

# **PACIFIC HUMAN RIGHTS LAW DIGEST**

**Volume 2, PHRLD**

**Under the editorial sponsorship of the  
Pacific Regional Rights Resource Team (RRRT)**

**Editorial Committee**

**Co-Editors:**

P Imrana Jalal  
(RRRT Human Rights Adviser &  
former Fiji Human Rights Commissioner)

&

Joni Madraiwiwi  
(former Judge of the High Court of Fiji &  
former Fiji Human Rights Commissioner)

**Editorial Committee Members:**

Hannah Harborow, Luisa Katubadrau &  
Mary-Ann Vine of RRRT  
& Tevita Seruilumi of the Fiji Women's Crisis Centre

# CONTENTS

---

<b>INTRODUCTION</b>	<b>v</b>
<b>USING THE DIGEST</b>	<b>vii</b>
<b>ACKNOWLEDGEMENTS</b>	<b>viii</b>
<b>EDITORIAL REVIEW</b>	<b>ix</b>

## **PART I: PACIFIC ISLAND CASES REFERRING TO CONSTITUTIONAL BILLS OF RIGHTS, HUMAN RIGHTS CONVENTIONS, STANDARDS & PRINCIPLES<sub>1</sub>**

Assembly	3
Children	22
Cruel, inhuman or degrading treatment	24
Custom	39
Dignity	41
Discrimination	61
Judicial independence	62
Legal aid	65
Liberty	68
Life	69
Movement	75
Privacy	77
Procedure	83
Religion	85
Rule of law	92
Sexual harassment	93
Speech	101
Torture	

## **PART II: INTERNATIONAL CASES REFERRING TO CONSTITUTIONAL BILLS OF RIGHTS, HUMAN RIGHTS CONVENTIONS, STANDARDS & PRINCIPLES**

Discrimination	104
Free speech	106
Religion	108
Sexual harassment	110

© Secretariat of the Pacific Community (SPC), 2008

All rights for commercial / for profit reproduction or translation, in any form, reserved. SPC authorises the partial reproduction or translation of this material for scientific, educational or research purposes, provided that SPC and the source document are properly acknowledged. Permission to reproduce the document and/or translate in whole, in any form, whether for commercial / for profit or non-profit purposes, must be requested in writing. Original SPC artwork may not be altered or separately published without permission.

ISSN 1817-6003

Pacific Regional Rights Resource Team (RRRT)  
Level 2, Pacific House  
Private Mail Bag, Suva, Fiji  
Tel: (+679) 330 5582 Fax: (+679) 330 6582  
Email: RRRTRegistry@spc.int Website: www.rrrt.org

<b>PART III: INTERNATIONAL HIV HUMAN RIGHTS CASES</b>	112
Children	113
Discrimination	123
Health	133
<b>INDEX BY NAME</b>	136
<b>INDEX BY COUNTRY</b>	

## INTRODUCTION

---

This is the second volume of the *Pacific Human Rights Law Digest (PHRLD)* produced by the Pacific Regional Rights Resource Team (RRRT).

RRRT has been working with and training human rights non-governmental organisations (NGOs), law students, lawyers, magistrates and judges in the Pacific region for over 10 years. Since 1998, a significant part of that training has included an annual three-week human rights course for graduating law students from the University of the South Pacific's Professional Diploma in Legal Practice (PDLP) class. Much of this training has focused on encouraging the use of conventions, international standards and constitutional bills of rights in the courts, and in fact has contributed to increased reliance on, and use of, these instruments by magistrates, judges and lawyers across the region.

The overall purpose of this *Pacific Human Rights Law Digest* is to disseminate for use by Pacific law students, lawyers, magistrates, judges and human rights advocates a collection of recent analysed human rights case law that can be used in the courts as precedents and as tools for policy initiatives. RRRT is mindful of the fact that the vast majority of the law fraternity in Fiji and the Pacific does not have access to the Internet and the useful website of the University of the South Pacific School of Law's Pacific Islands Legal Information Institute ([www.paclii.org](http://www.paclii.org)), which contains a large number of regional judgments.

The digest might also be of interest to those outside the Pacific who are interested in the development of human rights in our region.

The digest is not just for lawyers but for human rights activists and stakeholders who are increasingly engaging in the law as a potential arena of change. It is therefore not a simple compilation or compendium of cases with headnotes as in law reports, but an analysed summary of judgments pointing out the significant human rights issues. RRRT has a vast network of local level human rights community paralegals and defenders, numbering about 300 in eight Pacific countries, who are using the law as a tool for change in governance and human rights.

A new legal precedent not only creates a standard for the courts, it also provides an opportunity for human rights stakeholders to use it to create new policy or practice whether at micro (community), meso (institutional) or macro (policy) levels.

RRRT's ultimate objective is to help build a human rights culture which enhances the rule of law and democracy in the Pacific. Promoting the use of human rights standards in law, practice and policy is part of RRRT's broad long-term strategy for achieving that goal.

The vast majority of judgments in Pacific Island countries are not published in volumes. The full text of the cases included in this digest can either be found on RRRT's website ([www.rrrt.org](http://www.rrrt.org)) or on [www.paclii.org](http://www.paclii.org). Some Fiji cases can also be found on the website of the Fiji Human Rights Commission ([www.humanrights.org.fj](http://www.humanrights.org.fj)).

## ABOUT RRRT

---

The Pacific Regional Rights Resource Team (RRRT) provides human rights training, technical support, and policy and advocacy services. RRRT is a programme of the Secretariat of the Pacific Community (SPC), an international organisation that provides technical assistance, policy advice, training and research services to 22 Pacific Island countries and territories.

Initially established in 1995 as a gender and legal literacy programme funded by the UK Department for International Development (UK DFID), RRRT has since expanded its programme in response to elevated human rights needs in the Pacific. It now supports and works with the largest pool of human rights defenders in the region.

RRRT is unique in that its programme base continues to have a gender and a rights-based approach as its foundation. In 1998, RRRT was awarded the prestigious UNICEF Maurice Pate Award for its cutting-edge work in gender and human rights and in 2005, was chosen by the Office of the United Nations High Commissioner for Human Rights (Asia Pacific Office) as one of 14 ‘best practice’ rights-based projects in the region.

RRRT has programmes in Cook Islands, Fiji, Kiribati, Nauru, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. With partners including governments and regional and civil society organisations, it has been described as a ‘cutting-edge programme’ in human rights capacity building due to its approach of tackling both systemic and socio-economic issues through interventions at the micro, meso and macro levels.

Its goal is *‘to strengthen the capacity of the Pacific region to promote principles of human rights and good governance in order to achieve democracy based on social justice’*. It seeks to achieve this goal through a combination of training, mentoring, linking and support to community organisations; through its networks of legal rights training officers, community paralegals and civil society partners; and, at the regional level, through training lawyers, magistrates, judges and policymakers to adopt and apply human rights principles and good governance practices in their work.

RRRT is primarily funded by the New Zealand Agency for International Development (NZAID) and the Australian Agency for International Development (AusAID).

## USING THE DIGEST

---

Volume I of the *Pacific Human Rights Law Digest* (PHRLD) focused on the application and/or discussion of human rights conventions by Pacific Island courts. Volume 2 has a broader focus. It includes a variety of cases discussing not only United Nations human rights conventions and standards but also interesting cases decided by Pacific Island courts that refer to bills of rights in Pacific Island constitutions.

This digest is divided into three parts:

**Part I** contains recent (and some older cases) from various Pacific Island countries (PICs) that not only apply rights contained in the bills of rights of PIC constitutions, but also new cases referring to UN human rights conventions. If a convention or international human rights principle was even raised by the lawyers and dismissed in passing by the court, that judgment is included. However, the digest does not purport to contain every single case involving a human rights convention in PICs covered by the RRRT project.

Also reported in Part I are some older decisions that we came across recently or that were sent to us by judges, magistrates and lawyers. Included in this category are decisions on conflicts between custom and constitutional rights. We have chosen to include cases that mention significant civil and political or economic and social rights issues such as freedom of movement or religion, and cases that demonstrate the tensions between customary and formal law.

We have chosen not to include the vast number of judgments that discuss mainstream due process cases such as admissibility of evidence, fair trial, Judges Rules and the like, since such cases are fairly commonplace. Cases in this category are only included if they are of particular significance.

**Part II** contains some significant international human rights judgments that discuss various fundamental rights and freedoms in bills of rights or human rights conventions.

**Part III** contains some interesting and innovative cases from the common law world that discuss the difficult and controversial issue of HIV/AIDS. We are grateful to UNAIDS for allowing us to extract cases, which we thought might be of immediate importance to PIC governments and courts, from its excellent and useful booklet of HIV cases authored by the Canadian HIV/AIDS Legal Network, *Courting rights: Case studies in litigating the human rights of people living with HIV*, to enable wider dissemination in the PICs of its best practice collection.

Within the three parts, the cases are arranged in either subject or alphabetical order with the subject matter as headings. Some have more than one subject heading. Each summary contains a brief set of facts, the human rights issue on which the editors wish to focus, the decision and a commentary on the case. Within the summaries the laws and conventions used are listed. Significant cases are mentioned, but not all the cases mentioned in the full

text of the judgment are included in the text of the summary – only those cases that have some bearing on the human rights issue being discussed.

The digest is modelled on the highly regarded Interights *Commonwealth Human Rights Law Digest*, which RRRT greatly admires and consistently uses in training. RRRT acknowledges Interights for giving us the inspiration to produce a digest specifically focusing on the Pacific region.

This digest is accompanied by the RRRT publication *The Big Seven: Human Rights Conventions & Judicial Declarations* – a compilation of core human rights instruments and judicial declarations. *The Big Seven* is a handy reference tool to complement the digest.

## ACKNOWLEDGEMENTS

---

RRRT would like to thank all law students, lawyers, judges and magistrates who made unpublished judgments available to us. We would also like to thank Mary Motofaga of Fiji, a former student of the University of the South Pacific School of Law, who assisted during the initial stages of this digest.

## EDITORIAL REVIEW

---

This is the second volume of the *Pacific Human Rights Law Digest*. We had promised to publish a volume every two years bringing you all the relevant human rights case law from the region as well as landmark cases from beyond. We are one year late due to the difficulty in collecting cases in the Pacific. However, this is a more comprehensive volume of interesting summaries of case law. The cases are available from [www.paclii.org](http://www.paclii.org) or from RRRT on request.

Apart from these cases, many human rights cases are available from United Nations individual complaint procedures to various human rights committees/treaty bodies (Human Rights Committee (ICCPR), Committee on the Elimination of Discrimination Against Women (CEDAW), Committee on the Elimination of Racial Discrimination (CERD) and Committee against Torture (CAT)). For example, cases can be found on the UN website for CEDAW (<http://www.un.org/womenwatch/daw/cedaw/>) under ‘Decisions/Views’.

## COMMENTARY

### PART I

This part of the digest contains Pacific Island cases in which the courts are either interpreting human rights standards in their constitutions or legislation, applying international standards in ratified and unratified human rights conventions or considering how domestic and external frameworks affect each other.

#### Application and interpretation

One of the most controversial and divisive areas of human rights is the extent to which they can be applied horizontally, that is, between citizens. Although the cases discussed in this section are not grouped under this heading in the main text, they are discussed separately here for different reasons. The orthodox school of thought is that rights are only enforceable vertically, between the state and citizen. This means for instance, that rights cannot be enforceable between citizen and citizen, or against private corporations. The anti-discrimination provisions of the bills of rights in most PICs appear to cover the public sector and not the private sector, consequently limiting their application to the relationship between state and citizen. Courts have generally opted for a vertical application. In *Loumia v DPP*, the majority of the Court of Appeal in the Solomon Islands held that human rights concerned the relationship between the state and the individual exclusively; therefore rights were only enforceable vertically. The underlying rationale for this decision was to preclude the infringement of fundamental freedoms and the incorporation of custom law as part of the Solomon Islands law, both being inconsistent with the country’s constitution. However, the Constitution of Fiji together with the Fiji Human Rights Commission Act 1999 appear to allow for the horizontal enforceability of rights, although this interpretation is yet to be properly tested. Compare these cases with the South African case of *Khumalo & Ors v Holomisa* in Part II of this digest, where the court ruled that the right to free speech could be enforced against a private newspaper company.

### **Assembly**

The right to assembly is a fundamental aspect of a democracy recognised in the ICCPR in article 21. Does it assume even greater importance in a state in which the avenues of protest are even more strictly limited? In *Funaki & Anor v Police*, the court ruled that the police rightfully brought a peaceful pro-democratic protest march to an end in circumstances arising out of a stand-off. It could be argued that the conduct of Tongan Police in preventing the protest march might be acceptable behaviour in a functioning democracy. However, in a state where the monarch has near absolute powers, the duty of the court to protect this right assumes greater importance. In such states, civil disobedience might be the only form of dissent possible.

### **Children/International standards**

Although we have grouped these cases under the rubric of children, all considered the application of international standards to domestic law, and the interplay between domestic law and human rights international law. Two cases from Fiji focus on whether childcare responsibilities, given the ratification of the Convention on the Rights of the Child (CRC) and the domestic bail legislation, might allow the court to release parents on bail pending trial. In both *Devi v The State* and *Yuen v The State*, the courts applied the best interests of the child principle in the CRC to give weight to the Bail Act relating to the care of dependants, releasing the accused persons. However, they were mindful that the principle could not be applied arbitrarily as the act itself cited a number of factors to be considered.

In Nauru and Fiji, in *In re Lorna Gleeson* and *Rhea v Caine* respectively, the courts had to consider the effect of the CRC on mandatory citizenship and residency requirements in domestic legislation for applicants for adoption. In both, the courts ruled that the CRC could be relied upon to influence the meaning of citizenship and residency. It would appear that in both, the courts exceeded the boundaries of the application of the CRC to give residency and citizenship requirements an extreme meaning. By contrast, in *Social Welfare v Marshall & Ors*, the High Court of Fiji decided that residency requirements were mandatory conditions which could not be given an alternative meaning. A convention could not amend a clear and unequivocal provision of domestic legislation.

One might support fully the relevance of international law to domestic courts where relevant: a human rights convention can be used to fill a lacuna, to resolve an ambiguity or to favour the person seeking the protection of human rights where there is room for interpretation. It cannot be used to directly contradict a clear, mandatory provision in domestic legislation, especially one designed to protect the rights of children. The cases illustrate some of the interesting contradictions between the rights of adult individuals versus the rights of children. In our respectful view, the interpretation of residency requirements in *Social Welfare v Marshall & Ors* is to be preferred.

In inter-country proceedings, the local court cannot override a decision on residence made by another court abroad, especially in light of commitments under the Hague Convention. So the court held in *Nai & Ors v Cava*. It was also the first application of the unratified Hague Convention in Fiji. The court interpreted s 43(2) of the Constitution of Fiji to mean that it had an obligation to apply international human rights standards, even when counsel did not make submissions citing international conventions.

The case of *Fa'aoso v Paongo & Ors* signifies a clear departure from the traditional reluctance of Tongan courts to apply international human rights standards. The court adopted a *Teoh*<sup>1</sup> approach, stating that ratification by Tonga of the CRC could be relied on to reinforce the award of damages against the state in a case involving the savage beating of a 12-year-old by the police. This case appears to be the first application of the CRC in Tonga, but not the first application of a human rights convention. In 2005, Webster CJ had applied the International Covenant on Civil and Political Rights (ICCPR) in *R v Vola* (see later in this digest) for the first time in Tonga

Several cases in this digest arose out of the civil and political upheavals in Solomon Islands, emanating from the illegal removal of Prime Minister Ulufa'alu in June 2000 by civilian militia forces battling for land and other resources. Two groups were pitted against each other. The use of child soldiers was a feature of both groups. In *Kelly v R*, the court said there was a distinction between recruitment to the armed forces of the state and civilian militia groups; the latter did not have the protection of international human rights standards. This was a perplexing distinction given the tragic reality that child soldiers are largely recruited by guerilla or rebel groups rather than by national military forces. The court held that the ratification of the CRC had not been domesticated and that it was unnecessary to have recourse to it given that the constitution provided adequate safeguards. However, in the sentencing case involving the same child soldier, the court said that the CRC prohibited life sentencing of a child below the age of 18.

In the *State v Sorpapehu*, although the court said that the law must protect those classified as children by Fiji law, as well as in the CRC, it proceeded to reduce a child abuser's sentence, partially on the basis that the traditional apology was relevant to the length of sentence. It clearly gave greater weight to the mitigation advanced on behalf of the adult for the abuse suffered by his victim.

### **Cruel, inhuman or degrading treatment**

Whether prison conditions in Fiji could be classified as imposing cruel, inhuman or degrading treatment according to international standards, giving rise to bail, occupied the court in the *State v Boila & Naimoka*. Breaches of s 25 of the Constitution of Fiji could never be justified on the basis that Fiji was an underdeveloped country, or that the people of Fiji, because of their poor and simple backgrounds, were accustomed to being treated with inhumanity or disrespect. However, the court said the conditions were not so severely humiliating that they sapped the inherent dignity of the person.

### **Custom**

The tensions between customary law and formal constitutional protections continue to be a source of conflict in all Pacific communities. The cases reported in this section tacitly acknowledge the contradiction between the traditional Pacific Islands and the 'modern way of life'. Many of those conflicts manifest themselves in tensions between the rights of women to equality (as well as the rights of children to more autonomy and recognition) versus what is perceived by many to be their traditional status. This ambivalence resonates

1. *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 128 ALR 353 featured in 1PHRLD 88-90.

throughout the Pacific and sometimes has political repercussions, reflecting the sensitivities that are involved and the caution about concepts such as human rights.

In Papua New Guinea (PNG) and the Solomon Islands in particular, some communities condone the practice of revenge killings in particular circumstances. While the constitutions of many PICs recognise customary law, there is a clear demarcation in terms of serious criminal offences. The courts have held that the recognition of such practices must be consistent with the constitution and laws of the state. In *Loumia v DPP*, the court refused to accept the use of customary obligations/practice as a mitigating factor for murder. In both the *Loumia* and *Ulufa'alu* cases, the Solomon Islands courts held that the bill of rights concerned the relationship between the state and the individual exclusively, thus rights were only enforceable vertically, not horizontally.

In *Magiten v Beggie & Wahiginim*, the PNG court accepted that a breach of custom law could be a proper cause of action, but it must be properly pleaded. It must clearly state what the custom was and who applied it, and also provide details of its requirements in clear, precise and adequate terms.

Custom is accepted as an exception to the principle of non-discrimination on the grounds of sex by courts in some jurisdictions. In *Tanavalu & Ors v Tanavalu & Solomon Islands National Provident Fund*, the court took the view that the Constitution of the Solomon Islands permitted the use of custom law even if it discriminated against women. In that case, pension funds were paid to the father of the deceased, rather than to the deceased's widow. The father then distributed the funds at his discretion, giving nothing to the widow. The court ruled that this was in accordance with the relevant custom, where inheritance was by patrilineal succession. In contrast, in two cases in PNG, *In re Thesia Maip* and *In re Yongo Mondo*, the courts ruled that breaches of custom could not be used to justify the imprisonment of women.

Although not a main issue in the case, *Australasian Conference Association Ltd v Sela & Ors* addressed some of the tensions between customary and formal land law. In a very few situations, the long-held possession of land granted by custom chiefs could be upheld despite modern property rights under formal written property law. This decision is being appealed.

Customary or traditional reconciliation continues to be a mitigating factor in sexual offence (and domestic violence) cases around the Pacific. The practices of *bulubulu* (Fiji) and *ifoga* (Samoa) are examples of the genre. Such practices discriminate against women because the overwhelming majority of offenders are males. The victim's opinion is not relevant and the protocol is more of an engagement between the heads of the families affected to preserve social relations in the community or the village. The remorse of the perpetrator usually plays little or no part in the process. In *Nabuaka v The Republic* (Kiribati), the court ruled that traditional reconciliation under custom could not be a mitigating factor in rape sentencing, particularly when it was accompanied by violence.

The role of witchcraft in sexual politics is a reflection of male dominance in certain communities in Papua New Guinea. It is used as a means to ensure elderly women are kept

in submissive roles. The practice both discriminates, and is an implicit threat against elderly women. The allegation of witchcraft is difficult to disprove and engenders strong community feelings. Although *The State v Aigal & Kauna* was primarily an argument about the technical elements of a *nolle prosequi*, the court ordered the cessation of a prosecution in a case involving the alleged execution of a woman and the alleged detention and torture of seven others suspected of practicing witchcraft. In this instance, the court considered their human rights had been violated.

In *The State v Kule*, the customary practice of giving a daughter to the murder victim's family was held not to be a mitigating factor for murder. It violated constitutional prohibitions on slavery. The Convention on the Abolition of Slavery and Slave Trade was applied, as well as the constitution, to reach that conclusion. The handing over of the child was an institution or practice similar to slavery and therefore prohibited by the Constitution of PNG, even if the evidence showed that such a custom was a common practice. Whilst compliance with customary obligations was a matter to be taken into account, the particular custom had to be proven by evidence and consistent with human rights provisions of the constitution.

### **Dignity**

In the first case of its kind in Fiji, and in the Pacific region in general, the forcible gynaecological examination of a woman suspected of giving birth and abandoning the baby was held to be an invasive medical procedure. It was carried out in contravention of the bill of rights which provides for the right to freedom from scientific or medical treatment or procedures without informed consent. In assessing damages in the *Fiji Human Rights Commission v Police & Attorney General*, the view was that the level of damages ought to be assessed in light of the country's social and economic conditions and not by universal standards. It was also unnecessary to show outrageous conduct on the part of the defendant because the issue was about the infringement of human dignity.

### **Discrimination**

Most of the cases analysed in this section under the grouping of discrimination were not filed as discrimination cases *per se*. It is extremely rare for cases to be filed under this ground in the Pacific Islands region. Cases, which are in reality about some form of discrimination, are often brought before the courts on other grounds. A number of cases included in this category ought to have been argued on this basis but were advanced on other grounds. However, those cases have still been included under this heading. Discrimination against women on the grounds of sex, gender or custom is profiled in this section (as well as under the section on custom), even where it was not alleged or advanced. The tensions between women's right to equality and their subordinate status in custom remains a source of much controversy in the region.

Sex discrimination is accepted as a legitimate part of custom by the courts in some jurisdictions, but there is inconsistency in its application around the region (see also the commentary under custom previously). In *Minister for Provincial Government v Guadalcanal Provincial Assembly*, the Court of Appeal discussed the possibility that women were discriminated against because they were not able to be chiefs. It held that discrimination

against women was not unconstitutional if the constitution itself legitimised that gender discrimination. There is very little discussion in the Solomon Islands courts of the discriminatory effect of laws and practices on women. In this case, two members of the court recognised the effect of the particular constitutional provisions in reinforcing traditional power structures.

By comparison, a custom not allowing widows to have relationships was held to be *ultra vires* the equality provisions of the Constitution of PNG in *Raramu v Yowe Village Court*. One of the issues for consideration was whether the custom contravened the constitution in being discriminatory against women. The court refused to recognise such a practice because it was oppressive and discriminatory of women. Prohibiting widows from relationships struck at the equality provision in the constitution. The custom failed to recognise the inherent dignity of women as part of humankind.

Imprisonment for adultery is still a penalty in some parts of the Pacific, most often enforced exclusively against women. Although *Sipo v Meli*, as well as other cases from PNG regarding women's rights, are relatively old cases, they have been included for their human rights interest. PNG is one of the few countries in the Pacific Islands where adultery is still a criminal offence. It is punishable by imprisonment as well as with the payment of compensation in both custom and civil law. The court in this instance actually reinforced the importance of maintaining adultery laws in PNG. The practice is anachronistic and in violation of the inherent dignity of the person, and human rights standards in general.

Continuing with the theme of sex discrimination and gender equality, the courts have had to deal yet again with the sensitive issue of the discriminatory corroboration evidence practice in sexual assault trials in both Tonga (*R v Fungavai*) and Solomon Islands (*Teikamata v R*). The Tongan court, in considering the value of the uncorroborated evidence of the complainant, came to the conclusion that there was no legal requirement that a rape complainant's evidence had to be corroborated. Yet it proceeded to consider it nevertheless. The Solomon Islands court said that the cautionary warning in rape cases appeared to be artificial and unnecessary and required removal by legislation. If it was not removed by legislation, then the courts might have to act in future. It is interesting that the courts cite corroboration as if it were a binding law rather than a practice. Little thought is given to its discriminatory origins well canvassed in other countries. In some jurisdictions, the courts have indicated it should only be abolished by legislation, while the Fiji Court of Appeal abolished the practice citing among other things its discriminatory effect on women.<sup>2</sup>

It would be interesting to see what the Solomon Islands Court of Appeal might have done had similar arguments about gender and sex discrimination been put before it by counsel. In preferring to leave the matter of abolition to parliament, a conservative approach was clearly adopted notwithstanding that the corroboration rule is a practice rather than a law.

Despite there being no specific legislation to cover the distribution of property in *de facto* relationships, the court was prepared to apply equitable principles to fill the lacuna in

*Mariango v Nalau*. The constructive trust principle as the basis for the distribution of property in Vanuatu was extended to *de facto* marriages even in the absence of legislation. The court did this by reference to the recognition of equality as the basis for Vanuatu society.

In *Toakarawa v The Republic* (Kiribati), a vicious domestic violence case involving the permanent disability of the wife, the court had to consider the relevance of forgiveness in domestic violence. It said that domestic violence was not a private matter and did not affect the court's duty to impose a sentence reflecting the gravity of the offence.

Three landmark cases on age discrimination were argued on that basis in both Samoa and Fiji. In the *Fiji Human Rights Commission v Suva City Council, Fijian Teachers' Association & Fiji Public Service Association v Public Service Commission & Interim Attorney General* and *Kirisome & Ors v Attorney General & Commissioner of Police* (Samoa), Pacific Island courts finally ruled on the legality of retirement ages that had no specific link to an employee's fitness, or any other reason. Age discrimination is prohibited in the constitutions of both Fiji and Samoa. In the *Fijian Teachers' Association* case, the defendant had arbitrarily made the decision to reduce the retirement age pursuant to a policy made by the unelected interim government. The equality provisions of the Constitution of Fiji were held to have been breached and the justification for the policy made by the respondent was rejected. It was determined not to have met the threshold requirement in that the justification for the decision, i.e. savings and employment generation, was not proportional or sufficiently connected to the standards of equality.

In considering discrimination in Samoa in *Kirisome & Ors v Attorney General & Commissioner of Police*, the court applied a test to determine whether a limitation on the prohibition on age discrimination could be justified on an objective and reasonable basis. It said that the inequality challenged must exist for a legitimate purpose, and the manner in which those ends were achieved must be proportionate. In practice, a balancing exercise is undertaken; therefore the relationship or connection between the two (i.e. the means and the ends) have to be reasonable or affect the other in a way that bears relevance to what is appropriate in the circumstances. Where this cannot be established, then the apparent inequality would be struck down.

Several cases in this volume arose out of the political crises and coups in Fiji of 1987, 2000 and 2006 and are considered under different commentary. In the arena of discrimination, *Qicatabua v Republic of Fiji Military Forces & Ors* concerned soldiers who were charged with mutiny in 2000, and who had attempted to kill Fiji's current coup leader Commodore V Bainimarama. They were held to be entitled to the same due process rights as ordinary civilians on the grounds of constitutional equality. In *Fiji Human Rights Commission v Fiji Law Society*, the view was that it was unfair discrimination to suspend military lawyers for allegedly committing treason in December 2006 without a proper hearing.

### **Judicial independence**

The issue of perception of judicial bias arose in the interesting case of *Takiveikata v The State*, another arising out of the political crisis of 2000 and the attempted mutiny mentioned previously in *Qicatabua v Republic of Fiji Military Forces & Ors*. The accused, a traditional

2. *Balelala v State* [2004] FJCA 49 featured in 1 PHRLD 4-7.



high chief, was alleged to be the leader of the attempted mutiny. Comments made at a social event about the accused by the judge adjudicating the matter were taken as perceived reasonable apprehension of bias. The conviction was overturned on that basis and a retrial ordered. On appeal to the Supreme Court, it declined the judge special leave to appeal because he had no standing.

#### **Legal aid**

The availability of legal aid was the subject before the courts in Vanuatu and Fiji in *Office of The Public Solicitor v Kalsakau* and *The State v Silatolu*, respectively. In the former, the court was of the view that a Member of Parliament in these particular circumstances did not qualify as a needy person deserving of legal aid provided by the state. The latter arose out of the political upheavals in Fiji in 2000. The applicant for legal aid was an alleged coup perpetrator charged with treason. The Legal Aid Commission was required to provide legal representation in the treason trial as a matter of equality before the law.

#### **Liberty**

In the case of *In re Eroni Delai* the court had to consider whether a custodial sentence was constitutional and/or necessary in a traffic offence matter. The accused had served 6 months of a 12-month sentence. The court said that imprisonment for failure to pay a debt such as traffic fines would be rare; such penalties must be balanced against the right to liberty.

#### **Life/International standards**

The Tongan case of *R v Vola* was the first verdict in a murder case in Tongatapu in over 20 years. The court did not hesitate in applying international cases and the International Covenant on Civil and Political Rights, notwithstanding that they did not apply directly to Tonga or that Tonga had yet to ratify the covenant. It was recognised that the principles set out in the covenant and in the numerous authorities cited were reflective of the circumstances exercised in relation to the death penalty. The court was not hindered by the kingdom's non-ratification. The case illustrates the philosophical concerns of the judiciary in particular, and the wider community in general, in relation to the irreversible nature of the death penalty. Like Solomon Islands in the *Kelly* cases in this digest, this case marks the first clear departure from traditional non-enforceability approaches to international law in Tonga, and the growing influence of international human rights law on domestic courts.

#### **Movement**

The right to free movement is critical in a democracy and is often linked with discrimination on the grounds of free speech, political opinions and belief. It is not uncommon in military dictatorships or authoritarian states to punish political dissidents with travel bans or blacklists preventing them from leaving their countries. In both *Puloka & Ors v The Kingdom Of Tonga* and *Leung v Interim Attorney General (Immigration)* (Fiji), the courts ordered that bans be lifted to allow the applicants to leave the countries freely. Although unstated, the context was important, with a military-backed interim government or a near absolute monarch exercising authority. Where an arbitrary regime exercises power, the capacity of the courts to protect the rights of ordinary citizens assumes even greater importance. On the other hand, the court held in *Khera v Fiji Islands Revenue and Customs Authority* that preventing a citizen from leaving the country for non-payment of taxes was a valid limitation on the right to free movement because it was reasonable and justifiable.

In the Vanuatu case of *Ayamiseba v Attorney General (Immigration)*, the court had to consider the validity of a ministerial deportation order, requiring the removal of a West Papuan political activist. The court held that although the right to freedom of movement of non-citizens may not be the same as that of citizens, statutory discretion must be exercised carefully. Despite the power conferred in these particular circumstances, the minister was required to observe certain preconditions before authorising a particular course of action.

#### **Privacy**

Where the bill of rights states that the right to privacy has limitations prescribed by law as 'are reasonable and justifiable in a free and democratic society' but does not expressly state those limitations, it was for the courts to determine what was an excessive or unreasonable interference with privacy. In *Yaya v Attorney General & Director of Public Prosecutions*, the court held that the accused's right to privacy, despite his several previous convictions, was breached due to the publication of his name in the media in relation to reports of a series of violent robberies.

#### **Procedure**

Three cases from Kiribati, Fiji and Vanuatu concern the propriety of filing cases under the constitution to seek constitutional remedies or under ordinary legislation for an ordinary remedy when rights are violated. In *Ali v The State* (Fiji), the court stated that a remedy under the constitution should not be lightly sought; where alternative remedies were available these should be used first. The Kiribati court in *Attorney General v Mbwe* held a similar view that not all cases involving procedural errors or irregularities by the state were rights violations subject to constitutional redress and damages; this was true in only rare cases where there had been a fundamental subversion of the rule of law. The Vanuatu court held in *Public Prosecutor v Emelee & Ors* that because an unreasonable delay in trial was a violation of fundamental rights in the constitution, such cases should be brought under the constitution and not by way of judicial review. In *Railumu & Ors v RFMF & Attorney General*, the court determined that time limitation rules on constitutional redress were an unreasonable limitation on rights and the defence forces had the right to equal treatment accordingly.

#### **Religion**

A Tuvalu court did not uphold the principle of freedom of religion and non-discrimination in religion when it outlawed the establishment of a new Christian church in deeply Christian Tuvalu, on the basis that it was against Tuvaluan 'values'. In *Teonea v Pule o Kaupule & Nanumaga Falekaupule*, the High Court said that the equal right to freedom of religion was subordinate to the cohesion of Tuvaluan society as reflected in the constitutional recognition of Tuvaluan values and culture. In comparison, Samoan courts have consistently ruled in favour of freedom of religion on the basis of non-discrimination.<sup>3</sup>

#### **Rule of law**

The cases in this section from Fiji and Solomon Islands arose out of the crises, political upheaval, interruptions to democratic rule, and coups in those countries. They involve

3. *Lafaiatii & Ors v Attorney General & Ors* [2003] WSSC 8 featured in 1 PHRLD 71-77.

different violations of rights but are grouped together here (although they could just as easily be included in other sections) because they reflect varying attitudes to the rule of law. After the unlawful removal of the government in Solomon Islands in 2000, an Amnesty Act was passed to absolve various unlawful political acts associated with the removal. However, in *R v Su'u & Ors*, a Solomon Islands court said that an amnesty was not available to an accused (charged with murder) under the Act as it excused only political acts, not criminal acts done in violation of international humanitarian or human rights law. *Ulufa'alu v Attorney General & Malaita Eagle Force & Ors* unequivocally endorsed the orthodox view that human rights only apply vertically to bind the state *vis-à-vis* its citizens and not horizontally, i.e. as between individuals and between non-government entities and individuals in the private sector. This meant that the citizens of Solomon Islands had no remedy against the civilian militia forces because they were not soldiers of the state's armed forces.

The constitutionality of the military regime's anti-corruption unit in Fiji was the subject of litigation in *Khera & Ors v Fiji Independent Commission Against Corruption* in 2007. The court held that the institution of criminal proceedings by parties other than the Director of Public Prosecutions was illegal.

Despite *In re Nikhil Naidu* being an 'old case', it has been included in light of its significance in relation to recent events in Tonga, Solomon Islands and Fiji. The Fijian court said that the proclamation of a public emergency did not give the authorities power to limit certain rights according to their discretion. Freedom of liberty under the constitution cannot be extinguished, other than through certain limitations regarded as reasonable and justifiable in a free and democratic society. Certain alternative procedures which were reasonably practicable, rather than detention, were not followed by the police.

### Sexual harassment

Sexual harassment lawsuits are virtually unheard of in the Pacific region. Apart from Fiji, where the Human Rights Commission Act makes sexual harassment a civil offence by providing that '... *sexual harassment, for the purposes of this section, constitutes harassment by reason of a prohibited ground of discrimination*',<sup>4</sup> no other Pacific Island country has made it unlawful. Two cases involving sexual harassment and unfair dismissal are included in this digest, one from Tuvalu, *Katea v Niutao Kaupule & Satupa* in Part I and an Indian case, *Apparel Export Promotion Council v Chopra* in Part II. The Indian case was included not only because the Indian higher courts are trail blazers in human rights, but to demonstrate the varying treatment accorded the issue by different courts. In a landmark ruling, the Tuvalu court held that a woman may sue in tort law for unfair dismissal and damages citing sexual harassment as the basis for the factual claim. Although the court dealt with the issue purely in terms of the tort of assault and unfair dismissal as there was no formal civil or criminal offence of sexual harassment in Tuvalu, the case is indicative of the increasing assertiveness among women in Tuvalu in pursuing legal remedies in cases of 'sexual harassment'. Constitutional arguments were not considered, the applicable law being adequate to cover the situation. A constitutional argument could have been advanced using the constitution

and Tuvalu's ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in a similar manner to that advanced in the *Vishaka* case.<sup>5</sup>

There remains a residual reluctance to apply human rights principles and standards to cases that more readily fit into general law. Compare this with *Vishaka's* case, where the Supreme Court of India relied on the Indian Constitution and international human rights instruments to formulate sexual harassment guidelines in the workplace where there was a lacuna in the law. In *Chopra's* case, the argument was also initially framed in tort. When the case reached the Supreme Court, it upheld the appeal against the offender's reinstatement in terms of the violation of the rights of the complainant under the Indian Constitution.

### Speech

The right to free speech, expression and opinion is the cornerstone of democracy. It is so fundamental that only in the most stringent of circumstances ought it to be limited. In Samoa, in *Efi v Attorney General*, the court said that by denying the Leader of the Opposition access to the government-funded media, the relevant policy discriminated on the grounds of political belief and was therefore unconstitutional; freedom of expression included the freedom to communicate divergent opinions to others.

In cases challenging the authority of the military-backed interim regime in Fiji in 2007, the court expounded on the concept of free speech. In *Interim Attorney General v Draunidalo*, it held that the criticism of the judiciary by a lawyer in these circumstances was within the right to freedom of expression. In *Heffernan v Bainimarama, RFMF & AG* it ordered the military government not to interfere with a human rights activist's right to free speech, movement and assembly.

There have been a number of attempts to limit the right to free speech in Tonga. In 2004, a New Zealand-based Tongan language newspaper, *Taimi o Tonga*, was banned from Tonga through amendments to the constitution and an act of parliament. In the case of *Taione v Kingdom of Tonga*, the Supreme Court held that the constitutional amendment and the act of parliament were unconstitutional and unjustifiably limited press freedom, including freedom of expression and freedom of the press protected under clause 7 of the Tongan Constitution.

### Torture

In another case arising out of the post coup regime of Lt Col Rabuka in 1987, an academic tortured by members of the military forces for burning the military promulgated constitution in 1990 was awarded a large sum of compensatory and exemplary damages in *Singh v Ponijese, Attorney General & Ors*. Exemplary damages were awarded for punitive, arbitrary, oppressive or unconstitutional action by the servants of the state. The military was vicariously liable in the circumstances. No apology was offered and nor was disciplinary action taken. The policy consideration that the commanders and the senior officers had proper control of those under their command at all times, and that human rights and the rule of law were upheld, had to be reflected. Of great interest as well was the fact that although human rights

4. Fiji Human Rights Commission Act 1999, section 17.

5. *Vishaka v State of Rajasthan* (1997) 6 Supreme Court Cases 241 (India) featured in 1 PHRLD 92-93.

were clearly breached, the claim was dealt with purely in tort and not under human rights law, which generally attracted lesser damages. The involvement of the Fiji Human Rights Commission was rejected by both parties, and also by the court in a separate order.

