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INTRODUCTION

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

SPC RRRT has been working with and training human rights non-governmental organisations, law students, lawyers, magistrates and judges in the Pacific region for nearly 20 years. Much of this training has focused on encouraging the use of Conventions, international standards and constitutional bills of rights in the courts. In practice, it has contributed to increased reliance on, and use of, these instruments by magistrates, judges and lawyers across the region.

The overall purpose of this *Pacific Human Rights Law Digest* is to disseminate for use by Pacific law students, lawyers, magistrates, judges and human rights advocates a collection of analysed, recent human rights case law that can be used in the courts as precedents and as tools for policy initiatives. For those without ready access to the Internet, the PHRLD provides a convenient source of contemporary case law. For those connected to the Internet, it also serves as an inventory of the most significant human rights decisions to be found on the invaluable Pacific Islands Legal Information Institute website (www.paclii.org), and on other electronic sources outside the Pacific region. (Readers seeking the full text of decisions that are reported in the PHRLD but that they cannot access on the Internet may obtain them on request from SPC RRRT.)

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

The PHRLD is not just for lawyers but for human rights activists and stakeholders. It is therefore not a simple compilation or compendium of cases with headnotes as in law reports, but an analysed summary of judgments pointing out the significant human rights issues. SPC RRRT has a vast network of local-level human rights defenders who are increasingly using the law as a tool for change in governance and human rights. The experience of this network of human rights actors has now been reflected in the Diploma in Leadership, Governance and Human Rights, sponsored jointly by SPC RRRT and University of the South Pacific (USP) and offered through 12 USP campuses in the Pacific region.

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

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

ABOUT SPC RRRT

SPC RRRT provides human rights training, technical support and policy services. It is a programme of the Secretariat of the Pacific Community, an international organisation that provides technical assistance, policy advice, training and research services to 22 Pacific Island countries and territories.

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

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

SPC RRRT has specific programmes in Kiribati, Nauru, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu, and works on request in all other SPC member countries and territories. With partners including governments and regional and civil society organisations, it has been described as a 'cutting-edge programme' in human rights capacity building due to its approach of tackling both systemic and socio-economic issues through interventions at the micro, meso and macro levels.

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

SPC RRRT acknowledges the financial assistance of the Australian Agency for International Development (AusAID) in preparing and publishing Volume 4 of the PHRLD.

USING THE DIGEST

This is the fourth volume of the *Pacific Human Rights Law Digest.* As with the previous volumes, it publishes summaries of leading cases from the Pacific region and elsewhere that illustrate important developments in the judicial application of human rights standards.

This volume is divided into three parts.

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

Although most are decisions handed down since the completion of Volume 3 of the PHRLD, several older decisions have been included where they have been referred to in recent cases or legal writing, or have only recently been sent to SPC RRRT by judges, magistrates or lawyers.

Although the collection by no means covers all cases in the Pacific region that deal with human rights, it does contain a representative sample of the range of current issues and the most important and interesting cases from the region.

Part II contains some significant international human rights judgments that discuss various fundamental rights and freedoms in bills of rights or human rights Conventions. It gives particular attention to cases dealing with principles of contemporary importance in the Pacific region.

Part III contains some significant and interesting cases relating to climate change and human rights. This part, a new development for the PHRLD, has been added at a time when many countries in the Pacific region face enormous challenges from the effects of global warming and are considering their legal and policy responses. It contains selected international cases that illustrate some of the issues courts have had to determine in relation to climate change. Although still relatively novel, it can be expected that litigation on such issues will become more frequent and complex in years to come, both within and beyond the Pacific region.

Within the three parts, the cases are arranged in alphabetical order based on the subject matter of the heading. Each summary contains a brief set of facts, the key human rights issue or issues in the case, the main aspects of the decision and a commentary on the case. Each summary also lists the laws and international instruments considered by the court in deciding the human rights issues. Not all the cases referred to in the full text of the judgment are included in the summary – only those cases that have a significant bearing on the human rights issue being discussed.

The PHRLD was modelled on the highly regarded Interights *Commonwealth Human Rights Law Digest*. SPC RRRT acknowledges Interights for providing the inspiration to produce a publication specifically focusing on the Pacific region.

This PHRLD is accompanied by the SPC RRRT publication *The Big Eight: Human rights Conventions & judicial declarations* – a compilation of core human rights instruments and judicial declarations. *The Big Eight* is a handy reference tool to complement the PHRLD and is available on request from SPC RRRT.

ACKNOWLEDGEMENTS

SPC RRRT would like to thank Peter Creighton for his expertise and support to SPC RRRT in this publication, and in our work at the Pacific regional level. In addition, we would like to thank all law students, lawyers, judges and magistrates who made unpublished judgments available to us. We would also like to thank staff members and interns who assisted during the final stages of producing this volume of the PHRLD. And lastly, we thank our donor and partner, AusAID, without whom this publication would not have been possible.

EDITORIAL REVIEW

Overview

The cases in this volume of the PHRLD show that Pacific courts are increasingly aware of international human rights standards and applying them in resolving domestic legal issues. It is notable that the relevance of international standards has not been in dispute in any of the reported cases. The focus has been less on whether it is legitimate to use them, and more on when and for what purpose it is appropriate to do so. In part this may reflect a more subtle appreciation of the value of international standards in domestic litigation. They have not been invoked in opposition to, or substitution for, clear rules in Pacific constitutions or statutes. Rather, they have been employed to supplement domestic law – they have been used to guide courts in the interpretation of terms in the constitution, especially those provisions regarding rights; in the interpretation of statutes; in the exercise of judicial discretion; and in the development of rules of common law.

Courts have had regard in particular to those human rights treaties to which their respective countries are parties. Not surprisingly, the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) are the most widely cited, as almost all Pacific Island countries are parties to both. For example, in *Public Prosecutor v Malikum* and *Ulugia v Police*, courts in Vanuatu and Samoa respectively considered CRC Article 37, under which imprisonment should be the last resort when determining the appropriate sentence for juvenile offenders. Further, in *R v Gua*, the High Court of Solomon Islands relied on the equality principle in Articles 15 and 16 of CEDAW as well as the non-discrimination provisions in the Solomon Islands Constitution to put an end to the supposed common law marital exemption to rape.

It should be appreciated that the courts have also been prepared to consider treaties to which their countries are not parties. Three examples illustrate this point. In *Ponifasio v Samoa Law Society,* the Court of Appeal of Samoa had to determine the requirements of the guarantee of fair trial under Article 9 of the Constitution of Samoa. That provision requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established under the law. The relevant language of Article 9 is identical to that in Article 6-1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Court of Appeal drew directly on a decision of the European Court of Human Rights interpreting the European provision, in setting out the criteria for the independence and impartiality required under Samoa's Article 9.

The Court of Appeal of Vanuatu also recognised the value of the European Court's decisions when interpreting rights provisions in the Constitution of Vanuatu. In *Terra Holdings Ltd v Sope,* the court followed its earlier decision in *Groupe Nairobi (Vanuatu) Ltd v Vanuatu* [2009] VUCA 35, 3 PHRLD 30 regarding the constitutional right to be free from unjust deprivation of property. The court referred to Article 1 of the First Protocol of the ECHR. Although the European provision uses different language to the Vanuatu equivalent, the court was satisfied that the conceptual basis was similar. It therefore used the more detailed criteria in the First Protocol to elaborate the criteria for assessing when a deprivation of property would be 'unjust' under the Vanuatu Constitution.

In *In re Child M*, the Supreme Court of Vanuatu had regard to two international Conventions when deciding whether to approve an inter-country adoption. The court reasoned that in exercising its discretion, it should consider the best interests of child, as required by Article 21 of the CRC, to which Vanuatu was a party. It also used the detailed criteria from the Hague Convention on Inter-country Adoptions, to which Vanuatu was not a party. The court used those criteria in order to assess

where the best interests of the child lay in these circumstances. It concluded that as the criteria had not been satisfied, the adoption should not be approved. In effect, the terms of the Hague Convention were treated as representing the international consensus on what is generally required to protect the best interests of a child in an inter-country adoption.

This volume of the PHRLD also contains four cases in which Pacific courts ruled on the constitutionality of an incumbent government. They are collected under the heading of 'Democracy and Rule of Law'. All four decisions went against the respective governments, a fact that speaks to the independence of the courts in those jurisdictions, even when under the intense pressure of a political crisis. On another level of executive government, there are several decisions that reveal violent and unlawful practices employed by members of the police. Regrettably, similar cases involving the police, prison officers and members of the armed forces are not uncommon in the Pacific, and can be found in all previous volumes of the PHRLD. Although collected under the heading of 'Arrest and Detention', they too present challenges to the rule of law.

The role of the courts in adjudicating on the legal limits of executive and legislative power is vital not only to maintaining constitutional government and the rule of law, but also to protecting human rights. Many human rights, by their nature, impose limits on the powers of the legislature and the executive; and the protection of human rights requires the observance of those limits. As recognised in the Preamble to the Universal Declaration of Human Rights, 'it is essential … that human rights should be protected by the rule of law'. As a minimum, this requires that legal limits on legislative and executive power should exist to protect human rights, that those limits should be subject to adjudication by independent and impartial courts, and that the decisions of those courts should be respected and implemented as a matter of course.

Further, the protection of human rights should not be left to the courts alone. A range of factors may exclude some issues from judicial scrutiny. For example, the people affected may lack the resources and time needed to bring matters before a court. Alternatively, legislation may exclude the courts' jurisdiction in particular matters. In any event, litigation should be a last resort. In the first instance, government Ministers, members of Parliament, Speakers, those drafting government policy or legislation and those enforcing the law all have a role to play in interpreting and giving effect to human rights protections. The message emerging from the evidence provided by the case law in this volume is that there is still much to be done in developing the rule of law and a broader rights-based culture in the countries of the region. While the higher courts have provided strong leadership, their message has not always been heard or heeded in the wider society.

PART I

The first part of the PHRLD contains cases from the Pacific region in which the courts interpreted human rights standards in their constitutions or legislation, applied international standards in global or regional human rights Conventions or judicial decisions interpreting those standards, or considered how domestic and external frameworks affect each other. Several cases reported in Part II are also discussed in the commentary below, where they deal with issues closely related to the subject matter of Part I cases.

Arrest and Detention

Two cases from Papua New Guinea are reported in which the court ordered compensation for the misuse of power by police in the context of arrest or detention of persons suspected of committing crimes. A third decision, from Samoa, deals with the excessive use of force by police in the course of deporting a foreign national, whom the police believed to have been wrongly acquitted of a criminal offence.

In *Lamon v Bumai,* police arrested and detained five young men on suspicion of being involved in a murder. Over a three-week period, the suspects were subjected to the grossest forms of inhuman and degrading treatment which included being beaten, shot through the leg, scalded, set on fire, hanged, nearly drowned and forced to engage in sex with each other. After a further month in detention, the men were released without charge. In *Namba v Naru,* a police officer shot a young man in the leg, in the course of making an arrest, although the young man had done nothing wrong, was not running away and had put his hands in the air. As a result of the shooting, his leg was amputated. The issue for the court in both cases was the amount of compensation to be awarded for the serious breaches of rights protected by the Constitution of Papua New Guinea. In both cases, the amount awarded included general damages for pain and suffering and any enduring incapacity inflicted on the plaintiffs. It also included an award of exemplary damages to punish the State for its failure to properly train the police in acceptable forms of policing, and to mark the seriousness with which the court viewed the misconduct by the police officers.

Regrettably, these decisions are merely representative of a string of similar cases emerging from Papua New Guinea in recent years, in which police have used brutal methods. In his 2011 report to the Human Rights Council arising from his mission to Papua New Guinea, the Special Rapporteur on Torture found evidence of:

> systematic beatings of detainees upon arrest or within the first hours of detention, including during interrogation. The beatings were frequently inflicted by the police as a form of punishment, reflecting a complete disrespect for the presumption of innocence and the dignity of persons suspected of crimes.[2]

He also reported cases of police deliberately disabling people suspected of serious crimes, torturing escapees on recapture and even undertaking extrajudicial executions. Unfortunately, Papua New Guinea is not the only Pacific Island country where serious abuses of human rights by police occur, as evidenced by cases reported in earlier volumes of the PHRLD.

Police misconduct also featured in the Samoan case of *Nnamdi v Attorney General*. A Nigerian national was due to be deported from Samoa, following his acquittal on charges of theft and false pretences. Aggrieved by the acquittal, police officers took the opportunity on several occasions to beat the plaintiff severely. They also unlawfully detained him for two-and-a-half months, during which time he was denied proper food and medical treatment. In addition, police took various items of personal property from the plaintiff and consistently refused to return them, despite a direction from the Prime Minister to do so. The plaintiff successfully brought actions under the common law for assault and false imprisonment and for breach of the statutory duty under the Immigration Act 2004 to take care of a person in detention pending deportation. The court awarded damages for these wrongs, as well as for the loss of property. The court also awarded exemplary damages against the State. It took account of the fact that this was a deliberate breach of the plaintiff's common law and constitutional rights, inflicted as retribution by police who had not accepted his acquittal on the theft and false pretences charges.

The cases all illustrate the continuing responsibility of States to ensure that their security forces use their authority and physical force within the confines of their powers. Police must avoid using their powers to circumvent the proper procedures of the criminal justice system, or to impose punishment without trial and conviction. Governments in turn must take all reasonable steps to create an environment where the security forces understand and observe the limits of their authority.

2. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Addendum: Mission to Papua New Guinea, [40], http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-52-Add5.pdf, Retrieved from the Internet 21 May 2013.

Children

This volume contains a number of cases in which Pacific Island courts have relied on the principles in the Convention on the Rights of the Child when resolving issues relating to children.

Three cases deal with the relevance of the CRC when sentencing criminal offenders. In *Public Prosecutor v Malikum,* a boy aged 15 years admitted to having inserted a piece of wood into the vagina of his three-year-old cousin. This conduct constituted unlawful sexual intercourse under Vanuatu's Penal Code. Normally, an offence of this nature against a child would attract a substantial term of imprisonment for the offender. However, in sentencing the boy, the Supreme Court applied the principle that imprisonment should be a last resort in sentencing a child offender, and then should only be imposed for the shortest appropriate time. This principle was to be found in CRC Article 37(b), which Vanuatu had ratified. The principle had also been incorporated in domestic law: section 54 of the Penal Code applied the 'last resort' principle to offenders aged under 16 years. Applying section 54, the court concluded that a non-custodial sentence would be more appropriate, given the mitigating factors relied on by the boy.

However, the CRC does not exclude the possibility of sentencing a child to a term of imprisonment, if nothing else would be appropriate. Before this conclusion is reached, a court should consider all the available sentencing options to see if something less than imprisonment would be adequate in the circumstances. The trial judge in *Ulugia v Police* had examined the alternatives, but concluded that a prison sentence was necessary for the young offenders, who were convicted of manslaughter after a brutal, unprovoked fatal attack on another youth. The Court of Appeal confirmed this conclusion, although it reduced the sentence of the youngest of the offenders, who, at 14 years of age, was significantly younger than the 18-year-old who had initiated the attack.

The decision in *Quarter v R* dealt not with a child offender, but with a woman who had given birth shortly before being sentenced for theft. Courts are often invited to consider the impact on a child of refusing bail to the child's parent, or sentencing the parent to imprisonment. In these cases, protecting the interests of the child will be an important but not decisive consideration: see, for example, *Devi v State* [2003] FJHC 47, 2 PHRLD 11 and *Yuen v State* [2004] FJHC 247, 2 PHRLD 13. In *Quarter*, the Court of Appeal of the Cook Islands took account of evidence regarding the health of the mother and the needs of the newborn baby in reaching a pragmatic balance between punishing the mother for her wrongdoing and protecting the interests of the child. It ordered that the mother be remanded on bail until the baby was six months old. At that time, the mother was then sentenced to three months in prison. The Court of Appeal indicated that this compromise was required because of the lack of suitable facilities within the prison system for the mother to keep her baby with her. With better facilities, a baby might be kept in prison with his or her mother for a short time. However, it is unlikely that prison would be a suitable place for an older child.

The principle that the interests of the child should be the paramount consideration in decisions regarding their adoption is found in Article 21 of the CRC, to which all Pacific Island countries are parties. The principle has been applied by courts in the Pacific, even if it has not been expressly incorporated into domestic legislation: see, for example, In *re Lorna Gleeson* [2006] NRSC 8, 2 PHRLD 4; *Social Welfare Officer v Marshall* [2008] FJHC 283, 2 PHRLD 8; *Ali v Hakim* [2008] FJHC 53, 3 PHRLD 60. This volume of the PHRLD contains the decision In *re Child M* where the Supreme Court of Vanuatu applied the 'best interests' principle in an inter-country adoption case. In that case, the court declined to exercise its statutory discretion to authorise the adoption of a ni-Vanuatu child by a couple from New Caledonia. It did so by reference to Article 21 of the CRC and the more detailed criteria set out in the Hague Convention on the Protection of Children and

Cooperation in respect to Inter-country Adoptions 1993. Although Vanuatu had not ratified the Hague Convention, the court treated it as a statement of international best practice in inter-country adoption, and a more specific guide to the best interests of the child in such cases. It is a further illustration of the willingness of Pacific Island courts to have regard to International human rights standards when exercising judicial discretions.

The final case in the section on children, *Scott v Scott,* is a reminder of the limits on the use of Conventions in interpreting legislation. The National Court of Justice in Papua New Guinea was asked to discontinue an existing order that required a father to pay maintenance for his son, who lived in Canada with his mother. The father relied on the fact that the son had turned 18. However, the Matrimonial Causes Act 1961 provided that the court should not order maintenance for a child of the marriage who had attained 21 years, in the absence of special circumstances. The clear inference of the Act was that there was no need to prove special circumstances until the child reached 21. Despite that, the court ordered that a maintenance order should generally operate only until the child turned 16 years; after that, it would be necessary to prove special circumstances to justify an extension of the order.

The court reached that conclusion partly because of a discrimination argument: under another statute, maintenance orders for children born outside marriage operated until the child reached 16, so it was said to contradict the Universal Declaration of Human Rights and other Conventions to have maintenance provisions operating for different terms. This was seen as sufficient to justify interpreting the Matrimonial Causes Act provision as if the age at which it was necessary to prove special circumstances was 16 years rather than 21 years. It is suggested, however, that resort to human rights standards could not in this context overcome the clear words and effect of the statutory provision.

Democracy and Rule of Law

The cases in this section deal with the duty of courts to protect democratic rights and the constitutional arrangements for the workings of democratic governments. The first case deals with the rights of members of Parliament (MPs) to freedom of association and their right to vote freely in Parliament. The remaining four cases deal with attempts by the Parliaments of Vanuatu and Papua New Guinea to replace an incumbent Prime Minister. In all four cases, the courts found that the actions of the Parliament had not complied with the constitutional requirements, and so were legally ineffective. In the two cases from Vanuatu, the decisions of the courts were implemented. The Parliament subsequently replaced by constitutional means the person who had been reinstated by the court as Prime Minister. In this way, the shift in political allegiances within the Parliament produced a change of government, but the rule of law was ultimately maintained. By contrast, in the two cases from Papua New Guinea, the decisions of the Supreme Court were not observed. The refusal by those with political power to respect the decision of the highest court in the land seriously undermined the rule of law in that country. The reliance on force and political power by national leaders, contrary to the requirements of the law, is scarcely the example that the people of Papua New Guinea need.

In *Special Reference by Fly River Provincial Executive; Re Organic Law on Integrity of Political Parties and Candidates*, the Parliament of Papua New Guinea had enacted a law restricting the freedom of MPs to resign from the party for which they were elected, and to vote contrary to the party position on key issues. The Supreme Court ruled that the restriction on resignation infringed the freedom of association and could not be justified as necessary in a democratic society. Although its purpose was to enhance political stability, the court considered that it was likely to have the opposite effect, by destroying the party system. Less restrictive alternatives such as education of

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MPs were available. The court also found that the legal restriction on voting in Parliament infringed the constitutional right to hold public office and to exercise public functions. It also infringed MPs' constitutional right to freedom of speech, debate and vote in the Parliament.

In *Kilman v Speaker of Parliament of the Republic of Vanuatu,* the Court of Appeal ruled that in April 2011 the Parliament had not complied with the constitutional requirement of an absolute majority when passing a vote of no confidence in the incumbent Prime Minister, Hon Sato Kilman, before replacing him with Hon Serge Vohor. Mr Kilman was therefore still the Prime Minister. However, a month later, the Supreme Court ruled in *Natapei v Korman* that Mr Kilman had not been properly elected as Prime Minister in December 2010. At that time, the Parliament had failed to observe the constitutional requirement for a secret ballot when electing a Prime Minister. The court criticised the Speaker of the Parliament for failing to observe the clear requirements of the Constitution and awarded costs against him personally. The result of this rather messy litigation was that Hon Edward Natapei, the Prime Minister until December 2010, had not been lawfully replaced and remained the acting Prime Minister until such time as the Parliament validly replaced him. In June 2011 the Parliament duly elected Mr Kilman as Prime Minister; this time, there was no challenge to the validity of his election.

In re Reference to Constitution Section 19(1) by East Sepik Provincial Executive is a decision of the Supreme Court of Papua New Guinea dealing with the validity of Parliament's attempts to elect Hon Peter O'Neill as Prime Minister in place of Sir Michael Somare. The court concluded that none of the constitutional preconditions for replacing a Prime Minister had existed at the time. In particular, it had not been established that he had been unfit for office by reason of physical or mental incapacity. Nor had Sir Michael been absent from three consecutive Parliamentary sittings without leave, as he had been granted leave for one of the three sessions he had missed. Therefore Sir Michael remained in office. Further, even if there had been a vacancy in the office, Parliament had not followed the correct procedure before electing Mr O'Neill, as the constitution required at least a day to pass between the creation of the vacancy in the office and the vote for a replacement. The court declared that Sir Michael was still the lawful Prime Minister.

Immediately before the court handed down the above decision, the Parliament took steps to create retrospectively a vacancy in the position of Prime Minister, and to elect Mr O'Neill to the position. Immediately after the court announced its decision, the Parliament once more declared the office of Prime Minister vacant, and elected Mr O'Neill to that position. Despite attempts by Sir Michael and his supporters to assert his position as the lawful Prime Minister, Mr O'Neill and his supporters remained in effective control of government. The matter returned to the Supreme Court in In *re Constitution Section 19(1) – Special Reference by Allan Marat.* A majority of the Supreme Court ruled again that no vacancy in the office of Prime Minister had arisen. Sir Michael Somare was still the lawful Prime Minister.

Despite this ruling, Mr O'Neill and his supporters retained control of the government. Two members of the Supreme Court were charged with sedition, and Parliament enacted the Judicial Code of Conduct Act 2012, which (if valid) would have curtailed the security of tenure of judges, a vital element in maintaining the independence of the judiciary. The unconstitutional state of affairs continued until the general election in June 2012, after which Mr O'Neill was elected Prime Minister by the new Parliament.

Discrimination

A successful claim for unlawful discrimination was made in the Vanuatu case of *Hamel-Landry v Law Council.* There, the Law Council had made regulations under a statutory power setting out the

qualifications needed by a person seeking to be registered to practise law in Vanuatu. In essence, the person needed to hold a degree in law, to be resident in Vanuatu and to have two years' legal experience. However, the requirement for two years' legal experience was waived for ni-Vanuatu lawyers if they had been admitted to practise law in another Commonwealth jurisdiction. The plaintiff was a Canadian law graduate, admitted to practise law in Canada, resident in Vanuatu, but without two years' legal experience. He successfully argued that the Law Council discriminated against him because of his nationality when they refused his application for registration: if he had been a ni-Vanuatu citizen, he would have qualified for registration.

In this case, the regulations creating the discriminatory requirements infringed the Constitution of Vanuatu. Article 5(1) protects the right to equal treatment under the law or administrative action without discrimination as to place of origin. A law that treated people differently on the basis of their citizenship in substance amounted to discrimination on the basis of place of origin. Although Article 5(1) recognised the possibility that Parliament might impose restrictions on non-citizens, a law had to do so explicitly, and Parliament had not explicitly authorised the Law Council to do so.

While it appeared that the Law Council had been attempting to advantage at least some ni-Vanuatu lawyers, there was no attempt to justify its favourable treatment as affirmative action.

Fair Trial

Article 9(1) of the Constitution of Samoa provides:

> In the determination of his civil rights and obligations or of any charge against him for any offence, every person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established under the law.

But what is meant by an 'independent and impartial tribunal'? In *Ponifasio v Samoa Law Society,* the Court of Appeal of Samoa looked to common law principles and the decision of the European Court of Human Rights in *Findlay v United Kingdom* [1997] ECHR 8 when identifying the factors to be considered in deciding whether a tribunal was both independent and impartial. The Court of Appeal also acknowledged that the requirements of Article 9(1) might be more demanding today than when the Constitution was first established.

Applying the relevant factors, the Court of Appeal concluded that the Law Society's disciplinary proceedings against the applicant had infringed the requirements of Article 9(1). First, the fact that five members of the Council of the Law Society participated in the initial decision to bring misconduct charges against the applicant, and then sat on the tribunal that found him guilty, meant that the Council had been 'a judge in its own cause'. It had offended the requirement of independence by being both the prosecutor and the judge. Secondly, a reasonable observer might be concerned as to the objectivity of the tribunal. If its members had been involved in the decision to bring the charges, it might well be thought that they could be prejudiced when it came to deciding on the applicant's guilt.

There was no doubt that the Law Society had followed its established procedures in good faith. However, although those procedures may once have been adequate, the court concluded that they did not meet current expectations about a fair trial. It was still open to the Law Society to reconsider whether the applicant was guilty or innocent of professional misconduct. To meet the requirements of Article 9(1), it would be necessary to ensure that decisions about whether to prosecute the applicant were made by people other than those who would decide on his guilt.

Human Trafficking

In his foreword to the publication *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*[3], Kofi Annan wrote in 2004:

> I believe the trafficking of persons, particularly women and children, for forced and exploitative labour, including for sexual exploitation, is one of the most egregious violations of human rights that the United Nations now confronts. It is widespread and growing. It is rooted in social and economic conditions in the countries from which the victims come, facilitated by practices that discriminate against women and driven by cruel indifference to human suffering on the part of those who exploit the services that the victims are forced to provide. The fate of these most vulnerable people in our world is an affront to human dignity and a challenge to every State, every people and every community.

Pacific Island governments have begun to respond to this challenge, by introducing laws that make it a crime to engage in the practice of human trafficking, as envisaged in Article 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which is a supplement to the United Nations Convention against Transnational Organized Crime.

Given the importance of this development, the PHRLD reports two of the first prosecutions for trafficking. In *Liu v R*, the Court of Appeal of Tonga upheld the trafficking conviction of a woman who misled two Chinese women to come to Tonga in the expectation that they would work as waitresses in a restaurant. Once in Tonga, the women were forced into sex work. In rejecting the key grounds of appeal, the court displayed an appreciation of the vulnerability of the trafficked women. It rejected an argument that their evidence was not credible because the women had been in Tonga for some time before they complained to the authorities. The court ruled that there were good reasons for not reporting their abuse at the earliest opportunity: the women were in a strange land, did not speak the language, and believed their abuser had friends in the police and at the Chinese Embassy. Further, the court declined to find that the women's evidence needed a corroboration warning – that is, their evidence should be treated as unsafe unless it was confirmed by other independent evidence. The Court of Appeal saw no reason to treat trafficked persons, including those forced to be sex workers, as inherently unreliable witnesses. The convicted trafficker was sentenced to 10 years in prison, with the final three years suspended.

State v Murti deals with the first conviction for trafficking in Fiji Islands. The accused extracted payments from seven Indian nationals, on the promise that he would arrange work for them in New Zealand. In fact, he accompanied them to Fiji Islands and planned to leave them there, where they were at risk of exploitation. He was convicted of trafficking and obtaining property by deception, and sentenced to six years' imprisonment.

What is not evident from the case reports is how the trafficked persons were dealt with by the national authorities. It has been common in the past for trafficked persons to be promptly deported as illegal immigrants. This response overlooks the fact that they are victims of human rights violations, and that immediate deportation may only inflict further harm. The *Recommended Principles and Guidelines on Human Rights and Human Trafficking*[4] developed by the United Nations High Commissioner for Human Rights aim to bring a human rights perspective into anti-trafficking laws, policies and interventions. These suggest, for example, that trafficked persons should not be prosecuted for illegal

3. At page ii. The document is available at http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf.

4. Presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (E/2002/68/Add. 1).

conduct that is a consequence of being trafficked; that they be protected from further exploitation and harm; and that they be guaranteed safe, preferably voluntary, return to their country of origin.

While the introduction of legislation criminalising trafficking is to be welcomed, it is only one element of the response needed to address this form of human rights violation. Ultimately, action is needed to tackle the root causes to which Kofi Annan refers. But until this action proves effective, a humane response is needed towards those who fall victim to the exploiters.

Liberty

The importance of context to the interpretation of constitutional guarantees of rights is illustrated by the decision of the Supreme Court of Samoa in *Mapuilesua v Land and Titles Court.* The applicant was disputing a decision of the Land and Titles Court regarding title to land. He claimed that the decision had interfered with his liberty as guaranteed under Article 6(1) of the Constitution of Samoa, which provides that 'No person shall be deprived of his personal liberty except in accordance with law'.

The argument was doomed to fail, as the remaining parts of Article 6 made it clear that the 'liberty' in question was the physical liberty of a person, the right not to be detained in custody without lawful authority, rather than some broader notion of a freedom to live life according to one's own choices. This meaning was confirmed by a decision on a corresponding provision in Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The court had little difficulty in rejecting the argument, as the decision of the Land and Titles Court had done nothing to affect the applicant's physical freedom.

Life

The practice in some traditional communities of torturing or murdering people accused or suspected of practising sorcery undoubtedly amounts to a grave violation of the human rights of the victim. Often the victim will be among the most vulnerable members of the community, particularly women. For example, the Special Rapporteur on Violence against Women reported that in Papua New Guinea:

> women who marry into different tribes, widows and elderly women with no children or grandchildren to protect them, as well as women born out of wedlock, are at a higher risk of being targeted, given that perpetrators have no fear of reprisal killings or other consequences.[5]

Where the offenders are prosecuted and convicted, the question arises as to how they should be sentenced. On one view, allowance should be made for the cultural context of the killing. Hence a relatively lenient approach should be adopted if the offenders were acting on behalf of their family or community, carrying out what they believed to be their duty to remove the danger posed by a person who had already caused illness or death in that community. This approach prevailed for many years in the courts of Papua New Guinea and saw offenders receive significantly lower penalties than other murderers.

However, a different approach is now favoured, which denies that a sorcery-related motivation should be treated as a mitigating factor. This stance, established by the Supreme Court in cases such as *Baipu v State* [2005] PGSC 19 and *Thomas v State* [2007] PGSC 26, was applied in *State v Mesuno*. There the National Court recognised that a different response was called for, partly because of the increasing prevalence of sorcery-related killings, and partly because the killings were often motivated

5. Report of the Special Rapporteur on violence against women, its causes and consequences; Addendum: Mission to Papua New Guinea, 9 at [34]. http://reliefweb.int/report/papua-new-guinea/report-special-rapporteur-violence-against-women-its-causes-and-consequences, Retrieved from the Internet 16 June 2013.

by revenge or jealousy; claims of suspected sorcery had become all too easy and convenient to make. Accordingly, the court imposed terms of 34 years' imprisonment for the adult offenders in this case.

Mandatory Sentencing

Mandatory sentencing refers to the practice of prescribing in legislation a fixed penalty for anyone convicted of a particular offence. It removes the usual discretion given to the sentencing judge to take account of the particular circumstances of the offence, and of the offender, in deciding the appropriate punishment. The compatibility of mandatory sentencing with human rights standards raises complex questions, to which there are differing responses.

Manioru v R dealt with a challenge to the provision in the Solomon Islands Penal Code that required a person convicted of murder to be sentenced to life imprisonment. The Court of Appeal rejected the arguments that this provision infringed the principle of the separation of powers and the right to a fair trial. It relied on domestic and international precedents to this effect.

