The Domestic Violence Decree 2009, Fiji

Fiji Judiciary Criminal Law Workshop for Judges and Magistrates

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> ***"Despite constitutional provisions on equality before the law, gender norms seep into legal systems unnoticed and unchallenged. This means that women and men experience the same laws and legal systems differently."*** **(Power, Voice and Rights – A Turning Point for Gender Equality in Asia and the Pacific – UNDP 2010)**

Introduction

Our laws usually give the appearance of equality. Thus the way that the Crimes Decree defines murder as a crime, does not appear to be discriminatory. Similarly, the reconciliation provisions in the Criminal Procedure Code (now repealed) did not appear to discriminate against women. However, frequently, it was the way in which the law is applied, that a gender inequality is seen. A woman who resisted reporting an assault by a spouse, who was under pressure from family and church not to report, who demanded a police investigation and prosecution, was then often "persuaded" to reconcile by the courts. There is nothing wrong with reconciliation. Reconciliation, effected in a neutral and fair way is a good solution to problems as long as the parties have equal bargaining power, and as long as there is no pressure to reconcile. However, gender relations in society are rarely equal. They are affected by different economic powers, by emotional attachments, by a duty to ensure that the children are safe and secure, and by a culturally and values driven belief that violence in a family is inevitable and must be endured. The courts rarely considered reconciliation as a mirror of these fundamental inequalities. Thus, while a dispute between two men, or two women in a non-domestic sphere was likely to result in a fair and genuine reconciliation, a family domestic violence situation was not. There was rarely a genuine reconciliation. Under social, economic and cultural pressure to patch up their marital problems, husband and wife would go home to a continuing violent environment, which would next erupt into a homicide. Domestic violence was an area of the law which regularly saw the unequal treatment of victims of crime. A non-domestic assault tariff would result in a prison term. A domestic assault would be reconciled. This paper considers the Domestic Violence Decree of Fiji, passed in 2009, with a commencement date of September 2010, and

intended to promote an equal access to justice by women. It has now been almost two years since the passing of the Decree. A challenge for the law enforcement agencies is the implementation of a Decree which will inevitably showcase the attitudes of those who work in them.

The Domestic Violence Decree and CEDAW

Fiji is a party to the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW) and objects of the Decree include the implementation of CEDAW. Domestic violence is a form of discrimination against women. This is because, the vast majority of victims of domestic violence are women and girls, and because underlying the use of violence against women in the family, is the belief that men have the right to correct and chastise women. Such a belief is contrary to the often stated value that men and women are equal in dignity and in rights. The belief that a wife is the property of the husband, and may be assaulted by him, is a gender biased and patriarchal belief. By ratifying CEDW, Fiji has undertaken not only to protect women from gender-based violence, but also to eradicate social and cultural beliefs which give rise to these attitudes and to ensure that Fiji's legal system does not perpetuate these beliefs, nor violence against women.

Section 6 of the Decree therefore states;

"The objects of this Decree are –

(a) To eliminate, reduce and prevent domestic violence;
(b) To ensure the protection, safety and well-being of victims of domestic violence;
(c) To implement the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention on the Rights of the Child and related Conventions;
(d) To provide a legally workable framework for the achievement of (a) (b) and (c) above.

However, no matter how commendable a new law is, and no matter how well it appears to set out a framework for equality, the proof of a law is in its implementation. The challenge for the judiciary is that the reconciliation and assault provisions of the old law were implemented by the very judicial officers who are now bound to implement the Domestic Violence Decree.

The provisions of the Decree

The Decree is a **"Decree to provide greater protection from domestic violence, to clarify the duties of police in that regard, to introduce domestic violence restraining orders and other measures to promote the safety and wellbeing of victims of domestic violence and to promote rehabilitation of perpetrators of domestic violence and for related matters."**

The Decree protects family relationships which include relationships which are "de facto" (defined as the relationship between a man and a woman who live or lived with each other as spouses on a genuine domestic basis although not legally married to each other) and other family relationships which includes not just parents, children, brother, sisters and step-families, but also "clan, kin or other person who in the particular circumstances should be regarded as a family member". As to the scope of the protection of the Decree therefore, all is left to the judicial discretion. Although a same sex couple relationship may not fall under the definition of a de facto relationship, it may fall under the definition of "family or domestic relationship" under paragraph (c), of a person "who normally or regularly resides in the household or residential facility".

