

SAIPA'IA (OLOMALU) AND OTHERS v ATTORNEY GENERAL AND OTHERS

Supreme Court  
St John CJ  
26 February, 8 March, 5 April 1982

CONSTITUTIONAL LAW - inconsistent legislation - whether S16 and S19 Electoral Act 1963 are contrary to Article 15 of the Constitution - whether there is "equality before the law" or "equal protection" within the meaning of Article 15(1) - whether there is discrimination on any of the bases set out in Article 15(2) - convention debates to be used to interpret Article 15 - Article 15 applicable to Article 44 - progressive removal in Article 15(4) - the Constitution v The integration of Samoan custom and modern national government.

- HELD:
- (1) Article 15(3) deals with exemptions. By omitting to exempt the question of electors, it is impliedly included within Article 15(1) and (2).
  - (2) In Article 15(4) "progressive removal" is interpreted to mean when new legislation is passed covering a field where the prior legislation or law offended Article 15(4) or 15(2) that new legislation must eliminate the disabilities in the prior legislation or law which offends Article 15(1) and (2).
  - (3) Article 15 applies to the interpretation of Article 44 by reason of "subject to the Constitution".
  - (4) S16 and S19 of the Electoral Act 1963 are void pursuant to Article 2 by reason of their infringement of both sub articles (1) and (2) of Article 15.

LEGISLATION:

- Constitution of Western Samoa; Arts 2, 4, 8, 15, 44, 100, 101, 102, 111
- Electoral Act 1963; Ss 16, 19
- Regulations to the Samoa Amendment Act 1957 (N.Z.)
- Samoa Act 1920
- Acts Interpretation Act 1924 (NZ)

CASES CITED:

- Minister for Home Affairs v Fisher [1979] 3AER 21
- Hayward v Clay (1978) 439 US 955
- Anderson v Martin (1964) 375 US 399
- State Board of Electors v Socialist Workers Party (1979) US

A S Epati and R Drake for Applicants/Appellants  
F M Sapolu for Respondent

Cur adv vult

All these cases raise the same or similar issues. In all, section 19 of the Electoral Act 1963 (the Act) is attacked as being contrary to Article 15 of the Constitution and, in one case, Roderick Crichton v The Attorney-General and others, section 16 of the Act is similarly attacked.

The relevant provisions of the Constitution are:

"Article 2

- (1) This Constitution shall be the supreme law of Western Samoa.
- (2) Any existing law and any law passed after the date of coming into force of this constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Article 15

- (1) All persons are equal before the law and entitled to equal protection under the law.
- (2) Except as expressly authorised under the provisions of this Constitution, no law and no executive or administrative action of the State shall, either expressly or in its practical application, subject any person or persons to any disability or restriction or confer on any person or persons any privilege or advantage on grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, or any of them.
- (3) Nothing in this Article shall -
  - (a) prevent the prescription of qualifications for the service of a body corporate directly established under the law; or

- (b) prevent the making of any provision for the protection or advancement of women or children or of any socially or educationally retarded class of persons.

(4) Nothing in this Article shall affect the operation of any existing law or the maintenance by the state of any executive or administrative practice being observed on Independence Day:

Provided that the State shall direct its policy towards the progressive removal of any disability or restrictions which has been imposed on any of the grounds referred to in Clause (2) and of any privilege or advantage which has been conferred on any of those grounds.

#### Article 44

(1) The Legislative Assembly shall consist of:

- (a) One member elected for each of forty-five territorial constituencies having such names and comprising such nu'u or pitonu'u as are prescribed from time to time by Act:
- (b) Members elected by those persons whose names appear on the individual voters' roll.

(2) The number of members to be elected under the provisions of subclause (b) of Clause (1) shall be determined under the provisions of the Second Schedule.

(3) Subject to the provisions of this Constitution, the mode of electing members of the Legislative Assembly, the terms and conditions of their membership, the qualifications of electors, and the manner in which the roll for each territorial constituency and the individual voters' roll shall be established and kept shall be prescribed by law.

