PACIFIC HUMAN RIGHTS LAW DIGEST

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INTRODUCTION

This is the third volume of the *Pacific Human Rights Law Digest (PHRLD) which for the first time is being produced as a partnership between the Pacific Islands Forum Secretariat and the Pacific Regional Rights Resource Team of* the Secretariat of the Pacific Community.

In October 2005, Pacific leaders endorsed the Pacific Plan; a regional framework for development. The Pacific Plan contains specific objectives to advance human rights which are in support of the Leaders' Vision stated as, "*We seek a Pacific region that is respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values and for its defence and promotion of human rights*".

Objectives 12.5 of the Pacific Plan supports the ratification and implementation of international human rights norms and standards. In support of this objective, this publication tracks the implementation of international human rights standards through the Pacific courts.

The Pacific Islands Forum Secretariat works with SPC /RRRT due to its years of experience working with and training human rights non-governmental organisations (NGOs), law students, lawyers, magistrates and judges in the Pacific region. 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 analysed recent human rights case law that can be used in the courts as precedents and as tools for policy initiatives. PIFS 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), which contains a large number of regional judgments.

The Digest might also be of value 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 advocates 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. PIFS and SPC /RRRT combined have a vast network of regional and local level human rights actors , who are using the law as a tool for change in governance and human rights.

A new legal precedent does more than create a standard to be applied in the courts; it can also be used by human rights stakeholders to create new policy or practice, whether at micro (community), meso (institutional) or macro (policy) levels.

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 www.paclii.org or on request from SPC /RRRT.

ABOUT THE PACIFIC ISLANDS FORUM SECRETARIAT (PIFS)

The Pacific Islands Forum is a political grouping of 16 independent and self-governing states. The Pacific Islands Forum Secretariat is based in Suva, Fiji. The Secretariat's mandate is delivered through the annual Leaders' Communiqués and high level ministerial meeting decisions.

The Forum Secretariat is led by the Secretary General (currently Tuiloma Neroni Slade of Samoa) who is directly responsible to the Forum Leaders and to the Forum Officials' Committee (FOC). FOC is the Secretariat's governing body comprising representatives from all Forum members.

The Forum Secretariat is also mandated to coordinate the implementation of the Pacific Plan for strengthening regional cooperation and integration.

In 2004, leaders of the 16 Member States of the Pacific Islands Forum adopted a Vision for '*a region ...that is respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values and for its defence and promotion of human rights*'. A year later Forum Leaders agreed to give effect to their Vision through the "*Pacific Plan for Strengthening Regional Cooperation and Integration*" (the Pacific Plan) through four pillars – Economic Growth, Sustainable Development, Good Governance and Security.

Initiative 12.5 of the Pacific Plan, under the Good Governance pillar, encourages the "*appropriate ratification and implementation of international and regional human rights conventions, covenants and agreements, and support for reporting and other requirements*". Human rights are frequently referenced in the Pacific Plan because they complement its strategic objectives, ensuring a stable environment that will provide equal opportunities and subsequent prospects for development of Forum Island Countries and their citizens. In recognising the importance of human rights Forum Leaders have created a conducive environment for Pacific Islands Forum citizens to realise their full potential and constructively contribute to the development of their countries.

ABOUT SPC/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 inter governmental regional organisation that provides technical assistance, policy advice, training and research services to 22 Pacific Island countries and territories.

PIFS and SPC /RRRT acknowledges the financial assistance of the **Australian Agency for International Development (AusAID)** in preparing and publishing Volume Three of the Digest.

THE ROLE OF LAWYERS IN ADVANCING HUMAN RIGHTS

ADDRESS by TUILOMA NERONI SLADE
Secretary General, Pacific Islands Forum Secretariat

at the PACIFIC REGIONAL LAWYERS TRAINING WORKSHOP ON ADVOCACY/LITIGATION ON HUMAN RIGHTS

Auckland, 29 November 2010

The Project Manager, Secretariat of the Pacific Community / Regional Rights Resource Team

Distinguished Law Officers and participants
Ladies and gentleman

First, may I thank the Secretariat of the Pacific Community through the Regional Rights Resource Team (SPC/RRRT) for the very kind invitation for me to provide a keynote statement at this important Regional Workshop.

I have been asked to speak about the role of lawyers in advancing the rule of law, democracy and human rights. By the nature of their profession lawyers have a place of leadership and an essential and fundamental role in the protection of human rights. They are the natural guardians of international human rights law. The professional independence and standards of their calling equip lawyers especially well to ensure that human rights standards are properly advocated and enforced within the judicial and governmental processes, and that individuals whose rights have been violated can find effective remedy domestically and, increasingly, to seek such remedies internationally. It comes with their professional responsibility that lawyers be properly informed on human rights standards, in particular those universally proclaimed and agreed to in international legal instruments and acknowledged under international law.

Universal Declaration

It is well known that the Universal Declaration of Human Rights of 1948 is the basic statement on human rights, and that together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) they provide comprehensive definitions and the pledge of humanity for the promotion of universal respect for human rights and fundamental freedoms and for their observance. What is perhaps less known is that the Charter of the United Nations in 1945 had established the strong and essential bond between peace, justice and development and the rights of the human being.

Human rights are rooted in the nature and the condition of the human person. There is no peace where human rights are denied or systematically violated and where there is no development to bring about poverty elimination. In contrast, respect and promotion of human rights creates an environment favourable to both peace and development.

Read together, the Declaration provides greater clarity and definition to the rather terse reference in the Charter to "human rights and fundamental freedoms." Indeed, by virtue of articles 55 (c) and 56 of the Charter, States are obliged to take action for the achievement of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

The evolution of international human rights law has revealed that civil and political rights and economic, social and cultural rights are two sides of the same coin of universal human rights. In the Vienna World Conference on Human Rights in 1993 it was concluded that, "all human rights are universal, indivisible, interdependent and interrelated." It is so because human rights belong to all cultures, and intrinsic to all nations. They are not open to optional choices for one cannot pick and choose among rights; rather we are bound by all. It is imperative therefore that there be effective protection and effective promotion of social progress and better living standards in larger freedom, for the expression of human rights is about the desire of all people to live free from the horrors of violence, famine, disease, torture and discrimination. This has been the yearning of all people from time immemorial, and remains a vital force today.

It is the same impetus ascribed for the Pacific Plan Vision of 2004. As framed by Forum Leaders we seek for the Pacific a "region of peace, harmony, security and economic prosperity, so that all of its people can lead free and worthwhile lives." It is a vision of our Pacific which in essence claims and reasserts universal rights and freedoms.

Progress and Development

The verdict of history is that the twentieth century – the span of our own lifetime, for many of us in this room - has been the bloodiest in the modern era. And we know that through the cauldron of the Second World War, and the First World War before that, and as a result, humanity was able to produce the Universal Declaration.

Today, with an ever-globalising world, we face even more serious challenges, of urgent social change and development in order to tackle global poverty, to arrest widespread environmental degradation and to cool a warming planet. Meantime warfare and violation of people, woman and children in particular, remain a scourge in too many places. In the circumstances of our world today, the principles enshrined in the Declaration are the yardstick by which we need to measure human progress. These are principles which "lie at the heart of all that the United Nations aspires to achieve in its global mission of peace and development" .

Since its adoption in 1948, the Universal Declaration of Human Rights has extended its reach far and wide. It has served as a model for national constitutions and laws for many countries, including in the Pacific. Its provisions have supplied countless guidelines for national courts, parliaments, governments, lawyers and other professionals, and non-governmental organisations

throughout the world. But, there remains a significant gap between the high principles of the Declaration on paper and the facts on the ground. Every day, hundreds of millions of people worldwide, including the Pacific, experience serious violations of their human rights.

In some parts of the world there has tended to be a focus on violations of civil and political rights even though economic and social rights are daily concerns of the people. As it is said in the African Charter on Human and Peoples' Rights the "satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights". This is an aspect we in this region might bear in mind noting that in more recent times, the link between the rule of law, effective human rights protection and economic progress has been emphasised by the United Nations in connection, for example, with the achievement by member countries of the Millennium Development Goals (MDG/s). Achievements of the MDGs would seem to be a potential problem area for the Pacific in that there is no procedure in place for a human-rights assessment of MDG performance; and yet, it is clear from the language of the 'tracking' MDG reports that regionally and in many member countries of our region there are significant shortfalls with respect, for instance, to social protection, to the need to reduce persistent gender gaps and the needed improvements to governance standards and systems. It would seem to be a matter that might require attention in the next round of MDG assessments.

Rule of law

In all this the role of lawyers is fundamental, because they are the advocates and practitioners of the law, trained and versed, as they would be, in the technicalities and procedures of Government, of Parliament and the Courts and the justice system. The recognition of equality before the law in the Universal Declaration and the two International Covenants means that everyone has the right to effective remedy by competent national tribunals, to have full access to a fair and public hearing by an independent and impartial tribunal, to be presumed innocent until proven guilty, to exercise freely the right to freedom of opinion and expression, to assemble peacefully, to take part in the government of the country, and so on . Without the professional interventions of lawyers, and of other actors, the prospects for members of society in their exercise of rights would be illusory and the high principles of the Declaration and the Covenants would more likely remain sterile and unenforced.

Moreover, as emphasised in the Universal Declaration, "it is essential ... that human rights should be protected by the rule of law" . This means that for the proper enjoyment of rights and for their effective protection, human rights must be provided for and effectively protected by domestic legal systems. Part of the richness and strength of the European system and the jurisprudence of the European Court of Human Rights is the fact that every Member State accepts as legally binding the principle of the rule of law. In this respect as well, with the legal profession in every Pacific country having an established role in the national system of law and justice, Pacific lawyers have a natural place for leadership and engagement – and, as warranted, activism in the protection of human rights.

International human rights norms

As the practitioners lawyers would, of course, be expected to understand the national system of law and procedures. But, I would imagine that for some if not for many Pacific practitioners the situation with respect to international human rights law would be different and more complex. Even with the reaches of the Internet, part of the challenge would be access to information, for there is a great deal of material on a significant range of international Courts and tribunals, the Human Rights Council and various organs of the United Nations system and about treaties and other international instruments.

There is also the fact that with the adoption of the Universal Declaration the elaboration of human rights norms has proceeded more rapidly at the international level than under national laws. The main international instruments, along with the Declaration, are the two International Covenants. There are, in addition, numerous instruments which are more specific and detailed on certain rights, such as on the rights of the child , the elimination of discrimination on the basis of race and sex , the prohibition of torture and genocide , etc. In some cases, these are supplemented by regional treaties like the African Charter on Human Rights and People's Rights. Such treaties may affect domestic law more directly, but generally international and regional instruments do not automatically become effective in domestic legal systems.

Domestic application and ratification of international instruments

The domestic application of international norms in the national legal system has assumed importance, partly through the increasing engagement of Pacific countries with the affairs of the international community, mainly through the United Nations, and the need to discharge particular State obligations (in the struggle against global terrorism, or in the practical implementation of the Rome Statute of the International Criminal Court, for example). It is partly also because when a State signs and ratifies an international human rights treaty, the State is obliged to incorporate the treaty principles into domestic law. For example, the International Covenant for Civil and Political Rights requires member States to "respect and to ensure" the rights of citizens and residents, to adopt necessary measures if not already provided for by domestic law and to provide remedies. Most treaties are not as specific and leave the implementation to the judgment of the national authorities.

We know from various reports and studies initiated and facilitated by the New Zealand Human Rights Commission that the ratification of international human rights treaties and the related implementation and reporting of obligations are significant concerns for the Pacific States. Indeed, unless there has been dramatic improvement in recent times, the Pacific region has been known to have the lowest ratification rates worldwide of the nine core international human rights treaties.

Regional mechanisms

In the consideration of international developments, necessary regard must be given to the condition and realities of our countries and to the framework of mechanisms now in place in the Pacific region. Human rights is not entirely new to the regional agenda. In a variety of

ways we see the formulation of universal standards and norms in the constitutions and bills of right of Forum countries. And the possibility of a regional human rights institution has been turned over and over again, and no doubt we need to continue to do so.

As I have noted, we have a Pacific Vision for a peaceful, secure and prosperous region "so that all of its people can lead free and worthwhile lives." It is a fine vision. And we have the declared determination and commitment of Forum Leaders to make the Pacific a region that is "respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values and for its defence and promotion of human rights." What we need to ensure is to match vision and aspiration with serious effort to ensure credible results on the ground.

We need also to acknowledge that our region faces significant human rights issues, for example (to paraphrase from a report facilitated by the New Zealand Human Rights Commission and the Pacific Islands Forum Secretariat) in relation to employment, freedom from discrimination, protection and equal treatment of people living with HIV/AIDS, violence against women and children, the right to health (including to water and housing), environmental degradation and associated climate change concerns, the rights of those detained and incidents related to tribal or land disputes .

In 2005, Forum Leaders agreed to give effect to their Pacific Vision through the "Pacific Plan for Strengthening Regional Cooperation and Integration" under the four pillars of economic growth, sustainable development, good governance and security for the region. Human rights is included in the "good governance" pillar in the manner of an acknowledgement by Forum Leaders of the fundamental role of human rights in creating a conducive environment so that citizens of the Pacific are able to realise their full potential and constructively to contribute to the development of all Forum countries. Specifically, the Pacific Plan (initiative 12.5) calls for the "appropriate ratification and implementation of international and regional human rights conventions, covenants and agreements, and support for reporting and other requirements." Furthermore, human rights are referenced throughout the Pacific Plan as complementing its strategic objectives for ensuring a stable environment for economic development based on equal opportunities for all regardless of ethnicity, background or religious convictions.

From another perspective, we have the Aitutaki Declaration on Regional Security adopted in 1997 by which Forum Leaders accepted the need for the region to take on a more comprehensive approach to regional security consistent with the United Nation's Agenda for Peace. The Agenda for Peace highlights respect for democratic principles at all levels of society, and the importance of "democratisation" in nation states for stability, respect for human rights and the need to strengthen new democratic institutions to address conflict. The Aitutaki Declaration recognises "good governance" as a guiding principle for security cooperation in the region.

In the context of human rights, the Biketawa Declaration of 2000 would rank as one of the key statements in the elaboration of earlier Forum standards like those covered in the Aitutaki Declaration, and in the reaffirmation by Forum Leaders and their commitment to a number of guiding principles for the region, including the following:

- good governance in a manner that is open, transparent, accountable, participatory, consultative and decisive but fair and equitable;
- belief in the liberty of the individual under the law, in equal rights for all citizens regardless of gender, race, colour, creed or political belief and in the individual's inalienable right to participate by means of free and democratic political process in framing the society in which he or she lives; and
- upholding democratic processes and institutions which reflect national and local circumstances, including the peaceful transfer of power, the rule of law and the independence of the judiciary, just and honest government.

The quick summation of the regional instruments and political pronouncement of Forum Leaders is only a brief account. But I believe I would have provided enough to convey a sense of the Forum's commitment to participatory and democratic values and the key importance of human rights. The principles and guidelines set for the region have developed gradually and over time, informed and influenced by national and regional standards, and certainly by international developments. While pursuit of democratic principles in each Forum country will differ, shaped by differing histories, unique cultures and diverse national expectations, a core commitment to democratic values is, I believe, now clearly evident from the Forum instruments and principles I have referred to. By these principles the Forum stands as the primary vehicle for promoting and protecting democratic norms and helping to foster democratic practices in the region.

Forum Secretariat support

In this connection, I am happy to report that the Pacific Islands Forum Secretariat has established a desk for human rights to support Forum island countries with treaty ratification, reporting and implementation; and also to say that we are now seeking from the European Union and from others assistance to strengthen our capacities in this area. I am very pleased and proud that Mr Filipo Masaurua is now with the Secretariat to lead this important work.

We in the Secretariat do recognise that the capacity of legal institutions is fundamental to the ability of our Member countries to uphold and protect human rights. It is generally recognised that Forum island countries face significant challenges in resourcing their legal institutions, including the courts and tribunals. In light of region-wide concerns, the Forum Secretariat is about to embark on a study to examine the issues and causes in greater detail and with a view to ascertaining feasible options for improvements. The study will also examine legislative drafting services in the context of related issues such as the incorporation of international human rights norms into domestic law, and also the feasibility of, for example, regional approaches where such approaches might be appropriate. The study will involve wide consultation with public legal sector stakeholders and I would encourage your cooperation and engagement in this process, which we plan to commence early in 2011.

It would seem to me that one of the basic difficulties is not so much the applicability or inapplicability of international human rights law, but rather the general unfamiliarity with its provision and how little is known of the international provisions in national systems – perhaps even in traditional legal training as it was in my own time.

I believe that members of the legal profession, including the judiciary, have a moral obligation to assist in the development of the community along with civil society groups based upon the rule of law; and, at the more practical level, lawyers and judges have a professional responsibility to maintain their educational and practical proficiency through regular professional programmes. I express to the RRRT and the organisers high commendation for this training workshop. I also understand that a Pacific Human Rights Lawyers Network has been established and I express appreciation for that initiative as well. We know that within the United Nations system Basic Principles on the Role of Lawyers have been developed in line with the international human rights instruments. But, in truth, such principles would need to be translated into practical standards for their effective use in our region, including their support and recognition by member Governments.

While only forty-eight States adopted the Universal Declaration in 1948, it was reaffirmed by 171 States at the Vienna World Conference on Human Rights in 1993 when they declared "all human rights are universal, indivisible and inter-dependent and inter-related". Within the United Nations, many more countries are now engaged. Yet, serious violations of human right occur constantly around the world, including in our region. It is a matter of public record that pursuant to the Bitekawa Declaration Forum Leaders have taken action to suspend the participation of a Forum member country for its failure to comply with Forum values and democratic principles, and that there are serious concerns about the infringements under the prolonged Public Emergency Regulations.

I have spoken of the growing awareness of the human rights dimensions in important international work being carried out especially under the global outreach of the Millennium Development Goals, and of the significant shortfalls in the record of performance from countries of our region. In the past two years Forum Leaders have given clear direction of the need to address the disparities on gender issues and for attention to sexual and gender based violence in particular. The Forum region has responded to address the inequalities which exist for persons affected by disabilities and who suffer from disabilities. But there is serious inadequacy and inability to correct the disproportionate under-representation of women in Parliament and in other senior decision-making levels of Pacific society. We need to do more to end racial discrimination in all its forms, to ratify international human rights treaties, to adopt national plans of human rights action and include human rights in national economic priority setting, to ensure human rights education for all and to establish national human rights institutions.

Conclusion

As I close, let me say that the way in which justice is administered in a society is one of the basic indicators of its well-being. It is why there is insistence in the Universal Declaration that human rights be protected by the rule of law. The universality of the rule of law and of fundamental human rights means that it is the sovereignty of the people, which is the true source of national power and legitimacy. Let me also say that I believe the role of lawyers is to ensure the functioning of the rule of law and the achievement of the purpose of the Universal Declaration of Human Rights.

Thank you.

Tuiloma Neroni Slade

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USING THE DIGEST

This is the third volume of the *Pacific Human Rights Law Digest*. It continues the practice of the previous volumes, in publishing summaries of leading cases from the Pacific and from further abroad that illustrate important developments in the judicial application of human rights standards. This volume includes for the first time a section devoted to issues of domestic violence and family law. This section has been added at a time when many countries in the region are considering legislative reform in these closely related areas, which have a special impact on the human rights of women and children.

This volume is divided into three parts:

Part I contains summaries of cases from various Pacific Island countries (PICs) that consider human rights principles and rights contained in the bills of rights of PIC constitutions or in international human rights instruments.

Although most are decisions handed down since the completion of Volume Two of the Digest, several older decisions have been included. Some of these have been referred to in recent cases or legal writing, and some have only recently been sent to us by judges, magistrates or lawyers. Although the collection is by no means exhaustive of all cases in the Pacific that deal with human rights, it does contain a representative sample of the range of current issues and the most important and interesting cases from the region.

Part II contains some significant international human rights judgments that discuss various fundamental rights and freedoms in bills of rights or human rights Conventions, with particular attention given to cases regarding violence against women.

Part III contains some significant and interesting cases from the PICs, relating to family law and violence against women. Many of these have been the subject of discussion by RRRT and its partner organisations as part of RRRT's project entitled 'Changing Laws; Protecting Women.' The project seeks to provide the necessary information and technical assistance, including legislative models, to enable key stakeholders (government and civil society) within a country to make positive decisions about addressing violence against women through legislative change.

Within the three parts, the cases are arranged in alphabetical order based on the subject matter of the heading. Each summary contains a brief set of facts, the key human rights issue or issues in the case, the decision and a commentary on the case. Each summary also lists the laws and Conventions considered by the court in deciding the key issues. 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 providing the inspiration to produce a publication specifically focusing on the Pacific region.

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

ACKNOWLEDGEMENTS

The Pacific Islands Forum Secretariat and the Regional Rights Resource Team of the Secretariat of the Pacific Community would like to thank all law students, lawyers, judges and magistrates who made unpublished judgments available to us. We would also like to thank former staff members and interns who assisted during the initial stages of this volume of the Digest.

EDITORIAL REVIEW

Overview: Effective remedies for human rights infringements

As with previous volumes, the cases in Volume Three of the Digest illustrate the wide variety of contexts in which human rights standards may be invoked and the extensive range of judicial responses and remedies available within domestic legal systems where rights have been infringed. The importance of effective remedies was recognised in Article 8 of the Universal Declaration of Human Rights, which states:

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

This commentary begins by reviewing the cases in this volume in terms of the judicial responses to proven breaches of human rights standards. The picture that emerges is that the superior courts in the Pacific have been impressive in applying traditional judicial remedies to redress breaches of human rights in the cases before them. However, they have generally not been invited to develop responses which impose positive duties on governments to develop programmes and policies to better protect rights. Precedents for these judicial remedies exist in other jurisdictions. For example, in *Minister of Health (South Africa) v Treatment Action Campaign* (2002) 5 SA 721, 1 PHRLD 86, the Constitutional Court in South Africa ordered the government to devise and implement programmes to realise the right to access health care in relation to HIV. In *Swann v Charlotte-Mecklenburg Board of Education* 402 U.S. 1 (1971), the United States Supreme Court affirmed orders made by lower courts requiring education authorities to bring forward plans for removing unconstitutional racial segregation in schools. In *Mehta v State of Tamil Nadu* AIR 1991 SC 417, the Supreme Court of India ordered the State to give effect to the constitutional and statutory rights of children, by taking a range of steps to improve the welfare of children working in match factories. Even without mandatory remedies of this kind, the decisions reported in this volume can still be viewed as posing a challenge to governments in the relevant countries. In many cases, individual infringements of human rights standards are not isolated events: they often highlight or flow from systemic failures or widespread practices. Governments committed to observing and protecting human rights need to be pro-active in identifying the underlying conditions in which the individual breaches have occurred and in implementing strategies to reduce the likelihood of future infringements.

In a number of Pacific Constitutions, the courts have a power to give an ***advisory opinion*** regarding the constitutionality of proposed legislation before a Bill becomes law. The case of *President of the Republic of Vanuatu v Speaker of Parliament* provides an example: the Constitution of Vanuatu allows the President of the Republic to refer a Bill to the Supreme Court if the President considers that the Bill is inconsistent with the Constitution. In this case, the Court delivered its opinion that the Bill for the Family Protection Act 2008 was not inconsistent with the Constitution and invited the President to assent to the Bill. This advice was duly followed and the Bill became an Act. If the advice is that part of the Bill is unconstitutional, that part cannot be promulgated. Indeed, if that part in inseparable from the rest of the Bill,

the whole Bill proceeds no further: *In re the President's Referral, President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43. This mechanism has the advantage that no-one's rights need to be breached before the question reaches the courts. Provided the President remains vigilant to possible infringements, it is a useful means of preventing proposals that would undermine constitutional rights from ever becoming law.

