WHEN UNWRITTEN CUSTOMARY AUTHORITY OVERRIDES THE LEGAL EFFECT OF CONSTITUTIONAL RIGHTS: A CRITICAL REVIEW OF THE TUVALUAN DECISION IN *MASE TEONEA V. PULE O KAUPULE & ANOTHER*

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INTRODUCTION

That the legal systems of the independent states and the self-governing territories of the South Pacific are steeped in customs and traditional values is no longer in debate. One phenomenon that has however been problematic in these countries is the harmonisation of the indigenous customary values of these territories with the tenets of the human rights guarantees contained in their own constitutions.[1]

As many writers have observed, all the small island countries of the South Pacific, with the exception of Niue, have written constitutions that stipulate the fundamental freedoms and human rights that are enforceable in the law courts.[2] Tuvalu is not an exception.

The Constitution of Tuvalu contains a Bill of Rights[3] that comprises of the fundamental right to life;[4] the right to personal liberty;[5] the right to freedom from slavery and forced labour;[6] the right to freedom from inhuman treatment;[7] the right to freedom from deprivation of property;[8] the right to privacy of home and property;[9] the right to the protection of the law in criminal and civil proceedings;[10] the right to freedom of thought, religion and belief;[11] the right to freedom of expression;[12] the right to freedom of assembly and association;[13] the right to freedom of movement;[14] and the right to freedom from discrimination.[15]

One must not fail to observe however that despite these elaborate provisions of the Tuvaluan Constitution which are akin to the civil and political rights found in numerous human rights treaties and the constitutions of many nations of the modern world, the same Constitution prescribes the "protection of Tuvaluan values" as a unique limiting clause on the legal effect of some of these rights.[16]

It was the effect of these stated exceptions that constituted the gravamen of the decision in *Mase Teonea v. Pule O Kaupule & Another*,[17] and opens a new vista to understanding the delicate relationship between human rights and customary law in the context of constitutionalism in Tuvalu.

What were the issues for determination before the court? How did the court resolve those issues? Of what value is the judicial approach in this case to the development of human rights jurisprudence in Tuvalu and by extension, to other domestic legal systems of the South Pacific? This review examines the facts of the case, the textual significance of the Tuvaluan Constitution and its implications for human rights protection

in Tuvalu where customary paradigms hold significant constitutional implications.[18]

BRIEF FACTS OF THE CASE

The applicant, Mase Teonea, was a holder of Fiji Passport but a Tuvaluan by origin. He was married to a woman from one of the component communities of Tuvalu who also carried a Fiji Passport. By virtue of his theological training in New Zealand and Fiji, the applicant had started a Bible Study group in Funafuti in 2001 with the ultimate objective of setting up a church. The church materialised in 2002 and was duly registered under the Tuvaluan *Religious Bodies Registration Act* as the Tuvalu Brethren Church in the same year.

Once the church stabilised in Funafuti, the applicant and his group decided to expand their missionary activities to the outer islands of Tuvalu in 2003. However, prior to their arrival there, the Falekaupule of Nanumaga (i.e. the Council of Elders that functions as a local government council for the Nanumaga atoll of Tuvalu)[19] had adopted a resolution in 2001 banning "new religions" other than the Ekalisia Kelisiano Tuvalu (EKT), the Jehovah's Witnesses, the Bahai Faith, and the Seventh Day Adventist Church from the Nanumaga atoll.

Upon the arrival of the applicant and his group on Nanumaga in 2003, the Tuvalu Brethren Church soon attracted members of the community who later refused to make further "contributions" to the EKT that had for long enjoyed the support of the entire community. Based on the recalcitrant attitude of the members of the Brethren Church towards community obligations, the Falekaupule adopted another resolution expressly ordering the applicant to "stop advocating his religion."

Through various overt and covert acts, including the stoning of the church and its members and advice from some Nanumaga youths, the Police, and the Pulefenua of Nanumaga Falekaupule,[20] the applicant had no choice but to leave the community as his security could no longer be guaranteed.

The applicant later instituted an action through originating summons challenging the prohibition of his church work as a violation of his rights under Sections 23(1), 24(1), 25(1) and 27(1) of the Tuvaluan Constitution.[21] As an additional and alternative ground, the applicant claimed that the resolution of the Falekaupule prohibiting his church was *ultra vires* the powers conferred on the body under Section 40 and Schedule 3 of the *Falekaupule Act of 1997*.