However, the court did not consider in any detail the possibility that the sentence might offend the right to be free from cruel, inhuman or degrading treatment, as that argument was not relied on by the appellant. This line of argument had previously been successful in a Fiji case, *State v Pickering* [2001] FJHC 34, 1 PHRLD 58, which had relied on international precedents to strike down a mandatory sentence for a particular drug offence. The reasoning in that case suggests that where the mandatory sentence would be grossly disproportionate to some of the cases it could apply to, it would amount to cruel, inhuman or degrading treatment.

The court in *Manioru* indicated that the power of the legislature to mandate prison sentences should not depend on the seriousness of the offence or the severity of the sentence. It did, however, put to one side the question of the power to impose a mandatory death penalty. This issue was considered in the case of *State of Punjab v Singh,* a decision of the Supreme Court of India reported in Part II of the PHRLD. There the court held that the mandatory death sentence in question infringed the right to equality before the law and the right to life and personal liberty guaranteed by Articles 14 and 21 respectively of the Constitution of India. It also cited a range of international precedents that had characterised a mandatory death sentence as cruel and unusual punishment, inhuman or degrading punishment, a denial of the right to a fair trial or to due process of law, contrary to the separation of powers, or contrary to the rule of law. The arguments that succeeded in the Indian court were in substance the same as those that failed in the Solomon Islands case: mandatory sentences are objectionable because they prevent courts from imposing a sentence that is appropriate to the circumstances of the individual case. The difference, then, must lie in the unique harshness and finality of a death sentence. Not every reader will find that a convincing distinction.

Movement

The decision of the High Court of Kiribati in *Teriaki v Kauongo* illustrates the increasing reach of human rights standards in Pacific Island countries. In that case, Millhouse CJ expressly departed from the views of a former Chief Justice who had ruled some 30 years earlier that the Bill of Rights provisions in the Constitution of Kiribati only bound the State, and did not apply in actions between private citizens. Millhouse CJ pointed to the broader, more liberal interpretation of provisions for the protection of rights seen in the courts in more recent years. He concluded that the rights in the Constitution of Kiribati had 'horizontal' as well as 'vertical' application. In other words, the Constitution imposed duties on individuals as well as the State and its officials to respect the protected rights. Consequently, a group of old men who exercised customary authority on an island had infringed the plaintiff's freedom of movement when it unlawfully ordered him and his family to

leave the island. This decision was consistent with the views of other Pacific cases where traditional authorities had overstepped their legal powers: see, for example, *Public Prosecutor v Kota* [1993] VUSC 8, 1 PHRLD 74; *Lafaialii v Attorney General* [2003] WSSC 8, 1 PHRLD 71; *Leituala v Mauga* [2004] WSSC 9, 1 PHRLD 14 and *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2, 3 PHRLD 32.

Property

The constitutional right to be free from the 'unjust deprivation of property', as provided in Article 5(1)(j) of the Constitution of Vanuatu, clearly requires judicial interpretation. What is 'property' for these purposes? What amounts to 'deprivation' and when is it 'unjust'? None of these questions has an obvious answer that can be inferred from the context. In answering these questions in *Terra Holdings Ltd v Sope*, the Court of Appeal of Vanuatu drew guidance from decisions of the European Court of Human Rights on a comparable provision in the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

With its high reputation and enormous caseload, the European Court of Human Rights is proving a valuable resource for Pacific Island courts in interpreting their own bills of rights. There is, of course, no suggestion that Pacific courts are in any way bound to follow the European precedents, but there is much to be gained from drawing on the insights of that court where they are relevant and not inappropriate to Pacific circumstances.

In *Terra Holdings*, the court examined the lawfulness of ministerial approval for a private individual to develop land for the purposes of tourism. The approval allowed the reclamation of land below the sea. Such reclamation would substantially interfere with the rights of custom owners of that seabed, who had been neither consulted about nor compensated for it. The court found that there had been an unjust interference with the custom owners' property rights. The court did not consider tourism to be a permissible justification for the State to take a person's property. While this may have been too restrictive a view, it is suggested that taking property *without compensation* for that purpose would generally be an 'unjust deprivation'.

The case of *City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd*, reported in Part II, deals in part with the analogous right not to be arbitrarily deprived of property, as protected by section 25 of the Constitution of South Africa. In that case, the Constitutional Court ordered that a private owner of property not be allowed to evict persons who were unlawfully occupying the property until the city authority had had reasonable time to arrange emergency accommodation for the occupiers. The court acknowledged that to allow the occupiers to remain indefinitely would have been an arbitrary deprivation of the owner's property, but concluded that deferring the eviction for a limited time, to protect the occupiers' constitutional right to access to housing, was a reasonable restriction on the rights of the property owner.

Further, the Kenyan case of *PAO v Attorney General*, also reported in Part II, might be considered in this context. There the court held that intellectual property rights in medicines used for the treatment of HIV must be restricted where their enforcement would jeopardise people's rights to life and health by making access to generic (unbranded) medicines unaffordable.

Religion

In the previous volume of the PHRLD, the Court of Appeal of Tuvalu upheld the right of members of the Tuvalu Brethren Church to practise their religion on the island of Nanumaga: *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2, 3 PHRLD 32.

In a sequel to that decision, several members of the Tuvalu Brethren Church sought compensation for having been dismissed from their employment because of their religious affiliation. Only one of the claims in *Konelio v Kaupule of Nanumaga* proved successful. The other claims failed because the plaintiffs could not show that religion was the reason for their dismissal, or because the time for commencing the action had expired. That resulted from the fact that under section 112 of the Falekaupule Act, claims against the Falekaupule (the traditional assembly of elders on the island) had to be commenced within a year. Arguably, this is an unreasonably short time for commencing proceedings, particularly given the remoteness of communities on the outer islands of Tuvalu and the difficulty of accessing legal assistance there. However, the successful plaintiff was awarded the equivalent of three years' salary, by way of compensation for her loss and as exemplary damages for the interference with her constitutional right to practise her religion.

Violence against Women

The cases collected under the heading of 'Violence against Women' illustrate important developments both in statute and at common law for the better protection of women and girls from physical and sexual violence.

It has been long thought that a man could not be charged or convicted in Solomon Islands for raping his wife: *R v Gwagwango* [1991] SBHC 59. Section 136 of the Penal Code defines rape in terms that do not expressly exempt a man who has sexual intercourse with his wife without her consent. However, it was thought that the common law proceeded on the basis that on marriage a woman gave her implied consent to all future sexual intercourse with her husband. That consent was only revoked by a decree nisi, a separation order or, in certain circumstances, a separation agreement.

In the important case of *R v Gua*, the High Court of Solomon Islands has now ruled that the supposed common law exemption for husbands no longer represents the law in that country. The court concluded that such a rule discriminated against women and, as such, was contrary to sections 3 and 15 of the Constitution of Solomon Islands, as well as Articles 15 and 16 of the Convention on the Elimination of all Forms of Discrimination against Women, to which Solomon Islands was a party. While the removal of the marital exemption is to be welcomed, the only reservation about the case is whether it infringed at least the spirit of the principle that there should no criminal liability for an act that was not considered criminal at the time it was committed.

In several other jurisdictions, the definition of rape has been expanded beyond the traditional view that the offence occurred when a woman's vagina was penetrated by a man's penis without her consent. For example, section 89A of the Vanuatu Penal Code renames the offence as 'sexual intercourse without consent'. It expands the offence so that both males and females can be victims or offenders, and that penetration can be done by any part of the offender's body, to any of the victim's orifices. These reforms aim to remove sex discrimination from this part of the criminal law, in compliance with the principles of CEDAW. They recognise that any form of sexual violation involves an invasion of a person's personal integrity and an assault on the person's dignity.

Questions arise as to the proper principles for sentencing those convicted of these new forms of sexual offences. Are all cases within the broader definition to be treated as equally serious, or should there be differences according to the particular form of violation in question? In *Public Prosecutor v Tao*, the Supreme Court of Vanuatu sentenced a man who had digitally penetrated his wife without consent to two years' imprisonment, with the second year suspended. The court indicated that cases of digital penetration should be treated differently to penile penetration, apparently treating the former more leniently. This is broadly in accord with the approach in New Zealand, although the Court of

Appeal has recognised that in some circumstances, digital penetration could warrant a sentence as severe as that for penile penetration: *R v AM* [2010] NZCA 114. By contrast, the High Court of Fiji in *State v Jabbar* [2011] FJHC 778 concluded that the punishment should be the same regardless of the form of the sexual violation. Lying between these two approaches is the more flexible approach advocated by Tobias JA in the Australian case of *R v Hibberd* [2009] NSWCCA 20. His Honour suggested that it would be more helpful to assess the seriousness of the offence on the basis of the particular circumstances of the case, without making any assumption as to the relative seriousness of any particular form of penetration. While this reasoning may be more persuasive, it may not provide sufficient guidance to ensure consistency of sentencing. Accordingly, appellate courts may be more inclined to follow the more structured approach taken in New Zealand.

In Public *Prosecutor v Yacinth* the sentencing judge had reduced a male offender's sentence for sexual intercourse without consent because the female victim had not complained to authorities at the earliest opportunity. If she had done so, the offender would not have continued to commit the offences against her. The Court of Appeal of Vanuatu strongly rejected this reasoning and increased the man's sentence. The sentencing judge had in effect shifted partial responsibility for the offence to the woman. This was inappropriate, particularly in the circumstances of the case where the woman suffered from physical and mental disabilities. Her vulnerability contributed to the difficulty she experienced in discussing the events with the authorities, and made her omission to make an early complaint entirely understandable. That omission was irrelevant to sentencing.

In *Yacinth*, and in the Solomon Islands case of *R v Belo*, the courts have indicated that the physical or mental disability of the victim of a sexual offence should be treated as an aggravating factor, and so attract a heavier penalty. Given the greater vulnerability to sexual abuse of many persons with disabilities and the prevalence of sexual offences committed against them, this development is welcome. So too is the conclusion in *Belo* that a payment of custom money by the offender's family, made without his knowledge or consent, could not be treated as a mitigating factor in sentencing. As the court observed, a custom payment could only be relevant to show the offender's remorse. So, if the payment was made without the offender's knowledge or against his wishes, it could not show his genuine contrition for his offence.

PART II

Part II of the PHRLD contains cases from outside the Pacific region that raise human rights issues of interest and relevance to the region.

Abuse of Process

The decision of the High Court of Australia in *Moti v R* is reported because it overruled a decision of the Queensland Court of Appeal that was included in the previous volume of the PHRLD – *R v Moti* [2010] QCA 178, 3 PHRLD 46. The Australian government was seeking to extradite the appellant to face charges in Australia of having had sex in Vanuatu and New Caledonia with a girl younger than 16 years. The government of Solomon Islands chose instead to deport the appellant to Australia, in a manner that infringed the Deportation (Amendment) Act 1999. The High Court of Australia ruled that it would be an abuse of process to allow the prosecution in Australia to proceed because of the way the appellant had been returned to the country. It was not enough that the Solomon Islands government had acted unlawfully; it was Australia's knowing involvement in that unlawful deportation that compromised the fairness and integrity of the court process. That involvement occurred when Australian officials facilitated the deportation by providing travel documents at a time when they knew that the impending deportation would be unlawful. As a result, the prosecution was permanently stayed.

Discrimination

Two international cases dealing with discrimination are reported. In addition to their value for showing how discrimination claims are assessed, they are also significant for illustrating how courts can give effect to economic or social rights, particularly in the context where governments claim to have insufficient financial resource to meet the needs of the claimants.

Moore v British Columbia (Education) concerned a Canadian boy with a severe learning disability which meant that he required specialist assistance in order to learn to read. However, the local educational authority closed the specialist facility at that time, on financial grounds. The boy's father brought an action under the Human Rights Code, alleging discrimination in the provision of a public service. The claim was ultimately upheld in the Supreme Court of Canada.

The court assessed the claim of discrimination by comparing the educational service provided for the boy with that provided for other students generally. On this test, there was discrimination on the basis of disability: most students received an education in which they could learn to read, while the boy did not. In effect, the authorities had failed to make 'reasonable accommodation' for his special needs. Importantly, the Supreme Court rejected the conclusion of the British Columbian courts, which had found no discrimination because the boy had been treated no differently to other children with disabilities. The Supreme Court insisted that the comparison must be with students generally, rather than those with disabilities. Otherwise, the purpose of the Human Rights Code would be defeated because it would then be permissible for the authorities to provide no services at all for children with disabilities.

The Supreme Court went on to reject the argument that the discrimination could be justified on financial grounds. It reasoned that the authority could not claim economic necessity when it had not even considered the alternatives for meeting the boy's needs. In any event, the court identified other, less essential expenditures by the authority. The court ordered payment of compensation to the boy's father for the cost he had incurred by sending the boy to a private school where he could get adequate assistance.

City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd dealt with the complex problem of finding adequate housing in South Africa. Occupiers of some privately owned buildings that were to be demolished sought access to public housing provided by the City of Johannesburg. As a matter of policy, the City provided emergency housing for those evicted as a result of the City's own actions, but not for people evicted by private landowners. It claimed it did not have resources to accommodate the latter group. The Constitutional Court ruled that the City's policy infringed the occupiers' right to equality before the law. While it was appropriate for the City to prioritise some groups ahead of others, this must be done in a rational way, reflecting people's needs for housing. Exclusion of all those evicted by private landlords was irrational and unreasonable because it failed to assess the needs of the evicted people.

The court also rejected the City's claims that it did not have the funds to meet the needs of the occupiers. The City had failed to show that this was in fact the case. Further, it could not rely on the fact that it had not budgeted for this expense, as the Constitution imposed on it a duty to progressively realise the right to access to housing. It therefore had a duty to make adequate provision for this purpose.

Life

Closely related to the discrimination cases discussed above are three cases on the right to life and to health care. Again, these cases all deal in some way with the issue of judicial enforcement of rights requiring the provision of services in the context of limited State resources.

Bansal v Union of India raised the issue of the failure by the Indian State of Madhya Pradesh to adequately implement a national programme aimed at reducing maternal mortality in rural areas. A number of interested non-governmental organisations alleged that the State was failing to comply with the programme. Predictably, the State claimed that it was doing all that it reasonably could within its financial resources. To assess compliance with the programme, the court considered not only the detailed evidence provided by the parties, but also a report by court-appointed inspectors, who visited a number of health centres to see how services were in fact delivered. In the light of this evidence, the court concluded that the State had failed to provide sufficient staff and infrastructure to implement the programme. As a result, women were dying in childbirth, in breach of their right to life.

The court rejected the State's defence that it did not have enough resources; the evidence showed that it had not even spent the funds allocated to it by the national government for this purpose. The court recommended the State carry out a list of specific actions to remedy its shortcomings.

Similar issues were raised in the Ugandan case of *Centre for Health Human Rights & Development v Attorney General* but with a very different outcome. In that case, a non-governmental organisation alleged that the Ugandan government had failed to provide adequate maternal health care facilities. It claimed that the result of this failure was unacceptably high mortality rates for mothers, newborn babies and infants. The petitioner also identified two particular cases where women had died as a result of the inadequate provision of maternal health care. The government failure was said to infringe the victims' rights to life and to the highest attainable health care, as guaranteed in the Constitution of Uganda. However, the Constitutional Court accepted the government's argument that the matters raised were non-justiciable – that is, they raised questions that were not appropriate for a court to decide. Rather, they were matters for the executive and legislative branches of government to resolve.

The court's response is consistent with the view that many social and economic rights cannot be judicially enforced. It is said that the realisation of those rights requires the allocation of public resources, a matter properly left to the executive and legislative branches, which have both the authority and the means to make such 'political' decisions. Yet such a view is under challenge on several grounds. First, it should be recognised that judicial enforcement of civil and political rights can have major implications for the allocation of public finances, yet this does not make such matters non-judicial. Decisions about the need to provide interpreters or legal representation in courts, humane conditions in prisons, or recording equipment in police stations all have cost implications for government. Second, as a number of cases reported in the PHRLD show, courts in some jurisdictions have been willing to assess the legality of government decisions in fields such as health care, housing or education. In these cases, the courts have generally focused on the reasonableness of government decisions, or have forensically examined claims of inadequate resources. This does not require the courts to usurp government authority or discretion. Rather, it requires governments to make choices in a way that pays proper respect for rights protected in the relevant Constitutions.

The third case, *PAO v Attorney General*, arises under Kenya's new Constitution, which is also notable for its protection of social and economic rights. The petitioners relied on generic (unbranded) drugs, provided free of charge by government or charitable agencies, for treatment of their HIV infection.

They claimed that provisions in the Anti-Counterfeit Act 2008 put at risk the supply of these drugs because they allowed companies producing similar but branded drugs to have the generic drugs seized by customs officials.

The High Court held that the government of Kenya had a positive duty to supply essential medication, in order to fulfil the right to health, protected by Article 43(1) of the Constitution. It also had a duty to refrain from any action that would impede access to such medication. This duty would be infringed if legislation were enacted that would make essential drugs unaffordable to ordinary citizens. There was a real risk that the Anti-Counterfeit Act would have such an effect, as generic drugs had been seized under similar provisions in other countries. To avoid this risk, the court declared that enforcement of the Act in relation to generic drugs would be unconstitutional to the extent that it affected access to affordable, essential generic drugs. The Act would need to be amended to remove this possibility.

Mandatory Sentencing

State of Punjab v Singh, a decision of the Supreme Court of India, deals with the constitutionality of a mandatory death sentence. It is discussed at page 71.

PART III

The third part of the PHRLD contains cases dealing with climate change issues and the rights of those who campaign for the protection of the environment.

Climate Change

In Article 1 of the UN Framework Convention on Climate Change, climate change is defined as 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods'. In other words, 'climate change' refers to long-term changes in weather patterns that are attributable to human activities – principally, the burning of fossil fuels and the destruction or degradation of forests – which have increased the concentration of greenhouse gases in the atmosphere. Greenhouse gases (principally carbon dioxide, methane, nitrous oxide and water vapour) operate to trap heat: the greater the concentrations of these gases remaining in the atmosphere, the more the land, sea and air heat up.

There is growing recognition, in the region and beyond, that climate change poses serious challenges for the lives and well-being of Pacific Island people. The effects of climate change – increasing land, sea and air temperatures, rising sea levels, changes in rainfall patterns, and more frequent and intense extreme weather events such as cyclones – are likely to cause damage to infrastructure, declining supplies of food and fresh water, greater health risks, and the loss of habitable land in many Pacific islands. As such, climate change is a threat to human rights to life and health, to food and water, to housing and to development. In the worst case, people living on low-lying atolls may be forced to relocate, with a potential loss of nationality, language and culture.

The impacts of climate change will not be experienced equally across the globe. In global terms, the small island States are likely to be among the worst affected, and to have the fewest resources to respond to the changes. Within countries, some vulnerable groups are more likely to be disadvantaged than others: for example, women and children, the elderly and persons with disabilities are likely to experience more adverse effects and to have less capacity to adapt to the changed conditions.

Responding to the problem requires a significant reduction in the activities that cause the build-up of greenhouse gases in the atmosphere ('mitigation'). It also requires action to address the adverse effects of climate change that will occur until such time as mitigation proves effective ('adaptation'). Both

mitigation and adaptation will require concerted action at an international level to establish binding agreements to reduce greenhouse gas levels and to provide financial and technological support for adaptive measures, particularly in the less developed world. Modest progress in that direction was made under the Kyoto Protocol to the United Nations Framework Convention on Climate Change. In 2012 the operation of the Protocol was extended until 2020, by which time a new treaty is expected to be completed. Even so, the countries committing to the extended period represent only a small proportion of the sources of greenhouse gases.

At a national level, it will be necessary to establish legislative and policy frameworks across a range of activities. In large measure, these responses will be dependent on the political will of governments to recognise and respond to the challenges, often in the face of powerful interests. But litigation can also be expected to play a part, as those advocating action, and those resisting it, rely on legal strategies to support their positions.

To date, the case law dealing with issues related to climate change is relatively undeveloped and interstitial. Some of the more interesting or significant decisions are reported in this volume of the PHRLD. They are confined to action at the national level, and principally in relation to mitigation.

Regulation of greenhouse gas emissions. Although the United States of America has so far declined to make binding commitments at the international level to reduce greenhouse gas emissions, some domestic measures aimed at mitigation have been adopted. One such measure has been to engage the regulatory powers of the Environmental Protection Agency (EPA) under the Clean Air Act. That Act, among other things, requires the EPA to set standards for the emission from new motor vehicles of any 'air pollutant … which may reasonably be anticipated to endanger public health or welfare'. In 2003 the EPA declined to set standards for emission of greenhouse gases from vehicles, on the basis that such gases were not 'air pollutants' under the Act. It further claimed that; even if the gases were air pollutants, then it was not appropriate for the EPA to regulate them, first because climate science was too uncertain, and second because a more comprehensive solution would be needed to address climate change. In *Massachusetts v Environmental Protection Agency*, the Supreme Court found that the EPA had failed to perform its statutory duty. Greenhouse gases clearly fell within the definition of 'air pollutants'. Further, the policy reasons given for not proceeding were invalid. There was sufficient scientific certainty for it to proceed, and its only task was to assess whether greenhouse gases would endanger public health or welfare. If it concluded that they would, the EPA was bound by the Act to set emission standards.

Following this decision, the EPA made a finding (the 'Endangerment Finding') that greenhouse gases contributed to climate change which would endanger public health or welfare. It therefore proceeded to regulate vehicle emissions. The EPA also set standards for major stationary sources of greenhouse gases such as factories and power plants as required under the Act. These actions were challenged by states and industries that opposed the new standards. In *Coalition for Responsible Regulation Inc v Environmental Protection Agency*, the Supreme Court upheld the actions of the EPA. The court confirmed the Endangerment Finding: it concluded that substantial scientific evidence supported the causal link between greenhouse gas emissions and global warming; it also accepted that climate change was likely to adversely affect health, and that it would endanger human welfare by creating risks to food production, energy, infrastructure and ecosystems. The EPA had also correctly followed the Act in setting emission standards for vehicles and stationary pollution sources.

Taken together, these cases provide significant judicial endorsement of the links between human activity that produces greenhouse gases, climate change, and impacts on human health and welfare. They clearly reject claims that climate science is too uncertain to warrant immediate action; indeed

the court recognised that to wait for absolute certainty would obstruct the protection of public health and welfare. Instead, a precautionary approach was needed.

The EPA cases also demonstrate the possibility of forcing a reluctant public agency to become involved in mitigating the causes of climate change. For that strategy to work, it is necessary that the relevant statute imposes clear duties that a court can enforce. By contrast, *Friends of the Earth v Canada* illustrates the limits of this approach. Canada had ratified the Kyoto Protocol in 2002 and in 2007 the Canadian Parliament enacted the Kyoto Protocol Implementation Act. The Minister for the Environment purported to fulfil his obligation under that Act to publish a Climate Change Plan outlining how the government would fulfil Canada's obligations under the Protocol. It was evident, however, that the plan would not lead to Canada meeting its Kyoto obligations. The question for the court was whether to compel the Minister to make a plan that would. It decided not to. Essentially, it found that the language in the Act was not sufficiently precise or imperative to create legally enforceable obligations. As a result, the duty was not justiciable. The only remedies for non-compliance lay in the political arena.

Right to life and a healthy environment. The decision in *Gbemre v Shell Petroleum Development Company Nigeria Ltd* contains a relatively brief assessment of the merits of the claim, as much of the judgment deals with procedural points raised by the defendant, which the court viewed as designed only to delay proceedings. The court made declarations that the defendant's practice of gas flaring (burning gas byproducts from its petroleum activities) infringed the constitutional rights of the affected community. In particular, it infringed their rights to life and to live in a healthy environment. Flaring caused direct harm to health as well as contributing to climate change and damage to the environment. The court declared that legislation purporting to authorise the flaring was unconstitutional and further ordered the defendant to cease the practice.

Planning for coastal development. One example of prudent adaptation by governments is the introduction of planning requirements that make allowance for the expected effects of climate change. *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* illustrates one such planning requirement. A district council in South Australia required that proposed coastal developments make allowance for future changes in sea level due to predicted climate change during the first 100 years of the development. The council consequently rejected a development proposal that failed to make sufficient allowance for sea level rise; the proposed development needed to be set back further from the coast. The council's refusal of development approval was upheld first by the Environment Court and on appeal by the Supreme Court of South Australia.

Environmental Defenders

The final case in Part III deals with the rights of those who campaign for the protection of the environment, which should include those promoting action to limit climate change. In its decision in *Kawas-Fernández v Honduras,* the Inter-American Court of Human Rights recognised the link between protection of the environment and protection of human rights. It ruled that there was 'an undeniable link between the protection of the environment and the enjoyment of other human rights',[6] particularly economic, social and cultural rights. For that reason, it considered that environmental activists in Honduras were entitled to the same rights as any other human rights defenders. Further, the State had a duty to protect all human rights defenders, including environmental activists, from improper interference by its own officials as well as by private individuals. It had a duty:

6. Inter-American Court of Human Rights, Series C No 196 at [148].

to provide the necessary means for human rights defenders to conduct their activities freely; to protect them when they are subject to threats in order to ward off any attempt on their life or safety; to refrain from placing restrictions that would hinder the performance of their work, and to conduct serious and effective investigations of any violations against them, thus preventing impunity.[7]

The case was brought on behalf of Mrs Kawas-Fernández and her relatives. She was one of six activists in Honduras who were murdered over the course of a decade because they campaigned against environmentally harmful developments. Despite evidence implicating those involved in her murder, including senior police and military officers, no action had been taken in over 14 years. The court held that by its inaction, Honduras had violated the deceased's rights to life and freedom of association. It had also violated her relatives' rights to a fair trial, judicial protection and humane treatment.

The court ordered a remarkable range of remedies, including compensation and mental health care for the relatives, the diligent prosecution of the suspected offenders, public promotion of the work of the deceased and other environmentalists, and a public acknowledgement by the government of its default in this matter. The area that the deceased sought to protect is now a national park named in her honour.

7. Inter-American Court of Human Rights, Series C No 196 at [145].

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

ARREST AND DETENTION

ARREST AND DETENTION - DAMAGES FOR BREACH OF CONSTITUTIONAL RIGHTS

People who suffered severe and prolonged human rights violations by police officers were awarded damages, including exemplary damages, payable by the State.

LAMON v BUMAI

National Court of Justice
Canning J

Papua New Guinea
[2010] PGNC 21
12 March 2010

Laws considered

Constitution of the Independent State of Papua New Guinea (CPNG)

Claims By and Against the State Act 1996 (CBASA)

Facts

The plaintiffs (Ps) were five young men who had been arrested and detained by police on suspicion of their involvement in a murder. The initial entry into the men's house, the search of the Ps and their property and their arrests were all conducted in an unlawful manner. The police then subjected the Ps to torture and inhuman treatment in their home village over a three-week period before they were transferred to Madang town and remanded in custody. They were kept in custody for a month, before being released without charge. The police conduct included repeatedly beating the men with tree branches, causing bleeding and broken limbs; shooting one man in the leg; scalding one man with hot water; setting fire to two men's hair; hanging two men from a tree; forcing two men to engage in sexual acts with each other at gunpoint; forcing the men to dig up graves in a futile search for the murder victim's body; and forcing one man's head under water for long periods, as a result of which he lost five teeth and almost suffocated.

In a previous trial the court found that the State, the Commissioner of Police and seven police officers had breached the following rights:

1. right to freedom based on law (CPNG section 32);
2. protection from inhuman treatment (CPNG section 36);
3. right to personal liberty (CPNG section 42);

4. freedom from forced labour (CPNG section 43); and
5. freedom from arbitrary search and entry (CPNG section 44).

The Ps then sought damages in the form of:

1. compensation for breaches of human rights;
2. general damages for pain, suffering, humiliation and shame; and
3. exemplary damages.

Issue

- What damages should be awarded?

Decision

For three of the five Ps, the court ordered damages totalling PGK 184,000 for each of them, made up as follows:

1. reasonable damages: PGK 100,000 (including damages for breach of constitutional rights and general damages for pain and suffering and other losses due to the injury);
2. exemplary damages: PGK 25,000; and
3. interest: PGK 59,000.

For the two other Ps, whose treatment was not as severe, the court ordered damages totalling PGK 128,800 for each of them, made up as follows:

1. reasonable damages: PGK 70,000;
2. exemplary damages: PGK 17,500; and
3. interest: PGK 41,300.

The court explained that there were at least two ways of assessing damages in human rights cases. The first was to identify the different causes of action and award damages or compensation for each cause of action, including for breach of a human right or constitutional right. An alternative approach was to award one global sum of damages for all causes of action (subject to the global sum being divided into different categories of damages such as general damages and exemplary damages).

The court applied the second approach in this case, partly because that is how the Ps formulated their claims, and partly because of the sheer number of causes of action established by each of the Ps.

The courts did not readily award exemplary damages against the State for abuse of police powers. They would not do so in cases that involved a significant and unwarranted departure from the proper exercise of police powers, such as instances of unauthorised police action. In such cases, exemplary damages would be awarded only against the officers personally. However, this was not a case of that kind, as the police had committed breaches of the law within the scope of a proper police operation. It was therefore appropriate to hold the State liable for their actions.

The purposes of exemplary damages were to:

1. punish the defendant and vindicate the distinction between a wilful and an innocent act; and
2. symbolise public indignation, without unjustly enriching a plaintiff.

The test for such awards is contained in CBASA section 12(1): the breach of constitutional rights must have been so severe or continuous as to warrant the award of exemplary damages.

This case satisfied the test. The State had failed in its duty to train and educate the police officers on proper and acceptable methods of policing. The State had to be penalised for the wilfully unconstitutional actions of its officers. An award of exemplary damages would symbolise the indignation and disgust of the court and the people at what the police had done to the Ps.

The court regarded as unrealistic the view that it should be the individual police officers, rather than the State, who should pay the exemplary damages, as the officers were unlikely to be able to pay.

The court also awarded interest at 8 per cent from the date of the first breach of constitutional rights to the date of judgment.

Comment

In *Proceedings Commissioner, Fiji Human Rights Commission v Commissioner of Police* [2006] FJCA 75, 3 PHRLD 1, the Fiji Court of Appeal ruled that exemplary damages are generally not available in an action for breach of constitutional rights. However, the position is different in Papua New Guinea, where CPNG section 58(2) and CBASA section 12(1) specifically authorise the award of exemplary damages in such cases. The award of such damages is discretionary, and they are not granted unless the breach of rights is serious.

There is no doubt that the horrendous treatment of the Ps in this case warranted the award of exemplary damages, as well as a substantial award for breaches of their constitutional rights and for the pain and suffering they had experienced.

ARREST AND DETENTION - DAMAGES FOR BREACH OF CONSTITUTIONAL RIGHTS

A person disabled as a result of a severe human rights violation by a police officer was awarded general and special damages, exemplary damages and damages for breach of constitutional rights.

NAMBA v NARU

National Court of Justice
Cannings J

Papua New Guinea
[2011] PGNC 124
23 September 2011

Laws considered

Constitution of the Independent State of Papua New Guinea (CPNG)

Claims By and Against the State Act 1996 (CBASA)

Facts

The plaintiff (P) was among a group of young men travelling in a truck one night when it was pulled over by the police. After the police had fired shots in the air and assaulted some of the other young men, P ran off towards his home, fearing for his safety. When confronted by one of the police officers, P stopped running and put his hands in the air. The officer then fired three shots at P, two of which struck his leg. As a result of the injuries caused by the gun shots, P was later taken to hospital where his leg was amputated.

P sued the police officer, the Commissioner of Police and the State for breach of his human rights which were protected under CPNG. The action was not defended, and judgment was entered against the Commissioner and the State. The only issue before the court was the assessment of damages.

Issue

- What damages should be awarded?

Decision

The court ordered damages totalling PGK 195,020 made up as follows:

1. general damages: PGK 150,000 to compensate for pain and suffering, inconvenience, loss of use of his leg and other losses due to the injury;
2. special damages: PGK 20 for the cost of obtaining a medical report;
3. exemplary damages: PGK 30,000 to punish the defendant, vindicate the distinction between a wilful and an innocent act and to symbolise public indignation of the defendant's conduct; and
4. compensation under the Constitution: PGK 15,000.