The term "domestic violence" is defined in section 3 of the Decree, and reads as follows;

(1) "Domestic violence" in relation to any person means violence against that person (the victim) committed, directed, or undertaken by a person ("the perpetrator") with whom the victim is, or has been in a family or domestic relationship.

(2) In relation to subsection (1), "violence" means any of the following –

(a) Physical injury or threatening physical injury;

(b) Sexual abuse or threatening sexual abuse;

(c) Damaging or threatening to damage property of a victim;

(d) Threatening, intimidating or harassing;

(e) Persistently behaving in an abusive, cruel, inhumane, degrading, provocative, or offensive manner;

(f) Causing the victim apprehension or fear by –

(i) Following the victim; or

(ii) Loitering outside a workplace or other place frequented by the victim; or

(iii) Entering or interfering with a home or place occupied by the victim; or

(iv) Interfering with property of the victim; or

(v) Keeping the victim under surveillance;

(g) Causing or allowing a child to see or hear any of the violence referred to in paragraphs (a) to (f) inclusive;

(h) Causing another person to do any of the acts referred to in paragraphs (a) to (g) inclusive towards the victim.

Section 3(5) states that a single act can be violence for the purpose of the Decree, but so can a number of acts that form part of a pattern of behaviour even if one or more of those acts viewed in isolation may be considered trivial.

Orders can be made under the Decree by the Magistrates Courts, the Family Courts, the Family High Court, a Juvenile Court and the High Court. Section 19 provides that a restraining order can be applied for by the victim, a carer of the victim, a parent or guardian of a child, a person who normally resides with a child who is the victim, children over the age of 16 years if they are the victims, a police officer, a social welfare officer, the Public Trustee or "***any other person where it appears to the court to be necessary for the safety or wellbeing of the victim".*** This last category appears to open the doors of the courts to non-government agencies and bodies who wish to represent the victim in the interests of her safety and wellbeing. Civil society groups have in my view, been reticent in making applications for restraining orders for victims of domestic violence. This is regrettable. The section in my view was intended to empower women by empowering women's groups to appear in court to make applications under the Decree.

An application can be made ex parte in an urgent situation[1], but this must always be followed by an inter partes date and hearing. However an interim restraining order remains valid until it is suspended or varied or discharged by the court. In most cases, where there has been a history of family violence, it is generally safer to leave the restraining order in place indefinitely, because that is the victim's best protection against the recurring of such violence, even when the couple continue to co-habit.

Section 23 sets out the grounds for making a Domestic Violence Restraining Order. They are as follows;

1. The victim is or has been in a family or domestic relationship;
2. The Order is for the safety and well being of the victim or another person;
3. The respondent has committed, is committing, or is likely to commit domestic violence against the victim.

Relevant criteria for the making of the Order are;

1. Whether there is reason for concern that the respondent's behaviour may be repeated;
2. The perception by the victim and of other persons protected by the Order about the nature and seriousness of the respondent's behaviour;
3. The effect of the respondent's behaviour on the victims including their ability to lead normal lives.

[1] Section 20

These criteria apply when the making of an Order is discretionary. However the making of an Order is mandatory when;

1. A person is charged with a domestic violence offence;
2. For the safety and well being of the victim in a case where the alleged perpetrator is charged with a domestic violence offence;
3. A person is found guilty or pleads guilty to a domestic violence offence;
4. Where the court intends to stay or terminated proceedings.

The court will only not be required to make such an Order in these circumstances if the court is satisfied that it is not necessary for the safety and well being of the victim.

Section 25 provides for telephone applications, and section 26 allows the Court to make an application of its own motion. All Restraining Orders have the standard non-molestation orders, but additional non-contact orders can be made under section 29. Additional conditions are provided for spouses under section 30, and for children under section 31. Section 31 gives the courts powers to make temporary custody and care orders, although such orders can be subsequently superseded by the family Court.

