

Moot for USP – Otago Exchange 2011

Applicant (or appellant): USP Emalus

Respondents: Otago

The moot will be conducted in the Supreme Court of the fictitious jurisdiction of Pasifika, 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 40 minutes to address the court. Two counsels from both teams should speak for 15 minutes and their third member do the conclusion.
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 40 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 or the bench must stop the Counsel.

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 Friday, August 15th, 2011.
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 applicable law is as follows:

Pasifika has a written Constitution that includes the following provisions:

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

Article 1: Sources of law

(a) This Constitution is the supreme law of Pasifika and any other laws inconsistent with this Constitution are of no force and effect.

(b) The sources of laws in Pasifika are this Constitution, legislation, customary law and common law and principles of equity derived from the British Commonwealth. However, customary law shall not apply if it is inconsistent with this Constitution or legislation.

Article 2: Fundamental Rights

(a) Every person in Pasifika is entitled to the following rights:

The right to protection of property

The right to life

The right to association

Freedom of expression

Freedom of movement

The right to protection of the law and due process

Freedom from discrimination based on sex, status and ethnicity

The right to protection from torture, or inhumane or degrading punishment or other treatment.

(b) These rights may be subject to such reasonable limits prescribed by law as are demonstrably justified in a free and democratic society that believes in the importance of Christian principles, custom and the family.

Article 3: Every person in Pasifika has the following fundamental duties to himself and his descendants and to others –

(a) to respect and to act in the spirit of the Constitution;

(h) in the case of a parent, to support, assist and educate all his children, legitimate and illegitimate, and in particular to give them a true understanding of their fundamental rights and duties and of the national objectives and of the culture and customs of the people of Pasifika;

(i) in the case of a child, to respect his parents.

Article 8: The courts of Pasifika shall administer the law in order to do substantial justice between the parties.

Article 15: Where appropriate the courts of Pasifika shall take into account the customs and traditions of Pasifika.

Apart from the Constitution, Pasifika has a Penal Code, enacted as legislation, which sets out the following:

Section 107 Penal Code: No person shall commit intentional assault on the body of another person.

Penalty: (a) if no physical damage is caused, imprisonment for 3 months; (b) if damage of a temporary nature is caused, imprisonment for 1 year; (c) if damage of a permanent nature is caused, imprisonment for 5 years; (d) if the damage caused results in death, although the offender did not intend to cause such death, imprisonment for 10 years.

Pasifika has a Court of Appeal which sits twice a year and it is a signatory to CEDAW, UN Convention on the Rights of the Child and the UN Human Rights Charter. Pasifika recently enacted the Family Protection Act as a means of giving effect to the conventions to be part of Pasifika's domestic law. The purpose of the Family Protection Act is to preserve and promote harmonious family relationships and prevent domestic violence.

Section 2 of the Family Protection Act: Domestic violence is where the acts of a person intentionally: a) assaults a family member; b) psychologically abuses, harasses or intimidates the family member; c) sexually abuses the family member; d) stalks the family member so as to cause him or her apprehension or fear; e) behaves in an indecent or offensive manner to the family member; f) damages or causes damage to the family member's property; g) threatens to do any of the acts in paragraphs (a) to (f).

Section 3: (a) a single act may amount to an act of domestic violence; and (b) a number of acts that form part of a pattern of behaviour may amount to domestic violence even though some or all of those acts when viewed in isolation may appear to be minor or trivial.

Section 6: A person committing an act of domestic violence is guilty of an offence and can be imprisoned for not more than 5 years or a fine not exceeding USD50 00.00.

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

Liza was seventeen years old. Her father Stephen was a chief. He was part of the House of Chiefs that had ruled that women (of any age) are not allowed to wear shorts in the village. Liza on numerous occasions was whipped by her father using a leather belt or stick for wearing shorts, or whenever she disobeys her parents, or goes out to see her boyfriend without her parents' approval. Whipping is a standard customary punishment for disobeying orders of the House of Chiefs.

Due to the whipping Liza would have swelling on the arms and legs which sometimes got infected and needed antibiotics for treating the infection. Mike, a school teacher, had noticed this. After a month of Liza turning up with cuts and bruises on her leg the teacher spoke to her father. Liza continued to be whipped and eventually the teacher reported this to police who then charged her father for intentional assault under section 107 of the Penal Code.

Defence arguments at first instance

The defence relied on the case of *Public Prosecutor v Martin* [2009] VUSC 83 to argue that reasonable chastisement is permitted in law, and what is reasonable needs to be determined by the cultural environment, and that chastisement by whipping was not unusual, and was common in custom.

The defence also referred to Art 3(h) of the Constitution which provides that one of a parent's fundamental responsibilities is:

in the case of a parent, to support, assist and educate all his children, legitimate and illegitimate, and in particular to give them a true understanding of their fundamental rights and duties and of the national objectives and of the culture and customs of the people of Pasifika;

The defence also referred to Arts 1 and 15 of the Constitution, and noted that the ban on women wearing shorts and the punishment for it were part of customary law.

