously throughout the period between the filing of the petition and the grant of the decree dissolving the marriage;

(b) that, subject to subsection (3), the parties have both attended before the Court on one or more occasions, as required by the Court, in every month for a period of six months after presentation of the petition;

(c) that, subject to subsection (4), on every occasion on which a party has attended before the Court he has stated that he wishes the marriage to be dissolved;

(d) that the Court is satisfied of the voluntary nature of every statement by a party that he wishes the marriage to be dissolved and is further satisfied that he understands the consequences of that statement; and

(e) that the Court has attempted to promote reconciliation of the parties on every occasion on which either of them has attended before in the course of the proceedings."[42]

The statutory approach in Nauru further restricts the sole ground of irretrievable breakdown of marriage and the facts provided under section 9 for dissolution of marriage. The conditions for these facts are prescribed under section 10 such as those concerning of the parties: continuously living apart; attending court as required; making statements about the dissolution of their marriage that are voluntary in nature; and attended to occasions created by the court in promotion of reconciliation. Thus, the three provisions to the dissolution of marriage in Nauru makes for a framework that is reflective of a rather fault mechanism.

Secondly, in Tuvalu, the legal dissolution of marriage is governed by the *Matrimonial Proceedings Act* [Cap 21] (Tuvalu)[43]. The relevant provision for grounds for divorce in Tuvalu is section 9 of the *Act* that provides:

[42] *Matrimonial Causes Act 1973* (Nauru).
[43] *Matrimonial Proceedings Act* [Cap 21] (Tuvalu).

"*9. (1) Subject to Section 8, the only ground for divorce is that the marriage has completely broken down.*

(2) Without limiting what may be accepted as evidence that a marriage has broken down, a court may accept as such evidence proof that-

(a) the respondent has, since the celebration of the marriage, committed adultery; or

(b) the respondent has deserted the applicant without reasonable cause; or

(c) the respondent has, since the celebration of the marriage, treated the applicant with cruelty; or

(d) the respondent is certified by a medical officer or medical practitioner approved for the purpose of the Mental Treatment Act (Cap. 37, 1978 Edn.)-

(i) to be of unsound mind; and

(ii) to be unlike to recover; or

(e) in the circumstances it would be unreasonable to expect one party to continue in the marriage relationship with the order[44]*,*

but no such evidence relieves the court from the duty to determine whether or not the marriage has completely broken down."[45]

With reference to the above provision, the sole ground for the dissolution of marriage in Tuvalu is the complete breakdown of marriage. Nevertheless, the validity of the said sole ground exists with statutorily prescribed evidence. In order to hold marriage as have been completely broken down, the court will consider evidence in relation to: adultery; desertion with no reasonable cause; cruel treatment by responding party; unsoundness of mind with the unlikelihood of recovery of the responding party with the certification of the same - from a medical professional; and any circumstance where continuation of marriage will be unreasonable. Accordingly, making the dissolution of marriage mechanism in Tuvalu a fault principle.

[44] Quoted verbatim text from legislation.

[45] *Matrimonial Proceedings Act* [Cap 21] (Tuvalu).

III. Fault Grounds in The Region: Tonga, Vanuatu, The Solomon Islands and Kiribati

Tonga, Vanuatu, Solomon Islands, and Kiribati are amongst those countries in the region that have a fault-based system of dissolution of marriage. First, in Tonga, the *Divorce Act* [Cap 29] (Tonga)[46] provides that:

> "*Grounds for divorce petition.*
> *3. (1) Any husband or wife who is at the time of the institution of the suit domiciled in the Kingdom may present a petition to the Supreme Court (hereinafter referred to as "the Court") praying the Court to dissolve the marriage upon evidence-*
> *(a) that since the celebration of the marriage, the respondent has committed adultery or has been sentenced to a term of imprisonment of not less than 5 years; or*
> *(b) that the respondent has a former husband or wife still living or*
> *(c) that the respondent has wilfully deserted the petitioner for a continuous period of 2 years or more immediately preceding the presentation of the petition: or*
> *(Amended by Act 39 of 1988.)*
> *(d) that the respondent is afflicted with an incurable disease capable of being transferred to the petitioner by contagion or infection; or is incurably of unsound mind and has been continuously under care and treatment for a period of at least 5 years immediately preceding the presentation of the petition; or*
> *(Substituted by Act 39 of 1988.)*
> *(e) that the respondent at the time of the marriage is and continues to be incapable of consummating the marriage by reason either of some structural defect in the organs of generation which is incurable and renders complete intercourse impracticable or of some incurable mental or moral disability resulting in an invincible repugnance to sexual intercourse with the petitioner;*

[46] *Divorce Act* [Cap 29] (Tonga).

> *(f) that the respondent and petitioner have been separated for a continuous period of 2 years or more immediately preceding the presentation of the petition without both of them maintaining or intending to maintain or renew normal marital relations or co-habitation with each other; or*
> *(Amended by Act 39 of 1988)*"[47]

It has been noted that under the *Divorce Act* [Cap 29] Tonga has a fault system[48] of divorce that expressly provides eight 'faults' as options of evidence for the dissolution of marriage under section 3. These prescribed faults exist with regard to: adultery; imprisonment of the respondent for a term not less than 5; the previous spouse who is still living; desertion; incurable disease carried by the respondent; unsoundness of mind of the respondent; and incapability of the respondent to consummate. In addition to this, under the same provision, it is prescribed that the petition for dissolution of marriage can also be made on the basis of continuous separation of 2 years or more with the consent of both parties to the marriage.

Furthermore, in Vanuatu, the *Matrimonial Causes Act* [Cap 192] (Vanuatu) provides the legal methods involved in the dissolution of marriage. The *Matrimonial Causes Act* first states about the dissolution of a customary marriage under section 4 that:

> "*4. When two persons have been married according to custom, the marriage may be dissolved, annulled or separation ordered only in accordance with custom:*
> *Provided that notification of such dissolution or annulment of the marriage shall be made to the District Registrar in accordance with the provisions of the Civil Status (Registration) Act, Cap. 61 as amended*."[49]

Further to this, under section 5, the Act prescribes the fault grounds of petition for a

[47] *Divorce Act* [Cap 29] (Tonga).
[48] Secretariat of the Pacific Community Regional Rights Resource Team, *Legal Analysis on Violence Against Women* (2013).
[49] *Divorce Act* [Cap 29] (Tonga).

dissolution of marriage or divorce. It mandates that:

> "*5. Subject to the provisions of section 6, a petition for divorce may be presented to the Court either by the husband or the wife -*
> *(a) on the ground that the respondent -*
> *(i) has since the celebration of the marriage committed adultery; or*
> *(ii) has deserted the petitioner without just cause for a period of at least 3 years immediately preceding the presentation of the petition; or*
> *(iii) has since the celebration of the marriage treated the petitioner with persistent cruelty; or*
> *(iv) is incurably of unsound mind and has been so continuously for a period of at least 5 years immediately preceding the presentation of the petition; or*
> *(b) upon the grounds provided by subsection (1) of section 13, and by the wife on the ground that her husband has, since the celebration of the marriage, been convicted of rape or an unnatural offence*."[50]

The *Matrimonial Causes Act* [Cap 192] prescribes fault grounds for dissolution of marriage in Vanuatu such as those relating to: adultery; desertion; cruel treatment of the petitioner; incurable unsoundness of mind of the petitioner; and the respondent's conviction of an unnatural offence or rape. The said fault grounds are available for petitioning the dissolution of marriage, that is where the dissolution of marriage by custom is not applicable, which the Act specifies to be dissolved according to customs. Therefore, in Vanuatu, the fault mechanism is enforced.

Moreover, the *Matrimonial Causes Act 1950* (UK) governs the petition and methods for dissolution of marriage in the Solomon Islands and Kiribati. The relevant provision is section 1 of the *Act* that provides:

> "*1.-(1) Subject to the provisions of the next following section, a petition for divorce may be presented to the court either by the*

[50] *Divorce Act* [Cap 29] (Tonga).

husband or the wife on the ground that the respondent –

(a) has since the celebration of the marriage committed adultery; or

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(c) has since the celebration of the marriage treated the petitioner with cruelty; or

(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition;

and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality."[51]

Under the *Matrimonial Causes Act 1950* (UK) in the Solomon Islands and Kiribati there are fault grounds available for the petition of dissolution of a marriage such as those demonstrative of: adultery; desertion; cruel treatment by the respondent; the incurable unsound mind of the respondent; and the conviction of the respondent of an offence that is rape, sodomy or bestiality. Thus, in the Solomon Islands and Kiribati the fault principle is enforced.

B. SIMILARITIES AND DIFFERENCES: A REGIONAL DISCUSSION

The South Pacific Island states have statutory similarities and differences amongst their legal frameworks and methods for dissolution of marriage.

The first pair of countries with a similar statutory approach to dissolution of marriage are Fiji and Samoa. With the only ground of irretrievable breakdown of a marriage, the two nations have implemented a complete no-fault framework for dissolution of marriage. This is attached to the statutory requirement of a 12-month separation period in both countries, and an option of relying on the 24 months' continuous separation

[51] *Matrimonial Causes Act 1950* (UK).

period in cases of domestic violence in Samoa. The relevant provisions are as well of resemblance. This is owing to both provisions installed in the relevant statutes in Fiji and Samoa have been adopted from the *Family Law Act 1975* (Australia). Thus, Fiji and Samoa are two countries in the region that enforce alike no-fault mechanisms for the legal dissolution of marriage.

Further, in the statutory divorce mechanisms for Nauru and Tuvalu, the only ground for dissolution of marriage is the irretrievable and complete break of marriage, respectively. The irretrievable or complete breakdown of marriage falls within the no-fault theory of divorce where there is no requirement for the responding party to be proven guilty of any faults in order for the marriage to legally dissolve.[52] Only in Nauru, this is attached to the requirement of desertion of two years, and separation periods of 2 or 5 years in Nauru. But pertaining to the single ground of 'irretrievable or complete breakdown', the relevant statutes of Nauru and Tuvalu require the irretrievable or complete breakdown of marriage to be evidenced with one or more prescribed circumstances and facts. The facts and circumstances are primarily based on the faults of the responding party to be proven.

In other words: in Nauru evidence that relates to grounds of desertion, mutually consented separation of 2 years or 5 years of separation and certain behaviour of the respondent; and in Tuvalu evidence that qualifies as adultery, desertion, cruel treatment, or unsoundness of mind is required. It makes the alike regimes in Nauru and Tuvalu having a diverse position that is comprised of a no-fault ground with prescribed 'faults' to be proven in order to evince the sole no-fault ground of irretrievable or complete breakdown of marriage. In the same way as Corrin[53] commented on the divorce mechanisms of Nauru and Tuvalu as an example of a mixed system.

However, Jalal voiced and reasoned[54] that those South Pacific countries that require

[52] Saema Jamil, 'An Analysis of Irretrievable Breakdown of Marriage As A Ground for Divorce' (2015) 3 *Law Mantra Online Monthly Journal* 1 https://ssrn.com/abstract=2672107 (Accessed 12 May 2020).
[53] Jennifer Corrin, 'It Takes Two To Tango, but Three To Commit Adultery: A Survey of the Law on Adultery in Post-Colonial South Pacific States' (2012) 26 *International Journal of Law, Policy and the Family* 2 http://lawfam.oxfordjournals.org/content/26/2/187.short (Accessed 12 June 2020).
[54] Imrana Jalal, 'Gender equity in justice systems of the Pacific Island Countries and Territories' (Technical

evidencing breakdown of marriage or petition for its dissolution prior to a party can obtain divorce do not manifest a no-fault approach. For instance, where relevant legislation in Nauru and Tuvalu make provision for the requirement of a sole ground for divorce to be evidenced with specified facts and conditions, Nauru's framework has further set out formal requirements under section 10 of the *Matrimonial Causes Act 1973* as an extension to the evidential requirements. Since the no-fault ground of an irretrievable or complete breakdown of a marriage is not an independently[55] enforced ground in Nauru and Tuvalu, but is rather dependent on the absolute evidence of the fault of another party. Therefore, largely a fault framework is manifested in the said countries.

Additionally, the objective of the philosophy of no-fault is to get rid of any need to prove the guilt of another party for the dissolution of a marriage. As according to the Attorney General Lionel Murphy[56] during the second reading of the *Family Law Bill 1973* to introduce no-fault divorce in Australia, from where Fiji and Samoa adopted their no-fault divorce provisions, stressed the purpose of no-fault as definitely not having to prove faults or put any inquiry of faults for a marriage to legally dissolve. The frameworks of Nauru and Tuvalu have stipulated such a requirement even with the ground of irretrievable or complete breakdown of a marriage. Hence, in light of the underlying principle of no-fault mechanism and the requirement of prove of facts or faults only manifested in a fault regime for divorce, the resembling dissolution of marriage mechanisms of Nauru and Tuvalu predominantly follow the fault theory of divorce.

Moreover, whilst Nauru and Tuvalu still follow the fault principle with a framework designed differently to Tonga, Vanuatu, Solomon Islands and Kiribati, substantially, the purpose of the relevant dissolution of marriage provisions for former and latter countries demonstrate a fault framework for divorce. The reason being is the dissolution, either initiated with a sole ground marital breakdown or an express fault

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Background Paper, Asia Pacific Human Development Report Background Paper Series 2010/2014, 2010).

[55] Priti Rana, 'Irretrievable Breakdown of Marriage as an Additional Ground of Divorce: A Long Awaited Move' (2016) 5 *Journal of Global Research and Analysis* 2 http://www.geetalawcollege.in/wp-content/uploads/2017/05/December-2016-Issue.pdf#page=96 (Accessed 14 June 2020).