Section 32 allows the courts to make orders in relation to personal possession, and section 34 provides for one of the most important orders under the Decree, the orders for urgent monetary relief. I say this because; one factor which puts the victim under pressure to “reconcile” is the financial factor. If she does not “reconcile” there will be no money to feed the children. In most cases she reconciles in the interests of financial security, without any protection against further future violence. The court can, under the Decree, order that the perpetrator pay urgent monetary relief to the person protected, taking into account the following factors;

1. The consequences of the domestic violence for the protected person;
2. Whether the protected person was financially reliant on the perpetrator;
3. The financial circumstances of the protected person;
4. Whether the protected person will suffer financial hardship if the order is not made;
5. The financial circumstances of the perpetrator;
6. The ability of the perpetrator to pay urgent monetary relief;
7. The desirability to ensure that the burden of paying relief is on the perpetrator and not on Social Welfare.

Also provided for in the Decree are tenancy orders, occupancy orders, counselling orders, and education and rehabilitation orders. Orders can be suspended, varied, or discharged under section 38, but there is a requirement for service on all affected parties, and a hearing before such variation or discharge. Compensation can be applied for under section 39, although I understand that no such application has been made since the Decree was passed, and section 46 provides that except for a domestic violence breach offence, the standard of proof is the civil standard of "a balance of probabilities". Section 51 provides for the categories of persons who can appear under the Decree without leave, and any other person who will need leave. In granting leave, the court must consider, inter alia, the interests of justice, access to justice by the protected person or the respondent, and any objections by the parties. Section 55 provides that all parties must bear their own costs, unless the court rules that an application is frivolous or vexatious. All proceedings are to be heard in a closed court, except where the application is made in the course of criminal proceedings, and section 57 restricts publication of proceedings. Section 61 deals with overseas enforcement of restraining orders, section 72 provides for the appeal procedure (generally from the magistrates courts to the Family High Court, and otherwise to the Court of Appeal) and section 77 creates offences of breaching Domestic Violence Restraining Orders. The contempt jurisdiction of the courts is preserved under section 79, and under section 80 the Chief Justice may make Rules after consulting with the Chief Magistrate. The Marriage Act is consequentially amended, as is the Criminal Procedure Decree, and the Bail Act. In domestic violence cases bail conditions must include standard non-molestation orders.

The Sentencing and Penalties Decree

The Sentencing and Penalties Decree must be read together with the Domestic Violence Decree. Section 4 (3) provides;

> ***"In sentencing offenders for an offence involving domestic violence, a court must also have regard to ---***
>
> ***(a) Any special considerations relating to the physical, psychological or other characteristics of a victim of the offence, including –***
>
> ***(i) the age of the victim;***
>
> ***(ii) Whether the victim was pregnant; and***
>
> ***(iii) Whether the victim suffered any disability;***
>
> ***(b) Whether a child or children were present when the offence was committed, or were otherwise affected by it;***
>
> ***(c) The effect of the violence on the emotional, psychological and physical well being of a victim;***

(d) The effect of the violence in terms of hardship, dislocation or other difficulties experienced by the victim;

(e) The conduct of the offender towards the victim since the offence and any matter which indicates whether the offender—

(i) Accepts responsibility for the offence and its consequences;

(ii) Has taken steps to make amends to a victim, including action to minimise or address the negative impacts of the offence on a victim;

(iii) May pose any further threat to a victim;

(f) Evidence revealing the offender's

(i) Attitude to the offence;

(ii) Intention to address the offending behaviour;

(iii) Likelihood of continuing to pose a threat to a victim; and

(iv) Whether the offender has sought and received counselling or other assistance to address the offending behaviour, or is willing to undertake such counselling or seek such assistance."

In a recent case in the High Court Fernando J[2] applied this provision together with the Domestic Violence Decree in relation to a case of act with intent to cause grievous bodily harm. The victim was the de facto partner of the accused, and was three months pregnant at the time the offence was committed. She told the accused not to sleep near her and he hit her with a cane knife firstly with the blunt side of the knife, and then with the sharp edge, causing cuts over the head and face, and severing her right hand completely. She ran to her cousin for help and the accused then assaulted the victim's cousin with the same knife. The cousin was a diabetic, and also received injuries. In mitigation defence counsel said that the victim had tried to abort the child and had rejected the accused. The presiding judge did not accept this as mitigation. He applied the Domestic Violence Decree, and imposed a Restraining Order, and also considered section 4 of the Sentencing and Penalties Decree in considering appropriate sentence. He imposed a term of 5 ½ years imprisonment with a non-parole period of 5 years imprisonment.