(4) Members of the Legislative Assembly shall be known as Members of Parliament."

The relevant provisions of the Act are as follows:

#### "Section 16 Qualification of electors -

(1) Subject to the provisions of the Constitution and of This Act every person shall be qualified to be registered as an elector of a constituency if:

- (a) He is the Holder of a Matai Title; and

- (b) His name appears for the time being on the Register of Matais established and kept pursuant to the Land and Titles Protection Ordinance 1934 and
  - (c) He is not disqualified as a candidate for election by virtue of any of the provisions of section 5 of this Act; and
  - (d) He is over the age of 21 years.
- (2) Any person whose name appears on the individual voters' roll shall not be qualified to be registered as an elector of a constituency .

Section 19      Qualifications of voters -

(1) Subject to the provisions of the Constitution and of this Act every person shall be qualified to be an individual voter and to have his name entered on the individual voters' roll if he is a citizen of Western Samoa of or over the age of twenty one years and not disqualified as a candidate for election by virtue of any of the provisions of Section 5 of this Act, and if -

- (a) His name was entered on the European electoral roll on the 30th day of November 1963; or
- (b) He -
  - (i) Is the child of a father whose name was entered on, or who if alive on the 30th day of November 1963 would have qualified to have his name on, the European electoral roll on 30th day of November 1963; and
  - (ii) Was unborn or had not attained the age of 21 years on the 30th day of November 1963; or
- (c) He acquired his citizenship of Western Samoa by naturalisation; or
- (d) He acquired his citizenship of Western Samoa by birth and is the child of a father who is not a citizen of Western Samoa or of a father who is alive at the date of the commencement of the Citizenship of Western Samoa Ordinance 1959 would not have automatically qualified to be a citizen of Western Samoa by virtue of any provision of that Ordinance.

(2) Notwithstanding the provisions of subsection (1) of this section no person shall be qualified to have his name entered on the individual voters' roll if he -

- (a) Holds a matai title or is exercising any customary right or privilege in regard to customary land;  
or
- (b) Is married to a person holding a matai title or exercising any customary right or privilege in regard to customary land."

Because of the importance of issues raised in these cases and the arguments which have been put forward in favour of the constitutional validity of the relevant sections of the Act, I think it appropriate that I state the Court's function in clear terms. The constitution charges the Supreme Court with the duty of deciding whether legislation, and that includes the Act, is valid; if it is in conflict with a provision of the Constitution limiting legislative power it is invalid and of no effect. The Courts function is to look at the Constitution, determine the meaning of the relevant Article or Articles, then look at the Act and determine whether the constitution permits or prohibits what the Act, or part of it, provides. If the relevant part of the Constitution is clearly expressed the Court is bound to give effect to those clear words. The consequences flowing from giving effect to the provision are not the concern of the Court and do not influence the Court in making its decision. If the decision is thought by some to be inconsistent with Samoa custom or culture that factor is not taken into account except so far as custom has been preserved by the Constitution. Nor is the fact that the decision may lead to a change on the political organisation of the country a relevant consideration. The Constitution speaks; it is obeyed.

For the individual litigants it is argued that the relevant provisions of the Act violate both sub-articles (1) and (2) of Article 15. United States Supreme Court judgements are relied upon to support this contention as to Article 15(1). In those cases which come to this Court by way of appeal, the learned Magistrate was referred to a digest of some decisions in American Jurisprudence Volume 16 where the principle adopted by that court as to "equality before the law" and "equal protection" in the 14th Amendment to United States Constitution permitted discrimination on a rational basis. This reference was misleading. The United States Constitution deals separately with electoral qualifications for the federal legislature and therefore the 14th Amendment has no application to that subject matter. However, the 14th Amendment has application to State voting rights and I shall later refer to some decisions with respect to that matter to which the learned Magistrate was not referred.

Mr Sapolu of the Attorney-General's Department has argued in favour of the validity of the relevant provisions of the Act. His arguments may be summarised as follows:

(1) Article 15 is ambiguous or doubtful in meaning and therefore material extraneous to the constitution can be looked at to determine the true meaning of that article.