[56] Australian Law Reform Commission Report, *Family Violence – Improving Legal Frameworks*, Report 1 (2010).

ground, is dependent on prove of faults or evidencing facts. First, Tonga, Vanuatu, the Solomon Islands, and Kiribati together are a set of Pacific Island countries that share a common legal approach to dissolution of marriage. Within the regime for these countries of the South Pacific, the features of a fault system of divorce are manifested.[57] The approach exists in rather a traditional[58] fashion of the fault principle. These countries allow fault grounds traditionally established fault grounds for divorce such as adultery, specified period of desertion, and cruelty. Second, Nauru and Tuvalu melded mainly a fault mechanism with the ground of 'breakdown of marriage' substantially dependent on proving of circumstances, facts and evidence that are based on adultery, desertion, cruel treatment, and unsoundness of mind, and that are statutory grounds of divorce in the former set of countries. Therefore, it can be inferred that the similarity that the divorce mechanisms in Tonga, Vanuatu, the Solomon Islands and Kiribati, with Nauru and Tuvalu share is the framework of fault divorce, that is a traditional design for the former and mixed design for the latter.

Nonetheless, prior to the divorce provisions in Nauru and Tuvalu extend to the requirement of evidential demonstration of facts, and circumstances, the same is linked to an essential element of the no-fault framework for divorce[59]. It is the irretrievable or complete breakdown of marriage as the sole ground. The existence of this aspect in the mechanisms in Nauru and Tuvalu makes the latter indistinguishable from the divorce regimes in Fiji and Samoa, which are no-fault regimes provided under the *Family Law Act 2003* (Fiji) and *Divorce and Matrimonial Causes Ordinance 1961* (Samoa), respectively, with the sole ground of divorce as the irretrievable breakdown of a marriage. Hence, it is an indication that the mechanisms in Nauru and Tuvalu have been developed close to the frameworks used in Fiji and Samoa by virtue of adopting the sole ground of 'breakdown of marriage', albeit it is not an independent ground in the former states.

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[57] Cornell Law School, 'Fault Divorce' (2020) https://www.law.cornell.edu/wex/fault_divorce (Accessed 17 March 2020).

[58] Peter Nash Swisher, *'Marriage and Some Troubling Issues With No-Fault Divorce*' (2005) 17 *Regent U. L. Rev* https://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/docs/issues/v17n2/Swisher.pdf (Accessed 2 April 2020).

[59] Kusum, 'Irretrievable Breakdown of Marriage: A Ground for Divorce' (1978) 20 *Journal of the Indian Law Institute* 2 https://www.jstor.org/stable/43950531 (Accessed 12 April 2020).

Even with the mandated sole ground for dissolution of marriage as the irretrievable or complete breakdown in both Nauru and Tuvalu, the fault nature of approach comes into being with the requirement to prove facts that evince 'faults' of the responding party that led to the breakdown of marriage, irretrievably or completely. The regimes in Nauru and Tuvalu can be inferred as substantially a fault approach to divorce as owing to the prescribed faults contained within the concerning provisions for the divorce ground. The faults are statutorily structured as facts or circumstances of adultery, desertion or cruel treatment, unsoundness of mind or conviction of a natural offence of the responding party to be substantiated in compliance of satisfying the same as conditions to the breakdown of a marriage. Accordingly, the construction upon this aspect of the mechanisms in Nauru and Tuvalu warrants virtually a fault position for legally dissolving a marriage within their legal frameworks, and thus similar to the grounds provided in Tonga, Vanuatu, Solomon Islands and Kiribati.

Subsequently, this also becomes the argument for the difference between the divorce mechanisms in Fiji and Samoa compared with Nauru and Tuvalu. Where an integral aspect of the regimes in Nauru and Tuvalu is indicative of its fault approach to divorce, on another hand, Fiji and Samoa have a complete-no-fault system of dissolution of marriage by statute. In the same way, Tonga, Vanuatu, Solomon Islands and Kiribati have distinguishable approaches to Fiji and Samoa. The former set of Pacific Island countries continue to administer the legal method for dissolution of marriage with an absolute fault system of approach. This is contradictory to the mechanisms in Fiji and Samoa, whose frameworks are an absolute container of the no-fault approach. Hence, the approaches in Fiji and Samoa for dissolution of marriage is dissimilar to Nauru and Tuvalu, and Tonga, Vanuatu, the Solomon Islands, and Kiribati.

To conclude, having a true no-fault framework for dissolution of marriage, both Fiji and Samoa have similar no-fault regimes. Nauru and Tuvalu take a unique position for divorce theory in the Pacific with no-fault and fault ingredients. However, even being conscious of their development close to a no-fault framework with the adoption of a sole ground of irretrievable or complete breakdown of a marriage, the dependence of this single ground upon evidential bases for a successful divorce amounts to the treatment of the regimes in Nauru and Tuvalu as a fault approach to dissolution of

marriage. The regimes' predominant compliance with the fault philosophy is owing to its dependence on statutorily prescribed facts and circumstances to be proven. These materially reflect 'faults' of one party to the marriage, and is conclusive of a fault mechanism. As it is exactly seen under relevant provisions of the countries that truly follow the fault principle in the region.

That being the case, the frameworks of Nauru and Tuvalu are similar to Tonga, Vanuatu, the Solomon Islands, and Kiribati, that contrary to Fiji and Samoa follow the fault philosophy of legal dissolution of marriage. That is to say either in a uniquely 'blended' design of fault framework melded with a dependent sole ground, as in the former, and a traditional method, as in the latter nations. The two contradictory legal mechanisms for dissolution of marriage enshrined in the relevant statutes of the said South Pacific states warrant an analysis. The examination for implications of the contrasting legal approaches to be existing in the South Pacific nations that are in an ongoing development process of implementing human rights standards in domestic laws whilst not ignoring considerations that are of cultural and social relevance.

Chapter 3

A. IMPLICATIONS OF THE CURRENT TWO MAIN CONTRASTING DIVORCE MECHANISMS

I. Human Rights-Based Approach

A human rights-based approach is an embodiment of development with international human rights standards.[60] It is a framework for governance that by operation promotes and protects fundamental human rights for all in domestic laws. Under this approach, an analysis of vulnerabilities, discriminatory treatment of right holders, and impediments of human rights access is sought.[61] In addition, the rights-based approach is an avenue for the empowerment of particularly the marginalised sections of society. For example, through human rights-based implemented agencies that, even within states, provide said sections of society access to justice.

Recognition of such an approach leads to sustainable progress with regard to equity, as well as the elimination of any possible increment of poverty in a society. The approach within a state legal system encompasses the promotion and protection of civil, political, social, economic and cultural rights. It considers establishment of a complaints mechanism, application of principles of equality, with principal consideration to marginalised groups, by using evidence-based advocacy[62]. The human rights-based approach warrants the integration of the standards and principles of human rights into the making of laws.[63] In this context, the making of legal mechanisms of dissolution of marriage. There are certain fundamental rights and freedoms which are enshrined, protected, and promoted in the supreme laws, that is

[60] Michael Freeman, *Law and Childhood Studies* (2012).
[61] Social Protection & Human Rights, 'Introduction to a rights-based approach' (2015) https://socialprotection-humanrights.org/introduction-to-a-rights-based-approach/
(Accessed 12 March 2020).
[62] Margaret Satterthwaite, 'Measuring Human Rights: Indicators, Expertise, and Evidence-Based Practice' (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)*
https://www.jstor.org/stable/10.5305/procannmeetasil.106.0253?seq=1 (Accessed 20 March 2020).
[63] Scottish Human Rights Commission, 'What is a human rights-based approach?' (n.d)
http://careaboutrights.scottishhumanrights.com/whatisahumanrightsbasedapproach.html (Accessed 16 June 2020).

the written Constitutions of the South Pacific countries of Fiji[64], Samoa[65], Nauru[66], Tuvalu[67], Tonga[68], Vanuatu[69], Solomon Islands[70] and Vanuatu[71]. With the commitment to implement human rights in their national laws and policies, all of these countries are also members of the United Nations.[72] These South Pacific nations are either parties to all or certain human rights treaties, namely the *International Covenant on Civil and Political Rights 1976 (ICCPR)*, and the *Convention on the Elimination of All Forms of Discrimination Against Women 1981 (CEDAW)*, both of which are relevant to dissolution of marriage laws and grounds for its civil rights and non-discriminatory principles concerning both men and women.

While Fiji, Samoa and Vanuatu are state parties to both the ICCPR and CEDAW; Nauru, Tuvalu, Solomon Islands and Kiribati are parties to the CEDAW, but have not ratified the ICCPR; and Tonga has neither ratified the ICCPR nor the CEDAW.[73] Nevertheless, Tonga's will to become a state party to the CEDAW was expressed in 2015.[74] However, its struggle to ratify the CEDAW is an on-going debate[75], and a decision that has not been made yet is awaiting public consultations[76]. For this reason of the said countries' complete and partial commitment to protection and promotion of human rights standards of laws, and in light of the universal, inalienable and inherent nature of human rights, principles of which are protected in the supreme laws of the nations, a human rights approach is relevant to evaluate the two contrasting frameworks of dissolution of marriage in the South Pacific countries. As the

[64] *Constitution of the Republic of Fiji 2013.*
[65] *Constitution of the Independent State of Samoa 1960.*
[66] *Constitution of Nauru.*
[67] *Constitution of Tuvalu.*
[68] *Constitution of Tonga*.
[69] *Constitution of the Republic of Vanuatu.*
[70] *Constitution of Solomon Islands.*
[71] *Constitution of Kiribati.*
[72] United Nations Human Rights Office of the High Commissioner, 'Human Rights by Country' (2020) https://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx (Accessed 14 June 2020).
[73] United Nations Human Rights Office of the High Commissioner, 'Status of Ratification Interactive Dashboard' (2014)
[74] UN Women Asia and the Pacific, 'UN agencies welcome Tonga's decision to ratify CEDAW' (2015) https://asiapacific.unwomen.org/en/news-and-events/stories/2015/03/un-agencies-welcome-tonga-s-decision-to-ratify-cedaw (Accessed 3 March 2020).
[75] Pacific Women's Network Against Violence Against Women, 'Tonga shelves CEDAW signing as country debates women's rights' (2015) 3 *Beneath Paradise* 4 http://www.fijiwomen.com/wp-content/uploads/2017/07/BeneathParadiseNo4_WEB.pdf (Accessed 18 September 2020).
[76] RNZ, 'Tonga Govt sends CEDAW back to the public' (2017) https://www.rnz.co.nz/international/pacific-news/323856/tonga-govt-sends-cedaw-back-to-the-public (Accessed 18 September 2020).

enforcement of these frameworks, like any other regime, is related to the fundamental rights and freedoms of both women and men.

The fault principles in statutory divorce frameworks of Nauru, Tuvalu, Tonga, Vanuatu, Solomon Islands and Kiribati involve the consideration of 'faults' factors or guilt of the responding party to the petition of a divorce. That is to say, either as express grounds or evidence of facts or circumstances. This means that in the frameworks of these South Pacific countries one or more 'faults' of the responding party must be proven either as grounds in order for the marriage to dissolve, or as facts to evidence the complete or irretrievable breakdown of marriage for its legal dissolution. It is noted that adultery and cruelty are the most common faults in the Pacific.[77] For instance, in the Solomon Islands case of *Tyson v. Tyson* [2017] SBHC 61[78], divorce was absolutely granted on the ground of adultery as a proven fault of the responding party in the petition for dissolution of marriage because the fault ground was not contested.

From the human rights lens, adultery is not deemed as an offense. Where the conduct of adultery is a sexual conduct with the consent of two legal adults[79], it does not constitute a crime, and thus not a 'fault' in the view of the justice system. A relevant framework to reference here to the South Pacific states is one from Australia. It is because the true no-fault divorce regime in Australia is similar to that of Fiji and Samoa. In fact, it has substantially influenced the no-fault based dissolution of marriage provisions in the latter nations through section 48 of the *Family Law Act* 1975 (Australia)[80]. In these countries, adultery is not statutorily stated as a ground for divorce, nor a basis for evidencing the breakdown of marriage.

In Australia, under the *Human Rights Sexual Conduct Act 1994* (Australia), which is an implementation of Article 17 of the *International Covenant on Civil and Political Rights,* it is provided that:

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[77] Jennifer Corrin Care & Donald Edgar Paterson, *Introduction to South Pacific Law* (2007).
[78] *Tyson v. Tyson* [2017] SBHC 61.
[79] Melissa Murray, 'Rights and Regulations: The Evaluation of Sexual Regulation' (2016) 116 *Columbia Law Review* https://www.jstor.org/stable/43744123?seq=1 (Accessed 15 March 2020).
[80] Section 48 of *Family Law Act 1975* (Australia).

> "*4 Arbitrary interferences with privacy*
> *(1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.*
> *Note: Article 17 of the International Covenant on Civil and Political Rights is set out in Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986.*
> *(2) For the purposes of this section, an adult is a person who is 18 years old or more.*"[81]

In light of this, and conformity to human rights standards, the validity of adultery in the 'fault' grounds or circumstances for evidence of a fault-oriented divorce regime is indicative of an impediment of human rights, such as by way of interference of privacy that is arbitrary.[82] The enforcement of an adultery provision in the divorce mechanisms of Nauru, Tuvalu, Tonga, Solomon Islands and Kiribati is reflected in the countries' current status as not state parties to the ICCPR. Although, it is essentially voluntary unlike the offence of rape, yet, adultery is considered a serious cultural offence[83] in the mentioned South Pacific societies that enforce adultery under divorce provisions.