Enforcement and Implementation

It took a year for the police and the judiciary to commence the implementation of the Domestic Violence Decree. The police attended intensive training on the Decree in 2010, assisted by the

[2] **State v. Asesela Rabia** HAC 074 2011

Chief Registrar and the Chief Magistrate (he was then the Resident Magistrate, Ba) and it was quickly apparent that for the effective implementation of the Decree, the biggest hurdle would be attitudinal. Although all victims had and have a right to complain when a police officer did not apply for a restraining order, very few knew that they had this right, and none was able to enforce it. Non-government institutions showed a reluctance to apply for restraining orders, probably because they were not familiar with the law in relation to the applications.

A UNDP publication[3] in 2010 said this about the role of the judiciary in cases of violence against women;

> "***Judicial practices are also subject to discriminatory social norms that do not acknowledge women's rights or concerns, or treat them seriously or fairly. For women, the lofty provisions for equality in many of the region's constitutions, while important in their own right, have little bearing on the ways in which justice is actually meted out....Legal complexities that require onerous court proceedings represent one reason why women fail to obtain justice....Where courts have a duty to promote reconciliation and forgiveness, power differences related to gender can be easily overlooked. Women can confront significant financial, customary, family and community pressures to agree to circumstances that do not benefit them If violence is taking place, it may remain shrouded by the convention that it is a private matter."***

The question for the effective implementation of the Decree is whether the law is able to provide effective access to justice in a way which is simple, quick, objective, and able to cut past attitudinal and cultural barriers for women who are victims of violence at home.

One of the first cases to come before the High Court in relation to the Decree was **Suresh Chand Maharaj v State** [2010] FJHC 467, a case which arose out of a criminal charge of unlawful wounding under the Crimes Decree. The victim was the de facto partner of the accused, and was assaulted by the appellant with an iron rod. They were living together as de facto partners, and she was reliant on him for livelihood. He was a mechanic. On the day of the assault she wanted to visit her father. He did not agree. She told her father to cancel the visit. The appellant then struck her with the iron bar causing a wound on the head which required six stitches. He was charged, and in mitigation, said that he was the sole breadwinner and that he had reconciled with the victim. The victim confirmed that reconciliation had occurred, but also said that other cases of assault by the appellant against her were still pending before the courts. The magistrate accepted the reconciliation as a mitigating factor and sentenced the appellant to 18 months imprisonment. The sentence was within the tariff for unlawful wounding. The maximum sentence for the offence under

[3] Asia-Pacific Human Development Report 2010 **–"Power, Voice and Rights – A Turning Point for Gender equality in Asia and the Pacific"**

the Crimes Decree is five years imprisonment. The magistrate did not make a restraining order, nor did the magistrate consider the Sentencing and Penalties Decree in relation to sentencing for Domestic Violence. On appeal, Goundar J. said that;

> "***This is a serious case of domestic violence. The antecedent report shows that the appellant has a propensity to use violence against his partners. When the appellant was sentenced, The Magistrates' Court was obliged to apply the Domestic Violence Decree and the Sentencing and Penalties Decree. The Domestic Violence Decree applies to de facto relationships as well..... There is nothing in the court record to suggest that the learned magistrate made an enquiry on any effort made by the appellant to address his violent conduct towards the victim in view of her claim that she had been previously assaulted by the appellant and a case was pending in the court. If an enquiry was made, the learned magistrate would have realised the need to make orders under the Domestic Violence Decree to stop further violence on the victim."***

Commenting that it was unfortunate that the prosecution and the Magistrate had failed to apply the Domestic Violence Decree, the High Court then remedied the defect and held a separate inquiry into the need or otherwise for a restraining order under the Decree.

