

PACIFIC HUMAN RIGHTS LAW DIGEST

Volume I, PHRLD

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INTRODUCTION

The Pacific Regional Rights Resource Team (RRRT) has been training and working with law students, lawyers, Magistrates and Judges for over 10 years now in the Pacific region. Since 1998, a significant part of that training has included an annual three-week human rights for lawyers course for graduating law students from the University of the South Pacific's Professional Diploma in Legal Practice (PDLP) class. Much of this focused training has been directed at encouraging the use of conventions, international standards and constitutional bills of rights in the Courts, and in fact has contributed to their increased reference to and use by the legal fraternity 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 actors a collection of recent analysed human rights case law that can be used in the Courts as precedents and as tools for policy initiatives. RRRT is mindful of the fact that the vast majority of the law fraternity in 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 judgements.

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

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

A new legal precedent not only creates a standard for the Courts, but provides an opportunity for human rights stakeholders to use it to create new policy or practice whether at micro (community), meso (institutional) or macro (policy) levels. For example, if the Courts determine it is unconstitutional for a woman to be forced to return to her husband against her will (*Public Prosecutor v Kota & Ors*, Vanuatu), the Police need to develop a relevant working policy, one which is understood to mean no police officer is to tell a woman who reports domestic violence that she must return to her husband with or without prosecution, or that she has no choice.

RRRT's ultimate objective is to help build a human rights culture which enhances the rule of law and democracy in the Pacific. Promoting the use of conventions in law, practice and policy is part of the broad long-term strategy for RRRT to achieve that goal. Publishing the Digest has been a long-term plan of RRRT, but it had to await the amassing of a sufficient number of cases to be worthwhile.

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

ABOUT RRRT

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

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

RRRT has been described as a "cutting edge" programme in human rights capacity building due to its approach of tackling both systemic as well as socio-economic issues through interventions at the micro, meso and macro levels.

RRRT has programmes in the Cook Islands, Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. Its partners include governments, regional and civil society organisations.

RRRT's goal is ***"to strengthen the capacity of the Pacific region to promote principles of human rights and good governance in order to achieve democracy based on social justice"***.

RRRT seeks to achieve this goal through a combination of training, mentoring, linking and support to community organisations and community paralegals, our networks of Legal Rights Training Officers, community paralegals and civil society partners and through training at the regional level of lawyers, Magistrates, Judges and policy makers to adopt and apply human rights principles and good governance practices in their work.

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

USING THE DIGEST

This Digest is divided into three parts:

Part I contains all Pacific Island country judgements in the countries covered by RRRT that we know of which have referred to human rights conventions whether or not the conventions were accepted or rejected, and whether or not they formed part of the *ratio decidendi* or *obiter dicta*. If a convention or international human rights principle was even raised by the lawyers and dismissed in passing by the Court, that judgement is included. The Digest does not purport to contain every single case involving a human rights convention in the Pacific Island countries covered by the RRRT project.

Part II contains some significant human rights judgements that discuss various fundamental rights and freedoms in the Bill of Rights. Although these cases do not mention conventions, they are of significance in the development of human rights thinking. It is proposed that in future volumes of this Digest we will publish a greater number of judgements that refer to the Bill of Rights even if they do not mention conventions. We have chosen not to include any of the vast number of judgements which discuss ordinary civil rights, for example, fair trial, due process, the Judges Rules and so on, since such cases are fairly commonplace. We have chosen however to include cases that mention significant civil and political or economic and social rights issues such as freedom of movement or religion; or cases that demonstrate the tensions between customary and formal law. For those that have access to the Internet, more mainstream cases on the Bill of Rights in Fiji are available on the website of the Fiji Human Rights Commission (www.humanrights.org.fj).

Part III contains some of most significant international cases from the British common law world that have discussed the use and relevance of human rights conventions and in so doing have turned the tide of opinion in their favour. These include such cases as *Minister of State for Immigration & Ethnic Affairs v Teoh* and *Vishaka v State of Rajasthan*, which have been cited all around the common law world.

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

The Digest is modelled on the highly regarded Interights *Commonwealth Human Rights Law Digest* which RRRT greatly admires and consistently uses in training. RRRT acknowledges Interights for giving us the inspiration to produce a Digest specifically focusing on the Pacific region. This Digest is accompanied by the RRRT publication *The Big Seven: Human Rights Conventions & Judicial Declarations* – a compilation of the core human rights instruments and judicial declarations. *The Big Seven* is a handy reference tool to complement this digest.

ACKNOWLEDGEMENTS

RRRT would like to thank all law students, lawyers, Judges and Magistrates who made those unpublished judgements available to us. We thank also the USP Institute of Judicial and Applied Legal Studies (IJALS) law students who assisted at the initial stages of this digest, in particular Paul Mae of Solomon Islands and Beverley Kanas of Vanuatu.

RRRT also acknowledges the very generous assistance given by Elenoa Naigulevu, Personal Assistant to the Vice President of the Republic of the Fiji Islands.

The Digest has been developed with the generous support of NZAID, which is a core funder of the RRRT project.

EDITORIAL REVIEW

Each case summary in the *Pacific Human Rights Law Digest* (the Digest) contains its own commentary which forms part of the Editorial Review. The Digest does not purport to contain every single case involving a human rights convention in the Pacific Island countries covered by the Pacific Regional Rights Resource Team (RRRT). We would be delighted if the publication of the first volume of the Digest generates more case law, demonstrating the development of the application of conventions and other significant human rights cases involving the Bill of Rights. This could then be included in future volumes of the Digest.

PART I

This first Volume of the Digest focuses mainly on the use of human rights conventions by Pacific Island Courts. RRRT's training with graduating law students at the USP Institute of Judicial and Applied Legal Studies regional PDL course, lawyers, Magistrates and Judges has been centred around encouraging and trying to popularise the use of human rights conventions and international standards in domestic law for some 10 years. This Digest has provided us with an opportunity to assess and document the impact of those initiatives.

Traditional approaches to the use of international law in domestic Courts hold that it must first be enacted in domestic law. International law has little to do with domestic law. The former is about the relationship between States, international organisations and their concerns. It does not and should not influence domestic law. Treaties whether ratified or not do not form part of the law until they are incorporated in local legislation. International law is not directly enforceable within the Courts of common law countries. This doctrine of non-enforceability is inherited from Britain. However Britain, unlike the majority of Pacific Island countries covered in this Digest, has no written constitution with an entrenched Bill of Rights reflecting international standards of fundamental rights and freedoms.

Countries which appear to strictly follow the doctrine of non-enforceability include the Cook Islands, Solomon Islands and Kiribati. To a slightly lesser extent, Tonga and Tuvalu also generally follow this dualist approach but with some minor flexibility. The less conservative monist perspective regards international law and domestic law as parts of a single legal system. International law (including treaties and conventions) is a legitimate source of law just like domestic law and can be resorted to when appropriate. This is referred to in the Digest as the doctrine of enforceability of international law. Ratified treaties and conventions are therefore a legitimate source of law. From an analysis of these cases, examples of such countries are Fiji and Samoa.

Vanuatu appears to deviate between the two approaches. For its part, the Court of Appeal indicated in *Joli v Joli* that the rights and concepts set out in conventions needed to be given substance by Parliament in accordance with the separation of powers doctrine before it could have local application. However, in *Noel v Toto* the Supreme Court cited the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to support its decision to grant women equal rights to land entitlements. So too in *Molu v Molu* and

Nauka v Kaurua where Lunabek ACJ invoked the ratified Convention on the Rights of the Child (CRC) to ground decisions in the best interests of the child principle over the disputed custody of children.

Various judicial declarations (included in the RRRT published *The Big Seven: Human Rights Conventions & Judicial Declarations*) have also encouraged the use of conventions where relevant. These judicial declarations were formulated, drafted and endorsed by Judges and Magistrates themselves at the conclusion of various judicial conferences, colloquia and dialogues. In *Prakash v Narayan* (Fiji) the Court referred to some of them in the course of discussing the application of human rights instruments to domestic family law. The following are what RRRT refers to as the Big Seven Judicial Declarations:

- *Bangalore Principles on the Domestic Application of International Human Rights Norms* (1988);
- *Victoria Falls Declaration of Principles for Promoting the Human Rights of Women* (1994);
- *Hong Kong Conclusions on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights* (1996);
- *The Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl-Child* (1997);
- *Denarau Declaration on Gender Equality* (1997);
- *Pacific Island Judges Declaration on Gender Equality in the Courts* (1997);
- *The Tanoa Declaration on Human Rights in the Law* (1999).

The *Bangalore Principles* state *inter alia* that:

In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation or into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.

and, further that

It is within the proper nature of the judicial process and well-established judicial functions of national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

The *Pacific Island Judges Declaration on Gender Equality in the Courts* states also that:

Judges recognised that many opportunities exist for judges to draw on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CRC) and other international human rights instruments so as to interpret and apply creatively constitutional provisions, legislation, common law and

customary law. No law, custom, tradition, culture or religious consideration should be invoked to excuse discrimination against women.

Pacific Magistrates and Judges were responsible for three of these seven declarations which emanated from RRRT sponsored judicial training. Judicial declarations are not part of formal international or domestic law. Consequently, they are not binding on the courts. However, they are reflective of emerging judicial thinking in the application of these instruments in domestic law. Moreover, they underscore the increasing acceptance by the courts of the universality of human rights.

Courts are naturally reluctant to apply conventions to domestic law for many reasons. Some of these include a suspicion that judicial adoption might be an indirect means of avoiding the principle of non-enforceability; a concern that a drive towards international conformity might neglect national, social and historical contexts which take into consideration the unique history of (Pacific) peoples; a perception that this method of “law making” avoids Parliament and therefore does not reflect the will of citizens nor does it accord due respect to the doctrine of the separation of powers and the function of Parliament as the sole law making body; as well as an understandable reserve about the composition and competence of international bodies.¹

However, the doctrine of enforceability of conventions is backed by several compelling arguments. These include the following:²

- There can be no undermining of Parliamentary sovereignty when laws are binding, clear and unequivocal. In such circumstances, international law cannot be used to undermine or overrule local law;
- Countries voluntarily submit themselves to international law through the process of ratification. This is not mere window dressing. If there is a gap, lacunae or ambiguity in the law then a convention may fill that gap;
- Many countries already have firmly established human rights international standards in their constitutions or legislation. Where local laws are ambiguous or in need of assistance in interpretation, it makes sense to utilise those international standards to provide that guidance.

Apart from these reasons some Pacific Island constitutions have specific mandatory provisions which allow the use of conventions in the Courts, apparently without the need for ratification (Article 43(2) of the Constitution of Fiji, Article 15(5)(c) of the Constitution of Tuvalu and Section 17 of the Tuvalu Interpretation and General Provisions Act (Cap 1A), and Article 39(3) of the Constitution of Papua New Guinea). Only a very small number of countries worldwide have such provisions, including South Africa.

1. *The Impact of International Human Rights Norms – A Law undergoing Evolution* (The Hon. Justice M D Kirby AC CMG, Paper, 11 March 1995) www.lawfoundation.net.au

2. *Ibid.*

Article 43 (2) of the Bill of Rights in the Constitution of Fiji states:

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

Tuvalu's states at Article 15(5):

In determining whether a law or act is reasonably justifiable in a democratic society that has a proper respect for human rights and dignity, a court may have regard to:

- a) traditional standards, values and practices, as well as previous laws and judicial decisions, of Tuvalu; and*
- b) law, practices and judicial decisions of other countries that the court reasonably regards as democratic; and*
- c) international conventions, declarations, recommendations and judicial decisions concerning human rights; and*
- d) any other matters that the court thinks relevant.*

Section 17 of Tuvalu's Interpretation and General Provisions Act (Cap 1A) also states:

A construction of a written law which is consistent with the international obligations of Tuvalu is to be preferred to a construction which is not.

Despite those unequivocal empowering provisions, **Tuvalu** still generally follows the doctrine of non-enforceability. Until recently, the Courts have held the orthodox view that a ratified convention can only be applied if it is incorporated in domestic law. In *Anderson v R* the Tuvalu High Court declined to apply the CRC age of legal responsibility to review its decision to sentence to life imprisonment a prisoner who was under 18 at the time of conviction. It applied the strict doctrine of non-enforceability. Similarly in *Tepulolo v Pou & Attorney General*, the Court held that the CRC and CEDAW were not applicable to the laws of Tuvalu unless an Act of Parliament was passed to implement their provisions. The Court however, might take cognisance of their terms as an aid to the ascertaining of the true construction of a provision of written law where there was any difficulty in interpretation. In *Simona v R* the Court was of the view that where there was an inconsistency, ambiguity or lacuna in the written laws of Tuvalu, Article 15(5)(c) of the Constitution and Section 17 of the Interpretation and General Provisions Act enabled the Court to interpret the written law in a manner that was consistent with Tuvalu's international treaty obligations. As Tuvalu was a party to the CRC, the terms of the convention were applicable in interpreting the provision of the Constitution.

In the **Fiji Islands** at least, lawyers, Magistrates and Judges have not been shy about using such a provision to apply conventions to domestic law in innovative and creative ways. There are numerous examples of lawyers citing conventions; and Magistrates or Judges analysing their relevance over a wide and varied range of subjects not confined to constitutional matters. They have included criminal, family and civil law, either discussing and dismissing them or applying them if relevant. This has been the case for both ratified

and unratified conventions. The Courts have not distinguished between the two situations, applying Article 43(2) as the rationale because it does not state the need for ratification.

Examples from Fiji include the application of: the CRC to reinforce sentencing and reflect judicial disapproval of child sexual abuse offenders in *State v Mutch* and *Qiladrau v State*; CEDAW and the Constitution of Fiji to outlaw the gender discriminatory corroboration warning practice in the law of rape in *Balelala v State*; the International Covenant on Civil and Political Rights (ICCPR) and the Constitution to protect a right to privacy for sexual minorities prosecuted under the Penal Code in *Nadan & McCoskar v State*; the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Constitution in *PAFCO Employees Union v Pacific Fishing Co. Ltd.* to fill a lacuna in labour legislation reading in a right to enforce an arbitration award in a Court to make the relevant trade dispute law sensible, logical and enforceable; the ICCPR, ICESCR and the Constitution in *Rarasea v State* to ensure a prisoner's right to food rations; CEDAW and the Constitution to admonish the accused for his attitudes about women in *State v Bechu*; and the Universal Declaration of Human Rights (UDHR), the ICCPR and the European Convention on Human Rights (ECHR) to refuse a traditional chief's application for favourable jury treatment under customary law in *State v Ratu Takiveikata* which would have violated rules on equality. There are also several examples of conventions being cited to reinforce violations of constitutional due process and civil rights procedures in criminal law including *Naba & Ors v State*, *State v Fong & Ors*, *State v Kata* and *State v Pickering*.

Samoa has been in many ways at the forefront in applying conventions to domestic law. Without either ratification or a legislative framework it applied the spirit of the Hague Convention on the Civil Aspects of International Child Abduction of 1980 (the Hague Convention) to return a child to Germany in *Wagner v Radke* in 1997. In that case the Court ordered that the parents settle their dispute in Germany according to Hague rules. The Chief Justice of Samoa (Sapolu CJ) stated that even though Samoa was not a signatory or party to the Hague Convention, the Court must have regard to the principles and the philosophy of the convention in applying common law principles to this case. It could use the convention as a tool to guide and aid the Court. Samoan Courts have largely used the ratified CRC in criminal child abuse cases to reinforce sentencing and to emphasise judicial disapproval (*Attorney General v Maumasi*, *Police v Afa Lee Kum* and *Police v Taivale*). It has also used the Constitution of Samoa and the CRC in civil litigation to justify the amount of damages awarded in a case of banishment under customary law *fa'a Samoa* practices which the Court deemed unconstitutional in *Leituala & Ors v Mauga & Ors*.

In **Tonga** the Courts have been reluctant to apply conventions. In *Gorce v Miller*, a case involving an international abduction matter somewhat similar to that of *Wagner v Radke*, the Supreme Court held that it could only apply the common law prior to 1985. It could not apply the Hague Convention because Tonga had not ratified it. However in *Tone & Ors v Police*, the Court said although the CRC was only enforceable by an enactment of legislation, the need for the CRC arose (*inter alia*) from the widely accepted realisation of the need for children to be treated differently from adults in relation to police and court proceedings. Even without the enabling legislation, the Court was entitled to refer to the terms of the

CRC as a guide on what was acceptable form of treatment for children. It then set a new precedent ruling that child offenders were entitled to have their parents present during questioning.

In **Kiribati** the former Director of Public Prosecutions (now part of RRRT's staff) attempted to use the unratified CEDAW and the Constitution of Kiribati in *Republic of Kiribati v Timiti & Robuti* in what was then the first known attempt in a Pacific Island Court for a lawyer to use CEDAW as a basis of a challenge to discriminatory domestic law. She marshalled similar arguments to that used in *Attorney General v Dow* (Botswana) and *Balelala v State* (Fiji) but failed to convince the Court that CEDAW ought to be used to prohibit the gender discriminatory corroboration warning in rape cases. In 2003, RRRT state and civil society partners successfully lobbied for the passing of the Evidence Act 2003 which included a provision making the corroboration warning unlawful. In 2004, after the ratification of CEDAW and CRC, in a similar attempt to challenge the corroboration practice in a child sexual abuse case, the Chief Justice held that as the offence had occurred before the passing of the Evidence Act 2003 the corroboration practice still applied to the case before it. The Court refused to apply the ratified CRC to allow a degree of flexibility, stating that it did not form part of the law of Kiribati unless it was given the force of law.

The **Cook Islands** has applied the strict non-enforceability approach. In *R v Smith* the High Court held in response to the applicant's attempt to have recourse to the ICCPR which New Zealand had ratified for Cook Islands in 1978 that it could not apply the convention because "...that Covenant has not been enacted as part of the law of the Cook Islands and so has no legislative effect".

In **Nauru** there was a valiant attempt to apply the UDHR in *Jeremiah v Nauru Local Government Council* as far back as 1971 to argue that a "right to marry" a non-Nauruan woman ought to be read into the Nauru Constitutional Bill of Rights which was based on the UDHR. The attempt failed.

In all cases in which human rights conventions have been applied, Pacific Island Courts have not made the conventions the basis of the decision (which was always grounded in the constitution and/or other local legislation) but they have been used:

- To explain and expound a constitutional principle, legislation or the common law;
- To support decisions to rule on gender discrimination and other violations of the Bill of Rights;
- As an aid to interpretation;
- To fill in a lacunae or to read in a provision to make sense of legislation;
- To justify increased sentences;
- To show judicial abhorrence of criminal behaviour or other behaviour and attitudes;
- To resolve an ambiguity; and
- To justify or increase the amount of damages.

PART II

The conflicts between customary law and formal constitutional protections continue to be a source of tension in all Pacific communities. In *Lafaialii & Ors v Attorney General & Ors* the Samoan Chief Justice ruled in favour of constitutional guarantees to freedom of religion and against traditional banishment in holding that the chiefs in the village council had no right to prevent the plaintiff and his family from holding bible classes for the minority religion in the village. In *Public Prosecutor v Kota & Ors* the Vanuatu Supreme Court ruled that traditional chiefs had no power to force a woman to return to her husband citing constitutional protections to equality for woman and freedom of movement.

Corporal punishment is regularly administered in most Pacific schools. This practice is generally accepted as being part of Pacific “culture” but occasionally a parent challenges the practice. In the Tongan case of *Uhila v Kingdom of Tonga* the Court held that corporal punishment administered on a nine-year-old school boy was not unconstitutional *per se*. The 10 strokes inflicted for gross disobedience and misconduct might be excessive abroad but not in Tonga. However the excessive beating on the thighs with a solid object which led to the serious injuries was actionable and the plaintiff was awarded damages.

A few Pacific cases use the ground of discrimination as the basis of a challenge based on the Bill of Rights. In *Chandra & Anor v Permanent Secretary for Finance & the Attorney General* the Fiji High Court ruled that there was no unfair discrimination within the meaning of Article 38 of the Constitution of Fiji when a non-resident Fiji citizen pensioner was obliged to pay taxes on his pension under the Income Tax Act because he chose to live abroad.

PART III

The final section of the Digest contains eight international landmark cases applying conventions, some of which have been cited in many cases in Part I. Most of these are also covered in the Interights *Commonwealth Human Rights Law Digest* and on its excellent website (www.interights.org). These cases paved the way in applying the *Bangalore Principles* to judicial thinking. They are included primarily to assist the Pacific legal fraternity, especially for the vast majority of lawyers and magistrates who do not have access to the Internet in the Pacific. RRRT will make available the full text of these cases to those who request it.

In *Minister of State for Immigration & Ethnic Affairs v Teoh* and *Tavita v Minister of Immigration* the highest Courts of Australia and New Zealand finally put to rest the argument that ratified conventions had no applicability at all unless they were fully domesticated in local legislation. Ratification was an indication of some form of commitment to the principles encapsulated in those instruments.

The Supreme Court of India went even further in an extraordinary act of judicial activism. In *Vishaka v State of Rajasthan* it cited CEDAW and read in the offence of sexual harassment on the basis of general equality guarantees in the Constitution for the protection of women. In *Attorney General v Dow* and *Ephrahim v Pastory & Kazilege* the Courts of Botswana and Tanzania used their constitutions, CEDAW and other conventions to secure women's equal rights to citizenship and land respectively.

In *Canada Trust v Ontario Human Rights Commission* the Federal Court of Appeal applied the Canadian Charter of Rights and Freedoms, the ICCPR, the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and CEDAW to rule on the illegality of discriminatory parts of a trust. It indicated that the Charter had application beyond state actors as it was part of the public policy of the State.

In two South African cases, the ICESCR was cited in ruling that there existed justiciable rights to housing and health (*Government of RSA & Ors v Grootboom & Ors* and *Minister of Health (South Africa) & Ors v TAC & Ors*). In these cases the Courts said the term "progressive realisation of rights" implied that the State must take reasonable steps to achieve this goal. The Court said the State had to act positively to improve conditions. Progressive realisation meant taking reasonable measures within available resources for the step-by-step realisation of rights.

For those who look askance at these developments, we have reiterated elsewhere that the international human rights instruments have not been invoked unilaterally. There has to be a nexus that triggers the process whether it is ratification, enactment of domestic legislation or provisions such as an Article 43(2) of the Constitution of Fiji. That some Courts have been able to do so absent these mechanisms merely reflects an emerging global consensus about the commitment to human rights.

Co-Editors

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PART I: PACIFIC ISLAND CASES REFERRING TO HUMAN RIGHTS CONVENTIONS

IMPRISONMENT / CHILDREN

- **Convention on the Rights of the Child (CRC) considered to determine whether a person under 18 years of age can be sentenced to life imprisonment without possibility of release.**
-

ANDERSON v R

High Court
Ward CJ

Tuvalu
Criminal Case No 5 of 2003
26 September 2003

International instruments and law considered

Convention on the Rights of the Child (CRC)
Constitution of Tuvalu (CT)
Children and Young Persons Act 1933, UK (CYPA)
Penal Code (PC)

Facts

The applicant (A) was convicted of murder following a trial in which he sought to reduce the offence to manslaughter on the grounds of provocation. The offence was committed in November 1998 when A was 16 years old and he was convicted in August 1999, by which time he was 17 years old. A was sentenced to the mandatory penalty of imprisonment for life. A did not appeal the decision at the time and had served four years of the sentence before he appealed. (The age of responsibility in the CRC and the CYPA is 18.)

A sought declarations from the Court that:

1. He was under 18 years of age at the date of the offence, which should have been taken into consideration before he was sentenced to a mandatory life sentence;
2. Section 53(3) of the CYPA was applicable in Tuvalu as applied law, and therefore applied in this case. (The relevant provision provides that a convicted juvenile under 18 shall not be sentenced to life imprisonment or death);
3. The issue of age was reinforced by Article 37 of the CRC, which provides that no person under the age of 18 shall be imprisoned for life; and
4. Guidelines ought to be given by the Court for similar cases where a person under the age of 18 is convicted of murder and the appropriate length of time to be served if appropriate to do so.

Issues

1. Whether the Court should take into consideration the fact that A was below 18 years of age when he committed the offence; and
2. Whether the Court should take into consideration the age of A in accordance with the CRC and the CYPA.

Decision

The Court held that the proceedings by A were misconceived. A in effect sought to review an earlier decision by the same Court, when it had no power to do so. The application was refused. It said that Tuvalu was a signatory to the CRC and the Government ought to review the laws in relation to children. The Court referred to the fact that under Article 37 of the CRC no person under 18 should be sentenced to life imprisonment without possibility of release.

Comment

This was a technically correct decision under the strict doctrine of non-enforceability of international law. However Tuvalu has ratified the CRC. Even without ratification it was open to the Court to apply Article 15(C) of the CT and s.17 of the Interpretation and General Provisions Act (Cap 1A), which obliges it to apply and give regard to international conventions. Neither of these provisions were discussed by the Chief Justice and it is not known whether the same were cited by Counsel as justification for applying Article 37 of the CRC. The CRC clearly prescribes more lenient treatment for children yet to reach the age of 18 at the time they commit offences. This was also stipulated in the CYPA. In relation to the principle that the Court could not review its own decision, the matter could have been appealed to the Court of Appeal with specific reference to the relevant provision of the CT and the CRC. It is important to note that counsel should provide the Courts with copies of relevant international conventions and international instruments applicable in their cases when arguing international human rights principles.