The court applied the principles set out in *Lamon v Bumai*, reported immediately above, regarding the award of exemplary damages. It found that this was a case where exemplary damages should be awarded against the State, as it did not involve an unauthorised police operation. Further, the breach of constitutional rights was so severe or continuous as to warrant an award of exemplary damages under CBASA section 12(1). Here, the police conduct was horrific, as there was no reason for P to have been shot. He had not done anything wrong. The Commissioner of Police and the State had failed in their duty to train and educate the officer in question on proper and acceptable methods of policing.

The court identified a number of P's human rights protected by CPNG that had been violated:

1. protection from inhuman treatment, under section 36;
2. the right to the full protection of the law, under section 37(1); and
3. the right to be treated with humanity and with respect for the inherent dignity of the human person, under section 37(17).

The court identified three separate breaches of P's human rights and awarded PGK 5000 for each of them:

1. when the first shot was fired, which missed;
2. when the next two shots were fired, which struck him; and
3. when he was denied medical treatment.

Comment

In *Lamon v Bumai,* reported immediately above, the court distinguished two methods of calculating damages in cases where police officers had breached the plaintiff's constitutional or human rights. The first was to identify the different causes of action and award damages or compensation for each cause of action, including for breach of the human right or constitutional right. The other approach was to award one global sum of damages for all causes of action (subject to the global sum being divided into different categories of damages such as general damages and exemplary damages). The court in *Lamon v Bumai* applied the latter approach. By contrast, the same judge considered that the first approach should be applied in the present case. In determining the compensation for breach of constitutional rights, the court proceeded, not by assessing damages for each right that had been breached, but by awarding a sum of money for each of the three 'distinct occasions' that involved a violation of rights.

Whichever approach is used, it is important to keep in mind the purpose of each type or head of damage, in order to avoid double-counting the damages. General damages seek to compensate for items such as expenses incurred, income foregone and pain and suffering experienced as a result of the wrongdoing. Exemplary damages punish the defendant and mark judicial disapproval of the conduct. Constitutional compensation serves to provide a remedy for the very fact that rights have been infringed. It would be payable even if the breach caused no physical, psychological or economic loss, and there was no flagrant behaviour that would justify exemplary damages.

Even keeping these distinctions clear, it is difficult to explain why the court treated as 'distinct occasions' meriting an equal award of damages (1) the firing of one shot that missed P and (2) the firing of two other shots that struck P and caused him serious injury. The shots appear to have been fired in succession at one place. It may be that the court was drawing a distinction similar to that between assault (threatening physical injury) and battery (actually causing physical injury). If so, it might be thought that the separate 'causes of action' referred to by the court relate to different kinds of wrongful acts, rather than separate events in time. Further clarification of this point would be welcome.

ARREST AND DETENTION - DAMAGES FOR BREACH OF COMMON LAW AND CONSTITUTIONAL RIGHTS

A foreign national who was severely assaulted on arrest by police and who suffered inhuman treatment during lengthy unlawful detention pending deportation was awarded damages, including aggravated and exemplary damages.

NAMDI v ATTORNEY GENERAL

Supreme Court
Slicer J

Samoa
[2011] WSSC 91
3 September 2011

Laws considered

Constitution of the Independent State of Samoa (CS)

Immigration Act 2004 (IA)

Facts

The plaintiff (P) was a Nigerian national married to an American Samoan woman. In 2009 P returned from American Samoa to Samoa to face criminal charges for theft of USD 10,000 and false pretences. Upon his arrival in Samoa, P was arrested and detained and his passport, money and other personal property were taken by police for safekeeping.

At P's trial in March 2010 P was found not guilty, although the trial judge remarked that P was 'a rogue and an undesirable immigrant'. The court registrar requested the police to release P's travel documents but this request was ignored. P approached both the Speaker of the Legislative Assembly and the Prime Minister for assistance in recovering his property from the police but, despite a direction from the Prime Minister, the property was never returned.

On 2 December 2010 Samoan immigration authorities issued a deportation order against P, the validity of which was not questioned. However, P continued to object to leaving Samoa until his passport and property had been returned to him. At no stage did police or government officials properly inquire into the substance of P's complaints.

On 14 January 2011 P was arrested and severely assaulted by police. He was kept in custody pending deportation. On the night of 20–21 January 2011 P was again beaten by police before being transported, bound and gagged, to the airport. When the aircraft captain refused to allow him to board the flight, P was returned to Apia, and kept in custody for a further four-and-a-half months until

released by court order on 6 June 2011. During this time he was confined without the opportunity to exercise outside his barracks and was given minimal food, and some of his health needs were not met.

P claimed damages in tort for assault, false imprisonment and breach of a statutory duty of care. He also sought restitution of his property and compensation for his expenses while being unable to leave Samoa as a result of the detention of his passport. He also sought exemplary damages. He invoked the rights to personal liberty, to freedom from inhuman and degrading treatment and to property, as protected by CS Articles 6, 7 and 14 respectively, in support of his causes of action. The defendant denied all wrongdoing apart from the failure to return P's passport.

Issues

- Were P's claims substantiated?
- If so, what damages should be awarded?

Decision

The court found most of P's claims were substantiated and awarded total damages of WST 103,048.

The court found that P was assaulted by police on 14 January and awarded WST 6,000 damages for this. It found that on 20–21 January 2011, P was assaulted and treated in an inhuman and degrading way, as the police had used excessive force in transporting P to the airport. He was awarded WST 15,000 for these wrongs.

On the claim for false imprisonment and inhuman treatment, P succeeded in part. P had been detained under IA section 33. By section 33(7) he was to be deported 'as soon as possible'. For the period from 14 January 2011 until 20 March 2011, it was reasonable for P to be detained while attempts were made to make travel arrangements for P. Thereafter, no reasonable attempts were made. In these circumstances, his continued detention became unlawful.

In the alternative, the conditions of his detention were inhuman and degrading. Although P was a detainee, not a prisoner, his treatment in custody was worse than that of a person under punishment. This amounted to a breach of the duty of care owed under the IA. The obligations of the State to a prisoner or detainee have been recognised by international law and, in the absence of clear language in a statute, a court will not impute an intention in the legislature to abrogate fundamental rights or freedoms. P was entitled to compensation on this claim for WST 12,000.

For the loss of his property, including money, P was awarded WST 9,548. The court recognised that police are empowered to hold the property of a suspect during custody or as security for bail, but that does not give them a right of acquisition. P's right to property under CS Article 14 had been breached.

P was not entitled to his expenses prior to his trial in March 2010, as at that time he was facing charges that had been properly brought against him. However, from the time of his acquittal until 14 January 2011 he had effectively been prevented from leaving Samoa through the failure to return his passport and property. For this, P was awarded damages amounting to WST 7,500. There was a further period from his release on 6 June 2011 until the date of judgment during which P was also entitled to his expenses, adding another WST 3,000.

The court ordered a further WST 50,000 by way of aggravated and punitive damages.

Comment

In the words of the court, 'this case reflects systemic and individual failures which, despite the best efforts of the Prime Minister, led to a shameful and tragic outcome'.

The court did not dispute that it was open to Samoan officials to decide to deport P, particularly in the light of the assessment of the judge at the 2010 criminal trial that P was a rogue and an undesirable

immigrant. However, that assessment could in no way justify the conduct of officials in dealing with P's property and effecting his deportation. As the court noted, even a rogue and an undesirable immigrant to Samoa has rights afforded by the Constitution, statute and the common law. Where officials of the State fail to recognise this basic principle, it falls to the courts to provide a remedy, in this case in the form of compensation.

Punitive or exemplary damages are not lightly awarded, and are usually confined to cases of flagrant disregard of another's rights. This was not a case of a purely technical breach of rights, as suggested by the defendant. Rather, it seems that the police were influenced by a sense of grievance derived from their perception that P had been unjustly acquitted at his trial. The court insisted that this could not justify the police seeking retribution by other means. Remarkably, the police hostility to P was so strong that not even direct intervention from the Prime Minister was enough to achieve a satisfactory response.

The court also noted that the conduct of the defence during the trial, in which no fault was accepted by the defendant, was relevant to the assessment of damages. The point is similar to that in *Proceedings Commissioner, Fiji Human Rights Commission v Commissioner of Police* [2006] FJCA 75, 3 PHRLD 1, where the Fiji Court of Appeal ruled that the refusal by police to apologise for their conduct that breached the plaintiff's constitutional rights could be a contributing factor to an award of damages. In practice, this can create problems where the defence is based on a different version of events from those alleged by the plaintiff. However, such difficulty is unlikely to attract much judicial sympathy if there has not been a thorough, independent investigation into the plaintiff's allegations well before the matter comes to court. In this case, the court stated in relation to P's claim to his missing property:

Proper procedure required the appointment of a senior independent officer to investigate an internal irregularity. The then Commissioner of Police had been directed to investigate and report to the Prime Minister on the 'money' claim. It was not done or, if so, [it was done] in an unacceptable manner.

CHILDREN

CHILDREN - SENTENCING OF CHILD OFFENDERS

Child offenders should not be sentenced to imprisonment except as a last resort and for the shortest appropriate time.

PUBLIC PROSECUTOR v MALIKUM

Supreme Court
Lunabek CJ

Vanuatu
[2010] VUSC 111
26 August 2010

International instrument and law considered

Convention on the Rights of the Child (CRC)

Penal Code [Cap 135] (PC)

Facts

The defendant (D) pleaded guilty to one count of sexual intercourse without consent and one count of sexual intercourse with a child under the age of 13 years contrary to PC sections 91 and 97(1) respectively. D was aged 15 years at the time of the offence. D admitted that he had inserted a piece of wood into the vagina of his cousin, a girl aged three years, at their grandfather's home. This fell within the expanded definition of 'sexual intercourse' introduced in 2006 in PC section 89A (b):

> For the purposes of this Act, sexual intercourse means any of the following activities, between any male upon a female, any male upon a male, any female upon a female or any female upon a male:
>
> …
>
> (b) the penetration, to any extent, of the vagina or anus of a person by an object, being penetration carried out by another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law.

The medical evidence indicated that there had been no bruising or injury to the girl's vagina.

The court had to determine the sentence for these offences. The maximum penalty under section 91 was life imprisonment and under section 97(1) was imprisonment for 14 years.

Issue

- What was the appropriate sentence?

Decision

The court sentenced D as follows:

1. 24 months' probation and 100 hours' community work for sexual intercourse without consent;
2. 12 months' probation and 50 hours' community work for unlawful sexual intercourse; and
3. the sentences were to be served concurrently.

The court recognised the seriousness of the offences, which was aggravated by the facts that the girl was aged three years at the time of the offence, that D had used a piece of wood to penetrate her vagina, that there was a considerable disparity in age between D and the girl, and that they were cousins. These factors warranted a sentence of six years' imprisonment.

However, the court referred to CRC Article 37(b) which had been ratified by Vanuatu and given domestic effect by PC section 54.

CRC Article 37(b) provides:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of the last resort and for the shortest appropriate period of time.

PC section 54 provides:

1. a person under 16 years of age is not to be sentenced to imprisonment unless no other method of punishment is appropriate; and
2. if a person under the age of 16 years is sentenced to imprisonment, the court must give its reasons for doing so.

The court had regard to a number of mitigating circumstances. D was aged 15 years when he committed the offence. He had never attended school. He had no prior convictions and admitted the offence when questioned by police. He pleaded guilty at the earliest opportunity. He was ashamed of his actions and had moved away to live with his grandfather. In the light of these circumstances and the direction in section 54, the court imposed a non-custodial sentence.

Comment

Vanuatu's PC recognises the seriousness of any form of sexual intercourse without consent or when performed with a child under the age of 13. The maximum sentences are severe, and where the victim is a child, a stern sentence can normally be expected: see *Police v Faiga* [2008] WSSC 96, 3 PHRLD 17, *R v Teokila* [2008] TVHC 2, 3 PHRLD 18. In this case, the court indicated that a sentence of at least six years would have been appropriate, given the nature and circumstances of the offence.

But the court must also take account of the particular circumstances of the offender, particularly when he or she is a child. Under the CRC, imprisonment should be a last resort for sentencing a child, which is defined in that Convention as a person 'below the age of 18 years, unless under the law applicable to the child, majority is attained earlier'. In the PC, this principle is applied only for the benefit of offenders under the age of 16. In this respect, Vanuatu appears to have only partially complied with its obligations under the CRC.

The court displayed considerable leniency to the offender on account of his youth, lack of education and remorse. This can be justified on the basis that imprisonment can be a harmful experience for young offenders, because of the negative influences that may be encountered in prison and the adverse effects that may be caused by separation from the family and community. Finding alternative punishments to imprisonment may ultimately provide better long-term protection for the community to which the young offender will return. For this reason, it is desirable that sentences such as community service are available and utilised by the courts in appropriate cases.

The court did not explicitly address the question of whether the sentence should make allowance for the fact that the intercourse took a form other than penile penetration, although the court listed as an aggravating factor that the offender had used a piece of wood to penetrate the girl's vagina. This issue is discussed in another case from Vanuatu, Public Prosecutor v Tao, reported at page 52.

CHILDREN - SENTENCING OF CHILD OFFENDERS

> **Child offenders should not be sentenced to imprisonment except as a last resort and for the shortest appropriate time.**

ULUGIA v POLICE

Court of Appeal
Baragwanath, Slicer, Fisher JJ

Samoa
[2010] WSCA 15
24 September 2010

International instrument and laws considered

Convention on the Rights of the Child (CRC)

Crimes Ordinance 1961 (CO)

Young Offenders Act 2007 (YOA)

Facts

A group of young men attacked and brutally beat two other youths, one of whom died from the prolonged and unprovoked beating he received. Five of the attackers, including U, F and A, were convicted of manslaughter under the CO. U, F, A and another attacker were each sentenced to imprisonment for four-and-a-half years. The fifth attacker, who was 15 years old and had played a less culpable role, was placed on probation for two years. U was 14 years old, F was 18 and A was 17.

U appealed against conviction and sentence, while F and A only appealed against sentence. U's appeal against conviction was dismissed. This report deals only with the appeals against sentence.

Issue

- Were the sentences imposed appropriate, given the youth of the offenders and their varying involvement in the attack on the deceased victim?

Decision

The Court of Appeal dismissed the appeals by F and A. The court allowed U's appeal and reduced his sentence to three years in prison.

The court had regard to the terms of the CRC, to which Samoa was a party. It noted that the CRC did not prohibit the imprisonment of children. Article 37 of the Convention prohibited the use of the death penalty or life imprisonment without the possibility of release for offenders under the age of 18 years. It also provided that imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time.

Further, the court noted that the YOA contemplated the imprisonment of children in appropriate cases, and required child prisoners to be kept separately from adult prisoners.

The trial judge had described the offence as 'one of the most serious cases of an unprovoked and violent killing to be dealt with by this court'. As a result, the Court of Appeal concluded that this was a case where the imposed term of imprisonment could properly be regarded as a last resort and the shortest appropriate period of time. The trial judge had taken into account all relevant mitigating circumstances, and there was no valid objection to the sentences imposed on F and A. If anything, F was treated too leniently, as he was the biggest and oldest and had initiated the misconduct.

Where joint offenders are equally culpable, their sentences should take account of the principles of parity and consistency. In this case, the principles warranted a lesser sentence for U. If the offenders had all been adults, the Court of Appeal may not have intervened in the sentences imposed. However, given that U was a child and significantly younger than F, it was appropriate that he should receive a shorter sentence than F. Otherwise, the court reasoned, a young person in U's position might compare himself with his co-offender and feel aggrieved, which might affect his prospects of rehabilitation.

Comment

In disposing of the appeals against sentence, the Court of Appeal referred to the CRC, without distinguishing between the three appellants. Technically, only U was entitled to the protection of that Convention. The CRC defines a child as a person under the age of 18 years, unless under the national law the age of majority is attained earlier. Therefore, in this case the provisions of the CRC were not applicable to F, as he had reached the age of 18, nor to A who was 17, because the YOA section 2 defines 'adult' in that Act as a person of or over the age of 17 years. Even so, it was appropriate for the court to consider the relative youth of all offenders as a mitigating factor.

The CRC provides a number of protections for children who come into contact with the criminal justice system as suspects, accused persons or convicted offenders. These protections attempt to take into account the special vulnerabilities of the child and the desirability of promoting the child's reintegration into society. In particular, it requires States to provide alternative measures to institutional care or custody, such as supervision orders, counselling and probation. In this case, the trial judge was provided with evidence of the range of alternative measures available, but considered that the offences still justified a custodial sentence.

As the Court of Appeal recognised, the CRC does not exclude the possibility of using imprisonment as a sentence against a child, provided it is used as the last resort and the minimum appropriate sentence. (See also *State v Tamanivalu* 1 PHRLD 62.) Here, U was involved in a serious offence and a prison sentence was not inappropriate.

CHILDREN - SENTENCING OF MOTHER OF NEWLY BORN CHILD

A prison sentence for an offender who had just given birth was deferred for six months to make allowance for the special needs of both the mother and the baby.

QUARTER v R

Court of Appeal
Barker P, Williams,
Fisher JJA

Cook Islands
CA 03/11
9 June 2011

International instrument considered

Convention on the Rights of the Child (CRC)

Facts

The appellant (A) pleaded guilty to a charge of theft as a servant having stolen NZD 30,000 over an 18-month period. She was sentenced in the High Court to 12 months in prison. The trial judge also ordered A to pay reparation of the balance of the stolen money that she had not yet repaid. A had given birth to a baby 10 days before being sentenced. She served 20 days in custody before being granted bail pending an appeal. At the time of the appeal hearing, the baby was two months old.

A appealed against the sentence on the basis that she had recently given birth. The Court of Appeal received further evidence that had not been available to the trial judge: two medical certificates indicated that A had suffered severe bleeding after the birth, requiring rest and iron supplements; that it was desirable for the baby to continue exclusive breastfeeding for six months after birth and that A needed to breastfeed regularly or to express milk to avoid breast pain. It was also established that there were no adequate facilities at the prison for mothers with babies.

Issue

- Should the fact that A had recently given birth affect her sentence?

Decision

The Court of Appeal ordered that A be remanded on bail and remitted for sentencing by the High Court after the baby was six months old. The court indicated that if A had by then repaid the NZD 30,000 a sentence of three months additional to the 20 days already spent in custody might be appropriate.

Comment

The Court of Appeal had to balance two competing arguments: that A should not avoid punishment for her crime simply because she had given birth; and the fact that both A and her baby had special needs in the first few months after the baby was born. The court noted that while pregnancy or recent birth could not provide immunity to a prison sentence, it could affect the nature or duration of the sentence. The court took into account not just the interests of the mother, but also those of the baby, reinforced by the Cook Islands' accession to the CRC. In the circumstances, allowing A to stay out of prison until the baby was six months old was a pragmatic solution to the particular issues raised in this case.

However, it could be argued that the baby could still suffer psychologically when separated from the mother if A was subsequently sentenced to imprisonment once the baby reached the age of six months. A more general and durable solution to this issue could involve providing better facilities in

the prison to enable mothers to keep their babies with them. The Court of Appeal thought that this solution deserved investigation by the Minister of Justice, directing that a copy of the judgment be served on the Minister for consideration.

A was eventually sentenced by the High Court to a further period of imprisonment of three months: see *R v Quarter* [2011] CKHC 20.

CHILDREN - INTER-COUNTRY ADOPTION; BEST INTERESTS OF THE CHILD

In deciding whether to approve an inter-country adoption, a Vanuatu court had regard to the principles in the Hague Convention, even though Vanuatu was not a party to that Convention.

IN RE CHILD M

Supreme Court
Spear J

Vanuatu
[2011] VUSC 16
15 March 2011

International instruments and law considered

Convention on the Rights of the Child (CRC)

Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption 1993 (HC)

Adoption Act 1958 (UK) (AA)

Facts

The applicants were a married couple from Noumea, New Caledonia, who were seeking to adopt a 13-year-old girl of ni-Vanuatu nationality. The girl's natural parents consented to the adoption which would entail the girl moving to New Caledonia to live with the applicants. There had been no formal evaluation of the proposed adoption by any official agency. The applicants sought an adoption order from the court under the AA (as part of the existing law at Independence) authorising the applicants to adopt the girl.

Issue

- Should the court authorise the proposed adoption?

Decision

The court declined to make the adoption order.

Without deciding the point, the court assumed it had the power to make an adoption order in favour of non-resident applicants under AA section 12. However, the power was discretionary, and the discretion had to be exercised in conformity with Vanuatu's international obligations.

In this case there were two relevant international Conventions, the CRC and the HC. CRC Article 21 recognised that in allowing adoptions, the best interests of the child must be the paramount consideration. Clauses (b)–(e) of Article 21 dealt specifically with inter-country adoptions and provided in general terms for the appropriate conditions and processes that should be applied.

The HC was designed to give practical effect to CRC Article 21. It specified a number of rules designed to protect the best interests and fundamental rights of the child in cases of inter-country adoptions. These rules required States to:

1. first consider national solutions – that is, placement for adoption in the country of origin;
2. ensure that the child was 'adoptable';
3. ensure that information about the child and his/her parents was preserved;
4. ensure that the prospective adoptive parents were evaluated thoroughly by an independent, responsible and competent government agency in their country;
5. ensure that the match of adoptive parents and child was suitable;
6. impose additional safeguards where required; and
7. ensure that the placement in the foreign country would be monitored and generally supervised by a responsible and appropriate arm of that foreign country.

Vanuatu was a party to the CRC, but not to the HC. The court regarded itself as bound to exercise its discretion consistently with CRC Article 21, to protect the best interests of the child. The HC requirements spelled out in more detail how that could be achieved. Therefore, the court had regard to the HC requirements in assessing whether the proposed adoption was in the girl's best interests.

The applicants had failed to show that there was any guarantee that a responsible and suitable government body in New Caledonia would undertake responsibility for assisting with the assessment of the prospective adoptive parents and the ongoing supervision and monitoring of the adoption. It was also uncertain what would occur with respect to the nationality of the child. The court would need to be satisfied of these matters before an order could be made.

Comment

It is increasingly common for courts in the Pacific region to refer to a human rights Convention when exercising a judicial discretion, such as when sentencing offenders or deciding what is in the best interests of a child. They accept that the discretion should be exercised consistently with a Convention to which the relevant State is a party, even if the Convention has not been incorporated into the domestic law. This can be justified on the basis that the courts are acting as agents of the State and where possible should not bring the State into conflict with its international obligations. On this basis, it was appropriate for the court to have regard to the CRC, which Vanuatu had ratified in 1993. This required the decision about the proposed adoption to be made in the best interests of the child, as previously recognised in relation to decisions about the custody of children in *Molu v Molu No. 2* [1998] VUSC 15, 1 PHRLD 18.

But the further question raised by this case was whether a court should take account of a Convention to which the State was not a party, in this case the HC. Here, the court took into account the factors established by the HC. It did so, not because Vanuatu was under an obligation to comply with the HC, but because the principles set out in the HC implemented the principles of the CRC and represented the current international consensus as to what was in the best interests of a child in relation to an inter-country adoption. It is suggested that it is also entirely appropriate to have regard to this consensus, even if it is not obligatory to do so. With 87 States already party to the HC, its principles provide a useful resource for determining what is best for the child in these complex situations. The HC was taken into account by the High Court of Fiji in another inter-country adoption case, *Social Welfare Officer v Marshall* [2008] FJHC 283, 2 PHRLD 8.

The Vanuatu court's use of the HC principles was also comparable to that in the Cook Islands case of *Marsters v Richards* DP 4/2008, 3 PHRLD 8. There Williams CJ exercised his discretion to order an abducted child to be returned to its country of origin. His Honour had regard to the principles in the Hague Convention on the Civil Aspects of International Child Abduction, even though the Cook Islands had not ratified that Convention. Again, that particular Convention revealed the international consensus on what was in the best interests of the abducted child in question.

CHILDREN - DURATION OF MAINTENANCE ORDERS

An order for the maintenance of a child in Papua New Guinea should be construed as operating until the child reached the age of 16 years, so that it would be necessary to prove special circumstances to extend the order beyond that age.

SCOTT v SCOTT

National Court of Justice
Kandakasi J

Papua New Guinea
[2009] PGNC 226
17 December 2009

International instrument and laws considered

Universal Declaration of Human Rights (UDHR)

Matrimonial Causes Act 1963 (MCA)

Child Welfare Act 1961 (CWA)

Deserted Wives and Children Act 1951 (DWCA)

Facts

The respondent father sought an order to terminate maintenance payments in respect of his son who had attained 18 years of age. He argued that the normal cut-off period for maintenance was either 16 or 18 years. The applicant mother (M) sought continuation of the payments until the son reached 21 years of age. All of the parties were from Canada, and M and the son were currently living in Canada.

Under MCA section 73(1), the National Court could make such order for the maintenance of a child of a marriage as it thought proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances. Section 73(4) provided:

> The power of the court to make an order with respect to the maintenance of children of the marriage shall not be exercised for the benefit of a child who has attained the age of 21 years unless the court is of opinion that there are special circumstances that justify the making of such an order for his benefit.

Issue

- Should maintenance be continued until the son turned 21 years of age?

Decision

The court ruled that where an existing maintenance order did not specify the duration of the order, the normal cut-off date of 16 years would apply. A party seeking maintenance beyond that age had an obligation to make a case for special maintenance. The matter was adjourned to allow the parties time to attempt to settle the dispute in the light of the court's ruling.

The court noted that several laws provided for different age limits in relation to maintenance orders. MCA section 73(4) limited the power of the National Court to order maintenance for the child of a marriage over 21 years of age unless there were special circumstances. By contrast, under CWA section 56(b), an order by a Children's or District Court for maintenance of a child born outside marriage operated until the child reached 16 years. Similarly, an order by a District Court for maintenance under DWCA section 3(3) only operated until the child turned 16.

In the court's judgment, to allow maintenance orders under the MCA to operate until the child was 21 or older would create apparent discrimination between children, depending on which Act applied.

Equality of all people was a fundamental right recognised in UDHR Articles 1 and 7 and many other international Conventions. There was no sound policy reason for that different treatment, and it could not be justified as positive discrimination. MCA section 73(4) should not be read to enforce that apparent discrimination, which Parliament could not have intended.

The court considered that attaining the age of 16 years marked the end of normal dependency and the consequent maintenance period. It noted the almost universal international acceptance that children ceased to be children when they reached their 16th birthday and became young adults. That is when they ceased to be dependent on their parents and began to make their own decisions. It also noted that the Criminal Code made 16 the minimum age of consent for sexual penetration and that a female was of marriageable age at 16. Under MCA section 59, a decree absolute could not be granted unless satisfactory arrangements had been made for the welfare of children less than 16 years of age. Further, most judicial decisions on maintenance or dependency treated 16 years as the age of majority in PNG, although some suggested that the age should be 18 years.

These factors confirmed that 16 years was the age of majority for custody and maintenance orders, a conclusion not excluded by MCA section 73(4). It was apparent that section 73(4) dealt with two types of maintenance: ordinary maintenance for children under 16 and special maintenance for children over 16 and over 21. Even so, the court had to assess each case on its merits.

Therefore, when a case for maintenance was made out under MCA 73(4), it should normally be ordered until the child was aged 16. A court might order maintenance beyond 16, 18 or even 21 years where special circumstances were shown to exist. If an order did not specify the cut-off date, it should be understood as 16 years, leaving it to the parties to seek an order for extension beyond that date by proving special circumstances.

Comment

In the usual course of events, a party seeking to vary or terminate an existing order for maintenance would need to demonstrate a change of circumstances sufficient to justify a departure from the status quo. If that approach had been applied in this case, F would have been required to demonstrate why he should no longer pay maintenance for his son.

However, the court reached a different result by implying a limit on the previous court order, in effect limiting the operation of the order until the son reached the age of 16. Given that the son was already 18, it fell to M to show exceptional circumstances that would warrant an extension of the order beyond the age of 16.

There are a number of difficulties with this conclusion. First, the court stated that 'it is accepted almost the world over that in most cases, children cease to be children when they reach their 16th birthday'. Unfortunately, this assessment was made without reference to the Convention on the Rights of the Child (CRC). Article 1 of the CRC defines a child as 'every human being below the age of 18 years unless under the law applicable to the child majority is attained earlier'. This Convention, ratified or acceded to by Papua New Guinea and almost every other member of the United Nations, indicates that 18 is accepted internationally as the 'normal' age of majority. Where a statutory term is ambiguous, Pacific courts have favoured a construction that is consistent with an applicable Convention. Therefore, a court interpreting the word 'child' in a statute should prima facie treat it as referring to a person under the age of 18 years, unless the 'law applicable to the child' provided for a lower age of majority. In this case, the applicable law was the MCA, which contained nothing to suggest a lower age of majority. Accordingly, the starting point for any interpretation of 'child' in the MCA should have been 'a person under the age of 18 years'.

However, the interpretation that would be consistent with the State's international obligations under the CRC must give way where there is clear language in the statute to the contrary. When section

73(4) refers to 'a child who has attained the age of 21 years', it is clearly not using the meaning of 'child' in CRC Article 1. It clearly contemplates that maintenance orders may be made for a person over 21 years, who may still be a child for these purposes. If a statute extends benefits to people over the age of 18 years, there is nothing in the CRC to authorise or require a court to strip those benefits away. The CRC operates to set a minimum standard for the treatment of children under 18; it does not prevent a State from extending those benefits to others.

It is also difficult to see how section 73(4) can be read as creating two categories where proof of special circumstances was required, namely children over 16 and children over 21. It is not at all clear how these categories should be treated differently. If they both require proof of special circumstances, then the two categories would effectively collapse into one. This has the practical effect of amending section 73(4), by lowering the age at which special circumstances must be proved from 21 to 16 years. It is suggested that making such a change falls outside the proper limits of statutory construction. It would be preferable if uniformity in the normal duration of maintenance orders were achieved by legislation, made by the Parliament in the light of Papua New Guinea's obligations under the CRC.

As to the argument that the provision offended the guarantee of equality, it should be noted that the Constitution of Papua New Guinea does not prohibit discrimination based on age. Article 55 recognises equality 'irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex'. It also permits laws for the special benefit, welfare, protection or advancement of children and young persons. Further, even if there was impermissible discrimination, it is not clear why the appropriate response would be to reduce the benefits of maintenance to those below the age of 16 years, when discrimination could have equally been removed by raising the age limit under the other relevant laws to 21 years.

DEMOCRACY AND RULE OF LAW

DEMOCRACY - FREEDOM OF ASSOCIATION; RESTRICTION ON ABILITY OF MEMBERS OF PARLIAMENT TO CHANGE PARTIES AND TO VOTE FREELY IN PARLIAMENT

Aspects of a law that effectively prevented members of Parliament from changing parties between elections and from voting in Parliament contrary to the party line were unjustifiable restrictions on the freedom of association and the right to exercise public functions.

SPECIAL REFERENCE BY FLY RIVER PROVINCIAL EXECUTIVE; RE ORGANIC LAW ON INTEGRITY OF POLITICAL PARTIES AND CANDIDATES

Supreme Court of Justice
Injia CJ; Salika Dep CJ; Sakora, Kirriwom, Gavara-Nanu JJ

Papua New Guinea
[2010] PGSC 3
7 July 2010

Laws considered

Constitution of the Independent State of Papua New Guinea (CPNG)

Organic Law on the Integrity of Political Parties and Candidates 1993 (OL)

Facts

For some time after Independence, elected members of Parliament (MPs) in Papua New Guinea displayed shifting party allegiance, particularly in relation to votes on the election of the Prime Minister after a general election and on 'no confidence' motions. By 2000 it was considered necessary to address the instability created by this fluid party support. In that year, the Parliament amended the CPNG to allow for the enactment of an Organic Law to deal with political parties and their relationship with MPs; it also enacted the first OL. (Under the CPNG, an Organic Law is a statute with higher status than ordinary legislation and usually requires a two-thirds absolute majority in Parliament for its enactment or amendment.) In 2003 Parliament repealed the first OL and enacted a new OL which was the law in question in this case. The constitutional amendments and both versions of the OL were passed with overwhelming support from both sides of the Parliament.