Moreover, in Tonga, that enforces fault divorce with adultery, under section 2 of the *Adultery and Fornication Act* [Cap 21] (Tonga)[84], adultery is only considered an offence when a man commits the same with an unmarried woman, who is under eighteen years old. Upon conviction, a fine not exceeding $1000 and sentence not exceeding one year in default of payment is mandated. Nonetheless, this has been described as analogous to a civil claim because the parent or guardian of the unmarried woman, who should be less than 18 years old, must institute the proceedings.[85] To

[81] *Human Rights Sexual Conduct Act 1994* (Australia).
[82] *Toonen v. Australia* [1994] UNHRC 9.
[83] Secretariat of the Pacific Community Regional Rights Resource Team, *Legal Analysis on Violence Against Women* (2013).
[84] *Adultery and Fornication Act* [Cap 21] (Tonga).
[85] Jennifer Corrin, 'It Takes Two To Tango, but Three To Commit Adultery: A Survey of the Law on Adultery in Post-Colonial South Pacific States' (2012) 26 *International Journal of Law, Policy and the Family* 2 http://lawfam.oxfordjournals.org/content/26/2/187.short (Accessed 12 June 2020).

further reason with a human rights viewpoint, crimes involving a sexual conduct can be argued to be centrally dealing with the issue of consent. Where the sexual act is consensual between to legally consenting adults as in the form of adultery, the various significant aspects of justice may come in conflict with a divorce regime that formally recognises adultery as a 'legal fault'.

Nonetheless, with respect to human rights standards inclusive of making provision for access to justice for right holders, a divorce mechanism that considers facts and circumstances as faults come into being. This mechanism is found in divorce provisions found in the 'blended' frameworks of Nauru and Tuvalu. A rights-based mechanism warrants implementation of a system of justice with the rule of law for the protection of human rights that encompasses evidence-based elements.[86] Although a divorce regime by reason of human rights necessitates eradication of adultery as a fault, yet the facts and circumstances of a party to the being subject to domestic violence, cruel treatment is needful of consideration. To illustrate, in Nauru and Tuvalu, where the sole ground for dissolution of marriage is the complete breakdown of the marriage, the courts also accept evidence that demonstrates circumstances of cruel treatment, and in Samoa, that considers domestic violence.

In the same way, incorporation of principles of human rights within a divorce regime would mean legally recognising persistent cruel treatment or domestic violence leading to an absolute breakdown of marriage; or even in cases where adultery or unsoundness of mind can be deduced as drivers of continuous acts of violence or cruel treatment not as 'fault' but as facts and circumstances in evidence for the breakdown of marriage. To illustrate, in Nauru and Tuvalu that give the statutory focus of factual and evidential significance to cruelly treated victim and unsoundness of mind of the responding party; and Samoa's regime of no-fault, that too to some extent recognises domestic violence in a marriage petitioned for dissolution. Particularly, in the context of the Pacific where women victims of domestic violence are on the rise and one of

[86] United Nations Human Rights Office of the High Commissioner, 'Strengthening the rule of law and accountability for human rights violations' (2020) https://www.ohchr.org/EN/AboutUs/ManagementPlan/Pages/law-accountability.aspx (Accessed 2 March 2020).

the highest across the globe[87], embedding circumstances and facts associated with domestic violence and/or cruel treatment in the formal written laws of dissolution of marriage will be demonstrative of a legal mechanism that recognises and addresses grave concerns of abusive marriages or cruel treatment or any kind of harm that either physically or mentally [or psychologically] suffered by one party in the marriage leading to complete or irretrievable break down of the same.

On the contrary, some have argued that the validity of fault factors in a fault-based or any divorce system should be ceased owing to the relevance of fault principles to areas of law like criminal and torts, and not family law.[88] For example, in the case of *McGee v. McGee*, 974 P.2d 983 (1999), which was referred to in the Fiji case of *Khan v. Khan* [2016] FJHC 344 to draw a similar distinction, it was noted that

> "*Divorce actions will become unduly complicated if tort claims must be litigated in the same action...*
> *Consequently, requiring joinder of tort claims in a divorce action could unduly lengthen the period of time before a spouse could obtain a divorce and result in such adverse consequences…* "[89]

Yet, in a region where human rights violations are majorly found in the matter of domestic violence[90] or the marital context, a legal framework for dissolution of marriage is needful to recognise its significance and valid role in a marital breakdown or petition for dissolution of an abusive marriage. Express incorporation of the acts of cruel treatment and domestic violence under the dissolution of marriage provisions allow the court to address the said acts that substantially and materially contribute to a spouse's decision to petition for dissolution of marriage by reasoning marital breakdown. This will endorse human rights comprehensively in the form of a rule of law ensuring notions of rights-based approach with accountability and transparency of

[87] RNZ, 'Fiji police record rise in domestic violence cases' (2016) https://www.rnz.co.nz/international/pacific-news/301879/fiji-police-record-rise-in-domestic-violence-cases (Accessed 13 March 2020).
[88] Peter Nash Swisher, 'Reassessing Fault Factors in No-Fault Divorce' (1997) 31 *Family Law Quarterly* https://www.jstor.org/stable/25740125?read-now=1&seq=1 (Accessed 20 February 2020).
[89] *McGee v. McGee*, 974 P.2d 983 (1999); *Khan v. Khan* [2016] FJHC 344.
[90] The Coconet, 'Violence against women in Pacific rates amongst worst in the world' (2019) https://www.thecoconet.tv/cocoblog/violence-against-women-in-pacific-rates-amongst/ (Accessed 12 March 2020).

circumstances of cruelty and violence linked to the dissolution of a marriage by written law.

However, in *Nelson v. Jones*, 787 P.2d 1031 (1990) it was set out that "Although joinder is permissible, the administration of justice is better served by keeping tort and divorce actions separate…"[91] Accordingly, the principles and statutory constituents of the fault mechanism of dissolution of marriage followed in the South Pacific are not aligned with human rights standards concerning adultery provisions, and prescribed faults that can be dealt with under other relevant areas of law than family or divorce.

Nevertheless, the no-fault oriented divorce in the region is an example of a mechanism that exhibits features of the rights-based approach. Its design of not having the sole ground of irretrievable breakdown of marriage contingent on the proving of fault not only warrants a cost-effective[92] advantage but also it does not have statutorily prescribed faults or proof of facts contradictory to human rights standards. For instance, low wage earners and those who cannot afford highly paid legal professional, do not have to stress about costs, because the longer the judicial process and procedure of a dissolution of marriage such as involving the proving of fault and producing witnesses concerning the same, the costlier the divorce.

In addition, the no-fault framework does not deploy provisions that are not in compliance with human rights standards such as the adultery provisions, nor those of violence or cruel treatment that can be dealt with sections of justice and law that other than the divorce system. In the same way, it promotes substantive equality[93] by way of human rights. The working class or high income earning women and men have greater access to a range of legal professionals to fight their cases of proving their spouses' 'fault' in court. A no-fault regime takes the substantive equality position by

[91] *Nelson v. Jones*, 787 P.2d 1031 (1990).
[92] Speaks Law Firm, 'The Importance of No-Fault Divorce and What it Could Mean To You' (2019) https://speaksfamilylaw.com/the-importance-of-no-fault-divorce-and-what-it-could-mean-for-you/ (Accessed 2 April 2020).
[93] United Nations Development Programme, *Power, Voice and Rights A Turning Point for Gender Equality in Asia and the Pacific* (2010) http://hdr.undp.org/sites/default/files/rhdr-2010-asiapacific.pdf (Accessed 20 April 2020).

eliminating any 'faults' necessitated by statute to be evidenced in order to successfully have a marriage legally dissolved by men and women from all sections of society, including the marginalised. Therefore, from a human rights perspective, the no-fault regime is in absolute conformity to human rights standards compared to the enforcement of the fault theory of divorce provisions in the South Pacific that promotes principles contrary to human rights standards.

II. Feminism

Employment of the rights-based approach fosters the reinforcement of the feminist perspective[94] to divorce regimes. The feminist approach considers a diverse belief and practice system comprising of social, culturally individual, economic, and political aspects of eliminating gender inequalities with a central link to the interests and rights of women.[95] The key to the achievement of fair societal treatment of women from this point of view is the eradication of the prioritisation and dominance of patriarchal notions[96] in the said aspects of society. In order to attain this, constant developments in the area of family and marriage laws with regard to women have been made. For example, in the subject of marriage and family laws, its legislative evolution of women's autonomous legal identity after marriage.[97]

Feminists have achieved this, and continue to, in the form of advocacy for women's rights in the public sphere, equal rights within marriage, elimination of gender disparities, safeguard of women's equal access to social integration as their male counterparts and protection from sexual abuse and domestic violence.[98] This is linked to the relationship between women and the developments in the legal domain.

[94] Government of Canada, 'Human rights-based approach' (2017) https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/priorities-priorites/human_rights-droits_personne.aspx?lang=eng (Accessed 13 March 2020).
[95] Britannica, 'Feminism' (2020) https://www.britannica.com/topic/feminism (Accessed 18 March 2020).
[96] Sarah Gamble, *The Routledge Companion to Feminism and Postfeminism* (2nd ed, 2002).
[97] Arianne Chernock, *Men and the Making of Modern British Feminism* (2009).
[98] Peggy Brady-Amoon, 'Humanism, Feminism, and Multiculturalism: Essential Elements of Social Justice in Counseling, Education, and Advocacy' (2011) 50 *Journal of Humanistic Counseling* 2 https://doi.org/10.1002/j.2161-1939.2011.tb00113 (Accessed 23 March 2020).

Additionally, the legal theories and their implementation that aim to engage in extinguishing discriminatory sections of societal and legal structures.[99] The feminist perspective in the human rights-based approach reinforces gender mainstreaming with the ultimate objective of attaining gender equality through integration of principles and standards of human rights in the development of laws encompassing women's human rights along with the prohibition of gender discrimination.[100] It is therefore relevant to the dissolution of marriage laws in which principal concerns are both women and men as parties and their equal treatment without discriminatory laws against any.

One of the principal and key purposes of the feminist approach are to elevate women's rights via gender equality. The *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW)[101] is an internationally relevant legal framework that addresses the gender-based discriminatory laws in various legal frameworks of State laws, particularly concerning women. Under the CEDAW, the ratified nations not only agree to take measures in the form of legislative mechanisms for the absolute enjoyment of rights and freedoms of women but also those human rights of women that fundamentally relate to their cultural, traditional, and familial concerns and relations.[102] For a State party, ratification of the CEDAW warrants its legally binding commitment under the Convention to incorporate the provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW) into its formal written laws for governance and action fulfilling their Convention obligations.

From the Pacific community, Fiji, Samoa, Nauru, Tuvalu, Vanuatu, Solomon Islands, and Kiribati are parties to the CEDAW, Tonga being the only exception.[103] In 2015,

[99] Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (1995).
[100] UNICEF, 'What is HRBA?' (2016) https://www.unicef.org/policyanalysis/rights/index_62012.html (Accessed 23 May 2020).
[101] *Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW).*
[102] UN Women, 'Convention on the Elimination of All Forms of Discrimination Against Women' (2009) https://www.un.org/womenwatch/daw/cedaw/ (Accessed 22 March 2020).
[103] United Nations Treaty Collection, 'Status of Treaties' (2020) https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#bottom (Accessed 19 March 2020).

Tonga expressed its will to ratify the CEDAW barring those principles of the Convention that do not conform to Tongan constitutional provisions.[104]

With regard to family law and equal treatment of women before the law, the two provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW) substantially cover the said area of governance with relevance. According to Article 15 of the CEDAW it is mandated that:

> "*Article 15*
> *1. States Parties shall accord to women equality with men before the law. 2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity…4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile."*[105]

Additionally, Article 16 of the Convention provides non-discriminatory principles respecting women and their marital concerns such that:

> "*Article 16*
>
> *1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage;*
>
> *(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*

[104] UN Women Asia and the Pacific, 'UN agencies welcome Tonga's decision to ratify CEDAW' (2015) https://asiapacific.unwomen.org/en/news-and-events/stories/2015/03/un-agencies-welcome-tonga-s-decision-to-ratify-cedaw (Accessed 3 March 2020).
[105] *Convention on the Elimination of all Forms of Discrimination Against Women 1979 (CEDAW).*

(c) The same rights and responsibilities during marriage and at its dissolution…"[106]

Both the provisions address civil issues of gender inequalities and the exercise of legally accomplished rights and freedoms for women. They also focus on the employment of favourably material actions and initiatives that are non-discriminatory aspects associated with marriage and family as justifying women's equality with men. For example, equal rights in the legal method for dissolution of marriage. This accommodates to the notions of feminism where scholars in the legal domain believe that the legal process can construct and sustain universal standards of gender neutrality in the societies for women[107] and acknowledge their interests, adversities, and experiences. According to Jalal[108], divorce laws in the Pacific Island countries that are not in compliance with Article 16 of the CEDAW, that are those not being no-fault regimes, and so exhibit discrimination against women. The fault oriented dissolution of marriage rather continues the perpetuation of gender inequalities and inequities for women in its existence. The fault system of divorce largely embraces the 'fault' of adultery. Those that can be seen in practice and in law in the South Pacific countries of, and as they are, Tuvalu, Tonga, Kiribati, the Solomon Islands, and Vanuatu. The commission of adultery by the responding party during a marriage is considered as a ground for divorce or proving in fact for the breakdown of marriage in the said nations, only upon which divorce will be granted. It is contradictory to those international standards of human rights of women that encourage eradication of this practice as adhering to provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW).

In 2012, the UN Working Group on Discrimination against women in law and in practice addressed to all States to abrogate domestic laws that criminalise adultery.[109]

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[106] *Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW).*
[107] Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (1995).
[108] Imrana Jalal, 'Gender equity in justice systems of the Pacific Island Countries and Territories' (Technical Background Paper, Asia Pacific Human Development Report Background Paper Series 2010/2014, 2010).
[109] United Nations Human Rights Office of the High Commissioner, 'Adultery as a criminal offence violates women's human rights' (2012) https://www.ohchr.org/Documents/Issues/Women/WG/AdulteryasaCriminalOffenceViolatesWomenHR.pdf (Accessed 3 March 2020).