CRUELTY / CHILDREN

- **Convention on the Rights of the Child (CRC) used to protect children against cruel treatment or punishment by increasing sentence of stepfather who beat his stepson to death.**

ATTORNEY GENERAL v MAUMASI

Court of Appeal
Cooke P, Casey, Bisson JJA

Samoa
Criminal Appeal 7/99
27 August 1999

International instruments and law considered

Convention on the Rights of the Child (CRC)
Criminal Procedure Act 1972 (CPA)
Judicature Ordinance Act 1961 (JOA)

Facts

This involved an appeal against a sentence of three and a half years imprisonment imposed in the Supreme Court on the respondent (M) after a plea of guilty to manslaughter of a child.

M was a 41-year-old man. The deceased (D) was the son of M's wife from another relationship before she married M. D was only 8 years old at the time. M had been told by his niece that D had burnt her shoes and had also cut the sole of M's son's foot with a razor. M sent for D at school, told him to change into a *lavalava*, took him to another room and beat D with a rubber hose until M's wife (D's mother) intervened. M then ordered her to bathe D and put him to sleep. Shortly afterwards D experienced breathing problems and the pupils of his eyes became dilated. D died before he reached the hospital.

Issue

In sentencing an offender, should the Court take into consideration the rights of children provided in the CRC not to be subjected to cruel treatment or punishment?

Decision

The Court held that all Samoan Courts should have regard to the CRC in cases within its scope. It allowed the appeal against the sentence and increased M's sentence to five years, out of respect for the Chief Justice's assessment of what was appropriate in Samoan society. The Court further stated that if any truly comparable case arose in future, an even longer sentence would be justifiable.

Comment

The Court applied the CRC although Samoa had not enacted any domestic enabling legislation following ratification. From the decisive manner in which it invoked the CRC, it was conversant with international trends relating to the protection of children's rights and it clearly expected the Samoan Courts to do likewise.

What is apparent from a comparison with other jurisdictions in the Pacific, is that even where Courts are reluctant to apply international human rights instruments absent domestic enactments; they are nevertheless prepared to rely on them as aids to interpretation or guidelines where they involve non-controversial subjects such as children.

DISCRIMINATION / WOMEN

- **The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) used to support and justify a Court's decision to remove the corroboration warning requirement for evidence of victims of sexual violence on the ground of gender discrimination, which was prohibited in the Constitution of Fiji.**
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BALELALA v STATE

Court of Appeal
Ward P, Penlington & Wood JJA

Fiji Islands
Criminal Appeal No.AAU0003 of 2004S
8 November 2004

International instruments and law considered

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
Constitution of Fiji 1997 (CF)
Criminal Procedure Code Cap 25 (CPC)
Court of Appeal Act Cap 12 (CAA)
Penal Code Cap 17 (PC)

Facts

In 2002, the appellant (B) held prisoner and raped the complainant (C), a tourist, three times at a popular nature reserve. The Magistrate's Court (MC), in accordance with the corroboration warning in rape offences, found corroboration of C's complaints of sexual offences on facts that were only relevant to proving the consistency of C's evidence. However, it did not corroborate the involvement of B in these offences. The MC found B guilty on all three counts of rape and also for confinement. The matter was referred to the High Court for sentencing and B was sentenced to a total of 11 years imprisonment. B appealed against his conviction and sentence on the ground that the MC erred in law because it relied on incorrect evidence as corroboration for B's involvement in rape. Consequently B argued it was dangerous to convict him on C's words alone as per the corroboration warning. Accordingly B's conviction should be overturned.

Issues

1. What was the effect of a Court's misdirection on the law of corroboration, as it was understood at the time?
2. What was the correct approach to the need for evidence corroborative of complainants in rape cases?

Decision

1. The Court held that despite the error in corroboration by the MC, it was not one that involved a substantial miscarriage of justice by application of Article 23(1) of the CF. There was other cogent evidence which sufficiently corroborated C's evidence that B was involved in the offences;

2. In a new groundbreaking precedent the Court removed the corroboration practice (“the rule”) after examining the legal basis of it, the rationale behind the rule, the laws of Fiji and other jurisdictions on the rule;
 - 2.1 The PC and the CPC did not require corroboration in a rape offence or other sexual offences. However, the rule was enforced in Fiji as a long-standing practice under common law, whereby the Court gave a warning to itself that it was dangerous to convict on the uncorroborated evidence of the victim. Corroboration was a requirement in sexual offence cases except when the Court was satisfied a complainant was speaking the truth;
 - 2.2 The Court examined the origin of the rule and said it was representative of the practice in force in England at the time the CPC was enacted in 1944. The rule was based on an outmoded and fundamentally flawed rationale, which was unfairly demeaning of women. The Court quoted the following flawed reasoning as being unacceptable:
 - i) *Longman v The Queen* (1902) in which the rationale behind the practice was that: “*There is often a great temptation to a woman to screen herself by making false or exaggerated charge, and supporting it with minute details of a kind, which the female mind seems particularly adapted to invent. Unless, therefore, the story of the prosecutrix is corroborated, it becomes a mere question of oath, and although the law does not, in these cases, technically require corroborative evidence ... judges are in the habit of telling juries that it is not safe to convict the prisoner upon the unsupported statements of the woman ...*”
 - ii) *Reg v Henry* (1968) 53 r. App. Rep. 150 at 153, Salmon LJ explained the rule of practice on the basis that: “*... human experience has shown that in these Courts girls and women sometimes tell an entirely false story, which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reasons at all ...*”
 - 2.3 The rule had been applied to victims of either gender. In other jurisdictions it had been confined to women and girls because, under criminal law, rape and other sexual offences were crimes committed against women. The effect had been to place victims of sexual offences in a special category of suspect witnesses. This resulted in convictions which were solely based on the complainant’s evidence being regarded as unsafe and unsatisfactory. Consequently, they were quashed on appeal. Moreover, it afforded the accused protection which did not exist in other cases of serious criminality. In addition, it almost certainly had the effect in many instances of deterring the rape victims from reporting offences committed against them or from cooperating in the prosecution of offenders;
 - 2.4 The rule had also been criticised, repealed and abrogated in other jurisdictions because it was fundamentally flawed, irrational and demeaning of women.

The Court referred to the following jurisdictions for comparison:

- i) The International Criminal Court and the International Criminal Tribunals for the former Yugoslavia and for Rwanda respectively. The **Rules of Procedure and Evidence** exclude the requirement for the corroboration direction in relation to crimes of sexual assault;
- ii) Canada – the requirement for corroboration was abolished through s.8 of Chapter 93 of the **Criminal Law Amendment Act**; *State v. Jackson* (1981) 1 SACR 470;
- iii) New Zealand – under the **Evidence Amendment Act (No.2) of 1985** judges are prevented from commenting on the unreliability of uncorroborated sexual assault evidence;
- iv) Australia – s.164 of the **Uniform Evidence Act** removed the need to warn juries that it was dangerous to act on uncorroborated evidence. Similar provisions have been enacted in other states of Australia not subject to the Uniform Evidence Act;
- v) United Kingdom – the need for corroboration was removed by s.32 of the **Criminal Justice and Public Order Act 1994**;
- vi) Bangladesh High Court – *Al Amin v The State* 9 BLD (HCD) 1991;
- vii) Namibia – Supreme Court in *S v D* (1992) ISACR, *State v K* (2000) 4 LRC 129;
- viii) United States – US Supreme Court in *Carmell v Texas* (200) 963 S.W. 2n 833, *R v Rincon-Pineda* 14 Cal.3d 864.

2.5 The rule discriminated against women who were victims of sexual violence, which was a violation of Article 38(1) of the CF. Article 38(1) guaranteed, as part of Chapter 4 (the Bill of Rights), the right to equality before the law and under Article 38(2) of the CF discrimination on the ground of gender was prohibited;

2.6 Under Article 43(2) of the CF the Court was required to interpret the provisions of the Bill of Rights “*to promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the rights set out in the Bill of Rights*”. CEDAW was then cited as prohibiting any form of discrimination against women;

2.7 The CF was the supreme law of the land. The Court was bound to apply the Bill of Rights pursuant to Article 21(1) of the CF and any law that was inconsistent with its provisions was invalid to the extent of the inconsistency (Articles 2(1) and (2) of the CF);

2.8 Accordingly, the rule was not only abrogated to give full force and effect to the constitutional principle of equality before the law, it was also because it was an outmoded and fundamentally flawed view;

2.9 As the rule was only a long-standing practice, a Court’s declaration was sufficient to remove the rule. Legislation might be necessary to put any residual question to rest;

In the Eastern Caribbean Court of Appeal case of *Regina v Gilbert* (202) 2 AC 531, a submission that the rule can only be abrogated by statute was rejected because the rule was not enacted by statute but by long practice and experience;

- 2.10 The removal of the rule placed the victim's evidence in rape cases or other sexual offences on the same basis not only with the evidence of victims in other cases of criminality, but generally, subject to a caution where some aspect of unreliability arises justifying a caution particular to that case.

Comment

To justify and support its decision, the Court applied Article 38 of the CF supported by CEDAW and a Fiji Law Reform Commission report. In reviewing the practice of corroboration, it was apparent that it had persisted despite its dubious premises because Courts applied the precedent without much thought to its provenance or discriminatory implications. The procedural rule common to all Pacific Island countries which inherited the British common law was based on the belief that women naturally lied about being raped and that their evidence therefore had to be independently corroborated. This rule effectively required rape and abuse survivors to provide additional evidence to prove sexual assault, making it very hard to do so. This landmark precedent requires all Courts in Fiji to follow the new decision and provides an opportunity to apply the rule to other Pacific Island countries as many judges sit in other Appellate Courts. A similar initiative by Kiribati prosecutors resulted in the removal of the corroboration rule through legislative change in the form of the Evidence Amendment Act 2003.

In *S v D* (1992) 1 SA 513; (1992) ISACR the Court in Namibia discussed the cautionary rule relating to sexual assault. It noted that that the rule applied to all cases of this nature irrespective of the sex of the complainant. However, this did not alter the fact that in the overwhelming majority of cases the complainants were female. It held that taking this factual situation into consideration, the so-called cautionary rule which had evolved in cases of rape had no other purpose than to discriminate against female complainants, and had no rational basis for its existence. The Court held the cautionary rule to be unconstitutional on the grounds that it breached the requirement of equality before the law.

The cautionary warning is still used in Vanuatu, Solomon Islands and other Pacific Island countries. It has been removed by legislation in Kiribati, Cook Islands and by common law in Tonga (and now Fiji). This case, constitutional guarantees of equality, the ratification of CEDAW and *S v D* provide a sound basis for challenging the discriminatory practice of corroboration in sexual assault cases.

ABDUCTION / CHILDREN

- **Hague Convention used to argue for the return of a child to original place of abode. The applicability of non-ratified international human rights conventions to domestic law – conventions are not applicable unless ratified.**
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GORCE v MILLER

Supreme Court
Ford CJ

Tonga
Family Law Jurisdiction No. FA.43/2003
18 November 2003

International instruments and law considered

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

Child Abduction and Custody Act 1985 (UK) (CACCA)

Children's Act 1989 (UK) (CA)

Reciprocal Enforcement of Judgements Act (Cap. 14) (REJA)

Tonga Civil Law Act (Cap 16) (TCLA)

Facts

This was an international abduction case arising from a dispute over the custody of a four-year-old Australian child (C) between C's father (F), the applicant, and C's mother (M). M was an Australian national and F a French national who later became an Australian national during his relationship with M which began in 1998 and ended in 2001. Both M and F lived in Australia. M had custody of C and F had access which was incrementally increased by the Court as F applied for extended access. On 9 September 2002, as the Court was about to give judgement on F's application for extended contact, M fled with C and her other child from a previous marriage to Fiji and then onward to Tonga. On 11 June 2003, F found out that M and C were in Tonga. F obtained a Recovery Order from the Federal Magistrates Court of Brisbane, which he then sought to register in the Tonga Supreme Court. F had difficulty trying to enforce the Recovery Order owing to the absence of specific legislation to deal with international child abduction cases in Tonga.

Note: There were also other issues before the Supreme Court but the focus here is on the issues relevant to the international convention referred to in this case.

Issue

What was the applicable law in determining an international child abduction case?

Decision

The Court ruled that, by virtue of the TCLA, it could only apply the English common law prior to 1985 in its deliberation of this case for the following reasons:

1. The Recovery Order of the Federal Magistrates Court of Australia was unenforceable as the Court was not listed as one of the courts in the REJA. The

other recovery orders sought pursuant to the CA and the CACA, by virtue of the TCLA, were also denied because they were not applicable and were irrelevant to the facts in question;

2. The HC did not apply in Tonga because it had not been ratified. The related UK legislation, the CACA, was inapplicable because this Act simply ratified the Hague Convention 1980 for the UK. It also held that the only applicable law was the English common law prior to 1985, when the UK ratified the HC; any case law after 1985 would embody the principles of the HC, which rendered them inapplicable in Tonga;
3. Had Tonga ratified the HC, the Court would have had no discretion in the matter and provided that proceedings had commenced within 12 months of the abduction, the Court would have been obliged to order C's immediate return to Australia;
4. The Court applied the common law, *In re H (infants)* [1965] 3 All ER 906, in which the governing principle or chief consideration was "the welfare of the child" in deciding the appropriate forum to hear the custody of the child. Further, the Court ruled that it had the discretion to investigate fully or partially the merits of the case before making any order for the return of the child. At the same time, the Court was not bound to conduct any such investigation as well.

Comment

The Court was consistent in upholding the non-enforceability approach of the Tongan Courts, in which international human rights conventions would only be applied if ratified and incorporated into domestic law. This case differs slightly from the usual approach of the Tongan Courts in relation to international human rights conventions. In this case, the Court indicated that it would have applied the HC if Tonga had ratified it, implying that the Court would have applied a ratified convention prior to its being domesticated by legislation. In other cases the Tongan Courts have said that it would only apply a ratified and domesticated convention (for example, *Tone & Ors v Police*). The HC only applies between countries that have ratified it. Had Tonga ratified it, then the Court would have been obliged to abide by the rules of the HC. Accordingly, it would have ordered the return of the child to her original place of abode.

An appropriate comparison might be made to *Wagner v Radke* (Samoa), which is also discussed in this section. In that case the Chief Justice ordered the return of a German child to Germany notwithstanding that Samoa had not ratified the HC. The CJ held that the principles of the HC applied as a matter of international customary law. It codified many of the customary rules relating to the issue of international child abduction and Samoa as a member of the international community subscribed to them.

FAMILY LIFE / RIGHT TO MARRY

- **Article 16 of the Universal Declaration of Human Rights (UDHR) is not applicable in Nauru as the right to marry is not set out in the Constitution of Nauru.**
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JEREMIAH v NAURU LOCAL GOVERNMENT COUNCIL

Supreme Court
Thompson CJ

Nauru
Miscellaneous Cause No. 2 of 1971
5 March 1971

International instruments and law considered

Universal Declaration of Human Rights (UDHR)
Constitution of Nauru (CN)
Births, Deaths and Marriages Ordinance 1957 – 1967 (BDMO)

Facts

A Nauruan man (J) wished to marry a non-Nauruan woman but was unable to do so because the Nauru Local Government Council (NLGC) refused consent pursuant to s.23 of the BDMO, which made its permission a pre-requisite in order for such a marriage to become lawful.

J filed a petition in the Supreme Court, claiming that the requirement of consent of the NLGC under the BDMO was *ultra vires* Article 3 of the CN, which provided for every person in Nauru to be entitled to the fundamental rights and freedoms of the individual.

J submitted that Article 3 of the CN conferred on everyone in Nauru a right to the enjoyment of their private and family life independent of the provisions of Articles 4 – 13 which conferred fundamental rights and freedoms. He argued that the right to respect for private and family life included the right to marry and that right was without limitation as to race or nationality. J drew the Court's attention to Article 16 of the UDHR, which provides that "*men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family*". J admitted that certain limitations could lawfully be imposed, for example, relating to consanguinity, immature age and medical unfitness, but asserted that otherwise the right to marry was unlimited and that any law purporting to confer on any person or body a power to prevent any unmarried adult person from marrying was inconsistent with the CN and invalid to the extent that the power was exercisable on any grounds other than those three. J further argued that in interpreting this section, the Court must consider the minutes of the Constitutional Convention (conference) which had led to the passing of the CN.

Counsel for the NLGC denied that there was any right to marry which the Court could enforce. Article 3 did not confer any substantive rights independent of Articles 4 – 13 but had to be read with each of them in order to ascertain what rights were conferred by Part II. Articles 4 – 13 listed the various rights applicable in Nauru. J pointed out there was no common law right to have a marriage solemnised and submitted that none was conferred by

the CN or any statute other than the BDMO, which imposed certain conditions of which, in the case of a Nauruan, its consent was one.

Issues

1. Did the reference in Article 3 of the CN to an entitlement to fundamental rights and freedoms of the kinds stated therein, i.e. the right to respect for private and family life, refer to a right to marry?
2. If the right to marry was not included in Articles 4 – 13 of the CN, could the Court enforce the right to marry as set out in Article 16 of the UDHR and rule that any law purporting to confer on any person or body a power to prevent any unmarried adult person from marrying was inconsistent with the CN?

Decision

The Court dismissed the petition and held that the reference in the preamble in Article 3 of the CN to an entitlement to fundamental rights and freedoms of the kind stated only referred to those rights set out specifically in Articles 4 – 13, which did not include the right to marry. It rejected the argument that the UDHR was adopted as a whole in the CN or at the Constitutional Convention which led to its adoption.

Comment

In interpreting what Article 3 of the CN meant, the Court held that if the provision was not clear it could look at the minutes of the Constitutional Convention. In this case, the Court found that Article 3 was not clear and that the rights set out there were not created by that article, but were also reflected in the preamble. They appeared to be rights which pre-existed the CN. Thus, the Court found that it could look outside the text of the CN to assist it in interpreting it. The record of the deliberations of the Constitutional Convention were admitted as evidence to show the basic principles that the Constitutional Convention had accepted as the foundations of the “new” CN.

The Court found that the principles of the UDHR as reflected in the CN were only a statement of aims of the various states and not a declaration of rights to be included in the constitutions of those States. It also found in going through the deliberations of the Constitutional Convention that the Convention had not accepted that the whole of the UDHR should be adopted as establishing a substructure of legally enforceable rights more extensive than those enunciated in Articles 4 – 13 of the CN.

Of interest was the Court’s reference to a statement by Professor Davidson, an adviser to the Convention, that: “*Rights should be ones that it is easy to define, so that, when they are brought before the Court, the Court will have no doubt at all of the action to be taken*”; and “*Article 3 contains a brief reference to this Part of the Constitution*”. And then on 4 January 1968, the Professor had stated that: “*This Article was intended only as a summary of the general principles underlying the specific rights to be conferred by the succeeding Articles in Part II.*”

Thus, the reference in the preamble in Article 3 to an entitlement to fundamental rights and freedoms of the kinds stated only referred to those set out in Articles 4 – 13, which did not include the right to marry.

EQUALITY / MATRIMONIAL PROPERTY

- **The legality of the use of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in bringing about gender equality in matrimonial property decisions.**
 - **CEDAW must be specifically reflected in domestic law.**
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JOLI v JOLI

Court of Appeal
Lunabek CJ
Robertson, Von Doussa, Fatiaki,
Saksak & Treston JJA

Vanuatu
Civil Appeal Case No.11 of 20
7 November 2003

International instruments and law considered

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
Constitution of Vanuatu (CV)
High Court of New Hebrides Regulations 1976
Married Women's Property Act 1882 (UK)
Matrimonial Causes Act 1973 (UK) (MCA)
Matrimonial Causes Act [Cap 192]
Matrimonial Proceedings and Property Act, 1970 (UK)

Facts

This was an appeal from the decision of the Supreme Court (SC) of Vanuatu. The applicant (H) and his wife (W) divorced in the Magistrate's Court and the distribution of property was settled outside by the Court. The parties identified particular assets which were the stumbling block in negotiations and they sought the ruling of the Court to define "what are matrimonial assets for the purposes of a settlement?", so that their negotiation could go forward. The ruling sought was limited to the identification of assets that should be taken into account in a settlement but not on how the assets should be divided.

The SC held that there was no statute in Vanuatu to govern the issue in H's appeal. The MCA was silent on what property was to be regarded as matrimonial property, as was case law. The SC then referred to the CV and CEDAW to determine which assets were matrimonial property as well as formulating a principle for distribution of matrimonial assets. Article 5 (1)(k) of the CV forbid sex discrimination except if it was for the advancement of females (i.e. affirmative action); Article 5 of CEDAW required changes be made to social and cultural patterns that promoted stereotyped roles of men and women. Article 16 of CEDAW required equal rights regarding ownership, management and disposition of conjugal property.

The SC in applying the relevant provisions held that there was a presumption of joint or equal ownership of all matrimonial assets. The presumption could only be rebutted if the parties could show that at the time of the acquisition of the property in question they both intended that it should be the sole property of one. Accordingly, it found that the assets in dispute were matrimonial assets for the purposes of negotiation for a settlement.

H appealed against the SC's decision to the Court of Appeal (CA). He contended that the SC lacked the power to make any order that had the effect of transferring any part of his interest, legal or equitable, to W.

Issues

1. Could the courts use the equality provisions in the CV and CEDAW to make an order regarding the distribution of matrimonial assets?
2. Whether the SC had the power to make an order that had the effect of transferring any part of H's interest to W.

Decision

The Court of Appeal held that the SC did have the power to make an order to adjust the proprietary interest of H in the assets in dispute. Its reasoning however differed and was as follows:

1. There was already a law in Vanuatu to deal with the manner in which an adjustment of proprietary interests between parties was to be made. The MCA (UK) was applicable by virtue of Article 95(2) of the CV. Part II of the MCA empowered the SC to make property adjustment orders to bring about a division or settlement of property. There was no lacuna in the law of Vanuatu. There was no need to have applied the CV and CEDAW to govern property settlements;
2. The Court referred to the CV and said that they were "broad aspiration statements" or "concepts" which could only be directly translated to allow for joint ownership. There must be respect for the separation of powers. It was for Parliament to apply these "broad aspirations" or "concepts" into law; and
3. Similarly, it was for Parliament to decide what, if any, changes to the social patterns of conduct of men and women in the country should occur, and how the country as a State Party to CEDAW would reflect it in its domestic laws.

Comment

The SC cited the provisions of the CV and CEDAW to apply the principles of gender equality in the case before it. However, the Court of Appeal, in finding there was no lacuna in the law relating to the division of matrimonial property, adopted a narrower interpretation than the application of rights conferred by the CV and CEDAW. It stated that the rights and concepts set out in those instruments needed to be given substance by Parliament in accordance with the separation of powers doctrine. Compare this approach with the one taken by the Vanuatu SC in the case of *Noel v Toto*. It was interesting that the Court considered Article 5(1)(k) of the CV, which prohibits discrimination on specific grounds including sex discrimination, to be a "broad aspirational statement" rather than a fundamental human right, a constitutional law of general application rendering all laws and practices inconsistent with the principle void or unconstitutional.

CUSTOMARY LAW / MOVEMENT / CHILDREN

- **Convention on the Rights of the Child (CRC) articles invoked to protect the rights of children and to justify an award for punitive damages in banishment case under *fa'a Samoa* (customary law).**
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LEITUALA & ORS v MAUGA & ORS

Supreme Court
Vaai J

Samoa
Civil Jurisdiction
13 August 2004

International instruments and law considered

Convention on the Rights of the Child (CRC)
Constitution of Samoa (CS)
Land and Titles Act 1981 (LTA)
Offenders Ordinance 1922 (OO)
Samoa Act 1921 (SA)
Samoa Amendment Act 1927 (SAA)
Samoa Amendment Act 1938 (SAA)
Samoa Offenders Ordinance 1936 (SOO)
Village Fono Act 1990 (VFA)

Facts

The 61-year-old plaintiff (L) and the 20 members of his family were banished from the village of Lotofaga, Safata following a misunderstanding between L's family and the village Methodist minister and his family. The practice of banishment was, and continues to be, a customary practice under *fa'a Samoa* (customary law).

A series of events led to the banishment following a minor incident between the minister's son and one of L's sons over a bicycle ride. L's son was verbally abused and threatened by the minister following complaints from his son. The minister's wife also verbally abused another one of L's sons. L's two sons duly apologised to the minister's wife who was not appeased. She complained to the village town officer (*pulenu'u*) about L's sons. The wife also complained that the village was not protecting her family pursuant to the pact between the Methodist church and the village.

The *pulenu'u* called a meeting of the *Ali'i* and *Faipule*, or Village Council (VC), to consider her complaints. Whilst these events were happening in the village, L was at the hospital looking after a sick grandson and was unaware of events. On the day of the VC meeting, L had returned to the village. However, he did not attend the meeting because he was not a *matai* (chief) and he was also not called upon to appear before the VC. L relied on his two *matai* brothers' assurances that they would defend him at the meeting.

At the meeting, the *pulenu'u* reported the incident to the VC in a biased manner against L's two sons, stating that they fought and verbally abused the Minister, his wife and son.