## PART II

The second part of the digest contains four international cases applying conventions.

Indian courts are continuing to expand the boundaries in human rights. In *Apparel Export Promotion Council v Chopra*, the court held, following the famous *Vishaka* case, that the right to gender equality included being free from the unwelcome actions of a supervisor. It ruled that sexual harassment did not have to consist of actual physical contact. This case was instituted as a tort not as a breach of human rights in the constitution (see *Singh v Pomijese, Attorney General & Ors* in this Digest where a similar strategy was adopted). In recognising that there need not be any physical contact, it acknowledged that sexual harassment extended beyond that to any conduct that trespassed present acceptable limits.

What constitutes a ‘religion’ was considered by the court in the Cayman Islands in *Grant & Anor v The Principal, John A Cumber Primary School & Ors*. It had to determine whether a Rastafarian child was allowed to wear dreadlocks, etc. and be enrolled at a school that had rules about appropriate dress. The court held that the child’s right to education and freedom of religion as a Rastafarian had to be respected by the school.

The medical practitioners’ professional society was held to be guilty of indirect discrimination on the basis of national origin by not allowing doctors qualified in other countries to be registered on that basis alone in the New Zealand case of *Northern Regional Health Authority v Human Rights Commission*.

Putting to rest the unsettled nature of the law in South Africa, the highly regarded Constitutional Court held that rights were enforceable horizontally as well as vertically. This enabled ordinary citizens and corporate legal persons, as well as the state, to be held accountable for breaches of constitutional human rights in *Khumalo & Ors v Holomisa*.

## PART III

In Part III, a number of HIV cases from other parts of the common law world have been included. Although no cases have yet reached Pacific Island courts, it is just a matter of time before they do. This is because of the prevalence of HIV and the discriminatory treatment often accorded people living with HIV. These cases represent the latest thinking in human rights law and HIV/AIDS internationally.

The first group of four cases concerns the area of employment, probably one of the most keenly contested areas. In *Diau v Botswana Building Society*, the court upheld the right of an employee to refuse a compulsory HIV antibody test for the confirmation of her employment. In *Hoffmann v South African Airways*, *MX v ZY* and *Nanditume v Minister of*

*Defence*, the courts ruled that it was illegal to either exclude an HIV person from employment or to refuse to hire them, even in the armed forces.

In two highly controversial decisions, the court ruled in *R v Secretary of State for the Home Department ex parte Glen Fielding* and *Prisoners A-XX Inclusive v State of New South Wales* that a ‘no condoms policy’ was legal, although opening the door in the latter case for a potential action establishing that the prison/state owed a potential duty of care to prisoners.

Although a policy decision in itself may not be reviewable by the court, its effect – a breach of duty of care owed to the prisoners – is. In *Odafe & Ors v Attorney General & Ors*, an HIV-positive prisoner was held to be entitled to medical treatment in prison. In *R v Lo Chi Keung; HKSAR v Vasquez Tarazona Jesus Juan*, an HIV prisoner’s sentence was reduced on compassionate grounds.

In a highly contentious decision, the dismissal of a case against a school for deferring an application for enrolment of a child living with HIV was upheld. The decision in *Perreira v The Buccleuch Montessori Pre-School and Primary (Pty) Ltd & Ors* sets an unfortunate precedent for the large numbers of children around the world living with HIV who have a right to an education. Although acknowledging the potential for discrimination, it held that the school’s concern was well-founded. However, it is precisely these sorts of caveats that fuel the debate about these issues.

Human rights are an evolving concept. The cases reflect the continuing quest for equality in Pacific Island countries and the challenges that have to be negotiated. The universality of these rights are now largely accepted by our courts. But context is also important because it provides the reference point for ensuring these rights are applied appropriately and with sensitivity to manage the tensions between them and existing social, cultural and religious values in the Pacific Islands.

Co-Editors

P Imrana Jalal & Joni Madraiwiwi

## PART I: PACIFIC ISLAND CASES REFERRING TO CONSTITUTIONAL BILLS OF RIGHTS, HUMAN RIGHTS CONVENTIONS, STANDARDS AND PRINCIPLES

### ASSEMBLY

#### ASSEMBLY / FREE SPEECH / DISCRIMINATION

- **The right to assembly is not an unfettered right; it is subject to acting peacefully without disorder.**

#### FUNAKI & ANOR v POLICE

Supreme Court	Tonga
Ford CJ	[2006] TOSC 40
	13 December 2006

#### Law considered

Constitution of Tonga (CT)  
Police Act (PA)  
Criminal Offences Act (COA)

#### Facts

This case arose out of a stand-off between police and marchers (protestors) at the commencement of a large pro-democracy protest march on 1 June, 2006. Thirty-four cases arising out of the same incident had been adjourned in the Magistrates Court pending this appearance. The protest march had intended to petition either the King or the Legislative Assembly for democratic political reform under clause 8 of the CT.

‘Aleki Funaki (F) and another were convicted in the Magistrates Court of disobeying the lawful orders of a police officer contrary to ss 35(1) and (2) of the PA and obstructing a police officer acting in the execution of his duty contrary to s 114(b) of the COA. F appealed against conviction.

F appealed on four grounds, only two of which were relevant for present purposes: that the convictions were bad for duplicity and double jeopardy and their rights under clause 8 of the CT had been breached by the prosecution. Clause 8 states that:

*All people shall be free to send letters or petitions to the King or Legislative Assembly and to meet and consult concerning matters about which they think it right to petition the King or Legislative Assembly to pass or repeal enactments provided that they meet peaceably without disorder.*

#### Issue

- Had F’s rights been breached by the laying of two charges arising from one set of facts and the consequent limitations on his right to free assembly?

#### Decision

The court dismissed all four grounds of appeal. In relation to the claim of duplicity and double jeopardy, it was possible to lay charges for two different offences on the same set of facts. The first charges under the PA related to disobedience to a lawful order given by a police officer. The second under the COA concerned obstruction of a police officer in the execution of his duty. Both were distinct offences and involved different essential elements.

As for clause 8 of the CT, which concerned the right to write to or petition the King or Parliament, and to consult the same peaceably, it was not an absolute right; it was subject to the petitioners acting peaceably without disorder. The standard for determining this depended on the venue. Any form of assembly on a street or highway was likely to result in obstruction. In those circumstances, it required the petitioners to cooperate fully with orders given by the police. There was ample evidence before the magistrate to conclude that clause 8 did not give the petitioners the right to march in complete disregard of orders by the supervising police officers.

#### Comment

This is a clear illustration of the limitation that rights have in any society. They are not absolute (apart from the right to life, and freedom against torture and slavery), but are subject to reasonable limitations. In the present situation, given the venue was a public street and there were two marches being staged at the same time, it may have been reasonable for the police to be attempting to supervise the event. However, in the circumstances the court may have been unduly restrictive in its approach in deciding that F was not acting peaceably within the meaning of clause 8 in refusing to follow orders. The question that ought to have been asked was whether the police attempts at controlling a peaceful gathering were reasonable in terms of the rights guaranteed by clause 8 rather than emphasising their duty to control traffic. It is possible to lay charges for different offences on the same facts because they have different elements and could not be considered to breach the double jeopardy rule.

## CHILDREN

### CHILDREN / ABUSE / TRADITIONAL RECONCILIATION

- **The law must protect those classified as children by Fiji law as well as in the Convention on the Rights of the Child (CRC).**
- **The significance and value of a traditional apology are relevant to the length of sentence.**

#### STATE v SORPAPELU

High Court  
Gates J

Fiji Islands  
Cr. Appeal HAA151.05S  
7 March 2006

#### International instruments and law considered

Convention on the Rights of the Child (CRC)  
Constitution of Fiji (CF)  
Penal Code [Cap 17] (PC)

#### Facts

The respondent (S) was a relative of the female complainant (C), who was aged 16 years. C was visiting S's house to attend a family function. C was asleep in S's house when he knelt over her and sucked her breasts. S was charged with indecent assault of a female under the PC which attracted a maximum sentence of 5 years. S argued he should be treated leniently as he had pleaded guilty thereby sparing C from having to give evidence; had shown the court that he was remorseful and ashamed; was married with four children and three other dependants; was a first time offender who had readily cooperated with police; and had made a customary traditional apology before the hearing.

The Magistrate's Court (MC) reduced the charge from 'indecent assault' to a lesser charge of 'indecently insulting or annoying a female' and sentenced S to a conditional discharge of 12 months. The appeal to the High Court (HC) by the state concerned both the length of the sentence and the legality of the reduction to a lesser charge.

#### Issues

- Was the MC entitled to reduce the charges without hearing the views of the parties?
- Was the sentence appropriate taking into account all the mitigating/aggravating factors as well as Fiji's obligations under the CRC?
- What was the value of the traditional apology to the formal case?

#### Decision

The HC sentenced S to a term of nine-months imprisonment suspended for two years on the basis of an 'excellent written submission which was powerfully persuasive'. It refused to

accept the lesser charges for technical legal reasons (not discussed at length in this synopsis), but noted that no force was applied, no weapon used and no penetrative assault attempted. It was not possible to state how significant the MC found the traditional apology to be; a traditional apology could be a sign of remorse. There was no reason to doubt the genuineness of the apology, it seemed to follow a pattern of conduct and there was no evidence that the MC had 'overvalued' the apology procedure. It also said that there was no Victim Impact Report to suggest 'an unusual effect on the victim'.

#### Comment

It is unfortunate that despite invoking the provisions of the CRC, the court nevertheless chose to give S a suspended sentence, thereby reducing the overall punishment. The result is at odds with the application of the 'best interest of the child' principle. Articles 16 and 19 of the CRC state the law must ensure the child (someone under 18) must be protected from such interference and attacks. The act of sucking C's breasts was a gross violation of her body and her inherent dignity, accentuated by her status as a child. The emphasis on the lack of force and the absence of penetrative assault deflected consideration of that significant aspect. The view that a non-penetrative assault is somehow a lesser form of assault is a patriarchal one, viewing the crime from the perspective of the offender and not the complainant/survivor.

Was the traditional apology (*bulubulu* or *soro*) given too much prominence in the sentence? In Fiji women are not usually prominent in apology ceremonies. As a matter of practice, the male members of the family of the offender make the formal apology with the presentation of gifts, mats and a whale's tooth (*tabua*), the latter being the most prominent feature of the ceremony. Women may be present but are silent observers. The complainants have no say in the matter and usually do not even attend the ceremony. Their views are rarely if ever sought. The purpose of the *bulubulu* is to heal the rift between the families in order to enable the community to get on with life. It should not be a mitigating factor in reducing the sentence. It is difficult to say what actual weight was given to the *bulubulu* in the final sentence, given the other mitigating factors. The impact of such custom forgiveness ceremonies on sentencing is a subject of much controversy amongst women's groups working in the area of sexual assault and domestic violence.

### CHILDREN / ADOPTION / INTERNATIONAL STANDARDS

- **A mandatory provision in the adoption legislation requiring an applicant for adoption to be a Nauruan citizen could be overridden by a broad constitutional provision and the CRC.**

#### IN RE LORNA GLEESON

Supreme Court  
Millhouse CJ

Nauru  
[2006] NRSC 8  
15 December 2006

**International instruments and law considered**

Convention on the Rights of the Child (CRC)  
 Constitution of Nauru (CN)  
 Adoption of Children Ordinance 1965 (ACO)  
 Customs and Adopted Law Act (CALA)

**Facts**

The applicant (G) appealed a decision by the Family Court refusing her application for adoption on the ground that s 9(2) of the ACO required her spouse to be a Nauruan. G's spouse was not a Nauruan citizen. G and the child were both Nauruan citizens. G relied on the CRC and the CN to argue that it was in the child's best interests under s 6(2) of the ACO that G be allowed to adopt the child.

**Issue**

- Whether a mandatory provision in the adoption legislation requiring the applicants for adoption to be Nauruan citizens could be overridden by a broad constitutional provision and the CRC.

**Decision**

The court allowed the appeal. The interpretation by the Family Court of s 9 of the ACO was wrong because it was inconsistent with article 3 of the CN, which concerned the protection of the right of the individual to respect for 'his private and family life' and contrary to the spirit of the CRC. The requirement in s 9(2) of the ACO that the applicant's spouse be a Nauruan should not be regarded as applying to G's application. Article 3 overrode s 9 of the ACO.

**Comment**

The court had no hesitation in taking the CRC into account to reinforce the CN although it had not been 'domesticated'. Taking 'the best interests of the child' as a starting point, it considered the CN and the CRC in light of the facts of the case to nullify the requirement that the applicant's spouse be Nauruan in the ACO. The arguments relating to the CN and the CRC were accepted on submission by counsel. This reinforces the widening application of human rights by the courts in the Pacific. However, a human rights convention cannot contradict a clear and unambiguous provision of domestic legislation. It can only be applied to clarify an ambiguous provision or one that is capable of two or more interpretations or to fill a lacuna. Compare this case to the next case in this digest, *Rhea v Caine*, where a Fiji court decided that a clear and unequivocal residency requirement was fulfilled by a short-term stay, together with a previous stay in Fiji. Both cases might be considered to be untenable applications of international human rights standards.

**CHILDREN / ADOPTION / INTERNATIONAL STANDARDS**

- **Whether the strict criteria set out in adoption legislation on residency requirements for applicants for adoption should be interpreted broadly to accommodate the best interests of the child under the CRC.**

**RHEA v CAINE**

Magistrates Court	Fiji Islands
Waqavonovono (Mag.)	Adoption Case No. 26 of 2006
	18 December 2006

**International instruments and law considered**

Convention on the Rights of the Child (CRC)  
 Constitution of Fiji (CF)  
 Adoption of Infants Act [Cap 58] (AIA)

**Facts**

This case concerned an adoption application where the applicants (R) or (H for husband and W for wife) were American expatriates. R resided in Tel Aviv, Israel. W obtained custody of the infant (I) on 16 July, 2006. She remained in the country for three months during which she had continuous custody of the infant. H withdrew from the application because he had not been with W during the period in which W had custody of I. H arrived in Fiji a week before the adoption order was granted. H and W had adopted the infant's older sister while they were living in Fiji during 2003. The Director of Social Welfare challenged the capacity of R to adopt on the basis that they could not and did not fulfill residency requirements, which required a degree of permanent settlement for a period of time. In essence, the director argued that a temporary stay in Fiji could not satisfy a residency requirement.

The AIA, s 6(4), states that:

*An adoption order shall not be made in favor of any applicant who is not resident in Fiji or in respect of any infant who is not a resident.*

**Issues**

- Had the relevant provisions of the AIA on residency been complied with by W staying in Fiji with the infant for three months only?
- Could the relevant provisions of CRC influence the interpretation of a mandatory requirement of the adoption statute thereby changing its meaning?

**Decision**

The Magistrates Court (MC) allowed W to adopt the infant. The CRC could be taken to influence the meaning of residency, given that all the relevant provisions of the AIA had been complied with, taking into primary consideration the best interests of the child. Article 3 of the CRC states:

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

S 43(2) of the CF provides:

*In interpreting the provisions of this chapter, the courts must promote the values that underline a democratic society based on freedom and equality and must, if relevant have regard to public international law applicable to the protection of rights set out in this chapter.*

The term ‘resident’ in Fiji under s 6(4) of the AIA was to be construed in such a way so as to take into account the period in which W had lived in Fiji subsequent to the filing of the application for adoption. Such a construction would not conflict with any other provision of the AIA. Any reversal of the infant’s placement would be detrimental to the infant’s survival needs and future development. Therefore, it was in the best interests of the child that an adoption order be made.

#### Comment

While citing precedent and the provisions of the CF, the decision by the court raises serious issues. In particular, there is some doubt about the liberal interpretation of the term ‘resident in Fiji’ in s 6(4) of the AIA. If one assumes residence ‘involves an element of permanent resettlement for a foreseeable period of time and not some temporary period of sojourn’ (per Byrne J *In Re S* (1977) FJHC (182)) this approach is inconsistent. It treated the three-month probationary period as residence as well, which by definition is not permanent.

Reading into a clear and unequivocal residency requirement a short-term stay, together with a previous stay in Fiji, as fulfilling a residency requirement is, with respect, excessive. A human rights convention cannot contradict a clear and unambiguous provision of domestic legislation. It can only be applied to clarify an ambiguous provision or one which is capable of two or more interpretations. The case is problematic because it is now possible that this precedent will be exploited, regardless of its narrow construction, to allow those with *mala fides* intentions towards children to stay in Fiji for three months and then be granted a legal adoption on that basis. This is precisely what s 6 (4) was designed to prevent. The three-month rule was designed to assess whether the adoptive parent has the capacity to care for a child, not to satisfy a residency requirement. The residency requirement is a separate issue and is designed to ensure that a thorough investigation is able to be conducted on prospective adoptive parents. If the prospective parents are not resident/domiciled in Fiji with some degree of permanency, the local welfare authorities are less able to conduct a proper investigation as to suitability. If the prospective parents are overseas residents, they must apply through the relevant authorities abroad in a government-to-government arrangement that is designed to weed out those with *mala fides* intentions or who are otherwise not suitable. The government arrangements have long waiting lists of those who have been thoroughly checked and who are patiently waiting their turn. In a sense, the applicants here are ‘queue jumpers’.

## CHILDREN / ADOPTION / INTERNATIONAL STANDARDS

- **Residency requirements in legislation cannot be dispensed with even in light of the CRC.**

### SOCIAL WELFARE v MARSHALL & ORS

High Court  
Phillips J

Fiji Island  
Civil Appeal No. HBA 11 of 2006  
7 March 2008

#### International instruments and law considered

Convention on the Rights of the Child (CRC)  
Convention on Protection of Children and Co-operation (CPCC)  
Adoption of Infants Act [Cap 58] (AIA)  
Adoptions of Infants (Magistrates Courts) Rules  
South Australian Adoption Act 1988

#### Facts

H and W made an application to adopt two infants. The applicants were not residents of Fiji under s 6(4) of the Adoption Act. The Magistrates’ Court made the adoption order in their favour, although they were not resident at the time of application.

The Solicitor General’s Office filed an appeal on behalf of the appellant Social Welfare Officer (SWO), the *Guardian Ad Litem* for the infants at the centre of the adoption proceedings before the High Court. The appellant argued:

*i) That the learned magistrate erred in law in and in fact in not taking into account the best interest of the children as required under the Adoption Act (Cap 58) and Fiji’s obligations under the Convention on the Rights of the Child 1993 in the following:*

- a) the fact that there was no Home Study Report available from the Guardian Ad Litem*
- b) that the proper inter-country adoption procedures were not followed in this adoption application*
- c) [that proceedings] should have considered that it would be in the best interest of the child that they comply with South Australian Law, with its own conditions.*

The SWO further argued that s 6(4) of the AIA was clear that an Adoption Order should not be made in favour of any applicant who was not resident in Fiji, or in respect of any infant who was not a resident, and that the learned magistrate erred in law and in fact in not taking into account the residency of both applicants.

**Issue**

- Whether or not H and W being non-resident foreigners were able to adopt Fiji citizen children in Fiji given the mandatory requirements of residency for applicants for adoption.

**Decision**

The court held that whilst it sympathised with the respondents, it was the function of the court only to interpret the law and not to amend it. It could not change the meaning of s 6(4), which required residency in Fiji. The court also noted that the CPCC, in respect of inter-country adoption, imposed additional obligations on state authorities which could not be overcome by an amendment to s 6(4) of the AIA. The court upheld both grounds of appeal.

To the question as to whether s 6(4) of the AIA infringed the respondents' constitutional rights and was therefore discriminatory, the court held that s 6(4) was not an infringement. However, it was a legitimate restriction pre-conditional to the resident requirement and that it must be supported with credible evidence to show that indeed it amounted to limiting the constitutional right. Suffice to say, non-Fiji residents did not enjoy the same constitutional rights enjoyed by Fiji citizens.

**Comment**

The decision shows the advancement of the principle of 'the best interest of the child' in adoption cases and the 'prerequisites for inter-country adoption'. The best interest of a child that is provided for under CRC (Fiji is a state party) and the AIA (Cap 58) is designed to protect children and safeguard their interests. In any inter-country adoption application, the court must be satisfied that what is done is in the best interests of the children. In the present case, the court had no factual foundation to arrive at a determination of what was in the best interest of the children, in that there was no home study report of the prospective parents (respondents).

Even if it were possible to get a home study report, s 6(4) of the AIA makes it explicitly clear that an adoption order shall not be made in favour of applicants who are 'not resident in Fiji'. Residency is a matter for the court to decide based on the evidence before it. This condition seeks to ensure that children and their families are protected from unscrupulous people who may seek to unlawfully obtain children for adoption, and to prevent trafficking in and abduction of children. In support of that, the CPCC, in respect of inter-country adoptions, placed additional obligations on state parties to act according to the principle of the child's best interest; that is, to meet the prerequisites required in any inter-country adoption process. While Fiji is not a party to this convention, the convention takes effect by virtue of s 43(2) of the Constitution of Fiji.

This case may be compared to that of the two previous cases in this digest, *Rhea v Caine* and *In re Lorna Gleeson*, where the courts extended the boundaries of the application of the CRC to give similar residency and citizenship requirements an unrealistic meaning.

*Editors' note: Although as human rights lawyers we fully support the application of international law to domestic courts where relevant, it cannot be used to directly contradict a clear mandatory provision, especially one designed to protect the rights of children. This*

*case illustrates also some of the interesting tensions between the rights of adult individuals versus the rights of children. In our respectful view, this interpretation of 'residency requirement' is to be preferred.*

**CHILDREN / ADOPTION**

- **In inter-country proceedings, the local court cannot override a decision made by another court abroad on residence, especially in light of commitments under the Hague Convention.**

**NAI & ORS v CAVA**

High Court	Fiji Islands
Phillips J	Civil Action No.18 of 2008
	6 February 2008

**International instruments and law considered**

Hague Convention on the Civil Aspects of International Child Abduction (HC)  
Family Law Act 2003 (FLA)

**Facts**

The two parties to the case were (C) who was the natural mother of five-year-old (D) and the respondents (N), who were relatives who had played a role in raising D. N made applications for custody and adoption of D, while C sought to have orders that she be granted custody of D and have the liberty to take the child to Australia. C and D had Australian citizenship.

D had been resident in Australia for 14 months prior to travelling to Fiji and there had been an order in a New South Wales Court giving C 'residential responsibility' over the child. C was residing with N during the course of the case.

Earlier orders made were:

1. 28 January 2008: The Magistrate ruled that interim custody of D be given to N with limited access given to C pending the outcome of custody and adoption applications before the court. The magistrate also ordered that the Attorney General and the Director of Social Welfare be parties to the case under ss 177 and 178 respectively of the FLA.
2. 19 February 2008: Phillips J granted an interim stay order on the above orders of the Magistrate. Phillips J stated in her order that:
  - the Magistrates' Courts in Fiji did not have jurisdiction to entertain adoption applications in respect of a child who is an Australian citizen;
  - Section 43(2) required the courts to have regard to public international law if relevant, in this case the Hague Convention on the Civil Aspects of International Child Abduction;
  - the child be returned to Australia to her mother as soon as possible.



**Issue**

- Whether the court was able to make an order giving the child liberty to leave the jurisdiction before a decision was made on the issue of 'habitual residence'.

**Decision**

The court declined the application to stay the previous order. It held that the circumstances of the case, including the 14-month period that D had lived in Australia and the fact that D and C both had Australian citizenship, made them habitual residents of Australia.

The court referred to the Hague Convention in upholding its earlier decision that the child should be returned to her mother. Article 3 of the convention dealt with child custody and the court cited this to rule that D's mother had the right to custody in this instance.

**Comment**

This case set a precedent on the application of international law principles from two bold perspectives. First, it was the first application in Fiji of the Hague Convention, an unratified convention. Although other unratified conventions, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) have been applied previously, it is a first for the Hague Convention. Second, the court interpreted s 43(2) of the Constitution of Fiji to mean that it had an obligation to apply human rights conventions even when counsel did not make submissions citing international conventions.

**CHILDREN / PARENT'S BAIL**

- **The best interests of the child are a primary but not paramount consideration in the granting/refusal of bail for the child's parent who is awaiting trial.**

**DEVI v THE STATE**

High Court	Fiji Islands
Shameem J	[2003] FJHC 47
	5 March 2003

**International instruments and law considered**

Convention on the Rights of the Child (CRC)  
 Constitution of Fiji (CF)  
 Penal Code [Cap 17] (PC)  
 Bail Act (No.26 of 2002) (BA)

**Facts**

This was a second application for bail pending trial for the applicant (D) who was charged with three counts of imitation of currency. It was based on two main grounds, namely that the prosecution had no basis in law to request further remand and that D had a four-year-old son who now had no caregiver and whose clothes were locked up at D's house while she

was in custody. D's husband, the co-accused, was also in custody. Bail was initially refused on the basis that investigations were continuing. D said this was not a good reason for refusing bail. Under the CRC, the court needed to consider the best interests of D's child in granting or refusing bail.

Article 3(1) of the CRC states:

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

Article 9 concerned the principle of non-separation of parents from children, unless it was in the child's best interests.

**Issue**

- Whether bail should be granted to D, taking into account the best interests of the child as required under the CRC.

**Decision**

The court granted bail to D on the basis that the child should not be separated from its parent. It considered the CF and the BA on the right of a person to be released from detention on reasonable terms, and the right to be released on bail unless the interests of justice otherwise required. The primary consideration in deciding whether to grant bail was the likelihood of D appearing in court to answer the charges laid against her. D was charged with misdemeanours and had no history of offending or absconding.

The care of dependants was a relevant consideration in the granting or refusal of bail as per s 19(2)(b)(iv) of the BA. It held that the CRC was a valuable guide to the weight that a court must give 19(2)(b)(iv) to the BA. Where, for instance, both parents were in custody and there were no arrangements for the care of young children, bail should be granted because it was in the interests of the children that they were not separated from their parents. The CRC applied in Fiji pursuant to s.43(2) of the CF. However, while the best interests of the child was a primary consideration, it did no more than give those interests first importance. This had to be taken into account with other considerations.

**Comment**

The court applied the best interests of the child in the CRC to give weight to s 19(2)(b)(iv) of the BA relating to the care of dependants. However, it was mindful that the principle could not be applied arbitrarily. While important, it had to be considered with the other factors that had to be taken into account under the Act. In certain situations it might not be sufficient to counter the particular circumstances of a case, as for example, where a parent was charged with murder or rape. In applying the relevant provisions of the BA, the court endorsed an interpretation conforming to international law and the state's obligations. This case demonstrates that the principle of the best interest of the child under the CRC is increasingly being applied to all areas of the law where children are involved.

This case may be compared to the next case, *Yuen v The State*, where a similar issue arose.

**CHILDREN / PARENT'S BAIL**

- **The best interests of the child were a primary consideration in granting bail to the accused parent.**

**YUEN v THE STATE**

High Court	Fiji Islands
Winter J	[2004] FJHC 247
	24 September 2004

**International instruments and law considered**

Convention on the Rights of the Child (CRC)  
Constitution of Fiji (CF)

**Facts**

This was a second application for bail by the defendant (Y). Y and her husband were among six others accused of manufacturing the illicit drug, methylamphetamine. Both were in prison pending trial. The resident judge of the Court of Appeal rejected the first bail application on the basis it required a full bench. However, that application was withdrawn and a fresh application made to the High Court.

Y had two children, who according to a general and child health practitioner were showing signs of 'overt and subtle psychological patterns distinctive of children during prolonged separation from parents'. The younger child was emotionally withdrawn and comparatively under-developed for a pre-schooler. The doctor was concerned at the effect of separation, taking into account their migrant status and exclusive Chinese cultural upbringing.

Successive applications for bail had to be based on changed circumstances. Without that, earlier decisions could not be properly reconsidered.

**Issues**

- Was the absence of both parents a genuine psycho-social and developmental concern of sufficient impact to constitute changed circumstances?
- What was the impact of the CRC on bail in these circumstances?

**Decision**

In granting bail, the court referred to s 43(2) of the CF which provides that the courts: '*must, if relevant, have regard to public international law applicable to the protection of the rights set out in this chapter.*' In applying the 'best interests of the child' under the CRC, it took into account concerns that Y could interfere with witnesses or re-offend while on bail. However, those concerns were lessened somewhat by Y's need to ensure that the best interests of her children were satisfied.

Citing the decision of *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 69,<sup>6</sup> while the best interests of the child were a primary consideration, the court did no more than give them first importance, along with such other considerations as may in the circumstances of a given case require equal but not paramount weight. The best interests of the children were of first importance in this new application for bail. However, this decision should not be taken as a precedent for the principle that if both parents in a relationship are sent to jail, they can automatically expect to get bail because of their children's needs.

**Comment**

This case applied the approach adopted by Shameem J in *Devi v The State* in which the best interests of the child were considered as a primary, but not paramount consideration. However, the caveat is that bail is not automatic for parents invoking this principle. It would depend on the circumstances and context of the particular case and whether the best interests of the child/children outweighed competing factors. In another case, this primary consideration might be displaced by other competing factors such as the gravity of the offence with which a parent or caregiver was charged.

**CHILDREN / SOLDIERS / INTERNATIONAL STANDARDS**

- **The trial of a child soldier did not violate children's rights mentioned under the CRC.**
- **There is a difference between being recruited to a state military group and to an illegal military or para-military group.**

**KELLY v R**

Court of Appeal	Solomon Islands
Lord Slynn of Hadley P, McPherson & Morris JJA	[2006] SBCA 17 25 October 2006

**International instruments and law considered**

Universal Declaration of Human Rights (UDHR)  
International Covenant on Economic, Social and Cultural Rights (ICESCR)  
International Covenant on Civil and Political Rights (ICCPR)  
International Guidelines for the Administration of Juvenile Justice 1985 (The Beijing Rules) (BR)  
Convention on the Elimination of All Forms of Racial Discrimination (CERD)  
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)  
Convention on the Rights of the Child (CRC)  
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP)

6. *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 128 ALR 353 featured in 1 PHRLD 88-90.

Constitution of Solomon Islands (CSI)  
 Facilitation of International Assistance Act 2003 (FIAA)  
 Penal Code [Cap 26] (PC)  
 Juvenile Offenders Act [Cap 14] (JOA)

### Facts

This case arose out of the political crisis of June 2000 in which civilian militia removed the democratically elected government of Bartholomew Ulufa'alu. This was followed by inter-ethnic fighting between the people of Malaita and Guadalcanal.

On 24 April 2003, six members of the Church of Melanesian Brothers went to the Weathercoast in search of one of their members, who was believed to be held prisoner there by the Guadalcanal Liberation Front (GLF). The GLF was an insurrectionist group that had taken over control of that part of Guadalcanal and were illegally exercising powers of government and terrorising people in defiance of the authority of the regular government and laws of Solomon Islands. K, a 14-year-old member of the GLF, was accused of killing Pateson Gatu, one of the six church members. K was charged with murder. He applied for a permanent stay of the proceedings pending against him. It was argued that the prosecution of a juvenile was an abuse of process, being so unfair and wrong that to allow the prosecution to proceed would bring the administration of justice into disrepute.

The prosecution submitted that the Parliament of Solomon Islands had provided for the prosecution of juveniles under the JOA. The PC also provided for an age where children were criminally responsible. The age is, at most, 12 years, and on occasion as low as 8 years. The prosecution of a child who was 13 or 14 years old at the time of the alleged offence was in accordance with Solomon Islands law. The CSI provides for specific legal safeguards for any person charged with a criminal offence; however, there is no distinction of children.

The grounds of the application were as follows:

1. The age of K at the time of the alleged commission of the offence was an issue;
2. The prosecution was an abuse of process;
3. The prosecution should not proceed given the international nature of the prosecution and the international guidelines on the prosecution of child soldiers;
4. The prosecution should not proceed because in the event that the accused was convicted, he would be sentenced to a mandatory life sentence in contravention of the CRC to which Solomon Islands is a signatory.

### Issues

- Whether the continuation of the prosecution against a child soldier was unfair in that it would bring the administration of justice into disrepute.
- What was the international law on child soldiers and what was the applicability of such law to Solomon Islands?
- In the absence of the domestication of international law, what constitutional safeguards applied to protect the rights of child soldiers?

### Decision

Dismissing the appeal, the court emphasised that the constitutional responsibility was to ensure that a fair trial was afforded to K at every stage of the proceedings. The CRC related to the enlisting of children into the armed forces of a country and not into an illegal paramilitary group. As such, the prosecution of K was neither oppressive nor prejudicial. The CSI and the JOA provided adequate protection.

While Article 37 of the CRC provided safeguards for the children, it was for the court to ensure the procedure and process conformed to the provisions of the CRC. The Solomon Islands Government had the responsibility to enact legislation that would give effect to relevant international conventions. In the absence of legislation, the court would do all within its powers to protect juveniles under the CSI and the JOA.

The lack of proper detention facilities for juveniles was of serious concern, but proceedings for cases properly prosecuted would not be stayed because of the lack of proper detention facilities. Balancing the right of K to a fair trial with the safeguards provided by the CSI and existing legislation did not render this case to be so rare or exceptional that the court should stay the proceedings. Therefore the application was dismissed.

Of further relevance are the following comments:

*This leaves for consideration the propriety of prosecuting the appellant for a murder committed at so young age, having regard to his understanding and appreciation of the nature of the proceedings in which he was tried. Solomon Islands has acceded to the Convention on the Rights of the Child, which came into force on 2 September 1990. The convention has not, however, been ratified by Parliament so as to incorporate it into the domestic law of Solomon Islands. As most, therefore, it serves as a guide to the procedure to be followed in a case of this kind at common law or under statute. In fact, the only relevant provision of real consequence is Article 37(a) providing that life imprisonment 'without possibility of release' shall not be imposed on a person under 18 years who commits an offence, but this is relevant to the sentencing of young offenders rather than to their prosecution or conviction. The International Guidelines for the Administration of Juvenile Justice 1985 (the 'Beijing Rules'), which do not constitute the terms of a binding treaty, lay down desiderata which appear to have been complied with in the appellant's case. So far as relevant here, those rules are again material only in relation to sentencing. In addition, reference was made to an Amnesty International policy paper on the prosecuting of child soldiers. It does not possess authoritative status in international law or in Solomon Islands law except as the opinions of persons who are expert in the subject in question. The emphasis in paragraph 6 of the paper is that 'where persons under 18 acted entirely voluntarily, and were in control of their actions, they should be held to account for their actions in the appropriate setting'. Paragraph 6.1 remarks that the Convention on the Rights of the Child 'does allow young people to be prosecuted if the procedure can be fair and takes into account the particular needs and vulnerability of young people'.*

**Comment**

The court adopted a conservative approach in declining to stay the proceedings on the basis of K's relative youth and the surrounding conditions, which created an oppressive and hostile environment for a child. In finding that there were adequate safeguards in the CSI, it appeared to focus on the gravity of the offence rather than on the status of the offender. Further, in applying the CRC (ratified by Solomon Islands on 10 April 1995) in a narrow and restrictive manner, no account was taken of realities on the ground and the forced conscription of child soldiers by militia groups during the civil crisis. It is a tragic reality that child soldiers are largely recruited by guerilla or rebel groups rather than by national military forces. It may well be that K was caught up in forces beyond his control, which might therefore have been considered a mitigating circumstance. The CRC appears not to forbid the imprisonment of children, but requires humanitarian conditions consistent with children's rights.

International universal principles relating to 'child soldiers' and 'prosecution of child soldiers' have evolved into international legally binding instruments and jurisprudence laid down by international courts such as the International Criminal Court (ICC). Solomon Islands has not ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP). However, through its ratification of the CRC it has an international legal obligation to respect the principles of the CRC-OP, which is an extension of Article 38 of the CRC duly ratified by the Government. Several other instruments that relate to conscription of child soldiers by irregular armed groups or forces have been ratified by Solomon Islands, including the Geneva Conventions of 1949, the Protocol Additional to the Geneva Conventions of 12 August 1949, and the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977.<sup>7</sup>

CRC and related international treaties on child soldiers call on ratifying governments to do everything feasible to ensure that members of their armed forces who are under 18 years of age do not take part in hostilities. It reaffirms governments' responsibilities and obligations to take appropriate measures when it comes to conscription of children in armed forces, which could be regular or irregular forces. The responsibility rests heavily on state parties to the CRC and CRC-OP and much less on private armies or guerillas.

The Solomon Islands courts failed to explore the wider spectrum of international law relating to 'prosecution of child soldiers' that includes the ratified Geneva Conventions and the decisions of the International Criminal Court, which criminalise the conscription of child soldiers. The court applied a narrow and literal approach when interpreting the provisions of CRC in its limited interpretation of 'armed forces'. In this case, the court used a 'dualist approach' when interpreting international law, stating that it had not been domesticated or become part of legislation.

In Pacific Island countries and territories, only Vanuatu has ratified the CRC-OP. Fiji is a signatory.

*Editors' notes: Several cases arose out of the same set of facts involving the defendant Kelly. The case discussed here is the appeal against the decision of the High Court for conviction. The Court of Appeal substantially upheld the decision of the High Court. On appeal before the Court of Appeal, the court refused to set aside the conviction for murder, despite K's age, but allowed the appeal against life imprisonment, ordering a separate hearing on sentencing. The Court of Appeal, when considering arguments by K's counsel that international law regarding child soldiers should apply, said that 'Such treaties and agreements may provide interpretive assistance in applying local law. But, disregarding occasions of ambiguity, they cannot control or displace the positive provisions of Solomon Islands law under which the prosecution was instituted ...'*

*At the subsequent hearing for sentencing (R v K [2006] SBHC 35), the High Court imposed an eight-year sentence for murder, and given the period already spent in prison, released K into community care under the supervision of a relative for the remainder of the sentence.*

**CHILDREN / SOLDIERS / INTERNATIONAL STANDARDS**

- **CRC prohibits life sentences for persons below the age of 18 years and requires consideration of alternatives.**

**R v K**

High Court Palmer CJ	Solomon Islands [2006] SBHC 35 4 August 2006
-------------------------	--

**International instruments and law considered**

Convention on the Rights of the Child (CRC)  
Constitution of Solomon Islands (CSI)  
Beijing Rules (BR)  
Juvenile Offenders Act [Cap 14] (JOA)  
Penal Code [Cap 26] (PC)

**Facts**

This case arose out of political events emanating from the illegal removal of Prime Minister Ulufa'alu in June 2000 by civilian military forces battling for land and other resources. It pitted a civilian militia group, the Malaita Eagle Force (MEF), from Malaita against the Isatabu Freedom Movement (IFM) civilian militia forces from Guadalcanal, in Guadalcanal.

