

## IS THERE HORIZONTAL OR VERTICAL ENFORCEMENT OF CONSTITUTIONAL RIGHTS IN VANUATU? *FAMILY KALONTANO V DURUAKI COUNCIL OF CHIEFS*

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An important question to arise in relation to fundamental rights provisions in constitutions is whether these rights may be enforced horizontally (i.e. against private bodies and individuals) or just vertically against the state. Some constitutions in the region specify whether the human rights provisions are enforceable against private individuals and bodies or only against the state. For example, section 21(1) of the Fijian Constitution provides that the Bill of Rights chapter only binds the legislative, executive and judicial branches of government and all persons performing the functions of any public office.<sup>[1]</sup> In other constitutions the matter is not directly addressed and it is left to the courts to determine.<sup>[2]</sup> The Constitution of Vanuatu falls into the latter category, merely providing in article 6(1) that “anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.”

The issue of whether article 6 should be held to apply horizontally most recently came before the Supreme Court in the case of *Family Kalontano v Duruaki Council of Chiefs*.<sup>[3]</sup> The case was a constitutional petition by a family against the Duruaki Council of Chiefs and other individual chiefs. The petitioning family alleged that their rights under article 5(1)(d), (g) and (k) of the Constitution, which are the rights to protection of the law, freedom of expression and equal treatment under the law or administrative action, had been breached by the respondents. The allegations apparently arose in the context of the determination by the respondents of a contest about chiefly title between the petitioning family and another family. The respondents applied to strike out the petition and the court agreed to do so. The court provided a number of different grounds for its decision, but clearly stated that its *ratio decidendi* for the decision was that the rights in article 5 could not be enforced against individual persons. This decision is disturbing because the court did not consider in its judgment any possibility that the rights may be applicable horizontally or review any previous decisions before coming to this conclusion.

A review of previous case law in relation to this issue shows that the approach of deciding the issue without discussion and without reference to previous decisions is characteristic of the various courts before which the issue has been raised. However, the courts which have decided this issue previously have reached different conclusions to that reached by the court in the *Duruaki* case. Prior to the *Duruaki* case the issue had arisen once before the Court of Appeal and twice before the Supreme Court. In all three instances it was held that the rights could be applied horizontally. In the Court of Appeal case, *In re the Constitution of the Republic of Vanuatu, Infant P*,<sup>[4]</sup> the petitioners were a mother and her child and they were petitioning against the child’s adoptive mother and members of her family. The Court considered that article 6(i) “is extremely wide” and it ordered that the Supreme Court hear the petition. Unfortunately there is no record of the rest of the history concerning the case. Notably the court did not consider there to be any difficulty with article 6 being used as against individuals, although there was no indication that the

court had considered the possibility that the rights are only binding vertically.

The next time the issue came to court was in the Supreme Court case of *In re the Nagol Jump, Assal & Vatu v Council of Chiefs of Santo*.<sup>[5]</sup> The petitioners claimed that their rights under section 5(1)(g), (h), (i) and (k) of the Constitution had been breached by the Council of Chiefs of Santo in relation to their determination of the issue as to whether the *nagol* jump, a custom from Pentecost, could be performed in Santo. The court found that the petitioners' rights had not been breached, but accepted, again without any discussion of the issue, that article 6 could be used to bring a petition against a private body, which in this case was the chiefly council.

The second time the issue arose in the Supreme Court was by way of *obiter dicta* in a criminal case, *Public Prosecutor v Walter Kota and Ten Others*.<sup>[6]</sup> That case concerned the prosecution of some chiefs and their assistants for the kidnapping of a woman to force her to return from Vila to Tanna in accordance with a chiefly decision. In his reasoning, Justice Downing clearly envisaged that the powers of chiefs in custom are limited by the Constitution as he stated "I think that the Chiefs must realise that any powers they wish to exercise in Custom is subject to the Constitution of the Republic of Vanuatu."

This survey of the existing case law demonstrates that the weight of authority is clearly in favour of the enforceability of the rights against private persons and bodies as well as the state. It is therefore unfortunate that such a survey was not conducted in the *Duruaki* case in which the court reached a contrary decision. It is to be hoped that next time this issue comes before the courts it will be given the careful consideration that it deserves. It is an issue of some significance in Vanuatu today where there are a number of private bodies that have considerable importance in regulating the community, such as chiefly councils, social organisations and churches. In particular, in the context of calls for greater powers by chiefs it is relevant that three out of the four cases involved petitions against chiefly councils. If chiefs are going to be given more authority to resolve disputes and assist in the regulation of society, either formally through legislation or informally through police diversion policies as is presently occurring, it should be clear whether or not in exercising their duties they are bound to comply with the fundamental rights and freedoms in the Constitution. *Duruaki* suggests they should not be. The weight of precedent and policy considerations suggests that they should.

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<sup>1</sup> See the Constitution of Tuvalu for an example of a constitution that specifies that the provisions apply between individuals as well as between government bodies and individuals.

<sup>[2]</sup> For a general summary of other jurisdictions see Jennifer Corrin Care et al, *Introduction to South Pacific Law* (1999), 86.

<sup>[3]</sup> [2002] VUSC 32 ("*Duruaki* Case").

<sup>[4]</sup> [1984] VUCA 2.

<sup>[5]</sup> [1992] VUSC 5.

<sup>[6]</sup> [1993] VUSC 8.

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