Consequently, the VC unilaterally and unanimously (including L's brothers) decided to banish the said two sons as well as the rest of L's family from the village within three hours of the decision being made.

Aware of the consequences of not complying with the VC's decision, L and his family packed whatever they could and moved to his wife's village and stayed in a makeshift hut. One of L's sons was at the plantation and was unaware of the VC's decision. He was beaten with sticks and stones when he returned home later that evening by the village *tulafale* or untitled men on the order of the VC. L's son's life was saved by a couple from a nearby village who begged the VC for his release into their custody.

L sued the VC for damages on two grounds. First, that the VC breached his constitutional rights to a fair trial (Article 9 of the CS) as well as the right to freely move and reside anywhere (Article 13(1)(d) of the CS). The VC argued that the recognition of customary law under Articles 103 and 111 of the CS meant that the right to fair trial must be considered with the terms of the custom and usage of Lotofaga. Accordingly, the practice of not giving L an opportunity to be heard by the VC was fair in the context of village customs and usage. As for banishment, the VC argued that within the meaning of Article 13(4) of the CS, banishment was a reasonable restriction, imposed by the VFA in the interests of public order, on the exercise of the rights of freedom of movement and residence guaranteed by Article 13(1)(d).

Issues

1. Which law ought to take precedence – that of the CS or *fa'a Samoa* also recognised in the CS and the VFA?
2. Did the rules of natural justice apply in the proceedings of a VC? Should the VC proceedings comply with the right to a fair trial or custom and usage in disciplinary proceedings?
3. Whether banishment was a reasonable restriction on the freedom of movement and right to reside freely pursuant to Article 13(4) of the CS?

Decision

The Court awarded compensation for special and general damages of ST14,900 against the VC for breach of L's constitutional rights to a fair trial and his freedom of movement. In an unprecedented move, the Court also punished the VC with a ST50,000 fine as punitive damages to express its outrage at the VC's conduct in relation to both breaches. The reasons for the Court's judgment were as follows:

1. As the VC was a tribunal whose power, authority and mandate were derived from the VFA, it must comply with the requirements of the law, i.e. the rules of natural justice;
2. The right to a fair trial could not be read in the context of customs and usage. The right to a fair trial, which includes the right to be heard, to be informed promptly and the right to defend oneself, was a basic fundamental right of every person guaranteed by Article 9 of the CS. Under the VC's custom and usage practices, the VC did not give notice of a hearing and an accused person was not allowed to be present to question witnesses and present his or her defence. In light of the many

variations and different interpretations of customs and usages, as well as different procedures adopted by hundreds of villages in Samoa, fair and equal treatment of village residents could not be guaranteed under custom. Custom and law could exist side by side, but any custom that denied an accused a fundamental right would not be approved by the Court. However, the Court would not interfere with any custom that was just and in the best interests of the community;

3. The VFA did not confer on the VC legal authority to order banishment from the village. It was a customary punishment available only to the Land and Titles Court. Further, under custom and usage, the banishment of a family from a village was a punishment reserved for the most serious of offences, such as murder, but not for minor offences like fighting and swearing. Accordingly, L's banishment was not in accordance with the customs and usage under Articles 103 and 111 of the CS and the provisions of the VFA. It followed that the banishment was not a permitted restriction (Article 13(4)) on L's freedom of movement and right to residence;
4. In relation to the question of damages, the Court considered *inter alia* the right of the children in L's family. It referred to the CRC ratified by the Government to protect the children of Samoa. Article 16 of the CRC states:

(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence nor to unlawful attacks on his or her honour and reputation;

(2) The child has the right to the protection of the law against such interference or attacks.

The VC's high-handed and outrageous conduct in ignoring and breaching the rights of innocent children (and the rest of L's family), which compromised their safety, welfare and interests warranted punitive damages. This punishment was to reflect the Court's outrage at the VC's conduct and to also act as a deterrent to like-minded people from acting in the same manner.

Comment

Banishment is a form of traditional punishment in Samoa, part of *fa'a Samoa*. The *matai*, as chiefs, wield considerable power. Only *matai* for instance can stand for election to the national legislature. Only *matai* can be members of the powerful village *fono* (council). The conflict in this case highlights the unsettled nature of the relationship between constitutional rights and customary law. The CRC was not used in the substantive arguments but was subsequently applied by the Court in the assessment of damages.

The Court invoked the provisions of the CRC to enforce the legal rights of L's children and to protect their rights as the innocent and most vulnerable victims in this case. The attitude of the Court in awarding punitive damages against violators of children's civil rights is identical to the Court's attitude in sentencing criminal offenders of children. The Samoan Courts have consistently invoked the CRC to protect the rights of children.

EQUALITY / LEGAL AID

- **Equal entitlement to legal aid for non-citizens.**
 - **Commission must have final decision within resources.**
-

LYNDON v LEGAL AID COMMISSION & ANOR

High Court
Singh J

Fiji Islands
HAM 38/2002
21 February 2003

International instruments and law considered

International Covenant on Civil and Political Rights (ICCPR)
Universal Declaration of Human Rights (UDHR)
Constitution of Fiji 1997 (CF)
Legal Aid Act 1996 (LAA)

Facts

L, an alien citizen, was charged with a serious criminal offence and was awaiting deportation in prison. His application for legal aid was rejected by the Legal Aid Commission (LAC). He argued, *inter alia*, that he was being discriminated against on the basis that he was a non-citizen and applied for a number of remedies citing various constitutional provisions in the Bill of Rights (BOR) of the CF. The LAC and various State agencies argued that the denial of legal aid to non-citizens was a reasonable and justifiable restriction in a free and democratic society given that the LAC had extremely limited resources even for its own citizens. The LAC said it had followed guidelines under s.8 of the LAA in rejecting L's application. The State argued that L's rights had to be balanced against the interests of the citizens of Fiji, whose rights to legal aid would be prejudiced if non-citizens had a right to legal aid as well given the finite resources of the State. The Fiji Human Rights Commission, appearing as *amicus curiae*, argued that all persons in the country had the same rights, including non-citizens.

Issues

1. Whether a non-citizen is equally entitled to legal aid as a citizen; and
2. Whether the right in question is limited by the availability of resources.

Decision

The Court rejected L's application for legal aid, but noted the following:

1. The BOR in the CF was based on the UDHR. Fiji could not simply pay lip service to universal standards and every person whether a citizen or not was entitled to protection under the BOR. To treat a non-citizen with discrimination would be a violation of equal rights under Article 38 of the BOR. A restriction on a right would only be justifiable if it was rational and proportionate;

2. The LAC had limited resources and funds and its guidelines allowed it to legitimately reject applicants. It ought to take into consideration the seriousness of the offence and the impact of denying legal aid to all applicants regardless of their citizenship. The right to counsel in the CF was similar to Articles 14(3) and (4) of the ICCPR. Given the clear and mandatory words of Article 43(2) of the CF, the ICCPR's provisions could not be ignored by the Courts even if it was not ratified. However, the rights under both the CF and the ICCPR were not absolute but were subject to a number of factors including the seriousness of the offence, the potential sentence and the complexity of the case;
3. The application was denied finally on the grounds that at this particular stage of the extradition proceedings L did not need counsel. L had not exhausted all his remedies under the LAA. The interests of justice were not served by granting L legal aid.

Comments

This interesting decision did not make a clear decision either way, ultimately allowing the LAC to make its own decision based on guidelines in the LAA. However, the Court noted that non-citizens were entitled to equal treatment and that the final decision should not be made on the basis of citizenship but on other factors in the relevant legislation. The citation of the ICCPR, despite its non-ratification by Fiji, in support of its decision is a clear continuation of trends in the Courts of Fiji.

CUSTODY / CHILDREN

- **Convention on the Rights of the Child (CRC) used to determine child custody dispute.**

MOLU v MOLU

Supreme Court
Lunabek ACJ

Vanuatu
Matrimonial Case No. 030 of 1996
15 May 1998

International instruments and law considered

Convention on the Rights of the Child (CRC)
Constitution of Vanuatu (CV)
Matrimonial Causes Act Cap192 (MCA)

Facts

This case concerned an application in the Supreme Court of Vanuatu in which both parties who had been legally divorced in 1996 were disputing custody of their three children (C1, C2 & C3), child maintenance and matrimonial property.

Both the petitioner, the mother (M), and the respondent, the father (F), wanted custody of their three children. An earlier attempt to negotiate an agreement about custody of the

children at the Vanuatu Women's Centre was unsuccessful. The Court found that 10-year-old C1 had been staying with M's parents since he was 4 years old; five-year-old C2 had always lived with M and was happy and healthy; and four-year-old C3 had been staying with M until February 1996 when F's family took him. C3 had been staying with F's family at the time of this case.

Issues

1. Which parent was entitled to custody and on what basis?
2. Was the CRC relevant to the issue of custody?

Decision

The Supreme Court of Vanuatu applied Article 3(1) of the CRC, which had been ratified by the Vanuatu Parliament by Ratification Act No. 26 of 1992, which stated that, "*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*". The Court held that in any proceeding before the Courts for the legal custody or upbringing of a child, or the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, the Court must regard the welfare of the child as the first and paramount consideration and not the punishment of a spouse/parent. This meant that in such proceedings, the Court would not take into consideration whether from any other point of view the claim of the father, in respect of such legal custody, upbringing, administration or application is superior to that of the mother, or the claim of M is superior to F.

In dealing with such matters, the Court, before reaching a decision which is necessary for the wellbeing of the child, must take into account the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for or recognised by local custom of a village or island of the country, which is not inconsistent with the CV. That balancing exercise ought to be done in a manner consistent with the evolving capacities of the child so that the best interests of the child should always prevail in a particular given case.

The Court ruled that C1 be under the joint custody of M and F, and care and control also be extended to M's parents with whom the boy was currently staying. C2 was to stay with M as it was in her best interest to remain with M, and F was to have access to her. The Court ruled that custody of C3 be granted to F and he would be under the care and control of F and F's relatives. M would have access to C3. The Court came to this decision as it expressed the view that it would be in the best interest of C3 not to disrupt his life again if he was moved from where he was currently staying.

Comment

The Court applied the provisions of the CRC, which Vanuatu had ratified. Principles of the CRC were also partially enacted in some family legislation. It took great care to consider the personal circumstances of each of the children and how their interests would be best served. It carefully evaluated what it considered was best for each of the children and determined accordingly. It was also sensitive to the broader kinship ties the children had with the extended families of each of their parents within Vanuatu *kustom* law. It noted the importance and the significance of these relationships in the context of Vanuatu. The decision

illustrates the sensitivity of the Court in balancing the interests of the children as between their parents and their extended families on both sides.

CRUELTY / PRISONERS

- **Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR) used to determine whether the failure of authorities to try persons charged with murder within a reasonable time are against the rights of the individual and whether persons remanded in prison cells are treated humanely.**

NABA & ORS v STATE

High Court
Prakash APJ

Fiji Islands
Criminal Case No HAC0012 of 2000
4 July 2001

International instruments and law considered

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

European Convention on Human Rights (ECHR)

International Covenant on Civil and Political Rights (ICCPR)

United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (BOP)

United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)

Universal Declaration of Human Rights (UDHR)

Constitution of Fiji 1997 (CF)

Criminal Procedure Code Cap 21 (CPC)

Penal Code Cap 17 (PC)

Prison Act Cap 86 (PA)

Facts

This case concerned an application for bail by the five applicants (N & Ors) in the High Court. N & Ors had been remanded at the Natabua Prison remand block since 15 December 1999 for murder. They had earlier applied for bail in October 2000 but were refused. That application was made on the basis that there was no evidence of murder in the depositions and the delay of the trial. In its ruling in October 2000 the Court indicated that there were no special reasons to bail N & Ors. However, it further stated: *“If their trial does not proceed expeditiously in future the Court will have to reconsider the issue.”*

In this application N & Ors alleged a breach of constitutional rights as well as the unacceptability of the inhumane conditions they faced in the remand block. The fact that the remand block was overcrowded and not suitable for healthy human survival was not

denied by the officer in charge of Natabua Prison. N & Ors relied on the following provisions of the CF:

1. Article 25(1): *“Every person has the right to freedom from torture of any kind, whether physical, mental or emotional; and from cruel, inhumane, degrading or disproportionately severe treatment”*; and
2. Article 29(3): *“Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time.”*

Issues

1. Whether the treatment of N & Ors at the Natabua remand block amounted to cruel, inhumane, degrading or disproportionately severe treatment or punishment as provided in the CF, UDHR, ICCPR and CAT; and
2. Whether arrested or detained persons are entitled to a trial within a reasonable time as provided under Article 29(3) of the CF and in the ECHR; what was meant by “reasonable time”?

Decision

The Court held that N & Ors were entitled to a fair trial within a reasonable time under Article 29(3) of the CF. The failure of the authorities to make the resources available to try N & Ors was not a genuine reason for failing to try them in a reasonable time. It also cited:

- (i) ECHR Article 6(i): There is a duty on contracting parties, regardless of cost, to organise their legal systems so as to allow the Courts to comply with the requirements of the parallel article (similar article to that of the CF);
- (ii) ICCPR Article 9(3): *“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge ... and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.”*

It also held that the conditions in which N & Ors were held at the Natabua remand block was cruel, inhumane and degrading treatment contrary to the provisions of the CF, UDHR, ICCPR and CAT.

Moreover, the length of time they had been kept in custody awaiting trial further aggravated the inhumane and degrading treatment to which they were subjected.

The Court further held that the treatment of N & Ors in particular and other detained persons in the remand block at the Natabua Prison did not comply with the SMR; as such their constitutional right to be free from cruel, inhumane, degrading or disproportionately severe treatment or punishment had been breached. The court also stated that the treatment of N & Ors was inconsistent with the presumption of innocence guaranteed by Article 28(1) of the CF.

The Court observed that the CF itself required, in the interpretation of a provision of the Constitution, the need to take *“into account the spirit of the Constitution as a whole”* and to have regard to the context in which this Constitution was drafted and to the intention that constitutional interpretation take into account social and cultural developments. More

specifically in relation to human rights it mandated the Courts to have regard especially for “*developments in the understanding of the content of particular human rights; and development in the promotion of particular human rights*”. As far as the Bill of Rights (Chapter 4, Article 43(2)) was concerned “... *the courts must promote values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter*”.

Comment

The Court adopted a very expansive approach to the question of the breach of the human rights of N & Ors. It was not prepared to accept arguments made on practical grounds, saying the State had an obligation to remedy court delays and to put right the deplorable conditions at the Natabua Prison remand block. N & Ors were entitled to a trial within a reasonable time. The failure to do so was a breach of their rights. These delays obliged them to be held in conditions which the Court held to be cruel and degrading treatment. It cited the UDHR, ICCPR, CAT, ECHR and SMR to reinforce the provisions of the CF.

PRIVACY / SEXUAL MINORITIES

- **Bill of Rights protection of the right to privacy for sexual minorities; supported by international human rights standards.**
-

NADAN & McCOSKAR v STATE

High Court
Winter J

Fiji Islands
Criminal Appeal Case Nos: HAA 85 & 86 of 2005
26 August 2005

International instruments and law considered

International Covenant on Civil and Political Rights (ICCPR)

Constitution of Fiji 1997 (CF)

Penal Code, Cap 17 (PC)

Facts

N and M, both males, engaged in consensual, intimate, private but criminal conduct in contravention of the provisions of the PC.

On 20 March 2005, M, a tourist, arrived from Melbourne, Australia and met N. They stayed together as partners. On 3 April, at the end of his vacation, M suspected that N had stolen money from him. M lodged a complaint with the police (P), and N was then interviewed and told P that M had taken nude photographs of him, promised to pay him modelling fees after the photos were published on the internet and that they engaged in anal and oral sex. M was then taken in for questioning. M admitted taking the nude photographs. Both admitted consensual anal and oral sex.

M and N were separately charged with two counts under the PC, i.e. offences contrary to s.175(a) and (c), that between March and April of 2005 at Nadi each had or permitted carnal knowledge of the other against the order of nature, and committed acts of gross indecency between males contrary to s.177 of the PC. Both pleaded guilty to each of the charges in the Magistrate's Court and were sentenced to 12 months imprisonment for each count, to run consecutively.

The two men then appealed against their conviction and sentence on the following grounds:

1. That ss.175(a) and (c) and 177 of the PC were invalid as they breached the constitutionally guaranteed and in this instance, unlimited, rights of privacy, equality and freedom from degrading treatment; and
2. M also argued that his guilty plea was equivocal. He had been misled by the police to refuse legal representation and plead guilty so he could be spared further embarrassment and sent home quickly.

Issues

1. Were ss.175(a) and (c) of the PC gender and sexual orientation neutral and therefore not in violation of Article 38 of the CF which prohibited discrimination on the grounds of gender and sexual orientation?
2. Were ss.175 and 177 of the PC in breach of the CF which protected privacy and if so, did this non-conformity make those provisions invalid?

Decision

1. The Court held that the relevant sections were not discriminatory as they were gender neutral.
2. The Court further held that ss.175(a) and (c) of the PC were inconsistent with the CF and invalid to the extent that they criminalised acts constituting the private consensual sexual conduct against the course of nature between adults. That s.177 of the PC was inconsistent with the CF and invalid to the extent that it criminalised acts constituting the private consensual sexual conduct of adult males. In the event that adult males engaged in consensual sexual acts in private and were prosecuted under ss.175(a) and (c) or s.177 of the PC, the relevant sections in the PC were invalid and prosecutions a nullity. Invalidity in this context only rendered inoperative the offending sections to the extent of the inconsistency. Accordingly, the sections dealing with carnal knowledge against the order of nature and acts of gross indecency would still apply to sexual conduct between adults and adult males where sexual activity occurred in public or without consent or involved parties under the age of 18 years.
3. The guilty pleas by both N and M in the Magistrate's Court were found to be equivocal and proceedings declared a nullity. Both appeals were granted and the convictions and sentences in the Magistrate's Court quashed. No re-hearing was ordered.
4. Article 43(2) of the CF required the Court to have regard to public international law. The Court had no hesitation in applying international standards as endorsed by previous Courts including that of *State v Mutch* and *Minister of State for Immigration & Ethnic Affairs v Teoh*. It applied the ICCPR in support of its decision grounded in the Constitution. The Court cited and accepted the decision of the UN

Human Rights Committee in *Toonen v Australia* (Common No 488/1992) (31 March 1994) (50th Session), No.CCPR/C/50/D488/1992 IHRR 97 in holding that Article 17(1) of the ICCPR, which secures the right to privacy, had been breached because Tasmanian law made adult consensual sexual activity unlawful.

Comment

Although, the decision generated much controversy at the time it was delivered, a careful reading of the judgement suggests it was made on legal grounds. A distinction was made between the private and public aspects of the offence under s.177 of the PC. The latter was preserved by the legitimate public interest allowing prosecution for male rape or predatory gross male indecency. However the attempt to criminalise the private aspect was wholly unreasonable and unjustifiable in a democratic society. It offended the right to privacy that was guaranteed by the CF.

The Court made it clear that its decision was based on the privacy provisions of the CF rather than relating to equality as stipulated in Article 38. Although raised in submissions, it was not canvassed in the judgement. The issue of whether the relevant provisions are discriminatory awaits further argument. There is some basis for suggesting that the apparent neutral character of ss.175 and 177 of the PC are contradicted by the actual practice of applying them only in sodomy cases involving males. (The Director of Public Prosecutions could point to no example of a prosecution against a heterosexual person and the Court accepted the argument raised by the Fiji Human Rights Commission that the law was selectively enforced against homosexuals.) Reference is made to the Namibian case of *S v D* (1992) ISACR where the Court held the corroboration rule to be discriminatory on the factual basis that although the law appeared to be gender-neutral, in reality women were the main complainants of rape. Thus the corroboration warning was ruled unconstitutional on gender discrimination grounds.

CUSTODY / CHILDREN

- **Convention on the Rights of the Child (CRC) used to assist in the determination of a dispute over custody of children.**

NAUKA v KAURUA

Supreme Court
Saksak J

Vanuatu
Matrimonial Case No. 06 of 1996
11 September 1998

International instruments and law considered

Convention on the Rights of the Child (CRC)
Ratification Act of Vanuatu No. 26 of 1992 (RAV)

Facts

This case involved a mother (M) applying for custody of her four children aged 20 (C1), 19 (C2), 12 (C3) and 11 (C4).

An interim order had been granted in the Vanuatu Magistrates Court in 1996, in which that Court had granted custody of two children to M and two to their father (F). However, after the Court had made the order, the children ordered to be under M's custody had left her to live with F.

M claimed that F had had affairs with other women, had neglected to provide proper and adequate maintenance for the children at some stage when they were in her care, and had beaten up C3 with a belt. M had provided the children with money, clothes and food, earned VT30,000 per month and VT10,000 as housing allowance, was building her own house and was capable of looking after the children.

F denied these allegations saying that they were frivolous and vexatious. C3 and C4 had each written a letter saying that they wanted to stay with F.

Issue

Whether the wishes of C3 and C4 should be taken into account in determining custody.

Decision

The Supreme Court of Vanuatu followed the children's wishes, as they had written to the Court that they wanted to stay with F. It held that it was in the best interests of the children that their wishes be followed as they had been at the centre of their parents' problems and they knew which parent loved, cared for and supported them.

It held that the interests of both C3 and C4 would be best served by granting custody to F and applied Article 3(1) of the CRC, which Vanuatu had ratified through the RAV, which states: "*In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*"

The Court considered all the authorities before it and held that each case had to be decided on its own merits and circumstances. F was granted custody of the children, whilst M was given access during weekends, public holidays and school holidays. If it was expected that a child was to stay with M for more than 7 days or nights, M should first obtain the consent of F two clear days before the relevant period began.

Comment

It is interesting that the Court accepted the letters of 11 and 12-year-old children. It did not seek to interview the children or to consider the possibility that the children might have been forced to sign. If this case were to properly comply with human rights standards and the CRC, the following would be relevant factors:

1. Letters by 11 and 12 year olds might not be automatically accepted as relevant to the best interests principle;
2. The children's letters could not be filed by F's lawyer (who might naturally be inclined towards his client) as evidence without the Court exercising caution;

3. The children would be represented by an independent lawyer or other independent representative; and
4. They would be required to be heard by the presiding judge in the presence of an expert or someone experienced with children's issues who was trained to interview such young children.

CUSTOMARY LAW / LAND / EQUALITY / WOMEN

- **Bill of Rights in the Constitution takes precedence over customary law if the two systems conflict.**
 - **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) used to reinforce constitutional provision on non-discrimination.**
-

NOEL v TOTO

Supreme Court
Kent J

Vanuatu
Case No. 18 of 1994
19 April 1995

International instruments and law considered

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
Constitution of Vanuatu (CV)

Facts

The appellant (N) in this case requested clarification on a previous ruling as to whether the Court had intended to make (T) the sole owner of land at Champagne Beach and other land on Santo Island in his own right, or whether he held it in a representative capacity. The naming of T as the only applicant in the previous case caused some confusion. In most customary land disputes a family head or chief acted in a representative capacity. Under Article 73 of the CV, all land belonged to the indigenous custom owners and their descendents communally. N and T were members of the same clan.

The fact that the land generated generous income from tourists using the beach further complicated the matter. There was a lack of statutory authority or common law precedents about the distribution of income derived through use of customary lands. Article 74 of the CV states that "*the rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu*". Women in the clan were also seeking a share in the income from the land. T asserted it was customary practice to recognise men's rights to land but not those of women. The women would not necessarily share in the income derived from the land and it depended on T's discretion.

N sought the following declarations:

1. N is the custom owner of Land title 553, pursuant to Land Appeal Case L6/85;

2. N is equally entitled to any or all benefits arising from any or all activities connected with or conducted on or from the said land;
3. N is entitled to an account as to profits since the date of the earlier decision;
4. A declaration as to the appropriate management and financial control of the said land.

Issues

The main issues to be clarified by the Court were:

1. Whether the income derived from the land was due T as head of the family, or shared with other family members?
2. Was the distribution of income dependent on T's discretion as Head of the Clan?
3. If so, which of T's family was entitled to a share of the income and how was the distribution to be made?
4. Was the customary practice of differentiating between male and female ownership of land consistent with the CV?

Decision

The Court held that the customary practice was discriminatory and that female members of a family had equal customary rights over land as men. The Court held that the customary practice of differentiating between male and female was inconsistent with the CV which guaranteed equal rights for women. The Vanuatu Parliament had adopted CEDAW with respect to women's rights as also further recognition of protecting women's rights in Vanuatu. The Court rejected arguments that T's sisters had little or no right over land ownership and that they could only acquire land through their husbands or by requesting a share from their brothers. Although Article 74 recognised the rules of custom as the basis of ownership and use of land in Vanuatu, there were instances where customary rules might be viewed as discriminatory against women, undermining the fundamental rights sought to be protected by the CV. Customary law was still the deciding factor in land ownership in Vanuatu, subject to the limitation that any rule or practice of custom which discriminated against women was unacceptable.

Accordingly, the Court held that the sisters and female descendants of T's family were all entitled equally with the male members to the land and a share in the income. This also included all benefits, control and ownership of the land. However, the principles established for the distribution of income from use of customary land must be consistent with customary rules.

