The significance of twenty years

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The paper considers the decision of the Court of Appeal of Western Samoa in the case of Attorney-General *v.* Saipa'ia Olomalu *and the reasons for that decision being diametrically opposed to that of the Supreme Court. The significance in that context, for the Constitution of Western Samoa of twenty years of social evolution is also discussed.*

In August 1982, the Court of Appeal of Western Samoa, composed of Cooke P. and Mills and Keith JJ. gave judgment in *Attorney-General* v. *Saipa'ai Olomalu et al.*[1] The Court of Appeal found in favour of the Attorney-General and reversed the decision of St. John C.J. in the Supreme Court who had decided that although all previous election results were valid any future elections had to be based on universal suffrage. This had reversed the decision of the Magistrate at first instance and resulted in the Attorney-General taking the case to the Court of Appeal.

While the litigation was based on five separate cases, all asked the same question. Stated briefly, the challenge was that sections 16 and 19 of the Electoral Act 1963 were unconstitutional, being ultra vires article 15 of the forty-five territorial Constitution. Section 16 limits the right to vote in the forty-five territorial constituencies to the *matai*[2] over 21. Section 19 provides an Individual Voters Roll for the less than 10% non-Samoan population. This results in many Samoans not having the franchise. The unfairness perceived in the Electoral Act gave rise to questions of fundamental rights protected by the Constitution. In brief it was argued that article 15 guaranteeing 'equal rights' and 'equal protection before the law' made such disenfranchisement unconstitutional.

A brief mention of relevant aspects of Western Samoan history and culture to help in understanding the legislation should precede a review of the judgments.

In 1962 Western Samoa became independent having adopted a Constitution which did not completely fulfil the hopes of the United Nations. The United Nations, like New Zealand (the trustee), was forced to accept that the Samoan people wished their *matai* to retain powers of decision. This acceptance was made easier by the United Nations, seeing the initial title conferment by the unanimous vote of the family as being the first stage in a two-stage election process. Secondly, as there was one *matai* for every seven adult Samoans a reasonable representation of

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1 (1984) 14 V.U.W.L.R. 275.

2 *Matai* means roughly "head of the family"; see further the Court of Appeal's judgment (1984) 14 V.U.W.L.R. 275, 282-3.

the people's view was expected. The United Nations insisted that a plebiscite be held based on universal suffrage to ensure that the people supported both Independence and the Constitution, including the voting structure. Held in May 1961, the final vote was overwhelmingly in support.[3] The United Nations hoped that this voting might also have shown the Western Samoans about the feasibility of universal suffrage.

The traditional form triumphed, but even then most Samoans recognised that change might occur in the future. The litigation considered here is, perhaps, a sign that such a change of attitude may have occurred.

The question arises, why did the two courts reach diametrically opposed decisions? This paper will attempt to provide an explanation. It is submitted that the answer lies in a question of twenty years — the period between the Constitution's adoption and the litigation. Within that time changes occurred in the social environment and it is possible these may have altered the judges' perspectives on how they approached the Constitution.

Both courts considered similar material although the Court of Appeal reproduces it in much greater detail, for instance, setting article 15 in the context of the rest of the Constitution.

St. John C.J., refers to American decisions on the 14th Amendment to the U.S. Constitution (equality before the law and equal protection) to aid his interpretation and reference to principles. In contrast the Court of Appeal shows a preference for Privy Council decisions. This raises questions on how the judges see the Constitution. St. John C.J., by using the American cases without reference to the historical development leading to the decisions, appears to take the view that the Constitution is outside the environment which created it. Put in an extreme form, he could be interpreted as implying that constitutions are in an unique position, all embodying similar sentiments and thus making cross-cultural case comparison the legitimate starting point and American decisions the base line.

The Court of Appeal instead takes a specific view relying on *Ong Ah Chan* v. *Public Prosecutor* [1981] A.C. 648. There the Privy Council decided American decisions were of 'little help in construing provisions in the Constitution of Singapore . . . .'[4] Like Western Samoa, Singapore has a single assembly unlike the American federal structure. This was part of the reasoning behind the above statement and so the Court of Appeal felt able to adopt the Privy Council's argument.

The result is that the Court of Appeal is more concerned with the cultural context of the adoption of the Western Samoan Constitution. Reference is made to the United Nations Official Records and material on the *matai* system. Support for this action is found in *Minister of Home Affairs* v. *Fisher* [1980] A.C. 319 where

3 86.1% of the total number of estimated eligible voters participated. Of those, 83% voted yes to the adoption of the Constitution, 13% no, and 4% were informal. To the question of independence on the basis of the Constitution 79% voted yes, 13.5% no, and 7.5% were informal (United Nations General Assembly *Official Records* Agenda item 48 1961-62 pp. 16 and 17).

4 [1981] A.C. 698, 669.

the extraneous material of the U.N. Declaration of Human Rights was considered. The Chief Justice also makes reference to historical cultural material,[5] but not to the same extent. Although an Australian, he was nearing the end of his tenure, so presumably had a better knowledge of the customs than the New Zealanders on the Court of Appeal. His audience could be expected to be limited to those with some cultural knowledge of Western Samoa while the Court of Appeal decision was likely to attract a wider but less informed audience.