In other cases where the very subject of the litigation is the constitutionality of legislation or the legality of an executive decision, a judicial ***declaration*** may provide an adequate remedy. A declaration is an order that merely states what the legal position is; it does not order the parties to do or refrain from any act. Provided both parties stand ready to act in accordance with the law as declared by the court, a declaration will resolve the immediate issue. For example, in the case of *Teonea v Pule oKaupule of Nanumaga,* the Tuvalu Court of Appeal ruled that the decision of the island council to prevent the establishment of new religions on the island was contrary to the guarantee of freedom of religion in the Tuvalu Constitution. That was the only relief sought in the case, although claims for damages for those adversely affected by the island council decision were expected to follow if the challenge succeeded. *Samoa Party v Attorney General* provides a further example, although in this case the Court of Appeal in Samoa ruled that the legislation limiting the right to challenge the validity of elections was not unconstitutional. Similarly, in *Jackson v Attorney General*, the application for a declaration failed when the Supreme Court of Samoa held that the law switching road traffic from the right hand side of the road to the left hand side was not a breach of the constitutional right to life.

If the State is not willing to accept and abide by a judicial decision, no judicial remedy, declaratory or otherwise, will be effective. In *Qarase v Bainimarama*, the Court of Appeal for Fiji Islands granted declarations to the effect that the dismissal of Prime Minister Qarase and the other Ministers and the dissolution of Parliament were unlawful and in breach of the Fiji Constitution; it declared that the appointments of Commodore Bainimarama as Prime Minister and his Ministers were not validly made; and it declared that it would be lawful for the President to appoint a caretaker Prime Minister, for the purpose of advising a dissolution of the Parliament and for advising that a general election be held. The refusal of Commodore Bainimarama and his government to accept the decision of the court effectively ended, at least for the time being, the operation of the existing legal order.

Many other cases involve a ***collateral challenge*** to the validity of a law or the legality of an executive action. Typically, these arise where one party's case relies on a provision in a law or on an executive action, and the other party calls into question the legality of that provision or action. For example, in *State v AV,* a person convicted of a crime appealed on the basis that the statutory corroboration requirement for the evidence of a child witness had not been met. Although this was factually true, the State successfully defended the conviction on the basis that the statutory requirement was itself unconstitutional, so that there was no error in not applying it. The same kind of argument can be made by the defence in a criminal case, by demonstrating that the law establishing the crime alleged to have been committed is unconstitutional, as occurred in *Nadan v State* [2005] FJHC 252, 1 PHRLD, or by showing that the sentence is unconstitutional, as was argued in *Fangupo v R*. In that case, the Court of Appeal of Tonga indicated that it was likely that a sentence of whipping would be unconstitutional.

Groupe Nairobi (Vanuatu) Ltd v Government of the Republic of Vanuatu illustrates collateral challenge in a civil context. There, a company challenged the decision of a tax authority to refuse the company a tax refund. The refusal was justified under a later amendment to the tax law which operated retrospectively, but the company argued that the amendment was unconstitutional, as it amounted to an unjust deprivation of property. The challenge failed, as the court held that the company's clam for a refund was not 'property', and even if it was, the deprivation was not unjust.

Other judicial responses to unconstitutional action or human rights infringements can be seen at various stages of criminal proceedings. In *Takiveikata v State*, the court granted a ***permanent stay of proceedings*** as a remedy for an abuse of process, arising when the accused was kept in detention for an excessive period and denied access to a lawyer. In *R v Setaga*, proceedings were also permanently stayed because the excessive delay in commencing the prosecution against a child created a distinct risk of an unfair trial. A similar outcome was achieved at first instance in the Australian case of *R v Moti*, but reversed on appeal when the court ruled that the prosecution conduct in providing financial support for the complainant and her family was neither improper nor unlawful.

In *Police v Vailopa*, the court responded by ***excluding evidence*** of a confession made by a child suspect when questioned by the police in the absence of an independent adult. Similarly, an argument for exclusion of evidence was made in *Singh v State*; it was rejected because obtaining the evidence by a concealed recording device was not considered unlawful or improper.

Courts also consider breaches of human rights standards to be relevant to the ***sentencing*** of convicted offenders. In *Police v Palemene* and in *R v Teokila*, the inhumane conditions of the offender's detention pending trial justified a reduction in the sentence that would otherwise have been applicable. By contrast, in both *State v Krishna* and *Police v Faiga*, the recognition in the Convention on the Rights of the Child of the seriousness of crimes against children justified a stronger sentence against an offender whose victim was a child.

Breaches of human rights standards in the context of criminal investigations or detention can also give rise to civil liability for the State or its agencies. In *Navualaba v Commander of Fiji Military Forces*, the court awarded ***damages*** to a suspect severely assaulted while in military custody. The claims were based on the commission of the private law wrong (or tort) of assault. Where the wrong is proved, a person can be compensated in civil proceedings for resulting financial losses such as loss of income or medical expenses and for pain and suffering. The court was also prepared to award an additional sum as exemplary damages, which are designed to punish the wrongdoer and deter future breaches. Common law claims can also be based on wrongful detention, as illustrated by *Commissioner of Police v A Mother*.

An alternative strategy is to seek damages for breach of constitutional rights. The availability of this public law remedy was recognised in Fiji in *Proceedings Commissioner, Fiji Human Rights Commission v Commissioner of Police*. There are some differences in damages available in public law, as compared to private law claims. Importantly, the Fiji Court of Appeal indicated that exemplary damages would not generally be awarded for breach of constitutional rights,

as the purpose of the damages was to compensate the plaintiff for any losses suffered and to vindicate the plaintiff's rights; it was not to punish the defendant. In *Attorney General v Yaya*, public law damages were awarded for breach of privacy after police published a list containing details of persons suspected of committing serious crimes. The damages compensated the suspect for his humiliation, loss of dignity and injured feelings.

As the court held in *Navualaba*, it is not possible to recover both private law and public law damages for the same wrongful conduct. Consequently, plaintiffs will need to consider which type of claim will be more advantageous. In assessing this, it should be recognised that not all human rights standards are protected by private law: for example, the right to non-discrimination has not traditionally been protected by the common law; nor has the right to privacy (although that has changed in England since the enactment of the *Human Rights Act 1998)*. So the only recourse may be an action seeking constitutional damages, assuming that the rights to non-discrimination or privacy are included in the country's Bill of Rights. The action for constitutional damages may also be the only option if there is statutory immunity for claims in tort, but not for public law claims (see *Simpson v Attorney General* [1994] 3 NZLR 667). On the other hand, where there has been serious wrongdoing by agents of the State, the availability of exemplary damages might make a claim for private law damages more attractive, although the possibility of obtaining a greater award of damages in this way may be more apparent than real, since the seriousness of the wrongdoing will be taken into account in the assessment of public law damages.

Human rights concerns can also be a consideration in deciding whether to award ***discretionary civil remedies*** such as injunctions. In *Datt v Fiji Television Limited*, the court relied on the freedom of speech as a factor in refusing an injunction to prevent the publication of allegedly defamatory statements. Similarly, in *Fiji National Provident Fund v Fiji Television Limited*, the court took account of the right to free speech in refusing an injunction to restrain publication of allegedly confidential information.

PART I

This part of the Digest contains Pacific Island cases in which the courts interpret human rights standards in their constitutions or legislation, apply international standards in ratified or unratified human rights Conventions, or consider how domestic and external frameworks affect each other.

Arrest and detention

Several cases arise from the misuse of power by police or other security forces in the context of arrest or detention of persons suspected of committing crimes. In some cases, over-zealous or insensitive investigative methods were used; in others, the security forces were found to have inflicted harm as a form of punishment, even though the suspect had not been charged and tried.

In *Proceedings Commissioner, Fiji Human Rights Commission v Commissioner of Police*, police investigating the abandonment of a new born baby required a female suspect to undergo an invasive gynaecological examination. The woman was under arrest at the time and had objected to the procedure. The Court of Appeal confirmed that the woman's constitutional right not to

be subjected to medical treatment or procedures without consent had been infringed. There was no need to balance this right against the public interest in investigating the crime, as the police simply had never been given power to require a suspect to undergo a medical examination or any other form of invasive forensic procedure. As it happens, no such power was needed: the police could have used other lawful investigative methods, such as questioning the woman's co-workers as to whether she had recently appeared to be pregnant, or examining the woman's medical file, which she had consented to. These steps would have removed her from suspicion. In *Commissioner of Police v A Mother*, the police kept a woman in custody for 10 hours longer than was reasonably necessary, even though the detention was within the maximum time permitted by the Constitution. The court emphasised that arrest should not be used, as it was in this case, to try to bolster a case against another person, by obtaining incriminating evidence from the person in custody. A far more serious delay occurred in *Takiveikata v State*, where the accused was detained under guard in hospital for over two months, initially without proper access to a lawyer. The court considered the denial of the accused's right to liberty and to legal advice to be so serious that the proceedings against him should be permanently stayed.

Navualaba v Commander of Fiji Military Forces concerned the violent and degrading treatment of a person who had surrendered himself to military officers and admitted to serious crimes. The court stressed that it was not for the military or police to determine issues of guilt and punishment – that is the function of the courts. Regardless of what crimes a person may have committed, he or she remains entitled to a fair trial and to protection when kept in custody pending trial. The police had also failed to provide such protection in *R v Teokila,* when they allowed members of the public to assault a man accused of defiling a young girl.

The conditions under which suspects are kept must also meet minimum standards of humanity and decency: in *Police v Palemene*, the accused was 'punished' even before he was charged with an offence. For seven days, he was kept naked, in a very dark cell, with no food and only a small container to use as a toilet. The trial judge who had visited the cell considered the conditions 'beyond comprehension.' He released the offender on the basis that he had suffered enough before the trial.

All of these cases demonstrate the essential role of the courts in insisting that those charged with upholding the law must themselves observe its limits. However, the rights of citizens cannot be secured by judicial decision alone. Governments also have a responsibility to train their security forces to operate within the limits of their legal authority, and to foster a culture within the forces that recognises their proper role within the criminal justice system.

Children

The Convention on the Rights of the Child (CRC), which most Pacific Island countries have ratified, contains a range of protections for children who are caught up in different capacities in the criminal process. In general, they require measures that will make allowance for the special vulnerabilities of the child, and will assist in the development of the child into adulthood. Several cases in the volume demonstrate how these concerns have been addressed by Pacific courts. It is notable that in these cases, the courts took account of the Convention even though no legislation had been enacted to give domestic effect to the relevant Convention obligation. This underlines

the increasing willingness of Pacific courts to draw on international human rights standards in the determination of legal questions.

Police v Vailopa established that in Samoa, a statement obtained by police from a child in the absence of the child's parent or other supporting adult could not be used in evidence against the child, unless it was a truly spontaneous statement. This rule serves not only to assist a child in a highly stressful and possibly confusing situation, but also to provide an independent witness to what is said and done in the interview. The latter is most important if the interview is not recorded, and the police account of events is unreliable, as happened in this case.
R v Setaga concerned an inexplicably long delay in bringing an accused child to trial. The alleged offence had occurred when the child was 13, yet proceedings were not commenced until 4½ years later. Such a delay would be unacceptable for an adult accused, but is even more harmful for a child. The risks of an unfair trial as a result of the delay were great, especially as one of the issues was whether the accused appreciated the nature of his action at the time of the alleged offence. Assessing his understanding in such distant hindsight would have been difficult, if not impossible. The court permanently stayed the prosecution.

The special vulnerability of children is also recognised as an aggravating factor in sentencing an offender who has committed a crime against a child. This was recognised in Fiji in *State v Krishna* in relation to the use of corporal punishment by a teacher on a child, and in Samoa in *Police v Faiga*, a case of indecent assault on a child. In both cases, the courts referred specifically to the CRC in justifying a sterner sentence. In the Samoan case, the court also called for a review of the available penalties in such cases, to better implement the obligation to protect children arising under the CRC. The reported cases are illustrative of the increasing reference to the CRC in the context of sentencing of persons convicted of crimes against children.

Children should also ultimately be better protected as a result of the decision in *State v AV*. There, the High Court of Fiji struck down the statutory rule that no one could be convicted on the uncorroborated evidence of a child who testified without taking an oath. It also abolished the common law requirement requiring a warning that it was dangerous to convict on the uncorroborated evidence of a child testifying on oath. The corroboration rules were not only highly technical and confusing; they proceeded on the unfounded assumption that some classes of witnesses are inherently less reliable than others. The Fiji Court of Appeal had already struck down a similar requirement for the evidence of female complainants in sexual offence cases (*Balelala v State* [2004] FJCA 49, 1 PHRLD 4). In *State v AV*, the court concluded that the rule in relation to children was also discriminatory and contrary to the Fiji Constitution. The result is that the trier of fact will still need to assess the reliability of the particular child's evidence, and have regard to any demonstrated weaknesses in it. It will still be necessary to establish guilt beyond reasonable doubt, which will remain a formidable task, particularly where children are abused in private. Even so, the removal of the corroboration rules will assist by avoiding an unnecessary and confusing distraction and by treating child witnesses with the same dignity and respect as adults.

In *Public Prosecutor v Nawia***,** the accused had been convicted of causing death by reckless driving. As part of the sentencing process, the court had to consider whether to order compensation to the families of the deceased. It was in this context that the court had to consider the customary

reconciliation ceremony performed by the accused, which had included the offering of a young girl as reparation. The court expressed its strong disapproval of this customary practice that treats girls as a commodity: it was contrary to the Vanuatu law, the CRC, and to Christian principles. The court ordered that the girl be returned to her parents.

The other case in this grouping concerns the issue of child abduction. The Hague Convention 1980 seeks to ensure the prompt return of children who have been wrongfully removed from, or retained outside, the country of their normal residence. State parties to the Convention are expected to order the return of the children without a detailed examination of whether the parenting arrangements in the home country are the most appropriate for the child. As such, compliance with the Hague Convention may at first seem to be at odds with the CRC, which requires the child's best interests to be a primary consideration in all actions affecting the child. However, as the decision of the Cook Islands court in *Marsters v Richards* recognises, prompt return is generally in the best interests of the child: it will often re-establish the child's contact with both parents; it promotes continuity in the child's life; and it allows decisions about contact and custody to be made in the jurisdiction which is likely to have the most relevant information about the child. It is also likely to deter further wrongful abductions. Indeed, the CRC, in Articles 11 and 35, contemplates that States will take multilateral measures to prevent the abduction and non-return of children. Consequently, even in a State not a party to the Hague Convention, it will still be appropriate for a court to apply the spirit of the Convention, by ordering the return of the abducted child to the home country in all but exceptional cases. In doing so, it will be acting in the best interests of the child.

Liberty

The withdrawal of liberty inherent in imprisonment is a serious step, not to be taken without sound justification. Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognise that failure to meet civil obligations (such as a contractual duty or a debt) do not justify the imposition of criminal penalties, including imprisonment. To do so would in effect criminalise poverty. *Naylor v Foundas* affirms these principles by holding that it is not permissible under the Vanuatu Constitution to imprison a person for failure to pay a debt. It is necessary to show that the person has the means to pay, and has wilfully refused to do so, before imprisonment even becomes an option.

Life

The right to life is perhaps the most basic right of all, but the scope of a State's duty to protect the right will depend in part on how the right is expressed in the relevant Convention or constitution, and how the language is interpreted. Does the provision merely prohibit the arbitrary taking of life by the State, or does it create a positive duty on the State to do what it reasonably can to reduce or eliminate known threats to life? Different answers have been provided in different jurisdictions, depending partly on the wording of the applicable guarantee of the right to life. For example, decisions under the European Convention on Human Rights recognise that States may have a duty to take reasonable steps to avoid a real and immediate risk to the life of an identified person from the criminal acts of other persons, where the State knows or ought to know of the risk: see *Opuz v Turkey,* discussed in the commentary to Part III under the heading 'Violence against Women.' The duty to take positive steps to protect life may also arise where the State is engaged in activities which might unintentionally put lives at risk, such as conducting nuclear testing (see *LCB v United Kingdom*, (1998) 27 EHRR 212). These derive from the particular language of the Convention, which begins with an explicit assertion in positive terms that 'Everyone's right to life shall be protected by law.'

In other instruments the language is more limited. For example, in Article 5(1) of the Constitution of Samoa, the right is expressed in less expansive terms: 'No person shall be deprived of his life intentionally, except in the execution of a sentence of a court following his conviction of an offence for which this penalty is provided by Act.' This difference of language prompted the Supreme Court of Samoa in *Jackson v Attorney General* to distinguish the cases based on the European Convention as inapplicable in Samoa. The case involved a challenge to a government decision to change the national traffic laws, from driving on the right hand side of the road to driving on the left hand side. The applicants sought to demonstrate that the change posed a real risk to the lives of road users, so that the law effecting the change infringed the constitutional right to life. They relied on the European Convention cases to support their argument for a positive duty on the part of the State to avoid foreseeable risks to life. However, the court relied on the express language of Article 5(1) to confine the right to life to cases of intentional deprivation. The court considered that there was no scope for a broader interpretation of the kind permitted by the different language in the European Convention.

Limits on Rights: Privacy/Religion/Speech

Few constitutional or human rights are absolute. Some rights have their own internal limits: for example, the freedom from arbitrary arrest contains an internal limit in terms of when an arrest is arbitrary. Additionally, most rights may be restricted in pursuit of other legitimate public interests, provided the restrictions are reasonably justifiable in a free and democratic society. Several cases in Part I required the courts to identify the internal limits of a right, or to engage in the process of balancing the competing claims of public interest and constitutional rights. In one case, the balancing was required to decide the constitutionality of a rule of law; in another to decide the legality of police conduct and in three others, it was required as part of the application of a discretionary rule.

In *Singh v State,* the Fiji Supreme Court had to decide whether the use of evidence obtained by the secret recording of a conversation infringed the constitutional guarantee of privacy. The court ruled that the evidence could be used. It reasoned that the right to privacy only protects matters that can reasonably be expected to be private, according to community standards. In modern life, people must be aware of the possibility of conversations being recorded, and those engaged in serious criminal activity cannot reasonably expect that any recording of a conversation will not be used against them. Hence there was no interference with the right to privacy arising from the use of the evidence obtained by a participant in the conversation, which revealed serious criminality. The court further held that even if there had been interference with the right, it was justifiable in the public interest, by providing reliable evidence of serious criminality.

By contrast, the Court of Appeal in Fiji did find an unjustifiable infringement of privacy in *Attorney General v Yaya*. The respondent had brought proceedings after his name, address and

image were published in a list of men wanted by the police. The list received extensive coverage in the media in Fiji. At the time, the men were all suspected of involvement in serious offences of robbery. The court held that the publication had interfered with the respondent's right of privacy, as he could reasonably expect that the information that he was a suspect would not be made public, at least until he had been arrested and charged. It therefore fell to the State to justify the interference with the right. While it would be legitimate for the police to disclose the information in circumstances where it was the only option reasonably available to them to detect and apprehend the suspects, the evidence before the court did not establish that such a situation had arisen. As the police had not shown that other less intrusive methods were not available, the court concluded that publishing the list was a disproportionate response and so not justifiable in a democratic society.

Teonea v Pule o Kaupule of Nanumaga required the Tuvalu Court of Appeal to balance the freedom of religion against the right of an island council to preserve traditional Tuvaluan tradition and culture by forbidding the establishment of new faiths on the island. The arguments were finely balanced, but the majority of the court found that the freedom of religion should prevail in this case. Any restriction on a protected freedom must be a proportionate response to a perceived problem. In this case, the ban on new religions was not proportionate, as the court found that less extreme measures were available to address any threats to the cohesiveness of the small island community. The islanders had already demonstrated their capacity to manage diversity, by allowing four other faiths to co-exist peacefully. Issues of proportionality also figured in the balancing exercise conducted in *Samoa Party v Attorney General*, which is discussed under the heading of 'Political Rights.'

Datt v Fiji Television Limited illustrates the reluctance of courts to restrain in advance the publication of material that is alleged to be defamatory. Courts generally allow publication to occur, and then compensate any persons who can prove that they have been defamed. This approach does limit the right of persons to protect their reputation, but it is done in the interests of the freedom of expression. In the particular case, the argument for publication was strengthened by the need to have allegations of wrongdoing by public officials brought to public attention, at a time when the Parliament was in abeyance as a result of a military coup. For similar reasons, the court in *Fiji National Provident Fund v Fiji Television Limited* declined to restrain the publication of a report alleged to contain confidential information about the working of a government agency.

In *Attorney General v Vaai*, the Supreme Court of Samoa had to weigh the interests of free expression against the need to maintain public confidence in the courts. The court found the accused guilty of contempt of court on account of allegations which unreasonably suggested bias on the part of the Chief Justice. The court concluded that the accused had exceeded the limits on free speech. While this restriction on free expression is recognised in the Samoan Constitution, it is one that must be applied carefully, lest the courts be seen as too robust in protecting themselves from criticism.

Political Rights/Rule of Law

Courts face a range of sensitive issues in deciding whether and, if so, how to adjudicate disputes involving the 'political' branches of government, namely the legislature and the executive. Not all such disputes are matters for judicial decision. In *Ulufa'alu v Attorney General* the court declined to rule on the validity of the election of the Prime Minister of Solomon Islands, because the Constitution required that issue to be determined by the Governor General, not the judiciary. The court also declined to consider whether the constitutional rights of certain Members of Parliament had been infringed, as those Members were not parties to the litigation.

However, where the plaintiff's constitutional rights in the political process have been affected, the courts have an important role to play. In *Samoa Party v Attorney General*, the Court of Appeal in Samoa recognised that the measures taken by Parliament to restrict challenges to the validity of elections posed some risk to the implied right to free and fair elections. However, it accepted the judgment of Parliament that these restrictions were reasonably necessary or proportionate to curtail excessive electoral challenges.

The Fiji Court of Appeal took a bolder approach in *Qarase v Bainimarama*, where more fundamental issues were at stake. (The issue of the President's power to make law by Proclamation had been sidestepped in *FICAC v Devo*, pending determination of the issues in the *Qarase* case.) The Court of Appeal was called upon to decide whether the elected government of Prime Minister Qarase had been lawfully deposed by the military commander, whose actions were later ratified by the President. It was accepted by the parties that this was a matter for judicial determination, however difficult the implications might be. The Court of Appeal held that nothing in the 1997 Constitution authorised the dismissal of the Prime Minister in 2006 or the appointment of the interim government. Given that the interim government had by then been in control of Fiji for more than two years, the court proposed a course of action to promptly restore the country to democracy, without reinstating the deposed Qarase government. Presumably, it considered this the most pragmatic solution in the circumstances, judging that it was the most it could do to uphold the Constitution and the rule of law. The following day, the President announced that the 1997 Constitution had been abrogated. The President then purported to appoint himself as Head of State and, a day later, to appoint the military commander as Prime Minister. The legal status of the abrogation, appointments and the ensuing actions of the government remain to be tested. If and when they are, the *Qarase* decision will provide a clear statement of orthodox constitutional principles and their application to the facts of 2006.

Property

In *Groupe Nairobi (Vanuatu) Ltd v Government of the Republic of Vanuatu* the Court of Appeal of Vanuatu drew heavily on European Court of Human Rights precedents in deciding that a retrospective change in a tax law did not amount to the unjust deprivation of property. The case illustrates the extent to which courts are likely to defer to legislative or executive assessments of the public interest where the raising and spending of public revenue is concerned. In this case, the court accepted the need for the retrospective law, to protect the revenue from an unanticipated and potentially crippling liability to pay VAT refunds.

Torture

Certain human rights standards are now so well recognised in international instruments and case law that they are generally regarded as forming part of customary international law. While it is difficult to define all of the rights protected in customary international law, there is broad agreement that the list includes torture in all its forms, which include cruel, inhuman and degrading treatment or punishment. Further, the prohibition on torture is thought to have the status of 'jus cogens', meaning that States may not derogate from it (that is, limit or suspend the right) in any circumstances. It follows that all Pacific countries, whether or not they have ratified the Convention against Torture, have an obligation in international law to refrain from torture.