Comment

This was a first attempt by a Court to apply CEDAW in Vanuatu. It was invoked to reinforce the provisions of the CV. It was a bold decision extending human rights principles to customary rules regarding ownership of land. Entrenched attitudes regarding these issues often defy attempts by women to seek a greater say. At the same time, the Court was sensitive to the need for caution in applying these principles. In that regard, those seeking remedies needed to first establish that they had a customary entitlement to the land. Notwithstanding that caveat, it is a significant milestone for women's rights to land.

EMPLOYMENT / ASSOCIATION

- **International Covenant on Economic, Social and Cultural Rights (ICESCR) used to fill a lacuna in labour legislation reading in a right to enforce an Arbitration Award in a Court of Law.**
-

PAFCO EMPLOYEES UNION v PACIFIC FISHING COMPANY LIMITED

High Court
Byrne J

Fiji Islands
Civil Action No. HBC543 of 2000
25 January 2002

International instruments and law considered

International Covenant on Economic, Social and Cultural Rights (ICESCR)
Constitution of Fiji 1997 (CF)
Arbitration Act Cap 38 (AA)
High Court Rules (HCR)
Trade Disputes Act Cap 97 (TDA)

Facts

This matter involved an application to the High Court to enforce an Arbitration Tribunal Award following a trade dispute over the dismissal of 57 employees represented by PAFCO Employees Union (U), by the defendant, Pacific Fishing Company Limited (P). Pursuant to the TDA the dispute was heard by the Arbitration Tribunal, which ruled the dismissal unlawful. Arbitration Award No. 40 of 1996 directed P to re-employ the dismissed workers and pay them 3 months' salary. P did not fully comply with the terms of the award, so U applied to the High Court to enforce the award. P argued that the TDA did not make any provision to take the matter to the Court. It argued that any non-compliance of the award constituted a further trade dispute and therefore should follow the procedure under the TDA which would require the matter to be again referred to the Arbitration Tribunal.

Issue

Did the Court have jurisdiction to enforce an award of the Arbitration Tribunal made under the TDA in the absence of any specific enabling provision?

Decision

The Court held that even though there was a lacuna in the TDA it could enforce an award by an Arbitration Tribunal for the following reasons:

1. The CF's Bill of Rights (BOR), Articles 33(2) and (3) respectively, gave the workers and employees the right to organise and bargain collectively as well as the right to fair labour practices;
2. Article 41(1) and (2) of the CF stated that if any person considered that any of the provisions of the BOR had been contravened in relation to him or her that person could apply to the High Court for redress. This right was without prejudice to any other action with respect to the matter that person may have;

3. Article 43(2) of the CF enabled the Court to apply international human rights conventions, where necessary, to assist in the interpretation of a constitutional provision;
4. The relevant international convention was the ICESCR. Article 8 gave the right to trade unions to act on behalf of their members and to function freely subject to the limitations necessary in a democratic society;
5. The combined effect of the above provisions (Article 8 of the ICESCR and Articles 33 (2)(3), 41, 43 of the CF), is that the right of employees to organise and bargain collectively as well as the right to fair practices included the right to enforce awards of the Arbitration Tribunal. It was the statutory body created to determine trade disputes between unions and employers and in so doing, to pronounce on what the tribunal considered to be fair labour practices. Consequently, the Court had jurisdiction to hear P's application for enforcement of Award 40 of 1996.

Comment

Under Article 43(2) of the CF a Court may use relevant international human rights conventions, where necessary, to interpret any of the rights in the BOR. Therefore, non-ratification is not an issue. Tuvalu (Article 15(c)) and PNG (Article 39(3)) have similar provisions in their constitutions. The Court used the ICESCR to fill a lacuna in the TDA for the purpose of ensuring the practical realisation of a right guaranteed in the BOR, which should not be limited or diluted by the narrow interpretation of legislation. The Court filled the lacuna to make sense of the TDA and to give effect to the right to fair labour practices guaranteed by the CF. Compare this case to *Vishaka v State of Rajasthan*. Whether a Court may read in enforcement provisions into a statute where there is no specific provision made for them is problematic. Particularly when it may be argued that it was not contemplated in the TDA because enforcement was left to goodwill between the parties.

ABUSE / CHILDREN

- **Convention on the Rights of the Child (CRC) used to protect children against sexual abuse while in the care of parents and any other person who has the care of the child by increasing sentence of grandfather who had unlawful sexual intercourse with his 'adopted' granddaughter.**

POLICE v AFA LEE KUM

Court of Appeal
Cooke P, Casey and Bisson JJA

Samoa
Court of Appeal case No. 11 of 1999
18 August 2000

International instruments and law considered

Convention on the Rights of the Child (CRC)
Criminal Procedure Act 1972 (CPA)
Judicature Ordinance 1961 (JO)

Facts

The complainant (C) was the adopted 13-year-old daughter of K's daughter and lived in the same house with K and his wife. On the night of the incident, K had gone to C's bed late at night, had forced her to lie on the bed, taken off her clothes, molested her and then had sexual intercourse with her.

The Police (P) appealed the decision of the Supreme Court of Samoa against a sentence of 9 months imprisonment on two counts of unlawful sexual intercourse with a girl over the age of 12 and under the age of 16.

Issue

Whether the sentence of 9 months imprisonment for the offence of unlawful sexual intercourse with a girl over the age of 12 years and under the age of 16 years was consistent with Samoa's international obligations under the CRC which it had ratified.

Decision

The Court allowed the appeal against the sentence, quashed the sentence of 9 months and substituted 3 years imprisonment. It held that:

1. The Judge in the Supreme Court proceedings had failed in sentencing K to take into consideration the CRC, which required protection of C from sexual abuse while in the care of parents and any other person who had the care of her;
2. This case was within the scope of the CRC, but the trial judge had failed to take note of it. The Court should send out a strong message, where appropriate as in this case, that offences of this nature by a grandfather on a granddaughter would not be tolerated and would be met with a sentence of imprisonment sufficient to reflect society's condemnation of such conduct;
3. The sentence of 9 months imprisonment was manifestly inadequate to condemn such conduct, punish K and serve as a deterrent to K and other future offenders.

Comment

The same Court also presided in *Attorney General v Maumasi*. In the *Maumasi* case the same judges agreed that all Samoan Courts should have regard to the CRC when faced with cases of such nature or which appear within its scope. They further agreed that if any case of such nature were to arise in the future, an even longer sentence was likely to be justified. In *Maumasi* they substituted a 3½-year sentence with a 5-year term.

In this case, the Court seemed hesitant to impose a sentence of 5 years which was proposed by P. Its reasoning was that would have been a quantum leap from a sentence of two years that had been imposed in the past on guilty pleas. The Court also made the point that the facts of each case vary widely and had to be assessed upon its own merits.

ABUSE / CHILDREN

- **Convention on the Rights of the Child (CRC) used in sentencing to demonstrate society's obligations under the convention to protect children from sexual abuse by parents and persons who care for a child.**
-

POLICE v TAIVALE

Supreme Court
Vaai J

Samoa
[2000] WSSC 34
29 September 2000

International instruments and law considered

Convention on the Rights of the Child (CRC)
Crimes Act 1961 (CA)

Facts

This case concerned the sentencing of a 39-year-old accused (T) who was tried and convicted of indecent assault on his 11-year-old daughter. The maximum sentence for the charge of indecent assault was 7 years. The Court took into account the usual mitigating and aggravating factors in sentencing and it also considered Samoa's obligations under the CRC, which it had ratified in 1994.

Issues

1. What was the effect of the CRC on the sentencing of an accused who had sexually violated a child?
2. Whether the Court should impose a deterrent sentence on T; and
3. Whether the issue of the sole breadwinner should be taken into account in passing sentence against an indecent assault on a child.

Decision

In addition to imposing a deterrent sentence of 3 years imprisonment to reflect society's non-tolerance of T's conduct, the Court made the following observations in relation to the CRC:

1. The Court was obliged to impose a deterrent sentence to reflect society's obligation to protect the rights of the child under the CRC. It required the protection of the child from sexual abuse while in the care of the parents or any other person who had care of the child;
2. A precedent was set in the Court of Appeal case of *Attorney General v Maumasi*, where Lord Cooke in delivering the decision of the Court of Appeal said: "*All Samoan Courts should have regard to this Convention in cases within its scope*";
3. The deterrent sentence of 3 years was to impress upon T and other like-minded men that society had no place for such sexual offenders;
4. Despite the mother's plea for leniency on the basis that T was the sole breadwinner, the Court had to impose a deterrent sentence because of its obligation to protect children under the CRC.

Comment

The use of the CRC in Samoa is not new, as indicated by the Court in citing the Court of Appeal case of *Attorney General v Maumasi* as a precedent. The use of the CRC reinforced the practice of the Court to impose higher sentences in child abuse cases.

However, the Court was somewhat lenient given the maximum sentence for the offence is 7 years. This is perhaps a reflection of the strength of customary ties and family connections which were tacitly recognised while citing the CRC as the rationale for the Court's approach.

CUSTODY / CHILDREN

- **Convention on the Rights of the Child (CRC) used to allow interim custody laws to apply to all children regardless of their status and technicalities of the legislation.**

PRAKASH v NARAYAN

High Court
Madraiwiwi J

Fiji Islands
Civil Appeal No. BA0001J.1999
5 May 2000

International instruments and law considered

Convention on the Rights of the Child (CRC)

Constitution of Fiji 1997 (CF)

Juveniles Act Cap 56

Magistrates' Courts Act Cap 14

Maintenance and Affiliation Act Cap 52 (MAA) (Note, the new Family Law Act 2003 renders this Act void)

Matrimonial Causes Act Cap 51 (MCA)

Facts

This was an appeal from a decision of the Magistrate's Court at Tavua, in which interim custody of a child (C1) was granted to the mother (M). Reasonable access was granted to the father (F). This order was made during an application for maintenance filed by M against F.

There were two children of the marriage. C1 was 2½ years old and C2 about 9 months at the time the case first came before the Court. Before 7 January 1999, C1 lived with F's parents and C2 with M.

F appealed on technical grounds that the Court had no power to make interim custody orders under the MAA, only under the MCA. This order could only be granted if divorce proceedings were before the Court under the MCA. On 29 January 1999 the Magistrate delayed the case until the appeal decision, but did not set aside the interim custody order. M filed for maintenance for herself and her children from her husband on the ground of

desertion. The Magistrate granted the maintenance and interim custody for their child, C1 under s.4(b) of the MAA. F appealed against the decision for interim custody on the ground that the Magistrate went beyond his powers and also that there was no power in this particular Act to make interim orders.

Issue

Could the Court make an order for interim custody for a child who was before it only when there was a divorce case (as opposed to a maintenance case) as the legislation implied in its literal meaning? The earlier decision of *Kamoe v Kamoe* (Civil Appeal no 3/1984) had acknowledged the injustice for children inherent in this type of literal interpretation of the legislation but said it was duty bound to interpret the law as it stood.

Decision

The Court ruled that although it might seem that the Magistrate went beyond his powers, there were very good reasons to do so based on the following:

1. Four sections of the CF were relevant to the case. Article 22 stated that every person had the right to life. Articles 3 and 2(4) both emphasised the need to take a broad and contextual approach to the interpretation of the provisions of the CF. The Judge stated that “*the right to life is more than merely to draw breath; including the right to enjoy privileges and freedoms guaranteed by the Constitution*”.
2. Article 43(2) of the CF enabled the application of the CRC. Courts had an obligation under Article 3 of the CRC to have the best interests of the child as the primary consideration in all actions concerning children.
 - a) In *Vishaka v State of Rajasthan* the Court held that: “*Any international convention not consistent with the fundamental rights and in harmony with its spirit must be read into the provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.*”
 - b) In *Minister of State for Immigration & Ethnic Affairs v Teoh* the Court held that: “*The judicial declarations also reflected the direction in which the tide of judicial opinion is moving as well highlighting the fact that human rights is truly a universal concept.*”
3. The CRC had also been applied locally by a magistrate in *Seniloli & Attorney General v Voliti*. The decision was upheld by the High Court.
4. When looked at from a broad contextual point of view (by virtue of Articles 3, 22, 21(4) and 43(2) of the CF and Article 3 of the CRC) a broader interpretation must be given to s.4(2) of the MAA to include the capacity (of magistrates) to make interim orders regarding all children.

Comment

The broader interpretation given to the MAA and the powers of the Magistrate to make orders enabled children’s rights to be asserted in the Magistrate’s Court, where most maintenance and custody cases are heard. This case overturned 25 years of injustice done to children on the basis of a restrictive approach to legislative interpretation (*Kamoe v Kamoe*, Civil Appeal no 3/1984), which ruled that the MAA gave no power to order interim custody of children under maintenance proceedings. The previous cases did not give priority to children.

The reference to the CRC was also significant as an argument in favour of the respondent, not only because its contents were recognised as relevant to the case, but because it gained strength and legitimacy from prior use in the Courts. A further positive outcome of the case was the use of the *Bangalore Principles on the Domestic Application of International Human Rights Norms* (1988); as well as the following Judicial Declarations: the *Victoria Falls Declaration of Principles for Promoting the Human Rights of Women* (1994); the *Hong Kong Declaration on the Application of International Human Rights Norms Relevant to Women's Human Rights* (1996), *The Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl-Child* (1997) and the Pacific-based *Denarau Declaration on Gender Equality* in the Courts by Pacific Island Judges and Magistrates (1997). All these declarations, as well as the *Tanoa Declaration on Human Rights in the Law* (1999), are judicial guidelines requiring Judges and Magistrates to apply international human rights standards where relevant and possible as a tool of interpretation and as a guide for the interpretation of domestic law where it would not be inconsistent to do so.

NOTE: An accompanying compendium of the seven core human rights treaties and the judicial declarations on gender, children and human rights has been published by RRRT together with this volume.

BAIL / CHILDREN

- **Convention on the Rights of the Child (CRC) used to define “exceptional circumstances” in relation to a child defendant’s application for bail pending appeal.**

PRAKASH v STATE

High Court
Madraiwiwi J

Fiji Islands
Criminal Jurisdiction Case
Misc. Application no. HAM0009 of 2000S
13 April 2000

International instruments and law considered

Convention of the Rights of the Child (CRC)
Constitution of Fiji 1997 (CF)
Penal Code Cap 17 (PC)

Facts

This was an application for bail pending appeal against a Magistrate’s decision. The applicant (P) was 17 years old when he was charged on 14 January 1997 with the offences of breaking and entering and burglary. P was a first offender and did not have legal representation. The matter was not disposed of until 3 years after the date P was charged for various reasons. P maintained his “not guilty” plea throughout. The matter was finally dealt with on 23 March 2000 when P changed his plea to “guilty”. Upon sentencing, the Magistrate relied on a “Hon. Chief Justice’s Circular Memorandum No.1 of 1991” on the use of suspended

sentences and decided not to give P a suspended sentence. P was accordingly sentenced to 2 years imprisonment for each offence, which were to be served concurrently. P appealed to the High Court against the decision of the Magistrate and in the interim, P also applied for bail pending the appeal.

In the High Court, the rule of practice on bail pending appeal allowed it only in “exceptional circumstances” (*Apisai Vuniyayawa Tora & Ors v. Reginam* 24 FLR 28, CA). The phrase “exceptional circumstances” has been held to mean “where the appeal is likely to succeed” or “where the delay in determining the appeal would negate the purpose for the appeal”.

Issue

Could the Court grant an application for bail pending the appeal in P’s case?

Decision

The Court held that P’s case had certain factors that amounted to “exceptional circumstances”:

1. The meaning of the phrase “exceptional circumstances” was not exhaustive and it was a concept that allowed for flexible and careful application of the principle on a case by case basis to meet the ends of justice. This aspect of the Hon. Chief Justice’s Circular Memorandum was not given more careful attention.
2. When P committed the offence, he was only 17 years old and was therefore a child pursuant to the CRC, which was ratified by Fiji in 1993. By virtue of Article 43(2) of the CF, P was entitled to the protections afforded under the CRC. Article 3 of the CRC obliged the Courts of law to take into account “the best interest of the child” as a “primary consideration”.
3. If the “best interest of the child” principle were followed, the Magistrate would have done the following:
 - i. Advised P of his rights, such as the right to counsel. The Court should question the unequivocal nature of the plea given that P had steadfastly pleaded not guilty to the charges until the date of the hearing in 2003;
 - ii. Expedited the case to minimise any trauma to P; the case took over 3 years to be disposed of, which raised the question of P’s right to have the case determined within a reasonable time pursuant to Article 29(3) of the CF; and
 - iii. P’s age at the time he committed the offences. His vulnerability because of his age might have entitled him to legal aid in the “interests of justice” pursuant to Article 28(1)(d) of the CF.

Comment

The Court applied the provisions of the CRC to hold there were “exceptional circumstances” justifying the grant of bail. The CRC was relied on by virtue of Article 43(2) of the CF. It was clear that little attention had been given to the rights of children. P was entitled to certain safeguards that were not afforded him. In such cases, counsel need to be aware of the relevance of constitutional and international instruments provisions so they can be raised in Court. The Court relies to a large extent on the submissions made before it which underscores the crucial role of counsel in being familiar with international law as provided in Article 43(2) of the CF.

ABUSE / CHILDREN

- **Convention on the Rights of the Child (CRC) taken into account as a factor in determining the appropriate sentence for an accused.**
-

QILADRAU v STATE

High Court
Pathik J

Fiji Islands
Criminal Appeal No. 48 of 2000
30 June 2000

International instruments and law considered

Convention on the Rights of the Child (CRC)
Penal Code Cap 17 (PC)

Facts

The appellant (Q) pleaded guilty to committing an unnatural offence, contrary to s.175(a) of the PC. Q lured a 6-year-old boy (C) to his house, and had forced anal sex with him. Q was sentenced to imprisonment for 5 years. Q appealed against the sentence.

Issue

What would the appropriate sentence be taking into account all the mitigating/aggravating factors as well as Fiji's obligations under the CRC?

Decision

The Court reduced the sentence from 5 to 4½ years following legal precedents where sentences were reduced upon taking into account a guilty plea. It stated that the "small" reduction of another 6 months could not be entertained owing to the severity of the crime, the aggravating factors, and the application of the CRC to protect children from being victims of sexual abuse.

Comment

The PC (ss.149 & 183) is silent on whether the prosecution must prove vaginal penetration as opposed to penetration of any other part of the body. However the common law accepts rape as vaginal rape. In the present case, Q was charged with "carnal knowledge against the order of nature" which suggests that the PC also restricts rape to vaginal rape. This definition disregards the interests of male children and the gravity of the offending on their persons. Consequently it is a contravention of the equality and non-discriminatory principles of the CRC. Articles 38 and 43(2) of the CF provide a basis for challenging the reliance on s.175(c) of the PC rather than on ss.149 and 183 in cases involving anal rape.

TORTURE / CHILDREN

- **Corporal punishment by a headmaster does not necessarily contravene the torture section in the Constitution – nor does it necessarily amount to torture or inhuman or degrading punishment.**
-

R v ROSE

High Court
Ward CJ

Solomon Islands
S I L R [1987] 45
Criminal Appeal 1987/45
21 September 1987

International instruments and laws considered

European Convention on Human Rights (ECHR)
Solomon Islands Constitution (SIC)
Constitution of Botswana (CB)
Penal Code (PC)

Facts

This case concerned two 10-year-old boys who misbehaved during assembly and were given four strokes of the cane by the headmaster (R) in front of the other children. The complainant (C) was seen by a doctor who described the resulting injury as a raised area about 1.5 – 2 inches wide and about 6 inches long. He did not regard the injury as serious. R was charged in the Magistrate’s Court with four charges under the PC:

1. Common assault;
2. Assault causing bodily harm;
3. Assaulting a person under 15 years of age in a manner likely to cause suffering or injury; and
4. Ill-treating a person under 15 years of age.

The Magistrate’s Court acquitted the headmaster. The Director of Public Prosecutions appealed on two grounds:

1. If the common law defence of reasonable punishment existed, the punishment in this case was unreasonable.
2. The SIC abrogates the right of parents, teachers or other people to administer corporal punishment as Article 7 renders corporal punishment unlawful *per se*.

Issues

1. Is corporal punishment a violation of Article 7 of the Constitution? (Article 7 of the SIC provides that “*no person shall be subjected to torture or to inhuman or degrading punishment or other treatment*”.)
2. Is s.226(4) of the PC, which provides for the defence of reasonable punishment, in contravention of Article 7 of the SIC? (Section 226(4) provides that: “*Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person, having the lawful control of a child or young person to administer*”.)

reasonable punishment to him.” Section 226 relates to the charges of cruelty to a person under 15 years of age.)

Decision

The Court held that corporal punishment was not a violation of Article 7 of the SIC because it did not amount to degrading punishment.

The Court referred to the similarity of this article of the SIC to Article 7 of the CB and Article 3 of the ECHR and analysed the cases under these provisions in respect of both jurisdictions (*R v Petrus & Anor* [1985] LRC 699; *Tyrer v UK* [1978] 2 EHHR 1). The Court then applied the test of the European Court of Human Rights that whether or not corporal punishment was degrading was a matter of degree. It was not, of itself, unlawful and whenever it was administered in accordance with the spirit and controls of the Code of Discipline in the Teachers’ handbook would not breach Article 7.

It was also held that the defence of reasonable punishment set out in s.226(4) of the PC would contravene Article 7 of the SIC if the punishment imposed was unreasonable. In order for a punishment to be unreasonable it had to be degrading. The punishment imposed by the headmaster upon the boy was not reasonable punishment because of the deliberate decision to inflict the caning in public and the resulting emotional distress suffered by the boy.

Comment

The decision is an interesting one as the Court took the view that the legality of corporal punishment was a matter of degree. If it was applied in circumstances where there were appropriate controls it was valid. In the present case, the public nature of the punishment and the emotional trauma suffered by C rendered it degrading treatment and thus unconstitutional. The prevailing human rights perspective is that any state-sanctioned violence inflicted by one person or persons on another is below the standard of civilised conduct. This approach affirms the sanctity of the person and the innate character of human rights. *R v Petrus & Anor* (1985) LRC 699 reflected the emerging trends in this area where corporal punishment *per se* was held to be inhuman or degrading punishment.

TAXES / MOVEMENT

- **Failed attempt to use the International Covenant on Civil and Political Rights (ICCPR) in a tax case to argue that a tax offender should be allowed to leave the country.**
 - **A convention has no legislative effect in the Cook Islands unless it has been ratified and adopted locally as part of the national law of the country.**
-

R v SMITH

High Court
Quilliam CJ

Cook Islands
Civil Division Case No 0.A 3/98
26 April 1999

International instruments and law considered

International Covenant on Civil and Political Rights (ICCPR)
Constitution of Cook Islands (CCI)
Declaratory Judgment Act 1994 (DJA)
Income Tax Act 1997 (ITA)

Facts

This case involved an application made by the Applicant (S) under the DJA for declaratory orders as to the powers of the Collector of Inland Revenue in the case of persons about to leave the Cook Islands.

The proceedings arose out of an action of the Collector of Inland Revenue in January 1998 in notifying S that he would not be issued with a clearance certificate allowing him to leave unless his outstanding tax had been paid in full by 31 March 1998.

S sought clarification of the powers of the Collector in the issuing or withholding of a tax clearance for persons intending to leave the country temporarily.

Issues

1. Whether the Controller of Inland Revenue had powers under the s.201 of the ITA to restrain S from leaving the Cook Islands; and
2. Whether the ICCPR had any application in the Cook Islands in relation to the freedom of movement of an individual from one country to another given that NZ had ratified the Convention on behalf of the Cook Islands in 1978.

Decision

The Court held that s.201 of the ITA did not entitle the Controller of Inland Revenue to detain S arbitrarily. However, s.201 did provide that the Controller of Inland Revenue had to be satisfied that arrangements had been or would be made for the payment of tax if S wanted to leave the country.

The Court also stated that as the ICCPR had not been enacted as part of the national law of the Cook Islands it had no effect on the case at hand.

Comment

The Court held that the ICCPR could only be applied if there was domestic enabling legislation. This is the traditional approach to the applicability of international human rights instruments. The decision can be contrasted with the view that conventions reflect an international consensus in a particular area of law or rights and that where ratified, States Parties have an obligation to act consistently with it (without further action on their part).

ADEQUATE FOOD / PRISONERS

- **Application of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) to reinforce Article 25(1) of the Constitution of Fiji which protects the rights of prisoners.**
-

RARASEA v STATE

High Court
Madraiwiwi J

Fiji Islands
Criminal Appeal Case No HAA0027 of 2000
12 May 2000

International instruments and law considered

International Covenant on Civil and Political Rights (ICCPR)
International Covenant on Economic, Social and Cultural Rights (ICESCR)
United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)
Constitution of Fiji (CF)
Penal Code (PC)
Prisons Act Cap 68 (PA)
Prisons Regulations (PR)

Facts

The appellant (R) appealed against a sentence of 6 months imprisonment imposed for the offence of escaping from lawful custody contrary to s.138 of the PC. He also appealed against the sanctions imposed by the Commissioner of Prisons pursuant to ss.83(1)A(i) and (vi) of the PA as he had also breached paragraph 123(3) of the PR. This consisted of reducing his 8 month remission entitlement for the original sentence of 2 years by 1 month and 7 days and giving him reduced rations for 2 weeks. In addition, the 66 days he was at large were added to his sentence under paragraph 114 of the PR.