Prosecution arguments at first instance

In response, the prosecution accepted that whipping was a widely accepted practice, but argued that Pasifika is a signatory to both the UN Convention on the Rights of the Child and CEDAW, which introduce universally accepted standards of reasonableness. The prosecution also referred to the cases of *Fangupo v Rex; Fa'aoa v Rex* [2010] TOCA 17, and *Ali v State* [2001] FJHC 169, which indicate that corporal punishment is not acceptable in the Pacific region and should not be tolerated in Pasifika.

The prosecution further submitted that whipping is contrary to the Constitution of Pasifika because it is a form of 'torture', 'cruelty', or 'inhumane or degrading punishment or treatment'. Therefore, whipping is against the Penal Code, the Constitution, Family Protection Act and international human rights law.

Judge's decision

At first instance the judge relied on the decision in *Public Prosecutor v Martin* [2009] VUSC 83, which stated:

counsel was plainly relying on the common law defence of '*lawful correction*' or '*parental discipline*' as accepted and recognized by the Hon. Chief Justice when he observed in the course of delivering the Court's decision on a presidential reference (involving the **Family Protection Bill**) in: *President of the Republic of Vanuatu v. Speaker of Parliament* [2008] VUSC77 (at p.11):-

"... *There is nothing in the Bill which prohibits the exercise of genuine parental discipline. The term 'assault' is not defined in the Bill nor is it defined in section 107 of the Penal Code. The common law recognizes the exception of lawful chastisement where a parent delivers reasonable corporal punishment to a child. Such punishment does not amount to an assault at common law and so would not amount to an assault under the Penal Code ..."*

I respectfully agree and would highlight for present purposes the critical phrase of the common law defence which is: "*a parent delivers reasonable corporal punishment to a child*".

In considering such a defence the Court must assess, on the facts, whether the punishment is "*reasonable*". In making that assessment the Court must take into consideration the age, build, and mentality of the child and the instrument (if any) that was used in administering the punishment; the frequency of its use, the area of the body to which it was applied and the nature of any injuries caused. The Court may also take into consideration the duties imposed on parents and children by Article 3(h) and (i) of the Constitution. Parents have a duty to educate their children, and children, a corresponding duty, to respect their parents.

The Court is also required in determining whether the punishment was '*reasonable*', to have regard to present day conditions and commonly accepted standards and punishment methods prevailing in Vanuatu. What is unacceptable in other countries and societies may not necessarily be so in this country. As was said by Dalgety J. in *Uhila v. Kingdom of Tonga* [1992] TUSC4 (at p.4):

"I am unable to conclude that 10 strokes inflicted upon a nine year old boy for gross disobedience and willful and persistent misconduct is excessive. It might be abroad, but not in Tonga! As to the mode of chastisement I do not feel able to rule that there is anything objectionable to the use of a manioke stick".

It must also be remembered that corporal punishment is not per se unlawful and that parental punishment of a child is given for the benefit of the child's education and for the purpose of correcting the child in wrong behaviour. Any reason(s) given for the punishment is therefore a relevant consideration including, whether it took place in public view or in the privacy of the family home. Needless to say, corporal punishment by its very nature involves some physical pain and is inherently humiliating.

The prosecution did provide evidence to show that Liza was whipped on numerous occasions and she had bruises plus swellings all over her body, but, in my judgment, this is not adequate to discharge the burden of disproving the common law defence of reasonable parental correction.

The complainant, Liza admits that she was whipped by her parents from time to time to discipline her because she was not following their instructions, disobeys the village rule regarding wearing of shorts, and because she would sneak out to see her boyfriend which sometime results in her being late for school.

Based on the evidence before the court the charge on intentional assault does not have merit because the prosecution failed to establish that the whipping of the complainant Liza was excessive, unusual and unreasonable by Pasifika standards. Therefore, the action of the accused is not contrary to the Penal Code, Constitution, Family Protection Act or international human rights law. This court finds the accused not guilty.

Ground of Appeal

The Judge erred in law on the standard of reasonableness.

Case List

You are not expected to research beyond this case list

Cases directly on point

- *Public Prosecutor v Martin* [2009] VUSC 83
- *Uhila v. Kingdom of Tonga* [1992] TUSC4
- *Ali v State* [2001] FJHC 169
- *Regina v Rose* [1987] SBHC 6; [1987] SILR 45 (21 September 1987)
- *State v Noimbik* [2007] PGDC 63; DC587 (3 January 2007)

Cases on interest of the child principle

- *Tepulolo v Pou* [2005] TVHC 1; Case No 17 of 2003 (24 January 2005)
- *Enakali v Enakali* [1992] PGNC 7; N1047 (4 March 1992)

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.