In 2008 a reference was brought regarding the constitutionality of the amendments and certain provisions of the OL. The provisions had the effect of severely limiting the capacity of MPs to resign from the party with whose endorsement they were elected, except shortly before the next election. They also required MPs to support their party's position in Parliamentary votes on key issues – the election of the Prime Minister, no confidence motions, approval of the national budget and proposed constitutional amendments. Other provisions similarly restricted how independent MPs could vote on the key issues. Non-compliance with the restrictions constituted an offence of misconduct in office and a vote by an MP that did not comply with these restrictions would not be counted.

It was argued that the constitutional amendments were invalid because they altered the basic structure of the CPNG as established at Independence, by restricting the rights and privileges of citizens, and the powers and privileges of Parliament and MPs.

Further, it was argued that particular provisions in the OL imposed impermissible restrictions on a range of rights guaranteed in the CPNG, including the rights to hold public office and to exercise public functions and the freedom of association.

The OL also sought to regulate external contributions to political parties in PNG. Section 81 allowed non-citizens to make unlimited contributions to the Central Fund (for the funding of political parties generally) and limited contributions to individual political parties and candidates on certain conditions. It was argued that this was inconsistent with CPNG section 129(1)(c) which allowed for the enactment of Organic Laws *prohibiting* non-citizens from contributing to the funds of political parties.

Issues

- Did Parliament have the power to amend the CPNG so as to alter the basic structure of the constitution?
- Did particular provisions in the OL unjustifiably restrict the rights of citizens or MPs?
- Were the provisions in OL section 81 constitutional?

Decision

The court upheld the constitutional amendments except to the extent that they authorised an Organic Law that restricted or prohibited exercising the right to hold public office and to exercise public functions as protected by CPNG section 50(1)(e). Further, it identified 10 provisions in the OL that were unconstitutional.

The court rejected the argument that Parliament lacked the power to alter the basic structure of the Constitution. Although an implied limit of this kind has been recognised in some foreign jurisdictions such as India, it was inapplicable to the CPNG. The only limits on the Parliament's legislative powers were the express limits and conditions stated in the CPNG.

In this respect, CPNG section 50(2) only permitted a law to regulate, as opposed to restrict or prohibit, the exercise of rights in section 50(1). To the extent that the constitutional amendments had authorised restrictions or prohibitions on the right to hold public office and to exercise public functions, they were invalid.

In relation to the provisions in the OL that limited the ability of MPs to resign from their party, the court held that these were unconstitutional for infringing the freedom of association protected by CPNG section 47. The CPNG permitted regulation of or restrictions on the exercise of that freedom, but the provisions in the OL went further than was permitted: they were either a prohibition on the exercise of the freedom, or a restriction that could not be justified as necessary in a democratic society. The measures had the potential to destroy the political party system, resulting in political instability and bad governance. The problems that the measures were intended to address could be corrected by other means, namely through providing information to and educating MPs and electors. Those seeking to justify the law had not adduced evidence showing that similar measures had been adopted in other democratic societies.

The provisions in the OL that directed how MPs should vote on key issues infringed the right to hold public office and to exercise public functions protected by CPNG section 50(1)(e). An MP's right to vote on a proposed law was considered among the most fundamental of his or her elective and representative duties, and there was no authority to deny the performance of this duty under any circumstance. While it was permissible for political parties to use political means to secure the voting support of party members, the OL went further by legally compelling an MP to vote in certain ways and by invalidating the MP's vote if not in accordance with the party's instructions. The provisions in the OL were unconstitutional because they restricted or prohibited the exercise of the right in section 50(1)(e), when only regulation of the right was permitted. In any event, it had not been proved that the measures were justifiable as reasonably necessary in a democratic society.

For similar reasons, these provisions in the OL also infringed CPNG section 115, which protects the privileges of MPs. The provisions impermissibly restricted each MP's right to freedom of speech, debate and vote in the Parliament.

The provisions in OL section 81 were unconstitutional. The CPNG only allowed for an Organic Law that *prohibited* contributions to a party or candidate; it did not authorise a law that regulated such contributions.

Comment

It is understandable that the court rejected the argument for an implied limit on the power of Parliament to amend the basic structure of the Constitution. The CPNG is notable for the degree of detail it provides on the powers of governmental institutions and the limits on those powers. In the words of the court, the CPNG 'is a complete code of law that is comprehensive and exhaustive on every aspect of good governance'. It also contains within it the applicable principles of interpretation and the sources of aids to interpretation. In these circumstances, it was difficult to justify a further implied limit on power.

The questions regarding the compatibility of this law with the freedom of association are complex. Admittedly, the restrictions imposed on an MP's freedom to change parties were severe (although it seems that they were not effectively enforced in the period between 2003 and 2010). But the court's conclusion that they were not reasonably justifiable in a democratic society is contentious. The court identified the underlying problem as a personal or cultural one, which could more effectively be addressed by education over a long period:

> In an attempt to control [MPs'] behaviour and conduct, [the OL] is the Parliament's answer to correcting human failures and shortcomings that only integral human development of the whole human person can correct and not through or by passing laws to deal with that human failure. …
>
> We acknowledge that the behaviour and conduct of many Members after they are elected to office particularly when voting on important matters in the Parliament are unacceptable. But such conduct can be corrected by the Parliament through information and education of Members and electors. This cannot be done overnight by compulsion under law.

There is scope for different opinions on the most effective means of bringing about the desired changes in the conduct of MPs. No doubt education would have a role to play over the longer term. But where the MPs themselves appear to have considered that education alone would not succeed, at least in the short term, there is a good argument for allowing regulation to play a part as well. On the face of it, the law was designed to bolster the party system by strengthening the hold of parties over their MPs; it was also likely to prolong the terms of government by strengthening the grip of government parties on the Parliament. Yet the court concluded, without elaboration, that the law would destroy the party system and produce political instability. Perhaps the court had assessed that the law could not effectively contain the influence of money and power politics, a view that may have been borne out by experience. But in determining what was most effective in bringing about change in political behaviour, it may have been more appropriate in this case to defer to the judgment of the political branches of government (the legislature and the executive).

DEMOCRACY - RULE OF LAW; MOTION OF NO CONFIDENCE IN PRIME MINISTER

In determining whether a motion of no confidence in the Prime Minister had been passed by an absolute majority of members of Parliament, it was necessary to count the Speaker as a member of Parliament.

KILMAN v SPEAKER OF PARLIAMENT OF THE REPUBLIC OF VANUATU

Court of Appeal
Saksak, Fatiaki, Spear JJ

Vanuatu
[2011] VUCA 15
13 May 2011

Law considered

Constitution of the Republic of Vanuatu (CV)

Facts

On Sunday 24 April 2011, all 52 members of the Parliament of Vanuatu were present when a motion of no confidence in the plaintiff, Honourable Sato Kilman (K), the Prime Minister of Vanuatu, was voted on. All except the Speaker (S) took part in the vote. S declared that the motion had been carried by 26 votes to 25. The Parliament then elected another member, Honourable Serge Vohor (V), as Prime Minister. K sought relief from the Supreme Court on the ground that the motion had not been carried by an absolute majority as required under CV. The Supreme Court held that the vote on the motion was constitutionally valid. K appealed to the Court of Appeal.

Issue

- Had the motion of no confidence been carried by an absolute majority?

Decision

The ruling of S was contrary to CV and of no effect. K remained the Prime Minister of Vanuatu. The purported election of V as Prime Minister was of no effect.

CV Article 43(2) provided for a motion of no confidence in the Prime Minister. If the motion was supported by 'an absolute majority of the members of Parliament', the Prime Minister and other Ministers ceased to hold office immediately but were required to exercise their functions until a new Prime Minister was elected.

The Court of Appeal held that it was incorrect to exclude the Speaker when calculating the number of members of Parliament. There was nothing in the CV or in the Standing Orders of the Parliament to prevent S from voting. The fact that S had a 'casting' vote in the event of a tied vote did not prevent S from also having a 'deliberative' vote on any motion. Therefore, for the purposes of Article 43(2), there were 52 members of Parliament.

In this context, 'an absolute majority of the members of Parliament' could only mean at least half the members of Parliament plus one. In other words, the motion required the support of at least half of 52 members, plus 1 - a total of at least 27 members.

Comment

In a constitutional democracy, the courts have a fundamental role in determining the constitutionality of any action to remove a properly elected government. In this case, the court found that the constitutional conditions for removing the elected Prime Minister and Ministers had not been complied with, because the motion of no confidence had not been passed by an absolute majority. The subsequent actions of the Parliament that proceeded on the basis that P and his government had been removed from office, such as the purported election of a new Prime Minister, were of no effect.

The case proceeded on the basis that P was the lawful Prime Minister at the time that Parliament purported to replace him with V. However, a decision handed down a month later, *Natapei v Korman* (reported immediately below), established that P had himself been unconstitutionally elected Prime Minister.

DEMOCRACY - RULE OF LAW; ELECTION OF PRIME MINISTER BY SECRET BALLOT

The appointment of a person as Prime Minister without conducting the requisite secret ballot in Parliament was unconstitutional.

NATAPEI v KORMAN

Supreme Court
Lunabek CJ

Vanuatu
[2011] VUSC 72
16 June 2011

Law considered

Constitution of the Republic of Vanuatu (CV)

Facts

On 2 December 2010 the Parliament passed a vote of no confidence in the plaintiff, Honourable Edward Natapei (N), the then Prime Minister of Vanuatu. The Honourable Sato Kilman (K) was the only candidate nominated to be the new Prime Minister. The Speaker (S) then declared K elected as Prime Minister without conducting a secret ballot or any other form of vote. Some six months later, N sought to challenge the validity of the election of K as Prime Minister.

Issue

- Had K been validly elected as Prime Minister?

Decision

The court held that K had not been validly elected as Prime Minister and that N was still the Acting Prime Minister. It ruled that S should forthwith convene Parliament to elect a Prime Minister in accordance with the CV.

CV Article 41 provided that the Prime Minister should be elected by Parliament from among its members by secret ballot in accordance with the rules in Schedule 2. This was the sole, mandatory means for electing the Prime Minister. In this case, no secret ballot was conducted so the purported election of K was unconstitutional and invalid. By virtue of CV Article 43(2), N should continue to act as Prime Minister until a new Prime Minister was validly elected.

Comment

There are a number of troubling aspects of this case. The first is the timing of the application: the action by N was only commenced after the decision of the Court of Appeal in *Kilman v Speaker of Parliament of the Republic of Vanuatu* (reported immediately above) had been handed down. The court stated that it was seriously regrettable that six months had passed before the challenge was brought, during which time many important decisions had been taken on behalf of the Government of the Republic. A more timely application would have also removed the basis for the *Kilman* case itself.

Secondly, four members of Parliament, including K, had made sworn statements to the effect that there had in fact been a vote by show of hands, when it was conceded at trial that no vote had taken place. The court expressed its serious concern that the Prime Minister and the most senior Ministers of State including the Minister of Justice should have sworn to facts that were not true. His Honour called for a police investigation on any possible offence of perjury or conspiracy in the sworn statements.

Thirdly, the court expressed its concern at the conduct of S, who had exercised his functions and responsibilities 'outside the clear provisions of the Constitution'. The court took the exceptional action of awarding the costs of the case to be paid by S personally, as a mark of the court's disapproval of his conduct.

The net effect of the decision in *Kilman* and this case is that in law Mr Natapei was the Acting Prime Minister throughout this period, although in practice Mr Kilman, Mr Vohor and again Mr Kilman in turn led de facto governments. Additionally, it followed from the decision in this case that the people appointed as Ministers by Mr Kilman on 2 December 2011 were invalidly appointed, because Ministers could only be appointed by a validly elected Prime Minister: *Vanuaroroa v Natapei* [2011] VUSC 92.

With the courts insisting on observance of the terms of the Constitution in determining who was entitled to form the government in Vanuatu, the matter returned to the Parliament for further resolution. On 26 June 2011 Parliament voted in favour of Mr Kilman over Mr Vohor by 29 votes to 23 to make Mr Kilman the new Prime Minister.

The Parliament subsequently sought to discipline S for several incorrect rulings which had given rise to a number of constitutional cases, including the present case and the *Kilman* case. On 6 September 2011 Parliament removed S as Speaker and three days later passed a motion that found S to have been in contempt of Parliament and the Constitution and imposed a number of consequential penalties. In *Korman v Parliament of the Republic of Vanuatu* [2011] VUSC 304, Lunabek CJ upheld those parts of the motion that held S in contempt of Parliament, suspended him from Parliament for the rest of the term and barred him from holding any Parliamentary post for the remainder of the term. However, the court ruled that it was not open to the Parliament to find a person in contempt of the Constitution, nor to order a person to pay the costs of cases decided in the courts. These were matters for the courts to decide.

DEMOCRACY - RULE OF LAW; POWER OF PARLIAMENT TO REPLACE A PRIME MINISTER

The purported removal and replacement of the Prime Minister of Papua New Guinea by the Parliament was unconstitutional.

IN RE REFERENCE TO CONSTITUTION SECTION 19(1) BY EAST SEPIK PROVINCIAL EXECUTIVE

Supreme Court of Justice
Injia CJ, Salika DCJ, Sakora, Kirriwom, Gavara-Nanu JJ

Papua New Guinea
[2011] PGSC 41
12 December 2011

Laws considered

Constitution of the Independent State of Papua New Guinea (CPNG)

Prime Minister and National Executive Council Act 2002 (PMA)

Facts

Prime Minister Sir Michael Somare (S) was absent from Papua New Guinea from 24 March 2011 to 28 August 2011 while receiving medical treatment in a Singapore hospital. During that time, he was absent from the May, June and August meetings of the Parliament. He had been granted leave of absence only for the May meeting.

On 2 August 2011 the Parliament passed a motion declaring that there was a vacancy in the office of Prime Minister. It then proceeded immediately to elect Honourable Peter O'Neill (O) as Prime Minister. O was subsequently sworn in as Prime Minister by the Governor-General.

When S attended the next meeting of the Parliament on 6 September 2011, the Speaker ruled that he had ceased to be a member because he had been absent for three consecutive meetings of the Parliament.

A total of 38 questions were referred to the Supreme Court. At the heart of the reference was the question of whether S had been lawfully replaced as Prime Minister by O.

Issues

- Had S been validly replaced as Prime Minister by O?
- Had S ceased to be a member of Parliament?

Decision

The Supreme Court (Salika DCJ and Sakora J dissenting) declared that O had not been validly elected Prime Minister, and that S was still the lawful Prime Minister. It also declared that the Speaker's decision that S was no longer a member of the Parliament was unconstitutional and of no effect.

CPNG section 142(2) and (3) provided:

> (2) The Prime Minister shall be appointed, at the first meeting of the Parliament after a general election *and otherwise from time to time as the occasion for the appointment of a Prime Minister arises*, by the Head of State, acting in accordance with a decision of the Parliament.
>
> (3) If the Parliament is in session when a Prime Minister is to be appointed, the question of the appointment shall be the first matter for consideration, after any formal business and any nomination of a Governor-General or appointment of a Speaker, on the next sitting day.

The court held that under the second limb of section 142(2) – in italics above – the Parliament only had occasion to appoint a Prime Minister when a vacancy existed. A majority of the court held that the only circumstances in which a vacancy could arise were those specified in CPNG; there was no inherent power in the Parliament to create a vacancy whenever it saw fit. The CPNG stipulated at least 14 circumstances in which a vacancy would arise, but none of those had been shown to be applicable here.

Even if there had been a vacancy, section 142(3) required that the election of a new Prime Minister should have been decided on the next sitting day after the vacancy was created. This requirement, which was justiciable, had not been satisfied, as the Parliament had elected O on the same day as it had declared the vacancy.

It followed that no vacancy had arisen in the office of Prime Minister. S was still the lawful Prime Minister and the purported appointment of O as Prime Minister was unconstitutional and of no effect.

Section 142(5)(c) provided for the removal of the Prime Minister where two medical practitioners had jointly reported that the Prime Minister was unfit, by reason of physical or mental incapacity, to carry out the duties of his or her office. The procedure for invoking this ground of removal, further spelled out in PMA section 6, had not been complied with, and could not have formed the basis for a vacancy. In any event, it had not been the basis for the resolution on 2 August 2011.

CPNG section 103(3)(b) provided that a person was not qualified to be or remain a member of the Parliament if he or she was of unsound mind. The court concluded that it had not been proved that S was of unsound mind. Again, this ground would not have supported the resolution on 2 August 2011, even if it had been relied on that time.

Under CPNG section 104(2)(d), the seat of a member became vacant if he or she was absent, without leave of the Parliament, during the whole of three consecutive meetings of the Parliament. On the facts, this ground was not established, as S had obtained leave for the first of the three meetings from which he was absent. He was therefore still entitled to take his seat in the Parliament.

Comment

All members of the court recognised the political problems that had arisen as a result of the prolonged medical treatment of S, his unwillingness to resign, and the reluctance of the government to take steps to replace him. During this period, majority support in the Parliament had shifted from S to O. The question was whether O and his supporters had acted in accordance with the CPNG in using their undoubted political strength to take control of government. A majority of the court concluded that they had not.

There was a strong constitutional argument for this conclusion. The CPNG has detailed provisions regarding the appointment and removal of the Prime Minister. Injia CJ identified 14 provisions that spelled out when a vacancy would arise. These carefully drafted provisions, together with their rigorous conditions and procedures, would have been completely undermined if the court had recognised a further inherent power in the Parliament to create a vacancy whenever it thought fit. Further, the court was following the precedent set in *Haiveta v Wingti* (No. 3) (1994) PNGLR 197 in recognising the justiciability of the procedural requirement in CPNG section 142(3). In the *Wingti* case, a vote for electing a Prime Minister was declared invalid because it took place on the same day as the vacancy had arisen, rather than on the following day.

However, the political reality was that at the time of handing down the judgment in the present case, O and his supporters still controlled the Parliament and the organs of government. The events that ensued are recounted in the next case report, *In re Constitution Section 19(1) – Special Reference by Allan Marat.*

DEMOCRACY - RULE OF LAW; POWER OF PARLIAMENT TO REPLACE A PRIME MINISTER

Parliament's further attempts to remove and replace the Prime Minister of Papua New Guinea were unconstitutional.

IN RE CONSTITUTION SECTION 19(1) – SPECIAL REFERENCE BY REFERENCE BY ALLAN MARAT

Supreme Court of Justice
Injia CJ, Salika DCJ, Sakora, Kirriwom, Gavara-Nanu JJ

Papua New Guinea
[2012] PGSC 20
21 May 2012

Laws considered

Constitution of the Independent State of Papua New Guinea (CPNG)

Organic Law on National and Local-level Government Elections (OLE)

Prime Minister and National Executive Council Act 2002 (PMA)

Facts

The Supreme Court was originally scheduled to deliver its judgment in *In re Reference to Constitution Section 19(1) by East Sepik Provincial Executive* [2011] PGSC 41, reported immediately above, on 9 December 2011. However, the court did not do so until the afternoon of 12 December 2011. In the interim, the Parliament, without the court's knowledge, took several steps to support the position of the government of Honourable Peter O'Neill (O), should the decision prove unfavourable to it.

On 9 December 2011 the Parliament rescinded its earlier decision to grant Prime Minister Sir Michael Somare (S) leave of absence from its May 2011 sitting. The Speaker then declared vacant S's seat on the basis that he had been absent from three consecutive sittings (in May, June and August 2011) without leave.

On the morning of 12 December 2011 the Parliament amended the PMA (the first amendment). In effect, it created a three-month limit on the period during which there could be an Acting Prime Minister while the Prime Minister was absent from the country. Where the Prime Minister had been absent for more than three months, the Speaker was empowered to declare the position vacant; the Parliament could then elect a new Prime Minister. The amendment purported to operate retrospectively and to validate the appointment of O as Prime Minister in August 2011.

Later on the same day, the Supreme Court delivered its judgment in the *East Sepik Reference.* It ruled that S was still the Prime Minister and that the purported election of O as Prime Minister in August 2011 was invalid.

On the evening of 12 December 2011 the Speaker announced the court's decision to the Parliament, and again declared the position of Prime Minister vacant. The Parliament once more elected O to that position.

On 13 December 2011 the Governor-General recognised S as the Prime Minister and swore in his ministers.

The following day, the Parliament voted to suspend the Governor-General. The Speaker, as Acting Governor-General, then swore in O as Prime Minister. On 19 December 2011 the Parliament lifted the Governor-General's suspension. The Governor-General publically recognised O as the Prime Minister. O and his ministers continued to control the machinery of government.

On 21 December 2011 Parliament again amended the PMA (the second amendment) by prescribing an age limit of 72 years for the post of Prime Minister, with the effect of excluding S from holding this office.

The reference was brought to determine whether S or O was the legitimate Prime Minister. It was argued for O that the court's opinion in the *East Sepik Reference* was advisory only, and not binding. It was also argued that the steps taken by the Parliament since 9 December 2011, which had not been considered in the *East Sepik Reference,* further confirmed that S had been replaced as Prime Minister by O.

Issues

- Was the opinion of the court in the *East Sepik Reference* binding?
- Was the rescission of S's leave of absence valid?
- Were the amendments to the PMA valid?
- Was the election of O as Prime Minister on 12 December 2011 valid?

Decision

A majority of the court (Injia CJ, Kirriwom and Gavara-Nanu JJ) held that S was still the Prime Minister. Salika DCJ and Sakora J did not publish their opinions.

More particularly, the majority held that:

1. the judgment and orders in the *East Sepik Reference* were binding on all persons. Although often called an 'advisory opinion', CPNG section 19(2) made it clear that an opinion given under section 19(1) 'has the same binding effect as any other decision of the Supreme Court'. It was therefore the duty of all persons to give full effect to and comply with the binding opinions and orders issued in the *East Sepik Reference* and the present reference;
2. Parliament's decision to rescind S's leave of absence was inconsistent with S's right to hold public office protected by CPNG section 50. Before rescinding the leave, Parliament should have given S a right to be heard and the matter should have been referred to the National Court for determination, in accordance with OLE sections 228 and 229. Failure to follow the correct procedure meant the rescission was invalid and of no effect;
3. the first amendment was inconsistent with CPNG section 143(1), which did not give Parliament the power to put time limits on the period in which there could be an Acting Prime Minister. The first amendment was invalid and of no effect;
4. the maximum age limit for the office of Prime Minister was not a reasonably justifiable regulation of the right to hold public office and so was inconsistent with CPNG sections 38 and 50. The second amendment was invalid and of no effect;
5. the election of O as Prime Minister on 12 December 2011 and his subsequent confirmation by the Speaker in his capacity as Acting Governor-General on 14 December 2011 were inconsistent with CPNG section 142 as interpreted in the *East Sepik Reference.* Contrary to the declaration of the Speaker, there was no vacancy in the office of the Prime Minister. Further, the correct procedure for filling a vacancy in that office had not been followed. The actions were unconstitutional and of no effect;
6. the Governor-General was bound to follow the decision of the court in the *East Sepik Reference* by recognising S as the Prime Minister (as he had done on 13 December 2011 but subsequently retracted on 19 December 2011); and
7. at all material times, S remained the legitimate Prime Minister. He would continue in office until a new Prime Minister was elected following the 2012 elections.

Comment

The majority's conclusions followed the orthodox interpretation and application of established constitutional principles. However, its decision was not accepted by O's government, which, despite attempts by S to resume office, continued to exercise effective control of the machinery of government, including the security forces.

The government's response to the decisions of the highest court raised great concern for the prospects of the rule of law in Papua New Guinea. Subsequent action by O's government, in bringing sedition charges against Injia CJ and Kirriwom J and enacting the Judicial Code of Conduct Act 2012, posed further threats to judicial independence. Although the sedition charges were dismissed and the Judicial Code of Conduct Act repealed following the 2012 elections, the willingness of O's de facto government to ignore inconvenient decisions of the courts and to pursue judges over the performance of their judicial duties provided unwelcome precedents. Human rights are left more vulnerable where the independence of and respect for the courts are undermined.

DISCRIMINATION

DISCRIMINATION ON THE BASIS OF NATIONALITY OR PLACE OF ORIGIN

Discriminatory provisions in favour of ni-Vanuatu citizens in the requirements for admission to legal practice infringed the constitutional right to equal treatment under the law or administrative action.

HAMEL-LANDRY v LAW COUNCIL

Supreme Court
Spear J

Vanuatu
[2012] VUSC 119
27 June 2012

International instruments and laws considered

International Covenant on Civil and Political Rights (ICCPR)

Discrimination (Employment and Occupation) Convention 1958, ILO 111 (DEOC)

Constitution of the Republic of Vanuatu (CV)

Legal Practitioners Act [Cap 119] (LPA)

Legal Practitioners (Qualifications) Regulations (LPQR)

Facts

The claimant (C) was a Canadian citizen resident in Vanuatu. He had completed a law degree in Quebec, Canada, and had been admitted to practise there as a practising advocate, the Quebecois equivalent of a barrister. He applied to the Law Council (LC) for a certificate of registered legal practitioner, a prerequisite for applying to be admitted as a barrister and solicitor in Vanuatu.

The LPQR had been made by the LC under powers granted by the LPA to prescribe the qualifications for legal practitioners. Under LPQR Regulation 2, an applicant for a certificate of registered legal practitioner must:

(a) hold a Law degree or similar approved qualification;

(b) (i) have had at least two years' post-graduate supervised practical legal experience acceptable to the Law Council; or

(ii) be a ni-Vanuatu citizen who is admitted as a barrister and/or solicitor in a Commonwealth jurisdiction; and

(c) be a resident of Vanuatu.

The LC applied the LPQR and rejected C's application. C met requirements (a) and (c) but not (b). He had not had two years' post-graduate supervised legal practice, so did not satisfy requirement (b)(i). Although he had been admitted as the equivalent of a barrister in a Commonwealth jurisdiction, he was not a ni-Vanuatu citizen and so did not satisfy requirement (b)(ii).

C sought judicial review of the LC's decision on the ground that it was based on a regulation – regulation 2(b)(ii) – that was unlawful and of no effect. C argued that regulation 2(b)(ii) was discriminatory on the basis of the nationality of the applicant and beyond the powers given to the LC by the LPA. It was also contrary to CV Article 5(1) (k), ICCPR Article 26 and DEOC Article 1(a).

Issue

- Was it permissible for the regulation to discriminate in favour of applicants of ni-Vanuatu nationality?

Decision

The court declared that regulation 2(b)(ii) was illegal and void because it discriminated against those who were not ni-Vanuatu citizens. It quashed the LC's decision to refuse C's application and required LC to reconsider the application.

Regulation 2(b)(ii) clearly discriminated against those who were not ni-Vanuatu citizens. If C had been a ni-Vanuatu citizen, it would not have mattered that he had not had two years' practical experience; his admission as a barrister in Canada would have satisfied regulation 2(b)(ii). The LC's refusal of his application therefore reflected the fact that C was not a ni-Vanuatu citizen.

The powers of the LC to make regulations under the LPA were subject to the fundamental rights and freedoms recognised in CV Article 5:

5. (1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of … place of origin … :

…

(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph in so far as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.

Although Article 5 authorised restrictions on non-citizens, any such restrictions could only be imposed by law. This required that Parliament had passed a law with the obvious and clear intention of imposing or authorising restrictions against non-citizens. Nothing in the LPA showed such an intention. Therefore the LC had no power to make regulations that discriminated against non-citizens.

Further, the LC's powers could only be used for the objects and purpose of the LPA. It had been recognised in previous decisions that the purpose of prescribing qualifications for the admission of people as barristers and solicitors was to ensure that they have the appropriate character and skill. In this respect, there was no rational justification for distinguishing between ni-Vanuatu citizens and others and no explanation was offered by counsel for the LC. Therefore regulation 2(b)(ii) appeared to have been directed to some ulterior purpose beyond the LC's powers. The LC attempted to provide

an advantage to ni-Vanuatu citizens who had been admitted in a Commonwealth jurisdiction as against those who were not ni-Vanuatu citizens but had a similar qualification. That distinction did not advance the purpose of the LPA. Therefore regulation 2(b)(ii) was unlawful, both because it was directed to an ulterior purpose and because it infringed the right of people in Vanuatu to be free from discrimination on the basis of their place of origin.

The court ruled that the regulation 2(b)(ii) should operate without reference to the nationality of the applicant. As a result any person who has been admitted as a barrister and/or solicitor in a Commonwealth jurisdiction would be exempted from the practical experience requirement in regulation 2(b)(i), regardless of their nationality.

Comment

This was a clear case of direct discrimination on the basis of nationality. Under the regulations, a person who was not ni-Vanuatu citizen was treated less favourably than comparable ni-Vanuatu citizens. No objective and reasonable justification had been offered for the different treatment, and the court concluded that there was no sound basis for thinking that a ni-Vanuatu citizen would be better equipped in terms of skills or character to practise law in Vanuatu than a person with a different nationality but similar qualifications. In this case, the court inferred that the regulation had been drawn with the intention of conferring an advantage on ni-Vanuatu lawyers. Even if it was done without intending that result, it would still have had that impermissible effect.

The regulations therefore were discriminatory on the ground of nationality. However, nationality is not a prohibited ground of discrimination under the CV. Indeed, the Constitution contemplated that restrictions might be imposed by law on non-citizens. The court read this part of Article 5(1) quite restrictively, by requiring:

(a) that the restriction must be authorised in an Act, rather than in regulations or other delegated legislation; and

(b) that the Act must clearly intend to discriminate against non-citizens.

As neither of these conditions had been satisfied, the regulations could not be justified as permissible discrimination on the grounds of nationality.

Even so, it was still necessary to show that the regulations discriminated on a ground prohibited by Article 5. The relevant ground was 'place of origin'. Clearly, nationality and place of origin are not the same: a person may leave his or her place of origin and acquire nationality in another State. Even so, for the majority of people, their place of origin determines their nationality. The two concepts are so closely linked that to discriminate on the ground of nationality would in substance also discriminate on the ground of place of origin. For similar reasons, it might also be possible to mount a challenge to the requirement in regulation 2(c) that applicants be Vanuatu residents. (See by way of analogy *Supreme Court of New Hampshire v Piper* [1985] USSC 49, (1985) 470 US 274 and *Street v Queensland Bar Association* [1989] HCA 53; (1989) 168 CLR 461.)

No attempt was made by the LC to justify the favourable treatment of ni-Vanuatu lawyers within the proviso to Article 5(1)(k). That allows provisions for the 'special benefit, welfare, protection or advancement of … members of under-privileged groups'. Presumably, the LC did not consider it arguable that all ni-Vanuatu lawyers who had been admitted in a Commonwealth jurisdiction would constitute an under-privileged group.

DISCRIMINATION ON THE BASIS OF RACE OR PLACE OF ORIGIN

Discriminatory provisions in favour of ni-Vanuatu citizens in the requirements for admission to legal practice infringed the constitutional right to equal treatment under the law or administrative action.

BOHN v REPUBLIC OF VANUATU

Supreme Court
Lunabek CJ

Vanuatu
[2013] VUSC 42
5 April 2013

Laws considered

Constitution of the Republic of Vanuatu (CV)

Representation of the People Act [Cap 146] (RPA)

Facts

The applicant (A), formerly an American, became a naturalised citizen of Vanuatu in 1997. In 2012 he was elected to the Parliament of Vanuatu to represent the Epi constituency. When his election was challenged on the ground that he did not satisfy the requirements to be a candidate in Epi under RPA section 23A, A raised a constitutional challenge to those requirements.

Section 23A required that a candidate for a rural constituency (such as Epi) should be a native citizen or a citizen originating from that rural constituency. People would 'originate' from a constituency if any one of their parents or grandparents was from the constituency or if they had been adopted by law or custom into a family originating from that rural constituency. A claimed to have been adopted into a family from Epi, but this was disputed by those contesting his election.

A relied on CV Article 5 which provides:

5. (1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of … race [or] place of origin … but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health:
…
(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph in so far as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.