Article 25(1) of the CF states that: *“Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment.”*

Article 10(1) of the ICCPR states that: “*All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.*”

Issue

Whether the sanctions imposed by the Commissioner of Prisons in reducing the appellant’s food ration for two weeks was cruel, inhumane, degrading or disproportionately severe treatment or punishment.

Decision

The Court held that the 6 month consecutive sentence would stand and allowed the appeal to the extent that the punishments meted out by the Commissioner of Prisons would be set aside. The reduction of remission (s.83(1)A(i)) of the PA) and rations (s.83(1)a(vi) of the PA) breached Article 28(1)(k) of the CF as R had already been punished with a 6 month consecutive sentence for escaping from lawful custody.

Section 83(1)A(vi) of the PA contravened Article 25(1) of the CF and was null and void, the reduction of rations amounting to inhumane and degrading treatment.

The remission period of 1 month 7 days which was deducted was restored accordingly.

Furthermore, Article 11(1) of the ICESCR recognised the right of everyone to adequate food. To deny a prisoner adequate food was a violation of Article 11.

Comment

Article 43(2) of the CF allows international law instruments to be taken into account where relevant in the interpretation of human rights. The Court relied on this provision to apply provisions of the ICCPR and the ICESCR, as well as the CF, to the facts before it. It held that the reduction of rations amounted to inhumane and degrading treatment. Further that the attempt to punish R under the PR was double jeopardy and unconstitutional as R had already been penalised for escaping from lawful custody. Citing the case of *Minister of State for Immigration & Ethnic Affairs v Teoh*, the Court stated that ratification of international instruments obliged a State Party not to act inconsistently with their provisions.

RULE OF LAW / DEMOCRACY

- **Doctrine of necessity does not authorise permanent changes to a written constitution, let alone its complete abrogation.**
 - **Test to determine whether a constitution has been annulled is the efficacy of the change.**
 - **For a revolutionary government in Fiji to achieve de jure status, the efficacy test in the common law of Fiji must be applied.**
-

REPUBLIC OF FIJI & ATTORNEY GENERAL OF FIJI v PRASAD

Court of Appeal
Casey PJA, Barker, Kapi, Ward
& Handley JJA

Fiji Islands
Civil Appeal No. ABU0078 of 2000S
High Court Civil Action No. 217/2000
1 March 2001

Law considered

Constitution of Fiji 1997 (CF)

Facts

In 2000 there was a series of political uprisings in Fiji spearheaded by the illegal removal of the elected Government headed by Mahendra Chaudhry, which was instigated by George Speight on 19 May 2000. Parliamentarians were held hostage in Parliament for 56 days. There was an attempt by George Speight to illegally abrogate the Constitution and establish a new Government. Racial tensions between indigenous Fijians and Indo-Fijians escalated and there were burnings of Indo-Fijian homes in Muanaweni, Dreketi and elsewhere. The Military assumed control and there were curfews and restrictions on various rights. A group within the Military attempted a mutiny but failed. An Interim Civilian Government was installed by the Military after it had attempted to abrogate the Constitution and to rule by Decree. The de facto Government attempted to assume control of the nation. P, a citizen of Fiji who had not held any office or appointment under the 1997 Constitution, sought a Court declaration that the 1997 Constitution was still in force as the supreme law of Fiji. P challenged the legality of actions, including the purported abrogation of the CF, taken by those who had assumed control of the State. The defendants (D) were described as the Republic of Fiji and the Attorney General (the Interim Civilian Government).

Counsel for P addressed the High Court on all issues, whereas counsel for D addressed the Court only on the question of the legal standing of P.

The Court ruled that P had standing to bring the proceedings and upheld the continuing validity of Fiji's 1997 Constitution. It made the following declarations:

1. That the attempted coup of 19 May was unsuccessful;
2. That the declaration of emergency by the President of Fiji, Ratu Sir Kamisese Mara, in the circumstances then facing the nation, though not strictly proclaimed within the terms of the CF, was granted validity *ab initio* under the doctrine of necessity;

3. That the revocation of the 1997 CF was not made within the doctrine of necessity and such revocation was unconstitutional and of no effect, thus the 1997 CF was the supreme and extant law of Fiji;
4. That the Parliament of Fiji consisting of the President, the Senate and the House of Representatives was still in being, and that owing to uncertainty over the status of the government, it would remain for the President to appoint as soon as possible as Prime Minister, the member of the House of Representatives who in the President's opinion could form a government that had the confidence of the House of Representatives pursuant to Articles 47 and 98 of the CF and that government shall be the Government of Fiji.

This was an appeal against the High Court decision of Gates J of 15 November 2000. In the appeal, the Court of Appeal was requested to decide whether the 1997 Constitution still survived and to rule on the legality of the new regime, i.e. the Interim Civilian Government supported by the Military.

Issues

There were a number of issues arising in this case:

1. Did the Court of Appeal hearing this appeal have the jurisdiction to decide whether a new regime, set up in defiance of the 1997 Constitution, had become legal and thus entitled to rule the country?
2. Whether or not the 1997 Constitution was still in force after its purported abrogation by the Military.
3. How and when can a constitution be abrogated?
4. What was the legality of the regime of the Interim Civilian Government?
5. What was the status of the decrees made under martial law?

The Interim Government argued that the 1997 Constitution had ceased to become law and that there was a general perception amongst the indigenous Fijian community that the CF inadequately protected indigenous rights, insufficiently protected Fijian land and endorsed an electoral system having bizarre and unexpected results. Exploitation of these perceptions allowed such men as Speight to inflame their fears – by such exploitation, the “*calculated destabilisation of Fiji society, loss of life, destruction of property and such other fundamentally repugnant actions of the Speight group*” were possible. It argued that it had effective control of the country and should therefore be regarded as the new legitimate government.

Decision

The Court stated that in a situation where there had been a purported overthrow of a constitution but where the Court system had survived virtually unscathed, the Court had two options.

First, it could say that the usurping government, by abrogating the constitution or by changing it in an illegitimate manner, had succeeded in changing permanently the previous legal order and that the new order was legally valid. But the danger with this first option was that such a finding could be seen as giving the stamp of legitimacy to a usurper. As against that perception, a Court could not be blind to reality, however unfair or unfortunate that reality might be.

The other option was to declare the usurpation invalid. Under this option, a revolutionary change to the legal order would be declared unsuccessful. This result could occur even if the usurper had been acting under the doctrine of necessity, i.e. as a result of events which were so drastic as to call for the suspension of the constitution and/or the imposition of martial law. Under this scenario, the constitution would re-emerge.

Even when the doctrine of necessity did not apply, but there was a purported change in the legal order and an illegitimate overthrow of the constitution, the new order might not ultimately be recognised as the legal government. The usurper was required to prove various matters including, notably, acceptance of the new regime by the general populace.

Regarding its jurisdiction, the Court ruled that it could hear this appeal; it had been appointed and had taken the oaths of office prescribed by either the 1990 or 1997 Constitution – none of the judges had taken the oaths of office under the Judicature Decree 2000 of the Interim Civilian Government. Furthermore, that Decree stated that nothing should affect their continuance in office as Judges of the Court of Appeal and it did not require them to take new oaths. (Note: Courts, including those created by a written constitution, are authorised and required to decide when and if a revolutionary regime has become lawful – Lord Reid, at 723 in *Madzimbamuto v Lardner-Burke*, [1969] 1 AC 645.)

The Court had no hesitation in holding that the High Court was in error when it found that the Commander had “no genuine desire to remove the 1997 Constitution”. It was satisfied in light of further evidence placed before it that the Commander, for the reasons he conveyed to the President at the time, did have a genuine desire to do just that. The doctrine of necessity would have authorised him to have taken all necessary steps, whether authorised by the text of the CF or not, to have restored law and order, secured the release of the hostages, and then, when the emergency had abated, to have reverted to the CF. Had the Commander chosen this path, his actions could have been validated by the doctrine of necessity. Instead, he chose a different path, that of constitutional abrogation. The doctrine of necessity did not authorise permanent changes to a written constitution, let alone its complete abrogation.

In determining this question as to whether or not the CF had been abrogated, the Court found that it was not enough to only consider the invalidity of the Commander’s purported abrogation of the CF based on necessity. Another factor to consider in determining whether or not a constitution had been annulled was looking at the efficacy of the change. This factor was also important to consider in order to determine the legality of the regime of the Interim Civilian Government.

The Court found that the “efficacy” test in the context of the common law of Fiji was as follows:

1. The burden of proof of efficacy lay on the de facto government seeking to establish that it was firmly in control of the country with the agreement (tacit or express) of the population as a whole;
2. Such proof had to be to a high civil standard because of the importance and seriousness of the claim;
3. The overthrow of the constitution had to be successful in the sense that the de facto government was established administratively and there was no rival

- government;
4. In considering whether a rival government existed, the enquiry was not limited to a rival wishing to eliminate the de facto government by force of arms. It was relevant in this case that the elected government was willing to resume power, should the Constitution be affirmed;
 5. The people had to be proved to be behaving in conformity with the dictates of the de facto government. In this context, it was relevant to note that a de facto government (as occurred here) frequently reaffirmed many of the laws of the previous constitutional government (e.g. criminal, commercial and family laws) so that the population would notice little difference in many aspects of daily life between the two regimes. It was usually electoral rights and personal freedoms that were targeted. As one of the deponents said, civil servants such as tax and land titles officials worked normally throughout the coup and its aftermath. Their functions were established and needed no ministerial direction. The Court derived little proof of acquiescence from facts of that nature;
 6. Such conformity and obedience to the new regime by the populace as can be proved by the de facto government had to stem from popular acceptance and support as distinct from tacit submission to coercion or fear of force;
 7. The length of time in which the de facto government had been in control was relevant. Obviously, the longer the time, the greater the likelihood of acceptance;
 8. Elections were powerful evidence of efficacy. It followed that a regime where the people had no elected representatives in government and no right to vote was less likely to establish acquiescence;
 9. Efficacy was to be assessed at the time of the hearing by the Court making the decision.

Applying the test, the Court found that the Interim Civilian Government had not discharged the burden of proving acquiescence. It had therefore failed to establish that it was the legal government of Fiji. Accordingly, the burden of proving that the 1997 CF had been superseded lay on the Interim Civilian Government, which had not discharged the burden. The Court found that the 1997 CF remained the supreme law of Fiji and had not been abrogated and declared that Parliament had not been dissolved. It had been prorogued on 27 May 2000 for six months.

As for the status of the decrees made under martial law, the Court adopted the principle in *Madzimbamuto v Lardner-Burke*, [1969] 1 AC 645 case, being acts done by those actually in control without lawful validity may be recognised as valid or acted upon by the courts, with certain limitations namely: (a) so far as they are directed to and reasonably required for ordinary orderly running of the State; (b) so far as they do not impair the rights of citizens under the lawful ... constitution; and (c) so far as they are not intended to and do not in fact directly help the usurpation.

Comment

The Court referred very briefly to the fact that many authorities favouring illegal usurpations as creating a new legal order were decided “before the modern shift towards insistence on basic human rights and in ratifying international treaties”. This implicitly acknowledged the importance of human rights standards as creating a deterrent milieu within which to make a decision. Upon hearing submissions on the relevance of international human rights

law, the Court also stated it was unnecessary to have regard to international human rights law because the Bill of Rights contained all these rights anyway.

In practical terms, the Courts need to tread very carefully to ensure they do not recognise an illegal usurpation. As far as possible, they need to wait on events before making a determination. This may require an assessment of the situation and a request that would be usurpers prove their support from the general population by available means. The intention must be to clarify and pronounce on the legality of the circumstances.

EQUALITY / CHILDREN

- **Status of the Convention on the Rights of the Child (CRC) in relation to national law.**
 - **CRC used to argue against the requirement for corroboration of children's evidence, unsuccessfully.**
-

REPUBLIC OF KIRIBATI v IAOKIRI

High Court
Takababwe J

Kiribati
Criminal Case No. 25 of 2004
16 June 2004

International instruments and law considered

Convention on the Rights of the Child (CRC)
Constitution of Kiribati (CK)
Evidence Act 2003 (Act. No. 5 of 2003) (EA)
Penal Code (Cap 67) (PC)

Facts

I was charged with indecent assault on a 15-year-old female, the complainant (C), contrary to s.131(1) of the PC. The issue in this case was the question of the requirement of corroboration of C's evidence, which the Prosecution argued had been abolished by s.11(1) of the EA.

Issue

Did the Court require corroboration of C's evidence in a sexual offence case given the enactment of the Evidence Act 2003?

(Note: The CRC was referred to only in respect of the status of the international convention in relation to domestic law generally. The Court did not discuss how corroboration rules might be affected by the CRC)

Decision

The Court convicted I as charged and said:

1. The EA by s.11(1) abolished the court practice of requiring corroboration in sexual cases. However, the current offence was committed prior to the EA coming into force. Hence, the Court would apply the common law which was in force at the time of the commission of the offence;
2. The Court held that it was dangerous to convict on the uncorroborated evidence of the victim and accordingly warned itself so. Corroboration was a requirement in indecent assault cases except when the Court was satisfied that a complainant was speaking the truth;
3. The CRC did not form part of the laws of Kiribati, unless it was given the force of law in Kiribati.

Comment

The Kiribati Court adopted the principle of non-enforceability in its approach towards the application of any international human rights convention. The Court could only apply the CRC if it had been incorporated into domestic law by legislation.

The CRC can be used to argue against the need for corroboration of children's evidence. The requirement for corroboration of a child's evidence conflicts with the principle of equality under the CRC.

This discrimination is unreasonable and unjustifiable because it is based on the belief that children are inherently more unreliable than adults as witnesses. It is thought that children are highly suggestive, have difficulty distinguishing fact from fantasy, have unreliable memories, do not understand the duty to tell the truth and easily make false allegations, particularly in relation to sexual assault. This rationale has been discredited by research, which has shown that the evidence of children is no less reliable than that of adults. Moreover, children are less inclined to lie about events than adults.

The elimination of the corroboration rule in Kiribati by the EA does not guarantee an improvement in the quality of fact finding. What it removes is the unjustified discrimination and prejudices that can unfairly influence the judicial assessment of a child's credibility, which in turn disadvantage a child's evidence, thereby compromising a child's protection under the law.

DISCRIMINATION / WOMEN

- **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) used to argue that the 'corroboration warning' should be abolished.**

REPUBLIC OF KIRIBATI v TIMITI & ROBUTI

High Court
Lussick CJ

Kiribati
High Court Criminal Case 43/97
17 August 1998

International instruments and law considered

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
Constitution of Kiribati (CK)
Penal Code Cap 67 (PC)

Facts

T & R were charged with rape contrary to s.128 of the PC. T & R admitted having sexual intercourse with the complainant (C), but asserted that it was with her consent. C had told the police that some men had held her down inside a house situated inside the Te Mautari grounds and that T & R had raped her. The Court found C's testimony credible, even though some parts were inconsistent with the police report she gave two days after the incident.

The Court on the other hand found the evidence of T as illogical as he had stated that he had noticed that C seemed ashamed to participate, because people were outside on the verandah. The Prosecution (P) produced six witnesses to testify against both T & R; C herself, the policemen on duty at the time of the incident and at the lodging of the complaint, and an engineer at Te Mautari who testified to the physical state of C after the incident.

T & R elected to remain silent and did not call any witnesses. It was submitted by Counsel for T that the C suffered from an illness that caused her to imagine things and disturbed her reasoning, leaving her evidence in doubt. A similar argument was advanced on behalf of R and it was also submitted that there had been a complete absence of corroboration.

Counsel for the Prosecution challenged the corroboration rule as violating women's rights under the CK on the grounds of sex discrimination. She cited Article 3, which guarantees the protection of women under the law, and Article 15 (prohibited grounds of discrimination) in support. She argued that although Article 15 did not specifically prevent discrimination based on sex, she proposed that it be interpreted consistent with the principles formulated in CEDAW and other international instruments to include gender discrimination as well. This argument relied on the fact that most complainants of rape were women and such a rule placed women at a disadvantage to males.

Issue

Whether the requirement for the cautionary corroboration warning constituted discrimination under the CK and CEDAW.

Decision

As a general rule, P was required to prove each element of the charge beyond a reasonable doubt and if it failed, both the accused were entitled to be acquitted. There was no onus on T & R at any stage to prove their innocence. In a rape case, the 'corroboration rule' required the judge to warn the jury (or himself in this case) of the danger of convicting on uncorroborated evidence of C. P in the present case was therefore required to prove beyond a reasonable doubt that T & R had unlawful sexual intercourse with C without her consent (or that the consent was obtained by what was prescribed in s.128 of the PC) and to ensure that there was corroboration of C's claim.

The Court held that all the elements of the charges were satisfied beyond reasonable doubt and convicted both T & R, sentencing them to 7 years imprisonment. However, it rejected

the alternative arguments submitted by P. Whenever evidence existed which was capable of providing corroboration of the complainant's testimony, as it did in this case, the issue was going to be whether, in the light of that evidence, the complainant was believed. If C's testimony was truthful, the Court could still convict on her evidence, even though it may be uncorroborated. In other words, if T & R were to be acquitted, then it would not be because C was unable to meet the requirement of corroborating evidence but because she was not believed notwithstanding that such evidence existed. There was no need to consider the alternative argument on discrimination or the relevance of CEDAW because the Court believed C anyway.

Comment

The main argument put by the Counsel for the Prosecution was that the Court should not apply the corroboration rule in any case before it because it discriminated against women victims of rape. The argument was similar to that proposed in *AG v Dow* and *S v D*. Therefore, if the complainant was a credible witness, the Court 'ought' to believe her testimony even if her evidence was uncorroborated. Because the Court believed C, it did not have to consider the constitutional arguments. It chose not to respond on the arguments based on the CK and CEDAW.

In 2003, s.11(1) of the Evidence Act 2003 (Act. No. 5 of 2003) removed the discriminatory practice of corroboration. The legislation was initiated by Counsel for the Prosecution in this case.

UNLAWFUL DETENTION / CHILDREN

- **Convention on the Rights of the Child (CRC) used by both the lower and higher courts to emphasise the improper treatment of a juvenile unlawfully detained.**
- **CRC used in conformity with the Juvenile Act and the Constitution to ensure that children are given special protection or guaranteed special protective measures when in conflict with the law.**

SENILOLI & ATTORNEY GENERAL OF FIJI v VOLITI

High Court
Shameem J

Fiji Islands
Civil Appeal No HBA 0033 of 1999
22 February 2000

International instruments and law considered

Convention on the Rights of the Child (CRC)
Constitution of Fiji (CF)
Juvenile Act Cap 56 (JA)
Judges Rules (JR)

Facts

The AG appealed against the quantum of damages awarded by the Magistrate's Court for false imprisonment of a 14-year-old boy (V) at the Nadera Police Post for four hours.

V was stopped by a police officer as he was walking past the police post. He was taken to the police station, questioned and searched. The Police (P) found a tin of fish and some boiled cassava in his pockets. V was handcuffed to a post inside the police post until his release some hours later.

The plaintiff filed a writ of summons claiming damages for false imprisonment. The Magistrate found that V's constitutional rights, his rights under the CRC and his rights under the JA had been breached. The Magistrate found that the deliberate abuse of power by P, the flouting of V's rights, the trauma and distress caused to him and the humiliation he suffered were sufficient to justify the award of punitive damages. She awarded \$10,000 as aggravated damages and a further \$5,000 in punitive damages.

The grounds of appeal were that the award was so high as to be a wholly erroneous estimate, punitive damages were wrongly awarded and that the award was unsupportable having regard to the law.

Issues

1. In considering the issue of quantum and aggravated damages, whether the breaches of the plaintiff's rights under the CF and the CRC justified the award to V, particularly that of punitive damages; and
2. Whether the CRC was in conformity with the JA and the CF in relation to the custody of children.

Decision

The Court held that:

1. The breaches of V's rights under the JA, the JR, the CF and the CRC justified an award for aggravated damages;
2. This was not a case of an honest error of judgment by the police. Instead, it was a case of deliberate flouting of the law and of conscious acts on a vulnerable and a young member of the public, causing distress and humiliation to V;
3. The CRC was in conformity with the JA and the CF in relation to the issue of custody of children. It was intended to ensure that children in conflict with the law, and who are vulnerable because of age and powerlessness in relation to the administration of law enforcement agencies, were accorded special protective measures;
4. The rights of juveniles were protected together with adult suspects, by Article 27 of the CF. Those rights included the right to be told of the reasons for the arrest and detention, the right to prompt release if no charge was brought, the right to consult a legal practitioner, the right to communicate with next of kin, and the right "to be treated with humanity and with respect for his or her inherent dignity". None of these rights were accorded to the plaintiff; and
5. The JA provided for special measures to be taken in the detention of juveniles, the emphasis being to avoid detention except in exceptional circumstances. The spirit of the JA was not observed by the police officers.

However, the Court reduced the award of aggravated damages to \$6800 on the basis that the original figure was higher than appropriate in local circumstances. It did not disturb the amount for punitive damages.

Comment

The High Court endorsed the Magistrate's Court reliance on the CF, the JA and the JR, as well as the CRC. It is important to note that the Courts will always seek to rely on local laws, including the CF, before seeking to rely on international human rights instruments. However, Article 43(2) of the CF dispenses with the arguments over ratification and incorporation in domestic law by making 'relevance' the only test. This allows Courts in Fiji a greater degree of flexibility in relation to conventions. There is therefore no reason why the lower Courts should be hesitant to apply conventions given the provision and the endorsement on appeal.

DUE PROCESS / CHILDREN

- **Convention on the Rights of the Child (CRC) used to argue child suspect's right to parents or legal adviser being present whilst in police custody and before the police take a statement.**

SIMONA v R

High Court
Ward CJ

Tuvalu
Criminal Jurisdiction Case No. 1/02
14 August 2002

International instruments and law considered

Convention on the Rights of the Child (CRC)
Constitution of Tuvalu (CT)
Interpretation and General Provisions Act Cap 1A (IGPA)
Penal Code (PC)

Facts

This case concerned the rights of a child under arrest in police custody. The accused (S) was a 17-year-old charged with a number of criminal offences. A confession statement was taken from him whilst in police custody. Before the hearing of the charge, S applied to the High Court to quash his confession statement because the police failed to advise him of his right to consult his parents/guardian(s) or legal adviser, which resulted in the breach of his rights under Article 17 of the CT and Article 40 of the CRC. The Court held that S's application was premature as it was a matter to be considered by the trial judge. In any case, the Court identified questions of law in the application that it wished to deal with before remitting the case to the trial court. The questions were as follows:

1. Whether the accused had a right to contact his parents or to seek legal advice before questioning; and

2. If there was such a right, did the police have a legal obligation to advise the accused in custody of that right before questioning him?

Issue

1. Whether a combination of Article 17 of the CT and Article 40(2)(b) of the CRC gave the accused the right to consult his parents or seek legal advice?
2. Whether the CRC was applicable to Tuvalu's domestic law?

Decision

The Court held that Article 17 of the CT taken together with the CRC provided an accused with the right to contact his parents and the police had an obligation to inform the accused of this right. This ruling was based on the following reasons:

1. Article 17(2)(a) of the CT allowed the police to detain a child according to law for the purpose of proper discipline. Article 17(2)(a), however, did not provide guidance as to the terms of such detention or custody;
2. Where there was an inconsistency, ambiguity or lacuna in the written laws of Tuvalu, Article 15(c) of the CT and s.17 of the IGPA enabled the Court to interpret the written law in a manner that was consistent with Tuvalu's international treaty obligations. As Tuvalu was a party to the CRC, the terms of the convention were applicable in interpreting the provisions of the CT. There was no dispute that Tuvalu is a State Party to the convention and by the provisions of s.17 of the IA, a construction of a written law which is consistent with the international treaty obligations of Tuvalu is to be preferred to a construction which is not;
3. The relevant international convention was the CRC. Under Article 40(2)(b), a child's rights in police custody are as follows:
"...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 the legal or other appropriate assistance in the preparation and presentation of his or her defence."
4. The meaning of Article 17 of the CT was to be interpreted in accordance with the terms of the CRC (by virtue of Article 15(c) of the CT and s.17 of the IGPA). The combined effect was that an accused child had the following rights under the CT:
 - (i) The right to have a parent or guardian present before/while police take an accused child's statement (unless impractical);
 - (ii) The right to be informed by police of this right, and for the Police to take any reasonable steps to secure such attendance before taking any step which could result in the child making a statement against his/her interests.
 - (iii) The Chief Justice noted: *"I am satisfied that the Constitution read in accordance with the terms of the Convention gives any child in the custody of the police the right to have a parent or guardian present unless that is impractical. The perception that a child needs special protection arises from the immaturity and vulnerability of children. That is the foundation upon which the Convention was construed."*

Comment

The use of the CRC in this case was a significant advancement in the protection of children in Tuvalu. Previously, children in a hostile and stressful situation when accused of a criminal offence were not allowed the right to see their parents before the police took their statements. As a result of this case, children in police custody now have a right to the presence of a

parent or legal adviser. Furthermore, the police must inform them of that right as well as take practical measures to implement it. The failure of the police to comply may render any statement made by a child defendant in police custody inadmissible in court.