In *Fangupo v R*, the Court of Appeal of Tonga gave a strong indication, without finally deciding, that the prohibition on torture could also be read into the national law. It appeared to suggest that the Constitution of Tonga should be read in the light of the customary international law rule prohibiting torture. Consequently, the general protections of 'freedom' and 'fair trial' in the Constitution might be interpreted so as to make unconstitutional a law allowing for a sentence of whipping. The case illustrates one way in which domestic law may be brought into conformity with fundamental international standards, without the need for executive or legislative action.

PART II

This part of the Digest contains cases from outside the Pacific raising human rights issues of interest and relevance to the Pacific.

Abuse of Process

R v Moti has already been discussed in conjunction with Pacific cases where the courts ordered a permanent stay in proceedings because of serious impropriety or illegality by the prosecution or law enforcement agencies. The decision of the Queensland Court of Appeal is of interest because of its finding that substantial payments to the complainant and her family were not sufficient reason to stay proceedings against the accused, a former Attorney General of the Solomon Islands.

Discrimination

Dalco Engineering Private Ltd v Padhye may at first sight appear to retreat from the generally progressive position taken by the Supreme Court of India in human rights cases. In this case, the court held that the Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 only applied to statutory corporations and not private corporations. However, this decision did not deny the possibility of horizontal application of human rights provisions; it simply recognised that the clear language of the Act made such an application impossible in this instance.

Privacy

Naz Foundation v Government of NCT of Delhi provides an interesting instance of the potential for the Pacific to influence the development of human rights thinking in the rest of the world.

In deciding that it was unconstitutional to criminalise sexual acts between consenting adults of the same sex, the High Court of Delhi cited in support of its conclusion the decision of the Fiji Islands court in *Nadan v State* (2005) FJHC 500, 1 PHRLD 22, where an identical conclusion had been reached.

The remaining cases in Part II deal with issues of violence against women and are discussed below, together with the Pacific cases on the same issue in Part III.

PART III

This part of the Digest contains cases from the Pacific dealing with issues of domestic violence and family law.

Constitutionality of Family Protection Law

One of the more significant developments in advancing protection from domestic violence was the enactment in Vanuatu of the *Family Protection Act 2008*. The Act creates a new offence of domestic violence, punishable by imprisonment for up to five years or by fine. The offence extends to a wide range of acts of physical, psychological or sexual abuse within the family, which is defined to include parties to a legal, *de facto* or custom marriage, as well as their children, siblings and parents. The Act also provides for the making of protection orders to prevent future acts of domestic violence, with infringement of orders punishable by imprisonment for up to two years. The payment of 'bride price' provides no defence to an offence under the Act, nor is it relevant to the making of a protection order.

Following arguments from some opponents that the proposed Act was un-Christian, against Melanesian values and otherwise unconstitutional, the President of Vanuatu referred the Bill to the Supreme Court. In *President of the Republic of Vanuatu v Speaker of Parliament*, the court advised that there was nothing unconstitutional in the Bill: the provisions of the new law provided a proper balance between the rights of family members to be protected from violence, the rights of parents to reasonably discipline for their children and the rights of those subject to protection orders. The President then signed the Bill into law.

Family Law

The distribution of property following a divorce is the subject of detailed provisions in Fiji's Family Law Act 2003. *Nisha v Khan* provides an extensive review and application of the principles, demonstrating the recognition of non-financial contributions by a wife, usually on an equal footing with financial contributions by the husband; a broad view of the marital property available for distribution; and the general irrelevance of 'marital fault' in allocating the property.

By contrast, the statutory law in Samoa does not make explicit provision for property distribution on divorce. *Arp v Arp* therefore offers a new approach, by effectively adopting the English case law, which in turn gives effect to the Matrimonial Causes Act 1973 (UK*)*. This replaces the previous approach adopted in *Elisara v Elisara*, under which the Samoan courts were confined to determining the existing property entitlements of the parties under principles of common

law and equity. The new approach allows for a more explicit redistributive function, focusing not just on past contributions to the acquisition of matrimonial property, but also considering the future needs of the parties and their future earning capacities. As with Fiji, the approach taken in Samoa gives equal value to financial and non-financial contributions to a marriage, and generally ignores 'fault' issues such as marital infidelity in determining the property distribution.

Kisekol v Kisekol is an example of the approach taken in jurisdictions where there is no express power to redistribute property on divorce: the court determines the existing rights of the parties, but in doing so, is not bound by the terms of the legal title to the asset in question. As the case shows, equitable principles may make it unjust for the husband to rely on his legal title to deny a share in the property to his wife, if she acted to her detriment in reliance on a common intention that she should share in the property. The court prevented that injustice by imposing a constructive trust in favour of the wife. As a result, she obtained a half share in the property, as both husband and wife had acted on that basis before the marriage broke down. The case can also be used as a precedent in working out the entitlements of parties to a *de facto* relationship which has come to an end.

Enforcement of maintenance orders is a perennial difficulty in the Pacific and elsewhere. As *Chand v Rattan* shows, deliberate non-compliance with a maintenance order amounts to a contempt of court, and is punishable as such. A maintenance order has the same status as any other court order, and cannot simply be varied by the parties without recourse to the court.

In order to obtain an order to pay maintenance for a child, it may be necessary to prove that the defendant is in fact the father of the child. *Maharaj v Raju* shows that common law or statutory presumptions may assist in proving paternity, but they are only aids, and need not be relied on, if there is alternative proof such as an admission of paternity or DNA evidence.

NK v ZMR illustrates the interaction between the human rights standard that people, especially women, must be free to marry and to choose their spouse, and the custom of some religious and ethnic communities, where arranged marriages are the norm. Although not suggesting that arranged marriages will always infringe human rights standards, the court indicated some of the factors that will allow parties to such a marriage to obtain a decree of nullity on the grounds that there was no real consent to the marriage.

Finally, in *Ali v Hakim* the court applied the non-discrimination principle to rule that a person may apply for the revocation of his own adoption order, even after he has reached the age of majority. The court relied on its inherent *parens patriae* power, which is normally limited to making orders for the benefit of children. In this case, the court made the order for the benefit of an adult person who had been properly adopted as a child, reasoning that it should not discriminate against the applicant because of his age.

Violence against women

States have responsibilities in International Law to take appropriate measures to protect women from violence. The duty may arise from a number of sources. In *Opuz v Turkey*, the European Court of Human Rights recognised that Turkey, as a party to the European Convention on Human

Rights, was obliged to take preventive measures to protect an individual whose life was at risk, at least where the State knew of the risk. It must also act positively to prevent a person from suffering torture, inhuman or degrading treatment at the hands of another private individual. The obligation is not met merely by enacting laws – there must be effective enforcement by the police and the courts, and it must operate without discrimination between men and women. In this case, the court found that Turkey had failed in its duty, as the legal system was too complacent or accepting of domestic violence perpetrated against women. It was also acknowledged that similar obligations arise under the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW), making the finding of direct relevance to Pacific countries, most of which have ratified that Convention. This message was reinforced in *Police v Piuila* where the Supreme Court of Samoa emphasised that violence against a woman by her husband could not be tolerated. Nor could it be justified on the ground that the wife had failed to perform her 'wifely duties' in domestic work or child care.

Where a country systematically fails to perform its duty to protect women from domestic violence, the affected women may qualify for protection under the Refugees Convention. In *Minister of Immigration v Khawar*, the High Court of Australia accepted that gender-based persecution, perpetrated by private persons but acquiesced in by the State, could form the basis of a claim to refugee protection for women from Pakistan.

Protection obligations can also arise under the International Convention to Suppress the Slave Trade and Slavery (the Slavery Convention). In *R v Tang*, the High Court of Australia held that offences of intentionally possessing a slave and exercising a power of ownership over a slave, enacted to implement the Slavery Convention, could properly be applied to a situation where women sex workers were recruited in Thailand to work in an Australian brothel. The women worked under terms and conditions which so restricted their freedom and autonomy that they could properly be described as slaves within the meaning of the Act.

In the absence of applicable human rights standards, discriminatory laws and practices may survive. In *R v Talanoa,* the Supreme Court of Tonga continued to apply the traditional common law rule that requires a warning about the danger of convicting on the basis of the uncorroborated evidence of a complainant of a sexual offence. Even though the court acknowledged that the practice proceeded from 'highly questionable assumptions' with 'their highly gendered construction,' it did not see fit to reform this judge made rule. The impetus for reform would have been greater if Tonga had ratified CEDAW or had an explicit constitutional freedom from sex discrimination: contrast the decision in *Balelala v State* [2004] FJCA 49, 1 PHRLD 4, where a different result followed from the application of the Fiji Constitution and CEDAW.

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

ARREST AND DETENTION

ARREST AND DETENTION / DAMAGES FOR BREACH OF CONSTITUTIONAL RIGHTS

Courts in Fiji have the power to award damages for breach of a person's constitutional rights.

PROCEEDINGS COMMISSIONER, FIJI HUMAN RIGHTS COMMISSION v COMMISSIONER OF POLICE

Court of Appeal
Ward, Wood,
McPherson JJ

Fiji Islands
[2006] FJCA 75
24 November 2006

Laws considered

Constitution of Fiji 1997 (CF)

Human Rights Commission Act 1999 (HRCA)

Facts

The Proceedings Commissioner (PC) sued on behalf of one Joti (J). She was employed at a cinema in Suva. She found a new-born baby in a toilet cubicle at the cinemas. She reported her find to the police.

A few days later police took J from her workplace to the police station. At the police station she was asked if her breasts were discharging. J agreed that they were discharging but said it was due to a medical reason and invited police to inspect her medical folder at the hospital. The senior officer in-charge then instructed some officers to take J to the hospital for a medical check despite her protests. At the hospital she was subjected to invasive vaginal examination using an instrument. At the conclusion of the examination the doctor reported that she had not given birth recently.

The police refused to apologise to her for their actions. She sought assistance from the Fiji Human Rights Commission which brought proceedings on her behalf under the HRCA. She sought damages for breach of her Constitutional rights. The High Court ruled that damages could be awarded for breach of Constitutional rights in a proper case and awarded her $4,500 but refused to award exemplary damages. (That decision is reported in 2 PHRLD 39.)

J appealed to the Court of Appeal.

Issues

- Whether damages are available for breach of a right under the Bill of Rights provisions in the CF.
- If so, the measure of such damages.

Decision

The Court of Appeal confirmed that there had been a violation of J's right not to be subject to medical treatment without her informed consent, under CF s25(2), and her right to treated with humanity and respect for her dignity while in detention, under CF s27(1)(f). It increased the award to $15,000.00 but held that exemplary damages were not generally awarded for breach of Bill of Rights provisions.

The court ruled that on some occasions, declaratory orders to stop an existing breach were enough to satisfy the objectives of the Bill of Rights. In other cases, such orders may not be an adequate remedy, so an award of damages becomes necessary. It went on to state that the level of such awards ought not to be based on awards in foreign jurisdictions but according to costs and values prevailing in Fiji. The damages awarded must be restrained or modest or what the Court described as 'prudent damages.' However, the awards must not be so low that they devalue the respect for the policies which underpin the Bill of Rights.

The aggravating features of this case were that it was the police, who are supposed to uphold the law, who flouted the applicant's rights, together with their failure to offer a timely apology or engage in meaningful conciliation. For these reasons the award was increased.

Comment

This was the first case in Fiji where an action had been brought under the HRCA for breach of a Bill of Rights provision. The court favoured the view that the remedy for breach of such rights was a public law remedy and therefore the general principles for assessment of damages in tort do not necessarily apply, although they can provide guidance. Importantly, the court considered that the purpose of awarding damages was not to punish the party that violated the right, but to compensate the victim and vindicate that person's rights. Even so, the seriousness of the breach would be reflected in the amount of damages awarded. In this case, the Court of Appeal regarded the breach as a serious one, which was aggravated by the refusal of the police to acknowledge or apologise for the 'high-handed' conduct of their investigation.

ARREST AND DETENTION / DAMAGES FOR PERSONAL INJURIES / BREACH OF CONSTITUTIONAL RIGHTS

A person severely assaulted while in military custody is entitled to damages for personal injury as well as exemplary damages if the behaviour of the military was oppressive.

NAVUALABA v COMMANDER OF FIJI MILITARY FORCES

High Court
Singh J

Fiji Islands
[2008] FJHC 168
8 August 2008

Law considered

Common law damages for assault

Facts

In August 2000, the plaintiff (P) surrendered himself to the military forces and was placed under arrest for having committed murder and robbery. While in custody at the military camp, P was punched and kicked by soldiers, hit with an iron rod and a rifle butt, and had hot water poured over him. He was also forced to eat horse manure. As a result, he suffered fractures to a finger and his left forearm, a swollen face and black eyes, swollen limbs and body pains with tenderness on his back and chest walls. P required hospital care for 47 days. He also suffered post traumatic stress disorder, insomnia and irritability for years after the assault.

Issues

- Was P entitled to damages for the assault committed by the military forces?

Decision

The conduct of the military forces clearly amounted to a tort or civil wrong against P. A person in the custody of the police or the military is entitled to protection, regardless of what crimes he may have been committed. The punishment of criminal conduct is a matter to be determined by a court, after a proper hearing. It is not a matter for the police or armed forces.

The court rejected P's claim for damages for his loss of income as he had failed to prove the extent of his prior income and what he had done to mitigate his losses. However, P was awarded $45,000 in damages for pain and suffering and a further $18,000 for exemplary damages, to punish the defendant for the 'oppressive and high handed' acts of the soldiers.

A claim for damages for breach of P's constitutional rights was rejected as it had not been raised in P's statement of claim. In any event, he could not claim damages twice for the same wrong.

Comment

Exemplary damages are only awarded in exceptional cases, to punish the most serious misbehaviour and to deter repetition of the conduct. In this case, the soldiers' flagrant abuse of their position warranted the award of such damages, as a mark of the seriousness with which the wrongdoing was viewed and to try to deter any similar conduct in future.

The decision also shows that a person who has suffered loss as a result of unconstitutional conduct by public officials may have to elect whether to claim damages for breach of constitutional rights, or common law damages in tort (that is, damages for the commission of a civil wrong.) The availability of exemplary damages to punish particularly reprehensible conduct in cases like the present may make a common law claim more attractive, given the decision in *Proceedings Commissioner, Fiji Human Rights Commission v Commissioner of Police* (reported earlier in this volume), that exemplary damages are not available for breach of constitutional rights. However, as the seriousness of the wrongdoing is a factor in the assessment of 'constitutional damages,' the distinction may be more apparent than real.

ARREST AND DETENTION / DAMAGES FOR UNLAWFUL DETENTION

Police must not keep an arrested person in detention for longer than is reasonably necessary. A person has a right to damages if detained for longer than can be justified.

COMMISSIONER OF POLICE v A MOTHER

High Court
Hickie J

Fiji Islands
[2008] FJHC 183
27 August 2008

Laws considered

Constitution of Fiji 1997 (CF)

Criminal Procedure Code (Cap 21)

Common law damages for unlawful arrest

Facts

The complainant (C) and her four year old child were taken into custody by the police (P) over a break-in at the Magistrate's Court Registry where C was an assistant court officer. C was held for questioning over an evening and the next day with short breaks, ten hours longer than could be reasonably justified, but for less than the 48 hour limit in CF s27. During this time, attempts were made to implicate C's boyfriend. C sued P for damages. The Magistrate's Court awarded C $3,000 dollars for the excessive detention and a further $1500 dollars for injuries to feelings, $1500 for solicitor-client costs and $6000 dollars for C's child, who had been detained with her mother for five hours. The Police appealed.

Issues

- Whether the police actions were justified.
- The extent of the police detention powers, given CF s27.
- Whether the award for damages was excessive or appropriate.

Decision

The court upheld the decision. It found the actions of the police unreasonable and excessive and confirmed the amount of damages awarded by the Magistrate. Notwithstanding that CF s27 permitted a maximum detention period of 48 hours, the police were still required to act promptly and diligently. They could not detain a person under arrest just to bolster the case against that person or some third party. That is what P had done in this case.

Comment

The court was concerned to protect the liberty of citizens against the wide powers of the state. The powers of search and arrest were not arbitrary; they had to be exercised reasonably. Subjects should not be deprived of their liberty unless it is essential and within the ambits authorised by law. There was also an acute sensitivity to the situation within the country and the extra legal nature of the political environment.

ARREST AND DETENTION / ABUSE OF PROCESS

An unreasonably long period of detention and denial of confidential access to a lawyer may be so serious a breach of the accused's rights and the rule of law as to justify a permanent stay of proceedings.

TAKIVEIKATA v THE STATE

High Court
Bruce J

Fiji Islands
[2008] FJHC 315
12 November 2008

Laws considered

Constitution of Fiji 1997 (CF)

Criminal Procedure Code (Cap 21) (CPC)

Facts

The applicants were all facing three counts of conspiracy to murder the acting Prime Minister, the acting Minister of Finance and the acting Attorney General. The charges related to events that occurred between September and November 2007 after the military coup in December 2006. One of the accused was a businessman, Ballu Khan (K). K was arrested on 3 November 2007, after which he was detained under police guard in a public hospital from 3 November to 14 November. During that time, K was allowed to see his lawyer only for very short periods and only with a military officer present. On 14 November, K was taken to the Central Police Station and detained there until 16 November. On 16 November he was admitted to a private hospital, and remained there under police guard until 8 January 2008 when he was taken before a Magistrate.

K and the other applicants also alleged that they were subject to numerous other forms of unfair treatment at the hands of the military and the police before, during and after their arrest and detention.

All the applicants sought a permanent stay of the proceedings.

Issue

- Was the conduct established on part of the police and military so wrong that it would be an affront to the conscience of the court to allow proceedings against the accused to continue?

Decision

The court granted K's application, on the basis of his excessive detention and denial of confidential access to a lawyer. The other allegations were either not sufficiently substantiated, or were not sufficient to justify a stay of proceedings. Accordingly, the applications by all the other accused were refused.

The court has the power to stay proceedings as an abuse of process where:

(1) circumstances are such that a fair trial of the proceedings cannot be had; or

(2) there has been conduct established on the part of the Executive which is so wrong that it would be an affront to the conscience of the court to allow proceedings brought against that background to proceed.

A stay is only granted in exceptional circumstances; otherwise the charges brought before the court must be tried.

Here, K's detention was wholly unreasonable and in breach of CPC ss23 and 25, which require that an arrested person must be taken before a Magistrate without unnecessary delay. It infringed his right of personal liberty under CF s23. Overall, this breach was sufficient in itself to justify a stay.

The denial of confidential access to a lawyer also violated K's right under CF s27(1)(c) to consult his lawyer in private. Privacy is of the essence of consultation with a lawyer, and the presence of a military officer effectively prevented K from exercising his right. By its conduct, the Executive had substantially threatened basic human rights and the rule of law.

Comment

Generally, the community has the right to see that all crimes are prosecuted and it is only in very exceptional circumstances that a court grants a stay. Not every violation of a Constitutional or common law right will result in a stay, particularly as there may be alternative remedies available to the person affected, or procedures available to the court to counteract the effects of the breach. In this case, the court viewed the conduct of the security forces as so intolerable that it would bring the system of justice under law into disrepute if the case against K were allowed to proceed.

ARREST AND DETENTION / INHUMANE TREATMENT

An offender convicted of possessing narcotics was released without further punishment because of the inhumane conditions he had suffered in custody while awaiting trial.

POLICE v PALEMENE

Supreme Court
Vaai J

Samoa
[2007] WSSC 59
6 August 2007

Laws considered

Constitution of Samoa

Crimes Ordinance 1963

Facts

The accused (A) was charged with possession of narcotics. While in police custody, and before being charged, A was locked up in a 'punishment' cell for seven nights. He was kept naked, in a very dark cell, with no food and only a small container to use as a toilet. The trial judge, out of curiosity, visited the cell and found out it was impossible for any human being to live in such confinement.

Issues

- Was treatment of the defendant while incarcerated inhumane?
- Should such treatment have any impact on A's sentence?

Decision

The defendant pleaded not guilty but the court found otherwise. In determining the sentence, the court had regard to the condition in which A was kept while awaiting trial. The court described his treatment as 'beyond comprehension, unthinkable to say the least and inhumane indeed.'

The court said for a country that prided itself on its Christian beliefs and a Constitution which protected the human rights of everyone, the treatment received by the defendant while in custody should not be condoned. His Honour ruled that the defendant had suffered enough and that was his penalty for the possession charge.

Comment

Despite being in possession of narcotics, a serious offence, the court treated A with some leniency because of the degrading conditions of his custody while awaiting trial. Of great concern was the evidence given by a prison officer that it was standard procedure to keep prisoners naked in the punishment cell. Individuals are entitled to be treated with dignity and respect as human beings irrespective of their status or what they may have done. .

CHILDREN

CHILDREN / ABDUCTION

In deciding whether to enforce an order from a foreign jurisdiction to return an abducted child, a court should presume that it is in the best interests of the child to be returned to its home country so that issues regarding custody and access can be determined there.

MARSTERS v RICHARDS

High Court
Williams CJ

Cook Islands
DP 4/2008
9 May 2008

International instruments and law considered

Hague Convention on Civil Aspects of International Child Abduction 1980 (HC)

Convention on the Rights of the Child (CRC)

Infants Act 1908 (New Zealand) (IA)

Facts

The applicant (A) was the father and the respondent (R) the mother of a child (C) who was two years old at the time of the application. In 2007, a court in New Zealand ordered that R have custody of C, provided R resided in Nelson or Auckland New Zealand, and that A have access rights, under which C would stay with him for specified periods each year. Soon afterwards, R took C to Rarotonga and advised A that C would remain there. A obtained a warrant from the Family Court in New Zealand requiring C to be returned to New Zealand.

A then applied in the Cook Islands for an order enforcing the New Zealand warrant. R in turn applied for custody of C, to be exercised in the Cook Islands. She alleged that this would be in C's best interests, as A was violent and mentally unfit to be a responsible father.

Issue

In determining the application, should the court have regard to the HC, even though the Cook Islands is not a party to it?

Decision

The court took as its starting point that the welfare of the child should be the paramount consideration in deciding the application. That was required by the IA. However, in interpreting that requirement, the court should have regard to the international law obligations of the Cook

Islands, including those arising under customary international law. It was at least arguable that the HC formed a principle of customary international law against child abduction, in which case its principles would be relevant to the court's decision, since customary international law automatically forms part of the domestic law.

In any event, independently of the HC and the existence of orders in the home jurisdiction, it will often be in the best interests of the child to have questions of custody determined in the home country. Therefore, there is a presumption in favour of returning the child to the home country unless the remover can prove it is not in the best interests of the child to do so.

On the facts, the court found that R had failed to rebut the presumption in favour of returning C to her home country, New Zealand. It took note of the fact that the allegations made by R against A had been carefully scrutinised and dismissed by the New Zealand court. It also took account of the injustice to A caused by R's breach of the New Zealand court orders, and the undesirability of allowing R to benefit from her breach. The court ordered that C be returned to New Zealand.

Comment

The question of the applicability of the HC in countries which have not ratified that Convention has provoked different responses in different Pacific jurisdictions. In *Wagner v Radke* [1997] WSSC 6, 1 PHRLD 67, the Supreme Court of Samoa took account of the HC principles as a matter of customary international law, which forms part of the domestic law of the country without any need for ratification or implementing legislation. However, in *Gorce v Miller* [2003] TOSC 46, 1 PHRLD 8, the Supreme Court of Tonga considered that the HC was not applicable in that country, as Tonga had not ratified it. Even so, it found it was in the best interests of the child to be returned to her home country, Australia.