In **State v. S.T.** [2011] FJHC 135, the accused was charged with assault occasioning actual bodily harm, contrary to section 275 of the crimes Decree. The State applied for a restraining order. The victim was the spouse of the accused. The evidence was that on the day of the assault, she questioned the accused about his alleged extra marital affairs. They had an argument. In her evidence in court, she said that they had a scuffle with a jug of hot water, and that in the scuffle; some of the hot water fell on her face and hands. However, she told the doctor that the accused had thrown the hot water over her, and she told the police the same. She sustained superficial first degree burns on her face and hands. The injuries healed without scarring. There was a previous case against the accused for domestic violence against his spouse which had been terminated by reconciliation. The victim continued her relationship with the accused. The matter came before the High Court because the charge was originally one of act with intent to cause grievous bodily harm which was an indictable offence. The High Court ruled[4];

> ***"Since the accused is charged with a domestic violence offence there is no discretion but to issue a restraining order against him for the protection of the victim.....When the police charged the accused and bailed him to appear in the Magistrates Court on 18 November 2010, the Domestic Violence Decree had already come into effect. The police made no attempt to obtain a restraining order as required under the law. On this date the accused failed to appear in court.....A bench warrant was issued for his arrest. On 9 December 2010, the accused voluntarily appeared and had his bench warrant cancelled. He pleaded***

[4] Per Goundar J

> ***guilty to the charge of act with intent to cause grievous harm and informed the court that he had reconciled with the victim. The learned Magistrate convicted the accused and adjourned the case to 7 February 2011 for sentencing. Unfortunately on 9 December 2010, neither the police prosecutor nor the learned Magistrate considered the provisions of the Domestic Violence Decree as they were obliged to do.....This is rather an unfortunate state of affairs. The Domestic Violence Decree came into effect on 6 September 2010. But it seems to me that there is a lack of commitment to enforce the law by the law enforcement officers. This lack of commitment can defeat the clear objectives of the Domestic Violence Decree. The Domestic Violence Decree is designed to give greater protections to the victims of domestic violence who are generally women. Women victims are vulnerable. Most of them are financially dependent on their spouses. Judicial experience has shown that they do not have equal bargaining power as their spouses. They are forced to reconcile in domestic violence cases because of cultural and social constraints placed on them. The Domestic Violence Decree is designed to take away those constraints and to empower them to live a life without violence''***

In **Panapasa Raisoqoni v. State** [2001] FJHC 32 (Labasa)[5], the appellant was convicted of assault occasioning actual bodily harm and sentenced to six months imprisonment in the Magistrates Court. He appealed against sentence saying that the learned magistrate had failed to put weight on reconciliation, his guilty plea and good character. The victim was the spouse of the appellant. The appellant was employed as a chef at a resort. He was drinking with his workmates and the victim approached him and argued with him. He punched her. He was joined by a female friend, who also punched the victim. She sustained multiple injuries over her face and head. In sentencing, the magistrate put no weight on the evidence of reconciliation saying that there was a previous history of domestic assault on the victim, and that reconciliation could not be taken into account in a domestic case. The High Court said that this was not the correct approach. Reconciliation can be relevant in sentencing in a domestic violence case, but the effect of reconciliation cannot be termination of the proceedings. The Court held;

> "***The Domestic Violence Decree has changed the old law. Under the new law, domestic violence offences are not reconcilable and therefore there is no discretion given to the courts to encourage reconciliation. However, if the victim freely reconciles with her partner and gives evidence of that effect, reconciliation is a factor that ought to be taken into account in sentencing the offender.....My concern is that the appellant was convicted of a domestic violence offence and neither the prosecution nor the learned Magistrate considered the provisions of the Domestic Violence Decree to grant relief to***

[5] Per Goundar J

the victim. The Domestic Violence Decree binds the State (s.3). There is a legal obligation on the police 9s.12), the prosecutors (s.16) and the judicial officers (s.17) to implement the provisions of the Decree in domestic violence cases."

These decisions suggest that all members of the judiciary are not enforcing the Domestic Violence Decree. They also suggest that the prosecutors are not making applications for restraining orders in cases of family violence. What is apparent, from a reading of all rape and incest cases in 2011 and 2012, that although almost all these cases arise from a family relationship and although sexual abuse is a domestic violence offence, neither prosecution nor the judiciary is applying the Domestic Violence Decree nor the Sentencing and Penalties Decree to the sentence of such offenders. All prosecutors and judicial officers have attended training on domestic violence. Why are they failing to implement the Decree?