DISCRIMINATION / WOMEN

- **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) applied to condemn social and cultural behaviour based on notions of male superiority.**

STATE v BECHU

Magistrates Court
V Nadakuitavuki (Magistrate)

Fiji Islands
Criminal Case No. 79/94
2 December 1999

International instruments and law considered

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
Constitution of Fiji (CF)
Penal Code Cap 67 (PC)

Facts

On 13 August 1994, the complainant (C) was physically assaulted and raped by the accused (B). B was well known to C as they had previously had a sexual relationship. The medical examination showed no physical signs of injury or force on C's genitalia or any evidence of sperm in the vaginal swab. However, there was injury to C's left chest, left forehead and under her eye, which were consistent with the forceful use of a hard blunt object. B admitted that he had assaulted C. However in his defence, B stated that he was not guilty of the alleged offence as he was very drunk at the time. Moreover B and C had previously had a sexual relationship and she was currently involved with other men.

Issue

1. Whether the fact that B was intoxicated at the time of the offence was a proper defence; and
2. Whether the parties' previous relationship was relevant.

Decision

The Court found that B's excuses fell short of any legal or reasonable justification. Neither were they acceptable in any context and under any circumstances. B was accordingly convicted and sentenced to 5 years imprisonment. The Court:

1. Rejected the defence of drunkenness to excuse rape. Sexual intercourse without consent fell within the definition of rape under s.149 of the PC. B was reckless because he was aware that the other party might not have been consenting but proceeded to have intercourse with her anyway;

2. Rape is a direct violation of a woman's fundamental human rights embodied in the 1997 Constitution and international instruments, particularly CEDAW;
3. Noted that: "*Women are your equal and therefore must not be discriminated against on the basis of gender. Men should be aware of ... CEDAW which our country ratified ... Under the Convention the State shall ensure that all forms of discrimination against women must be eliminated at all costs. The Courts shall be the watchdog of this obligation. The old school of thought that women were inferior to men or part of their personal property, that can be discarded or treated unfairly at will, is now obsolete and should no longer be accepted by our society.*"

Comment

This was the first decision to cite CEDAW in the Fiji Islands and was notable for its forthright comments in what is generally a traditional and conservative society. In the Fijian cultural context women are not considered equal in status to men. The Court applied Article 43(2) of the CF. Article 43(2) states, *inter alia*, that the Courts must have regard to public international law applicable to the protection of the rights set out in the chapter.

The case opened the way for the application of international standards for women in criminal cases such as rape. Upon ratification, the Fiji Government originally made a reservation to Article 5(a) of CEDAW. Under Article 5(a) States Parties are committed to modify social and cultural patterns of conduct of men and women which are based on the idea of inferiority or superiority of either sex. This reservation has now been withdrawn allowing the full application of CEDAW.

TORTURE / PRISONERS

- **Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), Robben Island Guidelines (RIG) cited to uphold rights of detainees and prisoners to be protected from torture and cruel, inhuman and degrading treatment.**

STATE v FONG & ORS

High Court
Gates J

Fiji Islands
Criminal Action HAC010.04S
15 February 2005

International instruments and law considered

International Covenant on Civil and Political Rights (ICCPR)

Robben Island Guidelines (RIG)

Universal Declaration of Human Rights (UDHR)

United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)

Constitution of Fiji 1997 (CF)

Penal Code Cap 17 (PC)

Facts

Five men (F, O, S, M & C) were all charged with robbery with violence and the unlawful use of a motor vehicle. One was also charged with resisting arrest. The five men had held up a taxi, threatened the driver, and then took him to a local primary school where they tied him up, blindfolded him and left two youths to watch over him. F and the other men then used the taxi to commit a robbery at a shop. However, in the course of the robbery, the taxi's registration number was noted by staff. The men were tracked by the Police (P) and subsequently arrested. F and his friends made confessional statements to P. F and his friends were beaten and injured during arrest.

During the trial, F pleaded guilty on arraignment, whereas, the other four men pleaded not guilty.

Issues

This case concerned the admissibility of confessional statements allegedly made to P:

1. If the accused were subjected to extrajudicial punishment upon apprehension, and their confessional statements were obtained at that time, would they be admissible?
2. If the accused were further assaulted and threatened prior to and during interviews, would their statements be admissible?

Decision

In the *voire dire*, the Court ruled that it was satisfied on the evidence that O was assaulted when apprehended and arrested by P, and that he was assaulted again at Samabula Police Station upon arrival and in the cells consequently. The Court ruled that O was so intimidated that his statements were involuntary, and therefore, inadmissible.

With regard to S's statement, the Court also ruled the statement involuntary, and thus inadmissible. This particular accused had been injured improperly in police custody, punished for having run off and then assaulted so that he might confess.

The Court also found M's statement to be involuntary and inadmissible. This particular accused had also been inflicted injuries by P in order to obtain his statement. The Court stated that: "*To be tough on crime does not carry with it a license to break civilised professional standards of police law enforcement and investigation. Softening up procedures are impermissible and fall below such standards.*"

With regard to C, the Court also ruled his statement to be involuntary and inadmissible as he had also been assaulted and injured in police custody.

Comment

The Court applied the principles in Article 25(1) of the CF which prohibits torture. There was clear evidence of police brutality against the accused while in custody, which no rules could justify irrespective of how grave the crime or offence. It supported its decision by citing the principles of the UDHR (Article 5), the ICCPR (Article 7) and the RIG (Articles 4, 9 and 10). The RIG urge States to criminalise torture and not to allow any justification for it. The Court also quoted the Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, Principle 6 of the SMR of which provides standards for the proper treatment of prisoners.

FAIR TRIAL

- **European Convention on Human Rights (ECHR) used by the Courts to determine fair trial within a reasonable time; parallel provisions in Fiji Constitution.**
-

STATE v KATA

High Court
Townsend J

Fiji Islands
Criminal Case No HAC0009 of 1994L
10 May 2000

International instruments and law considered

European Convention on Human Rights (ECHR)
Constitution of Fiji 1997 (CF)
High Court (Constitutional Redress) Rules, 1998 / HCR
Penal Code Cap 17 (PC)

Facts

The accused (K) was charged with 5 counts of larceny by a servant of army stores. The events took place in 1991 and K was formally charged by the police in November 1992. K was a member of the Fiji Military Forces and was stationed in Lautoka. On the day of the incident, K was recorded by the soldier on duty at the camp as entering the area on a “ration run”. K went to the Supply Store and purported to take some items from the store.

K was suspended from the Army without pay as from 1 August, 1991. From that day to filing the application under Article 29 of the CF, 9 years had passed without a trial proceeding.

At the commencement of the trial on 8 May 2000, K, through his counsel, by motion applied for the following:

1. A declaration to the extent that the trial was not within a reasonable time; and
2. An order that the charges laid against him be dismissed and he be acquitted.

Issue

Whether the accused was deprived of his right to a fair trial within a reasonable timeframe under Article 29 of the CF which states that everyone has a right to be tried within a reasonable time.

Decision

The Court held that the failure to bring K to trial within a reasonable time was a continuing breach of the CF after a certain time, at least from 1996 or early 1997. Affidavit material showed an appalling failure to provide a trial within a reasonable time. The motion was granted and proceedings permanently stayed as K had been grossly prejudiced.

Comment

The Court relied primarily on Article 29 of the CF to find that K's right to a trial within a reasonable time had been breached. It then cited Article 6(1) of the ECHR to reinforce its position on the basis that it was a parallel provision to Article 29. The Court applied ECHR cases in relation to the parallel provision to decide what was meant by "a reasonable time" within which a trial must be held.

ABUSE / CHILDREN

- **Convention on the Rights of the Child (CRC) applied by the Court where it is appropriate to justify or explain the decision made by the Court.**

STATE v MUTCH

High Court
Pathik J

Fiji Islands
Criminal Trial No 8 of 1998
15 November 1999

International instruments and law considered

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

Facts

The accused (M) was convicted of six counts of rape and indecent assault on five female children between 1990 and 1997. The children varied in age between 9 and 13 years old at the time the acts were committed on them.

Issue

Whether the Court should also apply the CRC to reflect its support for the international community's concern for the protection of children's rights in sentencing the accused.

Decision

The Judge held that:

1. Though the PC had ample provisions to deal with sexual offences committed on children, the Court was prepared to apply the principles of the CRC where it was appropriate to justify or support a decision; and
2. Where any actions concerning children were brought before the Court, it was the accepted rule as provided in the CRC that "the best interests of the child" would be a primary consideration.
3. M should be sentenced to 7 years imprisonment.

Comment

The Court relied on the CRC to reinforce the position it had adopted in relation to the actions of M. Until this case the CRC "best interests of the child" principle was confined

only to family law matters. This case made it clear that the principle extended to other fields of law as this was the intention of the CRC. While the PC had adequate sanctions regarding offences M had committed, there was an element of repugnance that was better reflected in the provisions of the CRC. It demonstrated the resolve of the international community to protect the rights of children and the Courts would be vigilant in this regard. The CRC was applied by virtue of Article 43(2) of the CF.

CRUELTY / MANDATORY SENTENCING

- **A minimum mandatory sentence of imprisonment is unconstitutional as it breaches the right to freedom from torture and inhuman treatment.**
-

STATE v PICKERING

High Court
Shameem J

Fiji Islands
Miscellaneous Action NO: HAM 007 of 2001S
30 July 2001

International instruments and law considered

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

International Covenant on Civil and Political Rights (ICCPR)

Universal Declaration of Human Rights (UDHR)

Constitution of Fiji 1997 (CF)

Dangerous Drugs Act and amending Decrees (No 4 of 1990, No 1 of 1991) (DDA)

Facts

This case involved a 20-year-old male (P) who was charged with being in possession of dangerous drugs, an offence under the DDA (as amended). On 7 November 1998, he was found to be in possession of 4.7 grams of Indian hemp at Nasinu.

Issue

Whether or not a 3 months mandatory prison sentence for an offence under s.8(b) of the DDA (as amended) was in breach of Article 25(1) of the CF.

Decision

The Court held that a mandatory term of 3 months imprisonment for an offence under s.8(b) of the DDA (as amended) breached Article 25(1) of the CF which provided for freedom from torture and inhumane treatment. This was because it removed judicial discretion in sentencing young first offenders and the sentence was so severely disproportionate to the offending that it offended ordinary standards of decency. The Court also quoted Article 5 of the UDHR and Article 7 of the ICCPR, which prohibits cruel, inhuman or degrading punishment in support of its decision.

Comment

This judgement reflects the thinking that certain minimum mandatory sentences are too harsh. In this case, most of the offenders who would be liable under the amendment to the DDA would be mainly juvenile offenders and the sentence which would be imposed on them would be too severe – for example, they might be in possession of a gram of marijuana or be a first offender, yet they would have to be sentenced to prison immediately.

CUSTOMARY LAW / EQUALITY

- **The right to equality guaranteed in the Constitution does not permit a traditional titled chief to argue that he must only be tried before a jury or assessors of his peers; assessors do not have to be selected from persons of equivalent rank and paramount chiefly status.**
- **Discussion on customary law, the Bill of Rights (BOR), Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights (ECHR).**

STATE v RATU TAKIVEIKATA

High Court
Gates J

Fiji Islands
Cr Case 005.04S
20-22 October 2004

International instruments and law considered

European Convention on Human Rights (ECHR)
International Covenant on Civil and Political Rights (ICCPR)
Universal Declaration of Human Rights (UDHR)
Constitution of Fiji 1997 (CF)
Penal Code Cap 17 (PC)

Facts

This trial arose out of the attempted coup of 19 May 2000 and in particular the 2 November 2000 mutiny against the Military Commander in which a high chief (T) was said to be allegedly involved. T was charged with incitement to mutiny. Amongst other arguments, T argued that as a paramount chief he ought to be assessed by a group of his peers, i.e. other high chiefs. (Fiji has an assessor system somewhat similar to the traditional jury system but one in which the verdict can be overturned by the trial Judge.)

Issues

1. Whether assessors must be selected from persons of equivalent rank and paramount chiefly status despite the guarantee of equality in Article 38 of the CF; the place of traditional rank in the courts; and whether the denial of this would prejudice T's right to a fair trial.

2. What was the relevance of the non-justiciable Compact (Article 6(j)) which secured the paramountcy of indigenous Fijian interests as a protective principle?
3. The status of customary law and the right to retain culture and traditions in relation to the CF; the potential conflict between customary law and the Bill of Rights; the relevance of the affirmative action provisions to the assertion by T.
4. The relevance of international human rights law.

Decision

The Bill of Rights in the CF (Articles 38 and 43(2)) supported by the UDHR (Article 10), the ICCPR (Article 14) and the ECHR (Article 6) were relevant in determining that everyone was regarded as equal before the law. Article 43(2) of the CF mandated the Court to promote values of democracy, freedom and equality and to apply international human rights law. On these grounds the Court refused to accept that cultural imperatives required the special selection of chiefly assessors. The sum total of cases on juries indicated that a jury (assessors) was required to be “impartial” and not “understanding” of any accused person’s predicament. There was nothing in the law allowing a departure from this principle.

The Court held that there was no conflict between customary law and the Bill of Rights because there was no denial of customary law. It said that in any event this was not an exclusively indigenous matter, for example dealing with fishing or land matters, but was an attempt to dislocate the military in a modern democratic state. Further T did not qualify under affirmative action laws because he was a member of “the creamy layer” of Fijian society. If rank were allowed to be relevant in choosing assessors, it would lead to a floodgate of arguments in multicultural Fiji that every accused had a right to choose his/her peers.

Comment

This case is one in a series of criminal and civil cases that arose out of the chaotic events of May – November 2000 when Fiji was under a State of Emergency (for a period of time) arising out of an attempted coup which removed the lawful Government of Mahendra Chaudhry. Of note is the *Republic of Fiji & AG v Prasad* case in this Digest which upheld the validity of the 1997 Constitution despite the upheavals and the attempt by the Republic of Fiji Military Forces to abrogate it. The accused attempted to argue that his chiefly status entitled him to be tried by his peers. The assertion of indigenous rights had been part of the context of the events of 2000. The Court dismissed such assertions on the basis that the Bill of Rights in the CF, the UDHR, the ICCPR and the ECHR required equality before the law. That meant no regard was to be given a person’s status or standing in society.

EMPLOYMENT / ASSOCIATION

- **International Covenant on Economic, Social and Cultural Rights (ICESCR) used to help determine whether a right to strike has been exercised properly.**
-

STATE v REGISTRAR OF TRADE UNIONS, ex parte FIJI BANK & FINANCE SECTOR EMPLOYEES UNION

High Court
Scott J

Fiji Islands
Judicial Review No. HBJ 0015 of 2002S
30 April 2003

International instruments and law considered

International Covenant on Economic, Social and Cultural Rights (ICESCR)
Constitution of Fiji 1997 (CF)
Trade Disputes Act Cap 97 (TDA)
Trade Unions Act Cap 96 (TUA)
Trade Unions Regulations 1991 (as amended) (LN 58/91) (TUR)

Facts

The Fiji Bank and Finance Sector Employees Union (U) had not reported a trade dispute but sought an appointment by the Registrar of Trade Unions (R) of a supervising officer to oversee a secret ballot by U to obtain a mandate for a strike. R refused to do so. U challenged this decision.

Issue

Whether U, which had not reported a trade dispute, was entitled to the appointment by R of a supervisor for a secret ballot to obtain a mandate for a proposed strike.

Decision

The Court recognised that Articles 1, 24(1), 32(1) and 33(1), (2) and (3) of the CF protected the right to strike and held that the TDA did not make it compulsory to report a trade dispute. R misdirected himself by directing his attention to the TDA when responding to a request to discharge a duty vested in him under another law entirely, i.e. the TUR.

Where U requested the appointment of a supervisor under the provisions of regulation 10(1) of the TUR, neither the fact that U appeared to be in breach of a collective agreement nor that it had not reported a trade dispute to the Permanent Secretary for Labour was a sufficient ground to refuse U's request

The Registrar did not have a right to veto a union's plan to seek a mandate for strike action in an unreported dispute, or to place a further fetter on the right of a union to strike.

Comment

In this review, the Court noted that even though Fiji was not a party to the ICESCR, it took note of Article 8.1(d), which confers the right to strike provided it is exercised in conformity with the laws of the State. The Court applied this principle and took into account the relevant national laws of Fiji in determining whether or not this right to strike was exercised properly. Article 43(2) of the CF, which permits the use of international conventions, could have been argued as a justification for using the ICESCR in this case even without ratification.

SENTENCING / CHILDREN

- **Convention on the Rights of the Child (CRC) – children in conflict with the law. Best interests of the child principle applied in the case of sentencing a juvenile offender convicted for murder.**
-

STATE v TAMANIVALU

High Court
Shameem J

Fiji Islands
Criminal Case No: HAC 001 of 2003S
31 July 2003

International instruments and law considered

Convention on the Rights of the Child (CRC)
International Covenant on Civil and Political Rights (ICCPR)
United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (BR)
Children and Young Persons Act 1933 (UK)
Crime Sentences Act 1997 (UK)
Criminal Courts (Sentencing) Act 2000 (UK)
Criminal Justice Act 1967 (UK)
Criminal Law Amendment Act 1997 (SA)
Juvenile Act Cap 56 (JA)
Penal Code Cap 17 (PC)
Penal Code (Penalties) Amendments Act 2003
Sentencing Act 2002 (NZ)

Facts

T, a 14-year-old boy, was tried and convicted of the murder of H at Waibau, Naitasiri in September 2002. Believing there was no-one in the house, T broke into the house intending to steal. However, H came into the house, saw him there and started screaming. T then attacked her, striking her three times with a knife. H was admitted to hospital and died four days later from her injuries.

Issue

In the case of a juvenile offender convicted of murder, how does a Court determine what the appropriate sentence should be, given that the PC prescribes the penalty for murder as

life imprisonment, while the JA prescribes how a juvenile found guilty of murder, attempted murder or manslaughter should be treated.

Decision

T was sentenced to a period of detention under s.31 of the JA for 12 years and the circumstances of his detention were left as matters for the Minister for Social Welfare to decide. The Court said that the CRC requested State Parties not to impose life sentences on children under the age of 18. It recommended that T be given vocational training and education even after transfer to any adult facility.

Comment

Although the Court did not base its decision on international standards solely, the position of the legislation in Fiji regarding juveniles is consistent with the principles laid down for children in conflict with the law as in the ICCPR, the CRC and the BR.

In this particular case, the important principle highlighted is that where a juvenile is convicted for murder in Fiji, a judge may impose an alternative term, having first concluded that there is no other suitable way of dealing with the case. The result is that where a juvenile commits murder, he/she need not be sentenced to life imprisonment.

Such a discretion is in harmony with international law regarding children in conflict with the law. Furthermore, this sentence reflects the principle of the best interests of the child laid out in the CRC and the JA, which urges the Courts to impose imprisonment as a last resort and for the shortest possible time.

DISCRIMINATION / CUSTODY

- **Status of application of the principles of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) in Tuvalu on custody.**

TEPULOLO v POU & ATTORNEY GENERAL

High Court
Ward CJ

Tuvalu
Family Appellate Court Case No. 17/03
24 January 2005

International instruments and law considered

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
Convention on the Rights of the Child (CRC)
Constitution of Tuvalu (CT)
Custody of Children Ordinance [Custody of Children Act Cap 20] (CCO)
Interpretation and General Provisions Act (Cap 1A) (IA)
Native Lands Ordinance [Native Lands Act Cap 22] (NLO)

Facts

The father (F), the applicant in this case, and the mother (M) had a son (C). Both F and M were unmarried. M was responsible for C, and F had access to the child. F wanted the child to be taken to New Zealand to be looked after by his sister. M did not agree to this so F applied to the Nui Island Court for custody of the child.

Section 3(5) of the CCO provides that the paramount consideration in child custody matters is the “best interest of the child”. Section 3(5) states that s.3 is subject to the NLO. Under the NLO, s.20(2) states that after ascertaining paternity of an illegitimate child, the Court shall order that child when she/he reaches the age of 2 years to reside with the father. That child shall then in accordance with native customary law inherit land. Both the Island Court and Magistrates Court on appeal granted custody of C to F.

M appealed to the High Court and argued that s.3(5) of the CCO and s.20 of the NLO, which made it mandatory for the Court to award custody of an illegitimate child to the father, was in breach of the CT which prohibited discrimination. Furthermore, because s.3(3) of the CCO was subject to the NLO, it negated the mandatory test set out in s.3(3) of the CCO, removing the principal safeguard under the CCO which accords with the requirement of the CRC. But since s.3(3) of the CCO conformed with the requirements of the CRC, the Court should resolve the ambiguity by applying the test in s.3(3) and overriding s.20 of the NLO. Furthermore, M argued that s.20(2) of the NLO contravened Article 27 of the CT as well as the provisions of CEDAW. Both instruments prohibited discrimination against women on the ground of gender.

Issues

1. Did the CT forbid gender discrimination?
2. Were CEDAW and the CRC applicable in domestic law?
3. Was it mandatory for the Land Court to follow the orders in s.20(2) of the NLO, thereby precluding the Court from making any other order consistent with the paramount principle of “best interest of the child”? If that were so, was it a contravention of s.3(3) of the CCO as well as the CRC?

Decision

The Court declined all applications for declaratory orders, but directed that the dispute over the custody of C be heard before the Island Court for the following reasons:

1. Both men and women were afforded the protection of constitutional freedoms, including the freedom from discrimination. However, as sex was not listed as a prohibited ground of discrimination under Article 27(2) of the CT, unequal treatment because of a person’s gender was not discrimination. Accordingly, s.20(2) of the NLO, which granted the custody of the child to F, was not in breach of Article 27 of the CT;
2. The CRC and CEDAW were not applicable to the laws of Tuvalu unless an Act of Parliament was passed to implement their provisions. The Court however, might take cognisance of their terms as an aid to the determination of the true construction of a provision of written law where there was any difficulty in interpretation;
3. The measure in assessing custody of the welfare of a child was the first and paramount consideration, which arose clearly from s.3(3) of the CCO but not from any consideration that it must accord with the CRC. The “best interest of the child”

principle applied in every child custody proceeding of every Court in Tuvalu, including the Land Court and Island Court. The Island Court was not bound to follow the NLO;

4. The orders under s.20 of the NLO were not mandatory; the wording demonstrated that they were discretionary. The Land Court could make orders other than those in s.20(2) of the NLO provided that they were in accordance with native customary law. The Land Court was obliged to apply the best interest of the child principle when it dealt with s.20(2) of the NLO because it dealt with issues of custody and access. If in its decision it considered that the best interest of the child was best served under s.20(2) of the NLO then it could so order. But if it was not satisfied that the best interest of the child was served under these orders, then it could make such an order, as custom allowed, that would best accommodate the welfare of the child. However, if it found that it was in the best interest of the child to make no such order then it could take that course, and leave it to the parties to make an application to any Court under s.3 of the CCO to ensure the child's best interest was served.

Comment

The Court adopted a restrictive approach to Tuvalu's ratification of CEDAW and the CRC. It held that despite ratification, enabling legislation by the Parliament of Tuvalu was required to give effect to the provisions of international instruments. Compare this decision with *Vishaka v State of Rajasthan*, where ratification prompted the Court to import provisions of a convention to fill a lacuna in the domestic law where it was not inconsistent to do so. In the case of *Attorney General v Dow*, the Court read in the term "sexual" discrimination in relation to the definition of discriminatory treatment in legislation to enable it to outlaw gender discrimination. It held that equality of treatment provisions in the Constitution of Botswana conferred full rights on everyone, male and female, and could not be restricted by such an omission.

DUE PROCESS / CHILDREN

- **Convention on the Rights of the Child (CRC) used to set the standard or provide guidance on what is acceptable treatment of children in police custody.**

TONE & ORS v POLICE

Supreme Court
Ward CJ

Tonga
Criminal Case No. AM. 22-25/2004
28 June 2004

International instruments and law considered

Convention on the Rights of the Child (CRC)
Criminal Offences Act Cap 18 (COA)

Facts

This case concerned an appeal against a conviction following a guilty plea. The appellants – T (14), F (13), A (15) and L (16) – were arrested by Police (P) for offences of theft and housebreaking. They pleaded guilty as charged and were accordingly convicted and sentenced by a Magistrate’s Court. Despite their guilty plea, T & Ors appealed against the conviction to the Supreme Court on grounds relating to their treatment by the Magistrate. The Court ruled that as there was no evidence of equivocation on the guilty plea entered by T & Ors the appeal was left to the discretion of the Court. The Court would allow the appeal if there were circumstances which left the Court with serious doubt that the accused understood the procedures under which they were to be tried.

During the hearing of the appeal by the Supreme Court, it became apparent that whilst T & Ors were in P’s custody, their parents visited but were not allowed by P to see or speak to their children. As a result, they appeared before the Magistrate and pleaded guilty as charged without having seen anyone other than P.

P argued that their practice in all cases was that they did not allow anyone except a lawyer to see an accused until investigations had been completed. P argued that even if the manner in which P treated T & Ors was a breach of Article 37 of the CRC, it could only be enforced by the enactment of the necessary domestic legislation.