A claimed that the requirements in section 23A infringed his right to equal treatment under the law as a citizen. He also argued that the requirements impermissibly discriminated among citizens based on their race or place of origin. The government of Vanuatu admitted that A had been adopted by a family from Epi. It defended the requirements in section 23A as measures to ensure that a person from one rural constituency did not contest elections to Parliament in another rural constituency. It also claimed that these requirements protected vulnerable groups from discrimination.

Issues

- Did the requirements of section 23A infringe A's rights to equal treatment under the law?
- If so, could the infringement be justified?

Decision

The court ruled that section 23A was unconstitutional. It clearly infringed A's rights under Article 5(1) in its operation and effect. Further, the requirements could not be justified as public interest limitations or as provisions for the special benefit of vulnerable groups.

The requirement to be a native citizen or a citizen originating from a rural constituency treated citizens differently according to their race or place of origin. It operated to exclude as candidates citizens who had been naturalised, those who lived and worked in an electorate that was not their place of origin and those living with their spouse away from their own place of origin. This discrimination arose from the operation of the law. Therefore the right to equal treatment under the law has been infringed.

It then fell to the State to justify the discrimination. The alleged purpose, to ensure that a person from one rural constituency should not contest elections in another rural constituency, was not one of the legitimate public interests listed in Article 5(1) – defence, safety, public order, welfare and health. Nor was it a special measure allowed by the exception in paragraph (k).

It was not relevant to show that A satisfied the eligibility requirement by being adopted by a family from Epi. The requirement to prove such adoption was not imposed on some other ni-Vanuatu citizens and that in itself was discriminatory.

Comment

The court outlined the proper approach to cases under Article 5(1) (k). The burden first falls on an applicant to show that an infringement of the guaranteed right has occurred. Article 5(1)(k) is not a general guarantee of equality, and does impose an obligation on people to accord equal treatment to others. Rather, the applicant must show that there has been discrimination caused by the application or operation *of the law.* It is not necessary to show intention to discriminate. The prohibited grounds of discrimination include those listed in Article 5(1) but are not confined to them. The listed grounds must be interpreted in a broad and generous manner.

Once the applicant has discharged this burden, the State bears the burden of justifying the infringement. It may do so either by showing that the case falls under the 'affirmative action' exceptions in the second limb of paragraph (k) or under the provisos within the main clause of Article 5(1). The only grounds of justification permitted under the main clause are:

(a) restrictions imposed by law on non-citizens

(b) measures that respect the rights and freedoms of others and

(c) measures that pursue the legitimate public interest in defence, safety, public order, welfare and health.

Here the apparent purpose of section 23A was to promote a connection between candidates for election and the constituency. While this might seem a legitimate objective of an electoral law, the court concluded that it could not be characterised within any of the permissible grounds of justification. As a result it was unnecessary for the court to discuss any further matters that the State must prove, such as the proportionality of the measures taken for protecting the rights of others or in pursuit of legitimate public interests. The law might well have failed on such grounds too: connection with a constituency might be established by other means such as a period of residency or a connection through employment or marriage. Requiring the connection to be established by birth, lineage or adoption could therefore be regarded as disproportionate.

FAIR TRIAL

FAIR TRIAL - INDEPENDANT AND IMPARTIAL TRIBUNAL

The rights of a person charged with professional misconduct to a hearing before an independent and impartial tribunal were denied where the Tribunal members had participated in initiating the proceedings.

PONIFASIO v SAMOA LAW SOCIETY

Court of Appeal
Baragwanath, Fisher, Galbraith JJ

Samoa
[2012] WSCA 4
31 May 2012

International instrument and laws considered

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Constitution of the Independent State of Samoa (CS)

Law Practitioners Act 1976 (LPA)

Facts

The Law Society (LS) instituted an enquiry through its Disciplinary Committee into the conduct of the appellant (A). The Committee, comprising three members of the LS who were not on its Council, recommended that four charges be laid against A. The Council accepted the recommendation, appointed another member of the LS to prosecute A and appointed a Tribunal consisting of five members of the Council to hear and determine the charges. The Tribunal found A guilty of professional misconduct relating to funds he had received for a client. A was suspended from practice for two years.

A challenged the validity of the process on the ground that the membership of the Tribunal denied him of his right to an independent and impartial tribunal, as recognised in CS Article 9. The Supreme Court dismissed A's challenge. A appealed to the Court of Appeal.

Issue

- Was the Tribunal independent and impartial?

Decision

The Court of Appeal found that the Tribunal was not independent and impartial. The LS's decisions were set aside.

It was accepted that the LS had made a good faith attempt to follow the requirements of LPA sections 35 and 36 in handling the charges of professional misconduct. There was no suggestion of any actual bias by any of the decision-makers. However, the court ruled that the precept that justice must not only be done but be seen to be done had become increasingly important in the common law, Conventions such as the ECHR and national regimes for disciplinary proceedings. Its purpose was to protect public confidence in State institutions. This policy was recognised in CS Article 9, which stated that 'every person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established under the law' (emphasis added).

The court cited a decision of the European Court of Human Rights, *Findlay v United Kingdom* [1997] ECHR 8, [73] to expand on the meaning of the requirements of independence and impartiality:

The court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. As to the question of 'impartiality', there are two aspects of this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. The concepts of independence and objective impartiality are closely linked …

The court found that the Tribunal had not been independent. Its members were also members of the Council, and in that capacity had been involved in the decisions to bring the charges and appoint the prosecutor and had oversight of the prosecution. This offended the principle that 'no-one should be a judge in his own cause'. Here some members of the Council were both prosecutors and Tribunal members.

Nor had the Tribunal been impartial in an objective sense. The involvement of its members in the initial decision to bring the charges could have created in the minds of A or the public a reasonable apprehension that they might not bring an impartial and unprejudiced mind to the decision as to whether A was in fact guilty of the offences charged.

It was still open to the LS to bring the charges against A before another tribunal consisting of people who had not been involved in the preliminary stages of the process.

Comment

It is important for a fair hearing that those adjudicating on a matter are not closely associated with the parties. Observing this principle can be difficult in smaller Pacific Island countries, especially for courts or tribunals in small communities, where the ties of kinship and friendship are extensive. Where some connection is unavoidable, it is desirable that it is at least made clear to all.

Similar problems arise in a case such as this, involving disciplinary proceedings against a lawyer. Of necessity, all or most of the parties involved – the prosecutor, the defendant and the tribunal – will be lawyers, and all may be members of the Law Society. It is in the interests of justice, and the appearance of justice, that as far as possible the functions of prosecution and adjudication be handled by separate people. While this might create practical difficulties in the smallest jurisdictions, it should not prove an insurmountable obstacle for the more numerous members of the legal profession in Samoa.

HUMAN TRAFFICKING

HUMAN TRAFFICKING - EVIDENCE OF COMPLAINANTS; SENTENCING

Victims of human trafficking did not lack credibility simply because they had not complained at the first opportunity; nor did their evidence attract a corroboration warning.

LIU v R

Court of Appeal
Burchett, Salmon,
Moore JJ

Tonga
[2011] TOCA 3
30 September 2011

Laws considered

Criminal Offences Act [Cap 18] (COA)

Transnational Crimes Act 2005 (TCA)

Facts

The appellant (A) met two women in China and persuaded them to come to Tonga to work as waitresses in her bar restaurant. Both women were poor and aged in their thirties. Once in Tonga, A told them there was no work available at the restaurant, and forced them to work as prostitutes on threat of being beaten. One of the women left A's house after three weeks, having paid A to hand over her passport. The other woman stayed longer, and then worked for a time in a restaurant. Once she too had obtained her passport from A, she also left A's house.

A was charged and convicted on four counts of trafficking a person contrary to TCA section 24, one count of keeping a brothel contrary to COA section 80 and two counts of trading in prostitution contrary to COA section 81. She was sentenced to imprisonment - 10 years on each count of trafficking, six months for keeping a brothel and five years for each count of trading in prostitution. All the sentences were to be served concurrently.

A appealed against the convictions and sentence.

Issues

- Were the convictions safe?
- Was the sentence was excessive?

Decision

The appeals against conviction and sentence were dismissed. However, the Court of Appeal ruled that the prison sentence should have been suspended for the final three years.

The court rejected the argument that the complainants were not credible because they had not made a complaint at the earliest opportunity. In the circumstances, their delay was understandable: they were in a strange country, did not speak the language and had been told by A that she had friends in the police and the Chinese Embassy.

The court also rejected the argument that there should have been a corroboration warning in relation to the complainants' evidence. There was no such requirement. In any event, the women corroborated each other.

As to the sentence, the court noted that the maximum sentence available under the TCA was imprisonment for 25 years. This case, while not the worst, still deserved a severe sentence of 10 years. However, because A was a first offender aged 42 years, the final three years of her sentence should be suspended.

Comment

This was the first successful prosecution in Tonga for human trafficking. It is interesting to note that the defence sought to apply to the complainants the rules that have traditionally been applied to complainants in sexual offences. Historically, a sexual offence complaint was treated with suspicion if the complainant did not make it at the earliest opportunity and it was not corroborated – that is, not confirmed by independent supporting evidence. Given that these rules have been discredited and rejected in many jurisdictions, it is welcome that the court in Tonga chose not to extend them

to survivors of human trafficking. Instead, the court showed sensitivity to the position of the complainants by recognising that there were good reasons for them not complaining to authorities at the earliest opportunity. Further, by declining to apply a corroboration warning, the court moved beyond rules based on unhelpful stereotypes and focused instead on a more important issue: the quality of the complainants' evidence in the particular case.

The severe sentence demonstrated the seriousness of this crime, which involved both deceiving the women to travel to Tonga for employment as waitresses and then forcing them to work as prostitutes against their will. It reflected the desire of authorities in the region to deter further instances of this conduct, which targets and exploits the vulnerabilities of its victims.

HUMAN TRAFFICKING - SENTENCING

In the first conviction in Fiji Islands for human trafficking, the offender was sentenced to imprisonment for six years.

STATE v MURTI

High Court
Goundar J

Fiji Islands
[2010] FJHC 514
17 November 2010

International instruments and law considered

Convention against Transnational Organised Crime (CATOC)

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (TP)

Protocol against the Smuggling of Migrants by Land, Sea and Air (SP)

Crimes Decree 2009 (CD)

Facts

M was an Indian national. He met seven men, also Indian nationals, in Delhi and promised to arrange farm work for them in New Zealand. The men were fluent in Punjabi, but had limited understanding of Hindi and English. They paid M substantial sums of money for his services. M made travel arrangements for the men and himself, telling them they were flying to New Zealand when in fact they flew to Fiji Islands. M encouraged the men to lie to the immigration officers at Nadi airport, to obtain entry into the country. M intended to leave the men in Fiji Island and return to India, but all were arrested at Nadi airport.

M was convicted of one count of trafficking in persons and seven counts of obtaining property by deception. He was 62 years old, a retired seaman, with no criminal history. He had a sickly wife and financially dependent family members.

Issue

- What was the appropriate sentence for these offences?

Decision

M was sentenced to six years' imprisonment for each offence, to be served concurrently, with a non-parole period of four years.

The court observed that this was the first conviction for human trafficking in Fiji Islands. The CD had created a number of offences designed to give effect to the CATOC and two of its three protocols, the TP and the SP, even though Fiji Islands had not signed these Conventions.

As M was the first person convicted in Fiji Islands of human trafficking, there were no Fiji precedents for sentencing him. The court therefore had regard to trafficking cases from the United Kingdom, Australia and New Zealand. Although they were of limited guidance because the statutory maximum terms for these crimes differed, they illustrated the need for a deterrent sentence for this type of offence.

The court recognised the human rights dimension of human trafficking:

Trafficking in persons is a human right issue. Traffickers are motivated by greed to take advantage of vulnerable victims. Traffickers use coercive tactics including deception, fraud, intimidation, isolation, threat and use of physical force, and/or debt bondage to control their victims. The victims are generally subjected to degrading forms of exploitation such as forced prostitution, domestic servitude and other kinds of work.

In this case, the seven men were not actually exploited in Fiji Islands, but they were exposed to the risk of exploitation. This meant it was not the worst case of its kind, and did not warrant the maximum sentence which was 12 years' imprisonment in the case of trafficking and 10 years for obtaining property by deception.

Comment

According to TP Article 3(a), trafficking in persons has three elements:

1. a facilitative act (the recruitment, transportation, transfer, harbouring or receipt of persons);
2. undertaking that act by improper means (the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person); and
3. undertaking that act for an exploitative purpose (including the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs).

Trafficking of children is established by elements (1) and (3); it is not necessary that improper means are used: Article 3(c).

TP Article 5(1) obliges States Parties to enact criminal laws prohibiting the conduct described in Article 3 when committed intentionally.

The facts of this case bear the three elements of the Article 3 definition:

1. M recruited the men and facilitated their transport or transfer to Fiji Islands;
2. M used deception by promising the men that they would go to New Zealand and be able to work there; and
3. although it is not clear whether M's purpose was merely to extract money from the men by deception, or to deliver them to others who would exploit them, the court found that M had been reckless as to their exploitation – that is, he was aware of a substantial risk that they would be exploited in Fiji and unjustifiably took that risk.

However, it is notable that the offence for which he was convicted does not require the proof of all three elements. CD section 112(3) provides:

> A person (the first person) commits an indictable offence of trafficking in persons if—
>
> *(a)* the first person organises or facilitates the entry or proposed entry, or the receipt, of another person into Fiji; and

(b) in organising or facilitating that entry or proposed entry, or that receipt, the first person is reckless as to whether the other person will be exploited, either by the first person or another, after that entry or receipt.

Penalty — Imprisonment for 12 years.

The offence requires only the commission of a facilitative act with an exploitative purpose, but not the use of improper means. In other words, even if M had not deceived the men into travelling to Fiji Islands, he would still have been guilty of the offence. Yet the TP regards conduct involving only a facilitative act for an exploitative purpose as trafficking solely where the victim is a child. It is suggested therefore that the drafting of this provision and its counterparts in other jurisdictions requires reconsideration, as they extend criminal liability to activities that fall outside the international understanding of human trafficking. To do so could undermine one of the objectives of CATOC and its protocols, which is for States to act cooperatively in tackling this transnational problem. To enact different definitions of the relevant crimes could create obstacles in the path of that cooperation.

Note:

The second Fiji case concerning trafficking, *State v Laojindamanee* [2013] FJHC 20, illustrates how trafficking can be committed by those who operate entirely within one country (domestic trafficking). In that case, three Thai women were persuaded to travel to Fiji Islands to do massage work. Once there, they were forced to provide sexual services. The two men who travelled with them and facilitated their entry into Fiji Islands were each convicted of trafficking contrary to CD section 112(5) and sentenced to imprisonment for 10 years. A third man who met the women on arrival in Fiji Islands and served as their driver and escort for several days was convicted of domestic trafficking contrary to CD section 115(3) and sentenced to eight years' imprisonment. A fourth man, the head of the criminal operation in Fiji Islands, was convicted of sexual servitude contrary to CD section 106(1) and sentenced to imprisonment of 11 years and 9 months.

LIBERTY

LIBERTY

The guarantee of 'personal liberty' in the Samoan Constitution protects against unlawful interference with a person's physical liberty.

MAPUILESUA v LAND AND TITLES COURT

Supreme Court
Sapolu CJ

Samoa
[2011] WSSC 131
15 November 2011

International instrument and law considered

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Constitution of the Independent State of Samoa (CS)

Facts

The applicant (A) applied for judicial review of a decision by the Land and Titles Court (LTC) to include eight named matai as heirs for the purposes of determining a village title. In effect, A was arguing that the decision was wrong in that the eight matai should have been excluded as heirs. Among other things, A argued that the decision of the LTC had deprived him of liberty, which was protected by CS Article 6(1). He sought remedial enforcement of this right. A had not been arrested, detained or otherwise deprived of his physical liberty.

Issue

- Had A been deprived of his liberty by the decision of the LTC?

Decision

The court held that the argument was misconceived and the application was struck out.

Article 6(1) of CS provides:

> No person shall be deprived of his personal liberty except in accordance with law.

The court stated that this provision does not protect a person's liberty in the broad sense of a person's freedom to live life as the person wished. In this context 'liberty' had a narrower meaning, and referred to a person's physical liberty.

The court found that 'liberty' in Article 6(1) had the same meaning as in ECHR Article 5, which was interpreted by the House of Lords in *Secretary of State for the Home Department v JJ* [2007] UKHL 45. In that case, their Lordships made clear that being deprived of 'liberty' in Article 5 referred to situations such as being in prison or being compelled to be physically in a place where one would not choose to be.

As there was no suggestion that A had been imprisoned, detained or otherwise physically restrained, it followed that the argument alleging a breach of Article 6(1) had to fail.

Comment

The case is reported as a salutary lesson on the need to interpret a human rights provision in its context and with regard to relevant authorities. As the court recognised, A's argument was misconceived because it assumed a much broader meaning of 'liberty' than the context allowed. The remaining sub-clauses of CS Article 6 all dealt with matters involving unlawful detention or arrest, and supported the conclusion that being deprived of 'personal liberty' in Article 6(1) means a loss of the person's physical liberty.

As in many earlier Samoan decisions, the court displayed a willingness to examine and draw guidance from decisions in other jurisdictions, particularly those interpreting comparable human rights provisions in the ECHR.

LIFE

RIGHT TO LIFE - SORCERY-RELATED KILLING

The fact that a murder was committed in the belief that the victim was a sorcerer responsible for the deaths of others was no longer a mitigating factor in sentencing in Papua New Guinea.

STATE v MESUNO

National Court of Justice
Kangwia AJ

Papua New Guinea
[2012] PGNC 80
8 June 2012

Laws considered

Constitution of the Independent State of Papua New Guinea (CPNG)

Criminal Code (CC)

Facts

Three men and a youth aged 17 were charged with and convicted of the wilful murder of a pastor whom they attacked with bush knives and a pistol. They then buried his body where his family would not find it.

All the accused persons were blood relatives of the pastor. The families of the accused persons blamed the pastor for the death of other relatives, and attributed the death to sorcery practised by the pastor.

The court heard submissions as to sentence. Under CC section 299(2), the maximum penalty for wilful murder was death, but under CC section 19(1)(aa), the court had a discretion to impose a sentence of imprisonment.

Issue

- What significance should be given to the fact that the killing was motivated by the belief that the deceased had engaged in sorcery?

Decision

The court sentenced each of the three men to imprisonment for 34 years. It took account of the youthfulness of the fourth accused and sentenced him to 17 years in prison. It refused to regard the sorcery-related motivation as a mitigating factor.

The court recognised that the belief that sorcery could be used to harm or kill a person was embedded in many societies in Papua New Guinea. Unexplained illnesses or deaths were attributed to sorcery and violent action was taken against the suspected sorcerer in retaliation.

The court also acknowledged that in earlier times, sorcery-related killings had been treated as a special category of homicide with lower sentences than other murder cases. For example, in *Agoara Kebo v State* (1981) SC 198 the Supreme Court upheld a sentence of eight years for a sorcery-related killing. The apparent justification for the leniency was the prisoner's belief in sorcery, embedded in a cultural setting that was thought to have its own sanctions. The courts may have perceived a heavy sentence in these cases as an overt intrusion into such embedded cultural beliefs.

With an increase in sorcery-related killings, the courts had more recently taken a different approach. Sentences had increased significantly because sorcery-related killing had come to be viewed as an act of vengeance or 'payback killing'. Sorcery-related killings currently attracted custodial sentences equivalent to or higher than other types of homicide. This was done to preserve the sanctity of human life, which was protected by CPNG section 35, and to deter vengeance or payback killings.

The court concluded:

> Belief in sorcery should not and must not operate as a mitigating factor in sentencing, for to do so would indirectly promote or licence similar killings under the pretext of a belief, which cannot be proven with evidence. It would amount to giving total disrespect to a very serious offence under law. It would also promote ridicule to the sanctity of human life as a fundamental right of every person.

Comment

The belief in the existence and efficacy of sorcery is widespread in Papua New Guinea. Where sorcery is thought to have caused the death or illness of a person, it is common for some form of retribution to be inflicted on the suspected sorcerer. This might involve the destruction or confiscation of property, banishment from the village, torture or death, or some combination of these responses. Those inflicting the punishment typically regard the action as a measure of justice for the harm already inflicted by the sorcerer and a means of protection from further harm. Those accused of sorcery are more likely to be members of the community who lack supporters who might come to their defence – often the elderly, especially older women. It is also reported that accusations of sorcery are increasingly made out of jealousy, to conceal gender based violence or to avenge unrelated grievances.

Attempts to have alleged sorcerers dealt with by official means, by criminalising sorcery under the Sorcery Act 1971, were largely ineffective. There were obvious difficulties of proof in establishing that a person did engage in sorcery, and the prescribed penalties were considered insufficient by the affected communities. As a result, people continued to take the law into their own hands – to deal with the supposed sorcerers in their own, often brutal, way. The Act also appeared to confirm belief in sorcery: if sorcery did not exist, there would be no need to make it unlawful. Adopting the recommendation of the Constitutional and Law Reform Commission, the Parliament voted in May 2013 to repeal the Sorcery Act.

Taking action against those inflicting punishment on suspected sorcerers has also proved difficult. Because the communities in question often support the acts of retribution, it is common for the matter to go unreported to authorities, for police to fail to investigate those that are reported, and for witnesses to be uncooperative. In these circumstances, it is difficult to obtain convictions against the perpetrators.

Further, where convictions have been obtained, sentences have previously been reduced where the offenders were seen to be acting in accordance with their cultural practices. But courts are now less willing, in this context as elsewhere, to accept custom or culture as a significant mitigating factor in cases where the human rights of victims have been violated. In the present case, the National Court was following the lead of the Supreme Court in cases such as *Baipu v State* [2005] PGSC 19 and *Thomas v State* [2007] PGSC 26, where the court rejected the suggestion that sorcery should qualify as a special or significant mitigating factor. Even so, the picture is far from uniform. In another case from 2012, *State v Niruk* [2012] PGNC 152, a different judge of the National Court appeared more lenient to the offenders because they had acted from a belief that the person they murdered had committed sorcery. He sentenced the offenders to 12 years' imprisonment, three years of which was suspended.

The Parliament also legislated in May 2013 to make the death penalty available in cases of rape, robbery and murder, by authorising new methods of execution, including lethal injection, asphyxiation, firing squad and electrocution. While a determination to restrict violence, including sorcery-related killings, is to be welcomed, the resort to the death penalty has been widely criticised as a breach of human rights standards, and a response that fails to address the underlying causes of the problem. It remains to be seen whether the longer prison terms now generally imposed in the courts for sorcery-related killings and the potential use of the death penalty will have the desired deterrent effect, or whether traditional beliefs and fears will continue to have a stronger influence.

MANDATORY SENTENCING

MANDATORY SENTENCE FOR MURDER - SEPARATION OF POWERS; RIGHT TO A FAIR HEARING

A law that imposed a mandatory sentence of life imprisonment on those found guilty of murder did not infringe the separation of powers doctrine or the right to a fair hearing.

MANIORU v R

Court of Appeal
Auld P, Ward, Williams JJ

Solomon Islands
[2012] SBCA 1
23 March 2012

Laws considered

Constitution of Solomon Islands (CSI)

Penal Code [Cap 26] (PC)

Facts

The appellants (As) were convicted of murder. The sole issue on the appeal was the constitutionality of PC section 200, under which it was mandatory for a person guilty of murder to be sentenced to imprisonment for life.

It was argued that section 200 was unconstitutional because it removed all judicial discretion in sentencing offenders. This was said to be an unlawful interference with the doctrine of separation of powers enshrined in CSI. Alternatively, it infringed CSI Article 10(1) by denying to those found guilty of murder the right to a fair hearing as to the appropriate sentence in the case.

Issues

- Did the mandatory sentence infringe the doctrine of separation of powers?
- Did the mandatory sentence infringe the right to a fair hearing?

Decision

The provision for a mandatory life sentence was constitutional.

Parliament had the right to determine sentencing policy through legislation. This might include placing fetters on what the courts may do in matters of sentencing, such as minimum and maximum sentences and mandatory minimum disqualifications from driving or from the management of a company. These measures restricted judicial discretion in sentencing but that did not make them inconsistent with the right to a fair hearing. The position was no different for offences, such as murder, that attract more severe sentences.

The notion of separation of powers was a 'metaphysical construct' that had to make concessions to the practicalities of give and take by the three arms of government. As a matter of common sense, it was necessary for Parliament to have the power to determine, where it thought necessary, maximum, minimum and mandatory sentences. This was recognised all over the world.

The common law recognised Parliament's power in this respect, and the constitutional protection of the right to a fair hearing did not change the position. It provided no basis for judges to disregard Parliament's undoubted right to set mandatory sentences of general application. This was recognised in *Gerea v DPP*[1984] SBCA 2; [1984] SILR 161, following the dicta of Lord Diplock in *Hinds v The Queen* (1977) AC 195, 226 and of O'Dalaigh CJ in *Deaton v Attorney General* (1963) IR 170, 181.

The court went on to note the absence of any provision in Solomon Islands under which the sentencing judge could set a minimum term after which the possibility of parole might be considered. There was, however, a system under the Correctional Services Act 2000 by which the Minster could release life prisoners on licence, following a recommendation of the Parole Board and after consulting with the Chief Justice and the trial judge if available. The Court of Appeal indicated that it would be useful to introduce a practice where the trial judge might permit defence counsel to place on the record any mitigating circumstances, so that these would be available should the Minister subsequently consider releasing the offender on parole. This would be one means of enhancing the right to a fair trial within the existing legislative scheme.

Comment

The court here followed the authority of its previous decision in Gerea that the mandatory life sentence for murder was constitutional. However, that conclusion does not mean that all mandatory sentences are desirable as a matter of policy or are compliant with human rights standards.

In the course of its judgment the Court of Appeal cited the dictum of Barwick CJ in *Palling v Corfield* [1970] HCA 53 [10]; (1970) 123 CLR 52, 58:

> It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty.

However in the same paragraph of that decision, His Honour went on to say:

> It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.

There are many objections to mandatory sentences. Most obviously, they require courts to impose a sentence that may not be proportionate to the circumstances of the offender and of the crime, thereby offending a basic principle of justice. Not all murders and murderers are the same, yet if they are all dealt with alike, there will be injustice to some offenders.

It might be thought that some of the difficulties presented by mandatory sentences could be avoided by prosecutorial discretion. Prosecutors could bring in lesser charges if they considered that life imprisonment would be too harsh a penalty in a particular case. Yet this solution raises even greater difficulties because it shifts the assessment of what is a fair sentence from the judiciary to the executive. Because prosecution decisions of this nature are not exposed to public scrutiny or appeal, there is a greater risk of abuse. In other jurisdictions, prosecutorial discretion to avoid mandatory sentencing has been associated with discrimination on racial or other invidious grounds.

It should also be recognised that a mandatory sentence could infringe human rights standards. For example, in *State v Pickering* [2001] FJHC 341, 1 PHRLD 58, a law that imposed a mandatory term of three months' imprisonment for the possession of small quantities of Indian hemp was held to infringe the constitutional right to freedom from 'torture, cruel, inhuman, degrading or disproportionately severe treatment or punishment'. The court relied on precedents from the United

States, Canada, South Africa and Namibia establishing that a mandatory punishment that is grossly disproportionate to the circumstances of the offence can be regarded as cruel, inhuman or degrading treatment. It is not the mandatory nature of the sentence that makes it unconstitutional; it is the excessive nature of the sentences when applied to hypothetical cases that could reasonably fall within the terms of the statute.

On that reasoning, it could be argued that a mandatory life sentence for murder could amount to cruel, inhuman or degrading treatment. It is not unknown for an elderly person to commit a 'mercy killing' to relieve a beloved spouse of unbearable suffering, perhaps at the spouse's request. These cases generally attract a much more lenient sentence than other murder cases, because of the killer's motives, and perhaps also because of the offender's advanced age and prior good character. A life sentence, without the possibility of parole, might be seen as grossly disproportionate to the circumstances of such an offence. If it is enough to point to a hypothetical case where the life sentence would be cruel, inhuman or degrading, then the provision mandating that sentence could be struck down.

The cases relied on in State v Pickering were not referred to in the present case. The Court of Appeal simply noted in passing that:

> there is no suggestion, in the context of length of custodial sentence, of violation of human rights protection against cruel, oppressive or inhumane treatment, a feature of so many challenges to capital sentences.

A mandatory sentence with no possibility of parole creates further difficulties. It has recently been held by the European Court of Human Rights that in the case of a person sentenced to life imprisonment, there must be both a prospect of release and a possibility of review: *Vinter v United Kingdom Applications* 66069/09, 130/10 and 3896/10, 9 July 2013. All prisoners, including those serving life sentences, must be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved. Without that possibility, life imprisonment would infringe the guarantee against torture or inhuman or degrading treatment or punishment.

A mandatory sentence of life imprisonment would also infringe human rights standards if applied to offenders under the age of 18 years. The Convention on the Rights of the Child, by which all Pacific Island states are bound, requires States Parties to ensure that:

1. neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age (Article 37(a));
2. the arrest, detention or imprisonment of a child … shall be used only as a measure of last resort and for the shortest appropriate period of time (Article 37(b)); and
3. children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence (Article 40(4)).

In Solomon Islands, it is not mandatory to sentence children to life imprisonment for murder. Juvenile Offenders Act [Cap 14] section 15 qualifies PC section 200 by conferring discretion on the trial judge not to impose a life term on a child offender convicted of murder: *Kelly v R* [2006] SBCA 17; *R v K* [2006] SBHC 35, 1 PHRLD 18.

A mandatory death sentence raises additional human rights concerns, which are considered in the Indian case of *State of Punjab v Singh* reported at page 71 of this volume.

MOVEMENT

FREEDOM OF MOVEMENT - HORIZONTAL APPLICATION OF CONSTITUTIONAL RIGHTS

The right to freedom of movement protected by the Constitution of Kiribati can be invoked by one citizen against another citizen.

TERIAKI v KAUONGO

High Court
Millhouse CJ

Kiribati
[2009] KIHC 27
9 July 2009

Laws considered

Constitution of Kiribati (CK)

Local Government Act 1984 (LGA)

Facts

The plaintiff (P) was the elected mayor of the Maiana Island Council. The first defendants (Ds) were three elders sued in their own capacity and as representatives of Tebau, a group of old men of the island. Following a dispute within the Island Council, Tebau decided that the Council should be dissolved and that the councillors should resign and not be eligible for re-election for four years. P resisted this decision, and sought a declaration that Ds' actions were unlawful. P also sought a declaration that Ds had infringed his constitutional right of free movement by deciding that he and his family must leave Maiana as a penalty for his refusal to resign. Ds claimed that the decisions of Tebau were above every other law, and had been since time immemorial.

Issues

- Could Tebau lawfully dissolve the Island Council and oblige its members to resign?
- Could P seek redress for breach of his constitutional rights against private individuals?

Decision

Ds' decision to dissolve the Island Council and have its members resign and be ineligible for re-election for four years was unlawful and of no effect.

The customary powers of Tebau were subject to the supreme law of Kiribati, namely the Constitution and (by implication) the laws made under it. The LGA was such a law, and it provided a complete code on matters regarding the establishment of island councils and the election and removal of councillors. The LGA gave Tebau a power to nominate people to the Island Council but not to dissolve the Council or force its members to resign. Its actions were not authorised by law and were therefore of no legal effect.

The court accepted that it had a power to award a remedy against a private individual for the violation of another person's constitutional rights. However, in this case, the court did not make a declaration that Ds had infringed P's constitutional freedom of movement; it simply declared that Ds' actions in dissolving the Council and obliging its members to resign and be ineligible for re-election for four years were unlawful and of no effect.

Comment

This decision confirmed that the power of traditional or customary leaders was limited by the terms of the national Constitution. While this relationship is evident from the terms of the CK, it is not always understood or accepted by the traditional leaders and continues to be a source of tension in some communities.