On 24 April 2003, six members of the Church of Melanesia went to the Weathercoast in search of one of their members who was believed to be held prisoner there by the Guadalcanal Liberation Front (GFL). The GFL was an insurrectionist group that had taken control of this part of Guadalcanal and were illegally exercising powers of government and terrorising people in defiance of the authority of the regular government and laws of Solomon Islands.

7. <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/genevaconventions>

K, a 14-year-old member of the GLF, was accused of killing Patteson Gatu, one of the six church members. K was charged with murder and after being found guilty, was a minor awaiting sentence. The murder occurred in April 2003 when K was only 14 years old. On appeal against the conviction, the Court of Appeal determined that the mandatory life sentence did not apply to persons below the age of 18 years and, while dismissing the appeal against conviction, it allowed the appeal against sentence and remitted the case to the High Court for sentencing.

#### Issue

- What alternative punishment may be given by the courts for murder and what might be the reasons for doing so?

#### Decision

The court upheld the conviction on the basis that s 14 of the PC introduced exceptions to convictions for murder for persons between the ages of 8 to 12 years. It made reference to the CRC and the Beijing Rules, but said the former had not been incorporated in domestic law and the latter were guidelines that appeared to have been followed. In relation to the sentence, s 32 of the JOA introduced a specific regime for those under 18 years ('a young person'), to allow their youth to be a factor in sentencing. Section 1 of the CSI provided that a person under the age of 18 years must not be deprived of liberty save 'for the purpose of his education or welfare'. Section 13 of the JOA provided the court could sentence any offender to be 'detained for said period as may be specified in the sentence'. Section 14 conferred power on the minister to discharge the offender from detention. Reading ss 13 and 16 of the JOA with s 20 of the PC, together with reference to international treaties and conventions, implied that the State should amend the mandatory sentencing for murder in s 200 of the PC. K was released into the custody of a relative.

#### Comment

Reliance was placed on the CRC as a guideline to reinforce the statutory interpretation followed to limit the effect of a mandatory life sentence for murder on a person under the age of 18 years. Acknowledgement was also made of the fact that s 5(1) of the CSI reflected international law principles requiring a special regime of incarceration for persons under the age of 18 years.

Although no legislative changes were made after ratification of the CRC, it was used to provide guidance in sentencing. There were also overwhelming mitigating factors that were taken into consideration. The vulnerability of children and disadvantages they face, reinforce the need for international and domestic safeguards. This case appears to be the first one in Solomon Islands in which an international human rights convention ratified by the government was referred to by a Solomon Islands court. This case may be compared to the case of *R v Su'u & Ors* also reported in this digest, in which the court applied unratified conventions. These cases signal a departure from traditional non-enforceability approaches to international law in Solomon Islands and the growing influence of international human rights law on domestic courts.

## CHILDREN / TORTURE / INTERNATIONAL STANDARDS

- Accession to the CRC is an indication that a state party is bound by its terms.

### FA'AOSO v PAONGO & ORS

Supreme Court	Tonga
Ford CJ	[2006] TOSC 37
	11 September 2006

#### International instruments and law considered

Convention on the Rights of the Child (CRC)

#### Facts

The applicant (F) claimed damages of \$29,000 for being wrongfully assaulted by the police. F, aged 13 years (12 at the time of the incident), was savagely beaten by police officers after being falsely accused of theft. F was detained by the police for 20 hours before being released. F also claimed that he had suffered injuries as a result of the attack. Upon his release, F further claimed that he had been threatened. The police pleaded guilty and accepted that F had been wrongly accused.

#### Issues

- What was the relevance of Tongan incomes in assessing the amount of damages?
- Whether the CRC applied or was relevant in a case of torture of children.

#### Decision

F was awarded damages of \$10,000, comprising \$5,000 for wrongful confinement and \$5,000 for exemplary damages. The court referred to the case of *Akau'ola v Fungalei [1991] Tonga LR 22*, and issued the following admonition to police officers:

*A number of police officers still appear to believe that they have the right to exercise discipline over the public ... such abuse of authority will not be tolerated, and where it is proved to have occurred it will be stamped on, with increasing severity, until the bully boy in uniform no longer roams our streets.*

Police officers had to understand that their role in criminal investigation was exactly that – to investigate cases through interviewing witnesses and, through appropriate use of forensic methods, to gather hard factual evidence that would stand up in a court of law.

In December 1995, Tonga acceded to the CRC. The judge further said that though it still had to be properly ratified, the accession indicated a willingness by the nation to be bound by its terms. Article 37 of the convention sets out the obligations of a state concerning the apprehension and detention of a child (defined as a person under the age of 18 years). The opening words of each paragraph of the article are relevant to the present case. They read:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment ...

(b) No child shall be deprived of his or her liberty, unlawfully or arbitrarily ...

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age ...

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance ...

In the present case, all of these obligations were flagrantly abused. However, in the assessment of damages, the fact that some Tongans have no regular source of cash income was taken into account with a view to keeping awards of damages in proportion to the value of money and general conditions in the Kingdom.

#### Comment

The CJ remarked on the ‘culture of violence’ in the police force. The courts played an important role in checking abuse by officers of the state such as the police. The tender age of the youth did not preclude him from a savage beating by police officers. It was a particularly acute form of abuse of power because police are authority figures in small communities where their status is reinforced by traditional structures.

The court adopted a *Teoh* approach. Ratification by Tonga of the CRC was relied on to reinforce the award of damages against the state. The institution of such proceedings reflected an increased awareness by the public of their rights.

This case appears to be the first application of the CRC in Tonga but not the first application of a human rights convention. In 2005, Webster CJ applied the International Covenant on Civil and Political Rights (ICCPR) in *R v Vola*. Both cases signify a clear departure from the habitual reluctance to apply international human rights standards in Tonga.

## CRUEL, INHUMAN OR DEGRADING TREATMENT

### CRUEL, INHUMAN OR DEGRADING TREATMENT / PRISONERS

- **Effect of prison conditions on granting of bail; [conditions violating inherent dignity absent].**
- **Relevance of international standards to prison conditions.**

#### STATE v BOILA & NAINOKA

High Court	Fiji Islands
Shameem J	[2004] FJHC 255
	25 October 2004

#### International instruments and law considered

Universal Declaration of Human Rights (UDHR)  
 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)  
 International Covenant on Civil and Political Rights (ICCPR)  
 United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMRTP)  
 European Convention on Human Rights (ECHR)  
 Constitution of Fiji (CF)

#### Facts

The applicants (B and N) reapplied for bail on the grounds that the conditions of their custody in the ‘awaiting trial’ block of Korovou Prison were inhumane and degrading. Both had made a previous bail application that was refused because they had escaped from police custody and were unlikely to surrender to the custody of the court.

They described the conditions in which they were held, both stating that prison conditions were in breach of the UDHR, ICCPR and the UNSMRTP. In visiting the facilities upon B and N’s invitation, the court found the following: cell blocks had three occupants; there were three mattresses, three pillows and three blankets. The mattresses were damp and the blankets were used to cover the floor. There was one bucket latrine, which was emptied twice a day, one light bulb, one window, no water can, no mosquito nets and no medication for B and N’s injuries. Dinner was consumed inside the cell. The Commissioner of Prisons said that on 8 October during the proceedings all remand prisoners had been moved to dormitories with better conditions.

#### Issue

- Should the court grant bail on the basis of B and N’s likelihood of surrendering to custody or on the basis of s 25 of the CF, which states that ‘Every person has the right

*to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment”?*

### Decision

The court refused bail to both B and N. In carefully weighing the arguments of both parties, it referred to *Tyrer v U.K* [1978] 2 EHRR 1, in which the European Court of Human Rights held that the reason for inhumane treatment is irrelevant because it breaches Article 3 of the ECHR. Similarly, in *Seluck Asker v Turkey* (12/1997/769/998-999), the right under ‘Article 3 of the European Convention enshrines one of the most fundamental values of a democratic society. Even in the most difficult of circumstances ... Article 3 makes no provision for exceptions and no derogation from it is permissible ... even in the event of a public emergency’.

Reference was also made to the UNSMRTP (Part C) concerning untried prisoners, as B and N were in this case. The rules require that one prisoner is kept in one cell and that there are adequate sanitary facilities.

B and N argued that the conditions in which they were required to live in their cells contradicted the interests of the public. Both had a history of escaping police custody as well as a history of convictions. The offences were serious and there was a real risk of re-offending whilst out on bail. Considering these two issues alone, the court was inclined to refuse bail. However, the second step was to consider whether the conditions were so severely humiliating that they sapped the inherent dignity of the person. In the present case, both B and N were healthy and young, were no strangers to the criminal justice system and were both awaiting trial on multiple charges relating to violence.

The right of each man, woman and child in Fiji to be treated with dignity was an inalienable right. Breaches of s 25 of the CF could never be justified on the basis that Fiji was an underdeveloped country, or that the people of Fiji, because of their poor and simple backgrounds, were accustomed to being treated with inhumanity or disrespect. The prisoners of Korovou Prison, despite the crimes they might have committed against society, deserved to be confined in custody with no further degradation than was inherent in the act of confinement itself.

Notwithstanding those facts, **there were few cells that** satisfied the UNSMRTP and s 25 of the CF. If B and N were to remain in the dormitories, conditions would not be as inhumane and degrading as in the ‘awaiting trial’ block. Therefore B and N were to be remanded in the dormitories where the conditions were not inhumane. Accordingly, bail was refused. However, if there were future complaints about the condition of the holding facilities, bail would be granted without hesitation.

### Comment

The judge in this case took the unusual step of visiting the prison. Despite the criminal history and seriousness of the offences with which B and N were both charged, careful consideration was given to whether the conditions of the prison were fit for human habitation. The detailed manner in which the court weighed the interests of the public to be protected from B and N against the prisoners’ right to be treated humanely and with dignity, despite their remand status, reflected the evolving concern with human rights. Rights were not

diminished by their context but to be interpreted, bearing other relevant factors in mind. What these and other similar cases demonstrate is that arguments about lack of resources or policy considerations will not dissuade the courts from intervening where they consider the right invoked is being breached and there are no extenuating circumstances.

## CUSTOM

### CUSTOM / CONSTITUTIONAL LAW

- **Use of customary obligations/practice as a mitigating factor for murder is unacceptable.**
- **Rights generally have vertical application between state and citizen, and not horizontally between citizen and citizen.**

### LOUMIA v DPP

Court of Appeal	Solomon Islands
Connolly & Kapi JJA,	[1986] SBCA 1
Wood CJ	24 February 1986

### Law considered

Constitution of Solomon Islands (CSI)  
Penal Code Chapter 26 (PC)

### Facts

The appellant (L) appealed against his convictions for the murders of three men. L was with other members of a group that attacked the victims’ group with knives, bows and arrows, which resulted in the deaths of the three victims. L was convicted of murder. He appealed on the grounds that the Acting Chief Justice erred in refusing to allow the assessors to consider that pursuant to Kwaio custom, L believed in good faith and on reasonable grounds that he had a legal duty to kill those people responsible for the death of a close relative. (*Editors’ note: this is known in some Melanesian countries as ‘payback’ custom.*)

L argued that s 4 (the right to life) in the CSI applied only to relationships between private persons and the state and not to those between private persons. Therefore L’s duty to kill under Kwaio custom was not inconsistent with s 4 of the CSI and so should have been recognised as part of the law of Solomon Islands. Section 4(2) provides *inter alia* that a person shall not be regarded as having been deprived of his life if he dies as a result of the use of force as is necessary to defend life and property. On this basis, L argued that the charges against him ought to be reduced from murder to manslaughter.

**Issues**

- Should customary revenge killing be a factor in reducing a murder charge to manslaughter?
- Do rights apply vertically and horizontally (between individuals and between individuals and private actors, or only vertically between the state and the individual)?

**Decision**

The appeal was dismissed. Most of the fundamental rights guaranteed in Chapter II of the CSI were principally concerned with the relationship between the citizen and the state. If the Kwaio customary duty to kill were part of the law of Solomon Islands, it would be public law and therefore inconsistent with the CSI.

Common law together with the PC is a complete statement of the law in relation to the offences with which it deals. Killing for revenge is not lawful under the PC or the common law. Therefore, a custom that called for killing was inconsistent with the law and, pursuant to Schedule 3 para. 3(2) of the CSI, was not part of Solomon Islands law.

The exception to the prohibition on deprivation of life did not include the taking of a life as payback in accordance with custom. Nothing in s 4 of the CSI limited the protection against deprivation of life to acts by the state only. By implication, s 4(1) prohibited deprivation of life by a private person. Accordingly, the acts were contrary to s 4 of the CSI and the sentence of murder could not be reduced to manslaughter.

In relation to the issue of provocation, on which L argued the learned judge misdirected the assessors, killing in retaliation could not be regarded as a lawful act. The assessors in the High Court were also indigenous Solomon Islanders and their assessment of the behaviour and reactions of L took into account Kwaio custom, which practised revenge killings, as well as the issue of provocation. Therefore there was no misdirection.

Kapi JA had a different perspective, holding that s 4 of the CSI applied not only to the relationship between the state and the individual but between individuals as well. His Lordship observed:

*It is true that most of the provisions in Ch. II are principally concerned with relations between the citizen and the State. However, I cannot find any words in s 4 which would confine the protection against deprivation of life by the State only. The words, 'No person shall be deprived of his life intentionally ...' must be given a wide and generous application. Ministry of Home Affairs & Another v Fisher and Another [1979] All ER 21, per Lord Wilberforce.*

*[The] purpose of s 4 is to protect the right to life against any person or authority (including the State). This can be inferred from s 4(2)(a) where it is permissible under law (e.g. s 17 of the Penal Code) to allow a private person to kill another in defence of another person or property. The implication is that s 4(1) prohibits deprivation of life by a private person.*

*Examination of the other provisions in II also supports a wider application of fundamental rights provisions. Section 15(3) of the Constitution*

*prohibits certain types of treatment as between private persons and private bodies.*

*The essence of fundamental rights provisions in Solomon Islands is that they apply to all persons and they are limited only by their terms and qualifications set out thereunder.*

The court rejected the submission by counsel for the appellant and found the deceased were entitled to the protection of life under s 4 of the constitution.

The majority of the court said in considering s 4 in Chapter II of the CSI, it was 'principally concerned with the relations between the citizen and the State'.

His Lordship also said:

*The fundamental rights and freedoms of the individual may be infringed by the State in, broadly speaking, one of two ways. The infringement may occur arbitrarily and in defiance of the general rules of law. In such circumstances the individual has his remedy in the courts. It is thus not strictly necessary, though it may be salutary, to have contained in the Constitution provisions guaranteeing those fundamental freedoms. The evident purpose of the provisions of Chapter II is to prevent the infringement of those freedoms by the enactment of laws or regulations which impair them. The customary duty to kill or maim a wrongdoer who has himself killed or maimed which is contended to be part of the law of Solomon Islands in relation to the Kwaio people would, to that extent, be part of the public law and therefore, on any view, inconsistent with s 4 of the Constitution.*

**Comment**

In Papua New Guinea and Solomon Islands in particular, some communities condone the practice of revenge killings in particular circumstances. While the constitutions of many countries in the Pacific Islands region recognise customary law, there is a clear line drawn in terms of serious criminal offences. The courts have held that the recognition of such practices must be consistent with the constitution and laws of the state. They must also accord with international standards of human rights. The taking of a life for customary reasons does not fall within the exception to the deprivation of life, i.e. taking of a life in defence of another person. (See the 'witchcraft' case – *The State v Aigal & Kauna* – later in this digest for a comparison between custom and formal law.)

An interesting aspect of this case is the perspective of the members of the court regarding the application of Chapter II of the CSI. A majority held that it concerned the relationships between the state and the individual exclusively. Its purpose was to prevent the infringement of fundamental freedoms, and the incorporation of Kwaio custom as part of the law of Solomon Islands was inconsistent with s 4 of the CSI. Kapi JA agreed with the result, but found Chapter II also applied between individuals in some respects; s 4 was to be given a broad interpretation and the victims were therefore entitled to its protection. The decision in respect of the vertical versus horizontal application of rights is similar to that of the



*Ulufa'alu* case discussed later in this volume, in which the court also ruled that rights were only enforceable vertically.

*Editors' note: We respectfully disagree with this view. There is no logical basis for the argument that some rights are vertical, whilst others are also horizontal. Globally, there is a growing recognition that human rights are a matter for all to observe, including the private sector and individual citizens.*

## CUSTOM / CONSTITUTIONAL LAW

- **Breach of custom could be a proper cause of action but it must be properly pleaded. It must clearly state what the custom is and who applies it and also provide details of its requirements in clear, precise and adequate terms.**

---

### MAGITEN v BEGGIE & WAHIGINIM

---

National Court of Justice Cannings J	Papua New Guinea [2005] PGNC 75 21 April 2005
---	---

#### Law considered

Constitution of Papua New Guinea (CPNG)  
Underlying Law Act 2000 (ULA)  
Customs Recognition Act, Chapter 19 (CRA)

#### Facts

The plaintiff (M) sought an application for a default judgment against his wife (B) for being illegally married to his brother (W, the second defendant), which he said was contrary to customary law. M served a summons on B and W, who did not file an intention to defend. M claimed that while away on travel, B formed an association with and married W. M claimed that the marriage of B and W was a breach of their custom.

M sought the following orders:

1. That the marriage of B to W was prohibited according to custom and as such breached the fundamental rights of the children;
2. That B and W pay damages to M.

#### Issue

- Whether the breach of custom was a legal cause of action and an adequate ground for the court to execute a default judgment.

#### Decision

The application for a default judgment was refused. The court using its discretion was not satisfied that there was a reasonable cause of action arising from the originating summons and other documents. Breach of custom could be a proper cause of action, but it must be

properly pleaded. The application should have clearly stated what the custom was and who applied it, and should also have provided details of the custom's requirements in clear, precise and adequate terms.

The summons failed to meet those requirements and as a result B and W did not know the details of the custom they were alleged to have breached. The motion as it stood was dismissed.

However, the court could not dismiss the whole proceedings as this would be unfair to the plaintiff. The court also looked at the sources of the Underlying Law Act, which includes common law as well as customary law. Customary law should be applied unless it was inconsistent with a written law or by its application and enforcement would be contrary to the National Goals and Directive Principles and the Basic Social Obligations in the CPNG and if in its application it would be contrary to the basic rights guaranteed by the constitution. Moreover, the ULA also stated it was the duty of the counsel in relation to customary law that he or she assisted the court by calling evidence and obtaining relevant information and opinion that would assist the court.

The CRA recognised custom but not if its application would result, in the opinion of the court, in injustice or would not be in the public interest. Therefore, the application for a default judgment was refused but the other proceedings could continue.

#### Comment

This case illustrates the interesting tensions between formal and custom laws. It also highlights the unsettled nature of the relationship between constitutional rights and customary law. The tension between communal values and individual rights in PNG is apparent and the challenge lies in mediating between the conflicting values. The courts are aware of these contradictions and often attempt to craft compromises that may vary according to circumstances. They recognise that rights, while being universal in nature, have to be applied in a context that may require some modification.

## CUSTOM / DISCRIMINATION

- **Discrimination against women in the payment of pension funds is reinforced by custom law.**

---

### TANAVALU & ORS v TANAVALU & SOLOMON ISLANDS NATIONAL PROVIDENT FUND

---

High Court Lungole-Awich J	Solomon Islands [1998] SBHC 4 12 January 1998
-------------------------------	---

Court of Appeal  
Mason P, McPherson & Williams JJA  
Solomon Islands  
[1998] SBCA 8  
25 November 1998

### Law considered

Constitution of the Solomon Islands (CSI)  
Solomon Islands National Provident Fund Act [Cap 109] (SINPFA)

### Facts

The deceased husband (H) had nominated his brother and nephew as beneficiaries of his pension when he joined the fund. Under s 32 of SINPFA, that nomination became invalid when he married the following year. The Act provides that if a member of the fund dies without nominating a beneficiary for their accumulated funds, distribution is to be in accordance with the custom of the member, 'to the children, spouse and other persons' entitled in custom (s 33(c)). No provision is made as to how this custom is established.

In this particular case, after H died, his father applied for and was paid the amount held in the fund on the basis of custom in Babatana, South Choiseul. Of the \$11,079 paid to him, the father deposited \$4,000 in an interest-bearing deposit account in the name of H's son. He used \$3,000 to meet funeral expenses, paid \$2,000 each to the deceased's brother and nephew and \$79 was used for his own purposes.

The deceased's widow (W) challenged this distribution, seeking a declaration in the High Court that she and her infant child were each entitled to a third share of the money. The evidence in the case showed that inheritance in H's tribe was patrilineal and that H's father was entitled to distribute the estate to relatives. According to customary law, H's father had the discretion to pay some amount of the inheritance to the widow, but in some circumstances, for example, where she had left the father's house, he was entitled to leave her out of the distribution altogether. Although most of the argument concentrated on the proper interpretation of s 33(c), it was also argued for W that the customary law of that island was discriminatory against women and was therefore unconstitutional.<sup>8</sup>

The relevant sections of the CSI read:

#### ***Protection from discrimination on grounds of race, etc.***

*15.-(1) Subject to the provisions of subsections (5), (6) and (9) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.*

*(2) Subject to the provisions of subsections (7), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or performance of the function of any public office or any public authority.*

...

8. The bulk of this information is extracted from Jennifer Corrin Care, 'Customary law and women's rights in the Solomon Islands', *Development Bulletin*, No. 51, 20-22.

*(4) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.*

*5) Subsection (1) of this section shall not apply to any law so far as that law makes provision-*

...

*(c) for the application, in the case of persons of any such description as is mentioned in the preceding subsection (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description.*

*(d) for the application of customary law.*

### Issue

- Whether the customary law bias towards men on the distribution of pension funds was discriminatory to the widow on the grounds of gender and therefore unconstitutional.

### Decision

The court had to consider customary inheritance for the purpose of the SINPFA. In the High Court, the judge found that the word 'law' in s 15(1) did not include customary law. His basis for this finding was that the section was referring to a law to be made in the future and customary law was not such a law. Rather, it was 'evolving or was already pertaining at the time of the adoption of the Constitution'.

The court said that discriminatory customary law would be protected by the section in any event, because he considered that ss 15(5)(c) and 15(5)(d) excused discriminatory law in a case such as this.

The Court of Appeal upheld the first instance decision and limited their consideration of the conflict between customary law and protection from discrimination to the following words:

*The Constitution (s 15(5) and cl 3 of Schedule 3) recognises the importance of customary law to citizens of the Solomon Islands. The former provision recognises that the application of customary law may have certain discriminatory consequences. The learned trial judge was correct in holding that the Act was not unconstitutional because s 36(c) discriminated against the widow.*

Custom was accepted as an exception to the principle of non-discrimination on the grounds of sex. The court took the view that the Constitution of the Solomon Islands permitted the use of custom law even if it discriminated against women.

**Comment**

Sections 15 (1) to (4) of the CSI, which protect against discrimination, are often in direct conflict with the so-called values underpinning customary law in Solomon Islands. The 'values' are of course defined by men. The practical effect of this decision, together with *The Minister for Provincial Government v Guadalcanal Provincial Assembly* referred to later in the 'Discrimination' section of this digest, is to perpetuate discrimination against women based on customary law and practice. It is interesting to note that even where a provision is capable of a number of interpretations, rather than exercising discretion and finding in favour of the human rights of women and equality under the CSI and CEDAW, gender discrimination is so inherent in the legal system that the courts generally apply a strict formal law interpretation where possible.

**CUSTOM / DISCRIMINATION / WOMEN**

- **Recognition of women's autonomy and right to enter into de facto relationships violated by customary imprisonment under custom law.**

**IN RE THESIA MAIP**

National Court of Justice Woods J	Papua New Guinea [1991] PNGLR 80 N958 27 February 1991
--------------------------------------	--

**Law considered**

Constitution of Papua New Guinea (CPNG)  
Marriage Act (MA)

**Facts**

M claimed her personal liberty under s 42(5) of the CPNG was violated by the Village Court. M was taken to the Village Court at Balk on a complaint from S, the husband, that M was his wife and had left him for another man. M and S had lived together for about two years before S was arrested and taken to Bougainville and imprisoned for some months on an unrelated matter. S escaped some time in 1990 and came to the Western Heights to Balk village to look for M. By that time M was with another man so S took M to the Village Court. M was ordered to pay K700 compensation, which was later reduced to K300 by the Local Court Magistrate when endorsing the order for imprisonment. Upon failure to pay this compensation, M was imprisoned for 30 weeks by the Local Court. M filed a complaint under s 42(5) of the CPNG invoking the jurisdiction of the national courts.

**Issues**

- Was the relationship between M and S recognised as a marriage?
- Whether de facto relationships were recognised by custom law.
- Did the decision of the Village Court breach M's right to liberty?

**Decision**

The National Court held that the Village Court had unjustly and wrongly assumed a marriage without considering all the aspects and implications of the case. The decision by the Local Court was discriminatory and caused grave injustice to M as the female partner. Under s 42(5) of the CPNG, there was an overriding discretion to grant a hearing in cases where people claimed to be unlawfully or unreasonably detained. Where unsophisticated village people were imprisoned, did not understand the procedures of appeal and time was of the essence, there was a responsibility to act quickly and efficiently.

There were three recognised ways of getting married (custom, religious and civil marriage). However, the Village Court had purported to recognise a casual non-customary arrangement as a formal marriage. In this case, there was no proper marriage either by formal law or custom. Because of the legal implications and responsibilities of a marriage, the law would not recognise anything but a properly arranged or certified marriage.

**Comment**

The practice and procedures of institutions such as Village Courts reflect a bias against women. In this case, the Village Court had no qualms in holding there was a 'marriage' even though the relationship failed to fulfill the basic requirements of a customary, civil or religious marriage. This was notwithstanding the fact that the male partner was from another part of the country, while the woman was from the district. The Local Court, a level above the Village Court, in reducing the compensation awarded to S nevertheless endorsed the order for imprisonment. Section 42(5) of the CPNG, which the National Court had no hesitation in invoking to protect M, was clearly tailored to such circumstances. It is a sobering thought that were the National Court not on circuit (the court rotates around the country), women could be incarcerated for some time before they could seek remedies from superior courts.

**CUSTOM / DISCRIMINATION / WOMEN**

- **Unlawful detention illegal for failure to pay compensation under customary law bride price practice.**

**IN RE YONGO MONDO**

National Court of Justice Woods J	Papua New Guinea N707 (M) 10 May 1989
--------------------------------------	---

**Law considered**

Constitution of Papua New Guinea (CPNG)  
Village Court Act [Cap 44] (VCA)

**Facts**

The applicant (Y) claimed that she was being unlawfully or unreasonably detained in a corrective institution. Y was held on a warrant for 84 weeks imprisonment by virtue of an order of the Village Court. Y had failed to obey a Village Court order to pay compensation of K480, thereby contravening s 31 of the VCA. The amount was to compensate Y's bride price after she left her husband and returned to her village.

**Issue**

- In acting under the VCA, did the court unlawfully deprive the claimant of her liberty?

**Decision**

The court held that the imprisonment of Y was unlawful. Whilst the Village Court had power under s 31 of the VCA to order imprisonment for failure to obey an order for the payment of compensation, it was subject to s 42(1) of the CPNG, which states that no person shall be deprived of their liberty except under certain exceptions.

An order for imprisonment for failure to pay bride price compensation was not one of those exceptions. Therefore the order for imprisonment was clearly contrary to the CPNG. Under s 42 of the CPNG, the National Court could enquire at any time into the detention of persons held in custody.

**Comment**

The supervisory role of the National Court in such circumstances is critical. In rural areas and at village level, the power and influence of custom and traditions may often compromise or adversely affect the rights of women and other disadvantaged groups such as young people and people living with disabilities. The intervention of superior courts may be required to ensure the provisions of the CPNG are fully observed.

**CUSTOM / PROPERTY**

- **In some cases, the long-held possession of land granted by custom chiefs could be upheld in light of modern property rights under formal written property law.**

---

**AUSTRALASIAN CONFERENCE ASSOCIATION LTD v SELA & ORS**


---

High Court	Fiji Islands
Coventry J	[2007] FJHC 62
	31 January 2007

**Law considered**

Constitution of Fiji 1997 (CF)

**Facts**

The plaintiffs (ACAL) requested an order for vacant possession from the defendants (S) for land they had purchased from the traditional land owners. S's ancestors had settled and

lived on a portion of the land since 1935. ACAL requested a declaration for possession of the entire land area. The defendants were Solomon Islanders whose ancestors had come to Fiji from the mid 1800s to 1900s.

S claimed that they were given the right to remain in perpetuity upon the land according to the laws of the then prevailing system of land ownership. The land was given to them by the rightful chiefs of the said area and to this day the relationship with the Tamavua land owners had continued. There had been a wide and accommodating cultural acceptance of the defendants by the custom land owners.

**Issue**

- Whether the formal legal acquisition of land through sale and purchase agreement overrode the customary grant of the land by the chiefs.

**Decision**

The court made a declaration that the ACAL were estopped from removing the defendants from the part of the land that they occupied. (Estoppel is a remedy preventing a person from doing something.) Under equity, S had an equitable right to remain on the property. They were on the property prior to the transfer, the occupation continued after the transfer and ACAL was clearly aware of that. It was argued that if ACAL were to be successful, it would deprive S of their interest in the property, which was in breach of s 40(1) of the CF. Acquisition of the land would only be permissible for public purposes and was subject to payment of agreed compensation, taking into account all the relevant factors. Furthermore, s 40(b)(i)-(v) illustrates that the court must take into account the use of the property, the history of acquisition, its value, the interests of those affected and any hardship to the owner. The original permission was in perpetuity subject to the performance of custom obligations. It was a grant for the Solomon Island people and their descendants. Estoppel continued because there was continued occupation; the continued occupation by direct descendants of the original grantees and performance of customary obligations continued. Subsequently, the court refused to make a declaration that ACAL was entitled to possession of the said land.

**Comment**

Although not the main issue, the case addresses some of the tensions between customary and formal land law. A cautious approach by the court in this case allows for the rights of not only the defendants to be protected, but the rights of others who have inherited property in the same manner. As stated in the judgment, an objective person who has no knowledge of land tenure might quickly come to the decision that it would be unfair to remove the defendants given the length of time involved and the way in which the land was given to them. On the other hand, one could also say that ACAL in good faith allowed S to remain on the land and, prior to seeking court orders, had given adequate notice and even offered to assist in the relocation. In balancing the rights of both parties, the court would closely look into which rights would be directly affected. Again, in this approach, any party limiting the right would have a greater duty to give a justifiable reason for doing so.

**CUSTOM / RECONCILIATION / WOMEN**

- **Traditional reconciliation under custom cannot be a mitigating factor in rape sentencing, particularly when rape is accompanied by further violence.**

**NABUAKA v THE REPUBLIC**

Court of Appeal  
Hardie Boys, Tompkins & Fisher JJA  
Kiribati  
[2006] KICA 14  
26 July 2006

**Law considered**

Penal Code [Cap 67] (PC)

**Facts**

The appellant (N), aged 17 years, was sentenced to imprisonment for 12 months for assault occasioning actual and bodily harm, and four years for rape, to be served concurrently. Both charges arose from the same incident. N physically abused and then later raped the victim during a party.

N appealed the sentence imposed. He argued that it was manifestly excessive, certain affidavits were not filed before the sentence was passed, the victim had eventually accepted a traditional apology and that he had low self-esteem.

**Issues**

- What was the effect of the ‘reconciliation’?
- Would consideration of the affidavits alter the sentence imposed?

**Decision**

The appeal against sentence was dismissed. The major aggravating factor in addition to the rape was the violence involved. Also of importance was the social stigma that resulted from a young unmarried girl ‘having sexual intercourse’. Mitigating factors such as the age of N, the fact that he was supporting his family, his involvement in a Catholic youth group, his guilty plea as well as several attempts by N’s mother to apologise to the victim on behalf of her son, did not materially alter the seriousness of rape itself, particularly where the rape was accompanied by violence.

**Comment**

Reconciliation continues to be a mitigating factor in sexual offence (and domestic violence) cases around the Pacific. The practices of *bulubulu* (Fiji) and *ifoga* (Samoa) are examples of the genre. Such a practice is clearly discriminatory against women because the overwhelming majority of sexual predators are males. Furthermore, in traditional apologies, the victim’s opinion is not relevant and the practice is more of a protocol between the heads of the families affected. The remorse of the perpetrator usually plays little or no part. Survivors of sexual offences suffer not only during the commission of the offence but often for a lifetime as the experience may have a traumatising effect on their psychological state.

**CUSTOM / WITCHCRAFT / DISCRIMINATION**

- **Witch hunting might violate the right of women to equality and might therefore be unconstitutional.**

**THE STATE v AIGAL & KAUNA**

National Court of Justice  
Brunton J  
Papua New Guinea  
[1990] PNGLR 318  
12 July 1990

**Law considered**

Constitution of Papua New Guinea (CPNG)  
Criminal Code

**Facts**

This case involved the alleged execution of a woman and the alleged detention and torture of seven others suspected of practising witchcraft. The accused (A) was charged with manslaughter and was given a three-year suspended sentence. The Public Prosecutor appealed against the sentence, but the appeal was not pursued. The state then filed a *nolle prosequi* (to withdraw the case).

**Issues**

- In its constitutional role of protecting human rights, could the court reject a *nolle prosequi* so that the appeal against A’s minor sentence proceeded?
- What factors would the court take into account in refusing a *nolle prosequi*?

**Decision**

The court accepted the *nolle*. It held that under s 57 of the CPNG it could prevent a *nolle prosequi* from being filed if it would jeopardise A’s right to a fair trial within a reasonable time under s 37(3) of the CPNG and if it amounted to an abuse of process. In principle, it should also be able to apply the same power in respect of other rights. Account was taken of the fact that the case was investigated long after it occurred and the possibility of A being the community scapegoat. The *nolle prosequi* was accepted.

The secret killing of women suspected of witchcraft as a practice within the Simbu province was considered. There was a belief that witches were a public menace causing death and disease, and that society was justly entitled to protection from them. It was pattern of socially approved customary terror exercised against elderly women, to keep them in their place. The power of older women, as against men, was limited by the threat of an allegation of witchcraft, which usually resulted in their death. Witch hunting also violated the constitutional rights of the victims – the right to life, the right to freedom from inhumane treatment, and the constitutional direction to improve the status of women in the Constitution’s National Goals and Directive Principles.

**Comment**

The role of witchcraft in sexual politics is a reflection of male dominance in certain communities in Papua New Guinea. It is used as a means to ensure elderly women remain in submissive roles. The practice is both discriminatory of, and an implicit threat against, elderly women. The allegation of witchcraft is difficult to disprove and engenders strong community feelings. Tragically, once such accusations are made, victims are either killed or suffer serious harm. These were issues that a court would ordinarily take into account in rejecting a *nolle prosequi* on the basis that the human rights of those accused had been infringed. However, a significant passage of time had passed since the alleged offence (over a year) and the fact the offender was not the only one involved compelled the court to accept the *nolle prosequi*, thus ending the proceedings against A.

Many commentators continue to glamourise custom and culture and encourage the rejection of 'western' laws without paying sufficient attention to the fact that numerous customs are discriminatory against women. PNG has ratified CEDAW and guarantees the equal rights of women in the CPNG. Its responsibilities under both require the upholding of women's rights not only in the courts of law, but in policy and practice.

**CUSTOM / SLAVERY / CHILDREN**

- **Whether the customary practice of giving a daughter to the victim's family is a mitigating factor for murder and whether the practice violates constitutional prohibitions on slavery.**

**THE STATE v KULE**

National Court of Justice Doherty J	Papua New Guinea [1991] PNGLR 404 3 December 1991
--	---

**International instruments and law considered**

Slavery Convention (SC) 1926  
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (CASST) 1956  
Constitution of Papua New Guinea (CPNG)  
Customs and Recognition Act [Cap 19] (CRA)

**Facts**

The defendant (K) pleaded guilty to unlawful killing. Upon conviction, K pleaded that the customary practice of giving of a child as reparation ought to be a mitigating factor in his favour, which should reduce the sentence. K had given one of his daughters to a relative of the deceased victim according to customary obligations. K allegedly carried out the killing because he thought that the victim had been gossiping about him.

**Issue**

- Whether such a cultural practice could be considered as a mitigating factor when it directly violated s 253 of the CPNG, which forbids slavery and all similar institutions and practices.

**Decision**

The Court refused to recognise the custom of handing over one of K's daughters to the relative of the deceased as a mitigating factor. It was contrary to the welfare of the child under s 3(1)(b) of the CRA. The handing over of the child was an institution or practice similar to slavery and therefore prohibited by the CPNG, even if the evidence showed that such a custom was a common practice. Whilst compliance with customary obligations was a matter to be taken into account, the particular custom must also be proven by evidence.

The exception was that there should be evidence to demonstrate that such a custom was not contrary to the welfare of the child. Another consideration was whether it was contrary to the public interest to recognise a custom and reduce the sentence where a child had been handed over to another group of people as payment of obligations. The CRA conferred power to refuse the recognition of custom. Furthermore, the custom was not recognised because it was contrary to s 253 of the CPNG which states:

*Slavery, and the slave trade in all its forms, and all similar institutions and practices are strictly prohibited.*

Although unable to cite any case law within jurisdiction on the interpretation of the word slavery, reference was made to the SC which refers to slavery as:

*The status or condition of a person over whom other powers attaching to the right of ownership are exercised.*

The reference to 'person' included institutions that encouraged debt bondage, serfdom, bride price and exploitation of child labour. The handing over of a child in reparation for the misdeeds of another was similar to these situations and therefore prohibited by the CPNG.