In *Marsters v Richards*, the court avoided having to rule conclusively on whether the principles of the HC had become part of the domestic law of the Cook Islands as a matter of customary international law. Its finding suggested that the result would have been the same either way, because even if the HC were not applicable, it would still be in the best interests of C to be returned to New Zealand. It also indicated that it should generally be in the best interests of the child to be returned to the country of normal residence. This approach reduces the difference between decisions made under the HC and those applying a general test of the best interests of the child.

The court was also spared the need to decide whether a parent who merely had access rights could invoke the HC. Williams CJ noted the more liberal view of New Zealand courts which extends HC protection to a parent with access rights, and the strong criticism from commentators and the English courts that this applies the HC more broadly than was intended. In the final event, A did not need to rely on HC principles, as the case was determined on general 'best interests' principles.

CHILDREN / ABUSE OF PROCESS

A lengthy delay in prosecuting a person can amount to an abuse of process where the delay would prejudice the defence. Where the accused is a child, the need for urgency is even greater. In such cases, a court may permanently stay the prosecution.

R v SETAGA

High Court
Ward CJ

Tuvalu
[2008] TVHC 3
26 May 2008

International instrument and laws considered

Convention on the Rights of the Child (CRC)

Constitution of Tuvalu (CT)

Interpretation and General Provisions Act (Cap 1A)

Facts

The case concerned a boy alleged to have defiled a girl under the age of 13. The victim was 7 years old when the offending occurred. The accused was 13 years old at that time. The case was committed for trial in the High Court some 4½ years after the commission of the alleged offence, by which time the accused was 18 years old. He applied to have the proceedings permanently stayed on the basis of unreasonable delay in prosecuting the case.

Issue

- Should the court exercise its discretion and stay proceedings permanently due to unreasonable delay?

Decision

The court found that the accused boy had been interviewed by the police in October 2003 and again in December 2003. The victim's statement had been taken in October 2003. An eye witness had given her statement before the end of 2003. The police re- interviewed the accused in 2004. He was not committed to trial until 2008. No valid reason was offered for the delay.

The court held that a person must be prosecuted within a reasonable time. Reasonableness in any case depends on the nature of the offence and of the person involved. In cases where a child is involved or is the accused, the need for promptness is very important.

The court concluded that it had the inherent right to prevent abuse of process and to stop the prosecution of an action if the prosecution has manipulated or misused the process of the court. It can also do so where there has been inexcusable delay which has prejudiced the accused in defending the proceedings. This being an example of the second category, the court stayed the proceedings.

Comment
CT s22 provides that a person should be given a fair hearing within a reasonable time. CRC Article 40 provides that every child accused of an offence should have the matter determined without delay by a competent and independent tribunal in a fair hearing. Reasonableness, when it applies to the trial of children, must be read with the CRC in mind. At the end of the day, the court considers whether a fair trial is possible. If there is a significant risk of prejudice or injustice, and the delay was due to the actions of the police, that would amount to abuse of process and the court will stay proceedings.

A delay in bringing a child to trial may harm the child's wellbeing or development while he or she is waiting to have their case determined; it may also mean that memories of the event in question will be impaired. In this case, a critical issue at trial would have been the capacity of the accused when 13 to appreciate the criminality of his conduct. The 4½ year delay would have made that very difficult to assess in hindsight.

CHILDREN / CORPORAL PUNISHMENT

Violence against children in any form should attract serious criminal penalties, to recognise the infringement of the child's rights and to deter others.

STATE v KRISHNA

High Court
Winter J

Fiji Islands
[2007] FJHC 26
10 September 2001

International instrument and law considered
Convention on the Rights of the Child (CRC)
Penal Code (Cap 17)

Facts
The respondent was a Head Teacher. He was found guilty of common assault. He had inflicted corporal punishment on a 14 year old student by caning her palm with a wooden stick. The Magistrate granted the accused an absolute discharge but gave no reasons for the decision. The State appealed.

Issue
- Whether the absolute discharge could satisfy the sentencing principle of deterrence.

Decision
Because of their vulnerability, children need to be protected from any form of violence. The CRC comprises international standards for ensuring the rights of children including protecting children from violence. The court said that addressing violence against children requires us to

recognise children as fully-fledged rights holders. He said that children have to be guaranteed their right to physical, mental and sexual integrity as well as their dignity. The belief that adults have unlimited rights in the upbringing of a child compromises any approach to prevent violence being committed within the home, school or state institution. For lasting change, attitudes that condone or normalise violence against children need to be challenged. Taking into consideration that background, the judge held that the prime sentencing principle for this case was deterrence. His Lordship stated that 'the punishment that fits this crime is for you and others to know and be constantly reminded by the sentence imposed that violence against children is unacceptable.'

An absolute discharge is an exceptional order and is reserved only for those cases where the offender had no moral culpability or where there was only a technical breach of law and the consequences of a conviction were disproportionate to the gravity of the offence. Even though the respondent had unselfishly devoted his working life to educating children, this was not a technical breach of law but a deliberate act. The judge held that there could be no dispute that the accused and others should be deterred from such violence against children by the entry of a conviction. As the absolute discharge was not supported by a reasoned judgment it was in error and was quashed. The respondent was convicted and fined $300.

Comment
The sentence imposed reflected the court's complete abhorrence of any violence against children. In closing, the court was at pains to stress that those who inflicted harm on children would be given harsh sentences, with imprisonment being the usual consequence of their actions.

See also the decision of the Samoa Court of Appeal in *Attorney General v Maumasi* 1 PHRLD 2.

CHILDREN / CUSTOMARY RECONCILIATION

The custom of offering a young girl as reparation to the family of a person killed by an offender was contrary to the Convention on the Rights of the Child and should no longer be practised.

PUBLIC PROSECUTOR v NAWIA

Supreme Court
Fatiaki J

Vanuatu
[2010] VUSC 52
21 May 2010

International instrument and law considered
Convention on the Rights of the Child (CRC)
Constitution of Vanuatu (CV)

Facts

The accused (A) was convicted of causing death by reckless driving and driving under the influence of alcohol, after the truck he was driving left the road, and two of the five passengers riding on the open tray of the truck were killed. He appeared in the Supreme Court for sentencing. In the course of the sentencing proceedings, the court was informed of the elaborate customary reconciliation ceremony that A performed to the chiefs and relatives of the deceased. Along with quantities of food, cloth, mats and cash, A had also offered a young girl as part of the compensation, in accordance with custom on Tanna.

Issues

- What was the appropriate sentence?
- Was it appropriate to include a child as part of the compensation?

Decision

The court sentenced A to two years imprisonment, suspended for two years, and to two years disqualification from driving. In light of the custom compensation already handed over, A was not required to pay any further compensation.

However, the court expressed its strong disapproval of the practice of offering a girl as compensation, which it likened to child trafficking. It said that the practice 'objectifies and devalues the women of Tanna and denies them their fundamental rights to humane and equal treatment, to life, liberty and security of the person.' Having referred to the CRC and CV Article 5, the court went on to state:

> Young girls must not be treated as mere objects or commodities that can be swapped or exchanged under any circumstances and for whatever reason, and a customary practice that treats them in that abject manner is inhuman and cannot be founded on Christian principles. Such practices should not be sanctioned by the law which exist (sic) for the protection of all.

The court directed that the girl be returned forthwith to her parents.

Comment

Although the practice of providing a girl child as compensation or reparation only came to notice incidentally, the Supreme Court took a strong stand in condemning the customary practice and ruling that it was unlawful. Previously, the Vanuatu Court of Appeal had expressed the view in *Public Prosecution v Mulonturala* [2009] VUCA 38 that such use of a child to deal with the responsibilities of adults was 'abhorrent and unacceptable.' However, that court had not specifically declared it unlawful; it only declined to take the practice into account in mitigation.

Perhaps because of the way in which the matter arose in the *Nawia* case, the court did not address some of the assumptions that underpinned its conclusions. In particular, it did not explain why the CRC and CV were thought to have 'horizontal application' – that is, that they applied to private individuals in their dealings with other private individuals. This issue is discussed further in the comment on *Ulufa'alu v Attorney General* (reported later in this volume). Nor did the court explain how it had power to direct the persons in control of the girl, who were not parties to the proceedings, to return the girl to her parents.

CHILDREN / EVIDENCE

A statutory requirement that a conviction cannot be based solely on the uncorroborated unsworn evidence of a child was contrary to the guarantees of equal protection of the law and non-discrimination in the Fiji Constitution. Accordingly, the requirement was struck down as unconstitutional.

STATE v AV

High Court
Goundar J

Fiji Islands
[2009] FJHC 18
2 February 2009

International instrument and laws considered

Convention on the Rights of the Child (CRC)
Constitution of Fiji 1997 (CF)
Criminal Procedure Code (Cap 21) (CPC)
Juvenile Act (Cap 56) (JA)

Facts

The accused was convicted in the Magistrates Court for rape of a four year old girl. The case was transferred to the High Court to impose an adequate sentence. When the case was called before the judge, he noted that the accused had been prosecuted and convicted on the uncorroborated evidence of a child witness, which was expressly prohibited by JA s10. The State submitted that this provision in the JA was unconstitutional because it discriminated against children of a certain age and prevented equality before the law. The accused submitted that the provision was constitutionally valid and that non-adherence to its procedural requirements rendered the conviction unsafe.

Issue

- Does the different treatment of children's unsworn evidence under JA s10 infringe the guarantee of equality before the law and the right to non-discrimination on the grounds of age in CF s38 (1) and (2)?

Decision

The court ruled that JA s10 was unconstitutional and should be struck down. Further, the common law requirement to give a corroboration warning in relation to the evidence of children was also unconstitutional. The conviction entered against the accused was confirmed.

The court pointed to the discriminatory treatment of children as witnesses, compared to adults. JA s10 required a magistrate to assess a child's competency before allowing the child to give evidence. If the child gave unsworn evidence, the accused could not be convicted on that

evidence if it was uncorroborated. Further, the common law required a warning to be given about the dangers of convicting on the uncorroborated evidence of a child, when giving sworn evidence. By contrast, adults are presumed competent to be witnesses, have the option of giving evidence on oath or affirmation, and are not subject to a corroboration warning.

The court held that this differential treatment was based on myths and stereotypes about children, which are not supported by judicial experience or social science research. Different treatment without a rational reason offends the requirements of equal protection of the law and non-discrimination in CF s38(1) and (2).

The impact of the discrimination was grossly unjust to children who were violated but denied access to justice. A law that prohibits the conviction of those who commit crimes against children deprives the children of their right to due process of law. It should therefore be struck down. To do so is consistent with the CRC which Fiji ratified in 1993. By ratifying the Convention, the State is obliged to take all appropriate legislative measures to protect children in Fiji from all forms of physical or mental violence, injury or abuse, or exploitation or sexual abuse. The Convention also allows for judicial involvement to carry out the protective measures for children.

The court's only obligation in relation to children's evidence is to remind child witnesses of the importance of telling the truth before receiving their evidence. Their evidence should then be assessed like the evidence of any other witness without the requirement for corroboration or a warning.

Comment

The court drew a parallel with the former requirement to issue a corroboration warning in relation to the evidence of the complainant in the trial of sexual offence. In *Balelala v The State* 1PHRLD 4*,* the Fiji Court of Appeal struck down this requirement on similar grounds – that it was based on myths and stereotypes which could not be justified and which operated in a discriminatory way against female complainants.

JA s10 had been derived from an English provision which was repealed in England in 1988. The law in England has been reformed so that children under 14 are presumed competent to give unsworn evidence, and there is no requirement for corroboration, or a corroboration warning, in relation to their evidence. Similar legislative reforms had taken place in most common law countries. In Fiji, these reforms have effectively been achieved by the court applying provisions in the Bill of Rights.

The ruling should lead to the better protection of children, or at least the prosecution of those who violate them. Sexual crimes against children are more often than not committed in stealth when no one is around. The removal of the corroboration requirements will rightly focus on the primary issue – whether the particular child's evidence, set against the totality of the evidence, is to be believed.

CHILDREN / EVIDENCE

An admission to a crime made by a child in police custody in the absence of a parent or other appropriate adult will be inadmissible in the trial unless it was a truly spontaneous statement.

POLICE v VAILOPA

Court of Appeal
Baragwanath, Fisher,
Slicer JJ

Samoa
[2009] WSCA 11
9 October 2009

International instrument and laws considered

Convention on the Rights of the Child (CRC)

Young Offenders Act 2007 (YOA)

Evidence Ordinance 1961

Facts

The accused (A), a 16 year old boy, was charged with murder. The trial judge ruled inadmissible the police evidence of three admissions of guilt allegedly made by A following his arrest and detention. The first and third statements were excluded because the trial judge did not accept the police evidence as to what had occurred. The second statement was excluded because it was made in the absence of a supporting adult. The Attorney General appealed against the exclusion of the statements.

Issue

- Whether the admissions should have been admitted.

Decision

The Court of Appeal affirmed the decision of the trial judge to exclude all three statements. The court broadly followed the reasons of the trial judge in relation to the first and third statements.

On the second statement, the court ruled that the statement taken in the absence of a parent or other supporting adult must be excluded for a number of reasons:

(1) YOA s9 gave a child the right to have a parent or family member present at the hearing of proceedings against the child. This policy should be considered by the courts when determining the common law applicable to analogous situations such as the prior investigation of the offence.

(2) New Zealand criminal procedure law, which is applicable in the absence of Samoan provisions, excludes the admissions of children not made in the presence of a lawyer, parent or other supporting adult unless the admission is a truly spontaneous statement.

(3) The overall thrust of the CRC, which Samoa has ratified, points in the same direction as New Zealand law. The courts' presumption is that a state's domestic law is construed in a manner that will align with its international obligations.
(4) The law in Australia and other Pacific countries is similar to that in New Zealand.

Comment

The case strongly endorsed the point that the provisions of the CRC should be used to support children's rights. The Court of Appeal cited with approval the extensive Pacific case law set out by the trial judge, Nelson J, which showed the application of CRC and its philosophies in a wide range of circumstances.

CRC does not explicitly provide that children should only be interviewed in the presence of a parent or other appropriate adult. However, the High Court of Tuvalu in *Simona v R* [2002] TVHC 1 implied such a right from Article 40 (2)(b)(ii) which states:

> Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
>
> (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence.

This case sends a timely message to arresting authorities that they cannot simply obtain confessions from young persons in the absence of parents or other supporting adults and expect the court to allow them to be used in evidence. Children are particularly vulnerable in the stressful situation of an interview in custody and need the assistance and support of an adult who has their interests at heart.

CHILDREN / SEXUAL ABUSE

The State's obligation to protect children from sexual abuse, arising under the Convention on the Rights of the Child, justified a stern sentence for a person convicted of child abuse.

POLICE v FAIGA

Supreme Court
Nelson J

Samoa
[2008] WSSC 96
19 November 2008

International instrument considered

Convention on the Rights of the Child (CRC)

Facts

The accused (A) lured an 8 year old girl (C) to a vacant property where he used his index finger to fondle her genitals and buttocks. A was found guilty on a charge of indecent assault. He showed no remorse, although his mother apologised to C's aunt. A was banished from his village because of the incident.

Issue

- What was an appropriate sentence for the offence?

Decision

The court sentenced A to a three year custodial sentence after noting the provisions of the CRC and the need to protect children against the prevalence of sexual abuse. The court viewed offending against young and vulnerable children as serious and deserving of stern sentences. The court also took into account the effect imprisonment would have on A's family and the apology by A's mother to C's aunt.

Comment

There are some uncomfortable aspects of the decision such as the weight given by the court to the effect a prison sentence would have on A's family and the apology or *ifoga* made to the relative of C. This undermines the strength of the court's remarks about the need to protect children and to review the maximum penalties for child abuse. Given the circumstances, the sentence A received was lenient.

Even so, the court's questioning of the adequacy of the current penalties for child abuse was welcome. Although Samoa ratified the CRC in 1994, it has not yet revisited the maximum penalties for offences against children. There was a clear suggestion that the recently established Law Reform Commission might undertake such a task, to ensure that Samoa fulfils its obligations to protect children as required by Articles 19(1) and 34 of the CRC.

CHILDREN / SEXUAL ABUSE

In sentencing an offender for a sexual offence against a child, the court's primary duty is to protect children. However, it may also take account of the offender's guilty plea, harsh treatment in detention and previous good character.

R v TEOKILA

High Court
Ward CJ
22 May 2008

Tuvalu
[2008] TVHC 2

Law considered

Penal Code (Cap 8)

Facts

The accused (A) pleaded guilty to one count of defilement. A was 21 years old. The complainant (C) was 6 years old. A was second cousin of C's father. The offence was committed when the accused was very drunk. That there was a forcible assault was very clear from the evidence. The little girl suffered serious injuries to her face and head including a cut beneath the right eye and a black eye. She was bleeding from both ears. The forced sexual intercourse had left her with three tears to her genital area including tearing from her vagina through to her anus.

Issue

What was the appropriate sentence for a first offender convicted for such an offence against a very young victim?

Decision

A was sentenced to imprisonment for a term of six years, reduced by six months for the time already spent in custody prior to sentencing. The court's primary duty was to protect children from abuse and the sentence must reflect this. However, A had pleaded guilty and shown remorse. He had been handcuffed to a tower and abused by members of the public whilst in police custody. He received injuries during this episode of being tied to the tower. The court took into account his previous clean record and the fact he acted out of character.

Comment

The facts could easily have resulted in a charge of rape and conviction for rape. However, as this was a case of a young girl who could not have consented to sexual intercourse due to her tender age, the accused was sentenced on that basis. Both offences carried a maximum penalty of life imprisonment.

The sentence might on paper appear unduly lenient but the court had the advantage of seeing the accused and hearing mitigation first hand. In particular, it took into consideration remorse shown by the accused. He was also likely to be shunned by the community and live an isolated life after release.

Interestingly, the court considered that getting drunk and then committing a crime as a serious aggravating factor.

The court did not approve of the police allowing members of the public to assault A while he was in custody. It took that into account in determining A's sentence. It referred the matter to the Commissioner of Police with a direction to investigate the police conduct and report back to the court.

LIBERTY

LIBERTY

A defaulting debtor should not be imprisoned unless proved to have the ability to pay and to have deliberately defied a court order to pay.

NAYLOR v FOUNDAS

Court of Appeal
Lunabek CJ; Robertson, von Doussa, Fatiaki, Treston, Saksak JJ

Vanuatu
[2004] VUCA 26
5 November 2004

International instruments and laws considered

Universal Declaration of Human Rights

International Covenant on Civil and Political Rights (ICCPR)

Constitution of Vanuatu (CV)

Debtors Act 1869 (UK) (DA)

Facts

The respondent (R) obtained judgment against the appellant (A) for a sum in excess of VT2.5 million, together with interest at the rate of 5% and costs on a party and party basis. A was ordered to pay VT100,000 per month until the judgment debt was wholly paid. A made no payments under the order for over three years. The court then ordered A to pay the full amount due (almost VT4.5 million) within 5 days, and that in default of payment A should be arrested and detained. A appealed against the order for her detention in the event of default of payment.

Issue

- Whether the court should have ordered A's detention for default in payment of a debt.

Decision

The appeal was allowed. The court held that imprisonment for making default in payment of a sum of money has never been the law in Vanuatu. That position had been established by DA which was in force in Vanuatu at Independence and continued to form part of domestic law. Imprisonment for inability to pay a debt is also recognised as a serious breach of the international human right to liberty, recognised in the UDHR and ICCPR Article 11, which states that 'no person shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.' Although Vanuatu had not ratified ICCPR, the same conclusion could

be drawn from CV Article 5 (1)(b) (c) and (e), which recognise the fundamental rights and freedoms of liberty, security of the person and freedom from inhuman treatment.

The court has a power to punish for civil contempt, where there has been a deliberate failure to do something that is in the power of the defendant to do, but which the defendant, in defiance of the order, chooses not to do. A judgment debtor who is too poor to pay the judgment debt is not deliberately defying the order to pay, so imprisonment should not be ordered. That would only be appropriate where there is clear evidence that the debtor had the means to pay, but chose not to pay. Here A clearly did not have the means to meet the judgment debt.

Comment

There was little doubt that the court had been wrong to order detention in the event of non-payment. That response must be confined to cases of deliberate defiance of a court order to pay. See, to similar effect, *In re Eroni Delai* [2000] FJHC 56, 2 PHRLD 65.

LIFE

LIFE / DISCRIMINATION

The constitutional guarantee of life in Samoa only prohibits the intentional deprivation of life; it does not prohibit State action which might have an unintended harmful impact on human life.

JACKSON v ATTORNEY GENERAL

Supreme Court
Nelson J

Samoa
[2009] WSSC 122
28 August 2009

International instruments and laws considered

International Covenant on Civil and Political Rights (ICCPR)

European Convention on Human Rights (ECHR)

Constitution of Samoa (CS)

Road Transport Reform Act 2008 (RTRA)

Facts

The majority of vehicles in Samoa were designed to be driven on the right hand side of the road ('left hand drive vehicles'). The effect of the RTRA was that from 7th September 2009, drivers

in Samoa would be required to switch from driving on the right hand side of the road to driving on the left hand side. The applicants (A) were citizens who objected to the proposed switch. They brought proceedings seeking a declaration that the provisions in the RTRA requiring the switch were unconstitutional. They argued that the switch 'poses a known and real risk of direct and immediate threat to life' and as such infringes the guarantee of the right to life expressed in CS Article 5(1). Further, the switch was said to discriminate against the drivers of left hand drive vehicles, by requiring them to drive on the side of the road for which their vehicles were not designed, so infringing the guarantee against discrimination in Article 15.

Both A and the Attorney General called evidence from experts as to the likely impact of the switch on fatalities arising from traffic accidents. The court concluded that many factors combined to cause an accident, and the switch would at most be one of many causes of future accidents. The evidence established that there would probably be an increase in the number of accidents, but that it was not proved that this would mean an increase in the number of fatalities, as there was no necessary correlation between accidents and fatalities. Further, the remedial measures already taken or to be taken by the government would reduce but not eliminate the increased risk of more accidents arising from the switch.

Issues

- Did CS Article 5(1) apply to unintentional taking of life?
- Was there discrimination of the kind prohibited by CS Article 15?

Decision

The court ruled that Article 5(1) only applied to intentional deprivation of life. The language of the provision was clear:

> No person shall be deprived of his life intentionally, except in execution of a sentence of a court following his conviction of an offence for which this penalty is provided by the Act.

It was also clear from the Constitutional Convention Debates that the framers of the Constitution intended this clause should only apply to intentional deprivation of life.

Although there are cases decided under the ECHR which conclude that Article 2 of that Convention includes protection from unintended death (*Osman v UK* (2000) 29 EHRR 245 and *Makaratzis v Greece* (2005) 41 EHRR 49), those cases were based on the different language of Article 2. In any event, Osman was a controversial decision which has not been followed in some other countries such as the USA and Ireland. While the court should have regard to international Conventions when construing the rights protected in the Constitution, in this case it was constrained by the clear words of the section.

The court also declined to imply a right to be free from unintended deprivation of life, as there was nothing in the terms or structure of the Constitution to require such an implication. Even if there were such a right, it could not be absolute. Otherwise the State would have endless obligations which it could not practicably meet.

The claim for unconstitutional discrimination also failed: 'there is no inequality between the driver of a left hand drive vehicle and the driver of a right hand drive vehicle. Both are subject to the same set of rules, the same set of laws.' Further, A was unable to show that the disability or restriction of a left hand drive driver was based on 'descent, sex, language, religion, political or other opinion, social origin, place of birth or family status' as required by CS Article 15(2).

Comment

While the court accepted that a liberal interpretation of constitutional rights should generally be adopted, and that international human rights standards should be considered, the process of interpreting the constitution must still respect the language in which rights are expressed. Here it was clear that the constitution expressly protected against *intentional* deprivation of life. As there was no suggestion that the new law allowed for or caused an intentional deprivation of life, the argument could not succeed on the express terms of Article 5(1).