The judgment also recognised that constitutional protections of human rights are enforceable against private citizens. This principle is sometimes described as 'horizontal application', to distinguish it from 'vertical application', which refers to the principle that the rights are enforceable only against the State and its officials. In expressing his support for the horizontal application of the human rights protections in sections 3–16 of the CK, Millhouse CJ explicitly disagreed with the views of Maxwell CJ in *Teitinnang v Ariong* [1986] KIHC 1, (1987) LRCC (Const) 517. In the earlier case, Maxwell CJ had adopted the vertical application approach:

> The Constitution … is an instrument of government. It contains rules about the government of the country. It is my view, therefore, that the duties imposed by the constitution under the fundamental rights provisions are owed by the government of the day, to the governed. I am of the opinion that an individual or a group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution, no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold.

Millhouse CJ justified his different approach on the basis that in more recent years the courts have taken a broader, more liberal interpretation of provisions for the protection of rights. This view is consistent with a number of other decisions in Pacific Island countries, where constitutional rights have been enforced against traditional leaders or councils: see, for example, the Vanuatu case of *Public Prosecutor v Kota* [1993] VUSC 8, 1 PHRLD 74 and the Samoan cases of *Lafaialii v Attorney General* [2003] WSSC 8, 1 PHRLD 71 and *Leituala v Mauga* [2004] WSSC 9, 1 PHRLD 14. A similar result was reached in *Teonea v Pule o Kaupule of Nanumaga [2009] TVCA 2, 3 PHRLD 32,* although in that case the conclusion was based on Constitution of Tuvalu section 12(1) which specifies that constitutional rights are enforceable as between private individuals.

It has also been suggested that the position may be more complex than a simple choice between vertical and horizontal application. In *Ulufa'alu v Attorney General* [2004] SBCA 1, 3 PHRLD 36, the Court of Appeal of Solomon Islands indicated that whether citizens can rely on constitutional rights in actions between themselves may depend on 'the precise rights sought to be relied on and the context in which they are relied on'. Although the point has not been explicitly made in the cases cited above, it may be that Pacific courts have also taken into account the status of the parties against whom the rights are enforced. Even if leaders or councils exercising customary or traditional authority are not formally a part of the State, their decisions may have an effect within their own communities that is equivalent to or greater than that of the State. As such, there is a strong case for extending to such holders of public power the duty to observe constitutional rights, if the rights are to be effective in practice.

It should also be noted that the court acknowledged that it had the power to make a declaration that Ds had infringed on P's right to free movement, but declined to do so in this case. The remedy of a declaration is discretionary, and courts may decline to make an order that is not necessary to achieve a proper outcome in the case. In this case, it should have been sufficient for the legal position to be clarified for all concerned. But the court hinted that if Ds failed to act in accordance with the law, P could claim for damages. The court specifically referred to the availability of the private law action for unlawful interference with the exercise of P's legal rights. In some other jurisdictions the courts also award damages as a public law remedy for breach of a constitutional right: see *Proceedings Commissioner, Fiji Human Rights Commission v Commissioner of Police* [2006] FJCA 75, 3 PHRLD 1.

PROPERTY

UNJUST DEPRIVATION OF PROPERTY - DUTY TO PAY COMPENSATION TO CUSTOM LANDOWNERS

The ministerial approval of a development that would substantially interfere with the land rights of custom owners was an unjust deprivation of property when made without the owners' consent and without payment of appropriate compensation.

TERRA HOLDINGS LTD v SOPE

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

Vanuatu
[2012] VUCA 16
19 July 2012

International instrument and laws considered

First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (FPECHR)

Constitution of the Republic of Vanuatu (CV)

Foreshore Development Act [Cap 90] (FDA)

Facts

The respondent (R) and his family were custom owners of land in Fatumaru Bay, Port Vila. The family gave the land to the Republic of Vanuatu at Independence for a school, sporting field and public beach. The grant included land above the low-water mark.

In 2011 the State granted a lease over part of that land to a private individual who then transferred the lease to the appellant (A). The leased land ran along the coast between a road and the high-water mark. The Minister of Internal Affairs then granted approval to A under the FDA section 4 to carry out development seaward of the leased land. The development involved reclaiming the beach adjoining the leased land and the seabed to a distance of 50 metres below the low-water mark, as well as excavating a channel through an adjacent reef. The reclaimed land was to be used for commercial purposes. The custom owners were not consulted about the development and did not consent to it.

R claimed that the seabed and water below the low-water mark were custom land and that the development would trespass on that custom land. He argued that the FDA was unconstitutional because it permitted an unjust deprivation of the custom owners' property, contrary to CV Article 5(1) (j). Alternatively, he argued that the approval was unlawful because it amounted to an unjust deprivation of the custom owners' property.

A argued that under the FDA there was no requirement for the Minister to obtain the consent of the custom owners.

Issue

- Could the Minister lawfully approve the development without the consent of the custom owners?

Decision

The court ruled that the grant of approval for A's proposed development was invalid because it authorised an unjust deprivation of the custom owners' property, contrary to CV Article 5.

By CV Article 73, all land in Vanuatu belonged to the indigenous custom owners and their descendants. In this context, 'land' included both inland waters and territorial seas including the seabed. The seabed affected by A's proposed development fell within this definition of land. The right of custom owners to this land was 'property' within CV Article 5(1)(j).

The court rejected the claim that the FDA was invalid in its entirety. Approvals might be given under the Act where there was no question of any infringement of custom owners' property rights. For example, a development might take place only on public land or it might be done with the consent of the custom owners. It was therefore necessary to assess the constitutionality of the particular approval.

The court found that the proposed development amounted to a deprivation of property of the custom owners, within the meaning of Article 5(1)(j). It would involve dumping thousands of tonnes of rubble on the seabed, irreversibly changing the physical characteristics of the land from natural seabed and sandy beach to level dry land. The natural marine biodiversity and fisheries resources would be destroyed and the rights of custom owners to fish on and over the seabed would be permanently extinguished. The legal character of the land would be changed from seabed to dry land capable of being leased and put to non-traditional commercial use. The channel through the adjoining reef would also irreversibly extinguish seabed rights.

It also found that the deprivation was 'unjust'. In giving meaning to this term, the court relied on its earlier decision in *Groupe Nairobi (Vanuatu) Ltd v Government of the Republic of Vanuatu* [2009] VUCA 35, 3 PHRLD 30. In that case, the Court of Appeal had drawn on the principles developed by the European Court of Human Rights in relation to FPECHR Article 1, which also protected against unjust deprivation of property. The Court of Appeal had stated:

> Once a deprivation of property is found to have occurred it is necessary to examine whether the deprivation was lawful, whether it was in the public interest, and whether a reasonable and fair balance was struck between the public interest and individual rights.

In the present case, the court concluded that a deprivation of property would be 'just' if it could be justified in the public interest and if it accorded with accepted principles of justice and fair dealing. The court also considered the issue comparable with the proviso under CV Article 5 which allowed restrictions on rights if they respected the rights and freedoms of others or pursued the legitimate public interest in defence, safety, public order, welfare or health.

The court rejected the argument that development was in the public interest because it was for the purpose of advancing tourism. The court did so for the following four reasons:

1. Promoting tourism was not a public interest like defence, safety, public order, welfare or health.
2. Any benefit to tourism was dwarfed by the benefit of maintaining public access to the beach area which was given for the very purpose of allowing community use.
3. There were numerous other coast-line areas in the general vicinity where tourism developments could be promoted.
4. A deprivation of property of the magnitude of the one in this case could not generally be justified as being in the public interest unless the government first obtained lawful title to the land from the custom owners by compulsory acquisition on payment of appropriate compensation.

Comment

The CV offers little guidance on the question of when a deprivation of property is 'unjust'. The term means more than 'according to law'; and seems to require more than a fair process. In these circumstances, it was perhaps understandable that the court sought guidance in the decisions on FPECHR, Article 1. That provides as follows:

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

Although expressed in more extensive terms than CV Article 5(1)(j), the European provision recognises that the right to private property is not absolute, but that deprivation of private property by the State requires justification in the public interest. Nor should it be sufficient to point to some public interest in taking the property: the justification should be reasonably commensurate with, or proportionate to, the extent of the deprivation. In this case, the crucial factor was that no compensation was paid for the significant deprivation suffered by the custom owners. In a context where the right to property is constitutionally protected, it would be an exceptional case in which taking a person's property for a public purpose without providing adequate compensation could be justified.

What kinds of public interest can be relied on to justify deprivation of property? The court appeared to consider that the only permissible purposes were those listed in the proviso to CV Article 5: defence, safety, public order, welfare and health. On this basis, the promotion of tourism would not qualify as a public interest. This seems unduly restrictive. The five purposes stated in the proviso are not intended to define when a deprivation could be justified. Therefore, it should be open to the State to rely on other public interest grounds. Indeed, that was implicit in the *Groupe Nairobi* case, where the public interest in question was the protection of government revenues. It is suggested that it would be better to regard the promotion of tourism as a legitimate public interest for these purposes, but an insufficiently weighty one to justify the deprivation in this case.

Finally, it may be noted that section 53 of the Constitution of Papua New Guinea also has a provision protecting persons from unjust deprivation of property. It too provides a more detailed set of criteria for determining whether a deprivation is justifiable, although in different terms to those in the First Protocol. Section 53 was not discussed in the *Groupe Nairobi* case or the present decision.

RELIGION

RELIGION - DAMAGES FOR INFRINGEMENT OF FREE EXERCISE OF RELIGION

A person was awarded damages against the State after her employment was arbitrarily terminated because of her religious affiliation.

KONELIO v KAUPULE OF NANUMAGA

High Court
Ward CJ

Tuvalu
[2010] TVHC 9
23 March 2010

Law considered

Falekaupule Act [Cap 4.08] (FA)

Facts

In 2003 the Falekaupule (F) – the traditional assembly of elders on the island of Nanumaga – passed a resolution banning new religions from being established on the island. As a consequence, members of the Tuvalu Brethren Church (TBC) were effectively prohibited from practising their religion on Nanumaga.

In 2005 the High Court held that F had acted within its powers in making the resolution: *Teonea v Kaupule* [2005] TVHC 5, 2 PHRLD 83.

In 2006 F resolved to enforce its 2003 resolution by terminating the employment of TBC members who worked for F.

In 2008 four actions were commenced by people connected to the TBC. In the first action, the plaintiffs alleged that their employment had been unlawfully terminated in 2006. The defendants – F and the island council, the Kaupule (K) – objected that this action was commenced out of time, as FA section 112 imposed a 12-month limit for commencing such an action against them.

In the second action, the plaintiff (P) also alleged that her employment was unlawfully terminated in 2006. Although the time limit was again an issue in relation to F and K, P also sued the Attorney General, to whom the 12 months' time limit did not apply. P had been employed by the Ministry of Home Affairs and seconded to K. When K terminated her services, the Ministry of Home Affairs continued to pay her salary for eight months, to mark its disagreement with the decision to terminate, until the Ministry of Finance suspended further payments when it learned that P was no longer working for K.

The third action was brought by N, whose wife was a member of the TBC. He alleged that he was dismissed from his employment at the fusi (cooperative store) as a result of unlawful pressure by F and K. The defence admitted that it had pressured the fusi to dismiss N, but otherwise denied the claim.

The fourth action was brought by A, who claimed that her application for a position as a cleaner was not considered by K because she was a member of the TBC. The defence admitted that A's application had not been considered because she had failed to comply with F's resolution but otherwise denied the claim.

On 4 November 2009 the Court of Appeal reversed the High Court's 2005 decision, ruling that F's resolution was an unconstitutional restriction on the freedom of religion: *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2, 3 PHRLD 32.

Issues

- Were the first and second actions barred by the time limit in FA section 112?
- Was K's dismissal by the Tuvalu government unlawful?
- Was N's dismissal by the fusi unlawful?
- Was the failure to consider A's application unlawful?

Decision

The court dismissed all the action except P's claim against the Attorney General. It awarded to P damages equivalent to three years' salary.

The court dismissed the first action because it had been commenced more than 12 months after the alleged unlawful dismissal. It dismissed the second action against F and K for the same reason.

However, the court upheld P's claim against the Attorney General. It found that K's employment by the Ministry of Home Affairs was terminated arbitrarily as a result of the actions of F and K directing her to stop working on Nanumaga because of her membership of the TBC. That termination was done without notice to P and without resort to relevant statutory procedures. Given the difficulty that P would experience in finding other work on Nanumaga, the court awarded her compensation equivalent to two years' salary. The court also awarded a further sum equivalent to one year's salary by way of exemplary damages, because P's loss had occurred as a result of arbitrary action by government officials.

The court dismissed the third action. This was a claim of intimidation, that F and K had intentionally exerted illegitimate pressure on the fusi to inflict damage on N. The claim failed for two reasons: first, the pressure was not illegitimate. When these actions took place – prior to the decision of the Court of Appeal – F was entitled to accept the decision of the High Court as stating the law. It acted in accordance with what it understood to be its traditional role. Secondly, the evidence shows that the fusi resisted the pressure and only terminated N's employment because he was redundant.

The court dismissed the fourth action for reasons similar to those in the third action.

Comment

Although F and K acted against all the Ps because of their association with the TBC, only one was successful in obtaining compensation for the infringement of their right to practise their religion. This outcome points to some of the difficulties in obtaining satisfactory remedies for breach of human or constitutional rights through court processes. Among the difficulties was the problem of proving causation in discrimination cases: N failed to show he was dismissed because of the pressure brought by F and K on account of his religious affiliation, rather than simply because he was redundant.

Another difficulty arose, in relation to the intimidation claim, from the passage of time in bringing the appeal on for hearing. This was not attributable to the fault of the parties, but to the difficulty experienced in Tuvalu in convening a Court of Appeal. Although the Court of Appeal recognised that there had been a violation of the rights of members of the TBC, action taken in the intervening years by F and K could still be characterised as 'legitimate', as it conformed to the law as announced in the High Court decision.

A further difficulty related to the time limits imposed on commencing legal action. While it is legitimate to expect those with a complaint to pursue it with reasonable promptness, when memories are still fresh and witnesses and records are still available, injustice can be caused where the limitation rules are too strict, or are discriminatory. In some jurisdictions, rules persist that discriminate in favour of public authorities, typically requiring advance notice of an intention to bring an action against the authority and containing a limitation period far shorter than for other defendants. If a plaintiff does not comply with these rules, the action cannot proceed, regardless of the wrong done by the public authority. This creates a particular challenge to actions seeking redress for human rights violations, as they will almost invariably be brought against a government agency or people who acted on its behalf.

This special protection for public authorities can be traced to the United Kingdom's Public Authorities Protection Act 1893. They have since been abolished in the United Kingdom by the Law Reform (Limitation of Actions etc) Act 1954. Similar reforms have occurred in many other common law jurisdictions that had inherited or adopted the 1893 Act. The reforms have proceeded on the basis that there is no sound reason for providing a privileged position in litigation for public authorities: they have equal if not greater resources available to defend themselves when compared with private defendants. As Lord Bridge explained in *Arnold v Central Electricity Generating Board* [1988] AC 228, 269:

> The philosophy which was once thought to justify the distinction between public and private defendants in [regard to limitation of actions] had fallen wholly into disrepute when the distinction was swept away in 1954, and, so far as I am aware, has never subsequently regained any reputable currency.

In Tuvalu, the protection once provided to public authorities no longer operates in favour of the State, because the English limitation law as it stood in 1961 applies: *Iosefo v Tuvalu Red Cross* [2012] TVHC 9. However, the old rules have been preserved in favour of a Falekaupule by sections 111 and 112 of the FA. Serious consideration should be given to repealing this remnant of a discredited rule.

VIOLENCE AGAINST WOMEN

RAPE - MARITAL EXEMPTION

The historical exemption by which a man could not be guilty of raping his wife no longer applied in Solomon Islands.

R v GUA

High Court
Apaniai J

Solomon Islands
[2012] SBHC 118
8 October 2012

International instrument and law considered

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

Constitution of Solomon Islands (CSI)

Facts

The accused (A) was charged with raping T. At the time of the incident in question, T was A's wife, although she had left A about 11 days earlier and had commenced living with another man. The Crown led evidence that A forced T to travel with him to a remote place where he forced her to have sex with him against her will.

The defence submitted that A had no case to answer. In particular, it was argued that in Solomon Islands, a man cannot be guilty of raping his wife, unless there has been a decree nisi (a conditional order for divorce), a separation order or in certain circumstances a separation agreement. None of those qualifications applied in this case.

Issue

- Did the marital exemption to rape still apply in Solomon Islands?

Decision

The court rejected the submission of no case to answer. It found that the marital exemption to rape no longer applied in Solomon Islands.

The court acknowledged that the exception had previously formed part of the law of Solomon Islands. This was recognised by Muria J in *R v Gwagwango* [1991] SBHC 59. It proceeded on the basis that by marriage a wife impliedly consented to have sex with her husband. That consent could only be revoked by a decree nisi, a separation order or a separation agreement. In all other cases, the wife was considered to have consented to the intercourse.

However, that decision was based on several English decisions that were overruled by the House of Lords in *R v R* [1992] 1 AC 599, decided a month before the decision in *R v Gwagwango*. The supposed exemption had already ceased to be part of the common law at the time Muria J applied it to Solomon Islands.

In any event, the exemption was no longer appropriate to Solomon Islands. Women were no longer considered as sex objects or as the subservient chattels of their husbands. Marriage was now regarded as a partnership of equals. This principle of equality was reflected in CEDAW, to which Solomon Islands was a party. Article 15 of that Convention called on all States Parties to accord women equality with men before the law and Article 16 called for the same personal rights between husband and wife.

In addition, CSI sections 3 and 15 guaranteed women equal rights and freedoms to men and afforded them protection against all forms of discrimination, including discrimination on the ground of sex.

A husband raping his own wife did so to satisfy his own selfish desires at the expense of the wife's dignity and feelings. Such behaviour had to come to an end.

This was not the creation of a new offence against husbands. Rather, this decision removed a common law fiction that had become anachronistic and offensive.

Comment

The supposed common law marital rape exemption was a discriminatory law because it effectively only operated against women, and married women in particular. Under CSI section 15, such a discriminatory law was unconstitutional unless it could be shown to be reasonably justifiable in a democratic society. The fact that it was previously thought to form part of the common law of Solomon Islands could not provide the necessary justification. Indeed, no substantive justification for the exemption was offered in the case. Clearly, the court thought it could not be justified, in the light of modern attitudes to marriage and to the equality of men and women recognised by CSI and CEDAW. By refusing to continue this outdated exemption, the Solomon Islands court acted consistently with the highest courts in the United Kingdom (*R v R* [1992] 1 AC 599) and Australia (*R v L* [1991] HCA 48) which have also rejected the supposed common law exemption. In many other countries, where an exemption for marital rape was once included in legislation, statutory reforms have now eliminated this immunity.

A second issue arising from the decision was the retrospective application of the new understanding of the rape law. There is an important human rights principle, reflected in the International Covenant on Civil and Political Rights Article 15(1), against punishing someone for conduct that was not criminal at the time it occurred. The principle is expressed in CSI section 10(4):

> No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence.

Admittedly, the court in this case was not creating a new offence; it was extending the reach of the offence by removing a perceived defence. It could also be argued that the common law exemption had already ceased to exist by 1991, even if the decision in *R v Gwagwango* had failed to recognise the change: see PGA v R [2012] HCA 21. If so, it may be that the principle in section 10(4) was not breached.

If not, there remains a concern that A was exposed to criminal liability for an act which was not criminal in the Solomon Islands at the time he allegedly committed it. This raises the conundrum expressed by Bell J in her dissenting judgment in *PGA v R* [2012] HCA 21, [247]:

> The common law was demeaning to women in its provision of the immunity. It is no answer to that recognition to permit the conviction of the appellant for an act for which he was not liable to criminal punishment at the date of its commission.

On that view, in jurisdictions where the courts lack the power to make prospective rulings or to give advisory opinions, it would be more appropriate to abolish the exemption by legislative reform.

SEXUAL INTERCOURSE BY DIGITAL PENETRATION - SENTENCING

In sentencing an offender convicted of sexual intercourse without consent, a court should distinguish between cases of digital and penile penetration.

PUBLIC PROSECUTOR v TAO

Supreme Court
Spear J

Vanuatu
[2012] VUSC 219
25 October 2012

Law considered

Penal Code [Cap 135] (PC)

Facts

The offender (T) pleaded guilty to a charge of having sexual intercourse with his wife without her consent. He had returned home drunk one night, and forced his fingers into his wife's vagina, causing her considerable pain. T's wife resisted and prevented T from proceeding further. When questioned by police, T indicated that he believed he was entitled to have sex with his wife whenever he wanted and that she had no right to refuse him.

Under 2006 amendments to the PC, the offence of rape was renamed 'sexual intercourse without consent'. The definition of sexual intercourse was considerably expanded beyond the former requirement of penile-vaginal penetration. Section 89A provided:

> For the purposes of this Act, sexual intercourse means any of the following activities, between any male upon a female, any male upon a male, any female upon a female or any female upon a male:
>
> (a) the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law; or
>
> (b) the penetration, to any extent, of the vagina or anus of a person by an object, being penetration carried out by another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law; or
>
> (c) the introduction of any part of the penis of a person into the mouth of another person; or
>
> (d) the licking, sucking or kissing, to any extent, of the vulva, vagina, penis or anus of a person; or
>
> (e) the continuation of sexual intercourse as defined in paragraph (a), (b), (c) or (d); or
>
> (f) the causing, or permitting of a person to perform any of the activities defined in paragraph (a), (b), (c) or (d) upon the body of the person who caused or permitted the activity.

T came before the court for sentencing. The question arose whether the fact that the offence involved digital rather than penile penetration should affect the sentence.

Issue

- Should the sentence distinguish between different forms of sexual intercourse?

Decision

The court treated the offence differently because it involved digital, rather than penile, penetration. It sentenced T to a term of two years' imprisonment, with the second year suspended.

The court indicated that in overseas jurisdictions, a distinction was carefully drawn between the two forms of sexual acts, and that it was appropriate to follow this approach in Vanuatu. The court considered that T's actions warranted a four-year term, but reduced that on account of his remorse and early plea of guilty.

Comment

The question of the proper approach to sentencing in cases where the law has expanded the definition of rape or sexual intercourse is complex. While it is useful to examine the response in other countries, it is important to be aware of the statutory definition of the offences in each jurisdiction. For example, in England and Wales, the sentencing guidelines indicate that cases of digital penetration should generally be treated as less serious than penile penetration. However, those guidelines operate in the context of a criminal law that still treats these forms of penetration as different offences.

In Fiji Islands, the view has been taken in *State v Jabbar* [2011] FJHC 778 [8] – [9] that the approach should be the same whatever the form of violation:

> Whether it is penile penetration of mouth, vulva, vagina or anus, or digital penetration of vagina or anus, the approach to sentencing should be the same.
>
> An approach to treat these forms of violation as broadly similar in the sentencing context is consistent with the purpose of the rape law reforms. … Clearly, one of the objects of the rape law reform was to recognize that any act of sexual violation to the body of another must suffer the same punishment. After all, any form of sexual violation is an invasion of privacy and loss of personal dignity for the victim.

This echoes what the New Zealand Court of Appeal said in R v AM [2010] NZCA 114:

> an approach which treats [all] forms of violation as broadly similar in the sentencing context is consistent with the purpose of the rape law reforms. That is because one of the objects of the rape law reform exercise was to recognise that any act of sexual violation involves … 'an act of violation to the body of another involving at the very least an invasion of privacy and loss of personal dignity'.

However, the New Zealand court went on to distinguish between sentences for digital penetration or oral sex (other than penile penetration of the mouth) and those for penile penetration or penetration with an object, with the former generally attracting lower sentences.

Having made that distinction, the Court of Appeal indicated that there were dangers in focusing on the mode of violation in isolation from other aggravating factors. Accordingly, more serious cases of digital penetration or oral sex could attract sentences similar to those for penile penetration.

The High Court of Australia has rejected the view that all forms of violation covered by a statutory offence should be treated as equally serious. In *Ibbs v R* (1987) 163 CLR 447, the court stated:

> The inclusion of several categories of sexual penetration within the offence … carries no implication that each category of sexual penetration is as heinous as another if done without consent. When an offence is defined to include any of several categories of conduct, the heinousness of the conduct in a particular case depends not on the statute defining the offence but on the facts of the case.

Since then, some Australian courts have gone further in seeking to avoid generalisations about different forms of penetration, stressing instead the importance of the particular facts of the case. In *R v Hibberd* [2009] NSWCCA 20, Tobias JA argued against a hierarchy of forms of violation:

> any notion that one particular form of penetration may generally be regarded as more or less serious than another form should be rejected.

> As the objective seriousness of the offence is wholly dependent on the facts and circumstances of the particular case … any resort to prima facie assertions that one form of penetration is likely to be or generally will be more serious than another, is to be avoided. It can, in my view, only lead a sentencing judge to erroneously attribute more weight to the general proposition or assumption than the particular facts of the case.

It is difficult to rationalise these different approaches. Even so, several lessons emerge. First, it is important to recognise that all forms of non-consensual penetration involve an invasion of privacy and a loss of personal dignity. These are factors to be taken into account in all sentences. Second, it remains vital that the sentence reflects the seriousness of the particular case. For that reason, it is less helpful to focus on the simple issue of whether the penetration was digital or penile or whether it took some other form. In assessing the seriousness of the particular offence, it is more important to focus on factors such as the period over which the offences were committed, the use of threats or force or the abuse of trust, and the actual or potential harm caused to the victim. In assessing harm, it would be relevant to recognise that in some cases, penile penetration may carry risks of pregnancy or sexually transmitted disease, while digital penetration might cause other types of physical damage. Beyond that, it may be unwise to attach great significance to the form the penetration took.

SEXUAL INTERCOURSE WITHOUT CONSENT - SENTENCING;
VICTIM NOT REPORTING CONDUCT AT EARLIEST OPPORTUNITY

> **It was irrelevant to the sentence for an offence of sexual intercourse without consent that the victim had not reported the conduct at the earliest opportunity.**

PUBLIC PROSECUTOR v YACINTH

Court of Appeal
Lunabek CJ, Robertson, Fatiaki, Mansfield, Spear, Aru JJ

Vanuatu
[2012] VUCA 30
25 October 2012

Law considered
Penal Code [Cap 135] (PC)

Facts
The offender (Y) was a 38-year-old man who had pleaded guilty to one charge of sexual intercourse without consent, contrary to PC section 91. The offence was committed against his step-daughter (D) who was living at the time under his care and protection in his house. D was a 22-year-old woman with a mental disability that affected her speech and caused her right leg to be paralysed.

Y had sexual intercourse with D without consent on three occasions between August 2011 and January 2012. D became pregnant as a result of the intercourse and gave birth to a baby in July 2012. Only then did D report what had happened and gave a statement to the police. At that point, Y admitted his guilt and cooperated with the police.

The judge who sentenced Y reduced his sentence because D had omitted to make a complaint when the offending began in August 2011. If she had done so, the judge reasoned, the subsequent offending would not have occurred. Y was sentenced to four years' imprisonment.

The Public Prosecutor appealed against the sentence on the ground that the judge had wrongly treated D's omission to complain at the earliest opportunity as a mitigating factor.

Issue
Could D's delay in making a complaint be a mitigating factor in determining Y's sentence?

Decision
The Court of Appeal allowed the appeal and increased the sentence to six years. It ruled that D's omission to complain at the earliest opportunity could not be a mitigating factor in Y's sentence.

The court identified four aggravating factors:

1. there were three separate offences between August and January;
2. the victim became pregnant as a result;
3. the offending occurred within the family home where the victim ought to have been safe; and
4. the respondent took advantage of the victim's mental and physical disabilities.

These factors alone would have warranted a term of 10 years. This was reduced to six years because of Y's remorse, cooperation with police and early guilty plea. However, it was an error to treat the lack of an early complaint as a mitigating factor.

The court acknowledged that in earlier times complainants in rape cases were required to raise an immediate 'hue and cry' – that is, they had to report the offence as soon as possible and call on others to apprehend the offender. But it was now recognised that reactions of victims will vary, and that some may be unable to make an early complaint because of their particular circumstances. In some countries, specific legislative provisions required any delay to be ignored.

In this case, it was almost inevitable that D would not immediately make a complaint: she was fragile and vulnerable and the offender was a person who should have been caring for her. Her reticence to talk about what happened was demonstrated by her later difficulty in discussing the situation with a probation officer. Therefore D's initial omission to complain was irrelevant to the sentence in the case.

Comment
The expectation that a woman who had been sexually assaulted should immediately report the matter to someone else has historically been the basis for a number of rules in the criminal law. At one time, it was a procedural requirement before a prosecution could even be brought. Later, it was used to discredit the complainant's testimony, on the basis that a complaint made some time after the event was more likely to have been fabricated. In this case, it was used by the sentencing judge in a manner similar to contributory negligence: the woman was seen to have failed to protect herself from further offending. In other words, partial responsibility for the offending was placed on the victim.

All of these practices proceeded from a now-discredited assumption that the natural response to being subjected to a sexual assault is to report it immediately. Evidence shows that this response is unlikely for a range of reasons: fear that the offender may inflict further harm, fear of not being believed, shame, distrust of police or other officials, or dependence on the offender (as may have applied in this case).

Here, the Court of Appeal recognised that it was wrong, on the facts of this case, to treat the absence of an early complaint as relevant to the sentence. Given the complainant's fragility and dependence, it would have been unreasonable to expect her to make a complaint. By focusing only on the circumstances of the particular case, the court did not specifically rule that a lack of complaint would always be irrelevant. Even so, the court signalled that it would be unwise for a sentencing judge to rely on this factor in future cases.

It is also notable that the court regarded it as an aggravating factor that A took advantage of the complainant's disabilities. This is a matter discussed further in R v Belo, reported immediately below.

RAPE; SENTENCING - RELEVANCE OF VICTIM'S DISABILITY AND CUSTOM PAYMENT OF COMPENSATION

In sentencing an offender for rape, the physical and psychological disability of the victim was an aggravating factor, whereas a custom payment made to the victim's family without the offender's knowledge was irrelevant.

R v BELO

High Court
Pallaras J

Solomon Islands
[2012] SBHC 88
10 August 2012

Law considered

Penal Code [Cap 26] (PC)

Facts

The offender (B) was a man aged between 50 and 60 years. He was convicted of rape under PC section 136. The victim was a girl aged 15 years at the time of the offence. She had suffered from meningitis from the age of eight months, suffered from cerebral palsy and often had fits. Due to her state of health she had never attended school.

B had contrived to be alone with the girl in circumstances where he had been left alone to take care of her as a trusted friend of the family.

B's family paid shell money and $200 cash to the girl's mother on the night of the offence as a custom payment of compensation. This was done without B's knowledge and he was angry when he found out about it. His son had since sought to recover the payment.

B came before the court for sentencing. He relied on his previous good character and the custom payment in mitigation.

Issue

- What was the appropriate sentence for this offence?

Decision

The court sentenced B to six years' imprisonment. In doing so, the court treated B's breach of trust and taking advantage of the girl's disabilities as serious aggravating factors. In the circumstances, no credit was given for the custom payment.

The court referred to its duty to protect young children from being preyed on by older men. It insisted that cruelty of this kind would not be tolerated and that women of all ages had a right to be treated with dignity and respect.

The court regarded the following as aggravating factors:

1. the very young age of the girl;
2. the great difference in ages between B and the girl;
3. the girl's physical and psychological disabilities which B well knew made her particularly vulnerable and helpless;
4. the degree of contrivance shown by B in creating the opportunity to commit the crime; and
5. the fact that the crime was committed when the girl was ill and left in B's care as a trusted family friend.

These factors taken alone would have justified a term of eight years, but the term was reduced to six years to allow for B's previous good character and the four-year delay in the case being brought against him.

Although the court acknowledged that payment of custom money could be taken into account where it showed genuine contrition by the offender, the circumstances of the payment in this case did nothing to show B's remorse. The payment was made without his knowledge, and he became angry when he learned that it had been made.