**Comment**

The court in this case was not debating whether the custom was proved or not. It had to determine whether such customary practices were consistent with the CPNG and the country's international obligations. The welfare of the child principle would be affected by such practices. International conventions were considered as guidelines to determine whether such a practice was in fact contrary to the CPNG. In this case, the welfare of the child was not the only reason for not allowing the daughter to be given to the victim's family. Apart from legal powers conferred by the CRA to not recognise the practice, it contravened the CPNG for the reasons discussed. In this case, the offer of girls as reparation for offences committed brought into sharp relief the conflict that sometimes occurs between human rights and customary practices. It is of interest that although the court referred to the SC and the CASST (which PNG has not ratified), it did not refer to the CRC, which also had not been ratified then. The CRC would have been of great assistance as well. PNG ratified the CRC on 2 March 1993.

## DIGNITY

### DIGNITY / MEDICAL TREATMENT WITHOUT CONSENT

- **Freedom from scientific or medical treatment or procedures without consent first considered in Fiji.**
- **Right of arrested or detained persons to be treated with humanity and respect for their inherent dignity.**

#### FIJI HUMAN RIGHTS COMMISSION v POLICE & ATTORNEY GENERAL

High Court	Fiji Islands
Singh J	Civil Action No. 118093 of 2002
	8 November 2005

#### International instruments and law considered

Universal Declaration of Human Rights (UDHR)  
 International Covenant on Economic, Social and Cultural Rights (ICESCR)  
 Constitution of Fiji (CF)

#### Facts

A female employee (J) of *Village 6* cinemas reported finding a newborn baby in a toilet cubicle in the cinema complex. A few days after J reported the matter to the police (P), she was taken to the Central Police Station and thereafter escorted to the Colonial War Memorial Hospital. There she was made to undergo a medical examination to determine if she had given birth recently. J alleged that she was forced to undergo the medical test. P claimed that the test was necessary to remove doubt that J was the mother of the child as ‘her breast milk was flowing’. P also said that J had consented to the medical procedure in writing. The Fiji Human Rights Commission (FHRC) on behalf of J filed a claim for damages on the basis that:

1. J was forced to undergo an invasive medical procedure without her consent in contravention of s 25(2) of the Bill of Rights of the CF, which provides for the right to freedom from scientific or medical treatment or procedures without informed consent; and
2. s 27(1)(f) gives an arrested or detained persons the right to be treated with humanity and respect for their inherent dignity.

#### Issues

- What constituted consent to treatment?
- Were the actions of P in breach of J’s fundamental rights and freedoms in violation of the Bill of Rights?
- Could damages be awarded for a breach of constitutionally protected human rights and were damages a right or a discretion?

#### Decision

The court found J’s rights had been violated and awarded damages. This case concerned the balancing of P’s powers to investigate and detect crime with an individual’s right to personal privacy and to be treated with dignity. An adult person of sound mind has a right to decide what may or may not be done to her own body; anything done without consent is unlawful. ‘Informed consent’ means consent obtained after the person had been told what risks, even if minimal, or side effects are involved in treatment. In this case, J gave her consent in writing with a ‘shadow of police presence in the background’. Although the doctor was present at the time consent was given in writing, J was clearly distressed and believed that she would not be released unless she agreed to the medical procedure.

J asked for damages of F\$100,000 and for additional exemplary or punitive damages. Under s 41(1) of the CF, the court had clear power to award damages. Such an action was not a new tort but a public law action directly against the state for which the state was primarily liable (quoting *Simpson v AG* (1994) 3 NZLR 667 (*Baigent’s case*)). An added value was attached to the protection of a right, and that infringement of that right, even without injury or harm could lead to an award of damages (*Mohammed v State* [1999] 2 AC 111). However, every breach did not automatically deserve damages and whether damages were to be awarded was discretionary. There was no *prima facie* right to damages.

The level of damages ought to be awarded on the basis of the following principles:

1. The amount must be assessed against the backdrop of the country’s social and economic conditions and not by universal standards;
2. The level must not be excessive but restrained or moderate; extravagant awards were to be avoided;
3. It was unnecessary to show outrageous conduct on the part of the defendant because the issue was about the infringement of human dignity (although outrageous conduct would attract greater damages).

In the present case, P had reasonable cause to arrest J because her breasts were flowing with milk (subsequently found to be an idiosyncratic medical condition). However, the medical tests completely excluded J as a potential perpetrator of the crime. J’s right to be treated with dignity had been violated by her treatment by P in subjecting her to an embarrassing experience against her will. J was awarded \$5,000 in damages, \$2,000 of which went to the FHRC for costs.

#### Comment

This was the first case of its kind in Fiji. It provides a salutary guide for the police in terms of exercising powers that involve invasive actions affecting the public in general and vulnerable groups such as women and children in particular. There is often a tendency on the part of the police to focus on the offence or mischief to the exclusion of the privacy and dignity of the person. In the present case, J was treated in a particularly offensive and intrusive manner, given the personal sensitivities involved. The discussion of the issue of damages highlights the different principles applied where human rights breaches are established and for tortious actions. Compare with *Singh v Ponijese, Attorney General & Ors* discussed later in this volume, where the issues were dealt with purely in tort.

*Editors' note: The FHRC appealed the decision of the High Court on the ground that the award was inadequate. It sought compensatory damages for financial loss, for humiliation, loss of dignity and injury as well as for exemplary damages. Allowing the appeal, the Court of Appeal took into consideration that the forced medical examination was unnecessary, the conduct of the police highhanded, the context in which J was detained (and the additional breaches of her rights, such as the failure to caution or inform her of her right to counsel, and lack of contact with next of kin), the lack of consideration in her treatment and the subsequent response by police. Accordingly, the damages were 'wholly inadequate' and an amount of \$15,000 was awarded. There was no basis for awarding exemplary damages and financial loss was not proved. In increasing the amount, the Court of Appeal focused more closely on the conduct of the police and the blatant manner in which they had abused their powers.*

## DISCRIMINATION

### DISCRIMINATION / ADULTERY

- **Adultery is still punishable by imprisonment even if the accused chooses to be silent and not present a defence.**

#### SIPO v MELI

National Court of Justice  
Narokobi AJ

Papua New Guinea  
[1980] PGNC 7; N240  
23 May 1980

#### Law considered

Constitution of Papua New Guinea (CPNG)  
Native Regulations Act [Cap 44] 1989

#### Facts

The appellant, S, was a female cadet journalist at the University of PNG. She was convicted by the local court of having sexual intercourse with a 'married native' while knowing him to be married. She was sentenced to two month's imprisonment with light labour.

The evidence which led to S's conviction was that she was seen together with LM by MM (wife of LM) on several occasions and that there were witnesses who had seen them 'sleeping together'. S appealed on the following grounds:

1. That the evidence to prove the elements of the crime was insufficient;
2. That the sentence was manifestly excessive;

3. That she was denied her rights under s 37(10) of the CPNG, which allowed her to remain silent if she chose;
4. That s 84(2) of the Native Regulations Act denied her the constitutional right to equality before the law.

#### Issue

- Whether the offence of adultery had been proven, even where the accused chose not to defend herself as was her constitutional right.

#### Decision

The court reduced the sentence of S. In relation to the magistrate's decision on the evidence, the court held that the magistrate had properly entered a plea of guilty. Courts have to make the best they can of prior and subsequent events to be satisfied beyond reasonable doubt that adultery has occurred.

As to S's claims that the magistrate imputed guilt because of her silence, S was given adequate opportunity to respond and call witnesses but chose not to.

The Native Regulations Act on adultery required someone to lodge a complaint and in most cases the complainants were the partners of those involved in adultery. In this case, S was single and MM would be the obvious complainant. But since the respondent was single, there was no one to lay a complaint against MM. As the judge stated:

*As the common saying goes 'it takes two willing parties, adultery'. Why therefore should one willing party be immune from liability simply because the law lacks procedures to bring to trial a party to the offence? It is quite right therefore, in my view, for a citizen to invoke the Constitution and say, 'If we are all equal before the law, irrespective of race...or sex, then why is it that I am being punished and not the other co-offender who happens to be a man?' The appellant may well have recourse to s 39 of the Constitution (Reasonably Justifiable in a Democratic Society) and argue that this adultery law is not reasonably justifiable in a democratic society, having a proper regard for the rights and dignity of mankind. The same arguments could indeed be presented by a single man who has sexual intercourse with a married woman or commits adultery with a married woman.*

However, this was a constitutional matter, which was more appropriate for the Supreme Court. Subsequently, the decision by the magistrate was set aside and the sentence reduced to two-weeks' imprisonment with light labour.

#### Comment

Although this case, and others from PNG regarding women's rights, are somewhat older cases, they have been included in this volume because of the human rights element. PNG is one of the few countries left in Melanesia, indeed in the Pacific Islands, where adultery is still a criminal offence punishable by imprisonment and by payment of compensation in both custom and civil law. The court in this instance actually reinforced the importance of maintaining adultery laws in PNG. The practice is outdated and in violation of human rights standards and the inherent dignity of the person.



**DISCRIMINATION / AGE**

- **The bill of rights in the constitution takes precedence over collective agreements between employer and employee in industrial/employment law where there is conflict between the two.**

**FIJI HUMAN RIGHTS COMMISSION v SUVA CITY COUNCIL**

High Court  
Coventry J

Fiji Islands  
[2006] FJHC 44  
17 November 2006

**Law considered**

Constitution of Fiji (CF)  
Human Rights Commission Act 1999 (HRCA)

**Facts**

The plaintiff (FHRC) on behalf of M claimed that she was discriminated against on the basis of her age by the Suva City Council (SCC). M received a retirement notice when she was 54 years old, giving her six months notice of the SCC's intention to retire her. The SCC retired M on the basis of a collective agreement between the SCC and the staff union, which gave the SCC, in clause 19 of the agreement, discretion on whether to continue employment after employees reached the age of 55.

The FHRC sought an order that declared the collective agreement void and unenforceable.

SCC argued that the collective agreement was not 'law' for the purposes of the CF and was therefore not subject to the bill of rights.

**Issues**

- Did the bill of rights extend to the SCC, i.e. was it an agency of the state?
- Could the bill of rights apply to collective agreements as well as ordinary legislation and other 'laws'?
- Did the agreement violate the bill of rights s 38(2) of the CF, which states that a person must not be unfairly discriminated against, directly or indirectly, on the grounds of *inter alia* age?

**Decision**

The court held that the SCC was clearly part of local government. Section 21 of the CF stated that the bill of rights bound every level of government; therefore the CF clearly bound the SCC. The collective agreement, although not law in the strict sense of the word, was a policy that could be caught by the bill of rights as it could amount to a law.

There was no definition of discrimination in the CF or in the HRCA. Coventry J referred to the common law, which described discrimination as a distinction, whether intentional or not, based on grounds relating to personal characteristics of the individual or group, or

disadvantages of such individuals or group not imposed on others, or withholding or limiting of access to opportunities, benefits and advantages available to other members of the society. Discrimination against a person on the grounds of age was regarded as unacceptable. This was confirmed in many policy documents and in the legislation of the majority of countries.

It was generally accepted that age did not determine a person's ability and should not be used as a guide for access to or retention of employment. The fact that in exceptional circumstances someone might continue to work beyond that age was irrelevant. The fact that someone over the age of 55 was liable, at the discretion of the SCC, to be retired was discriminatory. The line was drawn by age and that in itself was discriminatory. The retirement age in the collective agreement had no rationale and was therefore unfair discrimination.

**Comment**

This case clearly spells out that if an agreement, irrespective of it being collective, is not in accordance with the CF it will be void. Thus, even consensual union agreements must comply with the bill of rights. In taking this approach, the court found that the SCC was bound by virtue of the provisions of the CF and took a horizontal approach to the enforcement of rights. The court also took into consideration the various conventions and policy to which many other countries, both regional and beyond, have aligned themselves. This case also demonstrates that policies may be invalidated by the bill of rights if they conflict with it. Certainly, many state-owned or partially state-owned companies need to amend policies and collective agreements that violate the discrimination provisions of the bill of rights.

**DISCRIMINATION / AGE**

- **Lowering of the mandatory retirement age without agreement is in breach of the quality provisions of the constitution.**

**FIJIAN TEACHERS' ASSOCIATION & FIJI PUBLIC SERVICE ASSOCIATION  
v PUBLIC SERVICE COMMISSION & INTERIM ATTORNEY GENERAL**

High Court  
Jitoko J

Fiji Islands  
Judicial Review No. HBJ 3J of 2007S  
20 December 2007

**Law considered**

Constitution of Fiji (CF)  
Public Service (General) (Retirement Age Amendment) Regulations

**Facts**

The post-coup interim administration in Fiji, headed by Commodore V. Bainimarama of the Republic of Fiji Military Forces as interim prime minister, unilaterally reduced the retirement age. The applicants, the Fijian Teachers' Association (FTA) and Fiji Public Service Association (FPSA), the largest union of public servants in Fiji, instituted judicial review

proceedings challenging the Public Service (General) (Retirement Age Amendment) Regulations 2007 made by the Public Service Commission, which reduced the retirement age for public servants from 60 to 55 years. The plaintiffs challenged the decision and sought to reinstate the compulsory retirement age of 60.

#### Issues

- Was the decision to reduce the retirement age valid?
- Could it be justified as an exception to s 38 of the CF?

#### Decision

The court held that lowering the mandatory retirement age without agreement was a breach of s 38 of the CF, which protected an individual from discrimination on the basis of age. It was open to groups as well as individuals to invoke the provisions of s 38 because rights were to be given a broad and liberal interpretation.

To justify the reduction in retirement age as ‘reasonable and justifiable in a free democratic society’, the legislative objective that the limitation would achieve must be sufficiently important to warrant overriding a constitutional right. It must also be ‘a pressing and substantial concern’. Secondly, the means to achieving those objectives must be proportionate or appropriate to those ends.

There were three aspects to the proportionality: the limiting measures must be carefully designed or rationally connected to the objective; they must impair rights as little as possible; and their effects must not so severely impinge on individual and or group rights that the objective is nevertheless outweighed by the abridgment of rights. In the present case, the rationale of the decision to save costs and create more employment did not meet the threshold requirement. It was neither proportionate nor rationally connected to the objectives to be accomplished because it was not certain the decision would achieve those ends in any case.

In light of past practice, there was a legitimate expectation that the applicants would be consulted on such a decision. However, there was no consultation as the respondent merely explained its intentions rather than engaging the applicants. There was therefore procedural impropriety given the respondent’s failure to observe the requirements of natural justice.

#### Comment

The decision is an important one given the circumstances. The PSC arbitrarily decided to reduce the retirement age pursuant to a policy made by the unelected interim government. The equality provisions of s 38 of the CF were breached and the justification the respondent advanced to justify it was rejected. It was held not to have met the threshold requirement in that the justification for the decision, i.e. savings and employment generation, was not proportional or sufficiently connected to those ends. The court considered in detail the rationale for the decision and determined that the state had not made a case for unilaterally reducing the retirement age as an exception to s 38 of the CF.

---

#### DISCRIMINATION / AGE

- **Discrimination in applying the legal age of retirement in the police force is unconstitutional.**

---

#### KIRISOME & ORS v ATTORNEY GENERAL & COMMISSIONER OF POLICE

---

Supreme Court  
Sapolu CJ

Samoa  
[2002] WSSC 3  
25 February 2002

#### International instruments and law considered

European Convention on Human Rights (ECHR)  
Constitution of Samoa (CS)  
Police Service Act 1977 (PA)

#### Facts

An application was made for judicial review of the retirement age for members of the Samoa police force. K aged 61, W aged 61, and M aged 57, claimed that the termination of their services was discriminatory and unfair. K, W and M had been served with a letter purporting to terminate their services. The applicants sought an interim injunction to stop the purported termination. The injunction was granted, but was subsequently discharged by the second respondent. The amended proceedings included the Commissioner of Police (CP) as second respondent.

CP cited two reasons in justification. Two of the applicants were over the age of 60 years, which was the maximum age for extension. The second reason was based on good administration. There were a number of senior officers in the force who were near, or had passed, the age of retirement. However, there were also a number of able and energetic young officers who were uncertain of a clear career path within the service because the senior ranks were ‘top heavy’ and there was a general reluctance amongst officers who had reached retirement age to retire. To achieve a balance, without weakening the police service to an unacceptable degree, not all officers who had reached the retirement age of 55 years were to retire at one time.

#### Issue

- Whether the decision to retire K, W and M was discriminatory on the basis of s 15 of the CS, which guaranteed equality before the law.

#### Decision

It was held that K and W had reached the maximum age of retirement by law and therefore their services could not be further extended. M’s application was granted.

The procedure undertaken to retire M did not observe the principles of natural justice or the duty to act fairly. He had not reached the maximum retirement age of 60 years. Given the number of officers who had reached the retirement age and continued working (some until

the age of 60 years), M had a legitimate expectation that he would be given the opportunity to comment or make submissions on any question of his possible retirement prior to a decision. The circumstances and subject matter under consideration required that procedure be followed. As M was not given such an opportunity, the decision to retire him was void. Section (15)1 of the CS, which protects against discrimination, including age discrimination, had been violated. In order to explain this, the court drew on international law and the ECHR, which was quoted in *Principles of Judicial Review* (1999) pp 482-493 by de Smith, Woolf and Jawell:

*Unequal treatment under the convention [Article 14 of the European Convention on Human Rights] requires 'objective and reasonable justification'. Under this test the apparent inequality that is being challenged must be valid, pursue a 'legitimate aim' and in addition, the means pursued to achieve the end must be proportionate.*

For CP to prove justification and that the difference in treatment was valid, two grounds had to be established: first the difference in treatment pursued a 'legitimate aim', and second, that the means employed to achieve that aim was proportionate. From the material presented, M had been treated differently from other police officers. Although there was a legitimate aim because there were too many high ranking police officers of retirement age, the proportionality between the means employed and the objective was problematic. Other officers who had reached the age of 60, and who were older than M and in poor health, were still working. Therefore there was no proportionality between the means employed and the legitimate aim achieved.

#### Comment

In considering discrimination, the courts may sometimes apply a test to determine whether it can be justified on an objective and reasonable basis. The inequality challenged must exist for a legitimate purpose, and the manner in which that end is achieved must be proportionate. In practice, a balancing exercise is undertaken; therefore the relationship or connection between the two (i.e. the means and the end) have to be reasonable or affect the other in a way that bears some linkage that is appropriate in the circumstances. Where this cannot be established, then the apparent inequality will be struck down. The approach recognises that discrimination and equality may sometimes have to be established in complicated and irregular situations.

#### DISCRIMINATION / DOMESTIC VIOLENCE

- **The relevance of forgiveness in domestic violence does not affect a court's duty to impose a sentence reflecting the gravity of an offence.**
- **Domestic violence is not a private matter.**

#### TOAKARAWA v THE REPUBLIC

Court of Appeal	Kiribati
Hardie Boys, Tompkins & Fisher JJA	[2006] KICA 9
	26 July 2006

#### Law considered

Common law

#### Facts

T was a 22-year-old married man. His wife was four months pregnant at the time. Whilst intoxicated, T beat his wife, who escaped to another house. T followed her and dragged her home by the hair. He continued to beat her and bit her on the nose, cheek, lips and fingers of both hands. He resisted attempts by neighbours to intervene. Her injuries were considerable and included the upper and lower lips being bitten off, exposing the teeth. The disfigurements were permanent. T maintained that at the time he was so intoxicated he did not know what he was doing; he had apologised for his actions and later reconciled with his wife.

The Chief Justice emphasised that domestic violence was not a private matter, that it was shameful, that it was to be severely punished and that it was a serious crime no matter who the victim was. That it was T's wife made it worse. The CJ noted, however, the apology, reconciliation, state of drunkenness, absence of previous convictions and early plea of guilt. T was sentenced to three years' imprisonment. T challenged the sentence, arguing amongst other things that he needed to earn money for the family.

#### Issue

- Was the apology, reconciliation and the fact that T was the main breadwinner relevant to sentencing in a domestic violence case?

#### Decision

The Court of Appeal agreed with the High Court and State Lawyer that assaults on wives were to be treated as serious matters of public concern and that the extraordinary ferocity and duration of the attack and the resulting permanent disfigurement made the sentence appropriate. It refused to reduce T's sentence of imprisonment.

#### Comment

Although this judgment demonstrates positive changes in judicial thinking – for example, that reconciliation, apologies and the famous 'breadwinner' argument are not relevant issues in reducing sentencing – it still falls short of awarding a sentence adequately reflecting the seriousness of the offence. This is particularly so in a region where wife beating is held to

be a customary ‘right’ of a husband. The violent nature of the assault on T’s wife was remarked on by the court, but the rhetoric was not reflected in the relative leniency of the sentence. The wife’s pregnancy and relationship to T should perhaps have been viewed as aggravating features of T’s actions.

#### DISCRIMINATION / SEX / EVIDENCE

- **Value of a complainant’s uncorroborated evidence: there is no requirement for corroboration of a rape complainant’s evidence.**

---

#### R v FUNGAVAI

---

Supreme Court	Tonga
Ford CJ	[2007] TOSC 8
	14 August 2007

#### Law considered

Common law

#### Facts

The accused (F) was a police officer charged with one count of rape and two counts of indecent assault. The complainant (C) was the estranged wife of another police officer. She alleged that F had raped and indecently assaulted her during her detention in a police cell. C claimed that she had great difficulty laying the complaint because of resistance by the police. F denied he raped C, saying she had been drunk and had failed to make complaints about F on the morning of the incident. C’s credibility and the fact that her evidence was uncorroborated were also raised.

#### Issues

- Whether the evidence of C carried sufficient weight.
- Was C a credible witness?

#### Decision

The court convicted F on the basis of C’s evidence, which it found was corroborated by one of the police officers in relation to identification. There was no requirement that the evidence of a complaint in a rape case had to be corroborated but nevertheless the court considered it.

#### Comment

Although C was found to be a completely believable witness, reference was still made to the need for corroboration. It is interesting that courts in common law countries have not outlawed the corroboration practice. Instead, it is treated as if it were a binding law without much thought to its discriminatory origins, which have been well canvassed in other countries. In some other jurisdictions (for example, Solomon Islands), the courts have indicated it should only be abolished by legislation, while the Fiji Court of Appeal outlawed

the practice, citing among other things its discriminatory application (*Balelala v State*).<sup>9</sup> The persistence of this practice is a reflection of the deeply entrenched systemic character of gender discrimination in the legal system. There appears to have been no discussion of the fact that this rape occurred in police custody, exposing the particular vulnerability of female prisoners. The case raises interesting questions about judicial perceptions.

#### DISCRIMINATION / SEX / EVIDENCE

- **The discriminatory cautionary corroboration warning in rape cases appears to be artificial and unnecessary and requires removal by legislation; if this is not done, then the courts may have to act in future.**

---

#### TEIKAMATA v R

---

Court of Appeal	Solomon Islands
Lord Slynn of Hadley P,	[2007] SBICA 3
Adams & Salmon JJA	30 March 2007

#### Law considered

Common law

#### Facts

In July 2004, the complainant (C), aged 15 years, went to a relative’s house to collect some clothes where she was allegedly raped. The appellant (T) was 24 years old at the time and said that the intercourse was consensual. Medical evidence suggested otherwise and C made a complaint of rape soon after. T was arrested and charged. He pleaded not guilty, but was convicted of rape in the High Court and sentenced to six years’ imprisonment. He appealed his conviction on the basis that the court did not properly consider the law relating to corroboration in sexual offence matters, and had made a mistake in finding that the evidence of the complainant was corroborated. The prosecution invited the Court of Appeal to make a finding on the need for corroboration in Solomon Islands. (*Editors’ note: but without mentioning the gender discriminatory elements of the requirement, it would seem.*)

#### Issue

- Whether the cautionary warning requiring corroboration should still apply in sexual assault trials.

#### Decision

The court dismissed the appeal and upheld the conviction. Any removal of the rule was to be achieved by statute. The accepted practice in Solomon Islands was that the trial judge must warn himself or herself of the dangers of acting on the uncorroborated evidence of a complainant. This was a requirement in many common law countries which in many instances had been abolished, usually by statute. In this case there was no reason to interfere with the

9. [2004] FJCA 49 featured in 1 PHRLD 4-7.

trial judge's decision. The High Court had found C to be a credible witness. The requirement for the rule was one of discretion involving a judge acting alone and that a finding of guilt could in any case be established on the basis of her credibility. While citing *Balelala's* case from Fiji, it was felt that Solomon Islands Parliament should remove the practice by statute, failing which there could be judicial intervention.

#### Comment

In the Fiji case of *Balelala v State*,<sup>10</sup> the Fiji Court of Appeal fully considered whether it was appropriate that the rule should continue. The practice in a number of countries was reviewed. A distinction was drawn between countries where the rule had been abolished through legislation and further instances where it had been struck down in decisions of appellate courts. It was held that the rule should no longer apply in Fiji because it was discriminatory against women and served little practical purpose.

On the invitation of counsel for the prosecution, a specific finding on the rule was made. The common law rule of practice had been vigorously opposed by the women's movement in Fiji as an example of systemic legal discrimination against women. Counsel had argued that the rule was discriminatory against women on the basis of sex and gender. Such discrimination was unlawful under s 38 of the Constitution of Fiji and was contrary to Fiji's obligations under CEDAW. The Fiji court closely scrutinised the origin of the rule and its erroneous assumptions about women's sexuality and held that the rule was unconstitutional.

It would be interesting to see what the Solomon Islands Court of Appeal might have done had similar arguments about gender and sex discrimination been put before it by counsel. In preferring to leave the matter of abolition to parliament, a cautious approach was clearly adopted. However, there was also a suggestion of judicial intervention if parliament did not act. While the corroboration rule was 'a practice' that was part of the common law, the court as a maker of such law did not feel it was appropriate in the first instance for it to remove the rule as was done in *Balelala's* case. This approach is surprising for those reasons. The Solomon Islands Constitution makes sex discrimination unlawful (s 15(4)) and the state has also ratified CEDAW.

#### DISCRIMINATION / LAWYERS

- **Unfair discrimination in suspending military lawyers alleged to have committed treason without a proper hearing.**

---

#### FIJI HUMAN RIGHTS COMMISSION v FIJI LAW SOCIETY

---

High Court  
Gates J

Fiji Islands  
Civil Action No. HBC02.07S  
6, 20 June 2007

10. Ibid.

#### Law considered

Constitution of Fiji (CF)  
Legal Practitioners Act 1997 (LPA)  
Human Rights Commission Act (HRCA)

#### Facts

This case occurred against the background of the takeover of Fiji's democratically elected government by the Republic of Fiji Military Forces (RFMF) and the installation of the military-backed interim administration of Commander V Bainimarama. The Fiji Human Rights Commission (FHRC) acted on behalf of the six plaintiffs, all military lawyers. They sought declarations of unfair discrimination under ss 38(1) and (2) of the CF and sought guidelines on the approach to the LPA procedure in regard to suspension of practising certificates. The six plaintiffs were all members of the legal unit of the RFMF.

The defendant, the Fiji Law Society (FLS), had written to the plaintiffs advising them that their practising certificates had been suspended due to their actions in assisting the RFMF to commit illegal acts against the Republic of the Fiji Islands. The FLS also claimed that the plaintiffs were in breach of the oath they had taken to uphold the law of the Fiji Islands and in their duty as officers of the High Court of Fiji.

Specifically, the FLS stated the plaintiffs breached s 93(2) of the Constitution Amendment Act 13 of 1997 when the RFMF removed the democratically elected government; s 187 of the same act in their declaring a state of emergency; and s 90 of the act in appointing Commodore Bainimarama as the President of the Republic of the Fiji Islands.

The breaching of s 109 of the CF was also cited in relation to dismissing the elected prime minister and appointing a caretaker prime minister, and s 108 of the CF in dissolving parliament.

The FLS concluded its letters of advice to the plaintiffs by citing its powers to suspend practising certificates under the LPA pursuant to s 45(1)(d).

The plaintiffs sought declarations stating:

1. the actions of the FLS were contrary to ss 38(1) and (2) of the CF in that the FLS unfairly discriminated;
2. Section 38(1) of the CF and the HRCA had been breached by the FLS in their actions of unfairly discriminating against the RFMF legal practitioners as the FLS had not sought to suspend the practising certificates of military legal practitioners in the 2000 coup;
3. appropriate legal and administrative steps to be taken or guidelines to be followed by the FLS under the LPA, consistent with ss 38 and 156 of the CF as well as the HRCA, in the event of a major upheaval or crisis (such as a coup);
4. guidelines consistent with human rights principles established by the 1997 CF and the HRCA as well as the LPA on the type of offences for which a practising certificate could be suspended or cancelled; and
5. under s 2 of the CF, consistency between the LPA provision on suspension and cancellation of practising certificates and the CF, the HRCA and other relevant human rights laws applicable in Fiji.

After the legal proceedings had begun, the FLS lifted the suspensions of the practising certificates in response to written submissions from some of the applicants. The FLS then claimed to the court that the plaintiff's case was an abstract question not arising from the existing facts of the case or existing rights. The FLS also raised issues of jurisdiction, questioning the appointment of the FHRC's proceedings commissioner and therefore her ability to represent the plaintiffs. For these reasons the FLS sought to strike out the originating summons.

#### Issues

- Was there a reasonable cause of action for the plaintiffs, i.e. should the FLS summons to strike out the plaintiffs claim be allowed? Was the plaintiffs' case procedurally correct, in that the matter had substance and did not deserve to be struck out, especially since the FLS had lifted the suspension it had imposed upon the plaintiffs?
- Was there illegal discrimination by the FLS under ss 38(1) and (2) of the CF?
- Was the suspension letter written by the FLS valid in its assertion of citing powers under s 45(1) of the LPA?
- Did the FLS deny the plaintiffs procedural fairness (natural justice)?
- Was the appointment of the proceedings commissioner illegal?
- Was the occurrence of a major upheaval (i.e. a coup) grounds to change the FLS's disciplinary proceedings? And was this a proper question for the court?

#### Decision

Gates J found that the plaintiffs' application for declarations 1 and 2, i.e. that the FLS had illegally discriminated, was an arguable case and that therefore the FLS summons to strike out the claim failed.

Declarations 3 and 4 sought guidelines from the court. The request for declaration 3, seeking guidelines for the FLS to act in a time of crisis under the LPA was in fact a power given to the FHRC by virtue of s 7(1)(m), and not a power necessarily given to the court. The seeking of these guidelines in declaration 3 was not therefore a question for the court.

In relation to declaration 4, there was no reason at this stage of the strike-out application by the FLS to go into substantive arguments, which would leave the application open for the plaintiffs to pursue further.

It was found that declaration 5 '*does not state the nature of the inconsistency between the LPA and the CF. This declaration needs to be re-drafted*'. The plaintiffs were given seven days to file an amended claim for declaration 5.

Gates J found further that the powers of the LPA had been incorrectly applied and implied that indeed there had been a denial of natural justice. However, at this stage of the 'strike-out' application by the FLS it was not necessary to decide on this question.

#### Comment

The decision emphasises the requirement for fairness and natural justice. Even in circumstances where the plaintiffs were *prima facie* complicit by virtue of their membership of an institution that had committed an illegal act, they were entitled to be given a hearing.

The FLS could not unilaterally suspend member without first giving him or her an opportunity to be heard. The practising certificates of the plaintiffs had been reinstated prior to the preliminary hearing, which suggests the FLS may have been somewhat hasty in its actions.

The FHRC came under sharp scrutiny for curiously choosing to advocate on behalf of military legal personnel well qualified to represent themselves, at a time of great upheaval in Fiji when the commission was under attack from members of the public for allegedly siding with the military regime.

#### DISCRIMINATION / PROPERTY

- **Constructive trust principle in distribution of property extends to *de facto* marriages in some cases, even in the absence of legislation.**

#### MARIANGO v NALAU

Court of Appeal  
Lunabek CJ,  
Young, Goldsbrough, Saksak & Bulu JJ

Vanuatu  
[2007] VUCA 15  
24 August 2007

#### Law considered

Constitution of Vanuatu (CV)

#### Facts

The appellant (M) appealed a decision in which the Supreme Court held that equitable principles applied to *de facto* marriage property rights. M and N were formerly in a *de facto* relationship, with the intention of marriage, in the course of which they built a house for rental income. M contributed the money and N his labour. The relationship ended after N refused to marry M and N sought compensation. M was ordered to pay N 500,000 vatu for his contribution to the development of the property.

#### Decision

Dismissing the appeal, the court held that article 95(2) of the CV incorporated the application of equitable principles in the law of Vanuatu. They applied to ensure fairness in *de facto* relationships in the absence of any statutory guidance inconsistent with article 5 of the CV, which recognised Vanuatu society was based on 'fundamental rights and freedoms of the individual without discrimination ...'. As to N's refusal to marry M, the parties made their contributions to the construction of the house on the basis and in the belief they would marry. The rental would provide them an income.

No agreement could be inferred that if one party called off the marriage, they would forfeit their contribution. The facts of the case justified compensation. It was reasonable for N to have expected some compensation for his work should the marriage not take place. On the facts, estoppel arose as in belief, reliance and detriment. This meant that M was prevented from stating that N had no right to a share. A constructive trust could also be inferred

through the efforts of the parties and their reasonable expectations. Unjust enrichment and a common intention inferred from the circumstances were also possible based on the facts. It did not matter which equitable principle was appealed as the underlying approach was similar. In the circumstances, the amount of the award was reasonable.

#### Comment

Despite there being no specific legislation to cover the distribution of property in *de facto* relationships, the court was prepared to apply equitable principles to fill the gap. It involved the constitutional provisions that recognised the application of equitable principles and the court reinforced this by reference to the recognition of equality as the basis for Vanuatu society.

This case is to be compared to that of *Joli v Joli*<sup>11</sup> in which the same Court of Appeal considered s 5(k) of the CV, which prohibits discrimination on specific grounds including sex discrimination, to be a ‘broad aspirational statement’. In the result, it granted the wife’s application for a share of the matrimonial property but declined to apply CEDAW. It avoided consideration of whether a law inconsistent with the equality provisions of the CV would be void or unconstitutional.

#### DISCRIMINATION / MILITARY FORCES / INTERNATIONAL STANDARDS

- **Members of the defence forces are entitled to the same due process rights granted civilians.**
- **International instruments and the constitution were cited by soldiers appealing a court martial sentence.**

#### QICATABUA v REPUBLIC OF FIJI MILITARY FORCES & ORS

High Court	Fiji Islands
Singh J	[2007] FJHC 132
	22 May 2007

#### International instruments and law considered

International Covenant on Civil and Political Rights (ICCPR)  
 Constitution of Fiji (CF)  
 Republic of Fiji Military Forces Act [Cap 81] (RFMFA)

#### Facts

These facts arose out of the political crisis in Fiji in 2000. The attempted *coup d’etat* in May 2000 was followed by an attempted mutiny against Commodore V Bainimarama at the Queen Elizabeth Barracks on 2 November, 2000. The applicant (Q) was convicted with others by a Court Martial for offences relating to the takeover of the Fiji Parliament in May

2000 and for mutiny. The mutineers were all convicted and sentenced to various terms in prison.

Q had already appealed the Court Martial sentence imposed on him to the Court of Appeal (CA). (A Court Martial is a military tribunal of equivalent standing to the High Court.) According to a plain and strict reading of s 30 of the RFMFA, a convicted soldier could only appeal against conviction but not against the sentence. The provision and act were silent about appeals against a sentence. The CA ruled that s 30 of the act did not permit an appeal against a sentence.

#### Issue

- Whether s 30 of the RFMFA, in appearing to deny an appeal against a sentence, contravened ss 25, 28 and 30 of the CF, which gave *all* citizens due process and civil rights.

#### Decision

The court held that s 30 of the RFMFA was inconsistent with s 28(1)(f) and s 38 of the CF because it failed to provide an appeal against a sentence. Applying ss 43(2) and (3) of the CF, it read in the additional words ‘and sentence’ to s 30 to ensure an appeal against a sentence was possible. In the event of any inconsistency, the CF took precedence as supreme law and any inconsistent law or executive practice was rendered void. Section 43(2) of the CF was cited, which obliged the court to promote the values that underpinned a democratic society and the content of public international law.

The court said that all persons had the right to be treated equally before the law. Article 26 of the ICCPR also provided a similar assurance. Circumstances existed where there could be a discriminatory provision based on reasonable classification, but it had to be rational and not arbitrary. It had to be based on an intelligible degree of difference that separated those who were grouped together from those who were excluded. Few professions were as dependent on discipline as the army; the personal interest and concerns of individuals were subservient to the collective good, needs and purpose. The RFMFA provided that soldiers were liable for criminal offences that they committed and, in addition, could be dealt with for numerous offences that were unique to the army, such as mutiny and desertion.

A person who was convicted and sentenced by the High Court for a criminal offence had the right of appeal against both conviction and sentence to the Court of Appeal. It did not stand to reason that simply because a person happened to be a soldier sentenced by a Court Martial, he should be given lesser justice. The expansive approach taken by the court was reflected as follows:

*Section 43(2) and Section 3 of the Constitution enable or require courts to interpret legislation expansively or permissibly as far as the Bill of Rights is concerned. The spirit of section 43(2) is captured if a court in proper cases were to read in words which change the meaning of a provision in a legislation to make it Bill of Rights and International Convention compliant. I am of the view that section 43(2) demands of courts and imposes an obligation to take a stronger approach than mere purposive interpretation when interpreting Bill of Rights provisions. The*

11. [2003] VUCA 27 featured in 1 PHRLD 12-13.

*court can take a radical rather than a purely purposive approach when considering rights provisions. Justice Bhagwati [of the Indian Supreme Court] advocated a creative and purposive and a goal-oriented approach. The Court has a duty within the bounds of the Constitution to provide effective relief for infringement of any rights even if it means shaping innovative remedies.*

Applying ss 43(2) and 3 of the CF, the court read in the words ‘and sentence’ after the word ‘conviction’ in s 30 of the RFMFA. It was of the view s 43(2) imposed a stronger obligation on the courts than a ‘mere purposive interpretation’. It conferred a duty within the bounds of the constitution to provide effective relief for infringement of any rights including the shaping of innovative remedies. Apart from the constitutional provisions, the court took into account the fact that the amendment would pose no additional obligation on the state and that parliament had been dissolved in advance of elections. In relation to this latter issue, it could transpire that Q and others may well have served their time by the time parliament intervened.

