

## **Moot for USP – Otago Exchange 2010**

### ***Bikfoot v Linda, Beo and Lisi***

**Applicant (or appellant):** Otago

**Respondents:** USP

The moot will be conducted in the Supreme Court of the fictitious jurisdiction of Ramos, a small island state in the South Pacific.

In this court, all authority from common law countries is persuasive, but not binding. The court is especially influenced by the decisions of courts in other Pacific Island nations with a similar constitution and culture.

The moot will be conducted according to the rules of the Mooting Manual of the University of the South Pacific School of Law, with the following modifications:

#### **A. Oral Submissions**

1. Each team of 3 speakers has 30 minutes to address the court. Counsel may divide their time between themselves as they wish so long as no counsel is allotted more than 15 minutes.
2. Each team will advise the bench before the commencement of the round how much time each counsel will use.
3. Applicant's counsel will argue first, followed by the respondent's counsel.
4. Applicants' counsel may take up to 5 minutes from the allotted 30 minutes for a Reply. Respondent's counsel has no right of reply.

#### **B. Associate's Duties**

1. The moot associate will keep the time. The associate will ring a bell once when 5 minutes and twice when 2 minutes remain in a submission. When the total time for a submission has elapsed, the judge's associate will ring the bell three times, after which Counsel must stop unless allowed to proceed by the bench.

### **C. Outlines of argument**

1. The outline of argument must be no more than 2 pages in length, and typed in no smaller than 12 point font. A separate list of authorities will be attached.
2. A copy of the outline of argument will be sent to the opposing team by email by Monday, August 16th, 2010.
3. The outline must be headed with the name of the court, the name of the action, and counsels' names. This should be followed by a list of issues and sub issues to be argued. Authorities which counsel will rely on in their submission should be listed with each issue and sub issue.

### **The validly-enacted Constitution of Ramos contains the following provisions:**

Ramos is a democratic county in the South Pacific which attained Independence from Great Britain in 1977. It has a valid written constitution which includes the following provisions:

Preamble: *We the people of Ramos believing in the importance of Christian principles, custom and the family, declare the Constitution to be the supreme law of Ramos.*

Article 2: *All persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of . . . sex. . . -*

*(d) protection of the law;*

*(j) protection for the privacy of the home and other property and from unjust deprivation of property;*

*(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females,.....*

Article 3: *The courts of Ramos shall administer the law in order to do substantial justice between the parties*

Article 5: *Where appropriate the courts of Ramos shall take into account the customs and traditions of Ramos.*

Article 10: *The rules of custom shall form the basis of ownership and use of land in Ramos.*

Article 20: *Customary law shall continue to have effect as part of the law of Ramos.*

The Island Court of Ramos has the jurisdiction to hear and make orders on customary land matters. The Island Court Act also provides the Supreme Court of Ramos (Land Appellate Division) with the same powers as the Island Court to make orders. The Supreme Court sits once a year to hear appeals from the Island Court and there is a right of appeal to the Court of Appeal.

The Parliament of Ramos recently adopted the UN Human Rights Charter and is a signatory to CEDAW. The applicable laws in Ramos are legislation, customary law as well as common law and principles of equity derived from the British Commonwealth.

**The undisputed facts that give rise to the dispute that is the subject of the moot are as follows:**

An area of land on the island of Malita known as Nalita, includes the well known Sandy Beach which is a popular tourist attraction. The land is customary land and the Island Court in accordance with custom declared that Bikfoot is the custom owner and he is entitled to claim any benefit arising from it. Bikfoot is the second born in a family of four. The eldest in the family is Linda who is strong advocate of feminism in Ramos. The third and fourth born in the family are Beo and Lisi.

Given the popularity of the Sandy Beach it attracted a lot of tourists and people to the area who are required to pay an entry fee. Bikfoot claimed that based on patrilineal descent he has the right to any income or benefit arising from the land. He further claimed in custom his brother Beo and two sisters Linda and Lisi have lesser rights.

A majority of the people on the island particularly elders and chiefs supported the claims made by Bikfoot. They held that in custom it is the senior male in the family that owns the land and his sisters have lesser right, which ceases to exist upon marriage.