Comment

The court referred to the principles for sentencing in a rape case set out in *R v Billam* (1986) 1 WLR 349, a decision that had been followed in R v Ligiau [1986] SBHC 15. In *Billam*, Lord Lane LCJ identified the following as aggravating factors:

(1) violence is used over and above the force necessary to commit the rape;

(2) a weapon is used to frighten or wound the victim;

(3) the rape is repeated;

(4) the rape has been carefully planned;

(5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind;

(6) the victim is subjected to further sexual indignities or perversions;

(7) the victim is either very old or very young;

(8) the effect upon the victim, whether physical or mental, is of special seriousness.

While there was no reference in the list to the disability of the victim, it is entirely appropriate to treat it as a further aggravating factor. Just as the extreme youth or old age of the victim increases the vulnerability of the victim, so does disability. It is known that women with a disability are at significantly greater risk of sexual abuse, and the law is justified in taking strong action for their protection.

Further, the court's reasoning was consistent with Solomon Islands' obligations under the Convention of the Rights of the Child Article 19. It is also gives effect to Articles 6, 7, 14, 16 and 17 of the Convention on the Rights of Persons with Disabilities, which Solomon Islands has signed but not ratified.

It is also appropriate that the court did not regard the payment of shell money and other compensation as mitigating the wrong done by the offender. At most, custom payments can be considered as an indication of remorse by the offender: *R v Asuana* [1990] SBHC 52. The evidence showed that B was hostile to the payment once he found out about it. So, although it may have been useful in reconciling the two families, it could not be treated as a mitigating factor for B.

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

ABUSE OF PROCESS

ABUSE OF PROCESS - UNLAWFUL DEPORTATION

The prosecution of a person charged with unlawful sexual intercourse was permanently stayed as an abuse of process where the prosecuting authorities had knowingly participated in the unlawful deportation of the accused from another country.

MOTI v R

High Court
French CJ; Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ

Australia
[2011] HCA 50
7 December 2011

Law considered

Deportation (Amendment) Act 1999 (Solomon Islands) (DAA)

Facts

Moti (M) was an Australian citizen. He was alleged to have engaged in sexual intercourse with the complainant (C), a girl under the age of 16 years, while he was outside Australia, namely in Port Vila, Vanuatu and in Noumea, New Caledonia. He was charged in Australia with these offences.

Although the Australian authorities had commenced proceedings for M's extradition from Solomon Islands, the Government of Solomon Islands chose to deport M to Australia in a manner that prevented M from exercising his rights under the DAA, at a time when M was actively seeking judicial remedies to prevent his deportation. The Australian Acting High Commissioner in Honiara was aware that the proposed deportation was unlawful under the DAA, and advised the Australian government accordingly. The High Commission facilitated M's removal by providing travel documents for M and two accompanying Solomon Islands officials which allowed all three to enter Australia.

The Australian authorities subsequently provided C and members of her family with financial assistance in meeting the family's living expenses pending the trial.

The Supreme Court of Queensland granted M a stay of the indictment on grounds of abuse of process. The trial judge ruled that the level of the financial support provided by the prosecuting authorities to C and her family brought the administration of justice into disrepute. This ruling was reversed on appeal by the Queensland Court of Appeal: see *R v Moti* [2010] QCA 178, 3 PHRLD 46.

M appealed to the High Court of Australia.

Issue

- Should the prosecution be stayed as an abuse of process either because of the involvement of the Australian authorities in the deportation of M from Solomon Islands or because of the financial support provided to C and her family?

Decision

The High Court (Heydon J dissenting) ordered the prosecution to be stayed as an abuse of process, because of the involvement of the Australian authorities in M's unlawful deportation. It dismissed the arguments based on the provision of financial support to C and her family.

It was not enough to show that the conduct of the Solomon Islands officials fell outside the scope of the DAA so that M's deportation was unlawful under Solomon Islands law. The focus was on the conduct of the Australian authorities in connection with the deportation. It was no answer to say that the Australian authorities did not advise or encourage the Solomon Island government to carry out the deportation. The fact that the Australian officials knew that the deportation would be unlawful and yet facilitated it by providing travel documents made the prosecution of M in the Queensland court an abuse of process.

Comment

The court recognised that 'the *end* of criminal prosecution does not justify the adoption of any and every means for securing the presence of the accused'. To allow the prosecution to use any available means to bring an alleged offender before the court would undermine the public interest in the administration of justice which requires the courts to ensure that their processes are used fairly by State and citizen alike. Failure to do so will erode public confidence in the legal process.

The court declined to provide a definitive formulation of what conduct in relation to a deportation from another State would amount to an abuse of process, preferring to make an assessment on the particular facts and circumstances of the case. While this allows the courts to respond flexibly to unforeseen possibilities, it also makes it more difficult for governmental officials to know how to proceed. In this particular case, the Australian officials were keenly aware of the need to avoid any conduct that might amount to an abuse of process and were proceeding on the basis of legal advice as to how that could be achieved. The attempts proved futile, as the High Court adopted a more flexible assessment of abuse of process than had been suggested in the earlier Australian authorities.

DISCRIMINATION

DISCRIMINATION - EDUCATION; DISABILITY DISCRIMINATION

In determining whether there had been discrimination against a child with special needs, it was necessary to compare the position of the child with that of children generally rather than with other children with special needs.

MOORE v BRITISH COLUMBIA (EDUCATION)

Supreme Court
McLachlin CJ, LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ

Canada
2012 SCC 61
9 November 2012

Laws considered

Human Rights Code (RSBC 1996, c 210) (HRC)

School Act (RSBC 1996, c 412) (SA)

Facts

The appellant (A) suffered from severe dyslexia, a learning disability. At first, he received special educational assistance at his public school. In grade two, his needs were so severe that the school district's psychologist recommended that he should attend the local Diagnostic Centre to receive more intensive assistance than was available at the public school. However, the school district closed the Diagnostic Centre on financial grounds. A was then sent to a private school to get the assistance he needed.

A's father filed a complaint with the British Columbia Human Rights Tribunal on A's behalf against the school district and the province, claiming that A had been discriminated against in the provision of a 'service customarily available to the public' under HRC section 8. The Tribunal found that there had been discrimination by the district and the province against A and other children with severe learning disabilities. It ordered a wide range of sweeping systemic remedies against both the district and the province. It also ordered that the family be reimbursed for the tuition costs of A's private school.

On judicial review in the Supreme Court of British Columbia, the Tribunal's decision was set aside. The court found that there had been no discrimination against A in the provision of special education when A's case was compared with that of other children with special needs. An appeal to the Court of Appeal was dismissed. A appealed to the Supreme Court of Canada.

Issues

- Should A's case be compared with other children with special needs or with the general student population?
- Could the discrimination be justified by the district's financial difficulties?

Decision

The court upheld A's appeal in part. It found that the district had discriminated against A when it closed the Diagnostic Centre without providing alternative means for addressing A's needs. However, the Tribunal's finding against the province and its order for systemic remedies were both rejected.

The court found that the relevant service was not 'special education' but 'education' in general. The issue was whether A had genuine access to the education that all students in British Columbia were entitled to receive under the SA. Special education was the means by which students with special needs obtained access to the general education services available to all students.

The relevant comparison was not between A and other children with special needs, but between A and other students generally. To proceed otherwise would have risked perpetuating the very disadvantage and exclusion from mainstream society the HRC was intended to remedy. It would have allowed the district to cut all special needs programmes and yet be immune from a claim of discrimination.

Here, there was no dispute that A was denied meaningful access to public education by reason of his disability in that there was a failure to provide adequate assistance to meet his special learning needs. The question was whether it was justifiable. The district had significant financial difficulties at the time and closed the Diagnostic Centre solely to save costs. However, this response to the district's financial difficulties impacted disproportionately on students with special needs. The district retained other programmes that, while valuable, could not be regarded as essential to enabling students to access the core curriculum. Further, it made no inquiry into whether there were other means available to meet the needs of students with learning disabilities. The district could not claim it had no economic choice when it had not even considered the alternatives.

There was no evidential basis for the Tribunal finding that the province had also discriminated against A. The relevant decisions had been taken at the district level.

The remedy of financial compensation for A's family was appropriate, but the systemic remedies ordered by the Tribunal went far beyond addressing the substance of A's individual claim.

Comment

The case highlights the importance of properly assessing whether discrimination exists. In many cases, a comparison is drawn between the complainant and other people in a similar situation, except that they do not share the complainant's sex, race, disability or other personal characteristic on which discrimination is prohibited. In this case, where A is claiming to be discriminated against because of his disability, the relevant comparators were children without a disability.

However, as the Canadian Supreme Court has acknowledged in *Withler v Canada (Attorney General)* 2011 SCC 12, even this kind of 'mirror' comparison may fail to properly identify discrimination in all cases. For example, it may overlook cases where discrimination proceeds from a combination of personal characteristics, or where there is no comparable group with whom the complainant can be compared. In all cases, it is suggested, a more contextual approach is needed, which takes account of the purpose of the law or practice under challenge, and all the circumstances in which it was applied to the complainant.

The discriminatory treatment was the district's failure to provide the special assistance A needed to be able to learn to read, which the majority of children did not need. In this sense, the discrimination lay in treating A the same as other children when his needs were different. The district failed to make 'reasonable accommodation' of A's needs to enable him to access education on an equal basis with others, as contemplated by the Convention on the Rights of Persons with Disabilities, Article 5(3).

The case also demonstrates how a court might assess a claim that it is too expensive to provide the needed assistance. While the court acknowledged that budgetary constraints were clearly a relevant consideration for the district, they could not be conclusive, since it would always be cheaper to do nothing to redress discriminatory barriers. Rather, there needed to be a careful consideration of all available options, weighing the costs of providing access to education for those with learning disabilities against other (discretionary) programmes. Such a rights-based approach does not determine how public funds will be spent, but it does require that the rights of people with disabilities be properly taken into account.

DISCRIMINATION - RIGHT OF ACCESS TO HOUSING; ACCESS TO EMERGENCY ACCOMMODATION

It was unlawful for a local authority to discriminate in its provision of emergency accommodation against those who had been evicted by private landowners.

CITY OF JOHANNESBURG v BLUE MOONLIGHT PROPERTIES 39 (PTY) LTD

Constitutional Court
Moseneke DCJ, Cameron, Froneman, Jafta, Khampepe, Mogoeng, Nkabinde, Skweyiya, Van Der Westhuizen, Yacoob JJ

South Africa
[2011] ZACC 33
1 December 2011

Laws considered

Constitution of the Republic of South Africa (CSA)

Housing Code (HC)

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998 (PA)

Facts

The respondent company (R) purchased property containing old and dilapidated buildings in which 86 occupiers resided. The occupiers were poor people who had been in lawful occupation prior to R's purchase. After R gave them notice to vacate the premises, their continued occupation became unlawful. R sought eviction orders against the occupiers under PA, to enable it to redevelop the property. It relied on its right not to be arbitrarily deprived of its property. The occupiers resisted eviction on the ground that it would render them homeless. They relied on their right of access to adequate housing and their rights to equality before the law and equal protection of the law.

The applicant (A), the city authority, was joined as a party because of its statutory duties in relation to housing. A claimed that it had no duty to fund housing from its own resources: its responsibility under the HC was limited to implementing programmes funded by the provincial or national governments. In this case, it had not received funding to house people evicted from private land.

In any event, it claimed that it lacked the resources to provide emergency housing for those evicted by private landowners.

A also claimed that it was operating according to its own housing policy, which differentiated between people who were being relocated by the city itself and people who had been evicted by private landowners. Under the policy, A provided temporary accommodation for the former but not the latter.

Issues

- Was R entitled to an eviction order against the occupiers?
- If so, was A obliged to provide the occupiers with emergency housing?
- Was A's housing policy discriminatory?

Decision

The court ordered A to provide temporary accommodation for the occupiers by 1 April 2012. It ordered the occupiers to vacate R's property by 15 April 2012. It also declared unconstitutional A's housing policy to the extent that it excluded people evicted by private landowners from consideration for temporary accommodation in emergency situations.

The court found that the PA attempted to balance the right not to be arbitrarily deprived of property (protected by CSA section 25) and the right of access to adequate housing, which was protected by CSA section 26 in the following terms:

> (1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Allowing the unlawful occupiers to remain indefinitely would have amounted to arbitrary deprivation of the owner's property. But the law sought to take into account the interests of the occupiers too: PA section 4 allowed a court to order the eviction of unlawful occupiers only where it was just and equitable to do so.

The court stated that in certain circumstances an owner would have to accept that its right to occupation could be temporarily restricted. Among the circumstances to be considered in this case were the following:

1. the occupiers had all been in occupation for more than six months, and some for a much longer time;
2. the occupation was originally lawful;
3. R was aware of the occupiers when it bought the property;
4. eviction of the occupiers would render them homeless; and
5. there was no competing risk of homelessness on the part of R, as there might be if eviction were sought to enable a family to move into a home.

In the circumstances, it would be just and equitable to order the eviction of the occupiers if A had already provided them with emergency housing.

As to A's responsibility, the court found that the duty to provide adequate housing fell collectively on national, provincial and local governments. As a local authority, A had both the power and the duty to finance its own emergency housing scheme. It was obliged to consider whether it was able to address an emergency housing situation out of its own means; it might also apply to the province for funds. It was not enough for the city to make ad hoc applications to the provincial government as emergency housing needs arose. It had a duty to plan and budget proactively for foreseeable situations like that of the occupiers. Further, it was no defence to say that the city has not budgeted for something if it should have planned for it in the fulfilment of its obligations. A had not substantiated its claim that it lacked the resources to meet the needs of the occupiers.

CSA section 26(2) recognised that reasonable legislative and other measures to provide adequate housing must be taken within available resources. Given the limited availability of resources, any housing policy would have to differentiate and prioritise between categories of people. However, the differentiation needed to be rational and reasonable. While a range of policy responses might all be reasonable, a programme that omitted the most desperate and vulnerable people would not be reasonable. A policy that excluded all people made homeless through eviction by a private landlord failed to reasonably consider the needs of those people. The exclusion was unreasonable and contrary to the right in CSA section 9(1) to be equal before the law and enjoy equal protection and benefit of the law.

The court fashioned a remedy that linked the right of R to evict the occupiers with the duty of A to provide them with emergency accommodation. Once A had complied with its duty, it would be just and equitable to allow the eviction to proceed.

Comment

The case illustrates some of the challenges faced by courts and governments when economic or social rights are made legally enforceable. The landmark case of *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19, 1 PHRLD 84 had recognised that the right to access to housing was justiciable in South Africa, as the CSA provided legal standards within which governments must attempt to address the acute shortage of adequate housing that was a legacy of the apartheid era. The current case provided a further elaboration and application of those standards.

The court was fully aware of the enormous demand for housing in Johannesburg, noting that an estimated 423,249 households in that city were without adequate housing. It recognised that it would be appropriate for A to develop policies that would address these needs, and that priority might be given to some people ahead of others. All of that was consistent with the concept of progressive realisation of rights recognised both in the CSA and human rights treaties such as the International Covenant on Economic, Social and Cultural Rights. But the policies would need to be based on a correct understanding of the city's responsibilities. In this case, the court found that A had formulated its policy on a misunderstanding of its responsibilities. It had wrongly assumed that provision for emergency housing was a matter for national or provincial governments only.

Further, any distinctions that were made between groups of people would need to be rational and reasonable, if the policies were to avoid being discriminatory. In excluding those evicted by private landowners from its temporary housing policy, the city may have assumed that those already in the private sector would be less needy then those in the public sector. The court found that this assumption was unjustified, as many of the occupiers were poor and particularly vulnerable. The policy failed to assess the needs of the people affected and their capacity to find alternative accommodation. It was therefore an unconstitutional policy, as it infringed the rights to equality before the law and equal protection of the law.

The decision demonstrates the careful balance needed between judicial deference to the choices made by the legislative and executive branches in addressing social problems and the insistence that rights be respected, protected and fulfilled. No doubt, the decision will have created practical difficulties for the city. It will have forced the city to modify its existing policies and make further hard choices in determining how to accommodate the evicted occupiers, perhaps by using accommodation previously earmarked for other people or by drawing on funds previously budgeted for other uses. The court's decision that the previous policy infringed fundamental rights did not direct what the new policy should be, or how it should be implemented. That task was transferred back to the responsible government agencies, to make their best efforts to act within the parameters set by the court. No one should underestimate the difficulty of that task; it is the challenge inherent in finding rights-based solutions to complex problems.

The case is also of interest for its reference to *'ubuntu'*, a concept said to underlie both the CSA and the PA, and to be relevant to their interpretation. The court referred to a passage in its earlier decision in *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, [7] where it was stated:

> The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

This concept may deserve further examination in the Pacific, given the importance of understanding how human rights can be applied within communal societies.

LIFE

RIGHT TO LIFE- MATERNAL HEALTH CARE

A state government was ordered to increase its efforts to implement a national programme to reduce maternal mortality in rural India.

BANSAL v UNION OF INDIA

High Court
Singh, Yadav JJ

Madhya Pradesh
No 9061/2008
6 February 2012

Law considered

Constitution of India (CI)

Facts

In 2005 the central government of India launched the National Rural Health Mission, a programme to provide accessible, affordable and quality health care to the rural population of India and to reduce maternal mortality. The programme was implemented in 18 priority states including the State of Madhya Pradesh (MP), one of the respondents in this case. The key elements of MP's implementation plan for 2006–2012 involved providing access to emergency obstetric care, skilled attendants at birth, and an effective referral system. The goal was to reduce the maternal mortality rate from 498 deaths per million live births to 200 deaths per million live births by 2010.

The petitioner (P), representing a network of non-governmental organisations working to improve public health, alleged that MP had failed to implement the programme effectively. P provided detailed statistics to demonstrate the many alleged failures in implementing the plan. P drew particular attention to the great disparities in mortality rates between different parts of the State and in the standard of health care as between richer and poorer women.

While admitting that facilities were inadequate, MP claimed that it was doing all that was possible given its limited human and financial resources. It provided the court with detailed information as to the services and facilities it was providing.

P sought a court order directing MP to take effective steps to meet the goal of reducing the mortality rate within the targeted period.

Issue

- Was MP required to do more to achieve the targeted reduction in maternal mortality?

Decision

The court upheld P's claim. It ordered the implementation of the programme within the existing 2012 timeframe.

To assess the competing claims as to the adequacy of MP's efforts to implement the programme, the court had ordered an independent inspection of several health centres chosen at random. The report indicated that the conditions were dismal, and far below what MP had claimed.

The court concluded, on the basis of the report and other evidence, that MP had failed to provide adequate infrastructure and staff to implement the programme. As a result, mothers were dying. The

inability of women to survive pregnancy and childbirth was a breach of their right to life, guaranteed by CI Article 21.

In regard to MP's claim that it lacked the resources needed to implement the programme, the court relied on evidence that the State had failed to spend a substantial part of the funds provided by the central government for this purpose.

The court recommended a detailed list of actions be taken by MP, including action in relation to staffing levels, medical treatment, the provision of electricity, water, sanitation and transport, better monitoring and documentation of every patient.

Comment

India has a very high maternal mortality rate. This has been attributed to inadequate public maternal health care, compounded by factors such as poverty, malnutrition, poor living conditions and discrimination. The decision in the instant case is one of several where the courts have made orders for the better provision of government services for pregnant women and mothers, based on their rights under the CI. Other significant decisions include the following:

- *People's Union for Civil Liberties v Union of India* Supreme Court, Writ Petition (Civil) 196/2001, judgment delivered 20 November 2007: The central government was ordered to continue benefit payments to poor, pregnant women prior to delivery, to ensure they could obtain adequate nutrition, in furtherance of their rights to food and to health.
- *Mandal v Deen Dayal Hari Nager Hospital* High Court of Delhi, Writ Petition (Civil) 8853/2008, judgment delivered 4 June 2012: A court ordered the State of Haryana to pay compensation to the husband and children of a poor woman who had died while giving birth after being denied access to the health care to which she was entitled. The court also made further orders requiring the government parties to implement more effectively the assistance schemes dealt with by the Supreme Court in the *People's Union* case.

LIFE; MATERNAL HEALTH CARE - JUSTICIABILITY OF CLAIM

Claims that the government had breached several constitutional rights because of its inadequate provision of maternal health care were dismissed on the ground that the issues raised were not justiciable.

CENTRE FOR HEALTH HUMAN RIGHTS & DEVELOPMENT v ATTORNEY GENERAL

Constitutional Court
Mpagi-Bahigeine DCJ/JCC, Byamugisha, Kavuma, Nshimye, Kasule JJA/JJCC

Uganda
[2012] UGCC 4
5 June 2012

International instrument and law considered

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Constitution of the Republic of Uganda 1995 (CU)

Facts

The petitioner (P) alleged that the Government of Uganda had failed to provide basic indispensable maternal health commodities in government health facilities. It also alleged that health workers at these facilities had displayed imprudent and unethical behaviour towards expectant mothers. As a result, it alleged, Uganda continued to experience unacceptably high mortality rates for mothers

(435/100,000), newborn babies (29/1000) and infants (76/1000). It also identified two particular cases where women had died as a result of the alleged failures.

P claimed that, by reason of these failures, the government had infringed a number of rights protected by CU, including the right to life (Article 22), the rights of women (Article 33), the rights of children (Article 34) and the right to the highest attainable standard of health care, recognised in ICESCR Article 12 and implicitly acknowledged in CU Article 45.

P sought remedies by way of declarations that the alleged failures breached the identified constitutional rights and that the families of the women who had suffered as a result of them ought to be compensated.

The respondent (R) raised a preliminary objection to the effect that the matter was not justiciable – that is, it was not a proper question for a court to decide, as it required the court to make a judicial decision involving and affecting political questions. Such matters were reserved for decision by the executive and the legislature.

Issue

- Did the petition raise matters that were justiciable?

Decision

The court found that the petition was not justiciable under the 'political question' doctrine. As a result, the application was struck out.

The court explained that the political question doctrine, as developed in the courts of the United States of America, was an aspect of the concept of separation of powers. Under the doctrine, certain issues should not be decided by courts because their resolution was committed to the legislative or executive branches of government or because those issues were not capable of judicial resolution. In deciding whether the doctrine applied in a particular case, the dominant considerations were the appropriateness of attributing finality to the action of the political departments (that is, the legislature and executive) and the lack of satisfactory criteria for judicial determination.

CU provided for the separation of powers, by establishing the separate functions of the Parliament (Article 79), the Cabinet (Article 111) and the judiciary (Article 126). The court declined to determine the questions raised in this case, as they were political questions. It considered that the executive had the political and legal responsibility to determine, formulate and implement policies of government for the good governance of Uganda. This duty was a preserve of the executive and no other person or body had the power to determine, formulate and implement these policies. If the court determined the issues raised in the case, it would be substituting its discretion for that of the executive granted to it by law.

The court indicated that P had other legal alternatives by which to address the problem raised in its petition. The court referred to the possibility of an order for mandamus (requiring a public officer to carry out public duties of office), an action in contract or tort and an action under CU Article 50 for infringement of a fundamental right.

Comment

The reluctance of the court to rule on the issues raised in the petition was understandable. The allegations were very broad and general. Determining the questions in issue would have required an extensive examination of the adequacy of the government's maternal health policies and their implementation. Issues of this sort are outside the experience of most courts and, in the opinion of many, are better examined by other institutions, such as the Parliament or Cabinet.

Even so, the invocation of the 'political question' doctrine in this context is unfortunate, if it is understood as preventing the courts from ever examining whether the provision of health care satisfies

the fundamental rights provisions of the CU. While it is true that the power and responsibility to determine, formulate and implement health policy are allocated by the CU to the executive branch, that allocation occurs within a constitution that also recognises fundamental human rights and so imposes limits on executive (and legislative) power. For example, CU Article 33 contains strong statements on the rights of women, including the following:

(1) Women shall be accorded full and equal dignity of the person with men.

(2) The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.

(3) The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.

If those provisions are to be effective, then it should be recognised that they impose limits on the powers of the 'political branches' of government. That does not mean that courts must substitute their discretion for that of the executive. Rather, courts need only determine whether the decisions made by the executive fall outside the limits established by the constitution. This is illustrated in the case of *Bansal v Union of India*, reported above at p65 and also by decisions of the South African Constitutional Court such as *Minister of Health v Treatment Action Campaign (No 1)* [2002] ZACC 16, 1 PHRLD 86. In the latter case, the court accepted that the right of access to health care was justiciable and applied a test of reasonableness in assessing the government's policy in relation to the provision of care for pregnant women with HIV. The task of formulating and applying the policy remained with the executive branch, provided it operated within the bounds of reasonableness. In this way, the court sought to accommodate both the separation of powers concept and the protection of fundamental rights.

It is unclear whether the alternative legal actions envisaged by the court in this case could satisfactorily meet P's concerns. Individual cases based on negligence or breach of contract might provide remedies for the particular people affected, but these would not address the systemic failure alleged by P. It is difficult to see how any claim raising the broader systemic issue would not also fall under the political question doctrine in the sense in which the court explained it.

LIFE; HEALTH - DRUGS REQUIRED FOR TREATMENT OF HIV

A law that put at risk the availability of generic drugs needed for the treatment of people living with HIV infringed their rights to life, human dignity and health.

PAO v ATTORNEY GENERAL

High Court
Mumbi Ngugi J

Kenya
[2012] eKLR
20 April 2012

International instruments and laws considered

International Covenant on Economic, Social and Cultural Rights (ICESCR)

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

Convention on the Rights of the Child (CRC)

Constitution of Kenya (CK)

Anti-Counterfeit Act 2008 (ACA)

Industrial Property Act 2001 (IPA)

Facts

The petitioners (Ps) were three adults who had lived with HIV for periods of 8 to 19 years. Two of them had been taking antiretroviral (ARV) drugs for 10 years, while the five-year-old son of the third had also been taking ARV drugs to treat the HIV infection with which he was born. The drugs were the most effective intervention for the survival of people with HIV, being associated with a 90 per cent reduction in deaths caused by AIDS. All of the ARV drugs in question were cheaper generic (unbranded) versions of more expensive patented, branded drugs. The generic drugs were provided free of charge to Ps by government or charitable agencies. Ps were all unemployed and could not afford to pay for the drugs.

Ps alleged that provisions in the ACA could adversely affect the importation and manufacture of generic drugs in Kenya and thereby put at risk their rights to life, human dignity and health as protected by CK Articles 26(1), 28 and 43. They argued that the definition of 'counterfeiting' under the ACA was broad enough to include the manufacture, in Kenya or abroad, of generic drugs. As a result a company holding a patent for ARV drugs could instigate Kenyan officials to seize generic ARV drugs on suspicion that they were imported counterfeit goods. This could cause a shortage of the drugs on which Ps relied. The respondents denied that the ACA was intended to bar generic drugs, but only to protect citizens from counterfeit medicines that were of inferior quality and so posed a risk to the life and health of citizens.

Ps sought declarations to the effect that ACA threatened access to affordable and essential generic drugs and so infringed Ps' constitutional rights.

Issues

- Did the ACA apply to generic drug?
- If so, would this infringe Ps' rights?

Decision

The court granted the declarations sought by Ps to the effect that:

1. the fundamental rights to life, human dignity and health as protected by CK Articles 26(1), 28 and 43(1) encompassed access to affordable and essential drugs including generic drugs;
2. in so far as the ACA severely limited or threatened to limit access to affordable and essential drugs including generic medicines for HIV and AIDS, it infringed Ps' rights to life, human dignity and health; and
3. enforcement of the ACA, in so far as it affected access to affordable and essential drugs, particularly generic drugs, was a breach of Ps' rights to life, human dignity and health guaranteed under the CK.

The court had regard to the situation in Kenya, in which the number of people living with HIV was estimated to be between 1.3 and 1.6 million. Many of them were unable to afford branded ARV medication and so were reliant on the cheaper generic drugs which first became available in Kenya after passage of the IPA. These drugs had greatly enhanced and lengthened the lives of people living with HIV. Any legislative measure that affected the accessibility and availability of ARV drugs would threaten the lives and health of the people living with HIV and would violate their rights under the Constitution and under international law.

The right to the highest attainable standard of health, protected by CK Article 43(1), ICESCR Article 12, CEDAW Article 12, and CRC Article 24, included access to medication required to remain healthy. A State that failed to put in place such access was in violation of the right to health of its citizens. The State also had to avoid any act that would impede access to essential medication. Therefore, any legislation that rendered the cost of essential drugs unaffordable to citizens would be in violation of the State's obligations under the Constitution.

The definition of 'counterfeit' in ACA section 2 was likely to be read as including generic medication. Importation or manufacture of generic drugs was made a criminal offence under section 32. There was a manifest danger that generic drugs could be seized under ACA section 34. This would be likely to affect the availability of generic ARV drugs. The risk of seizure was real, as there had been seizures of generic drugs in other countries under provisions similar to those in ACA.

The primary object of the ACA was to protect the rights of intellectual property holders, rather than to protect consumers. While intellectual property rights should be protected, these rights had to give way where it was likely that their protection would put in jeopardy fundamental rights such as the right to life of others. In this case, ACA sections 2, 32 and 34 threatened to violate Ps' rights to life, human dignity and health. The Act had to be modified to prevent that result.

Comment

The court did not finally decide whether the definition of 'counterfeiting' extended to importing or manufacturing generic drugs. There was a reasonable argument that it did so, and this ambiguity was enough to create the potential danger to the availability of generic drugs. Importers or manufacturers of generic drugs might have been inhibited by the risk of committing a crime; patent holders might have invoked the law to protect their branded drugs from competition from generic drugs; and enforcement officials might have seized generic drugs. By the time the legal uncertainty had been resolved, people such as the Ps could have suffered. In order to protect their rights to life, human dignity and health, the State needed to make the law clearer, so that those responsible for complying with or enforcing the law could readily understand that the law applied to counterfeit but not generic drugs.

The decision provides a further demonstration of how economic or social rights can be judicially enforceable. In *Minister of Health v Treatment Action Campaign (No. 1)* [2002] ZACC 16, 1 PHRLD 86, the Constitutional Court of South Africa enforced the State's positive duty to provide health services, when it ordered the government of that country to introduce its ARV drug programme to mothers giving birth in state hospitals and clinics throughout the country, rather than just in pilot sites. In the present case, the court only had to enforce the State's negative duty, that it refrain from action that would undermine the health programmes already in place for people living with HIV. This duty could be performed relatively simply and cheaply, by legislative redrafting to clarify the scope of the ACA provisions.

The question of the competing rights of Ps and the intellectual property holders was not fully explored, given that the respondents had argued that no conflict of rights arose under the ACA because it was not intended to extend to generic drugs. Even so, the court found that the protection of intellectual property rights did not justify this limitation on the 'inextricably bound' rights to life, human dignity and health. In doing so, it drew on *General Comment No. 17* of the Committee on Economic, Social and Cultural Rights, which noted that

> Ultimately, intellectual property is a social product and has a social function. *States parties thus have a duty to prevent unreasonably high costs for access to essential medicines,* plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education. Moreover, States parties should prevent the use of scientific and technical progress for purposes contrary to human rights and dignity, including the rights to life, health and privacy, e.g. by excluding inventions from patentability whenever their commercialization would jeopardize the full realization of these rights. (Emphasis added.)

The case also illustrates the potential to involve United Nations Special Rapporteurs in the resolution of issues in national courts. In this case, the Special Rapporteur on Health filed submissions in the case as an *amicus curiae* or friend of the court, arguing in support of Ps' position.

MANDATORY SENTENCING

MANDATORY DEATH PENALTY - RIGHT TO LIFE; RIGHT TO EQUALITY

A law that imposed a mandatory death penalty was declared unconstitutional because it infringed the rights to life and equality before the law.

STATE OF PUNJAB v SINGH

Supreme Court
Ganguly, Khehar JJ

India
Criminal Appeal 117/2006
1 February 2012

Laws considered

Constitution of India (CI)

Arms Act 1959 (AA)

Indian Penal Code 1860 (IPC)

Facts

The respondent (R) had been charged with and found guilty of several offences including a charge under AA section 27(3). The convictions were quashed on appeal to the High Court because of irreconcilable inconsistencies in the prosecution case. The Supreme Court affirmed the High Court ruling. The Supreme Court then went on to consider the constitutionality of AA section 27(3).