DETERMINATION OF THE ISSUES BEFORE THE COURT

Apart from the affidavit evidence before the court, the honourable High Court also relied on the oral testimonies of witnesses for both parties to the case. Even though the learned trial judge neither reproduced the issues formulated by the opposing counsels in their addresses nor explicitly set out the issue or issues arising for determination in this case, it is discernible from the face of the Judgment that the learned Chief Justice was strongly persuaded that only one issue came up for his determination, namely, the constitutionality of the restriction placed on the applicant's rights.

In determining this singular issue, the learned trial judge copiously relied on the Preamble and the non-justiciable Principles of the Tuvaluan Constitution in holding that the Falekaupule's actions limiting the applicant's constitutional rights were not contrary to the Constitution. In the words of the learned Chief Judge:

> I consider that the express subjection of the rights under sections 23-25 to the provisions of section 29 means that, if the court is satisfied the actions of the Falekaupule were taken as

> part of the traditional manner of decision making in that community and were taken because of a reasonable belief that the circumstances arising from the introduction of a new religion to the island might have one or more effects in section 29(4), it must accept that the Falekaupule was entitled to consider some restriction of the applicant's rights was necessary. In that case, although there was an infringement of the applicant's rights per se under sections 23-25, the Court cannot declare the restriction was contrary to the Constitution if interpreted consistently with the Principles set out in the Preamble.[22]

With due respect, the learned court applied a narrow view of the broader fundamental issues that demanded his determination in this case. For purposes of clarity, and to highlight the court's misdirection on the law, I set out some of the more germane questions that call for resolution in this case:

> 1. Whether it was within the powers of the Falekaupule to determine the extent to which anyone may enjoy the fundamental rights and freedoms prescribed in the Constitution of Tuvalu.
>
> 2. Whether the protection of certain religious groups comes under the definition of Tuvalu values and culture as stipulated in Section 29 of the Tuvaluan Constitution the provisions of which qualify the fundamental rights and freedoms contained in that Constitution.
>
> 3. Whether there is a legal basis for classifying all the rights guaranteed under the Tuvaluan Constitution as rights subject to the limiting clauses contained in Section 29(1) of the same.
>
> 4. Whether the right to freedom of movement under Section 27(1) of the Tuvaluan Constitution is predicated on citizenship.

It is of critical importance that one examines the considerations of the learned trial Chief Justice on these points.

There was no controversy before the court about the actions of the Falekaupule and its agents or officials constituting overt breaches of the fundamental rights of the applicant under the Tuvaluan Constitution. According to the learned Chief Justice:

> Clearly the resolution of the Falekaupule and the consequential actions by the Talafai, or whoever was responsible for stoning the meeting house, constituted a clear attack on that freedom [of religion and belief]. Similarly evidence shows a breach of the right to freedom of expression and of assembly and association under sections 24 and 25 and the applicant and his followers have undoubtedly been treated in a less favourable manner than other members of the Nanumaga community which amounts to discrimination under section 27. The respondents do not dispute that.[23]

While the court therefore believed that there had been gross violations of fundamental human rights as alleged, the court nevertheless accepted the plea that the violations of sections 23, 24, and 25 of the Tuvaluan Constitution were all excusable under the qualification in section 29. It is curious that the court avoided mentioning that the right to freedom from discrimination under section 27 was a right NOT subject to any qualification of culture or value, the violation of which should warrant a remedy as claimed by the applicant, and as envisaged by section 40 of the Tuvaluan Constitution.

On the "effect of the Falekaupule Act, 1997" under which the Falekaupule of Nanumaga purportedly acted

against the applicant, the court held that the Resolutions adopted by the Falekaupule did not amount to bye-laws as envisaged under the *Falekaupule Act*, and therefore, the Act was inapplicable in this case. The learned Chief Justice erroneously held that "Nowhere does the Act limit or remove any traditional powers of the Falekaupule."[24] It is difficult to justify the reasoning of the learned court in holding that a body constituted by statute can act outside the statute. The only legal basis for the existence of any Falekaupule in Tuvalu is the *Falekaupule Act of 1997*.[25] It is a trite maxim of statutory interpretation that *expressio unius est exclusio alterius*. Once a statute expressly stipulates the powers conferred, any other power not so stated cannot be read into it.