In my view, the resistance to the Domestic Violence Decree comes from the same attitude that saw an eagerness to promote reconciliation for domestic violence cases under the Penal Code. In my view, some judicial officers continue to reconcile cases of domestic violence, by accepting at face value the "reconciliation" presented by the victim in court. Members of the judiciary rarely look beyond the declaration of reconciliation to ask whether the victim will be safe when she goes home, and whether her reconciliation was forced by the perpetrator. This shows ignorance of our family and social structures and about the power relationships in a spousal or de facto relationship. When a victim of assault says she has reconciled and wants her spouse to be given a suspended sentence, what does she really mean? Is she safe from future assaults? Are the children safe? If a daughter was raped by her father, apart from a prison term, there must also be restraining order, unless the judicial officer is of the view that the victim's safety and wellbeing are no longer an issue. The greatest barrier to the implementation of the Decree is the attitudes of the prosecution, police and judicial officers whose task it is to enforce and administer the law. The greatest barrier is gender blindness to the way the justice system affects the simple rights of women and children. The greatest barrier to the enforcement of the law is the lack of objectivity of those who administer the law. The Domestic Violence Decree is not implemented by many prosecutors and judicial officers because they are not able to recognise the barriers to justice which exist for women and children as a result of our social and cultural institutions and values. The myths which exist in their minds exist to serve as a barrier to justice. They are;

1. Men have the right to physically correct their wives;
2. Women are manipulative and often deliberately provoke violence against themselves to get the innocent spouse into trouble;
3. Domestic violence is a private matter between husband and wife which should be sorted out privately;

4. A woman who complains of domestic violence is a bad wife and mother;

5. Domestic violence is not a criminal matter.

These attitudes lead to an over eagerness to "reconcile", to an over ready acceptance that the violence was provoked, to a belief that it takes "two to tango", and to an inescapable urge to ask the victim what she did to cause the assault. It is true that all marriages and relationships have difficulties. It is also true that the bringing up of children can be difficult and problematic, especially in the teenage years. However the problem that the justice system must confront is not why there are problems, but why violence and sexual assault are being used to "solve" the problem. In other words, a gender competent bench will avoid falling into the trap of using stereotypes to assess the problems facing a family, but will ask instead why *violence* is used in the relationship. A gender competent bench will look beyond a wife's plea of "reconciliation" to ask who the breadwinner is, how much family and social pressure weighs on her to force a reconciliation, and how the court processes and the law can be used most effectively to remove the violence from the family relationship. The issue is not who caused the problems in a marriage. The issue is why violence is being used in a family, and how the court can ensure that the victims of violence are safe. That is the issue.

It is because we all have families, because we may be married or in a partnership ourselves that we often judge others on the basis of our own personal relationships and on the basis of power relationships in our own homes. That leads us to subjectivity and a loss of focus on the question of the safety and well being of the victims of violence in the family.

Sadly, most cases of domestic violence which are dealt with in the magistrates' courts never come to the attention of the media, or the High Court. Sadly most cases of rape and incest within a family do not lead to a sentence imposed under the Sentencing and Penalties Decree, as a domestic violence sentence. This is so, even in the High Court. These cases have not been subjected to criticism by the Court of Appeal. The result of this failure by the judiciary is that the intention of the Domestic Violence Decree, which was to promote gender equality in the courts, and to promote gender competence within the judiciary, is defeated. The passing of progressive laws can only be applauded if those laws are implemented according to the spirit of the law. The result is that for women and children who are the victims of family violence, who come to court ignorant of the law but trusting in the impartiality of the judiciary, access to an equal justice is denied. The greatest test for the impartiality of any judiciary is its ability to be gender competent. Women and children are the most vulnerable in any society. In Fiji, with its patriarchal social structures, the power of the religious and traditional institutions, and the economically weak bargaining power of the majority of women, the judiciary may provide the only source of justice. When the judiciary fails to provide such justice, in relation to family violence, it fails in its most fundamental duty of objectivity and fairness in the

conduct of cases before the courts, and of providing substantive access to justice by all who live in Fiji.

Nazhat Shameem

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