#### Comment

The court adopted a progressive approach in ‘amending’ the RFMFA to enable soldiers to appeal their sentence, applying ss 43(2) and (3) of the CF. It also gave s 43(2) of the CF greater weight, which reinforced the capacity of the courts to go beyond mere purposive interpretation. The orthodox view would have been to simply conclude that s 30 of the RFMFA precluded any appeal against a sentence. The approach taken by the Indian, Canadian and South African courts was applied, holding that without effective relief the values underlying the rights provided in the bill of rights could not be promoted. Material considerations in this particular context were the absence of any additional burden on the state and the dissolution of parliament ahead of elections. This meant it could be some time before there was any legislative enactment, by which time the issues may have been rendered irrelevant. According to the *Bangalore Principles on the Domestic Application of International Human Rights Norms (1988)*,<sup>12</sup> international law may be relied on to fill a lacuna, so the approach adopted by the court was consistent with accepted judicial practice.

*Editors’ note: At the time of publication, the Court of Appeal had issued its decision reversing this decision. The appeal decision will be recorded in Volume 3 of the PHRLD.*

#### DISCRIMINATION / WOMEN

- **Custom not allowing widows to have relationships is *ultra vires* the equality provisions of the Constitution of Papua New Guinea.**

#### RARAMU v YOWE VILLAGE COURT

National Court of Justice  
Doherty J

Papua New Guinea  
[1994] PNGLR 486 N1262  
22 November 1993

#### Law considered

Constitution of Papua New Guinea (CPNG)

#### Facts

R was a widow but was nevertheless convicted and sentenced by a Village Court to a term of six months’ imprisonment for being involved with another man. The customary practice in many areas did not allow widows to have subsequent relationships.

#### Issues

- Whether the custom contravened the CPNG in that it was discriminatory towards women.
- Could the Village Court convict for offences not provided for in the Village Court Regulations?

#### Decision

The court refused to recognise such a practice because it was oppressive of and discriminatory against women. Prohibiting widows from relationships struck at the equality provision provided in s 55 of the CPNG. The custom failed to recognise the inherent dignity of humankind. The Village Court erred in imprisoning people for breach of what was only custom and not codified as law. Accordingly, R was to be released forthwith together with her four-month-old child.

#### Comment

The enforcement by a Village Court of this customary practice which discriminated against widows reflects the structural inequalities women face in everyday life. It was irrelevant that the practice was custom rather than law. In striking down the decision of the Village Court, the National Court was asserting the primacy of the constitution in general and human rights in particular over discriminatory practices that disadvantaged a particular group. When the situation is reversed, the uneven treatment accorded R is magnified: widowers are not similarly treated and the male involved with R was not punished. It was to safeguard against such occurrences that jurisdiction was referred to the National Court to grant a hearing where people claimed to be unlawfully or unreasonably detained.

12. Pacific Regional Rights Resource Team, *The Big Seven: Human Rights Conventions and Judicial Declarations* (RRRT: Fiji, 2005).



**DISCRIMINATION / WOMEN CHIEFS**

- **Discrimination against women is not unconstitutional if the constitution itself legitimates that gender discrimination.**
- **The constitution itself discriminates against women in that traditional chiefs are male.**

---

**MINISTER FOR PROVINCIAL GOVERNMENT v GUADALCANAL  
PROVINCIAL ASSEMBLY**


---

Court of Appeal	Solomon Islands
Kapi (Ag) P,	(1997) SBCA 1
Williams & Goldsbrough JJA	11 July 1997

**Law considered**

Constitution of Solomon Islands (CSI)  
Provincial Government Act 1996 (PGA)

**Facts**

When the CSI came into effect on 7 July 1987, there were no provisions for a system of provincial government. In the High Court, the Guadalcanal Provincial Assembly (GPA) attacked the validity of certain provisions of the PGA, which it argued were invalid as being inconsistent with the CSI. This argument was upheld on the basis that the system of government was required to be representative.

On appeal, the Court of Appeal allowed the appeal on the basis that s 114(2) of the CSI allowed parliament to consider the role of chiefs in providing for governments of the provinces. Section 114(2) included an obligation on the part of parliament to 'consider the role of traditional chiefs in the provinces'.

**Issue**

- How does the provision in s 114(2) for traditional representation of custom chiefs in governance of the CSI affect the rights of women?

**Decision**

The court held that the PGA was consistent with the CSI. While Kapi (Ag) P made no specific reference to women and traditional chiefs, Williams JA observed as follows:

*There are two aspects, however, to which I should specifically refer lest it should be thought that I have not addressed them. Firstly, the traditional position is that only a male can be a 'traditional chief'. That means that one-half of the members of the Area Assembly must be males and that, it might be said, effectively denies females equal opportunity with males. There is certainly force in the argument, but the answer in essence is that the constitution recognises that the 'traditional chiefs' should play a role in government at the provincial level. The constitution itself therefore*

*recognises this imbalance or discrimination and it will remain until the role of 'traditional chief' under the constitution is re-evaluated. Initially the role for women in government at the provincial level will be limited to standing for election to Area Assemblies, and undoubtedly when that has become more readily accepted, consideration will be given to the discriminatory effect of appointing chiefs and elders pursuant to ss 30 and 31 of the 1996 Act.*

Goldsbrough JA observed:

*Section 114 is clear and without ambiguity. Parliament has made provision for provincial government. It was required to do so. It has considered, as required, the role of traditional chiefs. Indeed, it has decided to enhance their role, as compared to the repealed legislation. In this regard it is clear that women at present may be disadvantaged, given that traditional chiefs are male. This I conclude cannot be said to offend against the constitution as it is required consideration by that same constitution.*

Two members of the court acknowledged that the effect of s 114 of the constitution affected women adversely because of the social context.

**Comment**

What is of interest, and is the basis for reporting the case in this volume, is the consideration of the rights of women in the discussion concerning traditional chiefs. There is very little discussion in the Solomon Islands courts of the discriminatory effect of laws and practices on women. This case is reported because of the discussion by two members of the appellate court of the possible disadvantageous effect of including chiefs in the governance structure. In this case, two members of the court recognised the effect the particular constitutional provisions had by reinforcing the traditional power structures. At the same time there was an acknowledgement that society was changing and not static and there was every likelihood that the question of male traditional chiefs would be re-evaluated in time. Solomon Islands has ratified CEDAW. Although there was no reference to international instruments that Solomon Islands had ratified, these conventions would have been modified by the constitutional provisions in place. It also should be remembered that a purposive (goal oriented) interpretation takes account of changes recurring in society over time.

## JUDICIAL INDEPENDENCE

### JUDICIAL INDEPENDENCE / PERCEPTION OF BIAS

- **Comments by a judge at a social event about the accused could be taken as perceived bias, rendering the judge unfit to hear the trial.**

#### TAKIVEIKATA v THE STATE

Court of Appeal	Fiji Islands
Ellis, Penlington & McPherson JJA	[2007] FJCA 45 25 June 2007

#### Law considered

Common law

#### Facts

This case arose out of a series of political uprisings in 2000 in Fiji spearheaded by the illegal removal of the elected government headed by Mahendra Chaudhry, which was instigated by George Speight on 19 May 2000. The military assumed control and there were curfews on movement and restrictions on various rights. A group within the military, allegedly supported by others, attempted a mutiny but failed. The appellant (T), a traditional high chief, was convicted in the High Court of four counts of incitement to mutiny. The judge was Justice Anthony Gates. T appealed, alleging bias, and sought an acquittal or retrial. T relied on two affidavits sworn by a married couple in which they alleged Gates J had told them at a social gathering on 14 July 2004, 'I am going to put him away'.

*Editors' note: Gates J was Acting Chief Justice under the military-backed interim administration headed by Commodore V Bainimarama, head of the Republic of Fiji Military Forces, as prime minister, when the decision was handed down.*

#### Issues

- Was bias or an apprehension of bias made out on the facts?
- Whether the perception of bias affected the principle of judicial independence.

#### Decision

The court upheld the appeal, quashed the guilty verdicts on all four counts and ordered a new trial on those counts. On the issue of whether a 'not guilty' verdict should be entered on all four counts, where the decision of the credibility of witnesses was made difficult by their position as accomplices and by the conflicting views of the assessors and the judge, there was a large advantage in hearing and seeing the witnesses. There would therefore be no entering of 'not guilty' verdicts.

Only if the evidence contained discrepancies, displayed inadequacies, was tainted or otherwise lacked positive force in such a way that an appellate court could conclude, even allowing for the advantage enjoyed by a judge or jury, that there was a significant possibility an innocent person had been convicted, could it intervene to set aside a verdict.

In weighing the evidence, the couple's version of events was accepted. On the facts, a fair-minded lay observer might reasonably consider that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge was required to decide. There was therefore certainly the possibility of an absence of an impartial mind on the part of the judge.

#### Comment

The case is a salutary reminder of the maxim that 'justice must not only be done but must be seen to be done'. It is also a reflection of the smallness of Pacific Island societies. While citing numerous factors in assessing the evidence, what appears to have weighed heavily with the court was that the judge did not directly contradict the couple being witnesses nor their credibility. Further, there was no use of direct speech in the judge's affidavit and no suggestion of ill will or ulterior motive by the couple. The delay by the couple in bringing the precise words to T's attention was explained in part by their being lay people and that there was no connection with T by the couple other than indirectly.

*Editors' note: At the time of publication, the Supreme Court rejected Gates J's appeal and upheld the decision of the Court of Appeal. Gates J has been appointed Chief Justice by the regime in power in December 2008.*

## LEGAL AID

### LEGAL AID / MEMBER OF PARLIAMENT

- **A member of parliament, in particular circumstances, did not qualify as a needy person deserving of legal aid provided by the state.**

#### OFFICE OF THE PUBLIC SOLICITOR v KALSAKAU

Court of Appeal	Vanuatu
Lunabek CJ, Treston J	[2005] VUCA 13 24 August 2005

#### Law considered

Constitution of Vanuatu (CV)  
Penal Code [Cap 135] (PC)

## Public Solicitors Act [Cap 177] (PSA)

**Facts**

The respondent (K), a member of parliament, was charged with the offence of perverting the course of justice under s 79 of the PC. K claimed that he should have been provided with a lawyer by the appellants under article 5(2)(a) of the CV and that this lawyer should be given sufficient time to prepare for the trial. The Public Solicitor (PS) appellant claimed that the primary judge did not go far enough in inquiring into the specific details of K's circumstances in determining his eligibility for legal aid.

The trial judge made the following orders:

1. The PS must engage a lawyer from outside the PS's Office to represent K.
2. K must enter into an agreement immediately with the PS about his contribution to the legal cost of running his case.

**Issue**

- Whether K qualified as a 'needy person' under s 56 of the constitution (*...where the state shall provide for the office of the Public Solicitor's Office, appointed by the President of the Republic of Vanuatu on the advice of the Judicial Service Commission, whose function shall be to provide legal assistance to needy persons*).

**Decision**

The appeal was allowed and the court held that K must either act for himself or find his own lawyer. The PS submitted that article 5(a) of the CV must be read together with article 56. The definition of a needy person was contained in s 5 of the PSA. The court in this instance had an opportunity to analyse the sworn statement of K about his monthly income, expenditure, assets and liabilities. An analysis of those figures indicated that K was not a needy person because he had the means to meet the probable cost of a lawyer. The decision on whether K could be represented by a state lawyer had to be limited to the particular circumstances; therefore alternative legal assistance was available to K. Accordingly, the appeal was allowed and the orders of the primary judge were set aside as K did not qualify to be provided with a lawyer at the expense of the state.

**Comment**

The courts will go to great lengths to ensure a fair trial. In this case, K claimed that he should have had the right to be represented by a state lawyer. Given his financial circumstances, the appeal was allowed and K had to pay for his own lawyer. However, for those meeting the criteria of a needy person, legal representation and assistance will be provided. This right to legal representation is enshrined in the Constitution of Vanuatu and is further supported by the Public Solicitors Act.

**LEGAL AID / TREASON**

- **Legal Aid Commission is required to provide legal representation in a treason trial as a matter of equality before the law.**

**THE STATE v SILATOLU**

High Court  
Wilson J

Fiji Islands  
[2002] FJHC 69  
22 August 2002

**Law considered**

Constitution of Fiji (CF)  
Legal Aid Act 1996

**Facts**

In 2000 there was a series of political uprisings in Fiji spearheaded by the illegal removal of the elected government headed by Mahendra Chaudhry, which was instigated by George Speight on 19 May 2000. Parliamentarians were held hostage in parliament for 56 days. There was an attempt by Speight to illegally abrogate the constitution and establish a new government. Racial tensions between indigenous Fijians and Indo-Fijians escalated and there were burnings of Indo-Fijian homes in Muanaweni, Dreketi and elsewhere. The military assumed control and there were curfews and restrictions on various rights. A group within the military attempted a mutiny but failed. An interim civilian government was installed by the military after it had attempted to abrogate the constitution and to rule by decree. In *Republic of Fiji & Attorney General of Fiji v Prasad*,<sup>13</sup> the Court of Appeal held the constitution to be extant and ordered a general election.

Silatolu (S) was charged with treason (allegedly committed between 19 May and 27 July, 2000), which is punishable by the mandatory death sentence. S applied for constitutional redress. He sought to enforce an aspect of his constitutional right to a fair trial under s 29(1) of the constitution. S sought specifically to enforce his qualified constitutional right to be given the services of a legal practitioner under a scheme for legal aid s 28(1)(d), i.e. the right to be given legal representation. Secondly, he sought to enforce his constitutional right to equality before the law under s 38(1).

S claimed that:

1. his right to be given legal representation had been infringed;
2. his right to equality before the law had been infringed; and
3. the current estimate of the length of the trial proper, as made by the prosecution, was '4 to 6 weeks'. The trial was expected to be lengthy, as well as complex and he therefore needed legal representation.

13. [2001] FJCA 2 featured in 1 PHRLD 42-46.

**Issues**

- Whether the applicant's qualified right 'to be given the services of a legal practitioner under a scheme for legal aid' had been contravened.
- Whether legal representation would be in the interests of justice.

**Decision**

The court held that S had consistently and reasonably expressed his concern that his qualified right to be given the services of a legal practitioner should not be infringed and that the Legal Aid Commission had deemed S entitled to legal aid as he had insufficient means to engage a private legal practitioner.

The test was whether 'the interests of justice require' the applicant, being a person charged with treason, 'to be given the services of a legal practitioner under a scheme for legal aid'.

The factors to be taken into account included:

1. the seriousness of the offence with which the applicant was charged. Treason was one of the most serious criminal charges which any person in Fiji could face; and
2. the length and complexity of the case.

**Comment**

The decision to require legal aid to represent S was just, given the penalty for treason, the complexity of the issues, and the widespread interest in the case throughout Fiji. The culpability of S was not an issue. The decision on whether he ought to receive legal aid was to be determined in the light of applicable constitutional and legislative provisions. It was irrelevant that S had been a very public presence in George Speight's overturn of the Chaudhry government and in the hostage crisis which followed. S was still entitled to his day in court and to appropriate legal representation.

## LIBERTY

**LIBERTY / DEBT**

- **Imprisonment for failure to pay a debt such as traffic fines is rare.**

### IN RE ERONI DELAI

High Court Scott J	Fiji Islands [2000] FJHC 56 14 April 2000
-----------------------	---

**Law considered**

Constitution of Fiji (CF)

Penal Code [Cap 17] (PC)  
Criminal Procedure Code [Cap 21] (CPC)  
Human Rights Commission Act 1999 (HRCA)

**Facts**

The applicant (D) was produced before the court by the Commissioner of Prisons on 11 April 2000 after a writ of *habeas corpus* (an order requiring a person to be brought before the court) had been issued. J had been sentenced to 12 months in prison by the Magistrate's Court.

D was a mini-van driver who during 1997 and 1998 committed 93 traffic offences, mostly incorrect stopping or using a private vehicle as a taxi. On each occasion, D was served with a Notice to Attend Court (NAC) under the provisions of s 80 of the CPC. (A NAC is, by virtue of s 80(2) of the CPC, equivalent to a summons). However, according to paragraph 5 of D's supporting affidavit, on no occasion did he actually attend court as required by the notice.

Section 80(1) of the CPC empowers a resident magistrate to deal with the offence to which the summons relates in the absence of the accused as long as the offence is only punishable either by a fine or by a fine and imprisonment not exceeding three months, and providing that the accused pleads guilty or is legally represented. A resident magistrate can also deal with the matter under s 199 of the CPC, which permits a hearing to take place in the absence of an accused where the accused is charged with an offence punishable by a fine not exceeding FJ \$100 or imprisonment for a term not exceeding six months. This procedure is commonly referred to as 'formal proof'.

In each case, D was given time to pay the fines but did not do so. The procedure went badly wrong in this case. Whereas the convictions were entered and the fines and default periods were imposed during 1997 and 1998, the first warrants of execution were not issued until 1999, by which time the applicant had accumulated huge fines and fees.

The Legal Aid Commission became aware of D's predicament and commenced proceedings for *habeas corpus*. At the application stage, leave was granted to the Director of the Fiji Human Rights Commission to intervene in the proceedings under the provisions of s 37(2) of the HRCA.

**Issues**

- Was a custodial sentence constitutional and/or necessary?
- Was the fine imposed by the court unreasonable?

**Decision**

The court ordered D's immediate release from prison. The reason was simple. In the words of the Magistrates' Bench Book (February 1994 Edition):

*Where the court imposes a custodial sentence it should review the aggregate to ensure that the overall effect is just.*

The principle, usually known as the ‘totality principle’, meant that the aggregate of sentences must bear some relationship to the gravity of the individual offences. It was abundantly plain and obvious that a man who parked his van illegally or used his private vehicle as a taxi should not be required to serve a 12-year term of imprisonment. By April 2000, D had already served 6 months’ imprisonment. Further imprisonment would clearly be unjust.

Section 23(1) of the CF provided that:

*A person must not be deprived of personal liberty except:*  
 (a) for the purpose of executing the sentence or order of a court ... in respect of an offence of which the person has been convicted; [or]  
 (c) for the purpose of executing the order of a court made to secure the fulfilment of an obligation imposed on the person by law.

Section 23(2), however, stated that:

*Paragraph 1 (c) does not permit a court to make an order depriving a person of personal liberty on the ground of failure to pay maintenance or a debt, fine or tax unless the court considers that the person has wilfully refused to pay despite having the means to do so.*

The questions to which s 23 immediately gave rise were whether the provisions of s 88(4) of the CPC and the procedure whereby fines were imposed on absent offenders after a CPC s 199 hearing were constitutional.

Secondly, there was no evidence to indicate that the court had enquired into D’s means to pay the fines before it imposed them. Therefore, it could not have satisfied itself that the applicant was in fact able to pay them. Accordingly, it could not be satisfied, as was required by s 23, that the non-payment was on the ground of wilful refusal.

The court’s view on s 23(2) was clear: an offender could only constitutionally be ordered to serve a default period of imprisonment if the court was satisfied that the offender had the means to pay the fine imposed but wilfully refused to pay it. This reading of the section was consistent with the detailed provisions of s 37(4) of the PC, which required the court to examine the offender’s means either before imposing the fine or before issuing a warrant for committal for non-payment.

Where, however, larger fines were imposed for more serious offences, then the Penal Code required an examination of means to take place before the fine was imposed and this was entirely consistent with s 23.

#### Comment

Imprisonment for failure to pay a fine or debt would be rare. Such penalties must be balanced against the right to liberty. In this case, the Magistrate’s Court proceeded to impose a custodial sentence on the basis of the convictions and fines that had been entered against D after he appeared in response to arrest warrants. The appellate jurisdiction of the High Court ensured that what was clearly a miscarriage of justice was lessened. D should not have been imprisoned without the court first having an examination of means.

*Editors’ question: What about situations where a parent fails to pay maintenance for children? Should this be an exception or should exactly the same principles apply?*

## LIFE

### LIFE / INTERNATIONAL STANDARDS

- **International Covenant on Civil and Political Rights (ICCPR) taken into consideration in determining the arbitrariness of the death sentence.**

### R v VOLA

Supreme Court  
Webster CJ

Tonga  
[2005] TOSC 31  
10 November 2005

#### International instruments and law considered

International Covenant on Civil and Political Rights 1966 (ICCPR)  
Criminal Offences Act [Cap 18] (COA)

#### Facts

V was found guilty by a jury of murdering P by repeatedly hitting him on the head with an iron bar.

Both V and P were drunk on the night in question and started arguing. V’s friend hit P with an iron bar. V then took the iron bar from his friend, stood over P and hit him repeatedly with the iron bar. V’s defence of intoxication and extreme provocation to the point that he lost his power of self-control was rejected by the jury. Under s 91 of the COA, there were two alternative penalties for murder: a death sentence or life imprisonment. There was only a limited discretion to impose the alternative punishment after considering all relevant factors.

#### Issues

- Whether to impose the death penalty or a life sentence.
- What was the effect of the ICCPR, an unratified convention, on Tongan legislation?

#### Decision

The court sentenced V to life imprisonment. Although the effectiveness of the death penalty was a matter for government and parliament, the court had to understand the debate surrounding the death penalty in order to make an informed decision. A consideration of the debate, although not directly relevant to Tonga, was important in understanding the principles involved.

On the matter of the arbitrariness of the death penalty, reference was made to article 6(1) of the ICCPR. Although Tonga was not a party to it, the principles encapsulated therein were fundamental:

*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

In exercising its discretion, the guidelines set out in *Bachan Singh v State of Punjab* (255 E-H, 256 A-C) were applied. The circumstances surrounding the offence were not exceptionally depraved or heinous in character, nor did it constitute, on account of its design and the manner of its execution, a source of grave danger to society at large. There was also no evidence of aggravation of an abnormal or special degree.

#### Comment

This was the first verdict in a murder case in Tongatapu in over 20 years. The court did not hesitate in applying international cases and the ICCPR notwithstanding, they did not apply directly to Tonga nor was Tonga a party to the ICCPR. It was recognised that the principles set out in the ICCPR and in the numerous authorities cited were reflective of the circumstances exercised in relation to the death penalty. The court was not hindered by the kingdom's non-ratification. The case is illustrative of the philosophical concerns the judiciary in particular and the wider community in general have to the irreversible nature of the death penalty. As in the *Kelly* cases from Solomon Islands, this case heralds the first clear departure from traditional non-enforceability approaches to international law in Tonga and the growing influence of international human rights law on domestic courts. See also *Fa'aoso v Paonga & Ors* earlier in this digest, where the court said in 2006 that accession to the CRC was an indication to the state party to be bound by its terms.

## MOVEMENT

### MOVEMENT / DISCRIMINATION

- **Right to apply for an order guaranteeing free movement and lifting a travel ban was still possible even when the ban was no longer applicable.**

#### LEUNG v INTERIM ATTORNEY GENERAL (IMMIGRATION)

High Court  
Singh J

Fiji Islands  
[2007] FJHC 110  
25 July 2007

#### Law considered

Constitution of Fiji (CF)

#### Facts

L, a solicitor, former Human Rights Commissioner and immediate past President of the Fiji Law Society, instituted a judicial review of a decision by the Director of Immigration to place him on an immigration watchlist of people banned from leaving Fiji. The ban was lifted before the beginning of the hearing of the leave application.

#### Issue

- Was there any basis for the court to make a decision given the issue was no longer live, i.e. that the ban on L's travel by the military had been lifted?

#### Decision

The court gave leave to apply for judicial review and confined it to damages, costs and declarations that the decision was unlawful, void and of no effect and that the interim administration acted unlawfully in breach of L's expectations. Although the actual issue was no longer outstanding, it was a matter of public interest. The core of this application was L's freedom as a Fiji citizen to travel overseas under s 34(3) of the CF, which guaranteed freedom of movement. The exercise of his ability to do so in light of the interim administration's power was a matter of public importance. L's intention to travel in the near future and the possibility of further damages being sought were additional reasons for the grant of leave.

#### Comment

The court could have refused leave to apply for the order on the basis that there was no longer a live issue and that the attendant issues upon the travel ban were of little consequence. However, leave was granted because of the principles involved: the freedom of a Fiji citizen to travel overseas under Article 34(3) of the CF and the exercise of discretion conferred on a public officer to affect the rights of a citizen. Although unstated, the context was important where a military-backed interim government was arbitrarily exercising authority and unduly restricting the rights of citizens. Where an arbitrary regime exercises power, the capacity of the courts to protect the rights of ordinary citizens assumes even greater importance.

*Editors' note: Fiji at the time was being governed by a military-backed interim government with the commander of the Republic of Fiji Military Forces as interim prime minister. Those opposing the regime were placed on a watchlist and prevented from leaving the country for publicly opposing it and exercising free speech. L wanted an order, notwithstanding, given possible future problems in leaving the country. The matter did not proceed to a substantive hearing because the parties settled out of court for an undisclosed amount.*

**MOVEMENT / EMERGENCY POWERS**

- **Unlawful restriction on freedom of movement by placing a travel ban on those opposing the state.**

**PULOKA & ORS v THE KINGDOM OF TONGA**

Supreme Court  
Ford CJ

Tonga  
[2006] TOSC 42  
20 December 2006

**Law considered**

Constitution of Tonga (CT)  
Emergency Powers Act [Cap 45] (EPA)

**Facts**

This case arose out of a political crisis in Tonga in November 2006 when pro-democracy supporters rioted and burnt down parts of the capital, Nuku'alofa. Emergency regulations were issued after the riot. The plaintiffs (P) claimed that they had been unjustly deprived by the defendant (KOT) of their basic rights to freedom of movement and travel. Their names were included on what was described in the pleadings as a secret list of Tongans blacklisted or prohibited from going to certain areas or leaving Tonga. P claimed that they had been stopped at various checkpoints around the country; they had been searched and were humiliated and highly embarrassed at being treated as criminals.

The list was drawn up by the defendant under the Emergency Powers (Maintenance of Public Order) Regulations (ER), made under s 2 of the EPA. In each case, military personnel, in relying on the names included in the list, had made orders prohibiting P's freedom of movement and travel.

The ER extended significant powers to any person authorised by Cabinet and every member of the Tonga Police Force and the Tonga Defence Force to act 'for the purposes of preserving public order and securing the public safety'.

P challenged the legality of the 'list'.

**Issue**

- Were the actions of the state in denying P and others the right to freedom of movement *ultra vires* the CT?

**Decision**

The court considered the strong *prima facie* case for a judicial review and in the circumstances awarded interim relief by giving leave for judicial review and allowing P to travel. The defence services denied that they had considered the case of the respective plaintiffs or that they had made a decision in putting their names on a list. In reality, a decision was made in each case which restricted P's freedom of movement or travel. The decisions had been

made without any consideration of the individual case before it but on the basis of the list. A decision made on that basis could properly be described as unreasonable and irrational.

In passing the Chief Justice commented that:

*A cursory examination of the authorities ... indicates that courts are reluctant to comment on or criticise the wisdom or expediency of steps taken by the authorities to deal with a perceived state of emergency situation. The courts, nevertheless, retain the power by way of the remedy of judicial review, to ensure that officials act within their legal powers and exercise any discretionary powers on reasonable grounds after following a proper process.*

**Comment**

Although there was no ruling on the legality of the list, the interim relief granted was a significant check on the power of the authorities. While accepting the rationale of the regulations, a distinction was made in the particular circumstances of the case. The police had merely acted on the basis of P's inclusion on a list of banned persons without considering the individual merits of each case. This was sufficient to attract the supervising jurisdiction of the courts to make a preliminary finding that the decisions were unreasonable and irrational. It appears that had the authorities been able to demonstrate to the court's satisfaction that, after individually reviewing each case on its merits, there was good reason to place the persons on the list, their decision would have been upheld.

**MOVEMENT / NON-CITIZENS**

- **The right to freedom of movement of non-citizens may not be the same as that of citizens.**

**AYAMISEBA v ATTORNEY GENERAL (IMMIGRATION)**

Court of Appeal  
Lunabek CJ,  
Robertson, Doussa, Fatiaki, Saksak & Tuohy JJ

Vanuatu  
[2006] VUCA 21  
6 October 2006

**International instruments and law considered**

Convention on the Rights of the Child (CRC)  
Constitution of Vanuatu (CV)  
Immigration Act [Cap 66] (IA)

**Facts**

A was an activist for the West Papuan independence movement. Although not a citizen of Vanuatu, A had lived in Vanuatu for lengthy periods of time amounting to more than 20 years. The Minister of Immigration (M) had ordered his deportation. A appealed against orders made by the Supreme Court, which refused to quash the removal order made against him by M.

A first came to Vanuatu in 1983. He assisted in various election campaigns. He visited Vanuatu on an ongoing basis until 1988 when he was deported to Australia. In that same year he was removed from the immigration watchlist and again made several trips to Vanuatu. He had been residing in Vanuatu without any specific authorisation since the expiry of his diplomatic passport. He was the father of a ni-Vanuatu child who was a citizen. A claimed that the removal order was inconsistent with the IA.

The respondents (AG) relied on s 17A(1) of the IA, which gives M the power to remove non-citizens if:

- a) the person is involved in activities detrimental to national security, defence or public order; and
- b) he is a wanted person in a foreign country for any criminal offence he has committed in that foreign country.

In these instances, M said he did not need to give notice for the removal of such persons (s 17A(2)).

#### Issues

- Were the reasons for limiting the rights of A to free movement reasonably justifiable?
- Whether the minister acted *ultra vires* (beyond his powers) the IA and the CV.

#### Decision

The court allowed the appeal. Parliament had provided for two specified situations that were defined in s 17A, (1) (a) or (b). The regime under s 17A did not ‘prohibit’ or ‘prevent’ M from giving notice or affording a non-citizen the rights of natural justice; it merely empowered M to decide whether he needed to do so in a particular case. It was wrong to say that the provision explicitly removed rights to prior notice to which a non-citizen might otherwise be entitled. As a matter of statutory interpretation, M must be of the opinion that the circumstances under either ss. (1) (a) or (b) existed and then under subsection (2) whether in the circumstances he needed to give notice. Consequently, M needed to undertake a separate and distinct enquiry and assessment on whether he needed to give notice.

There was no evidence to suggest that such an enquiry had been undertaken. Therefore, the exercise of power and the deportation that followed were unsustainable in law. The court mentioned in passing that as A had a ni-Vanuatu child who was a citizen of Vanuatu, the obligations under the CRC had to be given due regard.

#### Comment

The exercise of a statutory discretion must be exercised carefully. Despite the power conferred in these particular circumstances, M was required to observe certain preconditions before authorising a particular course of action. He omitted to do so and it did not matter that A might well have been involved ‘in activities detrimental to national security, defence of public order...’ because M was obliged to follow the prescribed procedures. The courts will carefully scrutinise the exercise of those powers that impinge on the rights of those affected; they will not hesitate to quash the decision of public officers if they are not made in accordance with the specific law or regulation.

#### MOVEMENT / TAXES

- **Preventing a citizen from leaving the country is a valid limitation on the right to free movement if the limitation is reasonable and justifiable.**

#### KHERA v FIJI ISLANDS REVENUE AND CUSTOMS AUTHORITY

High Court  
Singh J

Fiji Islands  
Civil Action No. HBC 162 of 2006  
6 July 2006

#### Law considered

Constitution of Fiji (CF)  
Income Tax Act (ITA)

#### Facts

The plaintiff (K) challenged the validity of a Departure Prohibition Order (DPO) imposed on him by the Fiji Islands Custom and Revenue Authority (FIRCA) for unpaid taxes of FJ \$3.458 million on the ground that it impinged on K’s freedom assured by s 34 of the CF. K argued that the DPO was therefore unconstitutional, and if valid it was not a reasonable and justifiable restraint on his freedom of movement in a free and democratic society.

#### Issue

- Whether curtailing K’s right to free movement for unpaid taxes was a valid limitation on his human rights.

#### Decision

Dismissing the application, the court upheld the validity of the DPO as falling within a valid limitation imposed by s 34(7) of the CF, the freedom of movement guaranteed by subsection (3) thereof. The DPO was validly issued under s 77A of the ITA. The restraint on K’s freedom was reasonable and justifiable. It was also no more restriction than necessary to achieve the purpose of the limitation. It was the duty of FIRCA to recover assessed tax. The DPO was intended to ensure it was able to do so. Tax had been assessed as due from K. FIRCA was entitled to determine what was adequate security given K owed F\$3.458 million and had defaulted on undertakings to make repayments. Therefore, the restriction on K’s movement or the demand by FIRCA for adequate security was reasonable.

#### Comment

In assessing restrictions and limitations to freedoms, the courts will scrutinise the nature of the limitation closely. An assessment will be made to determine whether the measures are properly conceived and there is a connection with the objective. The right restricted should be minimally impaired. There must be a balance between the adverse effects of the restrictions and the purport and intent of the legislation. In the present case, the restriction on K’s movement was for a clear public purpose. It was not a unilateral restriction on K’s freedom of movement but justifiable in terms of affecting the revenues due to the state from K. Compare this with the restriction in Leung’s case, which could not be related to a public purpose or reasonable grounds.



## PRIVACY

### PRIVACY / CRIMINAL RECORDS

- **Bill of rights and international human rights law protection for the right to privacy of persons with criminal records.**

#### YAYA v ATTORNEY GENERAL & DIRECTOR OF PUBLIC PROSECUTIONS

High Court	Fiji Islands
Pathik J	[2007] FJHC 136
	23 February 2007

#### International instruments and law considered

Universal Declaration of Human Rights (UDHR)  
 International Covenant on Civil and Political Rights (ICCPR)  
 European Convention on Human Rights (ECHR)  
 Constitution of Fiji 1997 (CF)  
 Police Act [Cap 85]

#### Facts

The applicant (Y) claimed that the respondent (AG) breached his right to privacy under s 37(1) of the CF when the former police commissioner mentioned his name in the media in relation to a series of violent robberies. The reports were titled '10 most wanted persons' and were widely disseminated via television, newspapers and radio. Y was named first on the list. Y gave himself up to the police after the media broadcasts and confessed to the robberies. Subsequently Y was tried, convicted and sentenced.

Y claimed the broadcast of his name through the media by the former commissioner gave his family and the public the impression that he committed the offences at a time when he was innocent. Y claimed that he was not on bail and did not have any charges pending against him. Y asserted that he had a right to be presumed innocent until proven guilty. The broadcast was therefore unreasonable, and caused him humiliation, distress and loss of dignity. Because of the broadcast, Y claimed that the public attention on him was excessive and invasive and thus his right to privacy was breached.

The AG claimed that he reserved the right under the Police Act to broadcast names through the media when safeguarding the interests of the public. There had been a series of violent robberies and as a result of their investigations, the police believed that Y and nine others were involved in the robberies. Airing the broadcast would caution the public and give Y and the nine others an opportunity to clear their names.

#### Issues

- Did the media blitz by the police on Y, bearing in mind his lack of involvement in criminal activities at the relevant time (despite his past convictions), infringe his right of privacy contrary to s 37(1) of the bill of rights?
- What were the court's powers to define limitations on rights in the constitution when there was no express legislation limiting the right?

#### Decision

The court held that Y's right to privacy was breached owing to publication in the media. Great weight was given to s 37(2) of the CF, which states that the right to privacy has limitations prescribed by law as being 'reasonable and justifiable in a free and democratic society'. However, it did not expressly state the limitations. It provided that legislation was yet to be enacted that regulated or prohibited the specific forms of interference with privacy, thus leaving it for the courts to determine what was excessive or unreasonable interference with privacy.

Reference was made to international conventions and common law to define what was a reasonable limitation of the said right. The burden of proof for the effectiveness of the limitation of a right rests on the party making the claim. The CF permitted the application of public international human rights law by virtue of s 43(2) and cited the UDHR (Art 12), the ECHR (Art 8) and the ICCPR (Art 17) on privacy protection, and cases litigating those articles in the English courts and the European Court of Human Rights.

The publication of names or photographs in the media, however, was justified given the public interest and the need to protect the life and property of citizens and combat crime. However, it needed to be in accordance with what was necessary in a democratic society. Publication of the information to the entire public was not necessary in this case. Distribution of the information on Y should have been limited only to persons who could make use of it. A limited circulation would not have breached the bill of rights provision. Therefore, the former police commissioner's publication of Y's name to the nation was undignified treatment of an 'innocent member of the public' as Y was at that time.

#### Comment

Y had a criminal history as well as being a suspect for the allegations to which he later confessed. This, however, did not give the police or any other local law enforcement agency the right to publish the names of individuals in the national media. Human rights apply to all manner of people and levels of the community. It matters not who they are. Each and every person has a right to be treated with dignity. When weighing the right of individuals against the interest of the public, the court applies a stricter test to those who make arguments seeking to limit the right. Despite there being no specific legislation, the court read in the limitation in accordance with guidelines laid down in the international conventions and cases referred to.

*Editors' note: So far, courts in the Pacific Islands have only referred to cases from other common law countries when looking at human rights issues. Another source of case law is the decisions of the treaty monitoring bodies that oversee the various human rights treaties. Although not binding, these cases provide an additional source of information as to the*

*meaning of various key rights. Of particular interest are the cases brought under the Optional Protocol procedures in which various human rights committees consider individual complaints.*

## PROCEDURE

### PROCEDURE / CONSTITUTIONAL REDRESS

- **A remedy under the constitution should not be lightly sought; where alternative remedies are available these should be used first.**

#### ALI v THE STATE

High Court Singh J	Fiji Islands [2005] FJHC 501 29 August 2005
-----------------------	---

#### Law considered

Constitution of Fiji (CF)  
Prison Act [Cap 86] (PA)

#### Facts

The applicant (A) applied for constitutional redress for an assault. He said he was backslapped by a prison officer (V) resulting in a bleeding nose. Damages and filing of an assault charge against V were sought.

#### Issue

- Whether A's case was a rights violation that qualified for constitutional redress or an alternative non-constitutional remedy.

#### Decision

Dismissing the application, the court found it was an abuse of process. Section 41 of the CF gave discretion to refuse the grant of relief if an 'adequate alternative remedy' was available. The Redress Rules under the CF did not provide a parallel process where other remedies were available. A could have complained to the police about the assault, filed a writ in the Magistrates' Court for damages and sought redress under the PA and Regulations thereunder.

#### Comment

Constitutional redress is an entitlement that is not an open endorsement to seek interventions by the courts. Where there are adequate alternative remedies, such applications may be refused. While not standing on technicalities or complicated procedures, redress is not to

be used as a short-cut or a substitute for normal procedures and mechanisms in place. These remedies should only be sought in appropriate circumstances, for example, where rights have been allegedly breached. They are not to be invoked as a ready option for the convenience of parties.