On the second issue, the court neglected to juxtapose the favourable disposition of the Falekaupule of Nanumaga to the four existing religious outfits with the unqualified guarantee of the right to freedom from discrimination under section 27. In the wisdom of the court, the entry of the applicant's church onto the religious landscape of the Nanumaga community was capable of being "divisive and unsettling to the large majority of the people of Nanumaga" whose identity had "for many decades been based on the unity of a single denomination, the EKT."

This reasoning is self-contradictory as the existence of other religious bodies in Nanumaga is an evidence of the religious plurality of the Nanumaga community. Even though the court established that three other religious bodies – Bahai Faith; Jehovah's Witnesses; and Seventh Day Adventist Church had also come onto the religious landscape of Nanumaga at different times and had all recorded separate numbers of followers in Nanumaga, it ignored the patent discrimination involved in denying the establishment of the applicant's church. The allegation by the Pulefenua that the applicant's church threatened unity in Nanumaga is an unhelpful denial of the fact of religious plurality and diversity in Nanumaga.

What more? The Tuvaluan Constitution accentuates the recognition of the dynamics of custom and societal values in its Seventh Preambular Principle to which the learned Chief Justice even alluded,[26] and these dynamics have been reflected in the Nanumaga community with the advent of diverse religious bodies at various times. Furthermore, the statutory definition of "customary law" under the *Laws of Tuvalu Act, 1987*, strengthens my contention that the customs and values of Tuvalu are dynamic and evolving.[27] It therefore defeats the intendment of the constitution to uphold a rule established by the Falekaupule against the tide of social pressures. Perhaps the honourable court also overlooked the inevitable incursions of globalisation.

On the third issue, the honourable court simply declined to recognise the freedom from discrimination as a self-executing right. According to the Chief Justice, "where actions restricting an individual's right to other freedoms are justifiable under the Constitution, any discrimination arising from the same actions must also be considered justifiable."[28] The court's reference to subsection (6) of section 27 was superfluous as that subsection excluded freedom from discrimination from those rights that may be subject to restriction. How could a law court read into a constitution what it intentionally excludes? It is extremely difficult to see how the learned court would simply extend its justification of the Falekaupule's actions to any other provision of the supreme Constitution of Tuvalu.

On the final issue, in addressing the alleged violation of the applicant's right to freedom of movement as guaranteed under section 26(1), the learned Chief Justice erroneously interpreted this right as attaching only to citizens of Tuvalu. There is nothing in the text of the Constitution of Tuvalu that makes only citizens of Tuvalu the beneficiaries of the provisions of its Bill of Rights. One cannot but discern the court's error on this point as it made this pronouncement in ignorance of Section 11(1) of the Constitution which makes "every person in Tuvalu" the beneficiaries of those rights. It will be apt to add here that in contemporary human rights drafting, both at municipal and international levels, the trend has been to make all human beings beneficiaries of the rights recognised in the constitutions of any country or the human

rights treaties binding on any country in whose territory they find themselves.[29] Tuvalu certainly wanted to vindicate its deep-seated desire to "take its rightful placer among the community of nations" as envisaged in the Preambular Principle 3 of its Constitution when it employed the terminologies "everyone", "a person", and "every person" in all the provisions on fundamental rights. No judicial interpretation must abridge explicit constitutional intentions.

IMPLICATIONS FOR HUMAN RIGHTS JURISPRUDENCE

If this were to be the judgment of an ordinary high court, one would have nursed the hope that recourse to some higher authority would produce some foreseeable reconsideration of its justice. However, the high-level source of this judgment makes it worrisome for the future of human rights adjudication in Tuvalu since the learned trial judge also happens to be the Chief Justice of Tuvalu who invariably is the arrowhead of the judicial process in Tuvalu.[30]

It is interesting to observe that despite the rigorous references to the decisions of superior courts in other notable jurisdictions, including Australia, Canada and Samoa, on some of the similar legal controversies involved in this case, the learned trial judge refused to be persuaded, and never even bothered to mention any of those foreign decisions relied upon by Counsel to the Applicant in his judgment.[31] A law court cannot properly distinguish a foreign decision cited for the purpose of persuasion without showing how such a decision stands as an unhelpful guide in deciding a case for which there is no local precedent.