It was also difficult, given the language used, to establish an *implied* right to be protected from unintentional deprivation of life. The court explained when an implied right might be recognised. It acknowledged that implying a right should not be done lightly; it required 'clear and persuasive reasons and a basis for doing so.' The language used in the Constitution is the result of long and carefully considered process, and it should not be readily added to by implication. 'If such a course of action be necessary in order to give [the Constitution] working effect, the court will not hesitate to do so but the case for that must be clear, obvious and without question.'

Implying a right to protection from the unintended deprivation of life is difficult where the Constitution expressly protects against intended deprivation. If both were intended, then why was only one mentioned? But in other circumstances, rights may be based on implication. See for example the decision of the Court of Appeal of Samoa in *Samoa Party v Attorney General*, reported immediately below this comment. There the court found implied rights to participate in and to enforce free and fair elections.

POLITICAL RIGHTS

POLITICAL RIGHTS / DISCRIMINATION

A law that limited the rights of unsuccessful candidates to dispute the validity of an election did not interfere with the rights of the candidates to a fair trial to determine their civil rights, deprive them of the equal protection of the law, nor infringe an implied constitutional guarantee of free and fair elections.

SAMOA PARTY v ATTORNEY GENERAL

Court of Appeal
Baragwanath, Slicer, Fisher JJ

Samoa
[2010] WSCA 4
7 May 2010

International instrument and laws considered

European Convention on Human Rights

Constitution of Samoa (CS)

Electoral Act 1963 (EA)

Facts

The appellants (SP) were a political party and unsuccessful candidates at a general election. They challenged the proviso to EA s105(c) on the basis that it breached the CS. The proviso prohibited losing candidates from challenging the results of an election if they received less than 50% of the votes received by the successful candidate. SP alleged that it encroached on their right to a fair trial to determine their civil rights and obligations under Article 9; that it breached Article 15 in being discriminatory and so deprived SP of equal protection under the law; and that it was contrary to an implied constitutional right of voters to participate in elections which are free and fair and an implied constitutional right to bring an election petition to 'enforce' free and fair elections. The case was dismissed at first instance by Sapolu CJ. SP appealed to the Court of Appeal.

Issue

- Did the proviso to s105(c) of the EA breach Articles 9 and 15 of the CS and the implied constitutional rights alleged by SP?

Decision

The court dismissed the appeal.

It held that the right to vote and the right to challenge an election were statutory rights created by EA rather than constitutional rights. If EA did not give rights to SP to challenge these elections (because SP did not satisfy the proviso) then they had no justiciable rights protected by Article 9 of the CS.

The court concluded that there was no breach of Article 15(1) because there was no relevant discrimination. When read with Article 15(2), it was clear that Art 15 is concerned with discrimination based on deep-seated personal characteristics such as descent, sex, language or religion, rather than discrimination based on failure to meet a certain percentage vote at a particular election.

Finally, the court accepted that the CS implicitly required adequate systems calculated to secure free and fair elections. This was a matter of 'public entitlement' rather than human rights. The requirement was to be assessed on a test of 'substantial adequacy.' Overall, the court was not persuaded that the measures in EA failed that test. The court acknowledged the existence of other mechanisms in Samoa for challenging an election: election petitions could be brought by candidates who met the proviso requirements or by the Election Commissioner, and criminal prosecutions could also be brought under EA s103. Given the limited public resources in Samoa,

the restrictions in the proviso, intended to limit expenditure on election petitions, were not disproportionate.

Comment

The court apparently felt some discomfort with the nature of the unusual restrictions imposed in the proviso to s105(c). It commented:

> It is at first sight striking that there should be removed from the Samoan electoral regime the general right to bring an election petition that entered the law of England in 1769 and for which counsel for the Attorney could offer no equivalent in any comparable jurisdiction. Every state must equip itself with safeguards against the election of persons who are disqualified from standing or who engage in corrupt practice. How can a system provide meaningful protection against infringement if not merely voters but even some candidates are not free to bring an election petition? (Footnotes omitted.)

Later, having upheld the measure, the court gently invited a reconsideration of the law when it remarked:

> Certainly to restore to voters, or even to runners-up, the right to bring an election petition would provide still greater protection of the public interest in free and fair elections.

The proviso is certainly unusual, and probably unique. It could even be said to promote greater irregularities in the voting system, in that a massive victory procured improperly will be more secure than a modest one. It might also be expected that other more rational means might have been available to deter unmeritorious challenges, such as by awarding costs. However, the court deferred to the judgment of the legislature in accepting that the measure was not disproportionate to the goal of reducing the number of electoral petitions. While it is widely accepted that the courts should allow a 'margin of appreciation' to the legislature in determining appropriate responses to national issues, a more critical approach can be justified in relation to electoral matters: unless the legislature has been freely and fairly chosen to represent the people of the country, its legitimacy is diminished, and so, in a democracy, is less deserving of deference.

The case has broader significance in showing that Pacific courts may be willing to imply constitutional limitations or rights additional to those expressly set out in the Bill of Rights. These are likely to be of a relatively general nature, with imprecise standards, but they present new opportunities for creative counsel.

PRIVACY

PRIVACY / UNLAWFUL SEARCH AND SEIZURE

A secret recording by a participant in a conversation relating to serious criminal activity was not a breach of the right to privacy nor an unlawful search or seizure; accordingly, the recording was admissible in evidence in the criminal trial of the other participant in the conversation.

SINGH v STATE

Supreme Court
Mason, Handley,
Weinberg JJ

Fiji Islands
[2008] FJSC 52
18 December 2008

International instrument and laws considered

European Convention on Human Rights
Constitution of Fiji 1997 (CF)
Constitution of United States of America
Canadian Charter of Rights and Freedoms
New Zealand Bill of Rights

Facts

The appellant (A), who practised law in Fiji, was charged with attempting to pervert the course of justice. He was representing a client (K) who was an officer employed by the Land Transport Authority. K was charged with corruptly seeking $200 from an owner of a vehicle (N) so the vehicle could be registered with the Authority

N had informed the police that A had approached him, asking him to alter his evidence against K. After consulting the Director of Public Prosecutions, the police gave a digital recording device to N. The next day A met N and suggested that N change some of his evidence. Without A's knowledge, N taped the conversation.

It was on the basis of this conversation that A was charged with attempting to pervert the course of justice. The High Court ruled that the taped conversation was admissible. A then pleaded guilty on an agreed basis that he could contest the admissibility of the recorded conversation on appeal. A's appeal to the Court of Appeal was dismissed. A then appealed to the Supreme Court.

A argued that the recording was an unreasonable search and/or an unreasonable seizure of his property contrary to CF s26(1) and therefore the evidence was inadmissible under CF s28(1)(e). Further he argued that the secret taping of the conversation at the instigation of the police was a violation of his right to privacy guaranteed by CF s37. The State denied that such rights were violated. In any event, if the recording was unlawfully obtained, the interests of justice required it to be admitted.

Issue

To what extent is the State permitted or justified in conducting covert surveillance with or without a warrant having regard to the provisions of CF ss26, 28(1)(e) and 37 of the Constitution of Fiji?

Decision

The court held the tape recording was admissible.

The court considered that there had been no search or seizure in this case, and so CF s26 was not applicable.

Nor had there been a breach of A's right to privacy under CF s37. The right is not unlimited, and its scope is informed by the standards of the community. It depends on what degree of privacy can reasonably be expected. One aspect of that assessment is the state of the law. In this regard, it was noted that Fiji has no statutory prohibition on the use of surveillance devices. The court concluded that participant recording in relation to serious criminal activity does not entail an unconstitutional breach of the privacy of the accused person in light of current standards of Fijian society.

As there was no illegal or unconstitutional conduct in obtaining the recording, there was no valid objection to its admission in evidence.

Comment

In the United States, Canada and New Zealand, the legality of 'participant recording' is considered under the guarantees against unreasonable search and seizure. Yet in the Fijian context, the Supreme Court adopted a narrower view of search and seizure, implying that it only applied to the 'taking of property or other form of trespassory conduct.' Apparently, it considered that the express protection of privacy, present in the Fijian constitution but not in the other Bills or Charters of Rights, precluded the need for the broader interpretation of search and seizure found elsewhere.

Even so, when dealing with the right of privacy, the court still considered the overseas cases on search and seizure to be relevant, as they were influenced by privacy considerations. The court noted that not all cases speak in unison. In Canada, such evidence would be regarded as obtained by an unlawful search or seizure, since people may reasonably expect that their private conversations are not recorded without their consent. Even so, such evidence may still be admissible under the exercise of judicial discretion. By contrast, the law in both New Zealand and the United States would not regard the evidence as having been unlawfully obtained.

Ultimately, the court preferred the view applied by the courts in New Zealand, where the crux of the enquiry is whether the intrusion of privacy was unreasonable. That involved considering

the public interest as well. It is in the public interest that serious crime should be detected. An attempt to pervert the course of justice is a serious crime: it strikes at the heart of the rule of law. Recording provides for an accurate account of a conversation and, therefore, reliable evidence. These factors were seen to outweigh the right of the individual to determine who hears what he or she has to say.

In the present case there was no illegality involved in obtaining the evidence, as A had invited N into his car; whether the same principles will apply where police trespass onto property to record a conversation is still to be seen.

PRIVACY / PUBLICATION OF SUSPECT'S PERSONAL DETAILS

Police may only publish the name, address and image of a suspect where that is the only reasonably available means of performing their duty to detect and detain suspected offenders.

ATTORNEY GENERAL v YAYA

Court of Appeal
Byrne, Powell,
Shameem JJA

Fiji Islands
[2009] FJCA 60
9 April 2009

International instruments and laws considered

European Convention on Human Rights (ECHR)

Human Rights Act 1998 (UK) (HRA)

Quebec Charter of Human Rights and Freedoms (QC)

Constitution of Fiji 1997 (CF)

Police Act (Cap 85) (PA)

Facts

In 2003, the police published a list of '10 most wanted persons', who were suspects in a series of violent robberies. The list included the name, address and image of the respondent (R). The list appeared for several days in news reports on television and radio and in a daily newspaper. R subsequently pleaded guilty to a charge of robbery with violence and faced other serious charges, including charges relating to murder, rape, arson and robbery.

In 2005, R commenced proceedings for a declaration that, by authorising the publication of the list of suspects, the Commissioner of Police had breached R's right to personal privacy, and damages for humiliation, loss of dignity and injury to his feelings. In defending the publication, the Commissioner stated that it was the only option available to the police 'to get to the suspect persons and to enable criminal investigations to commence.' The High Court found in R's favour

and awarded damages for breach of constitutional rights, in the sum of $4,000. The Attorney General appealed against that decision.

Issues

- Did the publication of the list breach R's right to privacy?
- If so, was it justifiable in the public interest?

Decision

The Court of Appeal upheld the decision of the High Court.

In determining the scope of the right to privacy protected by CF Article 37, the court had regard to international human rights law, including the ECHR, the HRA and the QC and decisions applying them. The court acknowledged that human rights law had transformed the common law right of privacy. It held that CF s37 protects information in respect of which there is a reasonable expectation of privacy. The right to privacy extends to information obtained by public bodies such as the police. In this case, the information that R was a suspect in a violent robbery was information which any reasonable person would expect would not be disclosed to the public, at least until he had been questioned and charged.

The right to personal privacy may be subject to such limitations 'prescribed by law as are reasonable and justifiable in a free and democratic society.' Those limitations can be prescribed by the common law or by statute. In this case, the police purported to act under PA 17(3), which requires police to detect and bring offenders to justice, and to apprehend persons for whose apprehension sufficient ground exists. However, it was not enough that the police were acting for a legitimate purpose:

> It must be shown that the publication was proportionate to that aim. In simple terms, was it necessary, was it justifiable, was it a proportionate step to publish in this manner? The test of proportionality must be narrowly construed once an intrusion into privacy has been established.

Here, the Police Commissioner's evidence failed to explain why publication was the only available option. It did not explain why other options, such as going to R's known addresses, speaking to his relatives or contacting the local police station to see if he could be located there, were not available. If publication was the only option, then it would have been justifiable, but this had not been proved. Hence publishing the list could not be brought within a permissible limitation on the right to privacy; the means used had not been shown to be proportionate.

Once the breach of R's privacy was established, it was not necessary to show that R had suffered harm or distress as a result of the breach. R was therefore entitled to damages, as determined in the High Court.

Comment

The case illustrates how, once an interference with a right has been shown, the burden shifts to the State to justify the infringement. The courts increasingly use the test of proportionality to assess whether the interference with rights is justifiable in a democratic society. That test will

examine whether the State action was done for a legitimate purpose, whether the means adopted to pursue that purpose were reasonably necessary, and whether the benefits achieved by the State action outweigh the harm caused by the interference with the rights. In assessing 'reasonable necessity,' courts are unlikely to simply accept an assertion that there were no other available means of pursuing the objective – there needs to be some evidence to support such a claim. If the evidence is not conclusive one way of the other, the court will generally accept a judgment by a legislature or the executive that is at least reasonable. But there needs to be a factual foundation for the judgment. In this case, the evidence of the Commissioner did not show the police had tried all reasonable alternatives to detect and apprehend the suspects. Consequently the court was justified in concluding that the Attorney General had not adequately justified the infringement of R's right of privacy. For decision makers, the lesson is that they should look for solutions to problems that involve the least possible intrusion on rights. For litigators, the case highlights the need to ensure that the evidence reveals the factual basis for assessing whether a response was proportionate.

PROPERTY

PROPERTY / RETROSPECTIVE OPERATION OF LAW

A legislative amendment to a taxation law which retrospectively extinguished a claim to a tax refund did not amount to an unjust deprivation of property.

GROUPE NAIROBI (VANUATU) LIMITED v GOVERNMENT OF THE REPUBLIC OF VANUATU

Court of Appeal
Lunabek CJ; Robertson, von Doussa, Saksak, Dawson JJ

Vanuatu
[2009] VUCA 35
16 July 2009

International instruments and laws considered

Universal Declaration of Human Rights (UDHR)

First Protocol to the European Convention on Human Rights (FPECHR)

Constitution of Vanuatu (CV)

Value Added Tax Act (Cap 247) (VATA)

Facts

In April 2005, the appellant company (A) agreed to purchase leasehold land from another company. It then sought a refund of approximately VT14.6 million in Value Added Tax (VAT).

The claim was made on the basis that the land constituted 'second hand goods', for which a refund was payable under the VATA, even though A had not yet incurred any liability to pay VAT. The refund was refused, although the claim appeared to fall within the terms of the VATA. On 1 January 2006, Parliament passed an amendment to VATA, which purported to exclude land from the definition of VAT, with effect from 1 August 1998, the date when the VATA came into force. The amendment, if valid, gave legislative support for the refusal of the refund.

A argued that the retrospective change to the VATA infringed CV Article 5(j), which recognises the right to protection from unjust deprivation of property. The trial judge ruled that there was nothing 'unjust' in the amendment, and dismissed the claim.

A appealed to the Court of Appeal.

Issue

- Did the amendment bring about an unjust deprivation of property?

Decision

The Court of Appeal ruled that the amendment was valid, and provided legal justification for the refusal of the refund.

In interpreting the meaning of CV Article 5(j), the court referred to UDHR Article 17 and cases decided under FPECHR Article 1. The latter states:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The court considered that Article 1 was in substance a protection against unjust deprivation of property. It noted that Article 1 recognises that a State may interfere with the right under certain circumstances, so long as the interference was lawful, served the public interest, and complied with general principles of international law. Further, the court said, Article 1 recognises that the levying of taxes will not constitute a breach of the protection of property which is otherwise guaranteed.

Relying on *National and Provincial Building Society v United Kingdom* (1998) 25 EHRR 127, the court held that at the time of the amendment, A had no enforceable right to a refund, as such a right only arose once a favourable assessment had been made under the VATA. Therefore A's claim for a refund was not 'property' under CV Article 5(j).

Even if A's claim did amount to property, and there had been a deprivation, it would still be necessary to consider whether the deprivation was lawful, whether it was in the public interest,

and whether a reasonable and fair balance had been struck between the public interest and individual rights. The court must allow Parliament a wide margin of appreciation in determining where the public interest lies, particularly in the allocation of public resources, as is the case with taxation and welfare laws: *James v United Kingdom* [1986] 8 EHRR 123. Although issues of compensation will sometimes arise, in the case of tax laws this is unlikely, as changes in tax rates and the scope of tax liability are necessary to meet changing circumstances. In this case, the amendment was considered necessary to protect the revenue from potentially large claims that had not been anticipated. The balance of competing interests was a reasonable one, and thus there was no 'unjust' deprivation.

Comment

The case shows the value of resorting to international human rights jurisprudence to clarify the meaning of the constitutional rights, which are often expressed in rather general and imprecise terms. The CV simply provided for protection from 'unjust deprivation' of 'property'; the meaning of those terms obviously required interpretation. Here, the court found valuable guidance in the terms of the UDHR and FPECHR and highly relevant decisions of the European Court of Human Rights in interpreting them. The court justified their use by saying:

> The fundamental human rights recognised in these instruments have a common base, and decisions from international human rights tribunals, and from the Courts of countries which have human rights charters contribute to the growing understanding of the protection which these rights afford. As fundamental human rights are recognised by international law to be universal in their application, the domestic courts of UN Members States will look to decisions about fundamental human rights in other States for assistance.

The court was alert to the need to ensure that the international analogies were appropriate. In particular, it recognised that Australian cases on the acquisition of property on just terms were decided in a different context, as they were not concerned with a guarantee of a fundamental right. By contrast, the European cases did raise essentially the same issues, and provided useful guidance to the court. The implication is clear: a sound knowledge of international human rights law can prove invaluable to lawyers and judges in the resolution of Pacific cases.

RELIGION

RELIGION / CUSTOMARY LAW

> **A restriction on the establishment of any new religion on an island infringed the constitutional guarantee of freedom of religion, notwithstanding the constitutional protection of national values and culture.**

TEONEA v PULE O KAUPULE OF NANUMAGA

Court of Appeal
Fisher and Paterson JJA;
Tompkins JA (dissenting)

Tuvalu
[2009] TVCA 1
4 November 2009

Law considered

Constitution of Tuvalu (CT)

Facts

Nanumaga is a Tuvaluan Island with a population of approximately 800 people. The majority are members of the Christian Church of Tuvalu (EKT), with smaller numbers practising the Seventh Day Adventist, Jehovah's Witnesses and Baha'i faiths. The appellant (A) was born in Tuvalu but became a citizen of Fiji. He was a pastor in the Brethren Church. He went to Nanumaga with his wife and another church leader. Forty people from Nanumaga converted to the Brethren Church. On 4 July 2003 the Falekaupule (traditional assembly of elders) passed a resolution banning new religions from being established on the island, so that members of the Brethren Church were effectively prohibited from practising their religion in Nanumaga.

The Brethren Church continued preaching, the upshot of which was that a number of young men attacked the congregation and the church leaders were finally forced to leave the island, leaving behind 59 converts.

A brought proceedings in the High Court seeking a declaration that the resolution of the Falekaupule breached the CT and was therefore void. The High court dismissed the application (see 2 PHRLD 83). A appealed to the Court of Appeal.

Issue

- Whether the resolution was a valid restriction on the freedom of religion in the CT.

Decision

The Court of Appeal, by majority, declared that the resolution was unconstitutional.

The court had to balance the competing interests of freedom of religion and the preservation of Tuvaluan values or culture. Freedom of religion is protected by CT s23. This freedom is subject to s29(4) and (5), which allow for restrictions on the exercise of this right if the exercise may be divisive, unsettling or offensive to the people; or may directly threaten Tuvaluan values or culture. However, any such restrictions must be reasonably justifiable in a democratic society that has a proper respect for human rights and dignity. Similar questions may arise in relation to freedom of expression (protected by s24) and freedom of assembly (protected by s25).

The court concluded that in this case the constitutional freedoms should take priority. It relied on a number of factors: the importance of freedom of religion in a free society; the fact that the 'culture' on Nanumaga is an evolving one, and already subject to many outside influences; the culture already recognised four foreign-sourced religions or denominations; the measures

adopted by the Falekaupule went further than necessary to deal with any intrusive conduct by the new churches; and more moderate measures were likely to remove the threat of further violence from opponents of the new church. Overall, the restrictions imposed by the resolution were not reasonably justifiable in a democratic society.

Comment

This is an important decision dealing with the collision between freedom of religion and the right of traditional leaders to preserve the cohesiveness and traditional values of their communities. The decision allowing a new church to be established is consistent with the decision of the Samoan court in *Lafaialii v Attorney General* 1 PHRLD 71.

It is important to appreciate that the court did not find that the right to establish a new religion will always override the maintenance of culture or traditional values. It is a question of finding an appropriate balance between the competing interests. In this case, the judges in the majority found that the measures taken by the Falekaupule effectively negated A's freedom of religion; but less restrictive measures may have been acceptable. For example, the Falekaupule could have prohibited any religion from unsolicited proselytising – going to people's homes uninvited, to try to convert them.

The third member of the court, Tompkins J, took a different view of the effect the measures. He held that the elders had not stopped A and others from practising their religion in private but only stopped them from converting others. This made it easier to conclude that the balance favoured the protection of traditional values.

There is always a danger that newcomers to a community, or new practices within the community, may provoke a hostile response. But the threat of a violent reaction to a lawful activity should not be used to justify a ban on the lawful behaviour. Instead, measures need to be taken on all sides to build acceptance, or at least tolerance, of difference within the community.

RULE OF LAW

Rule of Law / Criminal Procedure

The Fiji Independent Commission against Corruption had the same power as any other person to institute criminal proceedings in the Magistrates' Court, but not in the High Court.

FICAC v DEVO

High Court
Shameem J

Fiji Islands
[2008] FJHC 132
27 June 2008

Laws considered

Constitution of Fiji 1997 (CF)

Criminal Procedure Code (Cap 21) (CPC)

Penal Code (Cap 8) (PC)

Facts

The accused (A) was charged by the Fiji Independent Commission against Corruption (FICAC) with five offences under the PC. A challenged the laying of the charges on the basis that the power to prosecute lay exclusively in the Director of Public Prosecutions (DPP) under CF and that the purported conferral on FICAC of powers of prosecution was unconstitutional – either because the President did not have the power to make law by Promulgation, or because the Promulgation was inconsistent with the terms of CF. The information containing the charges should therefore be quashed.

Issue

- Could FICAC lay an information against D in the High Court?

Decision

The court declined to rule on the power of the President to make law by promulgation, as that issue was being considered more fully by another court. It did find that under CF the DPP's powers to prosecute were not exclusive. However, the information was quashed as the CPC only provided for the laying of an information in the High Court by the DPP. Unless and until the FICAC promulgation was determined to be valid, FICAC had no power to do so. It would be up to the DPP to decide whether to lay an information in the High Court. If not, FICAC could proceed in the Magistrates' Court.

Comment

The decision was a careful balancing act by the court, as the legal capacity of the President to legislate was yet to be determined at that time. The court sought to resolve the case without relying on the validity of the FICAC proclamation. It did so by finding that FICAC had the same common law power as any other person to bring a prosecution in the Magistrates' Court. However, only the proclamation gave FICAC the power to do so in the High Court and the court declined to give effect to that. Curiously, the court did not consider the argument that without the proclamation, FICAC would not exist as a legal person, and therefore would have had no capacity to initiate proceedings even in the Magistrates' Court.

RULE OF LAW / DEMOCRACY / HORIZONTAL APPLICATION OF RIGHTS

A person seeking redress for breach of constitutional rights under the Solomon Islands Constitution must show that the breach relates directly to or affects him or herself; it is not enough that the rights of others have been breached.