Linda, Beo and Lisi brought an action in the Supreme Court of Ramos to set aside the Island Court decision and make the following declarations:

- The Applicants are all custom owners of Nalita Land, which Sandy Beach is part of.
- The Applicants are equally entitled to any or all benefits arising from any or all activities connected with or conducted on or from the said land.

Hedge J sitting alone as the Supreme Court of Ramos held that both Bikfoot and his brother Beo are custom owners. Bikfoot is only a representative of his family.

As for the sisters Linda and Lisi Hedge J said: 'there is evidence which indicates that custom differentiates between male and female. Although I have not heard argument about it, I think that it is necessary for me to consider the effect of Article 2 of the Constitution'.

'It is clear that it was the intention of the Constitution to guarantee equal rights for women. A law which discriminates against women would be in conflict with this aim. Equal treatment under the law is a fundamental right. So also is protection of the law. I have also referred to the provision which does not permit unjust deprivation of property. The Constitution gives the rights referred to ".....without discrimination on the grounds of ..... sex ....."

'A law which gives a lesser right to a woman, because of her sex is inconsistent with the guarantee of protection of the law, may be inconsistent with protection from unjust deprivation of property and is inconsistent with the right to equal treatment under the law. The evidence before me suggests that custom, with respect to land rights does not give the same right to women as it does to men. If the woman marries, she is deprived of a right to property which she would otherwise have. The same does not apply to men. The custom therefore discriminates against women on the grounds of sex. It is the evidence that a woman may not be deprived of her right absolutely, but that any right she would have, would be lesser than that of her brothers'.

'A difficulty is encountered however, when one considers Article 10. This is the provision which states that rules of custom shall form the basis of ownership and use of land in Ramos. Does this mean that if custom discriminates with respect to land rights of women the fundamental rights which are recognised in Article 2, do not apply? I do not think that this can be so. It is clear, as I have stated that the Constitution aims to give equal rights to women. It permits a law which discriminates in favour of women. By not specifically permitting discrimination with respect to land rights, it must be that such discrimination cannot be allowed'.

**The proceedings so far:**

In the Supreme Court, Hedge J ruled that all Applicants are custom owners and they are equally entitled to any or all benefits arising from the Nalita land. This is an appeal case before the Court of Appeal of Ramos against the judgment of Hedge J.

**The grounds of appeal are as follows:**

1. The learned judge erred in law and in fact when he held that all the Applicants are custom owners.
2. The learned judge erred in law and in fact when he held that all Applicants are equally entitled to any or all benefits derived from the customary land.

## Case List

You are not expected to research beyond this case list

### Cases directly on point

- *Noel v Toto* [1995] VUSC 3; Civil Case 018 of 1994 (19 April 1995)
- *In re land known as Botorvov-Delua, Nathan v Albert* [2004] VUSC 29; Land Appeal Case 014 of 1993 (15 November 2004)
- *Santa Clara Pueblo v. Martinez* 436 US 49 (1978).

### More general land cases

- *Awop v Lapenmal* [2007] VUIC 2; Land Case 10 of 1984 (15 October 2007)
- *Haitong v Tavulai Community* [2007] VUIC 3; Land Case 04 of 1994 (22 October 2007)
- *Malas Family v Sonogoriki Family* [1986] VUSC 12; [1980-1994] Van LR 235 (8 October 1986)
- *Fugui v Solmac Construction Company Ltd* [1982] SBHC 8; [1982] SILR 100 (11 October 1982)
- *Manie v Kilman* [1988] VUSC 9; [1980-1994] Van LR 343 (5 July 1988)

### Cases on human rights and custom generally

- *Teonea v Kaupule* [2005] TVHC 5;
- *Lafaialii v Attorney General* [2003] WSSC 8;
- *Taamale v A-G* [1995] WSCA 1;
- *Leituala v Mauga* [2004] WSSC 9;
- *Sefo v Attorney-General* [2000] WSSC 18;
- *Lobo v Limanilove* [2002] SBHC 110;
- *Public Prosecutor v Walter Kota* [1993] VUSC 8;
- *Remisio Pusi v James Leni and Others* [1997] SBHC 100;
- *Loumia v Director of Public Prosecutions* [1986] SBCA 1.