The Chief Justice rejected the British rule of not looking at parliamentary debates in favour of the American Supreme Court practice of reviewing debates. The Court of Appeal was hesitant in referring to Convention Debates, initially accepting them provisionally. Later acceptance was tempered with the proviso that such acceptance should not necessarily follow in later cases, but here, as the debates were clear and confirmed the decision already reached, 'to shut our eyes to it would be artificial'.[6]

A variance both in material and emphasis is discernible from the judgments and this is explicable in terms of the underlying perspective the courts had of the Constitution. Once a constitution is formed, attitudes to its interpretation range from asking, is it set in that time and society, or does it grow from its historical origins and so require constant reconsideration with social change? A moderate view is to ask how long do social changes have to exist before the Constitution can be reinterpreted? The Western Samoan courts, when considering the extent of social entrenchment, swing to opposite ends of a continuum. The Court of Appeal moved towards seeing the Constitution as immutable, while the Chief Justice viewed it as changeable, but it was the moderate view of 'how long' that caused the difference in decisions.

No dispute exists over the function of the court when dealing with constitutions. By article 4 courts have a duty to enforce rights guaranteed under the Constitution, which is the supreme law (article 2). St. John C.J. states that if the words are clear they must be applied regardless of consequences. Both courts accept Lord Wilberforce's view in *Fisher* that a constitution is sui generis and so has its own rules of interpretation.

The dispute arises over the question of whether article 15 applies to article 44, under which the Electoral Act was enacted. The Chief Justice categorically stated there is some doubt over the application. The Court of Appeal considered other constitutions and the history of the inclusion of fundamental rights within the Western Samoan one. The court concludes that as the Western Samoans did not follow the pattern of including universal suffrage as a special subject they probably deliberately left it out, making it unlikely that its conclusion was contemplated by article 15.

The Chief Justice had to decide whether article 44, and thus the Electoral Act, is subject to article 15 and its requirements of equality. Dr Davidson, in the Constitution Convention Debates, envisaged the gradual elimination of the Individual Voters Roll and so indicates that he did not consider universal suffrage

5 Davidson, J.W. *Samoa Mo Samoa; the emergence of the independent state of Western Samoa* (Melbourne, O.U.P., 1967).
6 (1984) 14 V.U.W.L.R. 275, 291.

through equality of voting rights was being introduced. St. John C.J. argued that the draft article 44 differed from the adopted version as the words 'Subject to the provisions of this Constitution' were later added. This resulted in article 44 being subject to article 15.

The Court of Appeal considered this argument on the additional words 'to be a main point perhaps even the most crucial point, in his judgment'.[7] The higher court did not agree with his conclusion and considered in detail the Chief Justice's arguments.

The Chief Justice supported his view by suggesting that as article 44 deals with the qualification of electors then the framers could have restricted this to *matai* only if that was their intent. Secondly, article 15 (3) covers exemptions from equality such as preferential treatment of women, and thus *matai*-only voting could have been included here. As voting is not exempted then equality must cover it. Thirdly, the Chief Justice asked two rhetorical questions. If article 15 does not apply to article 44 then what is to stop the legislators from disenfranchising members of a particular religious group, or, secondly those of certain political persuasions?

Fourthly, article 15 (4) concerned the Chief Justice. This he saw as a commonsense provision which acknowledged that all law might not coincide with the constitution when it was introduced, so progressive removal of these faults after independence was a realistic response. The question arises, as the court has a duty to enforce the rights guaranteed by the Constitution, when can the court act to enforce rights which under 'progressive removal' have been postponed? St. John C.J. proposed two alternatives. The first was that as the legislation had been passed after independence it should fulfil the Constitution requirements and not be a reflection of pre-independence law. As such it is open to court inquiry. This view was accepted by the Court of Appeal. Another view is that eighteen months after independence is not long enough to expect changes, but twenty years later such laws make a "mockery of the phrase 'progressive removal' "[8] and so the courts should intervene.

The judge's fifth argument is based on custom. He noted that specific reference is made to certain customs and so custom per se is not protected by the Constitution. As *matai* voting power is not referred to then the Constitution does not preserve it. The custom itself is reviewed. Local government was strong but national government was a foreign innivation and thus traditionally *matai* suffrage has no relation to national government. Lastly the judge considered the argument that article 15 should be modified by the word 'reasonable' allowing 'reasonable discrimination'. Using the argument of drafting consistencies the judge refers to other uses of 'reasonable' and does not accept this view.

None of these arguments were persuasive in the Court of Appeal. *Matai* suffrage only is not explicitly mentioned because article 44 is deliberately drawn widely to allow the legislators to prescribe the electoral qualifications. Likewise *matai* voting will not come within the express exemptions. Neither the historical argument or the addition of 'reasonable' are discussed but historically St. John C.J. fails to consider

7 Ibid. 284.
8 Decision of the Chief Justice, R. J. B. St. John, unreported, Apia, 1982, p.11.

the immediate past and the position of *matai* in the National Fono which prepared Western Samoa for independence.