(2) That the rule of interpretation in British Courts, that parliamentary debates cannot be looked at to assist in determining the meaning of an Act, is not applicable to the interpretation of a Constitution of an independent State which is not an act of parliament and that the United States Supreme Court practice of looking at convention debates should be adopted.

(3) That the convention debates reveal that the true intention of the framers of the Constitution was to preserve a system of voting by matais only and the gradual absorption of the individual voters roll electors into the matai system.

(4) That even if the Act is discriminatory the adjective "reasonable" should be implied into Article 15 so that there is no absolute prohibition of discrimination but a legislative power in parliament to make "reasonable" discriminations.

(5) That Article 15 was never intended to apply to qualifications for voters.

(6) That the Samoa Amendment Act 1957 (New Zealand) and the Regulations made thereunder, which previous to the Act regulated voting rights are New Zealand legislation and therefore this country's parliament has no power to amend that legislation pursuant to Article 15 (4).

(7) That the unique nature of Samoan Culture existing at the time of adoption of the Constitution should bear heavily in favour of the validity of sections 16 and 19 of the Act.

(8) That the purpose of the two types of electors was to phase out the individual voters roll as those voters were absorbed into Samoan culture by taking titles or becoming part of an aiga under a title and that this was the intention of the framers of the constitution.

(9) That although the Act contains many discriminatory provisions these were intended by the framers of the constitution.

Interpreting a constitution is not a process of looking at the document in vacuo; historical background and the traditions of the society to which it is applied can often affect interpretation. Ambiguity of expression or doubtful meaning is sometimes not apparent until applied to the matter under consideration. Nevertheless, the prime matter for the task is the words used by the framers. I know of no better exposition of the guiding principles in interpreting fundamental rights provisions such as Article 15 than the words used by Lord Wilberforce in Minister for Home Affairs v Fisher [1979] 3AER 21 where His Lordship said, speaking of the Constitution of Bermuda, the following:

"When therefore it becomes necessary to interpret 'the subsequent provisions of' Chapter I (in this case 11) the question must inevitably be asked whether the appellant's premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to Acts of Parliament, is sound. In their Lordships' view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the court to accept as a starting point the general presumption that 'child' means 'legitimate child' but to recognise that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law. It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a Court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedom with a statement of which the Constitution commences."

The issue in that case was whether the word "child" in the constitution included illegitimate child.

His Lordship had previously referred to background material of the Constitution such as the European Convention on Human Rights and the United Nations Declaration of Human Rights, 1948.

The considerations here are whether there is "equality before the law" or "equal protection" within the meaning of Article 15(1) or whether there is discrimination on any of the bases set out in 15(2). Firstly there is discrimination between matais and untitled people in Section 16; the basis clearly is family status. It was conceded by Mr Sapolu that being a matai or a matai's wife related to status within a family. I accept that concession. Individual voters were described in the 1957 Regulations made pursuant to the Samoa Amendment Act 1957 (NZ) as persons defined as Europeans in the Samoa Act 1920 and Europeans are persons of foreign blood or mixed foreign and Samoan blood; they are untitled and placed on a separate roll on the basis of descent in Article 15(2).

Decisions of the United States Supreme Court manifest a rigorous application of the "equality before the law" and "equal protection" phrase in the 14th Amendment to electoral qualification in the State sphere. A state law making a freeholders referendum a condition precedent to actual election on a property based qualification, on an election of matter concerning general interest, violates the "equal protection" clause; Hayward v Clay (1978) 439 US 959; because it empowers those with property to override those without. A State law making designation of the race of a candidate on ballot paper compulsory operates as discrimination against candidate and violates the "equal protection" provision; Anderson v Martin (1964) 375 US 399. For the purposes of equal protection under the 14th Amendment, when such vital individual rights as the fundamental right of individuals to associate for the advancement of political beliefs, and the fundamental right of qualified voters to cast their votes effectively are at stake, the state must establish that its classification is necessary to serve a compelling interest; State Board of Electors v Socialist Workers Party (1979) US. I quote these examples from a vast body of case law to which I was given access to by the kindness of Chief Justice Miyamoto of the American Samoan High Court. It is necessary to emphasize that the "rational basis" test is applied as to the classification and not the ultimate object of this legislation. In this respect the argument advanced in favour of validity, before the learned Magistrate, was ill-founded.