### PROCEDURE / CONSTITUTIONAL REDRESS

- **Not all cases involving procedural errors or irregularities by the state are rights violations subject to constitutional redress and damages, which apply only in rare cases where there has been a fundamental subversion of the rule of law.**

#### ATTORNEY GENERAL v MBWE

Court of Appeal Hardie Boys, Tompkins & Fisher JJA	Kiribati [2006] KICA 3 26 July 2006
---	---

#### Law considered

Constitution of Kiribati (CK)

#### Facts

The Attorney General (AG) appealed against a decision of the High Court to quash an order that the respondent (M) be imprisoned for six months for contempt of the Nikunau Magistrates' Court. The HC ordered that he be freed and ordered that the AG pay him the sum of AUD 1,250 by way of redress. The appeal was brought solely in relation to the redress order. M had been in custody awaiting trial for several months on an outer island without access to the main court in Tarawa.

In the appeal, the AG's concern was confined to the possibility that individuals adversely affected by procedural irregularities would rely on this case as a precedent for a right to compensation under the CK for every procedural irregularity. The AG argued that compensation for procedural irregularities amounting to a breach of constitutional rights should be reserved for the most extreme cases, not those in which a person had the opportunity to use other legal avenues, for example, the appeal process.

#### Issue

- Whether M's case was a rights violation that qualified for constitutional redress or an alternative non-constitutional remedy.

#### Decision

The appeal was dismissed. This was one of those rare cases in which a person had suffered from both a fundamental subversion of the rule of law and lack of any effective means of overcoming the problem through conventional procedural channels. The consequences were serious.

**Comment**

The rights of the accused remain paramount during the process of an investigation or trial. The court must have a high regard for all the rights accorded to an accused person and should ensure that they are protected. This is not only for the benefit of the accused, but more so for the whole court process. All persons must be treated fairly before the law and failure of this is an abuse of process and a breach of one's constitutional rights. Not all procedural irregularities are rights violations – some are and some are not. Compare this case to the previous decision, *Ali v State*, in which the court found that not all violations require a constitutional remedy.

**PROCEDURE / CONSTITUTIONAL REDRESS**

- **Unreasonable delay of a trial is a violation of fundamental rights in the constitution.**
- **Such cases should be brought under the constitution and not by way of judicial review.**

**PUBLIC PROSECUTOR v EMELEE & ORS**

Court of Appeal  
Lunabek CJ,  
Saksak & Treston JJ

Vanuatu  
[2005] VUCA 11  
6 June 2005

**Law considered**

Constitution of Vanuatu (CV)  
Penal Code [Cap 135] (PC)

**Facts**

E was charged with conspiring to defeat the course of justice contrary to s 79 of the PC in charges related to forgery. The Supreme Court discharged the respondents (E and others) of charges laid against them. The state appealed the decision to the Court of Appeal. E argued that pursuant to article 5(2) of the CV, they were entitled to a fair hearing within a reasonable time. However, they could not at that stage have such a hearing because the events happened 18 months before. It was held that despite the offence, it was not unduly complex and accordingly E was discharged.

On appeal, the state submitted that article 5 of the CV had to be read with s 15 of the PC, which states:

*No prosecution may be commenced against any person for any criminal offence upon the expiry of the following periods after the commission of such offence...*

*(b) in the case of offences punishable by imprisonment for more than 3 months and not more than 10 years – 5 years.*

**Issue**

- Whether the delay was so unreasonable as to violate the rights of E under the constitution.

**Decision**

The appeal was allowed. The charges of conspiracy to defeat the course of justice were serious ones and it appeared that E and the respondents were persons of some substance, holding offices of significance. There was a legitimate public interest in public order to ensure such matters against such individuals were dealt with appropriately by the court. A balance was to be struck between the protection of human rights and the legitimate public interest in bringing offenders to account. The matter should be brought under the constitution as it was a breach of a fundamental right, rather than by way of judicial review.

**Comment**

In considering delays in the prosecution of criminal cases, the context is critical. The delay could not be considered in isolation. It had to be balanced with the legitimate public interest in public order and in holding people accountable. Moreover, delays are not a mathematical issue, but have to be assessed on the facts of each case. In this particular instance, the apparent 18 months' delay was reduced to nine months because the state was not at fault. As for the provisions of the PC, which stipulated five years for the prosecution of the offences for which E (and others) were charged, the court did not have to consider their validity given the decision it took. As a matter of practice, courts only strike down legislation as a last resort. As far as possible, they will seek to craft interpretations that preclude that option.

**PROCEDURE / MILITARY / CONSTITUTIONAL REDRESS**

- **Members of the defence forces had the right to equal treatment.**
- **Time limitation rules on constitutional redress were an unreasonable limitation on rights.**
- **To make an argument in terms of national security, there had to be a clear connection between the issue and those whose rights were affected.**

**RAILUMU & ORS v RFMF & ATTORNEY GENERAL**

High Court  
Jitoko J

Fiji Islands  
[2002] FJHC 92  
24 December 2002

**International instruments and law considered**

Universal Declaration of Human Rights (UDHR)  
International Covenant on Civil and Political Rights (ICCPR)  
Constitution of Fiji (CF)  
Army Act [Cap 31] (AA)  
High Court (Constitutional Redress) Rules 1998 (HCR)

**Facts**

This case arose out of the political crisis of May 2000 in which George Speight removed the democratically elected government of Mahendra Chaudhry. The military intervened and eventually handed power to an interim government. In November 2000, there was an attempted mutiny against Commodore V Bainimarama, the head of the military forces, which ultimately failed. The applicants (R), eight soldiers in all, were charged with various offences under the AA, ranging from mutiny to misprision of treason. They had all been in custody ('close arrest') for the past 24 months. Six of the eight had unsuccessfully applied for release under *habeas corpus* proceedings in May 2002. All eight had been in detention since November 2000. The application was by motion seeking declarations in respect of their constitutional rights, which they alleged had been breached by their continued detention, and an order for their release pending their Court Martial.

R's application was made pursuant to the HCR. However there was a limitation on the time during which application could be filed as set out in Rule 3(2):

*An application under paragraph (1) must not be admitted or entertained after 30 days from the date when the matter at issue first arose.*

According to the applicants, the 30-day rule was unconstitutional in so far as it infringed the right of the individual to unfettered access to the courts, as provided for under s 29(2) of the constitution.

The applicants sought the following declarations:

1. That R's respective constitutional rights to have their cases determined within a reasonable time by a court of law had been breached;
2. That R's respective constitutional rights to be released from detention on reasonable terms and conditions pending trial had been breached; and
3. That the respective detentions in prison were unlawful and/or amounted to oppression and that R should be released pending trial.

The applicants relied on s 29 of the CF and specifically subsection (3), which entitles a person to have their case determined within a reasonable time, as well as the presumption of innocence in s 28(1).

The Attorney General raised the issue of national security as justifying the continued close detention of R and others. The fact that R and others were facing charges of trying to overthrow the commander in the unsuccessful mutiny, coupled with the petition, content and objective, tended to show that R's release would provide an additional element of risk to those already existing in the community.

**Issues**

- Whether the 30-day limitation on applying for a remedy under the constitution was constitutional.
- Whether R could rely on the HCR for the relief they were seeking?
- Whether R had been granted a trial within a reasonable time?
- Was national security a justifiable reason for the continued detention?

**Decision**

The 30-day rule was an improper limitation on the right to a remedy under the CF. The court found that given the circumstances surrounding the case, together with the court's views on the limitation period expressed above, R fell within the HCR.

R in these proceedings had only filed their motion some 22 months after the incidents for which they were charged. The 30-day limitation period appeared insurmountable. Unreasonable delay due to the prosecution gave rise to injustice. The ability to comply with the 30-day rule would therefore have been beyond the control of an applicant.

The rights of the individual as protected under the bill of rights, including rights protected under s 29, could not be compromised by the imposition of conditions that were unreasonable or unjustifiable in a free and democratic society. Statutory provisions such as those in Rule 3(2) imposing a 30-day limitation period for applications to the court could not be allowed to remain unless valid grounds were advanced to support the period.

Therefore in the court's view, the time limitation of 30 days within which to bring an application was neither reasonable nor justifiable.

The state had not discharged the onus of proving that the limitation placed on the rights of R, which necessitated their continuing detention, was in the national interest or in the interest of national security. In all the circumstances therefore, the Court found that the continuing detention under 'close arrest' of the applicants for over 24 months without being brought to trial was in breach of their constitutional rights.

**Comment**

While the issue of security was significant, the rights of the applicants needed to be considered. They were also entitled to the rights guaranteed in the CF as non-military citizens. To make an argument in terms of national security, there had to be a clear connection between the issue and R. Until that was established, and that the threat was one which could be established in the circumstances, the balance would favour human rights. It was also significant that a considerable passage of time had elapsed during which R had been held in custody. (The offence of misprision of treason is committed where a person knows that treason is being planned or committed and does not report it as soon as he can to a justice of the peace or other authority. The offender does not need to consent to the treason; mere knowledge is enough.)

## RELIGION

### RELIGION / CUSTOM / DISCRIMINATION

- **Right to freedom of religion subordinate to the cohesiveness of Tuvaluan society, as reflected in constitutional recognition of Tuvaluan values and culture.**

#### TEONEA v PULE O KAUPULE & NANUMAGA FALEKAUPULE

High Court  
Ward CJ

Tuvalu  
[2005] TVHC 5  
11 October 2005

#### Law considered

Constitution of Tuvalu (CT)  
Falekaupule Act (FA)

#### Facts

The applicant (T) sought various declarations from the court to allow T to establish a new religious denomination. T had introduced and registered the Tuvalu Brethren Church with himself as pastor and church leader. An earlier decision of the *Nanumaga Falekaupule* resolved to ban the introduction or spreading of new religions on Nanumaga Island. Attempts by T to broadcast messages on the radio were blocked by the Board of Tuvalu Media Corporation, the government-owned media station. The *Nanumaga Falekaupule* (F) is the island council and the *Pule o Kaupule* are the council members.

F felt that the introduction of new faiths had tended to break up the cohesiveness of the community, especially where adherents to the new denominations refused to perform communal obligations because they were contrary to their beliefs. F's resolution stated that new religions were to be prohibited. F further decided that T should be banished from his own island for his safety.

T sought the following declarations and orders:

1. The decision by F hindered T's freedom of belief and worship guaranteed under s 23(1) of the CT;
2. The decision by F also prohibited T from exercising freedom of expression, which breached s 24(1), and freedom of association, which was contrary to s 25(1) of the CT;
3. T's freedom of movement had been infringed when he was banished from the island of Nanumaga; and
4. T claimed that the decision was discriminatory and contrary to s 27(1) of the CT, which stated that discrimination referred to the treatment of different people in different ways because of, among other things, their different religious beliefs,

and therefore he was also being discriminated against within the meaning of the CT.

Several sections of the CT (ss 23 to 25 and 29) provide that certain rights are subject to 'Tuvaluan values, culture and tradition and respect for human dignity'.

#### Issues

- Was freedom of religion subordinate to Tuvaluan culture even if both values were recognised in the CT?
- Whether F had breached the rights of T in considering the effects that a new denomination would have on the interests of the public.

#### Decision

The court declined to make the declarations sought by T, taking into account the role of F in Tuvalu society and its function in preserving social and cultural cohesion. There was a higher public interest that justified the discriminatory nature of F's resolution because the rights allegedly breached were subject to Tuvaluan values under s 27 of the CT.

The CT was the supreme law and all other laws were to be interpreted and applied subject to it. F relied on special provisions in the law concerning the preservation of Tuvaluan values and customs as well as the requirement for protection of the rights of those who might be affected by the enforcement by another group of their rights.

The role of traditional leaders had already been recognised in the case of *Alama v Tefesa* [1987] SPLR 385, in that the authority of the traditional leaders required them to make decisions to guide their people and look after their welfare. The FA did not formalise the powers, duties and obligations of F. Its traditional role of decision-making and the manner in which it was done was untouched. However, an innovation introduced by the FA was the making of by-laws subject to the provisions of the CT. Resolutions made in relation to the general management of the community were not by-laws and were unaffected by the CT.

The resolution of F was in accordance with its traditional role and did not involve the exercise of any power under the FA. There was clear evidence that failure to act would allow a situation that would be divisive and threatening to traditional values. As a result, F was entitled to consider imposing such restrictions on T's rights, which was justifiable discrimination.

#### Comment

Although T's rights were clearly breached, the court recognised a higher obligation in the public interest to safeguard the tradition and culture of Namumaga. However, international conventions as well as the CT guarantee freedom of religion, expression, belief and movement. Although these rights are not absolute, it is the duty of the party limiting the right to justify the reason for doing so. In this case, traditional and cultural rights were guaranteed by the CT. There was a need to balance community interests with individual rights, and to recognise the challenges small communities face in seeking to accommodate the two. The pendulum may often shift in one direction or the other depending on particular circumstances. From a purely human rights perspective, advocates may have concerns about

this decision and the disadvantage suffered by T. What must be remembered is that rights exist in a context and have to be considered against that background.

## RULE OF LAW

### RULE OF LAW / AMNESTY

- **Amnesty not available to an accused charged with murder under an Amnesty Act after unlawful removal of a government for criminal acts committed in violation of international humanitarian laws and human rights violation or abuses.**

### R v SU'U & ORS

High Court Mwanosalua J	Solomon Islands [2007] SBHC 144 1 March 2007
----------------------------	--

#### International instruments and law considered

Universal Declaration of Human Rights (UDHR)  
International Covenant on Cultural and Political Rights (ICCPR)  
International Covenant on Economic, Social and Cultural Rights (ICESCR)  
Constitution of Solomon Islands (CSI)  
Amnesty Act 2000 (AA)  
Penal Code [Cap 26] Revised edition 1997 (PC)  
Criminal Procedure Code [Cap 7] (CPC)

#### Facts

This case arose out of political events emanating from the illegal removal of Prime Minister Ulufa'alu in June 2000 by civilian military forces battling for land and other resources. Two civilian militia groups based on ethnic lines were pitted against each other. They were the Malaita Eagle Force (MEF) from Malaita and the Isatabu Freedom Movement (IFM) from Guadalcanal, in Guadalcanal.

S and others were charged with murder and attempted murder under s 20 of the PC. Each of the accused had the right, before being required to plead to the information in the usual way, to enter a plea of *autrefois acquit* or convict or pardon, under s 255 of the CPC.

S and others were members of the MEF who allegedly killed Francis Sale while the victim was preparing food with friends.

S and others claimed immunity from prosecution under the AA 2000, which was passed by parliament.

#### Issue

- Whether S and others were immune from prosecution under the AA.

#### Decision

The court held that S and others were not immune from prosecution. The amnesty or immunity from criminal prosecution referred to under the AA did not apply to criminal acts that violated international humanitarian law or to human rights violations or abuses. Where Francis Sale's life was taken through an unlawful act, the accused in such a case could be prosecuted and convicted of murder or manslaughter if found guilty by a court of law.

The right to life was absolute. A killing amounted to murder or manslaughter, which violated the right to life. Article 3 of the UDHR proclaimed the right to life, liberty and security – a right to the enjoyment of all other rights. Section 3(a) of the CSI gave every person the right to life, liberty, security of the person and the protection of the law. The right to life was an inalienable and inviolable right under the CSI. That was further reinforced by subsection (5) of s 3 of the AA, which excluded from immunity persons who committed criminal acts that violated human rights. This view was supported by the ICCPR and its Optional Protocols, and the ICESCR.

As a result the accused were not immune from criminal prosecution. They were required to plead to a charge of murder on the relevant date.

#### Comment

The amnesty and immunity conferred by the AA is not absolute. It does not cover criminal acts that are characterised as being executed in violation of international humanitarian law or human rights. The extent of the protection afforded is determined on a case-by-case basis where it is pleaded as a defence. The AA recognises the global applicability of human rights in limiting amnesty consistent with international standards. Although in this case the court confined itself to a consideration of the UDHR, the fact that it made passing reference to the other instruments cited is indicative of the globalisation of human rights. Moreover, it was recognition that Solomon Islands was part of the international community of nations. This was so despite the fact that Solomon Islands had not ratified the ICCPR and its Optional Protocols, which were specifically mentioned.

This was one of the first attempts by a Solomon Islands court to apply non-ratified conventions. The three cases arising out of the same set of facts signal a departure from traditional non-enforceability approaches to international law in Solomon Islands and the growing influence of international human rights law on domestic courts. Solomon Islands does not have a provision similar to s 43(2) of the Constitution of Fiji, which incorporates international law by reference.

**RULE OF LAW / DEMOCRACY**

- **Application for constitutional relief applies vertically rather than horizontally.**

**ULUFA'ALU v ATTORNEY GENERAL & MALAITA EAGLE FORCE & ORS**

High Court Palmer ACJ	Solomon Islands [2001] SBHC 81 9 November 2001
--------------------------	--

**Law considered**

Constitution of Solomon Islands (CSI)

**Facts**

This case arose out of political events emanating from the illegal removal of Prime Minister Ulufa'alu in June 2000 by civilian military forces battling for land and other resources. Two civilian militia groups based on ethnic lines were pitted against each other. They were the Malaita Eagle Force (MEF) from Malaita and the Isatabu Freedom Movement (IFM) from Guadalcanal, in Guadalcanal.

The applicant (U) sought a declaration that his resignation as Prime Minister was not voluntary but made under duress and protest. As a result of harassment, intimidation and threats issued against his parliamentary supporters between 5 and 30 June 2000, the meeting of Parliament on 30 June 2000 was perverted by S, D and N (the second, third and fourth defendants) to the extent that no valid and constitutional exercise of the power to elect a prime minister occurred. The purported election of S on 30 June 2000 was therefore invalid. U accordingly sought declarations to the effect that he was entitled to continue as caretaker prime minister under s 34(4) of the CSI until a valid meeting was convened to elect a new prime minister.

**Issues**

- Whether U had *locus standi* in a representative capacity.
- Whether the matter was non-justiciable.
- Whether Chapter II (Bill of Rights) of the CSI applied horizontally between citizens or only vertically between the citizen and the state.

**Decision**

The court dismissed the application and found against U on all three grounds

Under s 18 of the CSI, U could only institute proceedings in respect of himself and no one else. U had no locus to bring an action for redress in a representative or relator capacity. Those members of parliament and their families who had been intimidated and harassed had equal rights to come to court for redress. U had no fundamental right to be protected as prime minister under the CSI. The rights protected were his individual rights as set out in Chapter II.

Paragraph 10 of schedule 2 of the CSI was conclusive on the issue of non-justiciability. It provided that any dispute arising out of or in connection with any election meeting or the election of the prime minister under the provision should be determined by the Governor General. His determination was final and not justiciable. The alleged threats that were received prior to 30 June 2000 were connected thereto. If U had concerns about the validity of the meeting he should have raised them with the Governor General. Paragraph 6(3) of Schedule 2 provided the election meeting should be *in camera*. U could have raised his concerns then. By remaining silent he effectively waived his right to question the election process and acquiesced in the result. He was therefore bound by it. As to the application of Chapter II, it should be construed as applying on a vertical basis only. U could therefore not proceed against S, D and R in the circumstances because Chapter II of the CSI concerned the relationships between the state and the individual.

**Comment**

This case unequivocally endorses the orthodox view that human rights only apply vertically to bind the state vis-à-vis its citizens and not horizontally, i.e. between individuals and between non-government entities and individuals in the private sector. It also cited authorities from the Privy Council and other jurisdictions to reinforce this approach. In the absence of express provisions, the rights were to be construed as applying vertically only. (See the summary of *Loumia v DPP* discussed in detail earlier in this volume.) The contrary argument is that if the organs of state (i.e. the executive, parliament and the judiciary) are bound by bill of rights provisions, then they correspondingly have a duty to uphold and apply those rights in the discharge of their functions and responsibilities. Compare this situation with the *Canada Trust* case<sup>14</sup>, where the terms of a private trust were struck down as offending human rights, and with *Khumalo & Ors v Holomisa* (South Africa) reported in Part II of this volume, where the court held that the right to free speech had to be applied horizontally in the light of its critical significance and the potential for abuse by parties other than (and as well as) the state.

**RULE OF LAW / INDEPENDENCE OF DPP**

- **Institution of criminal proceedings by parties other than the Director of Public Prosecutions is illegal.**

**KHERA & ORS v FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**

High Court Winter J	Fiji Islands Criminal Case No. HBM 034 of 2007 17 August 2007
------------------------	---

14. *Canada Trust v Ontario Human Rights Commission* (1990) 69 DLR (4<sup>th</sup>) 321 featured in 1 PHRLD 81-2.

**Law considered**

Constitution of Fiji (CF)  
Criminal Procedure Code (CPC)

**Facts**

This case arose out of the post *coup d'etat* events of 5 December 2006. The military/interim administration of Commodore V Bainimarama established a Fiji Independent Commission Against Corruption (FICAC) by decree under Promulgation No.11 of 2007. FICAC then attempted to prosecute an alleged murder. It was alleged that K murdered Kamlesh Narandass Nand in September 2006. It was further alleged that K was aided and abetted by those named in the complaint.

FICAC sought more time to file information and provide disclosures. It was argued that its authority was drawn from s 2A (1) and (2) of the FICAC Promulgation, which allowed it to investigate and prosecute offences whether committed before or after its creation.

**Issue**

- Did FICAC have the authority to proceed and request an extension of time to file information and provide disclosures, i.e. did FICAC have legitimacy and therefore power to prosecute the murder?

**Decision**

The court declined the application, remanded K and others on bail and remitted the case to the Magistrate's Court. It was held further that the Director of Public Prosecutions (DPP), under s 114(4) of the CF, was the only constitutional officer with the authority to:

- (a) *institute and conduct criminal proceedings;*
- (b) *take over criminal proceedings that have been instituted by another person or authority; and*
- (c) *discontinue at any stage before judgment is delivered, criminal proceedings instituted or conducted by the Director of Public Prosecutions or another person or authority.*

Under s 233 of the CPC, only the DPP could file information in the High Court. FICAC drew its powers from Promulgation No.11 of 2007 published five months after the military takeover of the government.

Apart from the constitutional difficulty, there was a procedural one as well. In usual circumstances, the DPP commenced proceedings in the Magistrate's Court. There, the expedited process for preliminary hearings triggered a series of events that ensured the DPP disclosed all relevant material, files and information within the statutory period.

**Comment**

The decision underscores the importance of constitutional safeguards as a check on arbitrariness and the improper use of power. FICAC was established by promulgation (*prima facie* illegal) and given wide reaching powers of search, seizure and prosecution to combat corruption. However, little thought was given to harmonising those provisions with the functions and duties of the DPP as the appropriate authority under the CF to institute criminal

proceedings. Given the CF was asserted to be still intact, the powers vested in the DPP overrode those of FICAC. This was clearly an oversight in drafting the attempted legislation. It also reflected confusion on the part of FICAC in attempting to pursue what was clearly a criminal case rather than one of corrupt practices.

**RULE OF LAW / EMERGENCY POWERS / LIBERTY**

- **Freedom of liberty under the constitution cannot be extinguished unless through certain limitations regarded as reasonable and justifiable in a free and democratic society.**

**IN RE NIKHIL NAIDU**

Supreme Court	Fiji Islands
Rooney J	[1987] FJSC 6; [1987] 33 FLR 100
	17 July 1987

**Law considered**

Constitution of Fiji 1970  
Public Emergency Regulations 1987 (PER)

**Facts**

This case followed the military *coup d'etat* of Lt Col Rabuka in 1987, during a time in which the constitution was suspended and Fiji was under military rule. The applicant, a female lawyer, applied under the CF for a writ of *habeas corpus* in respect of the detention of her brother-in-law, Nikhil Naidu (NN). NN had surrendered himself voluntarily to the police on 9 July 1987 after having learnt that the police wished to interview him. The applicant was unable to ascertain the reason for NN's detention. NN was being detained under s 17 of the PER after an anonymous phone call was made to the authorities that a bomb had been placed on an aircraft leaving for Auckland. NN was arrested along with 16 others, all of whom worked for Sedgwick (Fiji) Limited to which the call was traced. NN was detained until trial even though there were no charges laid against him.

The police, as respondents, were of the view that they had the right to detain NN under s 17 of the PER. Despite the fact that they had insufficient evidence to charge NN, the police wanted NN in custody so that his house could be searched for evidence linking him to the telephone call.

**Issue**

- Whether the detention of NN by the police under the authority of the PER was legal in light of his right to liberty under the CF 1970.

**Decision**

The court ordered that NN be released forthwith. The police could not under the PER arrest and detain persons with impunity; the right to personal liberty granted by the constitution



still existed. The court noted that a proclamation had proclaimed a period of public emergency. The PER under s 17 gave power to the police to detain suspected persons; however, the guidelines were set out in *R v Halliday* (1917) AC 260.

The onus was on the police to prove that the arrest and detention of NN was lawful. There was no reasonable suspicion on which to arrest NN and it was the duty of the arresting officers to give reasons for the detention of NN. Section 16(c) of the CF (1970) was designed for the protection of detained persons and read:

*... shall as soon as practicable and in any case not more than seven days after the commencement of his detention, be furnished with a statement in writing, in a language he understands, specifying in detail the grounds upon which he is detained.*

The police admitted that the said constitutional requirement was not complied with, even though it was reasonably practicable. The court observed that although there were some inroads made into the right of personal liberty, to the extent that a law existed authorising the detaining of persons during a period of public emergency, the measures taken should be reasonably justifiable for the purpose of dealing with the situation that existed in Fiji at that time. The PER did not extinguish people's constitutional rights. Subject to lawful exceptions, the right to personal freedom remained. Section 5(2) of the constitution required that a person who was arrested or detained should be informed as soon as reasonably practical, in a language that he understood, of the reasons for his arrest or detention. This re-stated the common law and was a mandatory condition of arrest. Even if circumstances existed that may have excused it, it was still the duty of the person conducting the arrest to give the information at the first reasonable opportunity after the arrest.

#### Comment

Despite this case being an 'old case', it has been included in this volume due to its significance in light of recent events in Tonga, Solomon Islands and Fiji. In a free and democratic society, limitation of a certain right should only be permitted where it is absolutely necessary. In this case, the limitations on NN were not necessary and the police could have used other means during their period of investigation. Certain procedures that were reasonably practicable were not followed by the respondents. The proclamation of a public emergency does not give the authorities power to limit certain rights according to their discretion. As long as the CF exists, the right to personal liberty should be enjoyed by all persons.

## SEXUAL HARASSMENT

### SEXUAL HARASSMENT / UNFAIR DISMISSAL

- **Woman dismissed after continuous sexual harassment may sue in tort law for unlawful dismissal and damages.**

#### KATEA v NIUTAO KAUPULE & SATUPA

High Court  
Ward CJ

Tuvalu  
[2006] TVHC 1  
16 October 2006

#### Law considered

Common law

#### Facts

The plaintiff (K) sought damages for the tort of sexual assault and breach of her constitutional rights against the defendants (NK and S). K was a married woman from Funafuti married to a man in Niutao. The Niutao Kaupule (NK) is a traditional local island council. Each island in Tuvalu has an island council; the NK is the council for the island for Niutao.

K was appointed as a clerk for the NK and her superior was the second defendant (S). In 2001, S began making sexual advances towards K. As time passed, he asked K for sexual intercourse. Another colleague witnessed these advances in which K angrily told S to leave her alone. The harassment continued to the extent that S approached K at home asking her for sexual intercourse, which was also witnessed by a male neighbour. Late in 2002, K was allowed Christmas leave only after she consented to have sexual intercourse with S upon her return. After her leave she told S that there was no possible way she would agree. In 2003, after she had taken two days off to look after her sick daughter, K received a letter of dismissal from S for lack of competence.

The defendants filed a joint statement of defence denying all the allegations of sexual harassment, but admitted to improper procedure in the termination of K's employment.

#### Issue

- Was the dismissal of K fair according to law?

#### Decision

The court held that there was enough evidence to prove the sexual assault and that the defendants were liable for unfair dismissal. Although the civil standard of proof was based on a balance of probabilities, the gravity of the allegation required a higher degree of probability than many civil claims. However, the evidence by K satisfied the standard of

proof. The tort protected an individual not only from physical harm, but also from any interference with his or her person that was offensive to a person's reasonable sense of honour and dignity. This was far more than simply an attack on K's dignity, although that in itself was an important factor. It continued for a very long period of time and S's actions were clearly an abuse of his position. The true reason for K's dismissal was her continued refusal to succumb to the advances and threats of S, notwithstanding the threat of dismissal. K had worked in the same post with virtually no complaints about competence. The allegation made in dismissing her was unfair. Consequently, both the NK and S were liable for assault and for unlawful dismissal. Damages were to be assessed subsequently.

#### Comment

The court dealt with the issue purely in terms of the tort of assault and unfair dismissal. There is no formal civil or criminal offence of sexual harassment in Tuvalu. The case is indicative of the increasing confidence of Tuvalu women in pursuing legal remedies in cases of sexual harassment. The constitutional arguments were not considered, the applicable law being sufficient to cover the situation. A constitutional argument could have been advanced using the CT and CEDAW in a similar manner to that advanced in the *Vishaka* case.<sup>15</sup> Tuvalu has ratified CEDAW.

There remains a residual reluctance to apply human rights principles and standards to cases that more readily fit into general law. Compare this with *Vishaka's* case, where the Supreme Court of India relied on the Indian Constitution and international human rights instruments to formulate sexual harassment guidelines in the workplace where there was a lacuna in the law. In *Chopra's* case, discussed in Part II of this volume, the argument was also initially framed in tort. When the case reached the Supreme Court, it upheld the appeal against the offender's reinstatement in terms of the violation of the rights of the complainant under the Indian Constitution.

## SPEECH

### SPEECH / DISCRIMINATION

- **Freedom of expression includes the freedom to communicate those expressions to others.**
- **Restricting access to free media on the grounds of political belief is unconstitutional.**

#### EFI v ATTORNEY GENERAL

Supreme Court	Samoa
Wilson J	[2000] WSSC 22
	1 August 2000

15. *Vishaka v State of Rajasthan* (1997) 6 Supreme Court Cases 241 (India) featured in 1 PHRLD 92-93.

#### Law considered

Constitution of Samoa (CS)  
Government Proceedings Act 1974 (GPA)

#### Facts

The plaintiff (E) was the leader of the opposition. E claimed that the state was denying him access to the state-owned television station, radio and newspaper. Therefore his right to free speech was being violated by the state. The government argued that E would use the state-owned media to make anti-government statements. E claimed that he had every right to use media owned by the state and to make whatever statements he chose to make. Any restriction would be a breach of freedom of expression and of his right to be treated equally under the CS despite his political views. E also argued that the government put pressure on privately owned media to deny him access to private sector media.

The Attorney General, representing the state, responded that the right of E to express his ideas had not been infringed because he could have used non-state owned media. The state claimed that it reserved the right to determine who was allowed access to the government media. The Attorney General also said that the government had an existing policy of exercising 'caution with those who stir up the country'. On these bases, E was refused access to express his political views through the government media.

E sought an order to lift the ban on his use of the government media.

#### Issue

- Having regard to articles 13 (protecting free speech) and 15 (protecting non-discrimination) of the CS, were the actions of the state infringing E's constitutional rights?

#### Decision

The court held that the restricted access to the government media was a breach of E's right to free speech and non-discrimination, contrary to articles 13 and 15 of the CS. It ordered the lifting of the restriction upon E or any member of his party from having access to government media. The common law amplified that the right to free speech included the freedom to distribute information. This included the freedom to propagate ideas and that freedom was secured by freedom of circulation. Television was a powerful medium for communication of ideas. Freedom of expression therefore included the freedom to use such a medium.

A need for the authority's consent before one could use such a medium was a hindrance to that freedom. The efficacy of representative government depended also on free communication of such matters between all persons, groups and other bodies of communication. Therefore freedom of communication was akin to, if not identical with, freedom of speech and expression conferred and preserved in the CS.

Emphasis was placed on article 15(1), which states that all persons were equal before the law and article 15(2). Read together, this meant that the state could not subject E to any restriction on the grounds of political opinion. Any restriction would be discriminatory against E.

**Comment**

The court upheld freedom of communication in relation to public officers and political discussion as guaranteed by articles 13 and 15 of the CS. It drew parallels with the *matai* (chiefly) system and the *Fono* (village council), which had ‘fostered and developed the roles of people having the opportunity to become aware of important public issues and to learn about their leaders’ purpose in relation to them’. There was recognition of the fact that the dissemination of ideas was critical in a democracy and that any attempt to limit this right on the basis of state prerogative was invalid. This was a salutary lesson for those in authority because the apparatus of the state belongs to the people and, together with its powers, is held in trust for them and exercised on their behalf for the public good.

*Editors’ note: In this case the court took judicial notice of Hansard statements recording the views of the Prime Minister (also Minister for Broadcasting at the relevant time) during parliamentary debate. The court said these statements could be brought in as ‘insight into the PM’s state of mind about the issue’.*

**SPEECH / DISCRIMINATION**

- **Criticism of the judiciary by a lawyer in these circumstances was within right to freedom of expression.**

**INTERIM ATTORNEY GENERAL v DRAUNIDALO**

High Court  
Coventry J

Fiji Islands  
Miscellaneous Action No. 0053 of 2007  
20 November 2007

**Law considered**

Constitution of Fiji (CF)

**Facts**

This case arose out of the *coup d’etat* of 5 December 2006 in which the Republic of Fiji Military Forces removed the elected Government of Laisenia Qarase. The Interim Attorney General (IAG) sought an order of committal in contempt proceedings brought ‘in the public interest’ against the respondent (D), the Vice-President of the Fiji Law Society (FLS) and a member of the FLS Council. D had said *inter alia* in a television interview that: ‘*The confidence of lawyers in the judicial system, let alone the public, is shattered.*’ After a directions hearing, the parties filed affidavits and the matter was listed for hearing. Although the IAG had asserted he was bringing the suit partly at the instigation of senior members of the profession, only one affidavit in support by an officer from his chambers was filed. D for her part was able to rely on several affidavits from various members of the profession. Subsequently, the IAG sought to withdraw the application ‘in the public interest’ although there was no material change in circumstances.

**Issues**

- Was there a proper basis for discontinuance of the contempt proceedings against D?
- Should indemnity costs be awarded to D?
- Was D able to criticise the judiciary in these circumstances by exercising her right to free speech guaranteed under the CF?

**Decision**

Leave was granted to withdraw the proceedings. However the proceedings were brought and discontinued for ‘an ulterior purpose’ and the justice of the case required indemnity costs. There was nothing to show D was doing anything other than exercising her right to freedom of expression. Indemnity costs were assessed at F\$20,000.

The IAG was irresponsible in bringing these proceedings given that on 14 May 2007, when D made her comments, there was a genuine and responsible debate concerning the administration of justice in Fiji. All the facts deposed to in the affidavit filed on behalf of D laid the foundation for the comments she allegedly made and, under the Chaudhry test formulated by the Fiji Court of Appeal, would be ‘fair comment’. They would have been known to the IAG or could have with reason and diligence been ascertained. However, he was unable to advance any arguments to meet the defence of ‘fair comment’.

There was a delay in bringing the proceedings to a conclusion and the IAG should have acted expeditiously given the nature and seriousness of the proceedings. As for the proceedings themselves, it was difficult to understand how it was in the public interest to bring contempt of court proceedings against D, and with no material change it was in the public interest to discontinue.

For his part, the IAG’s criticism of the President of the Court of Appeal as published on 11 June 2007 clearly implied improper motives on the part of a senior judge. It was beyond understanding how the IAG could put D at risk of a fine and imprisonment when he had used stronger words a few days earlier. Given the constitutional right to freedom of expression and the Chaudhry test case, a proper assessment of the case before instituting proceedings would have determined there was little chance of success.

**Comment**

While the action of the case deals with procedural matters concerning leave to withdraw and award of indemnity costs, its real significance lies in its wider implications for free speech and the exercise of a court’s discretion to punish for contempt. Against the background of a military coup and non-elected regime, the court embarked on a careful and detailed examination of the applicant’s motives in instituting proceedings. Given constitutional safeguards about freedom of expression and judicial conformity on issues, as well as the actual context of the case, it was able to establish the respondent was within her right to make the remarks she did. The court had no hesitation in awarding indemnity costs against the applicant in light of the institution of these proceedings.

**SPEECH / MEDIA FREEDOM**

- **Restrictive law dealing with media freedom of expression was unconstitutional.**

**TAIONE v KINGDOM OF TONGA**

Supreme Court	Tonga
Webster CJ	[2004] TOSC 47
	15 October 2004

**Law considered**

Constitution of Tonga (Amendment) Act 2003 (CT)  
Media Operators Act 2003 (MOA)  
Newspaper Act 2003 (NA)

**Facts**

The publishers of *Taini 'o Tonga* (TOT) challenged the constitutionality of the Newspaper Act 2003 (NA) and the Media Operators Act 2003 (MOA), both of which allowed cabinet ministers to identify and list certain publications as seditious.

Clause 7 of the 1875 Constitution gave generous protection to the media and journalistic opinion providing that:

*No law shall be enacted to restrict this liberty. There shall be freedom of speech and of the press forever but nothing in this clause shall be held to outweigh the law of defamation, official secrets or the laws for the protection of the King and the Royal Family.*

To ensure that these acts above would not be ruled unconstitutional by the judiciary, the government took an unprecedented measure by amending clause 7 of the constitution through the Constitution of Tonga (Amendment) Act 2003 (CT). The Constitution Amendment Act added the following provisions:

*7. (1) It shall be lawful for all people to speak, write and print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press forever but nothing in this clause shall be held to outweigh the law for slander or the laws for the protection of the King and the Royal Family.*

*(2) It shall be lawful, in addition to the exceptions set out in sub-clause (1), to enact such laws as are considered necessary or expedient in the public interest, national security, public order, morality, cultural traditions of the Kingdom, privileges of the Legislative Assembly and to provide for contempt of Court and the commission of any offence.*

*(3) It shall be lawful to enact laws to regulate the operation of any media.*

Nearly one year after these three acts were passed, Taione, Akilisi Pohiva and around 150 other plaintiffs challenged their validity by way of judicial review, or alternatively, that the legislation in its attempt to limit liberty was inconsistent with clause 79 of the Constitution, which outlined the proper procedures for amending the CT.