The reason for this being that enforcement of adultery is discriminatory against women and is the cause of violence in law and in practice against women. The analysis report[110] of the UN Secretary-General, OHCHR special rapporteurs and the treaty bodies, the Working-Group drew the inference that encouragement of adultery as a legal concept and its embedment in discriminatory laws become particularly focused on women in ways that liberate violence against women. In line with this, the CEDAW bodies have also labelled legislation covering adultery as discriminatory of women and obsolete[111] in its nature owing to the emphasis of the Human Rights Committee on the point that continuing legal existence of adultery provisions will impede the will of women to report crimes of rape committed against them under the fear that their reports will be linked to adultery. Therefore, the formal written laws for fault divorce that include adultery as one of the statutorily permissible basis or proving of circumstances for divorce neither supports the democratically driven feminist considerations and concerns, nor it aids in the cessation of discriminatory laws and societal acts against women.

Nonetheless, the no-fault system of dissolution of marriage adopted in Fiji and Samoa is a conformity product of the feminist approach and principles covered under the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW). To illustrate, in the Fiji case of *LK v. JVR* [2009] FJHC 60[112], in addition to the need to recognise the fundamental change in dissolution being the no-fault principle in dissolution of marriage, the court noted that attuning to international human rights standards are promoted in the *Family Law Act 2003*, and one is the standard of the CEDAW in particular. The feminist perspective on divorce legal frameworks has justified the existence of the no-fault mechanism to divorce in literature. It is argued that the no-fault divorce is an initiative for the removal of an

[110] United Nations Human Rights Office of the High Commissioner, 'Adultery as a criminal offence violates women's human rights' (2012) https://www.ohchr.org/Documents/Issues/Women/WG/AdulteryasaCriminalOffenceViolatesWomenHR.pdf (Accessed 3 March 2020).
[111] United Nations Human Rights Office of the High Commissioner, 'Adultery as a criminal offence violates women's human rights' (2012) https://www.ohchr.org/Documents/Issues/Women/WG/AdulteryasaCriminalOffenceViolatesWomenHR.pdf (Accessed 3 March 2020).
[112] *LK v. JVR* [2009] FJHC 60.

inequitable inherent mechanism that restricted a successful divorce for only, and only, when one spouse was at fault.[113]

On one hand, few have been critical of the reform of no-fault as being inspired my feminism that catalysed the goodness of marriages into worse, on the other, reformers of feminism have stressed the opportunity in a no-fault system of divorce for women to walk out of a marital relationship that is unhappy[114] and grievous. One illustration of this is in the voice of human rights advocacy for gender and women's equality in the South Pacific.[115] It is believed that unlike the fault-based dissolution of marriage, that is irrespective of the nature of faults or proving of guilt as with or without adultery provision, the no-fault divorce gives both women and men equal opportunity to leave an unhappy marriage with dignity. In that fashion, feminists rather have become catalysts for reforms, and for the legal dissolution of marriages that are unfair and unhappy for women. It was a window of opportunity for those women who have been in unfair and bad marriages for several years. It can be deduced to be also for those women who have been the 'homemakers' in an unhappy marriage for years due to their incapacity to overcome the burden of proving a fault in their spouse and for divorce. In fact, the supporting argument for the role of feminism is derived by way of feminist initiatives that women gained equal access to those opportunities that are economic in nature and enhance their capacity and ability to no longer allow themselves to succumb to an unhappy marriage, but rather exit from it.

From the economic point of view, the no-fault system of divorce is a reform for women with regards to law and gender inequities, even in the marginalised bracket as opposed to the fault regime. This includes: women that are low-wage earners, women that are not working, home-makers, women from rural areas, and women who are surviving glimpses of poverty in life. Carbone in her study compiled the liberal, radical and cultural feminists' views that infer that women in various sections of society mostly

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[113] Herma Hill Kay, 'Equality and Difference: A Perspective On No-Fault Divorce And Its Aftermath' (1987) 56 *Cincinnati Law Review* 1 https://pdfs.semanticscholar.org/615f/08b09b05372df7d3ac7e1eaa248a5273ff3d.pdf?_ga=2.207153808.284167920.1590066479-1962308527.1589553428 (Accessed 3 March 2020).

[114] HuffPost, 'Did Feminism Cause Divorce?' (2011) https://www.huffpost.com/entry/did-feminism-cause-many-d_b_836327?guccounter=1 (Accessed 4 March 2020).

[115] Imrana Jalal, 'Gender equity in justice systems of the Pacific Island Countries and Territories' (Technical Background Paper, Asia Pacific Human Development Report Background Paper Series 2010/2014, 2010).

earn less than men.[116] To illustrate, in the South Pacific, the land is regarded as an essential asset for economic reliability.[117] With reference to entitlement and ownership of land, the state laws in all South Pacific nations do not expressly discriminate against women, except in Tonga. The Pacific Regional Rights Resource Team has noted that in practice, the economic independence of women is not an absolute realisation in the region as the management and control of acts or decisions concerning land still commonly stays with male relatives in customary settings.[118] This is demonstrated in the Solomon Islands where the *Moli Ward Customary Law Ordinance 2010* (Solomon Islands) is a relevant legislation that directly enforces women's rights to own customary land only in the Moli ward (one of the 21 wards in the Guadalcanal Province of the Solomon Islands) under section 68(1).[119] The recognition is limited to the Moli ward only, with practices and systems of customary land tenure in the rest of the Solomon Islands existing with customary norms that are discriminatory against women as the report[120] suggests that no footprints of such rights exercised nor precedents that demonstrate the application of the matrilineal system or passing of land through female heirs, as opposed to male counterparts. An extension of this is explained in *Awop v. Lapenmal* [2007] VUIC 2 where the court noted that:

> "*Land is traditionally transferred or inherited patrilineally from the chief or original ancestor to the eldest son who would normally bear the responsibility for providing equal distribution of the deceased father's land to other siblings, relatives and kinships. This is a male predominated system which is twinned with the land tenure system handed down from generation to generation. The only exceptional condition to the general principle of land ownership is that in the situation where there are no more surviving male heirs to the land then, ownership will pass on to the matrilineal offspring. This is*

[116] June R. Carbone, 'A Feminist Perspective on Divorce' (1994) 4 *The Future of Children* 1 https://www.jstor.org/stable/1602484?read-now=1&seq=1 (Accessed 5 March 2020).
[117] Pacific Regional Rights Resource Team, *Supplement to Law for Pacific Women: A Legal Rights Handbook* (2013).
[118] Pacific Regional Rights Resource Team, *Supplement to Law for Pacific Women: A Legal Rights Handbook* (2013).
[119] *Moli Ward Customary Law Ordinance 2010* (Solomon Islands).
[120] Pacific Regional Rights Resource Team, *Supplement to Law for Pacific Women: A Legal Rights Handbook* (2013).

typically seen where a woman's children having bloodline to the extinct patrilineal line are given land acquisition. Conversely and by custom, the matrilineal descendants cannot claim land ownership if, there are surviving male descendants. Any claim following the matrilineal lineage would be culturally limited to a claim of right to utilize the land. Conditions are normally attached to that right of use as well. Example, such a claimant is duty bound to perform a customary rite of recognition to the uncles in exchange, prior to any use of the land."[121]

Moreover, an express land ownership disparity is evinced in Tonga under the *Land Act* [Cap 132] (Tonga) which includes two kinds of land holdings: tax allotments and town allotments. Under sections 43 and 45 of the Act, Tongan men who are over 16 years old have tax allotment and town allotment entitlements.[122] The law does not allow women to own any land, but a lease of land is permissible when section 33 is applied for hereditary estates.

However, women's economic security is still not ensured as married women who receive land as a gift from the male family members or the father, ultimately lose the rights and control of the gifted land owing to its registration legally under the husband's name.[123] Placing these circumstances into perspective make the no-fault mechanism a form of development for the said women, or those who are in the marginalised section, that now does not have to go through heavy costs to file an action, hire a legal professional[124], and produce witnesses in court in order to support evidence for the prove of fault.

In spite of the gender neutrality of the fault grounds, an immense burden to prove faults is placed on poor women from rural settings in particular by reason of their limited access to courts and those who want free their way out of the situation of domestic violence. Contrarily, the aim of no-fault dissolution of marriage is to have a divorce

[121] *Awop v. Lapenmal* [2007] VUIC 2.
[122] *Land Act* [Cap 132] (Tonga).
[123] Tonga Royal Land Commission Report (2012).
[124] Imrana Jalal, 'Gender equity in justice systems of the Pacific Island Countries and Territories' (Technical Background Paper, Asia Pacific Human Development Report Background Paper Series 2010/2014, 2010).

mechanism with little to no conflict. This helps those women who earn less than their male counterparts and are unable to bear the costs of divorce proceedings, which is likely to gradually increase with the increasing length of the adversarial process of evincing fault or guilt of an abusive or cruel spouse.

Furthermore, the no-fault mechanism can be inferred as a departure from a framework that did not just economically stressed and burdened women, but as well brought humiliating situation for women in the courts – the fault dissolution. The no-fault system does not place women in a position of weighing their unhappiness and will to escape marriage with the fear of an impact on privacy and dignity. Accordingly, in the South Pacific, Fiji and Samoa, both of who are parties to the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW) can be seen as have implemented non-discriminatory principles from the Convention by bringing into force the no-fault oriented legislation for dissolution of marriage as supporting the feminism movement of equality. Equality can be defined in this as the manifestation of substantive equality, as also reverting to the economic position of women in local societies.

In *Andrews v. Law Society of British Columbia* (1989) 1 SCR 143, the concept of substantive equality was highlighted as one that promotes equality in the sense that it promotes a society where everyone lives in the safe knowledge of their recognition as human beings at law are deserving of equal concern, respect, and consideration.[125] The idea of equality embraced in this form is reflective of the feminism approach to law-making. Especially one that concerns women and men substantially in its provisions, such as divorce laws. Substantive equality is also manifested in the no-fault regime from the feminism perspective. Likewise, substantive equality is reflected in a no-fault regime as in compliance with Article 16 of the CEDAW, which also according to Jalal[126] is seen in no-fault regimes in the South Pacific. In the sense of equality that enables all classes of women, that is the working class from urban areas or rural, have an equal method of access to divorce, and court process for the same matter. The no-

[125] *Andrews v Law Society of British Columbia* (1989) 1 SCR 143.
[126] Imrana Jalal, 'Gender equity in justice systems of the Pacific Island Countries and Territories' (Technical Background Paper, Asia Pacific Human Development Report Background Paper Series 2010/2014, 2010).

fault principle represents the facilitation of equality for all women before the law such as that not only the working-class women, who generally earn less and have to go through fault proving expensive adversarial method of getting a divorce, but also for those poor women from rural settlements, existing in the contemporary Pacific society[127] and that cannot afford an expensive adversarial divorce.

Whilst some feminist voices have supported the no-fault dissolution of marriage, some have argued against it. The contradictory views are directed to the substance of no-fault principle. To illustrate such an opposing position, it has been examined in the literature that the primary purpose for no-fault divorce is to rather serve a favourable design of process merely for lawyers to escape the lengthy process of assessment of blame involved in the fault system.[128] Nonetheless, in light of this, it can be noted that the no-fault mechanism is needful to be designed as a scheme that redefines the fault attributes in order to weigh the consequences of the bad and good conduct in marriage. In this fashion of the no-fault system, exploitative and abusive conduct against women driven by patriarchal standards will not be disregarded. A close example of this would be the amended dissolution of marriage regime in Samoa that substantially gives consideration to domestic violence under its dissolution of marriage provision. The no-fault principle supports values of democratisation in a system that embraces principles of CEDAW and the view of feminism by eradicating grounds such as adultery, and the onus of proving those faults that unfairly places an economic burden on women. Accordingly, deriving a monolithic interpretation of the no-fault mechanism is being neglectful of recognising and addressing diverse matrimonial conflicts leading to marital breakdown that are much to the interests of patriarchy in society.[129]

Inclusion of cruel treatment and domestic violence, not as absolute grounds for dissolution of marriage, albeit as common causes of circumstances in the formal

[127] UN Women Asia and the Pacific, 'Fiji' (2020) https://asiapacific.unwomen.org/en/countries/fiji/co/fiji (Accessed 3 March 2020).
[128] Katharine Bartlett & Barbara Bennett Woodhouse, 'Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era' (1994) *Georgetown Law Journal* https://scholarship.law.duke.edu/faculty_scholarship/1704 (Accessed 5 March 2020).
[129] Hannah Chen, 'On Divorce: A Feminist Christian Perspective' (2003) 11 *Feminist Theology* 2 https://doi.org/10.1177/096673500301100215 (Accessed 23 March 2020).

written laws pertaining to dissolved marriages can be the feminist answer to address the same for women in abusive marriages or those subjected to domestic violence. Yet again, this should be done for those facts that do not necessitate criminal or tort actions, which would be an appropriate administration of justice for the concerning circumstances. As in *PP v. RP* [2009] FJHC 72[130] it was highlighted that matrimonial 'offences' cannot be supported in the no-fault dissolution of marriage which is a departure from the evidence that is of criminal or quasi-criminal standards. Even, through proving of circumstances leading to breakdown of marriage or as the guilt of a spouse, the implementation of the principles of CEDAW and feminist approach is not found in fault regimes. Such as in the alike regimes of Nauru, Tuvalu, Tonga, Vanuatu, the Solomon Islands and Kiribati that follow the fault philosophy. The inconsistency of these statutory frameworks with the CEDAW is seen in the demanding position that the regime places women in. For example, in Kiribati, where women have to produce evidence for matrimonial offences or faults like adultery and desertion is indicative of interference with their privacy and dignity.[131]

Furthermore, the proving of faults or facts or guilt of a party to obtain a divorce can often be unsuccessful or cause a time consuming adversarial process. An instance is the case of *James v. James* [2001] VUSC 72, where the court reasoned the dismissal of the petition for divorce on the ground of adultery being unsuccessful in evidence with the note that:

> "*It is not easy to prove act of sexual intercourse*"[132]

In addition, some faults do not have an absolute definition in the family or divorce contexts in order to legally dissolve on the balance of probabilities as required in evidence. Often, the evidence of faults or facts is not consistent with the legal definitions of the 'faults'. Where not legally proven or defined, it can remain an allegation that can harm the dignity of a woman for life. For example, in cases that

[130] *PP v. RP* [2009] FJHC 72.
[131] Pacific Women, 'Stocktaking of the gender mainstreaming capacity of Pacific island governments -Kiribati- ' (2015) https://pacificwomen.org/wp-content/uploads/2017/09/Kiribati-gender-stocktake.pdf (Accessed 6 March 2020).
[132] *James v. James* [2001] VUSC 72.

concern the fault or fact relating to cruel treatment. This is demonstrated in the case of *Nomisa v. Nomisa* [2002] SBHC 126, where the petition for dissolution of marriage was made on the ground of cruelty against the respondent being the wife. There, the court pointed out that the ground of cruelty "...can be damaging to her character as a mother and wife in the home."[133] It was noted that 'cruelty' is not defined in the relevant context but rather is derived from judge-made definitions and authoritative texts. The petition was denied as the court reasoned unsatisfactory evidence to cruelty. It can be inferred that the fault theory of divorce inhibits women to escape an unhappy marriage as it is difficult to prove faults or guilt or matrimonial offences that do not have a true definition to the divorce frameworks or have a variety of legal definitions.