Section 27(3) created an offence with a mandatory death penalty. It provided as follows:

Whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of section 7 and such use or act results in the death of any other person, shall be punishable with death.

Section 7 of the Act prohibited the acquisition, possession, manufacture or sale of prohibited arms or prohibited ammunitions.

It was argued that the mandatory death sentence was unconstitutional for infringing the rights protected by Part III of the CI.

Issue

- Was the mandatory death penalty constitutional?

Decision

The court declared that section 27(3) was void as it exceeded the legislature's power under the CI.

The AA had been amended in 1988 in the context of escalating terrorist and anti-national activities. Strong sentences were introduced with the intention of deterring such activities.

The court noted that section 27(3) was very wide in its scope. It was wide enough to include any accidental or unintentional use of prohibited arms or ammunition, so long as death resulted from that use. It also noted that 'results' was a wider term than 'causes', so that it was enough that death was the outcome of the action; it need not have been caused by the action. Yet all of the actions that fell

within the terms of section 27(3) were punishable only by death. There were no exceptions, and no judicial discretion to take account of individual circumstances in the determination of the sentence.

The Supreme Court of India had previously ruled unconstitutional a mandatory death sentence provided by IPC section 303 for the offence of murder committed by a person who was under a sentence of life imprisonment. In *Mithu v State of Punjab* (1983) 2 SCC 277, the court held that the law was arbitrary and oppressive and violated the right to equality before the law (Article 14) and the right to life and personal liberty (Article 21).

The essence of the objection in the *Mithu* case was that the law prevented a court from determining a sentence appropriate to the circumstances of the individual case. In that case, Chandrachud CJ stated:

> a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. … The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death.

The court also referred to decisions of the Supreme Court of the United States, the High Court of Malawi, the Supreme Court of Uganda, the Kenyan Court of Appeal and the Privy Council in cases on appeal from Belize, Saint Lucia, Saint Christopher and Nevis, the Bahamas and Grenada, all of which found that mandatory death sentences were unconstitutional. These decisions variously regarded the mandatory death sentence as cruel and unusual punishment, inhuman or degrading punishment, a denial of the right to a fair trial or to due process of law, contrary to the separation of powers, or contrary to the rule of law. The only exception cited by the court, a decision of the Privy Council on appeal from Singapore, was distinguished on the ground that the Constitution of Singapore contained no relevant right on which to ground an objection.

The court concluded that section 27(3) infringed CI Articles 14 and 21.

Comment

The court was not required to assess whether any death sentence was unconstitutional. Instead, the court only addressed the issue of whether a mandatory death sentence infringed rights under the CI.

In addition to the decisions of national courts cited by the Indian court, mandatory death sentences have been held to violate international human rights standards. This has been recognised by the United Nations Human Rights Committee (*Thompson v St Vincent and the Grenadines,* UN Document CCPR/C/70/D/806/1998, 2000) and the Inter-American Court of Human Rights (*Boyce v Barbados,* Series C No 169, 2007). The need for a court to assess the appropriateness of the death penalty in the individual circumstances of the case was also acknowledged by the African Commission on Human and People's Rights (*Interights (Bosch) v Botswana,* Communication 240/2001, 2003).

It is interesting to compare the decision in the present case with that in the Solomon Islands case of *Manioru v R*, reported above at page 40. There, the Court of Appeal upheld a mandatory sentence of life imprisonment. The arguments against the life sentence in that case were similar to those relied on by the Supreme Court of India in relation to the death penalty: in both cases, the mandatory nature of the penalty deprived the court of the capacity to determine a sentence that it considered proportionate

to the offence, taking into account all the circumstances of the individual case. Yet the Court of Appeal concluded that it was within Parliament's power to remove that discretion.

Would the same reasoning apply if the mandatory sentence under Solomon Islands law had been death, rather than life imprisonment? Although the Court of Appeal took the view that the severity of the sentence did not affect the principle in question, those comments appear to have been made in the context of custodial sentences and should be so confined. Given its extreme and final nature, the death penalty raises additional grounds for challenge, including its impact on the right to life, and the argument that it is in itself inhuman or degrading treatment. Admittedly, CSI Article 4(1) specifically provides an exception to the right to life in the 'execution of the sentence of a court in respect of a criminal offence … of which he has been convicted'. But the Court of Appeal noted in passing that there had been no suggestion in the case before it of cruel, oppressive or inhumane treatment, 'a feature of so many challenges to capital sentences'. It may be, then, that the Court of Appeal would have treated a mandatory death sentence quite differently to a mandatory sentence of life imprisonment. To have done so would be consistent with a broad range of decisions from other common law jurisdictions, which have accepted that judicial deference to Parliamentary supremacy is displaced when death is prescribed as the only available penalty.

PART III: CASES DEALING WITH CLIMATE CHANGE ISSUES

CLIMATE CHANGE

CLIMATE CHANGE - MITIGATION; REGULATION OF GREENHOUSE GAS SOURCES

The Environmental Protection Agency exceeded its statutory powers when it refused to regulate greenhouse gas emissions from motor vehicles.

MASSACHUSETTS v ENVIRONMENTAL PROTECTION AGENCY

Supreme Court
Roberts CJ, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito JJ

United States of America
549 US 497 (2007)
2 April 2007

Law considered

Clean Air Act (CAA)

Facts

Under CAA section 202(a)(1), the Administrator of the Environmental Protection Agency (EPA) was obliged to:

> prescribe (and from time to time revise) … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare …

In 2003 the EPA declined a petition brought by a number of environmental organisations requesting it to make rules under section 202(a)(1) to regulate greenhouse gas emissions from new motor vehicles. It declined on the grounds that:

1. it did not have authority under the CAA to regulate the emission of greenhouse gases as they did not qualify as an 'air pollutant' under the CAA; and
2. even if they were an air pollutant, it was unwise to regulate vehicle emissions at that time, as the causal connection between the emission of greenhouse gases and climate change had not been unequivocally established. Further, regulating vehicle emissions was only a piecemeal measure on an issue that required a more comprehensive response. As such, it was better left to the President to develop that broader response.

The State of Massachusetts (M) and others sought judicial review of the EPA decision. The EPA disputed M's standing to bring the action.

After the Court of Appeals for the District of Columbia Circuit had rejected the application, M appealed to the Supreme Court.

Issues

- Did M have standing to bring the action?
- Did greenhouses gases qualify as an 'air pollutant' under the CAA?
- Did the EPA's decision not to regulate greenhouse gas emissions comply with the terms of the CAA?

Decision

The Supreme Court (Roberts CJ, Scalia, Thomas, Alito JJ dissenting) ruled that M had standing to bring the action. It also found that by refusing to regulate vehicle emissions, the EPA had acted outside the terms of the CAA.

M had standing because the EPA's refusal to regulate greenhouse gas emissions presented an actual and imminent risk of harm to M and the remedy M sought was likely to reduce that risk. The risk of harm was based on a strong consensus on the scientific evidence that global warming posed a threat of a rapid rise in sea levels, severe and irreversible changes to natural ecosystems, a significant reduction in water stored in winter snowpack with direct and important economic consequences, more disease and more frequent extreme weather events such as hurricanes. The rise in sea levels had already begun to swallow coastal land belonging to M.

Regulation by the EPA was likely to improve M's position. Motor vehicle emissions were a significant source of greenhouse gas, which regulations could reduce. It was no objection that they would not solve the problem by themselves. A regulatory agency could still be expected to contribute to the solution by tackling some part of the problem within its own authority. Even if regulating vehicle emissions would not by itself reverse global warming, the EPA could still have a duty to take steps to slow or reduce it.

The EPA was wrong to exclude greenhouse gas emissions from the scope of an 'air pollutant' under the CAA. The CAA defined 'air pollutant' as:

> any air pollution agent or combination of such agents, including any physical [or] chemical … substance or matter which is emitted into or otherwise enters the ambient air …

Greenhouse gases such as carbon dioxide, methane, nitrous oxide and hydrofluorocarbons clearly fell within that definition. Therefore greenhouses gases fell within the term 'air pollutant' under the CAA.

The reasons offered by the EPA against the wisdom of making rules for vehicle emissions at that time were outside the terms of the CAA. Under section 202(a)(1), the only question on which the Administrator had to make a judgment was whether greenhouse gases caused, or contributed to, air pollution that might reasonably be anticipated to endanger public health or welfare. The argument that the matter was best dealt with by the President had nothing to do with the judgment required of the Administrator under the statute. Similarly, the concern about residual scientific uncertainty was irrelevant, unless that uncertainty was so great as to prevent the EPA from making the judgment required by the CAA, and the EPA had not said it was.

The EPA had failed to provide any relevant reason for not making a judgment as required under section 202(a)(1). Its denial of the petition to make emissions rules was 'arbitrary, capricious, … or otherwise not in accordance with law'. The case was remanded for further proceedings consistent with the court's opinion.

Comment

The decision was a major victory for those seeking to engage the EPA in regulating sources of greenhouse gases. In rejecting the grounds offered by the EPA for not intervening, the court effectively pointed the way to a much more interventionist approach than the then President, George W. Bush, had supported.

The court did not decide whether the evidence required the EPA to conclude that greenhouse gases did endanger public health or welfare (an 'Endangerment Finding'). That question was remitted back to the EPA. However, given the court's finding on the standing issue, that greenhouse gases were likely to harm M (and others), the clear inference was that an Endangerment Finding would be justified.

Nor did the court consider whether, having made such a finding, the EPA could take account of the kind of policy concerns it had relied on for not regulating vehicle emissions. That was a matter that was subsequently tested in the case of Coalition for Responsible Regulation Inc v Environmental Protection Agency, reported immediately below.

CLIMATE CHANGE MITIGATION - REGULATION OF GREENHOUSE GAS SOURCES

A finding that greenhouse gas emissions contributed to climate change, which in turn posed a danger to public health and welfare, was supported by scientific evidence and warranted the regulation of such emissions.

COALITION FOR RESPONSIBLE REGULATION INC v ENVIRONMENTAL PROTECTION AGENCY

Court of Appeals
Sentelle CJ, Rogers and Tatel JJ

District of Columbia
No. 09-1322
26 June 2012

Law considered

Clean Air Act (CAA)

Facts

Following the Supreme Court decision in *Massachusetts v Environmental Protection Authority*, reported immediately above, that greenhouse gases were an 'air pollutant' and therefore subject to regulation under the CAA, the Environmental Protection Agency (EPA) issued a series of rulings related to greenhouse gases. These were:

1. an Endangerment Finding, in which it determined that greenhouse gases contributed to the climate change problem, which might reasonably be anticipated to endanger public health and welfare;
2. a Tailpipe Rule, which set emission standards for cars and light trucks;
3. a Timing Rule, which provided that the requirement to obtain permits would apply only from the date at which the Tailpipe Rule began to operate;
4. a determination that the CAA required major stationary sources of greenhouse gases (such as factories and power plants) to obtain construction and operating permits; and
5. a Tailoring Rule in which the EPA determined that only the largest stationary sources would initially be required to obtain permits. This limit was imposed to reduce the administrative burden that would be imposed if all major stationary sources of greenhouse gases were required to obtain permits.

The petitioners (P) were State and industry opponents of the rulings. They argued that the rulings were based on improper constructions of the CAA and were otherwise arbitrary and capricious.

Issue

- Had the EPA acted in accordance with the CAA in issuing the rulings?

Decision

The court dismissed the petitions for review of the Timing and Tailoring Rules on the ground that the Ps did not have standing to challenge these rulings. It also denied the remainder of the petitions, ruling that the Endangerment Finding and Tailpipe Rule were neither arbitrary nor capricious and that the EPA's interpretation of the governing CAA provisions was unambiguously correct.

In making an Endangerment Finding under the CAA, the EPA was only required to make a scientific judgment about the potential risks greenhouse gas emissions posed to public health or welfare. It was not required to have regard to the policy and regulatory consequences of the finding. The EPA had made such a judgment, relying on assessments by the Intergovernmental Panel on Climate Change (IPCC), the US Global Climate Research Program (USGCRP) and the National Research Council (NRC). The EPA had concluded that the root cause of recently observed climate change was very likely the observed increase in greenhouse gas emissions arising from human activity. It found that climate change was likely to have adverse health effects as a result of extreme weather events, changes in air quality, increases in food- and water-borne sources of disease and increases in temperatures. It also found that climate change endangered human welfare by creating risks to food production and agriculture, forestry, energy, infrastructure, ecosystems and wildlife. These findings were supported by substantial scientific evidence and were not undermined by some residual uncertainty in the scientific record.

Once the EPA had found that motor vehicle emissions contributed to greenhouse gas air pollution, it was required by the CAA to issue emission standards for vehicles. These standards in turn triggered the regulation of major stationary sources. The EPA had correctly interpreted the relevant CAA provisions.

None of the Ps had standing to challenge the Timing and Tailoring Rules, as none of them would suffer any harm from those Rules; in fact, the burdens on them would be mitigated by the Rules.

Comment

The decision provided an important judicial recognition of the link between greenhouse gas emissions, human-induced climate change, and public health and welfare. The court accepted findings by the EPA that:

1. greenhouse gases (the term the EPA used to refer to the mixture of carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride in the atmosphere) contributed to climate change by trapping solar energy and reducing the escape of reflected heat;
2. the recent increase in greenhouse gases in the atmosphere was very likely caused by a range of human activities including the burning of coal, gas or petrol in cars, power plants and industrial sites;
3. the increase in the level of these gases in the atmosphere was predicted to cause adverse climatic changes, such as rising sea levels, drought and more severe storms and cyclones; and
4. these changes would in turn pose risks to human health and welfare.

Although the Ps sought to discredit these findings by emphasising the uncertainty in the state of scientific knowledge, the court ruled that the EPA had acted properly in accepting the reports of the IPCC, USGCRP and NRC as the best source material on which to base its findings. Further, the court confirmed that the existence of some uncertainty did not, in itself, warrant invalidation of the Endangerment Finding. Given that the CAA was precautionary in nature and intended to be protective of public health, waiting for scientific certainty would have defeated the purpose of the Act.

Although primarily concerned with arguments arising under the CAA, the court's endorsement of the EPA findings about the effects of climate change could be used in support of claims that climate change has the potential to infringe human rights provisions protecting rights such as the right to life or the right to a clean environment.

In related litigation, the United States Supreme Court ruled in American *Electric Power Co Inc v Connecticut* 131 S Ct 2527 (2011) that the availability of regulatory action by the EPA under the CAA excluded the possibility of a claim under the federal common law of public nuisance to seek abatement of carbon dioxide emissions from fossil-fuel-fired power plants. The court reasoned that Congress had shown an intention that the issue should be dealt with under the legislative scheme rather than by 'judge made' federal common law. The court left open the question whether the CAA also excluded claims under State common law.

For similar reasons, a claim by a Native Alaskan community for damages based on the federal common law of public nuisance was dismissed by the Court of Appeals, 9th Circuit, in *Native Village of Kivalina v ExxonMobil Corp* 696 F 3d 849 (2012).

CLIMATE CHANGE - MITIGATION; STATE OBLIGATION TO REDUCE EMISSIONS

The question of whether a government plan to reduce greenhouse gas emissions met the statutory requirements for such a plan was held to be non-justiciable.

FRIENDS OF THE EARTH v CANADA

Federal Court
Barnes J

Canada
2008 FC 1183
20 October 2008

International instrument and law considered

Kyoto Protocol to the United Nations Framework Convention on Climate Change (KP)

Kyoto Protocol Implementation Act (SC 2007, c 30) (KPIA)

Facts

The KPIA came into force in June 2007. Under section 5 of the Act, the Minister for the Environment was required to prepare a Climate Change Plan (CCP) describing the measures to be taken to fulfil Canada's obligations under KP Article 3.1 to reduce greenhouse gas emissions. Section 7 required the Governor in Council to ensure compliance with these obligations by making any necessary regulations.

The Minister published his initial CCP in August 2007. It revealed that the government had no intention of meeting Canada's obligations under Article 3.1. The government view was that compliance with the KP would have severe effects on the Canadian economy. Instead, the expected impact of the CCP was that Canada's greenhouse gas emissions in 2008–2012 would be 34 per cent above the KP target. Further, the Governor in Council had made no regulations under section 7.

The applicant (A) sought judicial review against the Minister and the Governor in Council for failing to comply with their duties under KPIA. The respondents argued that the duties under the KPIA were not justiciable.

Issue

- Were the duties under the KPIA justiciable?

Decision

The court dismissed the application. It found that the duties were not justiciable. Even if they had been, the court would not have exercised its discretion to award a mandatory order against the respondents.

The court concluded that the issues in question were not justiciable for the following reasons:

1. There were no objective legal criteria or objective facts by which a court could determine whether some of the criteria established by section 5 for the CCP had been satisfied. For example, the CCP was required to provide for 'a just transition for workers affected by greenhouse gas emission reductions' and an 'equitable distribution of reduction levels among the sectors of the economy that contribute to greenhouse gas emissions'. These policy-laden considerations were not the proper subject matter for judicial review.
2. The word 'ensure' is not commonly used in legislation to indicate an imperative.
3. The KPIA contemplated cooperative action with third parties, putting it beyond the control of R to unilaterally ensure compliance with KP.
4. The KPIA made provision for a failure to implement the required measures in a given year, suggesting that strict compliance with the KP obligations was not required in any particular CCP.
5. The court would have had difficulty in crafting a meaningful remedy for a breach of the duty to make regulations necessary for implementing Canada's KP obligations; it was not for a court to say what regulations should be made.
6. The KPIA clearly contemplated Parliamentary and public accountability, rather than a justiciable duty, by creating elaborate reporting and review mechanisms within the Parliamentary sphere.
7. If Parliament had intended to impose a justiciable duty on the government, it could easily have said so by appropriate language.

Comment

The decision of the Federal Court was upheld by the Federal Court of Appeal, with the appeal court agreeing substantially with the reasons of Barnes J: *Friends of the Earth v Canada (Environment)* 2009 FCA 297. An application for leave to appeal to the Supreme Court of Canada was dismissed: [2009] SCCA 497.

Canada had ratified the KP in 2002, with the support of a substantial majority of members of the House of Commons. By 2006 a new minority government had come to power. It announced a new emissions target far higher than that which Canada had previously accepted under the KP. In these circumstances, the KPIA was enacted without the support of the government, in an attempt by the opposition parties to require the government to adhere to Canada's KP obligations. While this may have been a useful political tactic, the terms of the law made it difficult to enforce in the courts.

The 2007 CCP made it clear that the government had no intention of complying with the KP, and that it would fail to meet its targets. Given that this would make Canada liable for penalties under the KP, the government decided to withdraw from the KP. On 15 December 2011 the Minister of Foreign Affairs gave notice of this decision. On 17 July 2012 the Federal Court rejected a claim that the decision to withdraw from the KP was contrary to the KPIA: *Turp v Canada (Attorney General),* 2012 FC 893.

CLIMATE CHANGE - RIGHT TO LIFE;
RIGHT TO A HEALTHY ENVIRONMENT

The practice of burning petroleum byproducts, which contributed to ill health, climate change and environmental damage, infringed the rights to life and to live in a healthy environment.

GBEMRE v SHELL PETROLEUM DEVELOPMENT COMPANY NIGERIA LTD

Federal High Court
Nwokorie J

Nigeria
FHC/B/CS/53/05
14 November 2005

Laws considered

Constitution of the Federal Republic of Nigeria 1999 (CN)

African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (ACA)

Associated Gas Re-Injection Act (AGRA)

Environmental Impact Assessment Act (EIAA)

Facts

The applicant (A) brought proceedings on behalf of himself and other residents of a community in Delta State, Nigeria. He alleged that the respondent (R) engaged in gas flaring (the burning of natural gas byproducts of oil exploration, production or processing) near A's community. He claimed that flaring caused carbon dioxide and a range of toxins to be emitted into the air and acid rain to fall. As a result, the community suffered ill health, premature death, climate change and damage to its crops, waterways and buildings. A alleged that R's conduct violated A's rights to life and human dignity under CN sections 33 and 34 and to a healthy life in a healthy environment under section 33, as reinforced by ACA Articles 16 and 24.

A also alleged that R had failed to conduct an environmental impact assessment, as required by EIAA.

Finally, A alleged that the flaring was unlawful under AGRA. Alternatively, if the flaring was authorised under AGRA, that Act was unconstitutional to the extent that it allowed gas flaring which infringed the rights protected by CN.

R denied all of A's allegations and made limited submissions on the substantive issues. R then made a series of unsuccessful applications to adjourn, transfer or stay proceedings. The court concluded that R had only sought to delay proceedings and had no further submissions to refute A's claims on the substantive issues.

Issues

- Had R's flaring infringed A's rights under CN?
- If so, what remedy should be granted?

Decision

The court accepted A's claims and made orders accordingly.

The court declared that R's gas flaring constituted a gross violation of A's rights to life (including the right to a healthy environment) and dignity under CN. It ordered R to cease flaring gas in A's community.

It found that R had failed to carry out an environmental impact assessment, contrary to EIAA.

It held that the provisions of AGRA that allowed flaring to continue were contrary to CN.

Comment

The decision offers limited explanation of the significant findings made by the court. It is likely that the court's decision to restrict R's opportunity to advance its submissions on the substantive issues reduced the more detailed examination of the facts and law that might otherwise have been expected.

Even so, it is significant that the court concluded that the rights to life and human dignity protected under CN sections 33 and 34 included the right to a clean and healthy environment. That right was infringed by the emission of a greenhouse gas, carbon dioxide and other harmful pollutants.

CLIMATE CHANGE - ADAPTATION;
PLANNING FOR COASTAL DEVELOPMENT

A local authority acted lawfully when it refused consent to a proposed coastal housing development that failed to meet planning requirements designed to allow for future sea level rises.

NORTHCAPE PROPERTIES PTY LTD v DISTRICT COUNCIL OF YORKE PENINSULA

Supreme Court
Debelle J

South Australia
[2008] SASC 57
4 March 2008

Law considered

District Council of Yorke Peninsula Development Plan (DP)

Facts

The respondent (R) was a district council in South Australia with authority to approve or reject proposals to develop land within its boundaries according to its development plan. The applicant (A) was a landowner that proposed to subdivide a large parcel of land in R's district into 80 allotments.

The DP required that developments near the coast should include coastal reserves for the preservation of natural features. It also required that allowance be made for future coastal erosion due to natural subsidence and changes in sea level due to predicted climate change during the first 100 years of the development.

After its proposal was rejected by R, A appealed to the Environment Court. There, the Commissioner upheld R's decision. The Commissioner found that the proposal had failed to make adequate allowance for a coastal reserve in addition to an erosion buffer that allowed for the predicted inland movement of the coast line over the next 100 years. The proposal was so contrary to the DP that development consent should be refused.

A appealed to the Supreme Court, alleging that the Commissioner had erred in his finding that the proposal so offended the DP that development consent should be refused. In particular, it argued that the Commissioner had erred in finding that the coast line was likely to move inland by 35–40 metres over the next 100 years.

Issue

- Should development consent have been refused?

Decision

The court dismissed the appeal.

The court noted that A's own expert witness had given evidence that the coast line was likely to recede by 35–40 metres over the next 100 years, and possibly up to 45 metres. A's expert witness had predicted it would move 46 metres. In the circumstances, the Commissioner was entitled to make the finding that it would recede 35–40 metres. If it receded by that amount, there would not be sufficient remaining land to provide both a coastal reserve and an erosion buffer zone.

The Commissioner was correct in his interpretation of the DP and its application to this proposal. In the court's judgment, the proposal offended so many of the goals and objectives of the DP that development consent must be refused. The proposal was on any view an attempt to develop the land to the greatest extent possible without due regard to the ecological sensitivity of the area and the need to preserve natural features.

Comment

The decision illustrates one activity where governments need to make allowance for the predicted effect of climate change, namely in regulating land development. In this case, the district council had made allowance for the likely rise in sea levels caused by climate change when deciding whether to allow housing developments near the coast. Failure to have regard to that risk could lead to a situation in years to come when future residents would find their land eroded or their homes and gardens flooded by the sea. As such, their rights to life, to food and to housing could be threatened. The need for proactive government regulation of this kind can thus be seen as a duty to protect the human rights of future residents of the affected land.

See also *Charles & Howard Pty Ltd v Redland Shire Council* [2007] QCA 200, in which the Queensland Court of Appeal confirmed the appropriateness of taking into account the impact of climate change on sea levels when considering whether to permit the development of land that was subject to tidal flooding.

ENVIRONMENTAL DEFENDERS

ENVIRONMENTAL DEFENDERS - RIGHT TO LIFE; FREEDOM OF ASSOCIATION; RIGHT TO FAIR TRIAL

The obligation of States to respect, protect and fulfil the rights of human rights defenders extended to environmental defenders.

KAWAS-FERNÁNDEZ v HONDURAS

Inter-American Court of Human Rights
Medina-Quiroga P, García-Sayán VP, García-Ramírez, Ventura-Robles, Franco, Macaulay, Blondet, Valladares-Lanza, JJ

Organization of American States
Series C No 196
April 3 2009

International instrument considered

American Convention on Human Rights (ACHR)

Facts

In 1995 Mrs Kawas-Fernández (K) was shot and murdered in her home. At the time, she was president of Prolansate, an organisation campaigning to preserve the natural environment around Tela in Honduras, Central America. She had reported instances of illegal logging in the area, successfully advocated for the establishment of a national park and subsequently opposed commercial developments within the park.

The Criminal Magistrate's Court commenced an inquiry into K's murder but, having taken statements from a number of witnesses in 1995, took no further action until 2003, after proceedings had been commenced in the Inter-American Human Rights Commission (the Commission). However, by 2009 the proceedings were still at a preliminary stage and no one had been charged over K's death.

Evidence presented to the Commission indicated that K's murder was attributable to certain private interests who objected to her environmental activism. However, it also pointed to the involvement of State agents in the murder and obstruction of the subsequent investigation. The police officer in charge of the murder investigation was the key suspect in planning the murder and hindering the investigation, while other evidence indicated the involvement of a senior military officer.

In the decade following K's death, other environmental defenders in Honduras were repeatedly threatened, and five were killed. The State had developed no overall policy to protect human rights defenders in general or environmental activists in particular.

The Commission inquired into the matter and made certain recommendations to Honduras. When the State failed to take adequate steps to implement these recommendations, the Commission brought the case to the Inter-American Court of Human Rights, alleging violations against K of her rights to life and freedom of association as protected by the ACHR. It also claimed that the rights of both K and her relatives to a fair trial and judicial protection had been breached by the failure to prosecute and punish those responsible for K's murder. The Commission further alleged that Honduras had violated the right to humane treatment of K's relatives. Honduras admitted breaches of the relatives' rights to fair trial and judicial protection, but denied the other claims.

Issues

- Had the State violated K's rights to life and to freedom of association?
- Had the State violated the rights to a fair trial, judicial protection and humane treatment of K or her relatives?

Decision

The court held that the State had violated K's rights to life and freedom of association. It also held that the State had violated her relatives' rights to a fair trial, judicial protection and respect for their physical, mental and moral integrity (an aspect of the right to humane treatment).

In cases of violent death, the State had an obligation to conduct an *ex officio*, prompt, serious, impartial and effective investigation as a fundamental element of the protection of the right to life. Here, the State did not perform an adequate investigation of the events, as was implicit in its admission of violating the relatives' rights to fair trial and judicial protection. There was overt negligence in the conduct of the investigations: there was no autopsy and the crime scene was not secured. Threats were made against witnesses by the senior investigating officer to silence them or to procure false accusations. Nothing was done to provide protection for witnesses who feared for their lives. The investigation remained inactive for eight years for no good reason.

Freedom of association obliged States to avoid interfering with people's right to join with others in lawful common pursuits. It also created positive obligations to prevent attacks on the freedom, to protect those who exercise it and to investigate violations restricting the freedom. To enforce these

positive obligations, it might be necessary for the State to intervene in the sphere of relations between private individuals.

Freedom of association included the right of individuals to set up and participate freely in non-governmental organisations that monitor, report and promote human rights. States had a duty to create the legal and factual conditions for human rights defenders to be able to freely perform their tasks: they had to protect the defenders when they are subject to threats, refrain from imposing restrictions that would hinder the performance of their work, and conduct effective investigations of any violations against them, to prevent impunity.

Environmental defenders like K fell within the protection required for human rights defenders. The defence of human rights was not limited to civil and political rights, but extended to economic, social and cultural rights as well. Further, the court ruled that there was 'an undeniable link between the protection of the environment and the enjoyment of other human rights'.

An impairment of the right to life or to humane treatment attributable to the State could, in turn, give rise to a violation of the freedom of association when such violation arose from the victim's legitimate exercise of that freedom. In this case, K's murder was motivated by her environmental activities conducted through the organisation, Prolansate. Her death clearly deprived K of her right to associate freely with others. K's murder and the failure to prosecute the perpetrators also had an intimidating effect on other environmental defenders. In the following decade, five other people were killed in Honduras for similar reasons. Given the involvement of at least one State agent in the murder, Honduras had violated K's right to association.

The right to a fair trial included the right of the alleged victims of human rights violations or their relatives to see that all measures necessary to know the truth about the facts are adopted and that those responsible are punished within a reasonable time. The right to judicial protection also gave them a right to reparation for any losses they sustained. These rights extended to the relatives of the victim of a murder, but not the victim herself. In this case, the State had failed to protect these rights of K's relatives, as the judicial process had made no determination after 14 years.

The State also violated the relatives' right to humane treatment. The circumstances of K's death and the inefficiency of the investigation had caused them pain and suffering as well as feelings of insecurity, frustration and impotence. This amounted to a failure by the State to respect their physical, mental and moral integrity, in violation of ACHR Article 5(1). However, it fell short of constituting torture or cruel, inhuman or degrading treatment within Article 5(2).

By way of remedy, the court ordered the State to:

1. pay specified financial reparations to K's relatives;
2. provide appropriate psychological or psychiatric care to those relatives who requested it;
3. conduct within a reasonable time criminal proceedings relating to K's murder and the subsequent hindering of investigations;
4. provide effective protection for witnesses, adequate resources and protection for the prosecutors, and full access to the proceedings for the victims in the case;
5. publish key sections of the court's decision in a national newspaper in Honduras;
6. publicly acknowledge its responsibility for the human rights violations in this case;
7. construct a monument in memory of K at the national park (already named after her) to recognise that she was killed defending the park; and
8. conduct a national campaign promoting the work of environmentalists in Honduras and their contribution to the protection of human rights.

Comment

The case highlighted the extreme dangers faced by environmental activists in many parts of the world. The court acknowledged that the risks were not confined to Honduras, but extended across the region. Evidence from other parts of the world confirms that the dangers are widespread and all too often deadly.

The case was also significant for its characterisation of environmental activists as human rights defenders. The court explained this on the basis of the clear link between human rights and environmental protection, recognised in decisions of the court itself, and in the European Court of Human Rights. It referred to discussions in the United Nations and Organization of American States (OAS) on the impairment of human rights due to environmental degradation and the adverse effects of climate change. It also suggested the emergence of a human right to a healthy environment, as evidenced by the inclusion of provisions recognising the right in the constitutions of 12 OAS members and in the Additional Protocol to the ACHR on Economic, Social and Cultural Rights (the 'Protocol of San Salvador').

The court stressed the duty of States to protect all human rights defenders. The court based this duty on the defenders' rights to life and to freedom of association; it could also have been sourced in other rights such as the freedoms of expression and assembly, or the right to participate in public affairs. Obviously, the duty requires States to avoid directly inflicting harm on the defenders by reason of their lawful activities, as occurred in this case. But they must go further and protect defenders from interference by private individuals as well, at least where the State is or should be aware that defenders are at risk. In Honduras, there was evidence of repeated threats and harm to environmental activists, yet the State had failed to respond adequately. Indeed, the State's failure to prosecute K's murderers had increased the danger to activists by promoting a culture of impunity. The court sought to redress this situation by ordering the State to proceed with the prosecutions and also to conduct a public campaign in support of the work of environmental defenders. These remedies sought not just to redress the wrongs suffered by K and her relatives, but to avoid the recurrence of similar violations to the rights of other environmentalists.

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