

A MOTHER'S CARE OR LAND, BUT NOT BOTH – *TEPULOLO V. POU*

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The Tuvalu case of *Tepulolo v. Pou*,^[1] provides some harsh illumination of the problems individuals face when Pacific Island countries sign up to international conventions and do nothing to implement them in their domestic laws. The case is a hard one and sad.

The plaintiff was an unmarried mother. We do not know how old she was or whether this was her only child. The first defendant was the father of the baby. He too was not married he seemingly did not propose to marry the mother of his baby although paternity was not in dispute. Instead, three years after the baby was born he sought to take the baby away from the mother to live with him and his parents. The child's mother opposed this believing that he also intended to take the child out of Tuvalu to New Zealand and give it to his sister there. She did not want to give up her child.

Counsel for the plaintiff argued hard for the mother to keep the child, but custom, poorly drafted laws, the inertia of the Tuvalu Parliament, and the reluctance of the court to take a pro-active human rights approach, conspired against him. The mother lost the case and the child. How did this come about?

It emerges from this case that the laws of Tuvalu are full of inconsistencies. First, the Constitution of Tuvalu declares that everyone in Tuvalu is entitled to the fundamental rights and freedoms set out in the Constitution without distinction based – among other things – on sex.^[2] The rights and freedoms to which everyone is entitled are then set out in Part II. One of the freedoms is freedom from discrimination,^[3] but this section only refers to difference of treatment on the grounds of race, origin, political opinion, colour, or religious (or lack of) beliefs. Sex or gender is not mentioned. Therefore, the court held, laws which discriminate on the grounds of sex or gender are not unconstitutional. Secondly, the rights of every person to such rights and freedom are cut down by provisions which do not apply non-discrimination provisions to laws in relation to land.^[4] Land law and land rights can therefore be discriminatory – without restriction as to grounds. Thirdly, under the *Custody of Children Ordinance* a court in making custody order must have 'regard to the welfare of the child' and 'to the conduct and wishes of the mother and father'.^[5] This suggests that the welfare principles prevail over the wishes of either parent in the court's deliberations. Indeed section 3(3) states this principle to be 'the first and paramount consideration'. Yet the *Native Lands Ordinance*, which confers on the court the power to adjudicate on paternity issues,^[6] allows a court to make an order that a child for whom paternity is acknowledged, must, after reaching the age of two years, reside with its father and /or his relations,^[7] unless this would be contrary to customary law. There is no reference to the welfare of the child, although the welfare or best interests of the child has been held to apply as a guiding principle by the Tuvalu High Court in custody cases concerning children in Tuvalu.^[8] The *Custody of Children Ordinance* was passed in 1974 whereas the *Native Lands Ordinance* was passed in 1957. Chronologically then it might be thought that the later act should be given priority over the earlier. However the court in this case could see no conflict between the two, despite the fact that not only

is the *Custody of Children Ordinance* later, but also it applies to all courts whereas the *Native Lands Ordinance* only applies to a lands court established under the Act.^[9] Indeed, the fact that the Island Court had made such an order without having the jurisdiction to do so seems hardly to have troubled the High Court – which could have ruled that the Island Court had acted *ultra vires*.

A final inconsistency lies in the fact that whereas the *Custody of Children Ordinance* puts the welfare of the child first, the *Matrimonial Proceedings Act* (which was not applicable here but was referred to in the case) despite stating that the welfare of the children is of paramount importance, ranks it as equal to that of the parties of the marriage.