To add, divorce frameworks that embody the fault philosophy can cause a negative impact on the dignity and character of women for the roles they play in the family. Therefore, the no-fault approach is a reform to recognise and to redress the gender inequities in the divorce frameworks of the South Pacific States in line with the CEDAW, that cannot be achieved with the fault theory of divorce. Whether it is the proving of one or two faults, or guilt or circumstance, including adultery or not, the fault principle of divorce is deduced as discriminatory against women for the opportunity of patriarchal societal attitudes it creates against them. Additionally, it does not address the gender inequities that exist in the Pacific Island states concerning divorce regimes, that rather is done through the no-fault divorce. Namely, the financial burden on women and the creation of humiliating circumstances for them. Of course, domestic violence or cruel treatment to women should also be substantiated in the legal framework for divorce to address domestic violence in its contextual origins and corresponding repercussions, against women. That is to say, the marriage and its ultimate breakdown as the women wishing to depart from graveness of her marital relationship.

Moreover, the mechanism used in Samoa is relatively demonstrative of this approach. It exists in a fashion that does not intersect with areas of criminal or tortious liability but only is assessed to conclude the breakdown of marriage through a required period of separation. As it has been noted by the courts and literary voices that the nature of

[133] *Nomisa v. Nomisa* [2002] SBHC 126.

no-fault divorce framework does not warrant assessment matrimonial offences or guilt. As also, it can be inferred from cases that the involvement of proving faults in a divorce mechanism allows disadvantageous instances for women. Thus, the true no-fault regimes enforced in Fiji, and in Samoa that also gives attention to domestic violence for a simple divorce, are not only the implementation of the relevant principles of the CEDAW but also demonstrative of the feminist approach and substantive equality.

III. Pacific Regionalism – Human Rights for The Pacific

The purpose of regionalism goes beyond geographical attributes. A region is organised with its common political, cultural and traditional elements. The system of ideologies and concepts that give meaning to regionalism is a process at the international level in the sense that it is a constant reference to transnationally shared problems to common resolutions for the same. Consequentially, to meet a shared goal of cooperation amongst a group of countries that are affected equally by each other's' polity, societal ideas and range of developments on account of not merely their geographical association, but also historical and political concerns that are influenced by their common cultural identity. For example, the South Pacific region. The inherent nature of the developments through regionalism is in its primary dynamic of promotion of those interests that are shared at the political, economic and cultural level.[134]

As a movement, regionalism is believed to be an activism fashion of answer to resolve regional matters.[135] This has given regionalism an advanced interpretation relating to the civil policy as a policy agenda and also issues of regional development.[136] To comprehend the nature of developments in a regional context, it is vital to abandon

[134] Ana Jovanovic, Darko Vukovic & Moma Jovanovic, 'Contemporary Models of Regionalism' (2012) 58 *Journal for Economic Theory and Practice and Social Issues* 12 https://ageconsearch.umn.edu/record/289605 (Accessed 13 March 2020).
[135] Shaun Breslin, et al, *New Regionalism in the Global Political Economy: Theories and Cases* (2002).
[136] Viviene Taylor, 'Advancing regionalism and a social policy agenda for positive change: From rhetoric to action' (2015) 15 *Global social policy* 3 https://doi.org/10.1177/1468018115600123 (Accessed 13 March 2020).

traditional theories and adopt pluralistic mechanisms.[137] In addition to this, regionalism as an international process requires standards of legal developments in compliance with international standards of laws. This, for a region, will of course be also melded with its cultural considerations. In the context of this analysis, regionalism is an extension of international human rights law followed and implemented as a regional framework in order to attain good governance for a group of States whose framework for governance have cultural and historical resonance. It is also influenced by various areas of law and law-making within a State, and its development, such as a legal framework for dissolution of marriage. Substantially, this sense of regionalism will be considered for analysis of legal approaches for divorce from the lens of a human rights mechanism for the Pacific region.

With reference to a regional human rights system, the Europe system of human rights is presently recorded as notably a leading regional integration.[138] Its success has inspired the scope and process for regionalism in other continents over the years. The *European Convention on Human Rights 1953* is one of the main sources for the rule of law and human rights as a regional mechanism dealing with issues different areas of law in light of human rights, including family law. An example of a case about family law matter, specifically domestic violence in the family law context that applied the Convention was the case of *Eremia v. Republic of Moldova* [2013] ECHR, Application No. 3564/11 (28 May 2013).[139] Human rights concerns are also covered under the sixteen Protocols to the *European Convention on Human Rights 1953*. Specifically, the seventh Protocol to the *European Convention on Human Rights 1953* explicitly contains a provision on the spousal relationship in light of human rights standards. This can be found under Article 5 of the seventh Protocol to the *European Convention on Human Rights 1953*. It states that

> "*Equality between spouses.*

[137] Giovanni Barbieri, 'Regionalism, globalism and complexity: a stimulus towards global IR?' (2019) 4 *Third World Thematics: A TWQ Journal* 6 https://doi.org/10.1080/23802014.2019.1685406 (Accessed 14 March 2020).
[138] Lorenzo Fioramonti, *Regionalism in a Changing World: Comparative Perspectives in the New Global Order* (2013).
[139] *Eremia v. Republic of Moldova* [2013] ECHR, Application No. 3564/11 (28 May 2013).

> *Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution*."[140]

The provision promotes gender equality in the legal divorce framework of EU countries. An example of this in the EU context is the availability of a no-fault method of dissolution of marriage in France. Mostly, where parties to a marriage have equal rights to mutually consent to a dissolution of their marriage without having to go through battle concerning the fault of another.[141] Parties can draw a dissolution of marriage agreement through a lawyer by mutual consent. Accordingly, it is not mandatory to prove the fault of the adultery on the part of the responding party, in the event that the parties to the marriage mutually consent to the legal dissolution of their marriage.[142] It is a regime in compliance with a regional human rights framework in the EU, that is *European Convention on Human Rights 1953*.

A similar regional mechanism for human rights has been established in the region of Africa. It is the *African Charter on Human and Peoples' Rights 1986*.[143] The African Charter is also called the Banjul Charter. It provides a regional legal framework for the promotion of fundamental freedoms and rights in the regions of Africa. The Charter has substantial similarities with the *European Convention on Human Rights 1953*. Yet, it was the *African Charter on Human and People's Rights* upon which the first draft of the *Pacific Charter on Human Rights* was created in 1989 in Samoa to establish a Pacific Regional Human Rights system.[144] In fact, in the South Pacific

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[140] *European Convention on Human Rights 1953* https://www.echr.coe.int/Documents/Convention_ENG.pdf (Accessed 12 April 2020).

[141] Kingsley Napley, 'Whose fault is it anyway? A French perspective on divorce by mutual consent and no fault' (2017) https://www.kingsleynapley.co.uk/insights/blogs/family-law-blog/whose-fault-is-it-anyway-a-french-perspective-on-divorce-by-mutual-consent-and-no-fault-divorce (Accessed 14 March 2020).

[142] Notaires de France, What procedure in case of a divorce in France? (2020) https://www.notaires.fr/en/couple-family/differents-types-divorce (Accessed 23 April 2020).

[143] *African Charter on Human and Peoples' Rights 1986.*

[144] Imrana Jalal, 'Why Do We Need A Pacific Regional Human Rights Commission?' (Conference Paper) https://www.wgtn.ac.nz/law/research/publications/about-nzacl/publications/special-issues/hors-serie-volume-viii,-2008/Jalal.pdf (Accessed 13 March 2020).

context, legal scholars[145] have considered the regional instrument of *African Charter on Human and People's Rights* to be a more direct supplement for the application of human rights in the domestic legal systems, compared to the variety of international human rights instruments, application of which can often be more complex. The human rights principle related to the subject of dissolution of marriage and that including the rights of gender equality, and the rights of women in a regional mechanism of human rights resonating with the potential mechanism of such a framework for the South Pacific, is found in the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2005*.[146] The Protocol is also titled as the *Maputo Protocol*. It contains an extensive set of rights of women relating to the marital circumstances of social, legal, and political concern inclusive of equality with men. The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2005* guarantees these rights for women and men across the African regions embodied in Articles 7 and 8, that mandate:

> "*Article 7*
> *States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:*
> *a) separation, divorce or annulment of a marriage shall be effected by judicial order;*
> *b) women and men shall have the same rights to seek separation, divorce or annulment of a marriage; …*"[147]

> "*Article 8*
> *Access to Justice and Equal Protection before the Law*
> *Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all*

[145] Peter Creighton, 'Pacific Human Rights Law Digest' (2015) 3 *Pacific Human Rights Law Digest* http://www.paclii.org/cgi-bin/sinodisp/other/PHRLD/pacific-human-rights-law-digest-3.html?stem=&synonyms=&query=African%20Charter (Accessed 16 June 2020).
[146] *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2005* https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf (Accessed 13 March 2020).
[147] *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2005* https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf (Accessed 13 March 2020).

appropriate measures to ensure:
a) effective access by women to judicial and legal services, including legal aid;…
…f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women."[148]

In the event of the implementation of a regional human rights mechanism for the Pacific, such as the Pacific Charter of Human Rights that was based on the *African Charter of Human and Peoples' Rights*, the fault principles embedded in the dissolution of marriage regimes of Tonga, Vanuatu, Kiribati, and the Solomon Islands, with Nauru and Tuvalu, will not be instrumental in upholding the principles of human rights embodied in a regional human rights framework for the South Pacific. It will be a conflicting issue amongst countries of the Pacific that have a no-fault system of legal dissolution of marriage, whereby men and women are not disproportionately[149] burdened with proving the guilt of their spouse to obtain a divorce, nor the marginalized section of women, that is poor rural women, are financially worried about battling a legal case of proving fault in order to leave an unhappy marriage.

One instance is the customary standards of human rights violations relevant to the South Pacific context operating with fault theory of divorce that impedes the implementation of a regional mechanism for human rights. For example, in Vanuatu and Solomon Islands, that statutorily follow the fault theory of divorce, require custom marriages to be dissolved according to customs under section 4 of the *Matrimonial Causes Act*[150] and section 4 of the *Islanders' Divorce Act* [Cap 170] (Solomon Islands)[151], respectively. In this fashion of divorce, a comprehensive and definite procedure is not prescribed and so inconsistent methods of dissolution can cause human rights violations. In other words, if the customary divorce processes, that is neither statutorily nor expressly defined, are performed in a discriminatory manner,

[148] *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2005* https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf (Accessed 13 March 2020).
[149] Imrana Jalal, 'Gender equity in justice systems of the Pacific Island Countries and Territories' (Technical Background Paper, Asia Pacific Human Development Report Background Paper Series 2010/2014, 2010).
[150] *Matrimonial Causes Act* [Cap 192] (Vanuatu).
[151] *Islanders' Divorce Act* [Cap 170] (Solomon Islands).

then a lot of people will be in violation of human rights laws.[152] The gender inequities in light of the fault elements of divorce that is largely driven by custom, such as the significance given to adultery as a fault and how cruelty in evidence is dealt with, can entail discriminatory treatment particularly towards women[153], and will accordingly contradict human rights standards. For instance, it has been gathered[154] that strong customary beliefs attached to customary divorce can often enhance women's vulnerability to domestic violence or cruelty in a bad marriage and limit their accessibility to convenient divorce as namely suggesting the young women to resort to religious prayers and recognise their responsibility towards their husbands and stay in the marriage. Likewise, it has been highlighted that divorce by customs in the region with the rigidity of fault philosophy can have discriminatory impact on women.[155] Therefore, the fault-based and customary divorce will not foster a regional human rights framework.

Furthermore, regionally oriented human rights framework will provide a legal approach to those human rights issues within the region, in other words, for a group of countries that share a cultural and societal identity. A regional regime is an implementation of a platform that not only brings awareness of local standards of human rights laws but also by enforcing international standards of human rights in a distinct cultural setting, collectively. The regional system of human rights will not merely have a complementary role to play to the international framework, but also such a mechanism in the Pacific can potentially transform its distinct identity in the approaches relevant to the enforcement of human rights in a regional context. For example, the no-fault system in Samoa is contributory to a regional human rights system. As the incidence of domestic violence is highest across the globe in the South

[152] Jean G. Zorne, 'Custom Then and Now: The Changing Melanesian Family' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (2010) 99.
[153] International Knowledge Network of Women in Politics, 'Translating CEDAW into Law: CEDAW Legislative Compliance in Nine Pacific Island Countries' (2007) https://www.iknowpolitics.org/en/knowledge-library/international-agreement-and-action-plans/translating-cedaw-law-cedaw-legislative (Accessed 18 September 2020).
[154] United Nations Office Human Rights Office of the High Commissioner, 'The Ngo Shadow Report On The Status Of Women In Solomon Islands, 2014' (2014) https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/SLB/INT_CEDAW_NGO_SLB_18377_E.pdf (Accessed 17 September 2020).
[155] Imrana Jalal, 'Gender equity in justice systems of the Pacific Island Countries and Territories' (Technical Background Paper, Asia Pacific Human Development Report Background Paper Series 2010/2014, 2010).