Issue

Could the Court apply the principles of the CRC to determine appropriate police and Court conduct and acceptable treatment of detained children?

Decision

The Court held that the manner in which P treated T & Ors from the time of their arrest to trial confirmed its doubt about their understanding of police procedures for the following reasons:

1. Although the CRC was only enforceable by an enactment of legislation, the need for the CRC arose (*inter alia*) from the widely accepted realisation of the need for children to be treated differently from adults in relation to police and Court proceedings. Even without the domesticating legislation, the Court was entitled to refer to the terms of the CRC as a guide on what was the acceptable form of treatment for children;
2. Article 37 of the CRC set the standard for treatment of children in police custody as follows: “... *every child in who is deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance...*”; and
3. Failure to conform to those terms might result in the Court excluding evidence or reversing a decision on appeal.

Comment

The Court took the orthodox approach of non-enforceability in terms of applying international human rights conventions in Tonga’s Courts. In particular, Tonga’s accession to the CRC did not create any legal obligation on the Courts to apply the principles of the convention unless the Tongan Parliament enacted the necessary domestic laws to incorporate its principles into its national laws. However, the Court did accept that the terms of the CRC or any convention for that matter might be a guide for what was acceptable treatment.

This is a slight relaxation of the traditional approach and acknowledgement of the growing acceptance of human rights.

ABDUCTION / CHILDREN

- **Hague Convention (HC) used as a tool to provide guidance to the Court in dealing with a child abduction case, even though the state was not a party to the convention.**

WAGNER v RADKE

Supreme Court
Sapolu CJ

Samoa
Supreme Court of Samoa (Misc 20701)
19 February 1997

International instruments and law considered

Hague Convention on the Civil Aspects of International Child Abduction 1980 (HC)
Infants Ordinance 1961 (IO)

Facts

This was an international abduction case involving an eight-year-old boy (C) and his German parents. The father (F) and the mother (M), both German nationals, had lived in a de facto relationship in East Berlin, where C was born. Soon after C's birth, F and M separated. C continued to live with M during the period of separation and F continued to visit his son.

In 1993, F applied to a Court in Germany for visitation rights. The Court granted F fortnightly visits. In 1994, M and C migrated to Ireland. M was having problems settling down in their new home and requested F to look after C.

In the German Embassy in Dublin, M signed a document stating that she agreed that F could take C as a member of his family and that C would live with F. M said that this was a temporary arrangement until she was in better health and better able to take care of C. M said there was no intention to grant custody to F. F argued that the document gave him actual custody.

F, without M's knowledge, applied to a German Court to withdraw the rights of M to determine C's place of residence and to revoke her parental custody. The German Court dismissed the application and made a temporary order directing that C should be returned to M. F appealed the decision and his appeal was dismissed.

After the decision of the Court, M could not find either F or C in Germany. It was not until March 1996 that she found out that F, C and F's new wife (M's sister) were in Samoa.

M applied to the Supreme Court in Samoa that the custody order granted to her in Germany be enforced and C returned to her.

Issues

1. Which Court (in Germany or in Samoa) was the more appropriate forum to decide the issue of custody of C.
2. What was the effect of the HC on Samoa?

Decision

The Court weighed the various factors, and decided the following:

1. That the appropriate court to determine the question of C's custody was the court in Germany;
2. That interim custody be granted to M on the condition that she travel with C to Germany within 7 days of the decision;
3. That F deliver C forthwith with all travel documents to M.

The reason for the decision was as follows:

If a custody case involved the abduction of a child from a foreign country, the Court must take cognisance of the principles of the HC, even though Samoa was not a signatory or party to the convention. Furthermore, it must have regard to the purpose and philosophy of the HC in applying common law principles. Conventions could be used as tools to provide guidance. The principles of the HC were applicable as international customary law as many of these rules existed long before they became codified in conventions.

Concern that C was removed from a convention country (Germany) to a non-convention country (Samoa) ought not make a difference in the approach in deciding with whom C should be. The welfare of the child was the first and paramount consideration in questions of custody under Samoan and international law.

The HC was clear in stating that its policy was to discourage the abduction of children across national borders and to ensure as far as possible that children who were wrongfully removed from their habitual place of residence were returned there as soon as possible. This was subject to various grounds, which the Court discussed as follows:

- (a) Had C settled in his new environment (in Samoa)? The Court found no evidence to suggest this. C had not even attended school in the 15 months he had spent in Samoa. Additionally, C's permit to remain in Samoa had expired, which meant that in any event he had to leave the country;
- (b) Was M exercising custody rights in respect of C at the time of his removal and whether she had consented or acquiesced in his removal? The Court found on the evidence that M had been exercising her custody rights, and that she had not consented or acquiesced in the removal of her child;
- (c) Was there a grave risk that the return of C to Germany would expose him to physical or psychological harm or otherwise place him in an intolerable situation? The Court did not find this to be so; and
- (d) Did C object to his return to Germany with M? The Court found that the child was too young to decide this issue, although it did take note of the fact that C said he was happy in Samoa and wished to stay with F.

Comment

The application of the HC to Samoa, which is not party to it, is a striking example of judicial activism in a country where neither its Constitution nor legislation provide for it. It has widened the scope for applying human rights conventions in judicial decisions. Any relevant argument in the Samoan Courts that rely on principles of the human rights conventions to which Samoa is a party, would by analogy, be readily accepted by the Samoan Courts subject to local circumstances. Compare this approach to that in other Pacific jurisdictions which have insisted on both ratification and the enactment of domestic legislation to give effect to conventions. The Court in the present case grounded its decision on the recognition that the HC had codified what were acknowledged as widely accepted principles to remedy the issue of child abduction.

PART II: PACIFIC ISLAND CASES CONSIDERING BILLS OF RIGHTS

DISCRIMINATION / PENSIONS

- Whether provisions of the Income Tax Act Cap 207 relating to taxability of non-resident's pension breach the equality provisions in Article 38 of the Bill of Rights in the Constitution of Fiji.

**CHANDRA & FIJI PENSIONERS' ASSOCIATION v
PERMANENT SECRETARY FOR FINANCE & ATTORNEY GENERAL OF FIJI**

High Court
Fatiaki J

Fiji Islands
Civil Action No 0025 of 1999
25 January 2002

Laws considered

Constitution of Fiji (CF)
Income Tax Act Cap 201 (ITA)
Income Tax Act (Amendment) Decree No 30 of 1999

Facts

The applicant (C) sought a declaration that the ITA and amendments thereto were *ultra vires* Article 38(1) and (2) of the CF, and were therefore discriminatory, on the ground that it purported to tax C on the basis of his residency in another country when pensioners resident in Fiji were entitled to a tax exemption. Article 38 guarantees equal treatment before the law. (Note: this case is only reported on the basis of the argument relating to discrimination.)

Issue

Was the imposition of tax on C's pension under the ITA a contravention of the equality provisions of Article 38(1) and (2) of the CF?

Decision

The Court held that the differential treatment did not amount to discrimination. It was not akin to prohibitive criteria found in Article 38. As it was open to C to reacquire tax exemption status though residency, the change could not be said to be of an 'immutable character'. Denying C the benefit of a tax exemption on the basis of his non-residency was not 'unfair discrimination' as the taxability of pensions was based on its source or receipt within the country and not on residency.

However, if that conclusion was wrong (i.e. in finding that differentiating between resident and non-resident pensions is not discriminatory), such discrimination in a taxing statute was 'reasonable and justifiable' on two grounds. First, the fact pensions were remittable to

a foreign country 'as of right' affected the country's foreign reserves. Second, in the absence of a comprehensive social security network, the government may have decided to favour individual resident pensioners by alleviating their tax burdens.

C had also sought to argue that the effect of the ITA was a limitation on his right to leave the Fiji Islands as guaranteed by Article 34(3) of the CF. However, the Court dismissed that proposition and stated that taxing a non-resident's pension was not a denial of that right. Rather, it assumed his absence from the country.

Comment

The Court held that there was no discrimination contrary to Article 38 of the CF because taxation of a non-resident pension was not unfair. The distinction made on the ground of residency was not immutable. It was something within the individual's control: that could be altered by reacquiring residency status and consequently, tax-exemption. Alternatively, the distinction was reasonable and justifiable. It was an expression of the social policy of the State and it was not the place of the Court to substitute its own opinion as to its efficacy.

Whether different treatment is considered discriminatory will depend on the context and the circumstances. The fact of non-residency in the present case was a relevant personal characteristic and could not be compared with the limiting criteria in Article 38. Taxation was based on the source or receipt of pensions within the country. It followed that someone outside Fiji would be subject to a different tax regime because he had left and thereby removed himself from its jurisdiction. The distinction on the basis of residency was therefore justified either as not being discriminatory or a reasonable limitation if it was.

CUSTOMARY LAW / RELIGION

- **Bill of Rights case dealing with freedom of religion provided in the Constitution.**
- **Conflict between traditional / customary banishment laws and constitutional guarantees of human rights.**

LAFALII & ORS v ATTORNEY GENERAL & ORS

Supreme Court
Sapulu CJ

Samoa
Civil Case No.8 of 2003
24 April 2003

Laws considered

Constitution of Samoa (CS)
Land and Titles Act (LTA)

Facts

The Plaintiffs (L) were villagers of the village of Falealupo. They were also members of a bible class that was established at Falealupo in 1980 with permission from the *Ali'i* and

Faipule, or Village Council (VC) or *fono*. As membership of the bible class continued to increase in numbers, L extended their activities from weekly bible studies to religious services on Sundays. This offended the VC as they had given permission to the bible class for weekly bible studies only and not for religious services on Sundays. The bible class was therefore instructed to cease its Sunday services but several of its leaders did not heed that instruction and were fined by the VC. All, except four, paid their fines. As a consequence the VC petitioned the Land and Titles Court for an order to banish from Falealupo the four leaders of the bible class who did not pay their fines. Banishment was a punishment practice of *fa'a Samoa*, the customary law of Samoa. The Court granted the petition by the VC and issued the banishment order sought. However traditional reconciliation took place between the VC and the bible class and the banishment order was not carried out. The bible class was allowed to continue within the village and its membership continued to increase in numbers.

A harmonious relationship existed between the parties until February 1999 when the VC issued a public notice prohibiting members of other churches from continuing to attend the bible class at Falealupo. L, as villagers of Falealupo, were allowed to continue with their bible class and to erect a building for that purpose. This building was erected on land belonging to Lamositele Tautala, who gave his permission for the building to be erected. Later on in the year one of the defendants told the bible class that the pastor of the village had expressed concern over the bible class as many of his parishioners had deserted the village church for the bible class. Also towards the end of the year members of the bible class were asked by the village to perform some singing and dancing for the millennium celebrations, but they refused on the ground that it was against their religious beliefs.

In the beginning of the new year the bible class was openly attacked by the village pastor in his sermon. A week later the VC ordered the bible class to cease its activities. They refused that order, and the VC again petitioned the Court. It upheld its previous order of banishment and ordered the bible class to cease its operations and non-village members of the bible class to leave the village. The members of the bible class failed to comply and were prosecuted for contempt in the District Court. Many of the members were sent to prison. After serving their terms, they returned to the village and continued with their religious activities. The VC again petitioned the Court and the same order was handed by the Court to the bible class group. They failed to follow the order and were arrested. They were later released as they indicated that they would appeal against the decision of the Court.

The Appellate Court decided against hearing the matter as it had already been settled by reconciliation between the parties. However, in 2002, 31 members of the bible class were charged before the District Court for contravention of the decision of the Land and Titles Court for reorganising bible classes in the village. In March 2002, L were warned by the Deputy Registrar of the Land and Titles Court to dismantle the building in which they conducted their classes. The building was dismantled in April 2002 and four of the families that usually attended the bible class were banished from the village.

L filed a motion for judicial review under Article 4 of the CS seeking:

1. An order for *certiorari* to quash the decision made by the Land and Titles Court on 23 March, 2000;

2. An order for the District Court not to enforce the decisions of the Land and Titles Court;
3. A declaration that the Land and Titles Court did not have jurisdiction to limit the number of churches in the village of Falealupo;
4. A declaration that the VC of the village of Falealupo had no jurisdiction to limit the number of churches in the village or prohibit L from conducting bible services in the village; and
5. A declaration that the VC of Falealupo contravened the right to freedom of religion provided in Article 11 of the CS.

Issues

1. Whether the VC of Falealupo village had the authority to banish L from the village; and
2. Whether the Land and Titles Court had the jurisdiction to stop L from exercising his group's right to freedom of religion.

Decision

The Court held that:

1. The decisions and actions of the VC of Falealupo in ordering the bible classes to cease, in dismantling the building where the bible classes were taking place and in banishing the members of the bible class amounted to a violation of L's right to freedom of religion under Article 11 of the CS;
2. An order of *certiorari* was to issue to quash the decision of the Land and Titles Court on 23 March 2000 and on 7 September 2000 as it contravened L's right to freedom of religion provided in Article 11 of the CS;
3. All prosecutions currently before the District Court, the second defendant, against L for contempt for alleged disobedience of the decisions of the Lands and Titles Court mentioned in (2) above were permanently stayed;
4. The actions of the VC, the third defendant, in dismantling the bible class building which belonged to L were in violation of L's right to freedom of religion provided in Article 11 of the CS and therefore declared unconstitutional;
5. The banishment by the VC of Falealupo, the third defendant, of L and their families from the village of Falealupo because of their religious beliefs was a violation of L's constitutional right to freedom of religion and therefore declared void and of no effect;
6. Ownership of customary land carried with it the right to prevent or exclude a religion being practiced upon such land given the definition of customary land in Article 101 of the CS. In this case the owner of the land where the bible studies were being held had given his permission.

Comment

The exercise of religious rights by individuals in Samoan villages continues to create tensions between them and the authority of the VC, which purports to represent the collective good. This is so especially with the rapid rise in the number of new fringe Churches. While the powers of the VC have been asserted in an arbitrary manner, there is a need to explore either mediation or some form of compromise rather than a first resort to the Courts. There is some concern that the continued intervention by the Courts will significantly erode both the traditional integrity and the structure of the VC. The tension between communal values

and individual rights is apparent and the challenge lies in balancing the conflict by seeking compromises that may vary depending on circumstances.

CUSTOMARY LAW / EQUALITY

- **Conflict between custom and formal written law, including the Constitution which guarantees freedom of movement.**
-

PUBLIC PROSECUTOR v KOTA & ORS

Supreme Court
Downing J

Vanuatu
Criminal Case No 58 of 1993
31 August 1993

Laws considered

Constitution of Vanuatu (CV)
Penal Code of Vanuatu, Cap 135 (PC)

Facts

A wife (W) and husband (K) had separated in bitter circumstances. Local chiefs tried to reconcile the parties and in so doing forced W to return to the couple's home on Tanna Island from Port Vila. The Chiefs contended that it was their customary duty to reconcile the parties. The Chiefs used police officers to ensure W's compliance. W was allowed to pack her clothes and was forcibly placed on a boat sailing for Tanna. W arrived in Tanna the following day and stayed there for approximately a week. W consulted the Vanuatu Women's Centre which gave her assistance and the matter was reported to the police on 23 August 1993. The Police prosecuted K and the group of Chiefs who had facilitated W's return to Tanna.

Note: Section 35 of the PC provides that "*it shall be unlawful to incite or solicit another person to commit any offence, whether or not that offence is committed*". A person guilty of inciting or soliciting an offence may be charged and convicted as a principal offender.

Section 105(b) provides "*no person shall by force compel or by any fraudulent means induce any persons to go from any place to another place. Penalty is imprisonment for 10 years*".

Issues

1. Whether the defendants' actions were illegal in light of the customary law defence provided; and
2. Whether W was forced to go from Port Vila to Tanna against her will.

Decision

K and his co-defendants were found guilty of various offences, fined and given suspended sentences. They were also liable for prosecution costs and given four months to pay both.

The Court observed there was a conflict between the CV and the written laws of Vanuatu on the one hand, and custom – i.e. between custom and the law of Vanuatu as passed by the Parliament of Vanuatu.

The Parliament of Vanuatu needed to consider whether any amendments had to be made to the CV or other legislation to clarify what was the role of the Chiefs. If this role was clarified by legislation, the fundamental rights of women in Vanuatu had to be protected.

Furthermore the Chiefs had to realise that any powers they wished to exercise in custom were subject to the CV, and also subject to legislation.

Article 5 of the CV mandated non-discrimination and made it very clear that men were to be treated the same as women, and women were to be treated the same as men. All people in Vanuatu were equal, and whilst the custom may have been that women were to be treated and could be treated as property, and could be directed to do things by men, be those men husbands or chiefs, they could not be discriminated against under the CV.

Article 5(1)(b) of the CV provided for the liberty of people. Article 5(1)(i) also provided for freedom of movement. The CV therefore provided that no person shall be forced by another to do something against his or her will.

The Court also observed that the Vanuatu Police had no authority to act as they did in the given case, to bully and force W to attend a meeting.

Comment

The Court observed that there was a conflict between the law of Vanuatu as reflected in the CV and its other laws and the customary law of the country. It was tacitly acknowledging the contradiction between the traditional and the modern way of life. The former was now subject to the latter as reflected in the CV, but it was for Parliament to determine further how to mediate the differences as in the role of chiefs. As the provisions of the CV were supreme, the Court gave effect to them and held the actions of K, his collaborators and the chiefs involved illegal. This dichotomy resonates throughout the Pacific and sometimes has political repercussions reflecting the sensitivities that are involved and the ambivalence about concepts such as human rights.

LEGAL AID / FAIR TRIAL

- **Where an accused is indigent, and application for legal aid is refused, consideration by a Court whether to make an order for counsel to be paid out of State funds in interests of fair trial.**
-

STATE v TANABURENISAU & ORS

High Court
Gates J

Fiji Islands
Criminal Action HAC044.04S
14 & 15 April 2005

Laws considered

Constitution of Fiji (CF)
Criminal Procedure Code Cap 21 (CPC)
Penal Code Cap 17 (PC)
Public Order Act Cap 20 (POA)

Facts

In this case, five men were charged with an offence against s.5(b) of the POA and s.50 of the PC, another case emerging out of the attempted coup of May 2000 and subsequent events. The offence was taking an engagement in the nature of an oath to commit a capital offence and carried a maximum sentence upon conviction of life imprisonment. Three of the accused had instructed counsel for the trial, however, the third and fourth accused had applied for legal aid, but their application had been denied. Despite this refusal, both accused men still expressed a wish to be represented by counsel.

Issues

The issues in this case were:

1. Should the State meet the costs of the defence for these two accused?
2. Would the trial miscarry if the two accused were unrepresented?
3. Would they lose their constitutional right to a fair trial if they had no counsel?
4. Even if such a right does not insist upon their being given counsel, nonetheless is it in the interests of justice that each be given the services of a legal practitioner for this particular trial, the right under Article 28(1)(d) of the CF?
5. By having no counsel provided to them, were they denied their right to equality before the law?

Decision

The Court held that the constitutional rights of the two accused would not be denied if no order was made for the State to pay for their defence.

The Court adopted the principle established in the case of *S v Radman: S v Mthwana* [1992] 1 SALR 343 where the Supreme Court of South Africa held that legal representation was not essential for a fair trial. The Court in that case reasoned that it was impractical for the Courts to oblige the State to provide counsel to indigent accused when such an obligation

would result in an intolerable burden on the organisation and financial status of the legal aid system.

Comment

The right to be given the services of a legal practitioner under a scheme for legal aid is not absolute. In comparison to systems outside Fiji, such as those in more developed countries, such jurisdictions have well advanced systems which are able to offer legal aid to those indigent accused who seek it. In Fiji, money and resources presently allocated to the Legal Aid Commission are meagre and rudimentary although this may increase over time. Compare this approach with that taken by the South African Courts in the *Government of SA & Ors v Grootboom & Ors* and *Minister of Health (South Africa) & Ors v TAC & Ors* cases where similar arguments about resources were dealt with unsympathetically.

CRUELTY / CHILDREN

- **Severe physical child abuse; civil claim for damages.**

‘UHILA v KINGDOM OF TONGA

Supreme Court
Dalgety J

Tonga
Civil Case 145 /91
19 October 1992

Laws considered

Constitution of Tonga, Cap 2 (CT)
Children and Young Persons Act 1933
Children and Young Persons (Scotland) Act 1937
Civil Law Act, Cap 25
Criminal Offences Act, Cap 18
Magistrates Court Act, Cap 11
Primary School Regulations 1928

Facts

The plaintiff (U) was a 9-year-old schoolboy attending Nuku’alofa Primary School. At the time of the incident he was 8 years old. U was to sit a test and was requested by his class teacher to bring a new exercise book to record his answers to the test. All the students in his class were asked to do the same. On the day of the test U arrived at school late and was unable to buy a new exercise book for the test. U did not tell his teacher of his plight, neither did he ask for separate sheets of paper. Instead he remained silent. His fellow pupils sat the test. U did not. U was administered corporal punishment in front of the class after the test.

Issue

Whether allowing corporal punishment at schools was unconstitutional, unlawful, wrongful and excessive within the meaning of the CT.

Decision

U was awarded damages of 250 pa'anga with interest at the rate of 10 per cent per annum. The payment was to be made into Court to be applied for the benefit of U.

The Court held *inter alia* that:

1. The 10 strokes inflicted for gross disobedience and wilful misconduct might be excessive abroad but not in Tonga;
2. However, to hit a child on the thighs with a solid object, as the teacher did, whether deliberate or negligent, was actionable if measurable injury resulted. It did in this case and U was entitled to an award of damages.

Comment

While the Court awarded damages to U, it clearly endorsed the concept of corporal punishment and only questioned the degree to which it had been administered. It cited the CT as providing no obstacle or barrier to corporal punishment. Under the CRC, corporal punishment is a violation of children's rights. The CRC reflects a similar provision in the ICCPR. Current international trends now prohibit such treatment. In the case of *Tone & Ors v Police* decided over a decade later, the Court held that the CRC, which by then had been ratified by Tonga, might be relied upon as a guide to what was acceptable treatment even if there was as yet no enabling legislation. It has been noted elsewhere that even where Courts have adopted a conservative approach in the enforceability of ratified conventions generally, they have been willing at least to use them as a guide on issues such as the rights of children.

PART III: INTERNATIONAL CASES HAVING REGARD TO HUMAN RIGHTS CONVENTIONS

DISCRIMINATION / WOMEN

- **Equality – the right not to be unfairly discriminated against.**
 - **Definition of “discriminatory treatment” in a constitutional provision omitting gender from list of unacceptable bases on which different treatment might be afforded to different groups of persons.**
 - **Application of international conventions to demonstrate international opposition to gender discrimination and uphold equal rights and women’s rights, as well as the right of children to citizenship.**
-

ATTORNEY GENERAL v DOW

Appeal Court
Amissah JP, Aguda, Bizos, Schreiner & Puckrin JJA

Botswana
1994 (6) BCLR
3 July 1992

International instruments and law considered

African Charter on Human and People’s Rights 1981 (ACHPR)

Universal Declaration of Human Rights 1948 (UDHR)

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

Convention for the Protection of Human Rights and Fundamental Freedoms 1953 (CPHRFF)

Constitution of Botswana (CB)

Citizenship Act 1984 (CA)

Facts

D, a Botswana national married to an American, challenged a provision set down in the CA which discriminated against her and her children. D argued that the CA contravened the CB by providing citizenship for the child of a citizen father and an alien mother, and not vice versa as in D’s case. D alleged that the CA was discriminatory and was a violation of her fundamental constitutional right to equality under the law.

The Court had to determine whether the CA was unconstitutional in light of equality provisions in the CB. The definition of discriminatory treatment in the CB did not include the word “gender” or “sex”. The Attorney General argued that the omission of “sex or gender” was deliberate because the whole fabric of Botswana customary law was patrilineal and was gender discriminatory by nature. D argued that the whole world was opposed to gender discrimination, as exemplified in international treaties, and that it ought not to be lightly assumed that the drafters of the Constitution intended to deliberately discriminate against women. Thus “sex” had to be read into the Constitution.

Issues

1. Whether on a proper interpretation of the CB, the legislature had contravened the guarantee against discriminatory treatment in the CA. The CA stated that a child born of a marriage between a citizen mother and an alien father would not qualify for citizenship whereas citizenship was conferred on the child of a marriage between a citizen father and an alien mother; and
2. Whether the CB allowed the legislature to discriminate on the ground of sex given that “sex” was omitted from a list of prohibited grounds in the CB.

Decision

The majority of the judges held that the provisions in question were unconstitutional. It was not permissible to ignore the word “sex” in the general provision conferring fundamental rights on all persons just because of its absence in the definition of discriminatory treatment.

A constitutional right conferred could not be circumscribed by a provision in a statutory definition which was included for the purposes of an entirely different section. To adopt a construction that a fundamental right conferred by a constitution on an individual should be circumscribed by a definition in another section was inconsistent with the principle that a constitution is to be interpreted generously, liberally and purposively. Accordingly the appeal was dismissed. D was allowed to apply for citizenship for her children.

The Court cited international human rights instruments in their constitutional and statutory interpretations, including the CPHRFF, ACHPR, UDHR and CEDAW.