The attention of the court was drawn to the fact that Tuvalu is a signatory to both the *Convention on the Rights of the Child* (ratified on 14 July 1995) and the *Convention to Eliminate Discrimination against Women* (acceded to on 4 October 1999).^[10] Although neither has been given effect in domestic law – as the Court was quick to point out; there is scope within Tuvalu law to adopt a pro-active approach. The Interpretation Act allows the courts to arrive at a construction of a written law which is consistent with the international obligations of Tuvalu rather than one which is not.^[11] In this case the court held that the court could only do so where the law was ambiguous. The court was reluctant to be seen to be correcting or amending the laws of Tuvalu to bring them in line with the country's international obligations. What the court failed to appreciate is that the judiciary is an arm of the state, and the courts – especially where governments are slow to act – have a role to play in interpreting legislation so as to endeavour to give effect to that country's obligations not only as a signatory to international conventions but as a member of the United Nations, subscribing to a common agenda. There was scope to argue that the inconsistencies referred to above at the very least made the intent and purpose of the law unclear. In any case, the court seemed considerably less reluctant to interpret the preamble to the Constitution as giving support to gender discriminatory provisions when it came to land issues and custody of children. Reference was made to the Preamble which refers to the 'maintenance of Tuvaluan values, culture and traditions'. There is no reference in the preamble to customary law. Yet the court was prepared to find that the court's power to make a compulsory residence order that a child reside with his father 'in accordance with customary law' had constitutional support.

Could the court have interpreted the section on discrimination so as to give effect to the broader principle that all persons - whatever his ...sex – are entitled to the rights and freedoms set out in the Constitution, and not to interpret the provision on discrimination restrictively? Arguably this could have been done, especially as this provision states that discrimination should not be 'wholly or mainly' because of the various criteria listed in the section (27) (1). It does not state that the discrimination must be 'solely' on these grounds.

It was also open to the court to rule that an order which gave effect to Tuvalu's obligations under CRC and CEDAW and was in line with the welfare principle should have been considered. The court accepted that there was scope for a court exercising its powers under the *Native Lands Ordinance* not to make an order that the child go and reside with his father. The making of such an order is discretionary and is made so as to provide support for the child. This support being the securing of inheritance to land rights through residence. In making an order, the Lands Court – like any other court – is bound to take into account the best interests or welfare of the child. Clearly in providing for the child's future land rights the court might have thought it was doing this. It was however open to the court either to make no order at all, or to postpone the coming into effect of the order,^[12] or to make 'such order as custom allows'. Whether custom allowed a young child to remain with his mother does not appear to have been considered. Nor was there any consideration of the relationship between custom and the welfare principle. Indeed there seems to have been little if any consideration by the court either at the Island Court level or the in the High Court, of what course of action was in the best interests of a three year old child. Nor, might it be added,

was there any consideration of what, if any fundamental rights of the child, might be infringed by this action.^[13]

While the application of the welfare principles may not always appear to take into account the social and cultural context of the Pacific and may be viewed by some as an alien and introduced concept,^[14] the decision in this case may be thought to represent the opposite extreme and is contrary to general trends throughout the region.^[15] In order to meet the evidential requirements for establishing a customary claim to land the High Court of a country which is a signatory to both the CRC and CEDAW, and has a constitution incorporating a bill of rights, ordered a small boy to be taken from his natural mother to live with his biological father and his relatives, in the knowledge that a) the mother may have problems with access as she has no matrimonial link with the man or his family and b) the man may remove the child from Tuvalu altogether. A hard case indeed it was, but it was also a sad one.

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[1] [2005] TVHC 1 (Tuvalu High Court).

[2] Section 11(1).

[3] Section 271).

[4] Section 27(2) (1)(c).

[5] Section 3.

[6] Section 20(1) and (2).

[7] Section 20(2)(i).

[8] See *Martin v. Martin* [2003] TVHC 15, Case No. 2 of 2003.

[9] Section 6.

[10] Hereafter the CRC and CEDAW.

[11] Section 17 *Interpretation Act* [Cap 1A].

[12] The wording of the provision under section 20(2)(i) is that 'If the father being a native accepts the child as being his, such child shall after reaching the age of 2 reside with the father...' It is therefore arguably that any age after two could be set by the court for the taking up of such residence.

[13] It is questionably, for example, whether a female child would be similarly treated.

[14] See for example, Ken Brown, 'Customary rules and the welfare principle: Post-independence custody cases in Solomon Islands and Vanuatu' (1997) 21 *The Journal of Pacific Studies* 83.

[15] See Sue Farran, 'Approaches to Child Custody in the Pacific Region' (Occasional Paper No. 3, University of the South Pacific School of Law Occasional Paper Series, 2003).