Pacific, and so it is indicative of the proportionate extent of violation of human rights in a marriage. The basis of dissolution of marriage grounds in Samoa is the no-fault principle. Nonetheless, within the same provision for the sole ground for dissolution of marriage, domestic violence in a marriage, within the matter of its dissolution, is given some attention. Thus, this can be a Pacific example of a divorce regime that deals with human rights violations in marriages whilst also retaining the no-fault system that conforms to human rights standards.

In addition to this, the first South Pacific nation to become a party to the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) was Samoa and following this, eventually, Samoa amended the basis of its dissolution of marriage regime from fault to a no-fault. This step of Samoa was a contribution towards Pacific regionalism of human rights, as also was Fiji's. Furthermore, the current developments in all aspects of governance in the Pacific region, such as one being the dissolution of marriage, also play a key role in regionalism in the sense of a regional mechanism for the rights and freedoms of the Pacific citizenry. For example, most Pacific Island countries that were British dependencies adopted the British mechanism of dissolution of marriage laws after gaining independence from the British. This placed the countries historically in a common value system of the legal framework for dissolution of marriage. For instance, where it was enforced, all of the South Pacific countries enforced dissolution of marriage laws that was fault oriented as adopted from the said laws in England as self-governance commenced.[156]

A regionalism perspective to the dissolution of marriage regimes in the Pacific begins with the historical account of matrimonial regimes adopted in the South Pacific countries, and following that, to deduce the regression in regionalism for the region or presence of progressive efforts to retain the regionalism with regard to family law affecting the Pacific citizenry. This dates back to when the Pacific Island nations gained independence. After gaining independence, Fiji, Samoa, Nauru, Tuvalu, Tonga, Vanuatu, Solomon Islands and Kiribati adopted a relevant English style instrument for

[156] Jennifer Corrin, 'It Takes Two To Tango, but Three To Commit Adultery: A Survey of the Law on Adultery in Post-Colonial South Pacific States' (2012) 26 *International Journal of Law, Policy and the Family* 2 http://lawfam.oxfordjournals.org/content/26/2/187.short (Accessed 12 June 2020).

the self-governance of marital dissolution in their countries. Namely: Fiji adopted the *Matrimonial Causes Act* [Cap 51] (Fiji); Samoa adopted the *Divorce and Matrimonial Causes Ordinance 1961* (Samoa); Nauru adopted the *Matrimonial Causes Act 1973* (Nauru); Tuvalu adopted the *Matrimonial Proceedings Act* [Cap 21] (Tuvalu); Tonga adopted the *Matrimonial Causes Act 1973* (UK); Vanuatu adopted *Matrimonial Causes Act 1973* (UK); Solomon Islands adopted the *Matrimonial Causes Act 1950* (UK); and Kiribati adopted the *Matrimonial Causes Act 1950* (UK). The dissolution of marriage post-independence in the South Pacific region was fault-based in its entirety.

However, in 2003, Fiji adopted the no-fault principle of "irretrievable breakdown of marriage"[157] for its dissolution of marriage framework from Australia. The no-fault system is guaranteed in the *Family Law Act 2003* in Fiji. Following Fiji's first step towards a non-discriminatory legislation in the area of divorce and obeying its human rights treaty obligations, Samoa as well amended its dissolution of marriage laws from fault-based to a true no fault system with the same ground as enforced Fiji and Australia. Hence, in the present time, Fiji and Samoa's subscription to a common value system for South Pacific region through the adoption of the no-fault divorce, imply a contributory step towards Pacific regionalism and solidifying the potential of a regional mechanism for promotion and protection of human rights.

The Pacific society shared a common value system with regard to governance of divorce across the Pacific region, prior to the developments to divorce laws in Fiji and Samoa. If a Pacific regional mechanism for human rights is established, in the essence of its values and principles of equality and non-discrimination it will not resonate with the fault-based divorce system. As by virtue of the principles under the regional mechanism for human rights in the Pacific, South Pacific states will be committed to the implementation of laws that conform to human rights standards and are non-discriminatory in its practical and legal nature. That is to say in consideration of both men and women as parties to a marriage and for the purpose of riddance of gender inequities. For example, in the event of a provision that is in line with Article 15 of the seventh Protocol to the *European Convention on Human Rights*, and provisions of a

[157] *Family Law Act 1975* (Australia).

proposed Pacific Charter to be based on the substantive provisions of the Protocol to the *African Charter*, with reference to Articles 7 and 8.

Therefore, Pacific regionalism manifested through a prospective Pacific Charter for Human Rights and its success will necessitate a range of international standard of developments in a transnational context. It can be construed as an umbrella term that covers the development of different areas of governance in compliance with human rights and implementation of civil rights amongst a group of countries that share a common path towards democratisation of its legal system from common political history. It will also be affected by the divorce laws that involve both men and women, which will become guidance for establishing principles for good governance[158] across the South Pacific.

As it is noted in the literature that in the South Pacific region the collective values revolve around principles and ideologies of solidarity and reciprocity, and maintenance of kinship relationships that are contained in the legal area of dissolution of marriage.[159] It will require the enforcement of domestic laws that conform to principles of international human rights standards and the CEDAW principles that obliges implementation of non-discriminatory laws in relation to women, including their equality with men. For instance, as both are legal parties to a marriage and in the legal issue of its dissolution.

IV. Pacific Socio-Cultural Context

The Pacific socio-cultural context can be identified in the distinct cultural and societal beliefs and values that South Pacific countries are known to embody in their regional cultural identity. It is the traditions and the Pacific values and belief system, a large

[158] Peter Creighton, 'Pacific Human Rights Law Digest' (2015) 3 *Pacific Human Rights Law Digest* http://www.paclii.org/cgi-bin/sinodisp/other/PHRLD/pacific-human-rights-law-digest-3.html?stem=&synonyms=&query=African%20Charter (Accessed 16 June 2020).
[159] Stewart Firth, *Globalisation and Governance in the Pacific Islands: State, Society and Governance in Melanesia* (2006).

derivation of which is family as an essential unit of the Pacific community. Different societies within the Pacific community have different values, albeit, most of the value system is maintained with a standard of behaviour, character, ideals, and morals. These are often linked to largely observed principles of Christianity[160] across the South Pacific communities.

The key constituent for most people of the South Pacific communities and the manner in which they lead their lives is the set of family values.[161] The values that establish interconnectedness beyond families and societies across the Pacific and cultural strength from the same is deemed as the foundation of well-being of Pacific individuals and the community. For this reason, the South Pacific citizenry exemplifies a great degree of cultural connectedness leading to the inference that socially cohesive communities have the potential to create healthier individuals. Thus, these beliefs and values known as the Pacific values collectively is the basis for the South Pacific socio-cultural context, which also forms customs or customary law.

Furthermore, after gaining independence and establishing self-governing written Constitutions, the South Pacific countries protected and promoted customary law under its Constitutions. For instance, the self-governing historical or unrevised of: Constitutions of Fiji [*Constitution of Fiji 1990*]; Samoa [*Constitution of Samoa 1962*]; Nauru [*Constitution of Nauru 1968*]; Tuvalu [*Constitution of Tuvalu 1986*]; Vanuatu [*Constitution of Vanuatu 1980*]; Solomon Islands [*Constitution of Solomon Islands 1978*]; and Kiribati [*Constitution of Kiribati 1979*] expressly stated the enforcement of customary law in and by the courts.[162] With reference to this, during the enforcement of these provisions, the court gave legal regard to customs, as also overriding any notion of universalism when dealing with the dissolution of marriage. In this fashion of legal dissolution of marriages, where adultery was against customary principles and common regional values, it was enforced in courts for dissolution of marriage.

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[160] David Armitage & Alison Bashford, *Pacific Histories: Ocean, Land, People* (2014).

[161] New Zealand Qualifications Resource Library, 'Pacific Values and Principles' (2017) https://library.careerforce.org.nz/Learning%20Assessment%20Resources/LG25987-3.0.pdf (Accessed 19 March 2020).

[162] Jennifer Corrin Care, 'The Status of Customary Law in Fiji Islands After the Constitutional Amendment Act 1997' (2000) 4 *Journal of the South Pacific Law* https://www.usp.ac.fj/index.php?id=13193 (Accessed 1 March 2020).

For example, in Tonga, affiliation to Christian beliefs influences social and sexual behaviours such as those that are adulterous and that makes an integral part of customs.[163] This influences the manner in which laws are made in accordance with some moral criteria[164], including the prohibition of adultery in accordance with Christian principles in Tonga.[165][166] Another illustration is in the Vanuatu case of *Maltok v. Maltok* [2002] VUSC 70, in which dealing with the issue of dissolution of marriage on the ground of adultery, the Supreme Court reasoned adultery in the context of marriage as belonging to contradictory principles of Christianity and values of the region.[167] Hence, the fault principles were enforced for the governance of its dissolution of marriage issues as it conformed to a legal framework in the Pacific Island countries that also used customs for legal disputes for their people.

Additionally, during the time of the statutory enforcement of customs, Christian principles were regarded as one of the elements of the customs across Pacific communities.[168] It goes on to justify the fault oriented divorce regime because it is a mechanism to legally condemn adultery as moral wrongdoing. Even, contrarily, from the feminist Christian point of view, it is recorded in the literature that the no-fault system of divorce is rather a positive medium for the commission of adultery by a spouse, as such that gives a spouse incentive to cheat in a marriage.[169] It morally contradicts the traditional value system of the Pacific and evinces the Pacific customary view of maintaining a regime that legally considers adultery in the context of marriage.

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[163] Sue Farran and Alexander Su'a, 'Discriminating on the grounds of status: Criminal law and *fa'afafine* and *fakaleiti* in the South Pacific' (2005) 9 *Journal of the South Pacific Law* 1 http://www.paclii.org/journals/fJSPL/vol09no1/5.shtml (Accessed 19 September 2020).
[164] Sue Farran and Alexander Su'a, 'Discriminating on the grounds of status: Criminal law and *fa'afafine* and *fakaleiti* in the South Pacific' (2005) 9 *Journal of the South Pacific Law* 1 http://www.paclii.org/journals/fJSPL/vol09no1/5.shtml (Accessed 19 September 2020).
[165] Sione Latukefu, *Church and State in Tonga* (1965).
[166] Finau Pila 'Ahio, 'Christianity and taufa'āhau in Tonga: 1800-1850' (2007) 23 *Melanesian Journal of Theology* 1 https://paeapoasa.files.wordpress.com/2017/02/23-1_22.pdf (Accessed 19 September 2020).
[167] *Maltok v. Maltok* [2002] VUSC 70.
[168] David Armitage & Alison Bashford, *Pacific Histories: Ocean, Land, People* (2014).
[169] Hannah Chen, 'On Divorce: A Feminist Christian Perspective' (2003) 11 *Feminist Theology* 2 https://doi.org/10.1177/096673500301100215 (Accessed 23 March 2020).

Nonetheless, a notion also exists in the legal systems of the South Pacific that morality that is associated with Pacific customs but not always with courts of law.[170] In the courts, customs or morality as part of Pacific cultures is not always considered in all issues of a divorce petition concerning adultery. In the fault-based dissolution of marriage case of *Banga v. Waiwo* [1996] VUSC 5, Vaudin d'Imecourt CJ with regard to adultery emphasised in his judgement that:

"*Our Divorce Courts are not Courts of Morality, but Courts of Law.*"[171]

In Vanuatu, under the *Matrimonial Causes Act* [Cap 192], which encompasses the fault oriented principles for divorce, gives significance to customs pertaining to the dissolution of marriage. That is to say, customary marriages are permitted to be dissolved in compliance with the relevant customs. In the Pacific customary dissolution of marriages, violence is often principally justified as a ground.[172] It can be seen as a favourable contextual mechanism, of fault-based dissolution, for those women in the rural Pacific setting who wish to leave an unhappy marriage or an abusive one where they are subjected to domestic violence.

To add, considering the distinct Pacific culture, that further varies from each South Pacific state to another, a customary dissolution of marriage mechanism paves the way for resolution in a way where the parties' socio-cultural context is taken into account for the dissolution. As Dr. Konai Helu Thaman emphasised giving regard to Pacific cultures in the family context that it is needful to delve greatly into the living background of people, an understanding of their values and context for the purpose of generating resolutions for their issues.[173] Therefore, a Pacific socio-cultural position will predominantly uphold the fault oriented dissolution of marriage, either by means of a customary dissolution of marriage mandated under a statute as seen in Vanuatu's

[170] Benedicta Rousseau, '"This is a Court of Law, Not a Court of Morality.": *Kastom* and Custom in Vanuatu State Courts' (2008) 12(2) *Journal of the South Pacific Law* http://www.paclii.org/cgi-bin/sinodisp/journals/JSPL/2008/22.html?stem=&synonyms=&query=court%20of%20morality (Accessed 28 June 2020).
[171] *Banga v. Waiwo* [1996] VUSC 5.
[172] Jennifer Corrin Care & Donald Edgar Paterson, *Introduction to South Pacific Law* (revised, 2007).
[173] Paesfik Proud, 'Culture and Values informing strong Pacific families' https://www.pasefikaproud.co.nz/stories/culture-and-values-informing-strong-pacific-families/ (Accessed 27 March 2020).

regime, or statutorily guided dissolution of marriage where faults or proving of 'guilt' in the form of facts in evidence are prescribed as also corresponding to moral wrongs under societal values.