The Supreme Court adopted the following guidelines:

*This court must –*

- 1) first pay proper attention to the words actually used in context;*
- 2) avoid doing so literally or rigidly;*
- 3) look also at the whole Constitution;*
- 4) consider further the background circumstances when the Constitution was granted in 1875;*
- 5) bear in mind established principles of international laws;*
- 6) finally, be flexible to allow for changing circumstances.*

The Crown argued that the concept of freedom of speech was peculiar to Tongan culture and that *poto* (codes of appropriate behaviour) was essential for maintaining Tongan values of group paramountcy over the individual. Ultimately this was for the benefit of social cohesion. The Crown also argued that media restrictions were necessary to preserve a balance between the right of media to comment and ethical journalism.

The Crown also said that the court had no right to review the Constitution Amendment Act because only the parliament had powers to decide if an amendment affected laws of liberty. They then argued that the entrenchment clause was not absolute and that the Constitution Amendment Act was compliant with the previous clause 7 because it only limited speech where exceptions had previously applied.

**Issues**

- Were the procedures implemented in enacting the Constitution Amendment Act consistent with those called for by clause 79 of the Constitution? And if so, did the entrenching provision of clause 79 prohibit this particular amendment because it affected the laws of liberty?
- Was it the intentions of the founders of the Tongan Constitution to entrench the values of Tongan culture or was it the intention to invest Tonga with a modern western style constitution and to uphold democratic values?

**Decision**

Rejecting the Crown's arguments, the court held that parts of the new clause 7(2) of the TC were inconsistent with the entrenching clauses 7 and 79 and were void in terms of clause 82. Clause 7(3) was not inconsistent and so was valid provided it was subject to the implied term '... necessary in terms of pressing social need'. They were no more than proportionate to the legitimate aim being pursued and did not involve prior restraint of freedom of expression. Ultimately it was the court's sole responsibility to interpret and apply the constitution and determine if the legislature had acted within its boundaries. Citing cases from the United States, Zimbabwe, Jamaica and Britain, as well as referral to international sources of common law, widened the jurisprudence of Tonga in allowing an array of potential legal sources to be considered. This was a departure from previous Tongan judicial opinion,

which had rejected the use of American law. Cited also were Voltaire, the poems of John Milton and Blackstone in his *Commentaries on the Laws of England*.

The use of common law outside of Tonga was justified with referral to King George Tupou I. It was the King's intention to adopt the greatest freedoms enjoyed by all 'Christian civilised peoples', and to achieve this goal, he had utilised the Constitutions of New South Wales and Hawaii.

The fact that the court was to some extent rejecting the argument that Tongan cultural values should override 'foreign' values was addressed:

*Nor am I able to accept that freedom of speech is simply a western notion, as I believe it is now a principle accepted or valued in many places throughout the world: one only has to look at countries where it is an issue to see that now it is no longer espoused by western people alone.*

The court then looked to the language of the entrenchment clause:

*It shall be lawful for the Legislative Assembly to discuss amendments to the Constitution provided that such amendments shall not affect the law of liberty, the succession to the Throne and the titles and hereditary estates of the nobles.*

The court interpreted this clause to strictly prevent any amendments to the constitution except those consistent with the TC. Thus, the Tongan legislature had powers to enact laws only according to the terms of clause 79. Clause 79 entrenched provisions in relation to liberty and so the legislature could only make laws affecting liberty under the powers granted by the constitution.

#### Comment

The Government of Tonga has tried on other occasions to restrain the right to free speech. It has violated this right by imprisoning journalists and other 'critics of government' from the early 1990s. This case found that freedom of speech was protected under clause 7 of the constitution and that Acts which sought to amend the entrenched right to liberty were unconstitutional unless there were extreme circumstances threatening the safety and security of Tongans. Attempts to uphold the amendments in terms of Tongan tradition and culture were rejected by the court. It pointed to the reformist initiatives and intentions of George Tupou I in promulgating the constitution in the late nineteenth century. The principle of judicial review was also clearly stated as a principle of Tongan common law.

#### SPEECH / MOVEMENT / DISCRIMINATION

- **Military government ordered not to interfere with right to free speech, movement and assembly of a human rights activist.**

#### HEFFERNAN v BAINIMARAMA, RFMF & AG

High Court  
Singh J

Fiji Islands  
[2007] FJHC 21  
20 April 2007

#### Law considered

Constitution of Fiji (CF)  
Court of Appeal Rules

#### Facts

This case arose out of the *coup d'état* of 5 December 2006 in which the Republic of Fiji Military Forces removed the elected government of Laisenia Qarase. The defendants (B and others) applied for a stay order pending appeal on an earlier order granted to the plaintiff (H). H, who was the director of a human rights NGO, had expressed her concern about the actions of the first and second defendants. Following her public statements criticising the regime, she was taken involuntarily to the police station, questioned and held without charge.

On 20 April 2007, the court issued an interlocutory injunction that restrained B from further interfering directly or indirectly with H's freedom of speech, assembly and movement. The same order was extended to H's legal advisers. The arguments were technical but had a bearing on H's human rights. H submitted that the interlocutory decision was not a judgment capable of being stayed as there were no coercive orders behind it. Therefore the decision appealed from did not require the defendants to do anything.

#### Issue

- Could the defendants apply for a stay on an interlocutory decision that did not require B to take positive steps and further protect the rights of the plaintiff?

#### Decision

The court refused the stay order. It had made no final orders against B. The orders given on April were interlocutory orders. Fiji's Court of Appeal sitting dates was also considered. Unlike other jurisdictions, Fiji did not have a full-time Court of Appeal. The appeal, if heard, would require an uncertain period of waiting time, resulting in further delay in the hearing of the matter. Furthermore, B was not required to take any positive steps from the earlier decision. It only prevented B from interfering with the plaintiff's rights. There were no predictable harmful effects of the decision on the defendants, especially as they had stated that they had no desire to intervene in H's rights.

**Comment**

Although ultimately a technical argument, the court gave clear and compelling directions regarding H's rights to speech and free movement at a time when travel bans were being imposed against human rights activists and anyone being outspoken or criticising the regime. The court properly confined itself to the facts of H's case but it was also fully conversant with the prevailing political climate in which public dissent was discouraged. The role of the courts in such circumstances assumes critical importance where ordinary avenues of accountability available under an elected government are absent. At the time of publication, those wishing to travel abroad were required to pay a \$12 fee to the Department of Immigration to determine whether they were on the travel blacklist.

**TORTURE****TORTURE / MILITARY FORCES / DAMAGES**

- **Amount of damages for a tort of assault in a case involving torture by soldiers could take into account the behaviour of the military forces.**

**SINGH v PONIJESE, ATTORNEY GENERAL & ORS**

High Court  
Coventry J

Fiji Islands  
Civil Action No. 0371 of 1993  
4 September 2007

**Law considered**

Common law

**Facts**

On 24 October 1990, three years after the military *coup d'état* of Lt Col Rabuka, with an interim government in place, Dr Singh (S) was kidnapped by five serving soldiers of the Republic of Fiji Military Forces (RFMF). The soldiers were members of the Special Operations Security Unit (SOSU). The unit's purpose was to 'collect and collate information about anyone or anything likely to destabilise the country'. S had allegedly taken part in the public burning of the new military-promulgated 1990 Constitution a few days earlier.

S was taken by the defendant soldiers of the RFMF to a remote spot. A hood was placed over his head and tied tightly, making it difficult for him to breathe. He was tied to a tree and beaten. He was unable to breathe properly. Later a vehicle tyre was burnt close to him and he was told that 'we will roast you alive'. At some stage as darkness fell he was unhooded, untied and his hands were placed over the roots of a tree. His hands and fingers were then

beaten by a metal pipe. He was beaten, questioned and tortured for a total of 12 hours. He was then abandoned and left to find his own way home.

On 22 November 1990, the soldiers pleaded guilty, were sentenced to 12 months' imprisonment each, suspended for 15 months and had to pay a fine of \$340 each. The leadership of the RFMF offered no apology and said that these actions were not authorised and that S was charged with sedition, a charge later withdrawn. At November 2006, there was still no apology under the new (and present) leadership; four of the five defendants were still serving soldiers in the RFMF.

On 25 June 1993, S commenced proceedings seeking general, special and exemplary damages. Judgment by default was entered subsequently and on 1 November 2006, judgment was given for S. Assessment of damages was delivered on 4 September 2007.

**Issue**

- What was the amount of damages to be awarded and on what basis?

**Decision**

The court awarded F\$250,000, comprised of \$75,000 for pain and suffering, \$75,000 for loss of career and \$100,000 for exemplary damages. Loss of career was treated as special damages and interest was to run from 24 October 1990 at 2.5 per cent. Interest for the compensatory and exemplary awards was set at 5 per cent from the date of judgment.

The trauma S suffered, as well as the memories of the episode, recovery from post traumatic stress disorder and the effect on his relationship with his family, were all considered in assessing the award for pain and suffering.

Damages for loss of career were considered in terms of detriment to S's career. The assault closed off his career options at the University of the South Pacific for several years. Further, for several years afterwards the apprehension he felt as a result of his experiences precluded any return home to Fiji. Assessing the sum in broad terms, the court awarded the same amounts as for pain and suffering, suggesting some equivalence.

Exemplary damages were awarded for punishing, arbitrary, oppressive or unconstitutional action by servants of the state. They were meant to uphold and respect the rule of law. The actions of the first five defendants were oppressive, arbitrary and unconstitutional. The military was vicariously liable in the circumstances. No apology was offered and nor was disciplinary action taken. The policy considerations that Commanders and senior officers were to have proper control of those under their command at all times, and that human rights and the rule of law were upheld, had to be reflected in the award.

**Comment**

Although S's human rights were clearly breached, his claim was dealt with purely in tort. S deliberately filed his claim under tort and not under human rights law, which generally attracts lesser damages. S also rejected the involvement of the Fiji Human Rights Commission, as did the court in a separate order. In making the award, it was the court's stated intention to take into account the reprehensible conduct of officers of the state. The justification for the amount assessed under exemplary damages was driven by the imperative

to check the power of the state by making it accountable for its officers' actions. Reference was made to upholding human rights and the rule of law.

Interestingly, while the separate judgment dated 1 November 2006 justifying the liability of the state made no reference to human rights, it was raised by the court itself collaterally in assessing exemplary damages in this case. Part of the reason for finding the state's conduct so heinous, and assessing damages accordingly, was the blatant manner in which S's rights had been violated. Thus, although the action was brought in tort, the court used the language of human rights to legitimise the amount of damages awarded, which it asserted in tortious terms.

This case is a salutary reminder of the need for a strong bill of rights, for international human rights standards to be maintained, and for a vibrant and vigilant human rights NGO community to monitor standards at all times.

---

## PART II: INTERNATIONAL CASES REFERRING TO CONSTITUTIONAL BILLS OF RIGHTS, HUMAN RIGHTS CONVENTIONS, STANDARDS AND PRINCIPLES

---

### DISCRIMINATION

#### DISCRIMINATION / NATIONAL ORIGIN

- **Interpretation of human rights undertaken in the light of international principles and experience as contained in the relevant conventions and covenants.**

---

#### NORTHERN REGIONAL HEALTH AUTHORITY v HUMAN RIGHTS COMMISSION

---

High Court  
Cartwright J

New Zealand  
(1998) 2 NZLR 218; (2007) 2 CHRLD 192

#### International instruments and law considered

Convention on the Elimination of All Forms of Racial Discrimination (CERD)  
International Covenant on Civil and Political Rights (ICCPR)  
Bill of Rights Act 1990 (BRA)  
Human Rights Act 1993 (HRA)  
Health and Disability Services Act 1993 (HDSA)

#### Facts

The plaintiff regional health authority (P) was concerned about the increase in the number of general practitioners and their over-concentration in some areas. P limited the issue of s 51 notices, which regulated the P's formation of contractual relations with general practitioners, to only general practitioners with undergraduate medical qualifications obtained from a New Zealand university. The Human Rights Commission claimed that the s 51 notice policy constituted indirect discrimination on the grounds of national origin contrary to s 19 of the BRA. It also infringed the right to freedom from unlawful discrimination contrary to s 22(1)(a) and (b) of the HRA by virtue of the operation of s 65 of that act, which prohibited indirect discrimination.

#### Issue

- Whether the s 51 notice policy constituted indirect discrimination against medical practitioners who had not qualified in New Zealand.

**Decision**

The court declared the s 51 notice unlawful for the following reasons:

1. That it was a crude instrument with which to limit the number of general practitioners and their over concentration. There was no good reason for the policy, based on objectively justified factors which were unrelated to any prohibited ground of discrimination;
2. While s 19 of the BRA did not explicitly mention indirect discrimination, it had to be read broadly and against the framework of international conventions that the country had ratified such as CERD, which defined discrimination as including any distinction that was discriminatory in purpose or effect, thus encompassing indirect discrimination;
3. That while the s 51 notice policy did not explicitly discriminate against foreign-trained medical practitioners based on their national origin, the majority of those who were entitled to practice in New Zealand as of right were of New Zealand origin. Therefore it could readily be inferred that those otherwise entitled to practice in the country but who were excluded by reason of the notice policy were of non-New Zealand origin. Consequently, the policy had the effect of treating the second group differently.

**Comment**

The interpretation of human rights legislation should be read liberally in light of international principles and experience as stated in the relevant conventions, particularly where they form the basis for domestic legislation. In applying the relevant principles, the courts examine the context and consequences of legislation to determine whether the particular principles have been breached. The process involves looking beyond the legal structures to ascertain whether there has been differential treatment, and if so, whether that is justifiable where a breach of human rights on the basis of discrimination or discriminatory protection is claimed. There is also a recognition that indirect discrimination is a more insidious and prevalent practice. To that end, the courts are inclined to adopt a more assertive approach to the issue as was adopted in this case.

**FREE SPEECH****FREE SPEECH / APPLICABILITY OF RIGHTS**

- **Defence of reasonable publication establishes a proper balance with the right to freedom of expression.**
- **Rights may be enforceable horizontally as well as vertically.**

**KHUMALO & ORS v HOLOMISA**

Constitutional Court	South Africa
Chaskalson CJ, Langa DCJ,	[2002] ZACC 12; 2002 (5) SA 401
Ackermann, Goldstone, Kriegler, Madala,	14 June 2002
Ngcobo, Sachs & O'Regan JJ,	
Du Plessis & Skweyiya AJJ	

**Law considered**

Constitution of South Africa (CSA)  
Rules of the Constitution Court (RCC)

**Facts**

K and N were sued by H, a well-known South African politician and leader of a political party, for defamation arising out of the publication of an article in their newspaper which stated *inter alia* that H was involved with a gang of bank robbers and that he was under police investigation. The applicants relied on s 16 of the CSA protecting the right to freedom of expression. Alternatively, they cited the common law, asserting that it should be developed to promote the spirit, purport and objects of the bill of rights as contemplated by s 39(2) of the CSA. They claimed the contents were matters of public interest. H's failure to allege that the statement was false (he was not required to do so by the common law of defamation) rendered the claim invalid as it failed to disclose a cause of action.

The High Court dismissed their application and they sought leave to appeal, requiring *inter alia* the Constitutional Court to consider the constitutionality of the law of defamation and whether the right to free expression had direct horizontal application as contemplated by s 8(2) of the CSA. They also required consideration of whether it was in the interests of justice to hear an appeal pursuant to s 167(6) of the CSA, on a technical issue to do with a 'decision on a constitutional matter' as contemplated by Rule 18 of the RCC.

**Issues**

- Whether it was in the best interests of justice to hear the appeal against the dismissal of an exception by the High Court and whether such a dismissal constituted a 'decision on a constitutional matter'?



- Whether the right to freedom of expression had horizontal application (i.e. did the right apply only as against the state or to private citizens and corporations such as the newspaper as well.)

### Decision

The application for leave to appeal was granted, but the appeal was dismissed by the court holding that:

1. as contemplated by rule 18 of the RCC, this was clearly a 'decision on a constitutional matter' and it was also in the best interest of justice to hear the appeal as the outcome of the appeal determined the manner in which the trial would be conducted in the High Court; the issue raised in the exception was of great public interest; there was a need to answer the question on whether the CSA required development of the law of defamation;
2. the right to freedom of expression was of direct horizontal application given the intensity of the freedom, coupled with the potential invasion of that right which could be occasioned by others apart from the state or the organs of the state;
3. it must be realised that it was often a difficult and sometimes impossible task to determine the truth or falsity of a particular statement and this could cause a chilling effect on the publication of information. However, such an effect was considerably reduced when the defence of reasonable publication existed. It allowed the defendants to rebut the unlawfulness of their action by establishing that whilst the publication was defamatory, it was nevertheless reasonable in all the circumstances. A proper balance between freedom of expression and the value of human dignity was established by this defence and further allowed the common law of defamation to be consistent with the provisions of the CSA;
4. in determining whether publication was reasonable, regard would be had to:
  - the individual's interest in protecting his or her reputation in the context of the constitutional commitment to human dignity;
  - the individual's interest in privacy. In that regard, there could be no doubt that persons in public office had a diminished right to privacy, though their right to dignity persists; and
  - the crucial role played by the press in fostering a transparent and open democracy.

### Comment

The court considered the right to freedom of expression in the light of the law of defamation and concluded that it was not absolute. The limits of the right were provided by the defence of reasonable publication. There had to be an appropriate balance between freedom of expression and the value of human dignity. This right was to be applied horizontally in the light of its critical significance and the potential for abuse by parties other than (and as well as) the state. Freedom of expression will be considered according to the context in which it is exercised. The full and complete exercise of this and other freedoms and rights requires both vertical and horizontal application. This is because rights and freedoms can be abused or infringed by parties other than the state. If one were to limit the exercise to rights to a vertical application, then the actions of others apart from the state would not be subject to scrutiny.

There is some confusion in Pacific Island courts about the application of horizontal and vertical rights. Solomon Island courts have ruled inconsistently in the matter (see *Ulufa'alu* and *Kelly* cases in Part I of this volume).

## RELIGION

### RELIGION / CHILDREN / EDUCATION

- **Child's right to education and freedom of religion as a Rastafarian had to be respected by the school.**

#### GRANT & ANOR v THE PRINCIPAL, JOHN A CUMBER PRIMARY SCHOOL & ORS

Court of Appeal  
Zacca P,  
Georges & Collett JJA

Cayman Islands  
(2001) 3 CHRLD 138; [2001] CILR 78

### Law considered

Education Law (1997 Revision)

### Facts

In the Cayman Islands, education was compulsory until 16 years of age under the Education Law (1997 Revision). The Education Council (EC), which oversees public education, could expel a pupil if he or she 'commits an act which is of such a nature that his presence in the school is likely to have a detrimental effect on the other pupils of the school or on the school'. There was no alternative sanction to expulsion, and readmission to any other school was subject to the EC's approval.

G and his son, S, were committed adherents of the Rastafarian faith, in which males did not cut their hair. The third respondent, EC, refused G's application to register S at a government primary school on the basis that his Rastafarian dreadlocks would contravene school rules. After G protested and sent S to school anyway, the matter was referred to the EC on a number of occasions between 1994 and 1996. On each occasion the EC refused to admit S because of his hairstyle. In December 1995, the EC upheld the school principal's (the first respondent) decision to expel S. In 1996, G applied for judicial review of the decision on the basis of his son's right to a primary education and freedom of religion, but the application was dismissed in 1999. G appealed.

**Issue**

- Whether to allow the appeal for judicial review based on S's right to a primary education and his freedom of religion.

**Decision**

The court allowed the appeal, quashed the decision and held the Rastafarian faith was a religion because the two essential attributes of faith and worship were present. Further, that the use of marijuana in Rastafarian ceremonies should not undermine this religious status even though it was illegal in the Cayman Islands. To hold otherwise would imply that Rastafarianism only qualified as a religion in those countries where the use of marijuana was permitted. The EC's concern that it might be seen to be 'soft' on drugs if it permitted S to attend, or that putative association of Rastafarianism with drugs would be detrimental to the school and other pupils, was irrelevant. There was no evidence that S or his parents used drugs or would seek to promote their use by other pupils.

Dreadlocks were also integral to the practice of the Rastafarian faith and were powerful evidence of the observance of the religious principles on which S had been raised. Other students would not suffer prejudice because of his dress or appearance. However, he would be prejudiced if he was removed from school as he would be deprived of an education at the only primary school he could attend. The nature and the extent of freedom of religion were not absolute and had to be exercised within the bounds of appropriate legal restrictions. The criteria for challenging the decision to expel S was that of 'Wednesbury unreasonableness', which had a subjective application. International conventions could only be used if they had been incorporated into domestic law either through statute or a bill of rights.

*Editors' note: In English common law, 'Wednesbury unreasonableness' is unreasonableness of an administrative decision that is so extreme that courts may intervene to correct it. The principle was formulated in Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223, where the court stated that it would only intervene to correct a bad administrative decision on the grounds of its unreasonableness if the decision was, as articulated in Council of Civil Service Unions v Minister for the Civil Service (the GCHQ case) [1985] AC 374, 410 per Lord Diplock, 'So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.*

**Comment**

Even though international conventions were not recognised as none had been incorporated into domestic law, the court upheld the appellant's right to religion and the right to education. It did so on the basis of the principles of judicial review by considering the decision to expel S in terms of 'Wednesbury unreasonableness'. The approach taken was to examine the tenets of Rastafarianism and having concluded it was a religion, whether S's adherence to it was sufficient to justify his expulsion. Considering all the circumstances, the decision was unreasonable and a violation of S's rights. While adopting an enlightened stance, the court also endorsed the traditional position regarding conventions and treaties (i.e. they could only be applied if incorporated in domestic law either through statute or the bill of rights).

**SEXUAL HARASSMENT****SEXUAL HARASSMENT / UNFAIR DISMISSAL**

- **Right to gender equality; the actions of a supervisor constituted sexual harassment deserving of dismissal from employment.**
- **Sexual harassment did not have to consist of actual physical contact.**

**APPAREL EXPORT PROMOTION COUNCIL v CHOPRA**

Supreme Court	India
Anand CJI, Khare J	[1999] INSC 7
	20 January 1999

**International instruments and law considered**

International Covenant on Economic, Social and Cultural Rights (ICESCR)  
Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW)  
Beijing Declaration (BD)  
Constitution of India (CI)

**Facts**

A female employee (X) claimed that she was sexually harassed by the chair of the Apparel Export Promotion Council, Chopra (C). C took X to the business centre of a hotel to work with him and sexually harassed her at various places within the hotel, including the lift, despite being warned on several occasions by X. X filed a complaint and an enquiry officer (EO) was appointed by the director of the Council to investigate. The EO concluded that X was molested by C. The Council's Disciplinary Authority dismissed C. C challenged the dismissal before several internal tribunals and thereafter in the courts. Eventually the matter came before the highest appeal court, the Supreme Court of India. At an earlier stage, a single judge of the High Court had ordered C's reinstatement on the basis that C had tried to molest X but had not in fact succeeded. Hearing of C's possible re-instatement, the female employees of the council felt agitated and filed an application seeking intervention in pending proceedings.

**Issues**

- Whether sexual harassment constituted a ground for dismissal?
- Did sexual harassment have to consist of actual physical contact?
- Was sexual harassment a recognisable legal principle in Indian law?
- What was the nature of sexual harassment in the workplace?

**Decision**

The court allowed the intervention, found the appeal was fair, set aside the order of the High Court and restored the punishment of the Disciplinary Authority. It criticised the High Court for its approach, including its treatment of the sexual harassment claim as a criminal matter rather than a civil matter in terms of evidence.

It was wrong to say that molestation could not have taken place unless there was actual physical contact. Even if there had been no touching, it did not mean that there had been no objectionable overtures with sexual overtones. C's actions were conduct which 'is against moral sanctions and which did not withstand the test of decency and modesty and which projected unwelcome sexual advances'. Any action or gesture, whether directly or by implication, that had the tendency to outrage the modesty of a female, fell within the general concept of sexual harassment.

*Vishaka v State of Rajasthan*<sup>16</sup> was cited. In *Vishaka*, the Supreme Court noted that the present civil and criminal laws did not adequately provide for protection of women from sexual harassment and that enactment of such legislation would take considerable time. It suggested a definition of sexual harassment as including such unwelcome sexually determined behaviour (whether directly or by implication) as: (a) physical contact and advances; (b) a demand or request for sexual favours; (c) sexually coloured remarks; (d) showing pornography; (e) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature. It was discriminatory, for instance, when a woman had reasonable grounds to believe that her objection would disadvantage her in connection to her employment.

The offence of sexual harassment was tied to the fundamental right to gender equality and the right to life and liberty as two of the most precious fundamental rights guaranteed by the CI. CEDAW and ICESCR both required that important steps be taken to prevent discrimination against women. Article 7 of the CI recognised women's right to fair conditions of work. These international instruments required India to gender sensitise its law and the courts were under an obligation to ensure that the messages of international instruments were not allowed to be 'drowned'.

**Comment**

This case was instituted as a tort, not as a breach of human rights in the CI. (See *Singh v Ponijese, Attorney General & Ors* in Part I of this volume where a similar strategy was adopted.) C had challenged his dismissal as unlawful and had sought reinstatement and back pay. However, the court, following *Vishaka*, applied human rights principles and said that the right to gender equality guaranteed in the CI implied a right to be free from sexual harassment. In observing that there need not be any physical contact, there was recognition that sexual harassment extended beyond that to any conduct that trespassed acceptable limits. This response was elicited by the decision in the High Court, which found there was no such conduct capable of being sexual harassment. It had also reached that conclusion on the basis of treating the evidence in criminal terms, i.e. as beyond reasonable doubt. The Supreme Court emphasised that this being a civil matter, the standard of proof of evidence was on the balance of probabilities.

16. (1997) 6 Supreme Court Cases 241 (India) featured in 1 PHRLD 92-93.

**PART III: INTERNATIONAL HIV HUMAN RIGHTS CASES<sup>17</sup>****CHILDREN****CHILDREN / EDUCATION**

- Dismissal of case against school for deferring application for enrolment of child living with HIV upheld.

**PERREIRA v THE BUCCLEUCH MONTESSORI PRE-SCHOOL AND PRIMARY (PTY) LTD & ORS**

High Court  
Mailula J

South Africa  
Case No. 4377/02  
21 October 2003

**Law considered**

Constitution of South Africa (CSA)

**Facts**

P applied to enrol her foster daughter at the defendant school (S), a private pre-school and primary school in January 2001 when there were three vacancies. At the time of application, P informed the school principal that her daughter, then two and a half years of age, was living with HIV. P believed it was in the best interests of her child for the school to be aware of her medical condition.

P was subsequently told that a teachers' meeting had taken place to discuss her foster daughter's enrolment. Serious concerns had been expressed about the school's readiness to deal with HIV-positive students and about the risk of HIV transmission in the school setting. S told P that it wanted to defer her application until her foster daughter was three years old and 'past the biting stage'.

P alleged discrimination by S. S, the Minister of Education and the Minister of Social Development were named as respondents. (No relief was sought against the ministers, save for costs in the event that they opposed the application, which they did not.)

17. These cases are directly extracted and modified from UNAIDS Best Practice Collection, *Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV* (Canadian HIV/AIDS Legal Network/UNAIDS: Geneva, 2006).

P sought an order declaring that S had engaged in discriminatory and unlawful conduct, contrary to the CSA, in refusing to enrol her daughter.

#### Issues

- Was the action of S in denying the child access to the school justifiable discrimination?
- Was the deferment of enrolment justifiable?

#### Decision

Dismissing the application, the court found that the principal's suggestion that the child's enrolment be deferred:

*... did not constitute a final decision. It is clear on the objective facts that the first defendant [Buckleuch Montessori School] was still prepared to consider the application for the enrolment of the minor child. In the result I am of the view that the first respondent had not taken a decision to exclude the minor child from the school simply because of her HIV status. Accordingly the application ought to be dismissed with costs.*

P filed an appeal against the judgment, although later decided not to proceed.

#### Comment

The judgment was disappointing in its approach to the question of unfair discrimination because it failed to deal with the implications of the school's deferral of P's application to enrol her foster daughter. There was no guidance as to the basis on which such deferment could take place, how long an application could be deferred and what steps a school teacher needed to take to accommodate children with HIV. Indeed, the concerns about possible HIV transmission expressed by the school were not reasonable, given the very small risk of transmission. As such, it amounted to what should be understood as unfair discrimination contrary to law. The judgment also left uncertain the acceptability of the other justification put forward by the school – namely, that it was ill-equipped to handle a child with HIV.

## DISCRIMINATION

### DISCRIMINATION / DEFENCE FORCES

- **Exclusion of HIV-positive man from defence force is discriminatory.**

### NANDITUME v MINISTER OF DEFENCE

Labour Court  
Levy AJ

Namibia  
[2002] AHRLR (NaLC 2000)  
10 May 2000

#### International instruments and law considered

Labour Act 1992 (LA)

Guidelines for the Implementation of a National Code on HIV/AIDS in Employment  
Defence Act

#### Facts

Under the Defence Act, recruits to the Namibian Defence Force (NDF) were required to undergo a medical examination. The applicant (N) sought to enlist in 1996. As part of that process, he was tested for HIV. Two weeks later, he was informed by an NDF medical officer that he had tested positive and, as a result, would not be accepted by the force. A comprehensive medical report completed one month later, showed that he was otherwise in good health and the examining physician explicitly agreed N did not have any medical condition that would be likely to interfere with the proper performance of his duty as a government service official. His HIV-positive status was the sole basis for his exclusion from enlistment in the NDF.

N argued that the NDF had breached the 1992 Labour Act (s 107), which prohibited discrimination in employment 'in an unfair manner' and also prohibited discrimination on the grounds of disability. The NDF admitted that it had rejected N solely on the grounds that he was HIV-positive, but denied that this amounted to unfair discrimination. It admitted that there were military personnel in the NDF who were HIV-positive because HIV testing was not part of the recruitment process when the NDF was established, and also because some personnel may have acquired HIV after enlistment.

#### Issue

- Was the applicant's HIV status sufficient to deny him employment in the defence forces?

#### Decision

The court held that the NDF was guilty of unfair discrimination. However, more expanded HIV-related testing was ordered as part of the medical examination of recruits and it permitted the exclusion from the NDF of applicants who failed to meet certain thresholds on CD4 levels and the viral load test.<sup>18</sup> N was ordered to undergo these additional tests, and the NDF was ordered to enlist N if he met these requirements.

In addition to the provisions of the LA, regard was had to the Guidelines for the Implementation of a National Code on HIV/AIDS in Employment issued by the government in 1998. Although the guidelines did not have the force of law, they were instructive. In particular, reliance was placed on the instruction that there should not be pre-employment tests for HIV and that employees should be given 'the normal medical tests of current fitness for work and these tests should not include testing for HIV'. In addition, the guidelines

18. A CD4 cell count is a measurement of the number of CD4 cells in a sample of blood. The CD4 count is one of the most useful indicators of the health of the immune system and the progression of HIV/AIDS. A normal CD4 cell count is between 500 and 1,400 cells/mm<sup>3</sup> of blood, but an individual's CD4 count can vary. In HIV-infected individuals, a CD4 count at or below 200 cells/mm<sup>3</sup> is considered an AIDS-defining condition. A viral load test measures the quantity of HIV RNA (ribonucleic acid) in the blood. Results are reported as the number of copies of HIV RNA per ml of blood plasma. (Source: <http://aidsinfo.nih.gov/Glossary/GlossaryDefaultCenterPage.aspx?MenuItem=AIDSinfoTools>)

directed that employees with HIV ‘should work under normal conditions so long as they are fit to do so and if they can no longer do so, they should be offered alternative employment without prejudice to their benefits’.

An HIV test alone would not determine a recruit’s fitness to serve in the forces, noting that: ‘If the military does not and will not do [testing for CD4 count and viral load] then the HIV test should also be abandoned. It will not achieve the purpose for which medical examinations are held’. Accordingly, HIV status was not a reasonable criterion on which to exclude a person from enlisting in the armed forces and an HIV test alone did not indicate the person’s current state of fitness for the job.

Consequently, the court decided to order that no person should be excluded from the NDF solely because of their HIV status if they were otherwise fit and healthy, unless their CD4 count was below 200 and their viral load exceeded 100,000.

#### Comment

The ruling set an important precedent by rejecting the NDF’s policy of simply excluding recruits based on their HIV status alone. It was not rationally connected to the objective of assessing fitness for training and service as a member of the NDF. However, in an attempt to address this objective more directly, additional pre-employment tests for those who were HIV-positive were ordered. It was asserted that CD4 and viral load levels would serve as suitable indicators of fitness. On the face of it, no consideration was given to whether insisting on such a training prerequisite for any position within the NDF was itself discriminatory because it created a barrier to suitable employment for people with HIV (or other disabilities). For example, it could be the case that an HIV-positive person could fulfil the duties of various jobs within the NDF even if their CD4 count fell below 200 and/or their viral load exceeded 100,000. On occasion, well-intended guidelines may compound the situation if their implications are not carefully assessed and considered.

#### DISCRIMINATION / EMPLOYMENT

- **Employee immune from dismissal for refusing compulsory HIV antibody test.**

---

#### DIAU v BOTSWANA BUILDING SOCIETY

---

Industrial Court	Botswana
Dingake J	2003 (2) BLR 409 (BwIC)
	19 December 2003

#### International instruments and law considered

International Labour Organisation covenants  
 Constitutions of Canada, India, Namibia, Sri Lanka and South Africa  
 Constitution of Botswana (CB)  
 Employment Act (EA)

#### Facts

In a letter dated 18 February 2002, D was offered probationary employment as a security assistant with the Botswana Building Society (BBS). The letter stated that her employment was conditional on her undergoing and passing a full medical examination conducted by a physician selected and paid by BBS. D started work on 25 February 2002. In a letter dated 27 August 2002, BBS told D that she was required to submit a certified document regarding her HIV status as part of the employment medical examination. In a letter dated 7 October 2002, D refused to provide such a document. BBS then told her, in a letter dated 19 October 2002, that she would not be offered permanent employment. D initiated legal proceedings.

The plaintiff sought reinstatement and compensation for unfair dismissal and humiliation. She also sought a declaration that her rights under the EA and the CB had been violated.

#### Issue

- Could an employee legitimately refuse a compulsory HIV test?

#### Decision

The court ordered the BBS to reinstate D and pay her compensation equivalent to four months’ salary. As D was found by the court to be ‘a permanent employee’ of the BBS at the time of dismissal, it was not entitled to dismiss her without a valid reason. The court found that the BBS had acted in a procedurally and substantively unfair way when it terminated D; she was not subject to a fair procedure and was not given a reason for her dismissal. D was dismissed because she refused to undergo an HIV test. She was entitled to disobey the instruction to undergo an HIV test as it was ‘irrational and unreasonable to the extent that such a test could not be said to be related to the inherent requirements of the job’.

The bill of rights in the CB applied to the BBS in the circumstances of the case for two reasons. First, the CB was not intended by its framers to be limited to organs of the state. Second, the CB should be given a large and liberal interpretation, one which took into account the realities of modern life. Accordingly, the bill of rights should be applied to private entities where there was an exercise of superior social or commercial power outside the traditional domain of the state. In the employment setting, employees were in a comparable position vis-à-vis their employer as individuals were to the power of the state.

The BBS had not acted in a discriminatory manner within the meaning of the bill of rights, because it had not been proved that D had been treated differently. In other words, it had not been proved that D was dismissed because of the suspicion or perception that she may be HIV-positive. However, the ground of HIV status or perceived HIV status was one of the ‘unlisted’ grounds on which the CB prohibited discrimination.

D’s right not to be subject to inhuman and degrading treatment had been infringed: ‘To punish an individual for refusing to agree to a violation of her privacy or bodily integrity is demeaning, undignified, degrading and disrespectful to the intrinsic worth of being human’. This conclusion was particularly warranted in the context of HIV, ‘where even the remotest suspicion of being HIV/AIDS [sic] can breed intense prejudice, ostracisation and stigmatisation’.

**Comment**

From a human rights perspective, there are positive and negative aspects to this decision. On the positive side, the decision affirms the 'horizontal' application of the CB to entities other than state organs. According to the court, private actors who wield significant economic and social power, and who therefore have a great deal of power over the lives of individual citizens, are not beyond the reach of the CB.

Another positive element was the court's willingness to view Botswana's National HIV/AIDS Policy to the extent that its provisions were consistent with the values espoused by the CB, as an important interpretive aid in its constitutional analysis. In examining international human rights instruments, the constitutions of other countries, HIV-related decisions from other countries and other international sources of guidance on HIV (some of which reflect human rights), an expansive approach was taken.

A significant negative aspect was the characterisation of the HIV test as 'compulsory post-employment testing', rather than compulsory testing as a condition of employment. The respondent made a specific written demand for a certified document of HIV status more than six months after the applicant commenced employment. However, it was clear from the evidence that the plaintiff's employment was conditional on successful completion of a medical examination that included an HIV test or certified document of HIV status. As a result, the decision did not address whether HIV testing as a condition of employment was legal under Botswana law.

A second related limitation was the narrow analysis of the question of HIV-related discrimination. It is encouraging that discrimination based on a person's real or perceived HIV-positive status is constitutionally prohibited in Botswana. But its limited approach to the question of demanding HIV testing as a condition of employment fell short of fully protecting against such discrimination. It has been recognised in many jurisdictions that such a demand amounts to prohibited discrimination in employment similar to requiring information on a job candidate's marital status, religion, sexual orientation, race or ethnicity.

*Editors' note: this case is important to the Pacific Islands for several reasons. D won on three separate grounds – privacy, inhumane treatment and the loss of liberty – despite the fact that the Botswana Constitution does not have HIV status as a specific prohibited ground of discrimination. This is similar to Pacific Island constitutions. Further, the court saw HIV discrimination as an 'unlisted' ground on which the CB prohibited discrimination. A similar strategy can be adopted in the Pacific.*

**DISCRIMINATION / EMPLOYMENT**

- **Prohibition of HIV-based discrimination by airline.**

**HOFFMANN v SOUTH AFRICAN AIRWAYS**

Constitutional Court  
Ngcobo J

South Africa  
[2000] ZACC 17; 2001 (1) SA 1  
28 September 2000

**International instruments and law considered**

Constitution of South Africa (CSA)  
Employment Equity Act (EEA)

**Facts**

In September 1996, H applied for employment as a cabin attendant with South African Airways (SAA). At the end of the interview process he was found to be a suitable candidate for employment and underwent a pre-employment medical examination including an HIV antibody test. He was clinically fit and suitable for employment. The HIV antibody test returned a positive result. Consequently, the medical report was altered to read that H was unsuitable for employment because he was HIV-positive.