Comment

The Court adopted a broad purposive approach rather than a narrow legalism in considering the issues before it. Citing international human rights conventions, several to which Botswana was a party, and the guarantee of equality to all citizens, it read in the word “sex” into the definition provision of the CB. What was critical was that the concept of equality could not be limited by the omission of a particular term in the interpretation section relating to what constituted discriminatory treatment. There was an obligation under international human rights law and under the CB to give full effect to the fundamental rights of all persons, including women. This was so notwithstanding that at that time CEDAW had not been ratified by Botswana. It was ratified on 12 September 1996. This case is therefore similar to that of *Wagner v Radke* where the Court had shown willingness to apply relevant conventions even without ratification.

See also the Zimbabwe cases of *Rattigan & Ors* [1994] 1 LRC 343; [1995] 2 SA 182 and *Salem v Chief Immigration Officer & Anor* [1994] 1 LRC 343. In Kiribati, Vanuatu, Tonga, Nauru and Solomon Islands, the citizenship laws similarly discriminate against Pacific women and their children. The 1970 and 1990 Constitutions of Fiji contained like provisions which were removed in the 1997 Constitution on the basis that they discriminated against women. Opportunity exists using *Dow* and CEDAW to challenge similar discriminatory laws.

Editors’ note: Ms Dow went on to become a Judge of the High Court of Botswana.

DISCRIMINATION / TRUSTS

- **Bill of Rights challenge involving a charitable trust which had education eligibility requirements based on race, religion, ethnic origin and sex was void as against public policy.**
 - **Horizontal application of Bill of Rights.**
-

CANADA TRUST v ONTARIO HUMAN RIGHTS COMMISSION

Ontario Court of Appeal
Robins and Tarnopolsky JJA, & Osker J (ad hoc)

Canada
24 April 1990

International instruments and law considered

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
Convention on the Elimination of All Forms of Racial Discrimination (CERD)
International Covenant on Civil and Political Rights (ICCPR)
Canadian Charter of Rights and Freedoms (CCRF)
Charities Accounting Act, R.S.O. 1980, c90
Human Rights Code, 1981 (HRC)
Insurance Act, R.S.O. 1980
Labour Relations Act, R.S.O. 1980
Ministry of Citizenship and Culture Act, 1982
Ontario Human Rights Code, R.S.O. 1970
Race Relations Act 1968 (U.K)
Trustee Act, R.S.O. 1980

Facts

In 1923, Reuben Wells Leonard established the Leonard Foundation Trust to provide scholarships at eligible institutions for students meeting the following qualifications: the student was to be “needy”, white, of British parentage or nationality and Protestant. The physical, mental and moral qualities of the student applying for a scholarship were important prerequisites in the selection, and priority was to be given to the children of certain parents, including the clergy and teachers. Different benefits were available to male and female candidates. Recitals in the trust referred to the superiority of the white race and the importance of maintaining the Christian Protestant religion.

The terms of eligibility for scholarships under the trust were challenged by students, parents, academics and other bodies who complained that the terms were discriminatory, racist, contrary to the public policy of the province of Ontario and not in keeping with the spirit and intent of the CCRF. A formal complaint was then filed against the Leonard Foundation alleging that the trust contravened the HRC. Thus the trustee brought an application before the Court to determine whether or not the trust was illegal or void.

Issues

The issues in this case were:

1. Did the provisions of the charitable trust contravene public policy or were they void for uncertainty?
2. If the answer to that question was in the affirmative, could the doctrine of *cy-pres* be applied to save the trust?
3. Did the Bill of Rights apply only to the State or to everyone?

Decision

The discriminatory provisions of the trust regarding race, colour, ethnic origin, creed or religion and sex were rendered void as they contravened public policy.

The settlor had general charitable intentions to promote leadership through education; the trust should be administered *cy-pres* without discriminatory restrictions. This allowed the trust to continue without the provisions that were deemed to be invalid for the reasons stated.

The freedom of an owner of property to dispose of his or her property as he or she choose was an important social interest that had long been recognised in Canadian society and was firmly rooted in the law. That interest should have, however, been limited in the case of this trust by public policy considerations. In this case, the trust was couched in terms so at odds with social values as to make its continued operation in its present form inimical to the public interest. A trust based on the notions of racism and religious superiority contravened contemporary public policy.

Comment

The Court based its decision on the HRC and the CCRF principles of equality and non-discrimination. It supported its decision by citing the CERD, CEDAW and the ICCPR. Of particular interest is the application of the CCRF principles to non-State actors and trusts, lending credence to the growing view that a Bill of Rights has horizontal as well as vertical applications on the basis generally that a bill of rights reflects the public policy of the State.

DISCRIMINATION / WOMEN

- **Constitution and international conventions used to set aside discriminatory customary law regarding land.**

EPHRAHIM v PASTORY & KAZILEGE

High Court
Mwalusanya J

Tanzania
High Court of Tanzania
22 February 1990

International instruments and law considered

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
International Covenant on Civil and Political Rights (ICCPR)
Universal Declaration of Human Rights (UDHR)
African Charter on Human and Peoples Rights, 1981 (ACHPR)
Constitution of Tanzania 1984 (CT)

Facts

The first respondent (P) had inherited clan land under a valid will. In 1988 she sold the land to the second respondent (K). The appellant (E), the first respondent's nephew, sought a declaration that the sale of land was void. E relied upon Haya customary law, the customary law applicable to P, which vested power in men and not in women to sell clan land. At first instance it was held that the sale was void and P was ordered to return the monies received for the purchase of the land.

On appeal to the District Court, that decision was overturned. The District Court held that, in accordance with the Bill of Rights (BOR) in the CT, which forbade discrimination on the grounds of sex, male and female clan members were now vested with the same rights and powers. The nephew appealed to the High Court maintaining the decision of the District Court was wrong in law.

Issue

Whether customary law prevailed over equal rights for men and women under the BOR of the CT and international human rights laws?

Decision

The Court held that the sale of land was valid.

The CT, which has incorporated the BOR in it based on international standards and the UDHR, prohibited discrimination on the grounds of sex. Tanzania had also ratified CEDAW. The customary law in issue was contrary to the CT and to its international obligations.

The bar to women selling clan land was discriminatory and contrary to the BOR in the CT. Women were now vested with the same rights as men with regard to the inheritance of clan land and the power to sell such land.

Comment

Most communities in Tanzania are patrilineal, i.e. land is passed from father to son, and are socially patriarchal. Women traditionally do not have the right to possess, acquire or inherit property in their own name. The decision was a significant milestone for the rights of women. The provisions relating to equality in the CT and the international human rights instruments have obliged the Courts to implement them, removing age-old discriminatory practices in the process.

The Tanzanian national government has continued to pursue land reform and in 1999 passed land reform acts asserting women were equal to men in matters of land acquisition and possession.

HOUSING / CHILDREN / JUSTICIABILITY OF ECONOMIC, SOCIAL & CULTURAL RIGHTS

- **Right of the child to minimum shelter.**
 - **Right of the child not to be separated from their parents.**
 - **Application of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to provide for the right to shelter and highlights States obligations to the covenant.**
 - **Justiciability of economic, social and cultural rights.**
-

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA & ORS v GROOTBOOM & ORS

Constitutional Court of South Africa
Chaskalson P, Langa DP,
Goldstone, Kriegler, Madala,
Mokgoro, Ngcobo, O'Regan,
Sachs, Yacoob JJA & Cameron AJ

South Africa
Case No (CCT11/00)
2001 (1) SA 46; [2000] ZACC 19
4 October 2000

International instruments and law considered

International Covenant on Economic, Social and Cultural Rights (ICESCR)
Constitution of South Africa (CSA)
Limburg Principles (LP)
Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1988
Child Care Act 74 of 1983
Child Care Amendment Act 96 of 1996

Facts

About 900 adults and children had been living in appalling conditions. They decided to move out and occupied vacant private land across the road. The owner, supported by the local council, obtained a Magistrates' Court order for their eviction. Their homes were demolished and they became homeless. They could not go back to where they had come from because other people now occupied that land. While there was a very large government housing programme, the waiting list was such that they would have to wait many years for proper housing to be made available. Meanwhile they had nowhere they could lawfully live. The Government said it could not and would not do anything to assist them. They applied for a Court order against the Government that it should provide them with housing or shelter and basic services. Upon evicting the applicants (G & Ors) from vacant land, the municipality provided temporary shelter for the children but excluded their parents.

At the outset of the hearing in the Constitutional Court, counsel for the government offered, and the community accepted, access to a piece of land, some building materials and access to basic services to ameliorate their situation. The Government subsequently failed to honor the undertaking. An urgent interlocutory application resulted in a consent order for the government to do so.

The Court considered constitutional rights in relation to the rights to adequate housing to which children were entitled.

Issues

1. Was the right to adequate housing in Article 26 and the right to shelter for children in Article 28(1)(C) of the CSA enforceable?
2. What was meant by the requirement of a “progressive realisation of rights” in the CSA (Article 27(2)) and the ICESCR (Article 2)?

Decision

Without considering the substantive rights of the parents, the Court held that the children’s rights to minimum shelter and rights not to be separated from their parents together obliged the Government to prepare additional shelter to house both the children and their parents. In so deciding, reference was made to the ICESCR and the LP on the implementation of ICESCR. The Court said the Constitution obliged the State to act positively to ameliorate these conditions.

Comment

The LP refer to the analysis of the ICESCR by a group of international lawyers under the aegis of the International Commission of Jurists. The concept or phrase “to achieve progressively the full realisation of the rights” has been interpreted to mean as follows:

1. The obligation to achieve progressively the full realisation of rights requires State parties to move as expeditiously as possible towards the realisation of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realisation. On the contrary, all State parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant;
2. Some obligations under the Covenant require immediate implementation in full by all State parties such as the prohibition of discrimination in Article 2 (2) of the Covenant;
3. The obligation of progressive achievement exists independently of the increases in resources; it requires effective use of resources available;
4. Progressive realisation can be effected not only by increasing resources but also by the development of societal resources for the realisation by everyone of the rights recognised in the Covenant.³

This case exemplified the domestic implementation of important international instruments in relation to children’s rights and socio-economic rights. The Court noted that appropriate relief within the context of socio-economic rights would include an order “directing the legislative and executive branches of government to bring about reforms in terms of their objective and then to retain a supervisory jurisdiction to supervise the implementation of those reforms”. The Court defined the remedy for the violation and the State agency had the flexibility to choose the method of implementation.

3. *The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, Commission on Human Rights, Forty-third Sess., Agenda Item 8, UN Doc. E/CN.4/1987/17, Annex (1987).

The Court interpreted the term “progressive realisation” as acknowledging that the right to housing could not be realised immediately for everyone, but that the State must take reasonable steps to achieve this goal. It observed that housing must be made more accessible not only to a larger number of people but to a wider range of people as time progressed. The Court also endorsed the view of the ICESCR Committee that “retrogressive measures should not be taken without justification”.

This decision is an interesting precedent illustrating how the Courts in a particular situation seek to balance the constitutional rights to economic, social and cultural rights with the practicalities that have to be considered. They will not necessarily accept financial or economic constraints as sufficient to justify inaction by State and municipal authorities. There is increasing recognition that States and other actors must do more to make these rights available to as many people as possible.

A judgement may not always result in an order for provision of specific benefits to specific individuals. Yet even where this does not happen, it may result in a far reaching and fundamentally important stage in the achievement of the right to housing.

HEALTH / JUSTICIABILITY OF ECONOMIC, SOCIAL & CULTURAL RIGHTS

- **Application of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to provide for the right to health and highlights States obligations to the covenant.**
- **Justiciability of economic, social and cultural rights.**

MINISTER OF HEALTH (SOUTH AFRICA) & ORS v TAC (TREATMENT ACTION CAMPAIGN) & ORS

Constitutional Court of South Africa	South Africa
A C Kerman, Goldstone, Kriegler, Madala, Ngcobo JJ	CCT 59/04
& Du Plessis AJ	5 July 2004

International instruments and law considered

International Covenant on Economic, Social and Cultural Rights (ICESCR)
Constitution of South Africa (CSA)

Facts

The applicants were a number of associations and members of civil society concerned with the treatment of people with HIV/AIDS and with the prevention of new infections. The principal original plaintiff among them was Treatment Action Campaign (TAC), collectively referred to as TAC. The Respondents were the National Minister of Health and the respective members of the executive councils (MECs) responsible for health in all provinces of the Western Cape 4. They are referred to collectively as “SA” for South Africa.

In response to the pandemic of AIDS, SA devised a programme to deal with mother to child transmission (MTCT) of HIV at birth and identified nevirapine as its drug of choice. MTCT of HIV may take place during pregnancy, at birth and as a result of breastfeeding. Nevirapine materially reduced the likelihood of transmission at birth. The drugs were supplied free from a pharmaceutical company for a period of 3 years. SA's responsibility was to provide testing and facilities to accompany the administration of nevirapine. The programme SA devised imposed restrictions on the availability of nevirapine in the public health sector. SA excluded the use of the nevirapine for the treatment of MTCT at those public hospitals and clinics where testing and counselling were available and where the administration of nevirapine was medically indicated.

Nevirapine was confined to two research sites per province. The public physicians outside the pilot sites could not administer nevirapine because SA's concerns regarding its safety and efficacy and/or because of "a need to assess the operational challenges inherent in the introduction of antiretroviral regimens for the reduction of vertical transmission". The problem then was that the mothers and babies who could not afford access to private health care, did not have access to the research and training sites which had the nevirapine.

TAC applied to the Court arguing that the restrictions were unreasonable when measured against the Constitution which obliged the State and all its organs to give effect to the rights guaranteed by the Bill of Rights Articles 7(2) and 8 (1). It asserted the right to have access to public health care services and the right to be afforded special protection under Articles 27 (1) and 28(1), and that SA was in breach of this positive duty under the CSA's Bill of Rights.

Article 27 of the CSA provides that everyone has the right to access health care services including reproductive health care, sufficient food and water and social security. It further provides that the State must take reasonable legislative and other measures to achieve progressive realisation of those rights. Subsection 3 provides that no one may be refused emergency medical treatment.

Article 28 of the CSA extensively detailed the rights of a child including the right to basic nutrition, shelter, basic health care services, and protection from maltreatment, neglect, abuse or degradation.

Issues

1. Was the prohibition on the prescription of nevirapine where medically indicated at public health institutions unconstitutional?
2. Was the Government constitutionally obliged to plan and implement a nationwide, comprehensive programme for MTCT?

Decision

The Court held that the rights conferred under Articles 27 & 28 of the CSA obliged SA to plan and implement an effective, comprehensive and progressive programme for the prevention of MTCT transmission throughout the country and not just in the places where it was being piloted.

The Court found SA had failed to observe its constitutional obligations under Articles 7(2) and 8 of the CSA, and therefore violated the right to health protected under Articles 27(1) and 28(1). SA was therefore to make an approved drug for the prevention of MTCT available in the public health sector; and to set out a timetable for the roll-out of a national programme for PMTCT. It held as follows:

1. Economic and social rights were justiciable rights under the CSA. It followed the case of *Grootboom*, where the State had failed to comply with its obligations to fulfil a housing right. There was a negative obligation on the State not to prevent or impair the right of access to health care services.
2. The minimum core obligations approach as set by the ICESCR Committee in determining the obligation of State to fulfil the economic, social or cultural right was inapplicable. The better approach was to apply the principle of “reasonableness” to evaluate government action or lack thereof towards fulfilling the economic right in issue. However, the Court was not institutionally equipped to make the wide ranging factual and political enquiries necessary for determining what minimum-core standards should be, nor for how public revenues should most effectively be spent.

Comment

In *Soobramoney v The Minister of Health, Kwazulu Natal* 1998 (1) SA 765 (CC) and *Grootboom* cases the Court had to consider what was meant by “the obligation of the State to achieve the progressive realisation of rights.” In both cases socio-economic rights had been interpreted in their social and historical context. The Court said the State had to act positively to improve conditions. The Court clarified once and for all that socio-economic rights were justiciable. It was not dissuaded by attempts to justify a more restrictive approach that focused on ICESCR core obligations which reflected a more benign pace of activism. Progressive realisation meant taking reasonable measures within available resources for the step-by-step realisation of rights.

RELEVANCE OF INTERNATIONAL HUMAN RIGHTS LAW TO DOMESTIC LAW

- **Relationship between Australian law and international law – whether human rights conventions are applicable if not adopted nationally.**
- **Government administrators obligated to refer to international conventions when circumstances arise.**

MINISTER OF STATE FOR IMMIGRATION & ETHNIC AFFAIRS v TEOH

High Court of Australia
Mason CJ, Deane, Toohey, Gaudron
& McHugh JJ

Australia
F.C No 95/013 (1995) 128 ALR 353
7 April 1995

International instruments and law considered

Convention on the Rights of the Child (CRC)

Administrative Decisions (Judicial Review) Act 1977 (AD (JR) A)

Customs Act 1901 (CA)

Family Law Act 1975 (FLA)

Human Rights and Equal Opportunity Commission Act 1986 (HREOCA)

Income Tax Assessment Act 1936 (ITAA)

Migration Act 1958 (MA)

Facts

The respondent (T), a Malaysian citizen, entered Australia in May 1988 on a temporary entry permit and in July of the same year married an Australian citizen who had four children. The eldest child was from Mrs. Teoh's first marriage and the other three were the children of T's deceased brother. Three further children were born of the marriage between Mrs. Teoh and T. In October 1988, T's temporary entry permit was extended for a further five months. Before this extension expired, T applied for a permanent entry permit or resident status. In November 1990, while the application was pending, T was convicted of nine charges relating to the offences of importation and possession of heroin and was accordingly sentenced to 6 years imprisonment.

In January 1991, T's application for residential status was refused by the Ministry of Immigration and Ethnic Affairs (MIEA) on the ground that he was not of good character. The MIEA informed him that they would deport him to his homeland.

T applied for a review of the decision and submitted references referring to the close relationship between him, his wife and children and the impact on the family if he were deported.

Issues

1. Whether the decision to reject T's application for resident status failed to give proper consideration to the rights of his children under the CRC; and
2. Whether the ratification of the CRC by the Australian Government meant that the executive arm of government had to abide by the principles of the CRC.

Decision

The High Court allowed the appeal stating that the delegate (MIEA's representative) failed to give proper consideration to a relevant factor, the effect of T's deportation on his family, and Australia's obligation as a signatory to the CRC.

The obligation under the CRC gave rise to a legitimate expectation to the respondent's children that his application for resident status would be treated in accordance with the terms of the CRC.

The Court said at paragraph 34 of the judgement: *"Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the*

executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as 'a primary consideration'. It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it."

Comment

The Court held that ratification of the CRC was sufficient to give rise to a legitimate expectation that its provisions would be considered by an administrative decision maker. Moreover all relevant legislation was (as its language permits) to be interpreted consistent with Australia's international obligations. This was so notwithstanding the fact that its provisions had yet to be incorporated into Australian law by enabling legislation. The decision reflects the weight given international human rights instruments even where it had only been ratified but not enacted in domestic law. Ratification obliged the Australian authorities to act consistently with the terms of the CRC. There was a positive duty which the Court held existed as compared with the insistence by Courts in some Pacific jurisdictions for the passing of domestic legislation to give effect to ratification.

RELEVANCE OF INTERNATIONAL HUMAN RIGHTS LAW TO DOMESTIC LAW

- **Government administrators should consider using international conventions when circumstances require their application and consideration.**

TAVITA v MINISTER OF IMMIGRATION

Court of Appeal
Cooke P, Richardson & Hardie Boys JJA

New Zealand
[1994] 2 NZLR 257
17 December 1993

International instruments and law considered

Convention on the Rights of the Child (CRC)
European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol (ICCPR/OP)
Citizenship Act 1977 (CA)
Immigration Act 1987 (IA)
Immigration Amendment Act 1991 (IAA)
Judicature Amendment Act 1972 (JAA)
New Zealand Bill of Rights Act 1990 (NZBOR)

Facts

The appellant (T), a Samoan citizen, became an “over stayer” in New Zealand (NZ) when his temporary entry permit expired. He was issued with a removal warrant under the IA. He appealed to the Minister of Immigration (M) on humanitarian grounds, seeking a cancellation of the warrant or a reduction of the five-year prohibition on returning to New Zealand. This appeal was unsuccessful. Judicial review proceedings were subsequently brought in the High Court on T’s behalf, for an interim order quashing the removal order and directing a rehearing of his appeal to M.

T relied on New Zealand’s international obligations under the ICCPR, its first Optional Protocol and the CRC. T argued that M, in deciding the appeal, should have considered the rights of T’s family and child in accordance with the rights stipulated in the said international conventions which NZ had ratified. The Crown argued that M was entitled to ignore its obligations under the international conventions.

Issue

Whether New Zealand’s international obligations pursuant to the CRC, the ICCPR, and the ICCPR/OP were required to be taken into account by M in making its decision on T’s immigration status?

Decision

The Court declined to make a determination on the issue pertaining to the merits of T’s application. Instead, the appeal was adjourned and M was directed to reconsider T’s application in light of his changed family circumstances and the relevant international instruments. In the course of the Court’s decision however, it made the following comments on the international conventions ratified by the NZ Government:

1. The Court did not accept the argument that M was able to ignore its international obligations. The Court said it was “*an unattractive argument, apparently implying that NZ’s adherence to international instruments has been at least partly window-dressing*”. A failure to give practical effect to international instruments to which NZ was a party might attract criticism. If the NZ Court were to accept that the executive had a discretionary power to ignore international human rights and norms, the NZ Courts could be subjected to legitimate criticism;
2. The Court stated that the judiciary had a duty to interpret and apply national constitutions, ordinary legislation and common law in the light of the universality of human rights as affirmed in the Bloemfontein Statement of 1993 and Balliol Statement of 1992;
3. NZ’s accession to the Optional Protocol of ICCPR meant that the UN Human Rights Committee was in a sense part of NZ’s judicial structure in that individuals subject to NZ jurisdiction had direct rights of recourse to it;
4. As M had no opportunity to consider T’s application in the light of the rights of the child, the universal human rights and international obligations involved and discussed above, it would be appropriate that M be given the opportunity to reconsider T’s case in the light of an up-to-date investigation and assessment.

Comment

Although the Court declined to make a determination, it remitted the matter to M for reconsideration in the light of New Zealand’s international obligations. It made it clear that

adherence to international instruments had certain implications and declined to accept the argument that ratification was without consequences. It recognised that the effect of international human rights instruments on domestic law was evolving. There was a trend in interpreting constitutions, statutes and the common law consistent with the universality of human rights. Moreover, the fact that New Zealand had signed the Optional Protocol to the ICCPR in a sense incorporated the UN Human Rights Committee as part of its judicial structure.

The Balliol and Bloemfontein Statements are judicial statements similar to the judicial declarations contained in the RRRT published *The Big Seven: Human Rights Conventions & Judicial Declarations* reaffirming the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in light of the universality of human rights.

DISCRIMINATION / WOMEN

- **Right to equality – the application of international conventions can fill a lacunae in local law to set up guidelines and norms for the protection of women workers where legislation does not exist in the area of sexual harassment.**
-

VISHAKA v STATE OF RAJASTHAN

Supreme Court

Verma CJI, Manohar & Kirpal JJ

India

(1997) 6 Supreme Court Cases 241 (India)

13 August 1997

International instruments and law considered

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

International Covenant on Civil and Political Rights (ICCPR)

Constitution of India 1950 (CI)

Facts

The cause of filing of the writ petition arose from an incident of the alleged brutal gang rape of a social worker in a village in Rajasthan. This was seen as a clear violation of fundamental rights, gender equality and the right to life and liberty by a women's organisation (V) which filed a writ in the Supreme Court. Its grievance was that while working women remained vulnerable to sexual harassment in the workplace, neither the legislature nor the government was taking any effective preventive measures in this regard. Accordingly, V petitioned the Supreme Court for the enforcement of the fundamental rights of working women as guaranteed by the CI.

Issue

As there was no specific offence of sexual harassment, what was the situation if there was no domestic law to provide safeguards in specific circumstances?

Decision

The Court held that in the absence of domestic law, international conventions and norms were significant for the purpose of interpretation of the guarantee of gender equality and the right to work with human dignity as provided in the CI. Any international convention not inconsistent with the fundamental rights in the CI and in harmony with the spirit of the CI must be read into these provisions to enlarge the meaning of equality and to promote the object of the CI. The offence of sexual harassment was read in.

The meaning and content of the fundamental rights guaranteed in the CI were of sufficient amplitude to encompass all the facets of gender equality, including prevention of sexual harassment or abuse.

The international conventions and norms were to be read in, in the absence of enacted domestic law occupying the field where there was no inconsistency between them. It was now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there was no inconsistency between them and there was a void in the domestic law.

Comment

This case reflects the most striking example of judicial activism in enforcing the rights of women. The fact there was no domestic law against sexual harassment in the workplace did not prevent the Court from applying international human rights law and guarantees of equality in the CI to prescribe guidelines in this matter. It was fortified in this approach on three grounds: there was a lacuna in the domestic law, fundamental rights in the CI allowed the Court to read in a right against sexual harassment, and there was no inconsistency between international conventions and norms and domestic law. While the decision provided some relief for Indian women, the problem would be more appropriately and adequately dealt with by legislation. It also raises interesting questions about the separation of powers between the judiciary and parliament and whether the Court had intruded on the latter's prerogatives.

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