Although, customs and customary practices are of vital regard in issues concerning different communal structures, such as families, marriage and its dissolution, still the state legal systems across the South Pacific follow the doctrine of constitutional supremacy. To illustrate this, today, the new and newly revised or amended written Constitutions of Pacific Island states, namely: Fiji [*2013 Constitution of Fiji*], Samoa [*Constitution of the Independent State of Samoa 1960*], Nauru [*Constitution of Nauru 1968*], Tuvalu [*Constitution of Tuvalu 1986*], Tonga [*Constitution of Tonga*], Vanuatu [*Constitution of Republic Vanuatu*], Kiribati [*Constitution of Kiribati*] and Solomon Islands [*Constitution of Solomon Islands*] have expressly defined the status of their Constitutions as the supreme law and limited the validity of any other law as inferior to the Constitution to the extent of the latter's inconsistency with the Constitution.[174] Under the said written Constitutions, fundamental rights and freedoms are promoted for both men and women. These also include provisions for the riddance of any discriminatory legislation based on gender. Nevertheless, customs and customary practices are not enforceable in the courts but are taken into account as to where they can be by the courts. Hence, contemporary Pacific socio-cultural context, as well as being composed of customary law, has been redefined as merely a factor for consideration in the (family) courts, yet not enforced by the same respecting the supremacy of the written Constitutions.

The present socio-cultural aspect of the Pacific society is a value system that involves constant efforts of melding the cultural or regional values and custom as inclusive of Christian principles into state legal systems that enforce constitutional supremacy clause under which freedom from non-discriminatory laws are protected. If this definition of the socio-cultural context of Pacific is put to perceive a regime for the

[174] Professor Donald Paterson, Yoli Tom'tavala & Anita Jowitt, 'Legal Traditions And Systems In The Pacific: An Overview Of Challenges And Opportunities For Legislative Reform' (Paper prepared for the Legislative Reform and the Convention on the Rights of the Child (CRC) in the Pacific: Sub-Regional Meeting 25–28 August, 2008, Port Vila, Vanuatu) http://repository.usp.ac.fj/8040/1/Legal_Traditions_and_Systems_in_the_Pacific.pdf (Accessed 16 March 2020).

dissolution of marriage, the no-fault system of divorce will be supported by two arguments. First of all, the written Constitutions of the South Pacific countries are stated to be the supreme law of the land and superior to customs for the purpose of its enforcement by the courts. Fundamental rights and freedoms of all men and women are promoted and protected under the Constitution. Hence, where South Pacific customary values inherently condemn faults of a spouse in a marriage such as adultery, the right to freedom from discriminatory laws like adultery provisions called to be repealed by the international laws, will be inconsistent with the constitution. Accordingly, the no-fault based dissolution of marriage will come into being.

Second of all, the fault-based dissolution of marriage that is mainly in compliance with customary notions tend to involve discriminatory methods against women. It has been suggestive through existing research work done on the Pacific that customary practices set up to resolve marital disputes in the South Pacific cultural setting, for the most part, are favourably inclined towards male relationships in a subtle fashion, rather than prioritising justice in the matter.[175] Nonetheless, it is believed that women are in fact equally treated in the procedure. However, it can be further implied from the socio-cultural viewpoint of the South Pacific that women are likely to be accounted for fault in the failure of their marital relationship and its dissolution when the same takes place by custom.[176] Both of these notions are reflective of aspects of a fault-based regime, which in the same sense does not comply with the democratic nature of the contemporary Pacific countries that aim to protect the fundamental rights and freedoms of the Pacific citizenry, and thus indicates the adoption of a no-fault framework.

Moreover, from the Pacific socio-cultural lens, no-fault method of dissolution of marriage enforced in a non-discriminatory regime taking into account Pacific values will still, be favourable. In other words, where the socio-cultural aspect of the South Pacific is not principally given legal consideration as encompassing customs and cultural values and beliefs, but fundamental rights and freedoms are, the Pacific value system and context can still be sustained in a no-fault regime. This is unlike the

[175] Lynda Newland, 'Villages, Violence and Atonement in Fiji' in Aletta Biersack, Margaret Jolly & Martha Macintyre (eds), *Gender Violence and Human Rights* (2016).
[176] Lynda Newland, above n 175.

enforcement of regime that whether in part or in entirety contain fault principles, contradicts standards of human rights. It is a two-fold view as the following:

1. Firstly, the no-fault system guarantees the Pacific value system. The South Pacific values foster communal cohesiveness through the family as an integral unit of the community.[177] Prioritisation of harmonious behaviour amongst communities takes place within the socio-cultural compass inherently inclusive of respect for each other and peaceful methods of dispute resolution. To illustrate, the no-fault mechanism to legally dissolve a marriage does not have the involvement of parties to a marriage having to unveil their dirty laundry in court.[178] The said customary and cultural principles can form the basis for the Pacific socio-cultural perspective to deduce no-fault as sustaining the Pacific values as the marriage will be legally dissolved without making an impact on the dignity of any family or party concerned, nor it will transpire concerns of demeaning a person or his or her character in the court. Organically, the circumstances surrounding divorce sources conflicts between all the parties involved.

Whilst the objective of the Pacific value system is to maintain peace and harmony in the communities, a no-fault natured dissolution of marriage, that does not necessitate evincing of any faults or guilt of another, subsides potential family conflicts that a divorce can generally catalyse in a community like the Pacific that relates largely to interconnectedness. For example, in the family law case of *RL v. UN* [2013] FJMC 111, dealing with the issue of dissolution of marriage by way of the no-fault ground of irretrievable breakdown of marriage, the court stressed in its holding, that divorce is simple in Family Law as it is irrespective of the guilt or innocence of none of the parties.

In light of the significance of 'family' in a Pacific socio-cultural frame, no-fault regime as pertaining to dissolution of marriage makes provision for reconciliation. This is found in the statutes for Fiji and Samoa that are no-fault frameworks.

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[177] Sue Farran, *Human Rights in the South Pacific: Challenges and Changes* (2009).
[178] Scott Meyer Law, '3 common strategies for filing an uncontested divorce' (2019) https://www.scottbmeyerlaw.com/blog/2019/10/3-common-strategies-for-filing-an-uncontested-divorce/ (Accessed 19 March 2020).

In Fiji, it is stated under section 9 of the *Family Law Act 2003 (Fiji)* that:

> " *9.-(1) Where proceedings for a dissolution of marriage have been instituted…it is the duty of the judge or magistrate constituting the court, and of every legal practitioner representing a party, to give consideration, from time to time, to the possibility of a reconciliation of the parties.*
> *(2) If, in such proceedings, it appears at any time to the judge or magistrate, from the evidence in the proceedings or the attitude of the parties, or of either of them, that there is a reasonable possibility of such a reconciliation, the judge or magistrate may-*
> *(a) adjourn the proceedings to afford the parties an opportunity to consider a reconciliation;*
> *(b) with the consent of these parties, interview them in chambers, with or without counsel, as the judge or magistrate thinks proper, with a view to effecting a reconciliation; and*
> *(c) if the judge or magistrate thinks it desirable to do so, nominate-*
> *(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 is considered a reconciliation.*
> *(3) If, after an adjournment under subsection (2) has taken place, either of the parties requests that the hearing be proceeded with, the judge or magistrate must resume the hearing as soon as practicable.*
> *(4) If the court makes an order or grants an injunction under section 202, the court must, if it is of the opinion that it is in the interests of the parties or of the children of the marriage to do so, advise either or both of the parties to attend a marriage counsellor.*
> *(5) Where a court having jurisdiction under this Act is of the opinion that counselling may assist the parties to a marriage to improve their relationship to each other and to any child of the marriage, it may advise the parties to attend upon a marriage counsellor or an approved marriage education and counselling organization and, if*

it thinks it desirable to do so, may adjourn any proceedings before it to enable the attendance."[179]

In Fiji, a no-fault mechanism of dissolution of marriage is embodied in legislation that with regard to the same gives the opportunity for and statutorily emphasises on reconciliation. By virtue of the said statute, marriage counselling is stressed for parties that petition for dissolution of their marriage. This design of the no-fault regime for the dissolution of marriage in Fiji can enable a husband and wife to "reflect"[180], and increase the possibility of the couple being reconciled as a family, even with cases that involve children. In this fashion, this element of the no-fault regime in Fiji is implicative of a manifestation of Pacific cultures in a customary sense. For example, customary reconciliation practices are observed in villages even for cases of marital conflicts[181] to preserve the family structures within the communities. Similarly, the true no-fault system of dissolution of marriage in Samoa also expressly gives prominence to reconciliation in divorce matters.

Namely, sections 7E and 7F of the *Divorce and Matrimonial Causes Ordinance 1961* (Samoa) mandate that:

"7E. Possibility of reconciliation–

(1) Where an application under this Ordinance for a decree of divorce has been made, the Court and a legal practitioner representing a party shall consider the possibility of a reconciliation of the parties.

(2) Where the Court considers that there may be a possibility of reconciliation it may require the parties to undergo marriage counselling if appropriate.

[179] *Family Law Act 2003 (Fiji)*.
[180] Financial Times, 'UK legislation to allow no-fault for the first time' (2019) https://www.ft.com/content/af0d2db0-5a9d-11e9-9dde-7aedca0a081a (Accessed 7 August 2019).
[181] Andrew Arno, 'Ritual of Reconciliation and Village Conflict Management in Fiji' (1976) 47 *Oceania* 1.

7F. Rescission of divorce order where parties reconciled – Despite anything contained in this Ordinance, if a decree of divorce has been made in relation to a marriage, the Court may, before the decree of divorce takes effect, upon the application of the parties to the marriage, rescind the divorce order on the ground that the parties have become reconciled."[182]

Therefore, the statutory arrangements of the no-fault mechanisms in Fiji and Samoa warrant preservation of essential cultural components of the Pacific that relates to sustainability of a sense of family in the Pacific society via opportunities for reconciliation.

2. Secondly, with reference to the Pacific socio-cultural context, a no-fault mechanism allows room for consideration of an expansive context that a diverse Pacific is. Cultural and social factors relevant to the South Pacific cultures and variety of communities within a nation are not absolutely eliminated from the newly adopted no-fault regimes in Fiji and Samoa. In fact, in a no-fault system, as statutorily designed in Fiji and Samoa, the achievement of the objectives of human rights and socio-cultural context as relevant parties to a marriage can co-exist by virtue of a substantive provision. The provision can produce a balance of taking into account customs, and cultural and social aspects relevant to the parties that petition for dissolution of their marriage whilst also protecting their constitutional rights as paramount. In Fiji, this can be deduced from section 30 of the *Family Law Act 2003* (Fiji) that specifies:

"*30. -(1) 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.
(2) Subject to subsection (3), in a proceeding instituted by an application, the ground will be held to have
been established, and an order for dissolution of the marriage must be made, if, and only if, the court is satisfied that the parties have separated

[182] *Divorce and Matrimonial Causes Ordinance 1961* (Samoa).

and have thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for dissolution of marriage."[183];

and in Samoa, the same is provided under section 7 of the *Divorce and Matrimonial Causes Ordinance 1961* (Samoa) as:

"*7. (1) An application under this Ordinance for a decree of divorce in relation to a marriage must be based on the ground that the marriage has broken down irretrievably.*
(2) Subject to subsections (3) and (4), in a proceeding instituted by such an application, the ground is held to have been established, and the divorce order shall be made, if, and only if, the court is satisfied that the parties separated and thereafter lived separately for a continuous period of not less than 12 months immediately preceding the date of the filing of the application for the divorce order."[184]

These provisions in Fiji and Samoa paves the way for consideration of Pacific socio-cultural context concerning the dissolution of marriage for both the parties. The approach to holding marriage as have irretrievably broken is not restrictive under these provisions. Reason being that it is interpretive of a wide discretion for consideration of circumstances and contextual sense of the marriage and its dissolution in light of the emphasis being "…if, and only if, the court is satisfied…" For example, in the dissolution of marriage matter of *DK v. RS* [2013] FJMC 177 under the no-fault framework for dissolution in Fiji, the court highlighted the factors that should be considered in order to deduce separation with regard to the marriage being irretrievably broken down. These factors were:

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- *physical separation (for instance, living in separate bedrooms)*
- *absence of sexual relations*
- *discussion of family problems*
- *communication between the spouses*

[183] *Family Law Act 2003* (Fiji).
[184] *Divorce and Matrimonial Causes Ordinance 1961* (Samoa).

- *joint social activities*
- *meal pattern*
- *performance of household tasks*
- *method in which spouses filed income tax returns*
- *when a spouse makes plans for his assets as a separated person*
- *adultery*
- *communications about separation*
- *consultation with a lawyer*
- *joint vacations*
- *gifts between spouses*
- *joint activities at home together (TV watching, tea in bed, etc.)*
- *visiting each other's relatives…*[185]

  …
- *appearance to outside world*
- *gifts and cards sent in joint names*
- *change of beneficiaries on insurance plans, RRSPs, etc.*
- *purchase of property without consulting the other spouse*
- *changing will*
- *communication of marriage breakdown to others*
- *corroborating evidence of third parties*
- *interest by spouse in trying to make the marriage work*
- *collaboration on renovations to home*
- *major arguments*
- *unsigned previous separation agreements*
- *religious beliefs about initiating separation or divorce*
- *one divorcing spouse telling the other that she did not love him or want to have anything to do with him*
- *celebration of holidays and important events (weddings, anniversaries, funerals) together* "[186]

With consideration of social and cultural factors in a no-fault legal framework for dissolution of a marriage such as in Fiji, which bears semblance to Samoa's dissolution regime as well, the similar contexts have also been given principle regard in literature for matters of dissolution of marriage. Particularly, the critiquing of the no-fault regime has drawn attention to the importance of cultural context as playing the core feature of a narrative in the case of dissolution of marriage in order to construe meaning out of a narrative of a broken-down marriage with concepts and

[185] *Oswell v. Oswell* [1990] CanLII 6747.
[186] *DK v. RS* [2013] FJMC 177.

responsibilities.[187] The no-fault frameworks in Fiji and Samoa for dissolution of marriage demonstrate this idea. It is illustrated in the factors that courts consider, which are also relevant to South Pacific cultural and social factors.