ULUFA'ALU v ATTORNEY GENERAL

Court of Appeal
Lord Slynn of Hadley,
McPherson and Ward JJA

Solomon Islands
[2004] SBCA 1
2 August 2004

Law considered

Constitution of Solomon Islands (CS)

Facts

The applicant (A) was the Prime Minister of the Solomon Islands in June 2000. On 5 June, members of the armed group known as the Malaita Eagles Force, together with disaffected police officers, placed A under house arrest and threatened his life if he did not resign. Acting under duress, A tendered his resignation to the Governor General, who then called a meeting of Members of Parliament (MPs) to elect a new Prime Minister. On 30 June, the meeting elected Hon Manesseh Sogovare (S) as Prime Minister.

In June 2001, A sought orders in the High Court declaring that A was entitled to continue to act as Prime Minister until replaced in accordance with the CS; that MPs and their families had been deprived of their rights to liberty, security of the person and the protection of the law under the CS; and that S had not been validly elected as Prime Minister on 30 June 2000.

Palmer ACJ dismissed the application. A appealed to the Court of Appeal. Before that court heard the appeal, a further Parliamentary election was held, following which S was replaced as Prime Minister.

Issues

- Whether A had standing to raise the alleged infringements of the rights of MPs and their families.
- Whether the election of S as Prime Minister was valid.

Decision

The Court of Appeal ruled that under CS s18(1), A could only allege a breach of the Bill of Rights provisions in relation to acts done or threatened to him. It was not enough that acts done or threatened to third parties would have an effect on him. So A could not argue that threats made against the MPs and their families infringed their constitutional rights; the MPs and their families would need to bring their own actions to protect their rights. Consequently, it was not necessary to decide whether the provisions in the Bill of Rights had horizontal application – that is, whether the provisions could be relied on as between citizens, rather than simply between citizens and the State (which is referred to as 'vertical application').

As to the election of S, CS schedule 2 paragraph 10 made it clear that any dispute in connection to the election of the Prime Minister was to be determined by the Governor General and could

not be questioned in the courts. There was nothing to suggest that the Governor General had failed to properly exercise his powers in relation to the election. Therefore the validity of the elections was not a matter that a court could consider.

Comment

The case is of interest for the comments made by the court on the issue of whether provisions in the Bill of Rights have horizontal application. Prima facie, the matter appeared to have been settled in *Loumia v DPP* [1986] SBCA 1, [1985-1986] SILR 158, 2 PHRLD 24, where the Court of Appeal took the view that the Bill of Rights provisions only had vertical application. (The same approach had also been adopted in Kiribati in *Teitinnang v Ariong* [1986] KIHC 1; [1987] LRC (Const) 517.)

However, the court in the instant case took a more nuanced approach. It acknowledged that 'this is a developing area as to how far citizens can rely on fundamental rights inter se' (between each other) and doubted that the answer was a clear cut one of 'always horizontal' or 'never horizontal.'

The court suggested that much will depend upon an analysis of the rights relied on: 'It is necessary to consider the precise rights sought to be relied on and the context in which they are relied on.' However, as A's case failed on other grounds, it was not necessary for the court to conduct such an analysis here.

It is unfortunate that the court did not expand further on the issue, as clearer guidance would have been most welcome. A number of jurisdictions have moved beyond a purely vertical application of human rights. For example, Irish courts have applied a robust horizontal approach, allowing private parties to rely directly on some fundamental rights in litigation against other private parties: see *Lovett v Gogan* [1995] ILRM 12. In Canada, a middle position has been adopted: although private individuals cannot ground their cause of action on the Charter of Rights when litigating against another private person, they may rely on the common law, which the courts must interpret and develop consistently with Charter values. In that way, some Charter rights indirectly govern the relations between individuals. But on any of these approaches, it is necessary for the court to examine the right in question to see whether it is of a kind that is capable of applying as between private persons, or whether the right in question is of a type that can only be enforced against the State.

RULE OF LAW / DEMOCRACY

The President of Fiji did not have a prerogative power to dismiss the Prime Minister and dissolve the Parliament. His purported exercise of power in 2006 to dismiss the elected government was unlawful.

QARASE v BAINIMARAMA

Court of Appeal
Powell, Lloyd and Douglas JJA

Fiji Islands
[2009] FJCA 9
9 April 2009

Law considered

Constitution of Fiji 1997 (CF)

Facts

On 5 December 2006 the Fiji Army took control of the streets of Suva and the Commander of the armed forces, Commodore Bainimarama (CB) assumed executive power of the State. He declared himself to be the President in place of President Uluivuda (PU) and dismissed Mr Qarase (Q) as the Prime Minister of Fiji. He appointed one Doctor Senilagakali as the caretaker Prime Minister. The next day, 6 December 2006, Doctor Senilagakali advised CB to dissolve Parliament. CB followed the advice.

On 4 January 2007, the caretaker Prime Minister tendered his resignation to CB and later on the same day CB purported to hand back executive authority to PU. PU ratified the actions of CB as being in the interest of the nation.

On 5 January PU appointed CB as the Interim Prime Minister. Other Ministers were appointed by PU acting on the advice of the Interim Prime Minister.

Q challenged the lawfulness of PU's ratification of his dismissal as Prime Minister and of the dissolution of the Parliament. In October 2008, the High Court ruled that PU had acted lawfully, using his prerogative powers as head of State. Q appealed to the Court of Appeal.

Issues

- Was it lawful in the prevailing circumstances to dismiss the Prime Minister and dissolve the Parliament?

Decision

The Court of Appeal unanimously ruled that the President did not have the power to dismiss Q and his Ministers or to dissolve the Parliament. Consequently, the purported appointments of CB as Interim Prime Minister and of his interim Ministers were invalid.

The appeal judges concluded that CF s109 prescribed the circumstances in which the president may dismiss a Prime Minister; there was no additional 'prerogative' power of the kind found by the High Court. It was questionable whether any such prerogative power continued to exist after Fiji became a republic. In any event, they did not continue to exist in Fiji after the 1997 Constitution. The language of CF clearly excluded the availability of a prerogative of dismissal: s109 provided that the President may not dismiss a Prime Minister unless he does not have the confidence of the House of Representatives and he does not resign or get a dissolution of the Parliament.

National security is not a reason for the President to dismiss a government. The express provisions in CF for dealing with a state of emergency are inconsistent with the existence of an implied

Presidential power in these circumstances. Indeed, CF contemplates it is the government which is expected to address the issue of national security.

The President may have additional powers to act under the doctrine of necessity, but it was not proved that the prevailing circumstances justified the use of that power. In any event, the purpose of that power is to enable the President to restore the Constitution, not to supplant it.

Having concluded that Q and his government had been unlawfully removed, the court did not order its reinstatement. It took into account political reality in that Q and some Ministers had opted to take pensions and therefore had resigned. It also took into account that CB had been in power for close to two and a half years. It took a pragmatic approach by suggesting that the President appoint an independent caretaker Prime Minister who should advise the dissolution of Parliament and direct the issuance of writs for an election.

Comments

The court reasoned that the 1997 Constitution was drafted with Fiji's history in mind. Fiji had experienced an abrogation of a Constitution in 1987. It had experienced military rule. The drafters of the 1997 did not want Fiji to go through the same experiences again. They wanted certainty and therefore deliberately set out the parameters of power of the President with respect to dissolution of Parliament and appointment of a caretaker Prime Minister.

The court endorsed the supremacy of the Constitution and that usurpation of the reins of government by use of force cannot be justified by relying on some vague reserve powers. It also endorsed that in the final analysis it is the courts which decide on the legality or otherwise of the abrogation of the Constitution.

The President did not act as the Judges had suggested but purported to abrogate the Constitution and put in place a new legal order. He went on to appoint CB as Prime Minister and appoint other Ministers on the advice of CB.

SPEECH

SPEECH / DEFAMATION

The court emphasised the importance of freedom of expression by applying a high threshold of proof before it would restrain publication of allegedly defamatory material prior to the trial of the plaintiff's action for defamation.

DATT v FIJI TELEVISION LIMITED

High Court
Singh J

Fiji Islands
[2007] FJHC 20
12 June 2007

Laws considered

Constitution of Fiji 1997 (CF)
Common law on injunctions in defamation cases

Facts

The plaintiff (P) was granted an interim injunction to prohibit the defendant (D) from airing news that while employed at the Fiji Inland Revenue and Customs Authority (FIRCA) he defrauded FIRCA of $5000 dollars. The allegation was based on a draft audit report on FIRCA. D applied to dissolve the injunction of the basis that the allegation was not defamatory, or else it was justified and fair comment.

Issue

- Where was the balance to be determined between protecting P's reputation and the right of D to air matters of public interest?

Decision

Dissolving the injunction, the court held that an interlocutory injunction to restrain allegedly defamatory material would not be granted unless it was clear that no defence would succeed at trial. Here, the issues raised in D's report were matters of public interest. They concerned FIRCA, the body responsible for tax collection on which the economic wellbeing of the country depended. At the time of the draft report P was a FIRCA employee. He had since been appointed to the board of FIRCA. The background of persons sitting on high statutory bodies was a matter of public interest. Also freedom of the press assumed greater importance in the absence of a sitting Parliament and the usual ministerial accountability.

Comment

The court upheld the right of the media to air matters on the basis of the public interest. The determination of whether or not the allegations were true was a matter for trial. The inclusion of freedom of expression in the CF's Bill of Rights gave it high priority, and in circumstances where there was an extra-legal situation, the court would lean towards disclosure.

SPEECH / CONFIDENTIAL INFORMATION

The rights to freedom of expression and freedom of the media impose a heavy burden on government to justify a restriction on the publication of allegedly confidential information regarding the performance of a public body.

FIJI NATIONAL PROVIDENT FUND v FIJI TELEVISION LIMITED

High Court
Coventry J
19 October 2007

Fiji Islands
CA 464/2007

Laws considered

Constitution of Fiji 1997 (CF)

Fiji National Provident Fund Act (Cap 219)

Common law on confidential information

Facts

Fiji National Provident Fund (FNPF) is a statutory body into which employers are required to pay an equivalent of 16% of the monthly wage of all workers. Half of this contribution comes from the workers and half from the employers. In June, 2007, the Fund had more than 330,000 members. It was the largest financial institution in Fiji with a base fund in excess of one billion dollars. It controlled 40% of Fiji's financial system.

On 5 December 2006 the Fiji Military Forces executed a coup and removed the Executive and the Legislative arm of the Government of Fiji. In January 2007, the CEO and the Deputy CEO of the FNPF Board were removed and new appointments made.

In March 2007 the FNPF commissioned a report from an accounting firm over the functioning of the Board from 2002 to 2006. The report found its way to Fiji Television Limited (FTL) which televised portions of the report on three prime time news bulletins. FNPF sought an order to stop FTL from continuing to televise the report. It obtained an ex parte injunction, that is, a provisional order, restraining FTL from telecasting the report for a limited time. It relied on the argument that the report was confidential. FTL sought to have the injunction lifted, arguing that it was in the public interest to disclose how this public body operated and how it invested the funds it held. It argued that to suppress the report would breach the constitutional right to freedom of expression.

Issue

- Should the court allow continuation of the injunction? Or should it dissolve it in the public interest as it infringed the freedom of expression and the freedom of the media?

Decision

The court discharged the ex parte injunction.

The court assessed the claim to confidentiality in the light of the constitutional right to freedom of expression. CF s30 guarantees to every person the right to freedom of speech and expression and to freedom of the press and media. These freedoms may be limited on the grounds listed in s30(2) which protect other interests such as confidentiality, but only to the extent that the limitation is reasonable and justifiable in a free and democratic society.

The court accepted that freedom of expression and of the media constitutes one of the cornerstones of democratic society. The freedom of the press and media is not for the benefit of the press or media but for the benefit of the public as a whole. The court noted that at the time of the judgment, Parliament was no longer sitting, so freedom of the press assumed a greater significance in matters of public interest.

For these reasons, a higher standard is applied before a court will restrain publication of government information. Not only must the government show the information is confidential; it must also show that restraint is necessary in the public interest for one of the permissible grounds in CF s30(2). Where these conditions have been met, the court will only restrict publication to the extent that is reasonable and justifiable in a free and democratic society.

The court found that FNPF had not shown that the information was sufficiently confidential nor that there was a public interest in suppressing it. The fact that disclosure would generate public debate and criticism of government action was not a sufficient reason to stifle publication of the report.

Comment

The case is an important endorsement of the right of the media to publish matters regarding the working of governmental agencies. The right is not for the benefit of the media companies; it exists to enable members of the public to get information which will enable them to assess how well government is being carried on. The right of the media to publish this information is even more critical where other means of political accountability are not functioning.

In its judgment, the court also referred to CF s173, which directs the Parliament to enact a law giving the public a right to access official government documents. As Parliament has not yet passed such a law, the court called for a Freedom of Information Act to be passed at the earliest opportunity.

SPEECH / CONTEMPT OF COURT

Written allegations from an experienced lawyer and politician suggesting actual bias by a judge amounted to the offence of contempt of court.

ATTORNEY GENERAL v VAAI

Supreme Court
Kellam J

Samoa
[2009] WSSC 47
4 May 2009

Law considered

Common law offence of contempt of court

Facts

The accused (A) was the leader of the SDUP, a political party which was involved in litigation about its recognition as a party in the Parliament of Samoa. The SDUP and seven of its members, including A, were unsuccessful in the first of two proceedings on the issue, heard by the Chief Justice of Samoa. A was subsequently charged with two counts of contempt of court for statements he reportedly made after the Chief Justice handed down his decision. The first count arose from a newspaper article in which A was reported as saying that the Chief Justice was 'biased towards the Government.' The second count arose from a letter to the editor written by A and published in a national newspaper. The letter set out various concerns about the perception of bias, and concluded that it was 'very difficult to have any confidence that the Chief Justice will act justly, fairly and independently in the determination of the substantive hearing in this matter involving the SDUP.'

Issue

- Whether the reported comments amounted to the offence of contempt of court.

Decision

A was not guilty on the first count. There was conflicting evidence as to what, if anything, A had said to the newspaper reporter who wrote the article in question. The court was not satisfied beyond reasonable doubt that A had made the comments reported in the newspaper.

A was guilty on the second count. The quoted statement in A's letter was likely to create, in the minds of reasonable readers, misgivings as to the integrity, propriety and impartiality of the Chief Justice. Further, it did so with no reasonable basis, and could not be regarded as fair comment.

Comment

Courts must be cautious in applying the common law of contempt to punish those who express disapproval or disappointment of court processes or decisions. As the court itself acknowledged, contempt proceedings should not be used 'to interfere with freedom of speech, the accountability of the administration of justice and the right of members of the public to criticise decisions of the court.' Additionally, the fact that the boundaries of acceptable criticism are unclear makes it difficult for a person to know how to stay on the right side of the line. In this regard, it is important to remember that it is no defence that the accused did not *intend* to interfere with the administration of justice, or undermine respect for the judiciary – it is enough that the conduct was likely to have that effect.

The court carefully considered A's long and rather complicated letter. For the most part, the court found that the language used did not clearly amount to an allegation of bias. But the final comments were seen to go far, as they suggested actual bias by the Chief Justice. As such, the comments impugned the integrity and partiality of the court and constituted the offence of contempt. Perhaps an impromptu remark to similar effect by a disappointed litigant might have been excused. But here, the assertion was made in a considered letter, written by a well qualified, well-known lawyer and politician. This factor added to the seriousness of the allegations and apparently tipped the balance in favour of the finding of contempt.

Although the charge of contempt was found proven, A was subsequently discharged without conviction.

TORTURE

TORTURE / SENTENCING

Sentencing offenders to be whipped is contrary to a principle of customary international law, from which a State may not depart, even if it is not a party to those international Conventions which forbid it.

FANGUPO v R

Court of Appeal
Ford CJ; Salmon, Moore JJ

Tonga
[2010] TOCA 17
14 July 2010

International instrument and law considered

Convention against Torture and other Cruel Inhumane or Degrading Treatment or Punishment (CAT)
Constitution of Tonga (CT)
Criminal Offences Act (Cap 18) (COA)

Facts

The appellants (A) each pleaded guilty in the Supreme Court to three charges of escape from lawful custody, and multiple charges of housebreaking and theft. They were each sentenced to a total of 13 years imprisonment. For the third escape, they were also sentenced to six lashes of either the cat or the rod, to be supervised by a Doctor and magistrates, as authorised by COA s31. Due to an oversight, A had already been convicted and sentenced in the Magistrates Court for the first and third escapes.

A appealed against sentence.

Issue

- Whether the sentences were excessive.

Decision

The Court of Appeal set aside the sentences imposed in the Supreme Court. Instead, it imposed sentences totalling six years, of which the final two years were suspended for three years.

The sentence of whipping was set aside, as it was imposed for crimes for which A had already been sentenced in the Magistrates Court. The court also made observations suggesting that

whipping would now be considered unlawful in Tonga. In reaching that conclusion, the court made the following observations:

(1) the prohibition against torture is part of customary international law and is a rule from which states cannot derogate, whether or not they are a party to the various treaties such as CAT which prohibit it.

(2) a purposive interpretation of CT clauses 1 (the declaration of freedom) and 14 (fair trial) may lead to the conclusion that the whipping provision in COA s31 is unconstitutional.

(3) COA s31(6) requires certification by a doctor that the offender has no mental or physical impairment to render him unfit to undergo whipping. It is arguable that it would be unethical for a doctor to participate in the infliction of a whipping sentence, making the sentence impracticable.

(4) the UN Human Rights Committee, the Inter-American Court of Human Rights and the European Court of Human Rights have all described whipping or flogging as cruel, inhumane and degrading.

Comment

The Court of Appeal did not need to make a final ruling on the legality of whipping, as the Supreme Court sentence could not stand for the reason that A had already been convicted and sentenced in the Magistrates Court for the offences in question. CT clause 12 prohibits trying a person twice for the same offence.

However, the court gave a strong indication that it was likely that whipping would now be regarded as unconstitutional in Tonga. It noted that a prohibition on torture, including cruel, inhuman and degrading treatment or punishment, now exists as part of customary international law. It is regarded as '*jus cogens*,' meaning that it is a rule that no State can opt out of. (See *Tavake v Kingdom of Tonga* [2008] TOSC 14.) Consequently, the fact that a State has not ratified and implemented the CAT makes no difference for this purpose – it still has a duty in international law to avoid the use of all forms of torture.

The court was apparently suggesting that the Constitution be read in the light of this binding international obligation. The broad guarantees of freedom (Article 1) and fair trial (Article 14) could be interpreted to include a right not to be subject to torture or cruel, inhuman or degrading treatment. If so, then it would be beyond the power of the Tongan legislature to make a law authorising whipping as a criminal penalty.

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

ABUSE OF PROCESS

ABUSE OF PROCESS

The court may permanently stay a criminal prosecution where the conduct of the prosecution would bring the legal process into disrepute.

R v MOTI

Court of Appeal
Holmes, Muir,
Fraser JJA

Queensland, Australia
[2010] QCA 178
15 December 2009

Laws considered

Crimes Act 1914 (Commonwealth)

Criminal Code 1899 (Queensland)

Facts

Moti (M) was an Australian citizen. He was alleged to have engaged in sexual intercourse with the complainant (C), a girl under the age of 16 years, whilst he was outside Australia, namely in Port Vila, Vanuatu and at Noumea, New Caledonia. He was charged in Australia for these offences. Although the Australian authorities had commenced proceedings for M's extradition from Solomon Islands, the Government of Solomon Islands chose to deport M to Australia in a manner that prevented M from exercising his rights under the Deportation Act.

After C and members of her family had provided statements to the prosecution, C's father requested assistance from the Australian authorities in meeting the family's living expenses, suggesting that otherwise C might reconsider her commitment to the case. Payments totalling $A81,639 were then made to the family between February 2008 and November 2009.

M applied to the Supreme Court of Queensland for a stay of the indictment on grounds of abuse of process. The trial judge granted the stay on the basis that the level of the financial

support provided by the prosecuting authorities pending trial to C and her family brought the administration of justice into disrepute. The prosecution appealed this decision.

Issue

- Was the trial judge in error in granting the exceptional remedy of a permanent stay?

Decision

The Court of Appeal allowed the appeal and set aside the stay. The court emphasised that the financial support had not been offered to obtain statements from the potential witnesses, and had not created an expectation of reward conditional upon giving satisfactory evidence; rather, it has been given to ensure the continued willingness of the recipients to give evidence. The trial judge had also failed to consider that the payments were not illegal, even if they went beyond the existing guidelines for payments to witnesses.

The Court of Appeal affirmed other findings made by the trial judge. In particular, it affirmed that the deportation of M from Solomon Islands to Australia was not a disguised extradition by Australia, as the Australian government did not connive or collude in the decision of the Solomon Islands Government to deport M. It also affirmed the finding that the prosecution had not been politically motivated.

Comment

A fair judicial system is guided by certain policy considerations. One such policy is that it must ensure that its process is used fairly by all litigants, be they state or private individuals. The second is that unless the courts uphold the first principle, public confidence in the court system may suffer because the public might consider that the court process can be used for oppression.

It is also a policy that courts grant a permanent stay of criminal proceedings only in exceptional cases. This is because it is in the public interest that those who are charged for an offence have the issue of their guilt determined by a court. Where these policies conflict, the court must engage in a balancing act between the right of the State to have all offenders tried by courts and the right of all citizens to be subject only to eminently fair proceedings.

The trial judge had viewed as an affront to the public conscience the level of financial support pending trial given to C's brother and her parents. The Court of Appeal considered that there were other available responses to any unsatisfactory aspects of the prosecution conduct: if the concern was a lack of transparency as to the basis of the payments, that had been met by an order for disclosure. If the concern was the effect of the payments on the credibility of the witnesses, that could be assessed through cross-examination at trial. Payments to secure attendance of witnesses at trial are not improper, and while the amount paid to these potential witnesses may have been unwise, the payments were not of a kind to warrant the stay of prosecution of the serious offences alleged to have been committed by M.

DISCRIMINATION

DISCRIMINATION / DISABILITY/APPLICATION TO PRIVATE COMPANIES

Indian legislation protecting people with a disability from discrimination was intended only to apply to State corporate entities and not to private companies.

DALCO ENGINEERING PRIVATE LTD v PADHYE

Supreme Court
Raveendran, Lodha JJ
31 March 2010

India
Civil Appeal No.1886 of 2007

Laws considered

Constitution of India (CI)
Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 (DA)
Companies Act 1956 (CA)

Facts

The appellant (A) was a private limited company incorporated under CA. The respondent (R) was employed by A as a telephone operator for more than twenty years until his employment was terminated because of an 85% hearing impairment that R had developed while working for A.

The High Court held that A was bound by DA s47 which provided that no establishment shall dispense with an employee who acquires a disability during his service. The court ordered A to re-instate R in a suitable position.

A appealed to the Supreme Court of India, arguing that it did not meet the definition of establishment in DA s2(k), since it was not a 'corporation established by or under a Central, Provincial, or State Act'.

Issue

Was A, a private company, bound by DA?

Decision

The Supreme Court allowed the appeal. It held that DA did not apply to private companies incorporated under CA. Therefore A was not required to reinstate R.

The court accepted that in interpreting social welfare and human rights legislation, a broad and liberal approach is needed. However, express limitations on the application of the statute could not be ignored. In this case, the definition of 'establishment' used in DA was the same as that used in other statutes to refer to statutory corporations, in contrast to companies in the private sector. The same distinction is also made in CI in the enforcement of fundamental rights.

Comment

The case was not concerned with the complex question of whether human rights set out in a Convention or national Bill of Rights are capable of being applicable as between private persons (including companies) or whether they only impose duties on the State and its agents (see commentary in 2 PHRLD ix.) In this case, the only question was whether national legislation imposed duties on private corporate employers. There is no doubt that legislation giving effect to a human right is *capable of* applying between private persons; the only question is whether it was *intended to* apply between them.