SAA policy prohibited the employment of HIV-positive people as cabin attendants. This prohibition was allegedly in place because cabin attendants had to be fit for worldwide duty, which required them to be vaccinated against yellow fever in accordance with National Department of Health guidelines. SAA stated that HIV-positive persons may react negatively to this vaccine. Further, SAA stated that HIV-positive people were prone to contracting opportunistic infections and, as a result, would not be able to perform required emergency and safety procedures. Finally, SAA stated that the life expectancy of people who were HIV-positive was too short to warrant the costs of training them. SAA's policy did not exclude HIV-positive persons from all employment with the airline, only from cabin crew positions.

SAA's medical expert gave evidence that only those persons whose CD4+ cell count had dropped below 300 cells/microlitre were prone to medical, safety and occupational hazards. According to SAA's medical expert, at the time of H's medical examination, there was nothing to indicate that he had either reached the asymptomatic yet immuno-suppressed stage of HIV infection or developed AIDS.

The AIDS Law Project, in its role as a friend of the court, provided medical evidence to the Constitutional Court. That medical evidence, with which the SAA expert concurred, demonstrated that an asymptomatic HIV-positive person could perform the work of a cabin attendant. It also demonstrated that even immuno-suppressed persons were not prone to opportunistic infections and could be vaccinated against yellow fever as long as their CD4+ cell counts were above a certain level.

**Issue**

- Was it justifiable to deny employment on the basis of a person's HIV status?

**Decision**

The court ordered SAA to offer to employ H as a cabin attendant. It was also ordered to pay H's costs in both the High Court and Constitutional Court.

On appeal, faced with the uncontroverted medical evidence, SAA conceded that its practice of refusing to employ cabin attendants because of their HIV-positive status was medically unjustified and was thus unfair. Instead, it argued that its 'true' policy was to refuse employment to HIV-positive cabin attendants where their HIV infection had progressed to a stage that SAA believed the person unsuitable for employment. The legality of SAA's 'true' policy was not considered because it had not been dealt with by the High Court and was a more appropriate case for the Labour Court.

The CSA applied to SAA since it was owned by a statutory body under the control of the state. Relying solely on the right to equality under the CSA (s 9), three basic enquiries were to be made:

1. First, did the challenged law make a differentiation that made a rational connection to a legitimate government purpose? Where there was no rational connection, then s 9 had been breached.
2. Second, where there was a rational connection, did the differentiation amount to unfair discrimination?
3. Third, if the differentiation did amount to unfair discrimination (and if it was found in a law of general application), could the differentiation be justified under a provision of the constitution that permitted limitations on rights) (s 36).

SAA's employment practice was irrational; the fact that some HIV-positive people might, under certain circumstances, be unsuitable for employment as cabin attendants did not justify the exclusion of all people living with HIV from those positions.

With respect to the second inquiry, SSA's policy discriminated unfairly against H because of his HIV status. People living with HIV were one of the most vulnerable groups in South African society; they faced prejudice and stereotyping despite medical evidence about how HIV was transmitted. Thus, any discrimination against HIV-positive people was a 'fresh instance of stigmatisation' and an 'assault on their dignity'. Moreover, HIV-positive people enjoyed special protection from discrimination under the EEA because of the impact of employment discrimination on their ability to earn a living.

The commercial interests of SAA, given that other airlines had a similar policy of excluding all HIV-positive people from being employed as cabin attendants, were also considered. It was not legitimate because it was based on fear, ignorance and stereotypes of supposed dangers posed by HIV-positive people, regardless of their individual circumstances: 'the constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perception of persons with HIV'.

**Comment**

The ruling affirms that the blanket exclusion of HIV-positive people from employment infringes the constitutional guarantee of equality. Individual job applicants should be evaluated in terms of their individual circumstance, including their ability to perform the essential duties of a job, rather than because they are HIV-positive. In the words of the court, the decision validated the principle of '*ubuntu*' – a Zulu word conveying the recognition of human worth and respect for the dignity of every person. It also highlights the role of the courts in providing relief for people living with HIV who seek to enforce their rights.

Domestically, the court's reference to the EEA was also significant. Relatively few employers are subject to the constitution. HIV-positive South Africans who do not work for the state or state-owned businesses must rely on the EEA for protection from discrimination in employment. The court's analysis of discrimination in this case provided guidance in deciding cases under the EEA.

Of interest is whether the court would have made the same decision had the airline been privately owned, raising the issue of horizontal application of rights, as between private (non-state) citizens.

**DISCRIMINATION / EMPLOYMENT**

- **Policy of refusing to hire people living with HIV struck down.**

**MX v ZY**

High Court of Judicature  
Tipnis J

India  
AIR 1997 Bom 406

**International instruments and law considered**

South Africa Code on HIV/AIDS and Employment  
Constitution of India (CI)

**Facts**

MX sought a court order remedying company ZY's discriminatory decision to deny him any further employment because of his HIV-positive status, including *inter alia* quashing the company's discriminatory policies and reinstating him with benefits and back wages. In 1986, MX was interviewed by company ZY and employed as a casual labourer from that point until about 1994. Company policy and practice required that casual labourers sign a register and be placed on a waiting list. Those determined to be medically fit were eventually employed on a permanent basis. In 1990, MX was directed to attend a medical examination with a doctor retained by the company. It included various tests, and nothing adverse was detected. MX continued to be designated as a casual worker, while he alleged that others off the waiting list both above and below him in length of service, were appointed to regular employment positions to fill vacancies.

In 1993, MX was again asked to undergo a medical exam, which included an HIV test. MX tested HIV positive, but in all other respects was deemed healthy. The examining physician certified that MX was fit for duty as a labourer. Notwithstanding this medical assessment, ZY removed MX from its waiting list of registered labourers.

MX wrote to ZY pointing out that he was fit to perform his job and that he was the sole income earner. He also wrote to the director of health services in the state government outlining his circumstances and requesting intervention. The director wrote to ZY pointing out there was no medical justification for refusing to employ MX and requesting ZY to allow him to continue as a casual labourer. The director also drew ZY's attention to the guidelines produced by the National AIDS Control Programme, which stated that HIV-positive status was not an acceptable basis for dismissal.

The HIV/AIDS Unit of the Lawyers Collective, an organisation providing legal aid services, research and advocacy to people living with HIV investigated the matter further. It discovered that ZY had issued written circulars mandating the testing of current and prospective employees for HIV. Those testing HIV-positive would not be hired and current employees could be dismissed.

#### Issue

- Was it justifiable to deny employment on the basis of a person's HIV status?

#### Decision

The court granted the petition. It ordered that MZ be reinstated, that he be taken into regular employment, if further medical examination showed he was still fit, and awarded 40,000 rupees (or US \$900) in compensation for lost income.

It held:

*[T]hat the impugned rule which denies employment to the HIV-infected person merely on the ground of his HIV status irrespective of his ability to perform the job requirements and irrespective of the fact that he did not pose any threat to others at the workplace is clearly arbitrary and unreasonable and infringes the wholesome requirement of Article 14 as well as Article 21 of the CI. Accordingly, we hold that the [employer's] circular ... in so far as it directs that if the employee is found to be HIV-positive by ELISA test, his services will be terminated is unconstitutional, illegal and invalid and, therefore, is quashed.*

The court also stressed the importance of non-discrimination in responding to HIV/AIDS:

*As is evident from the material to which we have made detailed reference in the earlier part of this judgment, the most important thing in respect of persons infected with HIV is the requirement of community support, economic support and non-discrimination of such persons. This is also necessary for prevention and control of this terrible disease. Taking into consideration the widespread and present threat of this disease in the world in general and this country in particular, the state cannot be*

*permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death. It is not in the general public interest and is impermissible under the constitution. The interests of the HIV-positive persons, the interests of the employer and the interests of the society will have to be balanced in such a case. If it means putting certain economic burdens on the state or the public corporations or the society, they must bear the same in the larger public interest.*

#### Comment

This case set a very positive precedent in Indian law for the right of people living with HIV to equality in employment. It is consistent with widely accepted international human rights norms. Reference was made to a number of policy statements from outside India on the issue of HIV and employment – including a World Health Organisation policy resolution passed by member states and the South African Code on HIV/AIDS and Employment. The National HIV Testing Policy published in 1995 by the National AIDS Control Organisation, which falls under the jurisdiction of the Indian Ministry of Health and Family Welfare, was also cited. All of these provided clear guidance that mandatory HIV testing in the employment context was irrational and unjustified, and amounted to an infringement of human rights.

Regrettably, there was no explicit prohibition of pre-employment HIV testing, a point made in several of the sources cited. In fact, the judgment left the door open to such testing. In stating that the petitioner might have to resubmit to medical tests to establish current fitness for the position, the court made reference to such tests 'including for HIV', even though it had declared his HIV status irrelevant to the employment decision.

In passing, the petitioner's request for an order suppressing his identity was also considered. Jurisprudence from the Supreme Court of India and from Australian courts suggested that such an order was appropriate and 'in the interests of the administration of justice', in light of the widespread societal stigma still attached to HIV and the ostracism and discrimination experienced by people living with HIV.

In the present case, the company was a state-owned corporation. Whether this would have been extended to a privately owned entity is an interesting question. The debate over the 'vertical' and 'horizontal' approach to the application of human rights, while evolving towards the latter, is not yet settled.



## HEALTH

### HEALTH / DIGNITY

- **Former inmate awarded landmark settlement after being infected with HIV in prison.**

#### PW v SOUTH AFRICA DEPARTMENT OF CORRECTIONAL SERVICES

South Africa  
1997-2003

#### International instruments and law considered

Constitution of South Africa (CSA)  
Correctional Services Act 1994

#### Facts

PW was incarcerated at Pollsmoor Prison from November 1993 to December 1994. He repeatedly tested HIV-negative over most of this period. He had a sexual relationship with an HIV-positive man while in prison. PW was apparently unaware of his partner's HIV status at the time.

PW sued the South Africa Department of Correctional Services (DCS) in 1997. He had tested positive for HIV on 27 November 1994, shortly before his release from prison. In court papers, PW alleged that the prison authorities knew that sex among prisoners was 'common' and that a 'material portion' of the prisoners were HIV-positive. PW further alleged that the authorities did nothing to prevent sex between prisoners nor did they provide sexually active inmates with access to condoms to reduce the risk of HIV infection. These facts were admitted.

PW alleged negligence at common law and a breach of the Correctional Services Act of 1959. He further argued that the DCS had violated his rights under the constitution, in particular:

- his right to be detained under conditions consistent with human dignity, and to be provided with adequate medical treatment at state expense;
- his right to freedom and security of the person;
- his right not to be subjected to torture of any kind, whether physical, mental or emotional, and not to be subjected to cruel, inhuman or degrading treatment or punishment;
- his right to life; and
- his right to respect for and protection of his dignity.

#### Issue

- Was the Department of Correctional Services liable for PW's status given that he was a prisoner, and what constitutional and legal rights had been violated?

#### Decision

Litigation was initiated in 1997 and an out-of-court settlement was reached in February 2003, the terms of which were confidential. Media reports stated that the plaintiff settled for 150,000 South African rand (approximately US \$25 000 at the time). It is known that the DCS 'denied any liability' for PW's infection but admitted that prisoners were not allowed to have condoms until 1996.

#### Comment

The case illustrates the use of litigation to hold a government accountable for the impact of its policies and its actions on people's health. In 1996, the Department of Correctional Services developed a new policy on managing HIV and AIDS in prisons. In 2000, this policy was supplemented by a Management Strategy on HIV/AIDS in Prisons. The 1993 WHO Guidelines on HIV Infection and AIDS in Prisons helped influence the DCS to change its policy. PW's case and the obvious possibility of legal liability appear to have played some role in prompting a shift in policy.

In its written policy, the DCS made a commitment to provide HIV education and condoms to prisoners 'on the same basis as condoms are provided in the community'. While this element of the policy is in accordance with international guidelines providing for counselling regarding HIV, not educating on the use of condoms and the dangers of high-risk behaviour before condoms are made available were not. This precondition has discouraged the use of condoms because privacy and confidentiality are not assured.

### HEALTH / PRISONERS

- **Medical treatment for HIV-positive prisoners should be provided in prisons.**

#### ODAFE & ORS v ATTORNERY GENERAL & ORS

High Court  
Nwodo J

Nigeria  
Suit No.FHC/PH/CS/680/2003

#### International instruments and laws considered

African Charter on Human and People's Rights (ACHPR)  
UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)  
Constitution of Nigeria (CN)  
Prisons Act (PA)

#### Facts

The four plaintiffs were HIV-positive and were remand prisoners awaiting trial for serious offences involving periods of between 2 years 4 months and 4 years 8 months. They made

the following applications:

- a) That their continuous detention and segregation amounted to breaches of their rights to a fair hearing, dignity and to be free from discrimination, as guaranteed by the CN;
- b) That the failure of prison officials to provide them with proper medical care and treatment amounted to inhuman and degrading treatment contrary to s 34(1)(a) of the CN and article 5 of the ACHPR and a breach of their right to life contrary to s3(1) of the CN;
- c) That they had a right to proper medical treatment whilst in custody pursuant to the requirement to respond to serious illness under ss 8(1) and (3) of the PA, the prison regulations and the UNSMR; therefore they should be relocated to a designated public hospital in order to receive such treatment.

#### Issue

- Whether the HIV status of prisoners entitled them to rights guaranteed by the CN and international human rights law.

#### Decision

The court held that:

- a) everyone, including those prisoners awaiting trial, had a legal right to seek redress for alleged breaches of their constitutional rights pursuant to s 46(1) of the CN and to article 7 of the ACHPR. The constitutional right to a fair hearing had been breached given the length of time they had been held on remand. The CN provided that any person arrested and detained upon reasonable suspicion of having committed an offence should be arraigned before a court of law within a reasonable time and, if not tried within two months from the date of arrest or detention, should be released on bail subject to any reasonable conditions.
- b) that although HIV fell within the list of 'serious illnesses' under the PA, discrimination on the grounds of illness, virus or disease was not covered by s 42(1) of the CN and therefore could not be invoked in this case.
- c) torture included mental or psychological trauma where a person's mental state was so disturbed that he was prevented from thinking and behaving as a rational human being. An average person diagnosed with HIV would be greatly disturbed and live in perpetual fear of attack. This combined with the fact that article 16 of the ACHPR provided for every individual to enjoy the best attainable state of physical and mental health, while the state had a corresponding duty to ensure they received medical care and treatment when they were sick, created an obligation on prison authorities to provide appropriate medical care and treatment for prisoners who had HIV. Problems of overcrowding led to a risk of the disease spreading and added weight to this duty, and the continued failure to provide such treatment amounted to torture.

Applying *Ubani v Director SSS* 1999 11 NWLR Pt. 129, it was held that having incorporated the ACHPR and its socio-economic rights, in particular the right to health, into domestic law, the government must respect its provisions. While recognising that the economic cost of providing medical treatment was quite high, the state had failed in its responsibility to all prison inmates, regardless of the offences they had allegedly committed. In such circumstances they should be relocated to a public hospital for treatment.

#### Comment

International instruments, and constitutional and legislative provisions in respect of human rights standards impose obligations the state must honour. Socio-economic rights are no exception; HIV-positive prisoners on remand are entitled to have access to treatment on the basis of the individual's right to enjoy the best attainable state of physical and mental health. There is growing recognition that international obligations as well as domestic enactments must be given effect in some form.

Given the state of mind of the average person diagnosed with HIV, the mental or psychological trauma suffered could be characterised as torture. Taken together with the obligation under article 169 of the ACHPR, the failure of the state to provide relief for prisoners living with HIV (as in appropriate mental care treatment and as well as reduction of overcrowding), according to the court, amounted to torture. This is an expansive definition of torture and would probably be the subject of intense scrutiny and debate. The concept of torture being in essence self-inflicted, rather than inflicted by one party or another, is an interesting proposition.

#### HEALTH / PRISONERS

- **Litigation occasioning change in policy on condoms in prisons.**

---

#### PRISONERS A-XX INCLUSIVE v STATE OF NEW SOUTH WALES

---

Supreme Court of New South Wales	Australia
Meagher, Sheller & Powell JJA	[1995] NSWSC 109

#### Law considered

Common law

#### Facts

Until the mid-1990s, the policy of the New South Wales (NSW) Department of Corrective Services (like that of the majority of other Australian state systems) was to oppose condom distribution. Although the authorities were aware that sexual activity occurred in prisons, reliance was placed on education as the primary HIV prevention measure. While ultimately unsuccessful, this case placed pressure on the government to change its policy.

Fifty inmates of NSW prisons through the Aboriginal Legal Service sought a mandatory injunction to force the NSW Government to reform its policies regarding condoms in prisons. The application sought:

- an order that the State of NSW, through the Commissioner of Corrective Services and the Director General of the Department of Corrective Services, must permit the plaintiffs and other male prisoners in NSW prisons to possess and use condoms;
- a declaration that the decision not to supply or permit the possession or use of condoms by male prisoners was made in breach of the duty of care owed by the State of NSW to the plaintiffs; and

- an order that the State of NSW supply, and permit the possession and use of, condoms by the plaintiffs and other male prisoners in NSW prisons.

#### Issue

- Was a prisoner entitled to access to condoms without a doctor's prescription to protect himself while in prison?

#### Decision

The court at first instance dismissed two of the three claims advanced by the plaintiffs and ruled that the third claim had to be redrafted so as to be brought solely on behalf of the aggrieved plaintiffs, rather than as a class action on behalf of the larger group of prisoners.

The judge in the first case was unwilling to allow a challenge to the 'policy decision' not to provide condoms in prisons, arguing that judicial review of an issue involving 'political considerations' would lead to 'political power [passing] from the parliament and the electorate to the courts'. However, he continued, 'different considerations would apply if the prisoners claimed a breach of the duty owed to them as individuals'. Although a policy decision in itself might not be reviewable by the court, its effect – a breach of duty of care owed to the prisoners – was.

If a duty of care were established, an injunction to restrain the tort of negligence might, although novel, be available. However, the court pointed out that there might be problems with proving a duty of care in this case; it could be held that the prisoners were contributorily negligent or that they voluntarily assumed the risk of being harmed.

The prisoners appealed the judge's decision, arguing they should be able to:

- rely on the writ of *habeas corpus*;
- rely on the Magna Carta; and
- continue their proceedings as a class of 50 rather than amend their pleadings and claims.

The NSW Court of Appeal upheld the judge's ruling and dismissed *habeas corpus* arguments after canvassing British, Canadian and American decisions. It also dismissed arguments premised on the contravention of the Magna Carta. Finally, it dismissed the third ground of appeal, concluding that the lower court's reasons involved a proper exercise of discretion to ensure the case was managed efficiently.

Referring to the earlier decision, the court remarked:

*His Honour saw no reason why in an appropriate case the Court would not grant an injunction to restrain the tort of negligence, even without proof of damage. Accordingly, if the appellants were able to establish by evidence that the failure by the Department to permit their use of condoms constituted a breach of the duty of care owed to them, they might be entitled to injunctive relief.*

It further concluded:

*What remains to be done is for the appellants to apply to the Common Law Division to amend their statement of claim in a way which accords with the judge's orders and the conclusions I have reached.*

#### Comment

The legal importance of this case lies in the fact that it provides recognition, albeit limited, that a claim of negligence based on a duty of care could be brought in the future. Although not commented on, the possible extension of tort law in this manner is a true reflection of the expanding and evolving application of human rights. International guidelines reflecting public health concerns assist in establishing the appropriate standard of care that should be met by prison officials in responding to HIV. According to WHO's 1993 guidelines:

*[A]ll prisoners have the right to receive health care, including preventative measures, equivalent to that available in the community without discrimination, in particular with respect to their legal status or nationality. [...] Since penetrative sexual intercourse occurs in prison, even when prohibited, condoms should be made available to prisoners throughout the period of detention.*

This case brought about important policy changes in relation to condom provisions for prisoners in NSW. In 1996, at least in part because of the legal action, the state government decided to make condoms available in all prisons after evaluation of an initial, successful trial condom-distribution scheme in a few NSW prisons.

#### HEALTH / PRISONERS

- **Policy upheld of not allowing prisoners condoms.**

#### R v SECRETARY OF STATE FOR THE HOME DEPARTMENT EX PARTE GLEN FIELDING

High Court of Justice, Queen's Bench Division United Kingdom  
Latham J [1999] EWHC Admin 641  
5 July 1999

#### International instrument and law considered

European Convention on Human Rights (ECHR)

#### Facts

The applicant (F) was a gay man incarcerated in Littlehey Correctional Facility, a government-run prison, where he was unable to obtain condoms. His application for judicial review was contested by the Home Department of the UK Government, which had jurisdiction over prisons.

The Home Department put forward a policy on condoms in prison in a 1995 letter instructing prison doctors that they were free ‘in the exercise of their clinical judgment’ to prescribe condoms for individual prisoners. The letter noted that prisoners should not have access to condoms except through the prison medical service. It went on to state that the intent of the policy was to preserve health, particularly in light of the risk of HIV transmission, and not to ‘encourage homosexuality’. The letter added that the ‘burden of our legal advice is in fact that there may be a legal risk in not providing condoms in the relevant set of circumstances through a failure in the duty of care’, and that doctors should thus be encouraged to prescribe both condoms and lubricants ‘when in their clinical judgment there is a known risk of HIV infection as a result of HIV risky sexual behavior.’

While in Littlehey, F had managed to have condoms sent to him from outside the prison, but they were confiscated and placed under the control of the prison medical service, which refused F access to them. He was later moved to a privately run prison, where he was provided with condoms without difficulty. He was subsequently released, but pursued the case seeking a change in the policy of providing condoms only with a doctor’s prescription.

#### Issue

- Was a prisoner entitled to access to condoms without a doctor’s prescription to protect himself while in prison?

#### Decision

The Home Department policy was upheld, that is, it was confirmed that condoms would be available only through a prison doctor’s prescription.

The medical director of Littlehey Prison may have misinterpreted the Home Department policy on condoms, being ‘significantly more restrictive ... than a fair reading’ of the policy would have warranted in denying F access to condoms. As to F’s case that the policy was ‘irrational’ it was observed that ‘providing condoms on demand might reasonably be seen to be an encouragement of homosexuality, and the Prison Service was entitled to avoid a policy that might give this impression’.

‘[C]ondoms have uses other than those for which they were designed,’ and therefore some level of control of condoms as a commodity should be the prerogative of the Prison Service. ‘The mere fact that a person asserts that he wants a condom does not mean that he is a genuine homosexual, nor does it mean that he is necessarily intending to engage in penetrative or other dangerous sexual activity, nor does it necessarily mean that he is in truth a consenting party to whatever activity is anticipated’. Therefore, whether the condom was requested for ‘genuine health reasons’ was best left to doctors.

F was entitled in principle to respect under the ECHR for his sexual orientation ‘and its practical consequences’ but the court noted that unlike the majority of prisoners (presumably meaning heterosexuals), ‘imprisonment did not prevent him from expressing his sexuality at all’. The real issue here was health, not the right to have sex.

The Home Department needed to formulate a clearer statement of its policy to avoid overly restrictive interpretation of it, a view reiterated by an appeal which upheld the ruling against F’s complaint.

#### Comment

The UN International Guidelines on HIV/AIDS and Human Rights recommend the provision of condoms in prison. Lack of access to condoms for prisoners appears to contradict one of the fundamental principles of the UN Standard Minimum Rules for the Treatment of Prisoners, i.e. that prisoners have access to the same level of services as those outside prisons. This equivalency principle was reiterated by the World Health Organisation in its 1994 Guidelines on HIV Infection and AIDS in Prisons, which also assert that ‘condoms should be made available to prisoners throughout their period of detention’.<sup>19</sup>

Condoms are now considered an essential element of HIV prevention and part of the ‘highest attainable standard of health’ services guaranteed in the International Covenant on Economic, Social and Cultural Rights (article 12), to which the UK is a party. The UN Committee on Economic, Social and Cultural Rights, which is the expert body mandated to monitor and promote states’ compliance with the obligations under the covenant, has issued a ‘General Comment’ on the human right to health. State parties are obliged to respect the right to health by ‘refraining from denying or limiting equal access for all persons, including prisoners or detainees, and refraining from ‘limiting access to contraceptives and other means of maintaining sexual and reproductive health’.<sup>20</sup>

The right of prisoners to confidentially obtain condoms or protect their right to privacy is guaranteed by the International Covenant on Civil and Political Rights (article 17). Prescription by a doctor limits that right in that a third party may withhold provision of condoms. In addition to eroding prisoners’ rights, it has serious health implications for them.

#### HEALTH / PRISONERS / SENTENCE

- **Compassionate reduction of sentence for prisoners living with HIV.**

#### R v LO CHI KEUNG; HKSAR v VASQUEZ TARAZONA JESUS JUAN

Court of Appeal, Hong Kong	(1996) 3 HKCA 155
High Court of the Hong Kong Special Administrative Region Court of First Instance	(2001) 941 HKCU 1

#### Facts

Hong Kong, a former British Colony, officially became a ‘Special Administrative Region’ of the People’s Republic of China in 1997 with the departure of the last British governor. It recognised the HIV epidemic and took overt steps to develop policy in response. Thus, the first of these two cases was heard in a Crown court and at a time when antiretroviral therapy would not have been available to a prisoner in Hong Kong.

19. World Health Organisation. Guidelines on HIV infection and AIDS in prisons (1993), 5.

20. UN Committee on Economic, Social and Cultural Rights. The right to the highest attainable standard of physical and mental health. (General Comment 14), UN Doc. E/C.12/2000/4 (2000), paras 34 & 35.

In both cases, the applicants sought to have their sentences reduced on compassionate grounds because they were HIV-positive. In the first case, the 27-year-old applicant (L) had been convicted of an arms-related offence and was serving an eight-year sentence in Stanley Prison. In the second case, the applicant (J), a Chilean national, had been convicted of conspiracy and false instruments offences (making a false passport) and was serving a 13-month sentence at Stanley Prison, concurrent with a sentence already being served.

#### Decision

In both cases the courts denied the request for a reduction of sentence adopting a similar approach.

In the first case, though a letter from one of Stanley Prison's medical officers confirmed the applicant's HIV status, the court noted there was no evidence about whether L was near or at the terminal stage of his disease and whether Stanley Prison could provide 'suitable and proper facilities' for his care. Leaving the door open for reconsideration if L's status deteriorated, the court stated: 'We can find no justification for considering a reduction of the sentences passed on the applicant on compassionate grounds ... We rest assured that the authority will closely monitor the applicant's condition so as to permit special procedure for an early release of a man of his affliction to be duly invoked'.

A similar observation was made in the decision in J's case, where it was noted that deterioration in the state of health of the applicant might warrant another look at his application. In this case, it was observed that the J's 'unfortunate medical condition' was one factor in his case that provoked 'human sympathy' but nevertheless there was a duty to 'deal reasonably firmly with crime' in sentencing decisions.

In *HKSAR v Tsong Wai Kei* (2003) H KEC 1056, a similar approach was adopted where it was held that the graver the crime, the greater the public interest – and the greater the need to maintain a strict sentence. Drug trafficking was cited as an example of an offence at the serious end of the spectrum. The applicant had been convicted for drug trafficking but had applied for reduction of an eight-year sentence on account of thyroid cancer.

#### Comment

Compassionate sentence reduction cases may be said to be less about human rights than about humanitarian values. At the same time, there was recognition of the likelihood of having to balance the gravity of the crime with the prisoner's physical condition and deterioration. Apart from humanitarian considerations, an inmate who is terminally ill is still entitled to be treated with dignity as a human being. The potential for advancing the law further in this direction is a possibility.

The International Covenant on Civil and Political Rights (article 7) prohibits cruel and unusual punishment, which might be cited as grounds in cases involving compassionate release for ill prisoners, though it apparently was not used in these cases. The UN Standard Minimum Rules for the Treatment of Prisoners does not directly address reduction of sentences on compassionate grounds, but notes that medical officers should report to prison directors whenever they consider 'that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment,' which suggests the possibility that action may be taken in such circumstances. The UN International Guidelines on HIV/AIDS

and Human Rights recommend that 'compassionate early release of prisoners living with AIDS should be considered,'<sup>21</sup> but this is not a legally binding instrument.

21. HIV/AIDS and Human Rights: International Guidelines. Office of the UN High Commissioner for Human Rights & Joint UN Programme on HIV/AIDS, 1998, para 29 (e).

## INDEX BY NAME

Apparel Export Promotion Council v Chopra (India, 1999)	110	Kelly v R (Solomon Islands, 2006)	14
Ali v The State (Fiji, 2005)	77	Khera v Fiji Islands Revenue and Customs Authority (Fiji, 2006)	74
Attorney General v Mbwe (Kiribati, 2006)	78	Khera & Ors v Fiji Independent Commission Against Corruption (Fiji, 2007)	88
Australasian Conference Association Ltd v Sela & Ors (Fiji, 2007)	33	Khumalo & Ors v Holomisa (South Africa, 2002)	106
Ayamiseba v Attorney General (Immigration) (Vanuatu, 2006)	72	Kirisome & Ors v Attorney General & Commissioner of Police (Samoa, 2002)	46
Devi v The State (Fiji, 2003)	11	Leung v Interim Attorney General (Immigration) (Fiji, 2007)	69
Diau v Botswana Building Society (Botswana, 2003)	115	Loumia v DPP (Solomon Islands, 1986)	24
Efi v Attorney General (Samoa, 2000)	93	Magiten v Beggie & Wahiginim (PNG, 2005)	27
Fa'aoso v Paongo & Ors (Tonga, 2006)	20	Mariango v Nalau (Vanuatu, 2007)	54
Fiji Human Rights Commission v Fiji Law Society (Fiji, 2007)	51	Minister for Provincial Government v	59
Fiji Human Rights Commission v Police & Attorney General (Fiji, 2005)	39	Guadalcanal Provincial Assembly (Solomon Islands, 1997)	
Fiji Human Rights Commission v Suva City Council (Fiji, 2006)	43	MX v ZY (India, 1997)	120
Fijian Teachers' Association & Fiji Public Service Association v	44	Nabuaka v The Republic (Kiribati, 2006)	35
Public Service Commission & Interim Attorney General (Fiji, 2007)		Nai & Ors v Cava (Fiji, 2008)	10
Funaki & Anor v Police (Tonga, 2006)	1	Nanditume v Minister of Defence (Namibia, 2000)	113
Grant & Anor v	108	Northern Regional Health Authority v Human Rights Commission (NZ, 1998)	104
The Principal, John A Cumberland Primary School & Ors (Cayman, 2001)		Odafe & Ors v Attorney General & Ors (Nigeria, 2003)	124
Heffernan v Bainimarama, RFMF & AG (Fiji, 2007)	100	Office of The Public Solicitor v Kalsakau (Vanuatu, 2005)	62
Hoffmann v South African Airways (South Africa, 2000)	118	Perreira v The Buccleuch Montessori Pre-School and Primary (Pty) Ltd	112
In re Eroni Delai (Fiji, 2000)	65	& Ors (South Africa, 2003)	
In re Lorna Gleeson (Nauru, 2006)	4	Prisoners A-XX Inclusive v State of New South Wales (Australia, 1995)	126
In re Nikhil Naidu (Fiji, 1987)	90	Public Prosecutor v Emelee & Ors (Vanuatu, 2005)	78
In re Thesai Maip (PNG, 1991)	31	Puloka & Ors v The Kingdom of Tonga (Tonga, 2006)	71
In re Yongo Mondo (PNG, 1989)	32	PW v South Africa Department of Correctional Services (South Africa, 2003)	123
Interim Attorney General v Draunidalo (Fiji, 2007)	95	Qicatabua v Republic of Fiji Military Forces & Ors (Fiji, 2006)	55
Katea v Niutao Kaupule & Satupa (Tuvalu, 2006)	92	R v Fungavai (Tonga, 2006)	49
		R v K (Solomon Islands, 2006)	18

R v Lo Chi Keung; HKSAR v	130
Vasquez Tarazona Jesus Juan (Hong Kong, 1996; 2001)	
R v Secretary of State for the Home Department	128
ex parte Glen Fielding (United Kingdom, 1999)	
R v Su'u & Ors (Solomon Islands, 2007)	85
R v Vola (Tonga, 2005)	68
Railumu & Ors v RFMF & Attorney General (Fiji, 2002)	80
Raramu v Yowe Village Court (PNG, 1993)	58
Rhea v Caine (Fiji, 2006)	6
Singh v Ponijese, Attorney General & Ors (Fiji, 2007)	101
Sipo v Meli (PNG, 1980)	41
Social Welfare v Marshall & Ors (Fiji, 2008)	8
State v Boila and Nainoka (Fiji, 2004)	22
State v Sorpapelu (Fiji, 2006)	3
Taione v Kingdom of Tonga (Tonga, 2004)	97
Takiveikata v The State (Fiji, 2007)	61
Tanavalu & Ors v Tanavalu &	28
Solomon Islands National Provident Fund (Solomon Islands, 1998)	
Teikamata v R (Solomon Islands, 2007)	50
Teonea v Pule O Kaupule & Nanumaga Falekaupule (Tuvalu, 2005)	83
The State v Aigal & Kauna (PNG, 1990)	36
The State v Kule (PNG, 1991)	37
The State v Silatolu (Fiji, 2002)	64
Toakarawa v The Republic (Kiribati, 2006)	48
Ulufa'alu v Attorney General & Malaita Eagle Force & Ors (Solomon Islands, 2001)	87
Yaya v Attorney General & Director of Public Prosecutions (Fiji, 2007)	75
Yuen v The State (Fiji, 2004)	13

## INDEX BY COUNTRY

### AUSTRALIA

Prisoners A-XX Inclusive v State of New South Wales (1995)	126
--	-----

### BOTSWANA

Diau v Botswana Building Society (2003)	115
---	-----

### CAYMAN ISLANDS

Grant & Anor v The Principal, John A Cumberland Primary School & Ors (2001)	108
---	-----

### FIJI ISLANDS

Ali v The State (2005)	77
Australasian Conference Association Ltd v Sela & Ors (2007)	33
Devi v The State (2003)	11
Fiji Human Rights Commission v Fiji Law Society (2007)	51
Fiji Human Rights Commission v Police & Attorney General (2005)	39
Fiji Human Rights Commission v Suva City Council (2006)	43
Fijian Teachers' Association & Fiji Public Service Association v Public Service Commission & Interim Attorney General (2007)	44
Heffernan v Bainimarama, RFMF & AG (2007)	100
In re Eroni Delai (2000)	65
In re Nikhil Naidu (1987)	90
Interim Attorney General v Draunidalo (2007)	95
Khera v Fiji Islands Revenue and Customs Authority (2006)	74
Khera & Ors v Fiji Independent Commission Against Corruption (2007)	88
Leung v Interim Attorney General (Immigration) (2007)	69
Nai & Ors v Cava (2008)	10
Qicatabua v Republic of Fiji Military Forces & Ors (2006)	55
Railumu & Ors v RFMF & Attorney General (2002)	80

Rhea v Caine (2006)	6	In re Yongo Mondo (1989)	32
Singh v Ponijese, Attorney General & Ors (2007)	101	Magiten v Beggie & Wahiginim (2005)	27
Social Welfare v Marshall & Ors (2008)	8	Raramu v Yowe Village Court (1993)	58
State v Boila and Nainoka (2004)	22	Sipo v Meli (1980)	41
State v Sorpapelu (2006)	3	The State v Aigal & Kauna (1990)	36
Takiveikata v The State (2007)	61	The State v Kule (1991)	37
The State v Silatolu (2002)	64	<b>SAMOA</b>	
Yaya v Attorney General & Director of Public Prosecutions (2007)	75	Efi v Attorney General (2000)	93
Yuen v The State (2004)	13	Kirisome & Ors v Attorney General & Commissioner of Police (2002)	46
<b>HONG KONG</b>		<b>SOLOMON ISLANDS</b>	
R v Lo Chi Keung; HKSAR v Vasquez Tarazona Jesus Juan (1996; 2001)	130	Kelly v R (2006)	14
<b>INDIA</b>		Loumia v DPP (1986)	24
Apparel Export Promotion Council v Chopra (1999)	110	Minister for Provincial Government v Guadalcanal Provincial Assembly (1997)	59
MX v ZY (1997)	120	R v K (2006)	18
<b>KIRIBATI</b>		R v Su'u & Ors (2007)	85
Attorney General v Mbwe (2006)	78	Tanavalu & Ors v Tanavalu & Solomon Islands National Provident Fund (1998)	28
Nabuaka v The Republic (2006)	35	Teikamata v R (2007)	50
Toakarawa v The Republic (2006)	48	Ulufa'alu v Attorney General & Malaita Eagle Force & Ors (2001)	87
<b>NAMIBIA</b>		<b>SOUTH AFRICA</b>	
Nanditume v Minister of Defence (2000)	113	Hoffmann v South African Airways (2000)	118
<b>NAURU</b>		Khumalo & Ors v Holomisa (2002)	106
In re Lorna Gleeson (2006)	4	Perreira v The Buccleuch Montessori Pre-School and Primary (Pty) Ltd & Ors (2003)	112
<b>NEW ZEALAND</b>		PW v South Africa Department of Correctional Services (2003)	123
Northern Regional Health Authority v Human Rights Commission (1998)	104	<b>TONGA</b>	
<b>NIGERIA</b>		Fa'aoso v Paongo & Ors (2006)	20
Odafe & Ors v Attorney General & Ors (2003)	124	Funaki & Anor v Police (2006)	1
<b>PAPUA NEW GUINEA</b>		Puloka & Ors v The Kingdom of Tonga (2006)	71
In re Thesai Maip (1991)	31	R v Fungavai (2006)	49



R v Vola (2005). 68

Taione v Kingdom of Tonga (2004) 97

**TUVALU**

Katea v Niutao Kaupule & Satupa (2006) 92

Teonea v Pule O Kaupule & Nanumaga Falekaupule (2005) 83

**UNITED KINGDOM**

R v Secretary of State for the Home Department 128

ex parte Glen Fielding (1999)

**VANUATU**

Ayamiseba v Attorney General (Immigration) (2006) 72

Mariango v Nalau (2007) 54

Office of The Public Solicitor v Kalsakau (2005) 62

Public Prosecutor v Emelee & Ors (2005) 78