Thus, from the Pacific socio-cultural perspective, the fault theory of divorce in the region retains customs and principles of Christianity[188] including adultery provisions that are protected by both. However, this contrary to human rights standards in the protection and promotion of fundamental rights and freedoms of both men and women, and prove of 'faults' or guilt can be discriminatory against women in practice and in law. Additionally, the legal battle to prove the guilt or fault on one party to the marriage not only humiliates both men and women but also, hinders the maintenance of peace and harmony amongst communities in the South Pacific owing to the conflict-driven nature of the fault philosophy of divorce.

On the other hand, support for the cultural and social contexts is found in the no-fault dissolution. This includes values relating to peace and harmony through a fashion of dispute resolution that not merely excludes the elements of legal 'fight' and promotion of conflict via proving the 'guilt' of a party, but also encourages reconciliation such as in the relevant statutes of Fiji and Samoa. In the use of the no-fault principle in the South Pacific, factors of social and cultural resonance are also given consideration when dealing with the issue of separation for irretrievable breakdown of a marriage. This is of course done to the extent of not creating a platform for proving the guilt of another, rather in a manner that purely concludes a simple divorce.

[187] Katharine T. Bartlett & Barbara Bennett Woodhouse, 'Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era' (1994) *Georgetown Law Journal* https://scholarship.law.duke.edu/faculty_scholarship/1704 (Accessed 5 March 2020).
[188] Jennifer Corrin, 'It Takes Two To Tango, but Three To Commit Adultery: A Survey of the Law on Adultery in Post-Colonial South Pacific States' (2012) 26 *International Journal of Law, Policy and the Family* 2 http://lawfam.oxfordjournals.org/content/26/2/187.short (Accessed 12 June 2020).

Chapter 4

A. CONCLUSION

Some of the current dissolution of marriage laws in the Pacific Island countries have realised developments to the grounds for dissolution of marriage from the traditional fault principle to either a 'blended' approach or an absolute no-fault. Yet, some have still retained the traditional style of a fault regime adopted mainly from the English style of laws from the time self-governance commenced in the region. The 'blended' framework in the region can also be recognised as a developed regime that enforces the single ground of breakdown of marriage, irretrievably or completely, yet not independent of fault principles as those found in true fault regimes. Categorically by nature, the fault theory of dissolution is followed in Nauru, Tuvalu, Tonga, Vanuatu, the Solomon Islands, and Kiribati. The frameworks in these countries involve the requirement of evincing 'faults' or matrimonial offences or guilt of the responding party in order to have the marriage legally dissolved where petitions commonly contain faults of adultery and cruelty. However, in the region, Fiji by virtue of the *Family Law Act 2003* (Fiji); and Samoa under the *Divorce and Matrimonial Causes Ordinance 1961* (Samoa) have departed from the traditional grounds for dissolution of marriage, that is of fault basis, to an absolutely no-fault framework. The no-fault ground of *irretrievable breakdown of marriage* incorporated in both the statutes is substantially adopted from a similar provision contained in the *Family Law Act 1975* (Australia).

The legislative journey towards and the existence of these different mechanisms demonstrate the constant efforts that the said Pacific Island states are making in order to balance cultural needs with principles of human rights through their written Constitutions and domestic laws, namely the divorce legislation. Accordingly, an analysis of the two contrary theories of legal approaches to the dissolution of marriage warrants the position that is democratically appropriate for, or one that is a needful reform for a contemporary South Pacific region. The relevant perspectives are: human rights; feminism as a catalyst of achieving human rights standards in domestic laws such as elimination of discriminatory principles; a Pacific regionalism view of human

rights; and the contextually relevant perspective of the Pacific socio-cultural context. Hence, the conception of some criteria to produce or reform dissolution of marriage regime that for the South Pacific considers fundamental rights and freedoms, circumstances or factors distinct to the Pacific citizenry and respect to deep-rooted cultural concerns.

Firstly, the fault philosophy of dissolution of marriage, either in a blended fashion or in its true form followed in the South Pacific nations, does demonstrate preservation of traditional customary values of the region, and in that, the principles of Christianity. However, such statutory consideration of Pacific socio-cultural context is an impediment to the implementation of principles of human rights that are fundamental rights and freedoms that should be by virtue of written Constitutions and domestic laws of divorce in the Pacific Island states absolutely realised for men and women. For instance, it contradicts the non-discriminatory standards set by the *Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW)*[189] with the enforcement of adultery provisions.

To further reason from a feminist view and the CEDAW Committee strongly emphasising domestic laws in the Pacific Island states that enforce adultery in a mechanism for dissolution of marriage to repeal such laws in light of the nature of the consequences that mainly women face. It is not supported under a human rights framework, whether of regional or international standard, as enforced in a fault-based approach to divorce with regard to men and women due to the debatable nature of the fault or matrimonial offense of adultery. Another reference of human rights standards can be derived from an Australian legislation, the relevance of which is in the fact that the no-fault frameworks in the South Pacific region have been adopted from Australia. Namely, the *Human Rights Sexual Conduct Act 1994* (Australia)[190] that relates to the interpretation of adultery between two consenting adults as interference with privacy that is arbitrary. With this, voices in literature also regarded adultery as a matrimonial offence to be debatable with respects to the element of consent.

[189] *Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW).*
[190] *Human Rights Sexual Conduct Act 1994* (Australia).

Moreover, some faults can be more appropriately dealt with under a legal framework that is not based on the dissolution of marriage, but under areas of law such as criminal or torts. For example, cruel behaviour. This also brings to the argument the disadvantages of lengthy, conflict-driven, and financially demanding adversarial process that a fault dissolution of marriage, which involves the process of proving the 'guilt' of one party, entails. These can have a negative impact on the dignity and privacy of both men and women, economically burden women especially the marginalised, as well as cause a complex atmosphere of conflicts in a family as a whole. The inhibition of the values of peaceful and harmonious fashion of dispute resolution are part of the divorce via the fault theory that also is complex as opposed to the no-fault. Thus, where countries of the region do not collectively address the human rights gaps such as evinced in the fault approach to divorce and enforcing adultery provisions, the potential progressive steps, in the form of domestic laws like divorce law, towards a regional human rights mechanism, will be hindered.

Secondly, the no-fault principle for divorce, a true design of which is found in Fiji and Samoa as influenced by the *Family Law Act 1975* (Australia) solidifies the protection and promotion of international human rights principles in domestic legislation and ensures the protection of relevant Pacific socio-cultural factors. It also is an implementation of the countries' commitment to the principles of CEDAW, a Convention that Fiji and Samoa have ratified to. The mechanism of no-fault divorce is non-discriminatory to both women and men from the human rights point of reference. The no-fault provisions for dissolution is indicative of a mechanism that allows parties – both men and women – to depart from an unhappy marriage without a high degree of financial investment, dignity concerns or family conflicts involved in the legal process for dissolution. Its cost-effective feature also fosters substantive equality as ensuring access to justice for women and men from all sections of society who seek divorce without having the burden to legally battle for the guilt of the responding party in order to successfully have an unhappy marriage legally dissolved in Fiji and Samoa.

Additionally, Samoa's true no-fault position encompasses the consideration of domestic violence. The contextual relevance of this can be sourced from the surge of domestic violence cases over the years recorded in the South Pacific in the marital

context. The incorporation of an option to irretrievable breakdown of marriage owing to domestic also facilitates a woman's wilful departure from an abusive and unhappy marriage by way of a no-fault regime without burdening with lengthy adversarial costs. The no-fault framework does not merely strengthen the human rights protection mechanism for parties to a marriage, but also their socio-cultural context. To illustrate, the no-fault statutory provisions in Fiji and Samoa do not limit a court's discretion to any specified consideration, barring a satisfactory separation of twelve consecutive months. The Pacific social and cultural contextual values, concerns, and factors can be considered as and where they are deemed relevant to the parties, from a list of factors that courts often consider to deduce the point of separation for marriage being irretrievably broken down for the parties.

Lastly, to conclude using the criteria of human rights standard of domestic laws for the promotion and protection fundamental rights and freedoms for women and men, feminism fostering principles of equality between women and men, with the sustainability of relevant socio-cultural values, the fault philosophy of divorce for a contemporary Pacific does not promise progression for a democratically developing South Pacific region, nor a Pacific regional human rights mechanism. Nevertheless, adoption of the no-fault framework is the implementation of human rights standards, principles of feminism, and CEDAW in domestic law that also solidifies the idea to establish a regional system of human rights for the Pacific.

The said mechanism also lets room for relevant consideration to the value system, the inherent social principle of connectedness, and the culture of preserving a sense of a family in the community, and other relevant factors that fall in the social and cultural context of the South Pacific citizenry, as the court deems with regard to separation and irretrievable breakdown of marriage. Hence, the legal position of no-fault dissolution is not a mere guarantee for promoting and safeguarding human rights in domestic laws, but as well a stepping stone towards the implementation of a regional mechanism of human rights for the South Pacific region.

B. Recommendations

The examination of the present legal frameworks for dissolution of marriage in the South Pacific countries, namely Fiji, Samoa, Nauru, Tuvalu, Tonga, Vanuatu, the Solomon Islands, and Kiribati is indicative of either complete or further reforms using some relevantly conceived criteria of human rights standards including, feminism and Pacific regionalism, and the intellectual Pacific socio-cultural perspective. The four interrelated perspectives that are relevant to the South Pacific region and nations, and law-making related to dissolution of marriage, warrant some recommendations concerning current dissolution regimes in the region. The recommendations are as follows:

1. Repeal of discriminatory dissolution of marriage laws.

Domestic legislation that encompasses adultery as an offence or as one of the grounds for the petitioning dissolution of marriage is largely discriminatory against women. This has been highlighted by the relevant human rights bodies. Particularly in the South Pacific, enforcement of adultery provisions is mostly detrimental to women as it perpetuates dangerous practices[191] against them. On that account, its repeal is justifiable by way of its legal existence being a violation of human rights and its customary existence from the same scope being harmful to women, rather not materially addressing the main issue of dissolving a marriage. With regard to both men and women as parties, the fault of adultery is debatable owing to the elements that constitute this 'fault' as an offence or not. Thus, the repeal of the fault theory of divorce that enforce adultery provisions.

2. Adoption of a mechanism that is not complex or disadvantageously burdens the parties, but simple and free of chances for conflict – no fault.

The fault theory, whether in its true form or partially adopted, requires the proving of the guilt of the responding party and so potentially a long legal battle. Where the guilt

[191] Imrana Jalal, 'Harmful Practices Against Women In Pacific Island Countries: Customary And Conventional Laws' (Expert paper for Gender & Human Rights Adviser Pacific Regional Rights Resource Team (RRRT/SPC) Suva, Fiji Islands, June 2009) https://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Expert%20Paper%20EGMGPLHP%20_Imrana%20Jalal_.pdf (Accessed 24 April 2020).

or 'fault' is not successful, divorce is not granted. These situations can financially burden either party, damage their dignity or character via faults of adultery or cruelty, and enhance the existing state of conflict between the parties in divorce with more. Accordingly, a no-fault mechanism for dissolution addresses these concerns through a sole ground, without the requirement of proving of any guilt or fact or matrimonial offence or fault ground, and to the extent of simplicity being a key attribute of such a dissolution of a marriage.

3. Addressing dissolution of marriage issues with a more relevant design of no-fault framework.

The scope of the provision[192] under the no-fault framework allowing a marriage to only be dissolved in the event that the court is satisfied that complete or irretrievable breakdown of marriage also makes provision for consideration of cultural and social concerns relevant to the parties to the marriage. In spite of that, there are concerns materially relevant to the Pacific context and marriage that is needful of statutory regard. It is the issue of domestic violence that within the circumstances of marriage are most common[193] occurrence in the South Pacific region. Owing to its material relevance to a marriage, that becomes a process during which a party becomes a victim of domestic violence, and that results in the breakdown of the marriage, then an express statutory consideration of 'domestic violence' will be a pertinent legal mechanism to address the dissolution of marriage within the scope of the no-fault provision. At present, the no-fault regime in Samoa is a model of this. Under section 7 of the *Divorce and Matrimonial Causes Ordinance 1961* (Samoa), which is regarded as an absolutely no-fault oriented mechanism, it is provided that "… *(3) Where the court is satisfied that a party to the marriage is the subject of domestic violence, the court may hold that the marriage has broken down irretrievably even if the parties have not separated…"* The true no-fault provision in Samoa considers domestic violence as an optional case of separation for a marriage that has irretrievably broken down. Therefore, amendment of the existing no-fault framework to this, and where a regime is reformed to the no-fault, such a design is relevant. Reason being that domestic

[192] *Family Law Act 2003* (Fiji).

[193] Christine Forster, 'Ending Domestic Violence in Pacific Island Countries: The Critical Role of Law' (2011) 12 *Asia-Pacific Law and Policy Journal* 2 http://blog.hawaii.edu/aplpj/files/2011/11/APLPJ_12-2_Forster_Final.pdf (Accessed 15 April 2020).

violence is of common occurrence in the region in records, considering it for separation is an enhancement to the relevance of a dissolution of marriage provision to the South Pacific citizenry. Yet, it is needful to note that the extent of this does not form a matter for areas of laws not belonging to a divorce jurisdiction, nor revert to the fault theory.

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