Again, while the trial court was indeed entitled to decide against all the persuasive authorities cited based on the distinctive provision of Section 11(2) of the Tuvaluan Constitution, the court deliberately failed to take cognisance of the qualification placed on this provision by Section 12(2) which says an action shall be unlawful, even though undertaken under a valid law, if such an action "(a) is harsh or oppressive; or (b) is not reasonable in the circumstances; or (c) is otherwise not reasonably justifiable in a democratic society having a proper respect for human rights and dignity."
The disposition of the learned Chief Justice indeed conveys the message that any action purportedly done in the guise of "Tuvaluan customs and values" would find judicial validation in the superior courts of Tuvalu.

This observation certainly presents an urgent need for a restatement of the scope of customary law and its overbearing influence on constitutional notions that have been accorded unquestionable legal validation in the comity of nations. That remarkable international political statement, the Vienna Declaration and Programme of Action (the Vienna Declaration), which was unanimously adopted by all the participating 171 member states of the United Nations at the World Conference on Human Rights in 1993, had sought to dismantle the age-long stereotype about the fiction of cultural relativism. In unequivocal terms, the instrument proclaims that:

> "All human rights are universal, *indivisible* and *interdependent* and *interrelated*. The international community must treat human rights globally in fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[32]

Just as the Tuvaluan Constitution itself rightly anticipated dynamic social changes, its judiciary cannot afford to stagnate the relevance of Tuvalu in the global movement towards a more effective protection of human rights.

CONCLUSION

Having highlighted some of the conclusions and inferences narrowly drawn by the trial judge from the facts available in this case, it might be possible for the first time reader of this piece to postulate that this is one decision that must be subjected to an appellate review. Such a suggestion is, however, beyond the scope of this essay and lies within the exclusive prerogative of the applicant.

It is obvious that the task of balancing the guaranteed rights of the Tuvaluan Constitution and customary law and values is a difficult one which would require sustained rethinking and repositioning for the judiciary and other stakeholders in the dispensation of justice in Tuvalu.

However, while rigorous efforts continue in finding equilibrium between these competing social demands, focus should not be lost on eschewing any overzealous or extensive protection of alleged "Tuvaluan customs and values" particularly where such are blatantly discriminatory or lacking verifiable legal basis. This is the view canvassed in this short write-up, flowing from the judicial pronouncements in the case under examination.

The desire to preserve traditional norms and practices must not be allowed to trample on the need to recognise the Tuvaluan society as a dynamic entity. Tuvaluan customs and values will indeed be better protected and preserved when that pursuit is carried out with respect for the supreme law of the land that supersedes all other rules, laws, and powers. That is the quintessence of a law-ordered society.

Far from being an *ex cathedra* pronouncement on all the dynamics that would inform the reconciliation of Tuvaluan customs and values with the express constitutional provisions on human rights, this short essay would have achieved its purpose if it stimulates further intellectual discourses on its broader themes.

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[1] For some insightful discussions on the tension between human rights and customary values in the island states of the South Pacific, see Jennifer Corrin Care, 'Reconciling Customary Law and Human Rights in Melanesia' (2003) 4(1) *Hibernian Law Journal* 53-76; Don Paterson, 'New Impulses in the Interaction of Law and Religion: A South Pacific Perspective' (2003) *Brigham Young University Law Review* 593-623.

[2] See, for example, Alison Quetin-Baxter, 'The Constitutions of Niue and the Marshall Islands: Common Traits and Points of Difference' in Peter Sack (ed.), *Pacific Constitutions* (Australian National University, Canberra) 97, 112; A. H. Angelo, 'Lo Bilong Yumi Yet' (1992) 22(3) *Victoria University of Wellington Law Review* 33, 37; Jennifer Corrin Care, Tess Newton & Don Paterson, *Introduction to South Pacific Law* (Sydney: Cavendish Publishing Limited, 1999) 85; Jennifer Corrin Care, 'Customary Law and Human Rights in Solomon Islands: A Commentary on *Remisio Pusi v. James Leni & Others*' (1999) 43 *Journal of Legal Pluralism and Unofficial Law* 135-144; Paterson, above n 1, 606.