In cases of ambiguity, courts should read human rights legislation broadly to give effect to the beneficial purposes of the Act. However, in this case, DA was stated to apply to 'establishments' – defined in terms which the Supreme Court had held in 1981 to mean statutory, not private, companies. If the 1995 DA was meant to apply to private companies, it was reasonable to expect the legislature to make that intention clear by using other language.

PRIVACY

PRIVACY / SEXUAL MINORITIES

- **Criminalising same sex acts in private between consenting adults contravened the right of privacy that was implicit in the Indian Constitution. It was also discriminatory, and so contrary to the right to equality.**

NAZ FOUNDATION v GOVERNMENT OF NCT OF DELHI

High Court — **Delhi**
Shah CJ, — **WPC 7455/01**
Muralidhar J — **2 July 2009**

International instruments and law considered

Universal Declaration of Human Rights

International Covenant on Civil and Political Rights

European Convention on Human Rights

Constitution of India (CI)

Indian Penal Code 1860 (PC)

Facts

Naz Foundation is a non-governmental organization (NGO). It works in the field of HIV and AIDS intervention and prevention. It works with, among others, the gay community, a section of the community recognised to be extremely vulnerable to HIV and AIDS. It brought this action in the public interest because it claimed its work was seriously impaired by State agencies' attitudes towards the gay community and by their enforcement of PC s377, which criminalised same sex acts as unnatural offences. It challenged the validity of s377 on the ground that by criminalising sex acts between consenting adults in private, it infringed the provisions of CI by abridging the right to privacy and dignity.

Issue

- Did PC s377 infringe the provisions of CI?

Decision

The court held that the right to privacy is implied from the freedom of speech and of movement in Article 19 and from the right to life and personal liberty in Article 21 of CI. A citizen has a right to be left alone. The right to be left alone included the right to make fundamental decisions about one's sexuality and any invasion of that is an invasion of privacy, at least if one acts consensually and without harming another. The court took note of global trends and protections of privacy rights of homosexuals. It found that s377 was a serious impediment to successful public health intervention: high risk groups were reluctant to reveal same sex behaviour due to fear of law enforcement agencies, thereby pushing cases of infections underground. This made access to them more difficult.

The court also held that s377 breached CI Article 14 (the right to equality); public revulsion towards a particular group was not a valid ground to deny equality. It found that the discriminatory treatment of the gay community was unfair and unreasonable and in breach of the equality provisions of the CI. It also found that s377 amounted to discrimination on the basis of sexual orientation, an aspect of sex discrimination which was prohibited by CI Article 15.

The court concluded that s377 in so far as it criminalised consensual sexual acts between adults in private violated CI Articles 14, 15 and 21.

Comment

The court did not totally strike down s377. Non-consensual sexual acts and sexual acts with those under 18 (minors) would still be caught under s377. A person under 18 cannot validly consent. This result is similar to that in the Fiji case of *Nadan v State* (2005) FJHC 500, 1 PHRLD 22, which was cited by the Delhi High Court.

VIOLENCE AGAINST WOMEN

VIOLENCE AGAINST WOMEN / STATE FAILURE TO PROTECT WOMEN

The discriminatory failure of a State to take action against perpetrators of domestic violence against women can be the basis of a claim to refugee status.

MINISTER OF IMMIGRATION v KHAWAR

High Court
Gleeson CJ, McHugh
Gummow, Kirby JJ;
Callinan J (dissenting)

Australia
[2002] HCA 14; (2002) 210 CLR 1
11 April 2002

International instruments and law considered

International Covenant on Civil and Political Rights

Convention on the Elimination of All Forms of Discrimination against Women

Convention relating to the Status of Refugees (Refugees Convention)

Migration Act 1958 (Commonwealth)

Facts

Ms Khawar (K), a Pakistani national, was married with two young children. In 1997 she and the children arrived in Australia and K sought protection as a refugee on the ground that she had been a victim of serious and prolonged domestic violence on the part of her husband and members of his family, that the police in Pakistan refused to enforce the law against such violence or otherwise offer her protection, and that such refusal is part of systematic discrimination against women which is both tolerated and sanctioned by the state. Accordingly, it was argued, she satisfied the definition of a refugee: she held a well founded fear of persecution on the basis of her membership of a social group: the social group was 'women in Pakistan' and K feared persecution on that basis because the state tolerated or permitted domestic violence against women.

The Immigration authorities refused K's application for a protection visa. She appealed to the Refugee Review Tribunal (the Tribunal), which affirmed the decision made by Immigration. In coming to their decision, the Tribunal concluded that K was the subject of private harm inflicted for personal reasons by her husband and his family, rather than persecution by the state. The Tribunal therefore declined to make any finding as to whether K fell within a social group, or whether the state did tolerate or condone domestic violence, as these allegations could not assist her case.

The matter was eventually considered on an appeal to the High Court of Australia.

Issues

- Whether the failure of a country to provide protection against domestic violence to its women nationals, in circumstances where the motivation of the perpetrators of the violence is private, can result in persecution of the kind referred to in Article 1A(2) of the Refugees Convention.
- Whether women in Pakistan constitute a particular social group within the meaning of the Refugees Convention.

Decision

By a majority of 4 to 1, the Court sent the matter back to the Tribunal to make findings on the two outstanding issues. On the material available to it, it would be open to the Tribunal to find in K's favour on both issues and this would be sufficient to establish her claim to protection.

It held that the protections contained in the Refugees Convention addressed in the main persecution by the State or agents of the State on grounds specifically prescribed, namely race, religion, nationality, political opinion or membership of a particular social group. However the Court went on to say that Australia could owe protection obligations to victims of serious violence inflicted by non-state agents where the State had a duty to act and protect but for some reason or another was unwilling to act. In other words, persecution could consist of the harm inflicted by the husband and his family together with the failure of the State to protect K from such harm.

The court further held that the harm to the victim or unwillingness to act or protect must be due to the victim's membership of one of the groups specifically referred to in Article 1A(2). It found that Pakistani women could constitute a particular social group and that the size of the group was not material to this finding. It is power not numbers that creates conditions in which persecution may occur.

Comment

The High Court of Australia recognised the failure of the state to protect women from family violence and other forms of gender violence as a basis of asylum. The case is similar to the UK House of Lords case, *R v Immigration Appeal Tribunal; Ex parte Shah [1999] UKHL20*, which recognised gender-related persecution in granting asylum for a woman who was subject to violence from her husband and his political affiliates. In that case, the court found that Pakistan did in fact tolerate and sanction domestic violence, as K had alleged in the Australian case.

This approach is consistent with the European Human Rights Court decision in *Opuz vs Turkey,* recognising that the State can be liable for failing to provide an effective remedy for victims of gender-based violence committed by non-state actors. It challenges the traditional 'vertical application' of Human Rights – that only States are bound to observe human rights standards – which previously limited States' responsibility for women survivors of domestic violence.

The failure to protect women in these cases is also discriminatory, and so contrary to the principle of non-discrimination set out in the International Bill of Rights (UDHR, ICESCR and ICCPR)

and CEDAW. The United Nations Commissioner for Refugees (UNHCR) has also recognised that the Refugee Convention was not intended to discriminate on the basis of gender.

Pacific statistics generally show high rates of domestic violence that is tolerated and legitimised through community attitudes, gaps in the legal framework and often lack of action by state mechanisms. If these gaps in the legal framework and lack of action by the responsible mechanisms are discriminatory, then Pacific governments may also be in breach of their obligations. These obligations may arise under national constitutions, at least where they prohibit sex or gender discrimination. Alternatively, most Pacific island countries have ratified CEDAW or one of the instruments that make up the International Bill of Rights and therefore in principle are committed to eliminating gender-discriminatory practices in law, policy and practice.

VIOLENCE AGAINST WOMEN / SLAVERY

Women who consented to engage in prostitution could still be regarded as held in a condition of slavery where they were in fact subject to powers of control generally associated with ownership.

R v TANG

High Court
Gleeson CJ, Gummow, Hayne, Heydon, Crennan, Kiefel JJ (Kirby J dissenting)

Australia
[2008] HCA 39; (2008) 237 CLR 1
28 August 2008

International instruments and law considered

International Convention to Suppress the Slave Trade and Slavery (Slavery Convention)

Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery

Criminal Code (Commonwealth) (CC)

Facts

The respondent (T) operated a licensed brothel in Melbourne, Victoria. Victorian law permits the operation of licensed brothels. She was charged and convicted under CC s270.3(1)(a) for five offences of intentionally possessing a slave and for five offences of exercising power of ownership over a slave.

The charges related to five women who were recruited from Thailand to work in a Melbourne brothel. Under the terms of an oral agreement, each woman owed a debt of about $45,000 to T. This debt was based on the price paid by T to 'purchase' the women from their Thai recruiters, as well as travel, accommodation and other expenses.

To pay this debt the women were required to work six nights a week in a brothel servicing clients. For every client serviced the debt was reduced by $50. The women were provided

accommodation and food. They were to earn nothing from their work until the debt was paid off. The seventh day was a free day when they could work and keep earnings for that day. The women's passports and return air tickets were kept by T. Their movements were also supervised, and they were effectively confined to the brothel.

All five women had voluntarily travelled to Australia on the understanding that once their debt was paid off, they would have the opportunity to earn money on their own account by working as prostitutes. They knew about the general nature of the work they were going to perform.

The convictions were quashed in the Court of Appeal of the Supreme Court of Victoria, from which there was a further appeal to the High Court of Australia.

Issue

- Whether T's conduct was capable of falling within s270.3(1)(a).

Decision

The court found there was evidence on which a jury could have found T guilty, and reinstated the convictions.

In deciding whether the five women could be regarded as slaves, the court made reference to the definition of slavery in CC, namely the 'condition of a person over whom any or all of the powers attaching to the right of ownership are exercised including where such a condition results from a debt or contract made by the person.' This definition, which is derived from the Slavery Convention, assumes that no one can be a slave in a legal sense in Australia, as ownership of a person is not possible. Instead, the CC targets conduct which treats a person as if they were a slave. In short, it prohibits *de facto* slavery.

The High Court had to distinguish between slavery and other harsh employment conditions which may not amount to slavery. Gleeson CJ held that this depended on the nature and extent of the powers exercised over the women. Of particular relevance here was T's capacity to deal with the women as objects of sale and purchase, her extreme control over their movements, and the lack of payment for their services. Gleeson CJ also accepted that lack of consent was relevant, but not essential – it was possible for a person to have agreed to enter the condition of slavery.

Hayne J agreed with Gleeson CJ. His approach was that a person may be said to enslave another human being where one person has 'requisite dominion' over the other. Hayne J concluded that a slave is someone 'deprived of choice.' He said that 'asking what freedom a person has may shed a light on whether the person was a slave.'

Hayne J concluded that even if the five women came to Australia voluntarily, knowing well the nature of work they had to perform, the central question was whether they had 'any freedom to choose what was done with them in Australia.' They had arrived in Australia with little money and hardly any knowledge of English. They were 'bought and sold' and required to pay off a debt that was arbitrarily imposed on them. They had no effective choice about their movements or working hours. His Honour also cast doubt on the reality of the women's consent, suggesting that factors such as the power imbalance with their recruiters may have well have precluded real consent.

Comment

The discussion endorsed the principle that domestic legislation should be interpreted, as far as possible, to be consistent with a nation's international obligations, including obligations in relation to human rights. The High Court interpreted the definition of slavery in CC in line with the definition in Article 1 of the Slavery Convention. It also supported the broader interpretation of slavery adopted by the International Criminal Tribunal for the former Yugoslavia in the *Kunarac* case, Case No IT-96-23 and IT-96-23/1-A (12 June 2002) (Judgment) rather than the more restrictive interpretation of the European Court of Human Rights in *Siliadin v France* (2005) VII Eur Court HR 333.

This case is an important landmark in that it recognises the realities of contemporary forms of slavery. It is a significant decision in an era when human trafficking is a major international concern.

VIOLENCE AGAINST WOMEN / STATE RESPONSIBILITY

State parties to the European Convention on Human Rights must not only refrain from violating human rights through their own actions and those of their agents, but must also act to safeguard the rights of those within its jurisdiction.

OPUZ v TURKEY

European Court of Human Rights
Casadevall P, Fura-Sandström, Bîrsan, Gyulumyan, Myjer, Ziemele, Karakaş JJ, Quesada SR

Europe
Application No. 33401/02
9 June 2009

International instruments and law considered

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

European Convention on Human Rights (ECHR)

Criminal Code of Turkey

Family Protection Act (Law no. 4320, 14 January 1998)

Facts

The applicant (A) lived in Diyarbakar, Turkey. She started a relationship with HO in 1990. They were officially married in November, 1995. They had three children born in 1993, 1994 and 1996. Their relationship was a torrid one. The applicant and her mother were subjected to numerous assaults and threats to life by HO. The judgment lists eight incidents of assaults. The earliest incident was in April 1995 when HO had asked them for money and had beaten them and threatened to kill them. A's medical report confirmed bruises on her body. Several others involved HO seriously wounding A and her mother with a knife. On another occasion, HO drove his car into A and her mother. HO also made a series of threats to kill A and her mother. Finally

in March 2002, the mother decided to move away. While she was removing her furniture in a truck, HO shot her dead.

Prior to the final incident, a similar pattern of conduct followed most of the assaults. A and her mother would lodge a complaint with the authorities; HO would be arrested but released pending trial; A and her mother would then withdraw their complaints (under pressure from HO or the authorities or both) and the charges would be dismissed, even though there was medical evidence to show the extent of the severe injuries suffered by A and her mother. On one occasion, a court fined HO for a knife attack on A.

HO was convicted of the murder of his mother in law and sentenced to life imprisonment, which was then reduced to 15years and 10 months for his good behaviour during the trial and because the offence was regarded as an 'honour crime.' HO appealed and pending appeal the lower court released him from custody.

After the death of her mother, A sought relief from the European Court of Human Rights. She alleged that Turkey had violated Article 2 (the right to life), Article 3 (the right to freedom from torture and inhumane treatment) and Article 14 (freedom from discrimination). She alleged that despite a history of abuse and threats to kill, the Turkish authorities had failed to provide her protection. She argued that this failure to provide protection was the result of gender based discrimination amongst Turkish legal institutions and society.

Issues

- Was A's complaint admissible?
- Was the State responsible for the violation of A's rights, when the offending conduct was committed by HO?

Decision

The court declared A's complaint admissible. It rejected the Turkish submission that A had failed to exhaust her domestic remedies; as it found that the available remedies were ineffective.

Article 2 of the ECHR requires State parties not only to refrain from intentional and unlawful taking of life but also to safeguard lives of those within its jurisdiction. It requires a State to take preventive operational measures to protect an individual whose life is at risk, where the State knows of the risk. In A's case, given the history of HO's violent conduct and threats to the safety of A and her mother, further violence against the two was not only possible but also foreseeable. A and her mother had sought protection but the authorities refrained from intervention, because the complaints had been withdrawn, and because the violence was seen as a family matter.

The court noted that there was an escalating violence against A and her mother by HO. The crimes committed by HO against the two were grave and warranted preventive measures to safeguard against future threat to health and safety. Action should not have been dependent on the women maintaining their complaints. The court concluded that there was a positive obligation on the state to take preventive measures to protect A and her mother whose life was at risk. It found that the Turkish authorities had failed to display due diligence. They had the power to make protection orders against HO but had failed to do so. Further, they had taken over

six years to deal with the murder prosecution, and it was still not finalised. Hence there was a breach of Article 2.

Secondly, the court considered Article 3. It forbids torture or cruel and degrading treatment. The violence suffered by A, both physical and psychological, fell within those terms. The court ruled that there was a duty under the Convention on state parties to ensure that individuals within its jurisdiction were not subjected to such treatment, including treatment by private individuals. That is, the obligation was not only confined to treatment by state agents. The court concluded that the response by the authorities to the conduct of HO was manifestly inadequate. It was not enough for them to say that A could have applied for entry into a 'safe house.' The state needed to be more proactive and effective in protecting A. Therefore there was a violation of Article 3 of ECHR.

Thirdly, the court found that there was violation of Article 14 of the Convention when read in conjunction with Articles 2 and 3. Article 14 ensures enjoyment of rights and freedoms laid in the Convention without discrimination. The applicant argued that the domestic law of Turkey was discriminatory and insufficient to protect women, as a women's life was treated as inferior in the name of family unity. The court ruled that even though Turkish law on paper made no distinction between male and female, it discriminated against women in its practical operation. The discrimination resulted from the general attitude of local authorities, the manner in which women were treated at police stations when they reported domestic violence and judicial passivity in providing effective protection to the victims. It found police try to convince the victims to return home and drop complaints. Moreover, the perpetrators of such crime did not receive dissuasive sentences because courts mitigated sentences on grounds of tradition, custom and family honour. It ruled that it had been internationally held through interpretation of CEDAW and the Inter American Convention on the Prevention, Punishment and Eradication of Violence against Women that the State's inaction, even if unintentional, to protect women from domestic violence breached women's right to equal protection of the law.

The Court awarded EUR 30,000 in damages for mental anguish caused to A as a result of her mother's death

Comment

The principle significance of the case lies in the fact that the Court found the State violated A's rights by failing to take adequate steps to protect her from violence at the hands of her husband. The Court emphasised that the State's duty did not cease at just passing progressive legislation but extended to taking steps to protect women from all acts of violence about which it was made aware. In this case, the Government had made some valuable reforms, such as legislating for protection orders and setting up safe houses for women suffering from domestic violence. However, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors indicated a lack of commitment to address domestic violence. This ruling advocates a proactive approach by States in implementing and applying rights based legislation.

The Court relied on a wide spectrum of comparative legal instruments, reports and Conventions including CEDAW and the Belém do Pará Convention which sets out States duties to eradicate gender based violence.

PART III: CASES FROM THE PACIFIC DEALING WITH DOMESTIC VIOLENCE AND FAMILY LAW ISSUES

CONSTITUTIONALITY OF FAMILY PROTECTION LAW

CONSTITUTIONALITY / FAMILY PROTECTION LEGISLATION

The provisions in the Bill for the Family Protection Act No 28 of 2008 (Vanuatu) were not inconsistent with the Constitution of Vanuatu.

PRESIDENT OF THE REPUBLIC OF VANUATU v SPEAKER OF PARLIAMENT

Supreme Court
Lunabeck CJ

Vanuatu
[2008] VUSC 77
22 November 2008

Law considered

Constitution of Vanuatu (CV)

Facts

Following the passage through the Vanuatu Parliament of a Bill for the Family Protection Act No.28 of 2008, the Bill was then presented to the President for his consideration and assent. The President then referred the Bill to the Supreme Court pursuant to Article 16(4) of the Constitution seeking the court's opinion as to the constitutionality of the Bill.

It was argued that certain provisions of the Bill were inconsistent with the CV:

(1) The definition of domestic violence in s4(1)(a) included an intentional assault on a family member. It was argued that this made unlawful the exercise of parental discipline of a child. As such, it was inconsistent with the Preamble to the CV, which recognised that Vanuatu was based on Christian principles; which allow reasonable assault by a parent on his or her child as a form of correction. It was also inconsistent with the fundamental freedom of conscience and worship in CV Article 5(1) (f).

(2) Ss13(d) and 15(1)(c) provided for a protection order to prohibit a person from being in or near specified premises or to grant exclusive occupancy of a place of work or residence. It was argued that this infringed the rights to protection of the law and protection for the privacy of the home and other property and from unjust deprivation of property, and so inconsistent with Article 5(1)(d) and (j).

(3) S32 of the Bill allows a court (except in criminal proceedings) to receive any evidence that it thinks fit, even if it would otherwise be inadmissible in a Court. It was argued that this infringes the right to the protection of the law, which is guaranteed in Article 5(1)(d) and further elaborated in Article 5(2)(a)(2)(a).

(4) S7 of the Bill made provision for the appointment of 'authorised persons' to make temporary protection orders in limited circumstances. It was argued that this was inconsistent with Article 47(1) and (2), which vest the administration of justice in the Judiciary, who are to be appointed by the President.

Issue

- Were the identified provisions of the Bill inconsistent with the Constitution?

Decision

The court found that none of the identified provisions were inconsistent with the Constitution. In particular, it ruled that:

(1) The provisions of the Preamble had no more than an interpretative role, and could not form the basis for a reference under Article 16(4). In any event, there was nothing in the Bill to prevent the exercise of genuine parental discipline, including the reasonable corporal punishment of a child.

(2) The rights in Article 5 are 'subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health.' The considerations relevant to the grant of a protection order invoke some or all of these legitimate interests. The limited nature of protection orders mean that they were not inconsistent with Article 5(1)(d) and (j).

(3) The reception of otherwise inadmissible evidence in non–criminal cases did not infringe the rules of natural justice which are protected by Article 5(1)(d). In any event, any inconsistency could be justified as the measures are only intended to facilitate proof for preservative measures in cases where, typically, strict proof is notoriously difficult.

(4) It was not intended that 'authorised persons' would exercise judicial functions or form part of the Judiciary. Therefore there was no inconsistency with Article 47(1) and (2).

Comment

The Family Protection Act 2008 is an important advance in providing legal protections from domestic violence. As such, it is welcome that the Supreme Court found no constitutional impediment to the President granting his assent to the Bill.

The judgment of Lunabeck CJ should have put to rest some of the concerns raised in parts of the community about the impact of the law on practices such as the disciplining of children. The Act makes it unlawful to assault a family member, but the use of reasonable corporal punishment as a means of disciplining children is not considered an assault in common law, and that law has not been changed by the Act. It is, however, essential that any force used should be 'reasonable'. It can be expected that judicial and community standards as to what is reasonable may gradually evolve, as evidence shows that other forms of discipline are both more effective as a means of promoting good behaviour and less harmful to the development of the child.
The Act provides for the appointment of 'authorised persons' with the power to make temporary protection orders. Authorised persons may be community leaders such as chiefs, pastors,

teachers or senior police officers. It is envisaged that this arrangement will be utilised in remote situations, where access to courts is limited. Although there is practical merit in this solution in order to meet the immediate needs of potential victims of domestic violence, it is suggested that legislators should exercise caution in conferring powers to determine people's rights on persons other than the judiciary. The determination of rights by a well-trained judiciary that is independent of the Parliament and the Executive promotes the better protection of people's rights. One should be cautious before conferring similar powers on persons who do not have the same training and guarantees of independence. Although the court in this case reasoned that authorised persons would not determine any rights or obligations, and would 'merely discharge the limited statutory function of deciding whether to issue a temporary protection order and the terms thereof,' the person subject to the order clearly comes under an obligation not to infringe the terms of the order, at risk of committing an offence under the Act. Although the orders only have a temporary effect, and do not finally determine the rights of the parties, it is essential that the persons invested with this significant power must have appropriate training in its proper use.

FAMILY LAW

FAMILY LAW / REVOCATION OF ADOPTION ORDER

A court may revoke an adoption order on the application of an adopted person who is an adult at the time of application.

ALI v HAKIM

High Court
Scutt J

Fiji Islands
[2008] FJHC 53
4 February 2008

International instrument and laws considered

Convention on Rights of the Child (CRC)

Constitution of Fiji 1997 (CF)

Adoption of Infants Act (Cap 58) (AIA)

Facts

The defendants are the biological grandparents (BG) of the applicant (A). The third parties are A's biological parents (BP). A was born in 1982 and legally adopted in Fiji in 1997 by BG, who had cared for him since birth.

In 2007, A applied to the High Court to revoke the adoption order made in 1997 and to be re-registered as the son of BP. At the time of the application, A was aged 25 and lived in Australia with BG. BP lived in Fiji. All the parties were in favour of revocation.

Issue

- Could the court revoke an adoption order properly made ten years earlier on the application of an adult adoptee?

Decision

The court did not have power under AIA to revoke the 1997 adoption order. AIA only provided for revocation of adoption orders in limited circumstances which did not extend to a case like A's. Instead, the court fell back on the *parens patria* inherent jurisdiction to assist the parties.