I now turn to the submissions based upon the existence of doubt as to the application of Article 15 to Article 44 and the constitutional debates to which counsel referred me. I do so on the assumption that there is doubt, that I am entitled to do so



but, without deciding there is that doubt, or that entitlement. There does appear Professor Davidson's (a constitutional adviser), forecast of the effect of Article 44 in gradually eliminating the individual voters by absorption into the Samoan cultural system. But the Article 44 in the draft constitution he was speaking to was significantly different from the Article 44 ultimately adopted by the framers. That significant difference was that Article 44(3) in the draft did not contain the words "subject to the provisions of this constitution". The inclusion of those words in the constitution clearly indicate that the framers intended Article 15, inter alia, to apply to article 44. Had those words not been added, it could be argued that the fundamental guarantees including Article 15 had no effect on Article 44. It is significant also, that Article 15 in the draft constitution remained unaltered. As to the amendment of the draft Article 44, there are decisions of the High Court of Australia to the effect that such amendments of the final draft can assist in the interpretation if doubts are raised, but lack of research facilities here make these decisions difficult to locate. I have formed the opinion that there is nothing in the convention debates which assists Mr Sapolu's argument; indeed the amendment of Article 44 by the addition of the words "subject to the constitution" is not only not helpful to that argument, but runs counter to it.

Article 44 is concerned with the "qualification" of electors, i.e. their fitness for a function, that function being to vote. If the framers intended that only matais should vote in the territorial electorates they could have said so. They did not and this again is against an interpretation supporting section 16.

Returning to Article 15 the framers have turned their minds to exemptions from its operation. Article 15(3) provides that nothing shall prevent the prescription of qualifications for the public service or provision for the advancement of women etc. The framers, by their omission to exempt the qualification of electors, impliedly include that qualification within Article 15(1) and 15(2).

Turning again to Article 44 if sub-article (3) gives the legislature the right to determine who shall vote without regard to Article 15 could it disqualify the adherents of a particular religion? Could the legislation disqualify all those of a particular political persuasion? These rhetorical questions are permissible because they point up the untenability of an argument that Article 44 leaves parliament with an absolute discretion as to who shall be electors.

In Article 15(4) there is an admission by the framers of the constitution that some existing law offends Article 15(2). There follows the words "Provided that the State shall direct its

policy towards the progressive removal of any disability or restriction which has been imposed". Such a provision is in my experience unique in a constitution. The first question that arises is whether the court should monitor that policy? Article 4 is in the following terms:

"Article 4 Remedies for enforcement of rights -

(1) Any person may apply to the Supreme Court by appropriate proceedings to enforce the rights conferred under the provisions of this Part.

(2) The Supreme Court shall have power to make all such orders as may be necessary and appropriate to secure to the applicant the enjoyment of any of the rights conferred under the provision of this Part."

Article 15 gives rights as included in Article 4 but in Article 15(4) some rights are postponed for some time at least. For how long are they postponed? It would seem correct to me to say at least that when new legislation is passed covering a field where the prior legislation or law offended Article 15(4) or 15(2) that new legislation must eliminate the disabilities in the prior legislation of law which offend Article 15(1) or 15(2).

The Electoral Act 1963 was new legislation. It did nothing to eliminate the disabilities imposed on untitled persons in the 1957 Regulations made pursuant to the Samoa Amendment Act 1957 (NZ). It further restricted access to the ballot box by persons of European descent by specifying a date on which the elector's name was entered on the roll. By 19(1)(b) only children of "fathers" not of "mothers" are eligible. Where the word "person" is used in the same section "father" does not import the feminine gender pursuant to the Acts Interpretation Act 1924 (NZ).