[3] Constitution of Tuvalu, 1 October 1986, as amended by the Constitution of Tuvalu (Amendment) Act, Act No. 2, 1992.

[4] Section 16.

[5] Section 17.

[6] Section 18.

[7] Section 19.

[8] Section 20.

[9] Section 21.
[10] Section 22.
[11] Section 23.
[12] Section 24.
[13] Section 25.
[14] Section 26.
[15] Section 27. It is worthy to note that the Tuvaluan Constitution also contains an obscure provision recognising "other rights and freedoms retained by law" even though these are nowhere enumerated or defined in the constitutional text. There is no known decision where the content of this provision has received judicial interpretation.

[16] Section 29 of the Constitution provides:
"Protection of Tuvaluan values, etc.
(1) The Preamble acknowledges that Tuvalu is an Independent State based on Christian principles, the Rule of Law, Tuvaluan values, culture and tradition, and respect for human dignity.
(2) This includes recognition of-
(a) the right to worship, or not to worship, in whatever way the conscience of the individual tells him; and
(b) the right to hold, to receive and to communicate opinions, ideas and information.
(3) Within Tuvalu, the freedoms of the individual can only be exercised having regard to the rights or feelings of other people, and to the effect on society.
(4) It may therefore be necessary in certain circumstances to regulate or place some restrictions on the exercise of those rights, if their exercise-
(a) may be divisive, unsettling or offensive to the people; or
(b) may directly threaten Tuvaluan values or culture.
(5) Subject to section 15 (*definition of "reasonably justifiable in a democratic society")* nothing contained in a law or done under a law shall be considered to be inconsistent with section 23 (*freedom of belief*) or 24 (*freedom of expression*) to the extent that the law makes provision regulating or placing restrictions on any exercise of the right-
(a) to spread beliefs; or
(b) to communicate opinions, ideas and information;
if the exercise of that right may otherwise conflict with subsection (4)."

[17] Unreported Case No: 23/03, High Court of Tuvalu, Funafuti, 11 October 2005 (hereinafter 'the Judgment') (Copy on file with author).
[18] There is one other area of this epic judgment which I consider to warrant critical discussion but since it will not be appropriate to becloud the focus of this write-up, it might just suffice to mention it in passing: Although the title heading of the judgment shows that it was delivered by the "Chief Justice", the name of that Chief Justice was never mentioned anywhere in the judgment, not even in the signature column. It is always proper for judgments to exhibit the identities of their givers. I however appreciate the assistance of Barrister Albert Seluka, Counsel to the Applicant, who gave the name of the Chief Justice as Gordon Ward.
[19] See Sections 4 and 40, *Falekaupule Act (Act No. 8), 1997*.
[20] The "Pulefenua" is synonymous with the "Pule o Kaupule" and refers to the Head of the Falekaupule under the *Falekaupule Act*. See section 2(1) *Falekaupule Act*. The two titles were used interchangeably throughout the Judgment.
[21] The applicant's counsel added section 26(1) during the hearing.
[22] Page 15 of the Judgment.
[23] Page 13 of the Judgment.
[24] Page 16 of the Judgment.

[25] See Section 4(1) *Falekaupule Act*.

[26] Page 9 of the Judgment.

[27] See Section 5(1) *Laws of Tuvalu Act (Act No. 8), 1987* defining "customary law" as comprising "the customs and usages, *existing from time to time*, of the natives of Tuvalu" (emphasis added).

[28] Page 18 of the Judgment.

[29] See Allan Rosas & Martin Scheinin, 'Categories and Beneficiaries of Human Rights' in Raija Hanski & Markku Suski (eds.), *An Introduction to the International Protection of Human Rights: A Textbook*, 2nd Revised Edition (Åbo: Institute for Human Rights, 1999) 49, 56-60.

[30] See Jennifer Corrin Care, Tess Newton & Don Paterson, above n 2, 318.

[31] Page 12 of the Judgment.

[32] Vienna Declaration and Programme of Action (the Vienna Declaration), June 1993, U.N. Doc. A/CONF. 157/23, Part I [5] (emphasis added).