Although *parens patria* powers are for the protection of children, the court held that they can extend to a situation where a child's status was dealt with by law and the child is now an adult. The limited powers of revocation in AIA did not restrict the inherent powers under *parens patriae*. If it were otherwise, it would infringe the right to equal protection in CF s38 which provided that a person must not be unfairly discriminated against on grounds of his/her personal characteristics or circumstances including age or birth. The court was of the view that the adoption laws were neither reasonable nor justifiable if they denied A the right to reaffirm his birth status to his biological parents. The court further referred to the CRC which promotes the best interests of the child as a primary consideration and which also recognises the importance of extended families. The court revoked the 1997 adoption order and ordered the Registrar of Births to note the revocation.

Comment

This is a very creative but somewhat strained use of a Convention to achieve an end not provided for in domestic legislation.

An inherent power of the court can be restricted by implication by a statute. In this case, it was arguable that AIA s4 had restricted the inherent power to revoke an adoption order by providing for a limited statutory power to revoke. However, the court relied on the guarantees in the Bill of Rights and the provisions of CRC to avoid this conclusion. It effectively held that the *parens patriae* jurisdiction (a) allowed for revocation in circumstances outside AIA s4 and (b) extended to an application brought by an adult adoptee.

The second of these conclusions was justified on the basis of the guarantee of equality in CF s38. The reasoning suggests that an application could have been brought if the applicant had been an infant and it would be unreasonable to treat him differently because he was 25.

The court looked at two basic purposes of the CRC. It stated that its application was not necessarily confined to children. It considered that the first purpose was to ensure that children have the highest level of possibility of good positive well cared for life. Secondly, its purpose was to work towards the reality, that having such lives as children, they grow up into adults having the highest level of possibility of adulthood.

FAMILY LAW / MAINTENANCE

Parties cannot by private agreement alter a court order for maintenance of a child, the support of whom takes precedence over the parents' discretionary expenses.

CHAND v RATTAN

Magistrates' Court (Family Division) **Fiji Islands**
Magistrate Wati **06/SUV/0614**
9 Feb 2009

Laws considered

Family Law Act 2003

Family Law Rules 2005

Facts

Certain orders had been made by another Magistrate. The applicant (a) complained that the respondent (R) had failed to comply with those orders. Contempt proceedings were filed on the ground of wilful disobedience of court orders.

Issue

- Had R wilfully disobeyed court orders?

Decision

After hearing the parties, the Magistrate concluded that A had not shown beyond reasonable doubt that R had wilfully disobeyed three of the orders. However she found proven the ground that R had wilfully disobeyed the order to pay maintenance for their child. The court rejected R's argument that he understood that by granting consent for the child to be taken out of jurisdiction, his duty to make maintenance payments would cease. Even if A agreed that R need not pay maintenance, the court ruled that parties cannot by private agreement alter court orders for maintenance of a child.

The court also ruled that the duty of a parent to maintain a child had priority over all commitments other than those reasonably necessary to enable the parent to support himself or herself. The commitments must be reasonably necessary, so expenses like those for pet care, entertainment and church tithes cannot be claimed as priorities over the needs of a child.

Comment

Maintenance orders are for the benefit of the child and not for the benefit of the parents. Once a maintenance order is made, only the court can vary that order. Parties who are subject to a court order cannot vary the order by agreement between themselves. Any variation must be sanctioned by the court.

FAMILY LAW / NULLITY

A person's human right to choose a spouse and freely enter into marriage must be considered when determining whether parties to an arranged marriage truly consented to the marriage.

NK v ZMR

High Court (Family Division)
Scutt J

Fiji Islands
[2009] FJHC 95
2 April 2009

International instruments and law considered

Universal Declaration of Human Rights (UDHR)

Convention on the Rights of the Child (CRC)

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):

Family Law Act 2003 (FLA)

Facts

The applicant woman (A) and respondent man (R) went through a civil ceremony on marriage in Fiji on 22 December 2008. A was then 21 years of age and R 27. A had only met R nine days before the ceremony; he visited her at her home only twice prior to the ceremony. Prior to that, A had not even been aware that a marriage was being arranged for her. A had been pressured into entering the marriage by her father and uncle. Following the ceremony, R only visited A for about five minutes, before returning to Australia, where he remained. The parties never lived together. A had expected that after they had been through the civil ceremony, they would have a Muslim religious marriage ceremony. This never eventuated.

A applied for a decree of nullity on the basis that there had been no real consent to the marriage.

Issue

- Had these parties to an arranged marriage genuinely consented to the marriage?

Decision

The court granted the decree of nullity.

Under FLA s26, the court was required to consider, among other factors, the CRC and the CEDAW. CEDAW requires that no one is allowed to be forced into marriage; both parties must willingly and freely enter into the marriage relationship. Article 16(1)(b) emphasises a woman's 'right to choose a spouse and enter freely into marriage', this right being 'central to her life and her dignity and equality as a human being.' The freedom and rights of both spouses are also proclaimed and preserved in the UDHR, to which Fiji is a signatory. It is in the light of these rights that the requirement to prove lack of real consent by reason of duress or fraud must be assessed.

To show duress, it is not necessary to prove physical force was used or threatened. Rather the court must examine all the evidence within the context of contemporary Fiji society, taking into account the particular community from which the parties come. Here, A came from a community which expects parties to marry in their early twenties or their late teens and views arranged marriages as the norm. Children are expected to obey their parents and to accept the 'rightness' of arranged marriage. Children may not question the arrangement and believe they must submit to it without argument. In this context, a number of factors indicated that A acted under duress:

- she had known R for only a few days, and had barely spoken to him;
- when asked by R to marry him, she referred the decision to her father;
- at the time, she did not want to marry R;
- she was only 21 and felt obliged to accept her parents' choice for her;
- her father and uncle's presence at the ceremony placed further pressure on her.

The court also found that she had entered the marriage because of fraud. A had been led to believe by R that a religious ceremony would follow the civil ceremony. Without that expectation she would never have entered the civil marriage (nor would her parents have allowed her to.) R had now withdrawn from going through a religious ceremony. This may have been because he too had been pressured into the marriage,, and now did not wish to proceed with it. Even so, his rejection of the religious marriage still satisfied the civil concept of fraud used in the FLA.

Comment

This case is typical of many decided in Fiji, where parties seek to set aside as a nullity an arranged marriage, often in circumstances where a civil ceremony occurred but the expected religious ceremony did not eventuate. The court was sensitive to the religious and social beliefs of the community from which the parties came, but insisted – as the FLA requires – that the demands of domestic and international law must prevail.

FAMILY LAW / PATERNITY

Where paternity is in issue in an application for child maintenance, it is not necessary for the applicant to rely on or satisfy the statutory presumption of paternity if she can prove paternity by other evidence.

MAHARAJ v RAJU

High Court (Family Division)
Scutt J
19 May 2008

Fiji Islands
Appeal 0989 of 2006

Law considered

Family Law Act 2003 (FLA)

Facts

This was an appeal from the Magistrates' Family Court. The magistrate had ruled that Maharaj (M) was the father of a child born to Ms Raju (R). M appealed against the ruling on the grounds that the magistrate did not take into account the presumption of parentage arising from cohabitation, as provided in FLA s132. The presumption is that if a child is born to a woman who had lived with a man at any time in the period between 20 weeks and 44 weeks before birth, the child is presumed to be fathered by that man, unless the contrary is proved.

The magistrate also ordered M to pay R $35 per week as maintenance for the child. It was established that M was in work as a sales merchandiser at the time but neither party had produced evidence as to the amount of M's income and other expenses.

Issues

- Was the magistrate required to consider the presumption of parentage in determining paternity?
- Was the magistrate required to ask for a report as to M's means before making a maintenance order?

Decision

The presumption of parentage is only one means of proving paternity, which a party may or may not choose to rely on. In this case, R was able to prove paternity by other evidence, so there was no need for her to rely on the presumption, and no need for the magistrate to consider it.

It was not an error of law for the magistrate to order M to pay maintenance without asking for a means report. M had failed to adduce any evidence and had no grounds to object. However, in the interests of the child, the magistrate should have ascertained M's capacity to pay. The matter was remitted for rehearing solely on the issue of the amount of maintenance M should be required to pay for the child.

Comment

Presumptions in law often assist a party to prove a fact in issue (in this case, paternity). However, it is wrong to think of the presumption as a requirement to be satisfied before the fact in issue can be proved. It is simply an available option for the party, which they need not rely on, if they can prove the fact by other means. In this case, it would be absurd if paternity could only be established by proving that the parties had lived together at the time when the child could have been conceived: many children are born to parents who have not lived together, and paternity can be established by other means such as DNA tests.

Difficulties in proving capacity to pay maintenance can be easily overcome if on the first call of case in court, the parties are reminded to bring documentary proof of income and expenditure. At the end of the day a trial process must be fair to both parties, and, in this case, to the child of the parties. That is what the court tried to achieve by bending over backwards to assist M and ordering an investigation as to his means before a fresh maintenance order was made.

FAMILY LAW / PROPERTY

The principles for the distribution of assets following a divorce in Samoa are to be found in the leading House of Lords authorities decided under the Matrimonial Property Act 1973 (UK).

ARP v ARP

Supreme Court
Sapolu CJ

Samoa
[2008] WSSC 35
13 June 2008

Law considered

Matrimonial Causes Act 1973 (UK) (MCA)

Facts

The husband (H) and wife (W) were married in 1973, separated in 2001 and divorced in 2004. During that time they had two sons and an adopted daughter. Both worked in developing a successful rental car business in Samoa. The land on which the matrimonial home was built had been transferred to H by his mother, but that was in return for $5,000 sent by H and W to the mother. Most of the $5,000 had been earned by H, with a smaller amount contributed by W. The house had been funded by H and from earnings from the rental car business. W also made significant improvements to it. After separation, W and the daughter continued to live in the matrimonial home.

H had initially funded the business, and made further contributions to purchase vehicles for it. Both H and W worked in the business. On separation, H and W divided the rental cars between them and subsequently each operated separate rental car businesses.

Although H and W had each claimed to be entitled to the home, by the time of trial they both agreed that it be transferred to the two (now adult) sons

Issue

- Who was entitled to the matrimonial home on dissolution of the marriage?

Decision

Both H and W had a share in the matrimonial home. It was unnecessary for the court to determine their respective shares, as it ordered that the home be transferred to the sons, in accordance with the parties' wishes. Upon transfer, it would be for the sons to decide whether W and her new partner should be allowed to continue to live there.

The court departed from its earlier decision in *Elisara v Elisara* [1994] WSSC 14, in which it had indicated that claims to matrimonial property could be decided either on the basis of unjust enrichment, as understood in Canada, or on the basis of a 'reasonable expectation'

test adopted in New Zealand. In the instant case, the court preferred to follow the lead of two English authorities, *White v White* [2000] UKHL 54, [2001] 1 AC 590 and *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618 both of which apply the MCA.

Some of the key features of this approach were:

- the primary objective of the distribution is fairness, taking into account all the circumstances.
- the first consideration should be given to the welfare of the children of the marriage.
- there is no place for discrimination between husband and wife and their respective roles; there should be no bias in favour of the money-earner and against the home-maker and the child-bearer.
- as a general guide to the 'sharing principle' in relation to matrimonial property, equality should be departed from only if, and to the extent that, there is good reason for doing so.
- this sharing principle is applicable as much to short marriages as to long marriages and generally applies to the matrimonial home, however acquired.
- the sharing principle applies to 'business and investment' assets as much as to 'family' assets, where acquired during the course of the marriage, at least when acquired by the parties' common endeavour.
- the position may be different for 'non-matrimonial property', that is, assets that the parties brought to the marriage or were acquired by inheritance or gift; but even these assets may be available to meet the claimant's financial needs.
- the question of who was at fault in the breakdown of the marriage is generally irrelevant. It might be relevant in exceptional cases, such as where misconduct by one party has affected the future earning capacity of the other party after the marriage is dissolved.

In this case, the rental car hire business was considered as part of the matrimonial property, as both H and W had contributed to its success. It was appropriate to divide this asset equally (as the parties had done in a settlement between them). The matrimonial home was also treated as matrimonial property, as it had been acquired during the course of the marriage. The alleged misconduct of the parties was ignored in the determination of the property issue.

Comment

The decision as to the distribution of the matrimonial home was relatively simple, given that the parties were essentially in agreement as to what should happen to it. However, the case is very significant, as it sets out some of the principles for determining the distribution of assets in other cases.

Although the English decisions were made in the context of no-fault divorce (while Samoa continues to recognise fault-based grounds for divorce), and a statutory power to redistribute property on divorce (for which there is no Samoan equivalent), the court considered that they

provided the best available guidance for the difficult task involved. The court acknowledged that some allowance might be needed to accommodate special features of Samoan circumstances, particularly regarding inalienable customary land. (A similar proviso has been recognised in Vanuatu, in the case of *Joli v Joli* [2003] VUCA 27, 1 PHRLD 12, where the court established that the MCA was applicable in Vanuatu.)

The decision is to be welcomed for its equal treatment of the contributions, both financial and non-financial, of the parties. There is a strong focus on treating the marriage as a partnership between equals, who each contribute to the joint endeavour in their own ways, whether that is in the paid workforce or in domestic work and child-rearing. The likely outcome of such an approach in most cases is an equal division of the assets, unless there are strong grounds for departing from equality. It is also significant that the conduct of the parties, in terms such as their infidelity or mistreatment of the other, will rarely affect the distribution of property.

It should be noticed that the court stressed that it was only referring to those factors in the English cases of most relevance to the immediate case. The court thus focused on the 'sharing principle' and said little about two other key principles established in the House of Lords cases: the assessment of the present and foreseeable financial needs of the parties, and compensation to redress any significant future economic disparity between the parties arising from the way they conducted their marriage (eg where the wife might be disadvantaged in her career by taking time out for child rearing). Family lawyers in Samoa will need to become familiar with all aspects of the leading English decisions.

FAMILY LAW / PROPERTY / MAINTENANCE

Property acquired by one spouse after separation may still be treated as matrimonial property where it was purchased with funds acquired during the continuance of the marital relationship.

NISHA v KHAN

Family High Court
(Appellate Division)
Scutt J

Fiji Islands
Appeal No. 06/Suv/0021
25 July 2008

Law considered

Family Law Act 2003 (FLA)

Facts

The husband (H) and wife (W) cohabited for 11 years before marrying in 1976. They had lived and raised a family in the USA for 23 years and acquired citizenship there, before retiring back to Fiji in 1997. In 2000, H purchased land at Wainibuku and began spending time there with another woman with whom he had started a *de facto* relationship. However, H also continued

to spend time with W in the matrimonial home and to maintain her. H and W finally separated in 2002.

On dissolution of the marriage, the magistrate awarded W $125 per week by way of maintenance, a half share in the matrimonial home (to be transferred into her name) and half the value of the Wainibuku property. Upon payment to W of her half share in the Wainibuku property, the maintenance payments would cease. H appealed against the orders, arguing that the magistrate was in error on the facts, that the amount of maintenance was excessive, and that W should have no claim to the Wainibuku property because it was acquired by H after the breakdown of his relationship with W.

Issue

- Had the magistrate reasonably exercised his discretion in awarding maintenance and dividing the property?

Decision

The appeal was dismissed. The court upheld the magistrate's findings of facts, as they were open on the evidence; it also upheld the maintenance order and the property settlement.

The court held that the magistrate had properly considered the factors relevant to maintenance under FLA – the capacity of H and W to earn future income (having regard to their age, health, education, skills, experience, income-earning assets and entitlement to social security payments from the USA), the capacity of H's new partner to earn an income, financial support from family members, and any liabilities of the parties.

The court also accepted the magistrate's finding that H and W had not separated at the time H acquired the Wainibuku property. A marital relationship has not necessarily broken down even though one party begins to live with another person. Nor was it conclusive that H had pronounced a Talak, a customary law divorce. Therefore it was open to find that the property had been purchased during the marital relationship. Even if the property had been acquired after separation, it had been purchased with funds acquired during the relationship and so should be considered matrimonial property in any event.

The court accepted the magistrate's findings that W had made an equal contribution to the acquisition of the matrimonial property. Her contributions were mainly non-financial in nature, but after a long marriage, the courts will tend to value both parties' contributions equally, unless there is some exceptional factor to the contrary.

Comment

The decision contains a careful review of many Australian authorities on the Australian Family Law Act, on which the Fijian law is based.

Although there was much argument on the appeal as to whether the Wainibuku property had been purchased during the subsistence of the marriage, the issue was something of a diversion: as the court found, the significant fact was that the purchase money had been acquired while the relationship was still in place, so that the land was properly regarded as matrimonial

property. Even so, the decision shows a realistic appreciation of many relationships, by recognising that a marriage does not necessarily end when one spouse begins an adulterous relationship with a third party.

The decision also confirms the trend seen in *Arp v Arp* above, for contributions between spouses in a long marriage to be treated as equal in all but exceptional cases. This greatly improves the position of those women whose contribution to the marital partnership takes the form of non-financial contributions such as child care, domestic work, home improvement or unpaid work in subsistence food production.

FAMILY LAW / PROPERTY

A party whose name is not registered on the title to property can establish an interest in the property under a constructive trust, by showing a common intention shared with the legal owner that she should have such a share, and her detrimental reliance on that intention.

KISEKOL v KISEKOL

National Court of Justice
Davani J

Papua New Guinea
OS No. 171 of 2009
6 October 2009

Law considered

Common law on constructive trusts

Facts

The wife (W) and husband (H) were married in 1995. In 2000, the matrimonial home was purchased and registered in the name of H alone. W's evidence, which the court accepted, was that they had agreed that the property would be in joint names, but that after the purchase, H explained that he had registered it in his name alone, because he was paying the mortgage. However, he told W that 'the bottom line is that it's ours and you've got to be happy that you own a house.' W proceeded on this basis, and purchased palm trees and other flowers and planted them on the property to beautify the premises.

Following the parties separation in 2006, W remained in occupation of the property. However, H purported to sell the property to the second defendants, who sought to obtain vacant possession. W sought a declaration that she held a one half share in the property by way of a constructive trust.

Issue

- Did W have a share in the property even though it was registered in H's name alone?

Decision

The court ruled that H held the property on constructive trust for himself and W equally and that H must pay her half the proceeds of sale to the second defendants. W could remain in possession of the property until the money had been paid.

In this case, W had succeeded in establishing a constructive trust based on common intention. It was necessary to show that:

(1) there was an agreement between the legal owner and the 'partner' that the land or property was to be jointly owned; that the partner was to have a distinct interest in the property. That agreement could be either express or implied; and

(2) the partner acted on the belief of that agreement to his or her detriment.

Where this is shown, the legal owner is then said to become constructive trustee for the partner and holds the property in trust for the partner according to the agreement.

Comment

The principle in this case applies both to married couples and those in a *de facto* relationship. It enables the court to determine the existing property rights of the parties, even if the court has no power to redistribute property as it sees fit.

The constructive trust allows a party whose name does not appear on the title deed to establish a right to share in the property, or even to obtain a greater share than that indicated by the legal title. The court will examine the objective evidence of what was said and done between the parties prior to, at the time of and shortly after the purchase of the property. Even if H had a secret intention not to give W any share in the property, he is bound by his words to her at the time, provided W then relied on them to her detriment. The detriment does not need to be a contribution to the purchase price of the property. In this case, the detriment was her spending money on improvements to the property.

VIOLENCE AGAINST WOMEN

VIOLENCE AGAINST WOMEN / EVIDENCE

In the trial of a person accused of rape, the court must give a warning that it is dangerous to convict on the basis of the uncorroborated evidence of the complainant.

R v TALANOA

Supreme Court
Ford ACJ

Tonga
[2006] TOSC 14
13 April 2006

Laws considered

Criminal Offences Act (Cap 18) (COA)
Evidence Act (Cap 15) (EA)
Common law practice of corroboration

Facts

The complainant (C) met the accused (A) at a night club. C accompanied A and two others to a vacant house after A first bought a bottle of liquor. C claimed she wanted to go to another nightclub and A agreed to take her. The vacant house was adjacent to A's house. C alleged that inside the house, A took her to a room, which was locked from the outside, and raped her as did the other two. C later walked to the police station with a stranger and reported the matter to police. A was charged with rape and one count of abetment to rape.

Issue

- Was a corroboration warning required?

Decision

Acquitting A of rape, the court held that although corroboration was not required to sustain a conviction, the practice is to warn the jury of the danger of convicting on the uncorroborated evidence of the complainant. In this case, there was no corroborative evidence (that is, no admissible evidence from an independent source which tends to confirm the victim's evidence that the accused committed the crime.) On the issue of credibility, the court preferred A's evidence. It found that (C) had consented to having sex with the accused on the night in question.

Comment

The court here applied the traditional common law approach that a person may be found guilty of a sexual offence on the evidence of the complainant alone (without any supporting evidence) provided a warning has been given pointing out the danger of doing so. See also the Tongan cases of *R v Fungavai* [2007] TOSC 8, 2 PHRLD 49 and *R v Kakala* [2008] TOSC 10. The court acknowledged the criticism that the traditional approach is based on 'highly questionable assumptions' with 'their highly gendered construction.' These criticisms have prompted legislatures or the courts in other jurisdictions to abolish the need for a warning. (These developments were reviewed in *Balelala v State* [2004] FJCA 49, 1 PHRLD 4.) However, the traditional practice is still applied in Tonga, unnecessarily adding to the difficulty of securing convictions in sexual offence cases.

VIOLENCE AGAINST WOMEN / SENTENCE FOR MANSLAUGHTER

In sentencing the offender for manslaughter, the court considered it an aggravating factor that it was an assault by a husband on his wife.

POLICE v PIUILA

Supreme Court
Nelson J
15 March 2010

Samoa
[2010] WSSC 21

Law considered

Common law on sentencing

Facts

The defendant (D) and his wife lived with their two young grandchildren. One morning, the children woke at 5am. The wife was unable to get the children back to sleep, so she returned to bed and went to sleep. This angered D, who violently kicked his wife several times in the jaw. She died from the injuries. D pleaded guilty to manslaughter. The Supreme Court considered the appropriate sentence.

Issue

- What was the appropriate sentence?

Decision

The court considered that the crime was aggravated by the fact that D had killed his wife, and by the fact that it was caused by an unprovoked and violent act. The court stated that:

> There seems to be a notion that in twenty first century (21st C) Samoa, assaulting your wife should be tolerated if she fails in her 'wifely duties'. To those misguided enough to hold such an antique view and belief the court sends this strong message – no this sort of conduct is no longer acceptable and will not be tolerated.

To emphasise the seriousness of the offence, the court increased the 'starting point' for the sentence for manslaughter of a wife from eight years to ten years imprisonment. However, D's guilty plea required a deduction of 3 years, and D's previous good record plus the *ifoga* and customary settlement he made to the family of his late wife warranted a further reduction of one year. In the result, D was sentenced to six years imprisonment.

Comment

The court displayed considerable awareness of the gender based aspects of the violence in this case. First, the court rejected any notion that it was somehow acceptable for a man to use violence against his wife. Rather than being an extenuating factor, which might justify a lesser sentence, the court ruled that it made the offence more serious. The court also refused to accept any suggestion that the violence had been provoked by the wife undertaking her child care responsibilities in a manner that her husband found unsatisfactory. These pronouncements represent the kind of judicial response to domestic violence expected by international human rights norms, as set out in the case of *Opuz v Turkey* (reported earlier in this volume).

The only lingering concern from a human rights perspective was the reduction in sentence allowed for D's apology and customary settlement with the victim's family members. It has been noted in an earlier volume of this Digest (2 PHRLD 35) that allowing customary reconciliation to be used in mitigation in cases of gender based violence is discriminatory against women, as the overwhelming majority of offenders in such cases are men. Further, the victim's opinion is often not considered (more so in this case, where the victim was deceased) and the remorse of the offender often plays little part in the process.

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