I am of the opinion that sections 16 and 19 of the Act are not saved by Article 15(4) for the reason that disabilities have to be eliminated when the legislature passed a new act dealing with an area of law where disabilities previously existed. That the Act was passed only eighteen months after Independence does not relieve the legislature of this obligation.

Assuming my conclusion in the last paragraph herein is incorrect I turn to assume that the Act passed in 1963 was too early to be a "progressive" removal of disabilities and approach the matter on the basis of looking at the disability and determining whether by today that disability should have been removed.

It is nigh on twenty years since Independence. It would make a mockery of the phrase "progressive removal" to hold that a delay of twenty years or more was justifiably the intention of the framers. If the convention debates be relevant, Professor

Davidson's remarks to the convention, made in 1960, were to the effect that that sub-article was inserted because the necessary legislation could not be prepared and passed before the then projected date for Independence in 1961.

Mr Sapolu's argument included a submission that the unique nature of Samoa culture should bear heavily in favour of the validity of the relevant sections of the act and in particular the matais decision-making role pursuant to that custom should induce an interpretation that marries custom with the notion of national government. To re-state it more broadly, and I trust I do not misunderstand the argument, the Constitution is the integration of Samoan custom and modern national government which is democratic to a degree.

It is clear that Samoan custom is preserved to some extent in the Constitution. By Article 100 the matai system is preserved and that preservation is not made "subject to the constitution". Likewise customary land is preserved and made inalienable, except for public purpose by Articles 101 and 102. The definition of "law" in Article 111 includes "such custom or usage which has acquired the force of law . . . . under the provisions of any Act or Judgement. . . . ." Work or service in accordance with Samoan custom is exempted from the fundamental freedom from forced labour in Article 8. Specific areas of custom have been preserved; custom generally has not. Indeed the notion of national government and custom are not easily reconcilable. Western Samoa did not develop any customary rules relative to such a government. Although Samoan culture had a highly developed and sophisticated political content (see P H Buck: Samoan Material Culture; Davidson: Samoa mo Samoa; Gilson: Samoa 1830-1900) the political notion of one Samoan nation as a political entity was an idea never current and missionary attempts to guide or manoeuvre it that way failed dismally; see Gilson op. cit. What Samoans had developed with great expertise and sophistication, compared with races of people, the history of which had been much longer in time, was, in modern political theory, an admirable system of local or provincial government. Unity as a nation is a notion which was absent in Samoan political theory. Taking a broad overall and generous view, in the sense of giving full weight to the state of society at the time of independence, it seems to me that the Constitution is a successful marriage of modern national government and an old culture. The framers had to cater for both facets. They left Samoan culture where it had always been, on the land and in family organisations, but they super-imposed [on] that culture a national government framework, selecting from many modern constitutions what they thought was the best available to satisfy the aspiration of nationhood and the preservation of such part of their culture compatible with nationhood.

The submission that the adjective "reasonable" should be imported to modify article 15 with the effect of allowing "reasonable" discrimination is clearly untenable. Firstly the framers did not in any way indicate such an intention; secondly, in other articles dealing with fundamental rights, reasonable restrictions on certain bases were allowed; see Articles 11 and 13. If one finds some Articles allowing reasonable restriction and others not an intention to make those others absolute is evident.

The conclusions I reach are that both sections 16 and 19 of the Act are void pursuant to Article 2 by reason of their infringement of both sub Articles (1) and (2) of Article 15. The effect of this judgement is that, unless reversed on appeal, or the constitution appropriately amended in the meantime, the next election of a member or members of parliament in this country cannot take place on the basis of the Act as it now stands. The limits of the Court's function is to make that declaration making void those two sections of the Act, but I express the opinion that nothing short of universal suffrage for all citizens male and female, who have attained the age of 21 years will suffice to satisfy the constitutional strictures as they now stand. This decision does not invalidate any previous election conducted pursuant to the Act; it speaks only as to the future.

I stand over all cases except that of Georgina Moore where I have already made orders, to a date to be fixed when individual orders appropriate to the individual cases can be formulated and to deal with the question of costs.