His most forceful argument is that other interest groups could be disenfranchised at will. This point was accepted but set in context, for 'the same can probably be said even of many countries with elaborate constitutions.'[9]

The Court of Appeal added its own arguments against the suggestion that article 15 applies to article 44. Initially it considered the Constitution as a whole. It was noted that the preamble refers to the chosen representatives of the people with no specific reference to universal suffrage. In comparison with other similar constitutions there is no specific provision for universal suffrage in the article which covers political rights. This is understandable having reviewed the United Nations reports and if it is not explicit then it is highly unlikely that universal suffrage would be introduced by a sidewind. A detailed study of articles 44 and 45 shows that two different voting regimes were contemplated, one based on representation of those in constituencies.

However the most dramatic arguments are when the court turns to the additional words. "Subject to the provisions of this Constitution" was found to be a standard formula which made it clear which provision governs others in cases of conflict. Confusion here could arise over the entitlement of individual voters and not, as the Chief Justice suggested, the applicability of article 15.

The Convention Debates provided information on the framers views. Dr. Davidson did not consider that article 15 (2) applied to political rights and so it follows it will not apply to voting rights.

Looking at the article 44 discussion the court, due to 'the benefit of a much fuller presentation of the convention documentation',[10] decided Dr. Davidson did know of the added phrase and that completely destroyed the argument of the Chief Justice. Universal suffrage was proposed, discussed and out-voted. It would be inconceivable after such a debate that the Constitution's framers ever intended article 15 to apply to article 44 and by a back-door method introduce universal suffrage.

It was finally argued that the passage of time could alter the weight the court gave to the debates but having considered the Constitution 'to be the basic law of the state over a long, unpredictable and changing period'[11] the court could not accept the passage of time argument after such a short period as twenty years, and especially on such a fundamental question.

The judgment of the Court of Appeal shows the Chief Justice's decision to be based on a false assumption. Most of the evidence available to the Court of Appeal was readily available to the Chief Justice. The attitude of the Constitution framers to universal suffrage is well documented by Dr. Davidson in *Samoa Mo Samoa* which St. John C.J. refers to. The United Nations missions tried to introduce the idea of universal suffrage, but were forced to accept that *matai* suffrage was the preferred form, and the Samoans were going to retain it. New Zealand, although hoping for universal suffrage, had come round to accepting 'Samoan democracy' and

9 (1984) 14 V.U.W.L.R. 275, 285. 10 Ibid. 292. 11 Idem.

gradually so too did the United Nations. All of this is well reported and St. John C.J. would, for the most part, be aware of it, even if he did not have the benefit of as full a presentation as the Court of Appeal had. His lack of information is probably most significant with regard to the material related to article 44. He possibly was not informed of Dr. Davidson's knowledge of the important introductory phrase.

The possible conclusions to be drawn from such differing interpretations of similar material vary. It is possible that St. John C.J. did not seriously consider or realise the significance of the Western Samoa's determination to keep the *matai* suffrage system and in fact thought that the added phrase related article 15 to article 44. It is just as possible to conclude that St. John C.J. was indulging in legal fiction. If that is so, one possible explanation might be found in the old adage 'the end justifies the means'. The end was a legal decision, a court's judgment, which would enforce the introduction of universal suffrage. The means was the legal argument that article 15 applied to article 44 and the justification can be seen in his support of article 15 (4). For St. John C.J. twenty years is more than long enough for Parliament to have begun to fulfil its constitutionally proposed policy of progressive removal of discrimination.

The problem is one of separation of powers. When can the judiciary tell the legislators what to do? The Court of Appeal ends its judgment by questioning whether all adult Samoans have an effective voice, but consider these 'are questions, not of law, but of social and political policy'[12]. The decision rests with Parliament, not the courts.

This can be seen as 'passing the buck' and so taking an easy way out. It may even be the only path a court can take, especially when the judges are not part of the community. What the people want is always subjective and the courts are in no position normally to find out what is wanted. In theory, usually the people can express for themselves their wishes through the ballot box, and this argument is often put forward so judges can stay out of the political realm. But here the argument fails when what may be wanted is a right to use the ballot box. Although the courts here are prepared to interpret the constitution generously, the material considered does have its limits. Courts are not free to question people about their desires, to hold their own plebiscite, or even go in search of the 'ordinary person'.

The courts have an obligation to the people. The Constitution imposes on them a duty to intervene if the legislators act unconstitutionally. Where the people have little power to the political limitations, and therefore have a greater need to resort to the court system to ensure their rights, it is not too much to suggest that the courts must be the people's main security.

At the date of acceptance of the Constitution, clearly *matai* suffrage only was not seen as unconstitutional by most of the parties involved. However, for all outsiders, the majority of 'Europeans' and a minority of Samoans, it was not seen as the end. The hope is evidenced throughout the United Nations reports that Western Samoa would eventually accept universal suffrage, and this partially explains the flexibility in article 44.

Is twenty years long enough for this change to have at least begun?

12 Ibid. 293.