

Article 16.1(h)

Marriage and Family Life

Inheritance and Succession

Meera Kumari and Mira Khanal (Petitioners) v His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs, Secretariat of the Council of Ministers, House of Representatives, National Assembly (Respondents)

Supreme Court, Special Bench
2 August 1995

Laws and International Instruments Considered

CEDAW 1979;

Chapter on Partition of the Country Code, No's. 1, 16, 25;

Constitution of Nepal 1990, Articles 1, 11, 17, 23, 88(1), 131;

Nepal Treaties Act 1991, Section 9.

This case examines discrimination in the inheritance rights of Nepalese women. The Court considered whether inheritance laws which permit sons to inherit their parents' property without conditions but imposed conditions on daughters was in breach of the *Constitution of Nepal 1990* ["the Constitution"].

The petitioners, Meera Kumari and Mira Khanal, claimed that No. 16 of the *Chapter on Partition of the Country Code* ["the Code"] discriminated against women. No. 16 of the Code stated that although a son could inherit a share of his parents' property without conditions, a daughter could not inherit a share until she reached the age of 35 and only if she was still unmarried.

The petitioners argued that No. 16 of the Code, which gives women a belated and conditional right of inheritance, was contrary to the Constitution, which provides for the equal treatment of men and women. They argued the Code was also contrary to Nepal's obligations under *CEDAW* and that under the *Nepal Treaties Act 1991*, a domestic law that was inconsistent with a treaty ratified by Nepal was unlawful. Since this law was inconsistent with both the Constitution and its international obligations under *CEDAW*, it should be declared unlawful.

The respondents argued that they did not have the power to make laws and that they should not have been named as respondents in this case. If they were held to be responsible they argued that the Constitution did incorporate the principles of *CEDAW* in relation to equality and property rights and was consistent with international standards. They argued that the right of equality guaranteed in the Constitution was not a right to full equality in all circumstances. The equality provision should be interpreted to take into account the different social situations of men and women in Nepal. In this instance, the respondents argued it was appropriate to have different inheritance conditions treatment for men and women because a woman would receive property from both her father and her husband, but a man would only receive property from his father. They argued that if the law was changed it would cause “disruption of the whole structure of the traditional society like ours”.

The Court called upon two senior advocates acting as *amicus curiae* (friends of the court) to provide their opinions on the issues raised in this case. The *amicus curiae* argued that the Court should not change inheritance laws in isolation as this would disrupt societal norms. They argued that such a change should only be made by public consensus and through the lawmaking process where the public would be given an opportunity to comment on the proposed laws. This process would validate the law and avoid it being meaningless. They also argued that the Constitution guaranteed equal treatment, but only between equal persons and since sons and daughters were unequal by nature, unequal treatment could not be argued. Finally, the *amicus curiae* submitted that the inheritance laws give more protection to women than to men, as unmarried women receive their inheritance from their fathers at the age of 35 and married women receive their share from their husbands. They concluded that as women are adequately provided for this could not be held to be discrimination.

Decision

The Court held that the Code did not discriminate against women. It accepted the argument that sons and daughters were treated equally by the inheritance laws. The Court held that both sons and daughters had similar access to family property although the means of their access differed. A son inherited property through his birth family and a daughter inherited property through her husband and his family or, if she remained unmarried, through her birth family. The Court found that changing the inheritance laws in favour of women would be tantamount to discriminating against men.

The Court directed the Government of Nepal to introduce a bill in parliament within one year of the court order by consulting with women’s organisations, sociologists, concerned social organisations and lawyers and by examining the legal provisions of other countries on women’s rights in inheritance laws.

Commentary

This decision reflects a profound misunderstanding of the concept of equality and a deeply rooted patriarchal bias. On the one hand, the Court spoke of equality; on the other, it discussed the need to take into account implications for society, which the Court acknowledged was patriarchal. Embedded in all of the Government's arguments and in the decision was the assumption that women were never going to have sufficient assets for a court to discuss partition of women's assets. The Court was not prepared to upset a discriminatory social system that privileges men and in doing so failed to enforce international norms and standards adopted by Nepal. The discussion on the "special" nature of women and their need for protection was used by the Supreme Court to justify "equivalent", but not "equal" rights to inheritance for women. The Supreme Court appeared unwilling to change the gender stereotypes which the law was reproducing.

Though the result is not positive for women, the judgment is significant for directing the Government to examine this issue in consultation with women's groups. It should be noted, however, that the consultations and public discussions failed as reported by UNIFEM.

General Recommendation 19

Violence Against Women

Sexual Harassment

Apparel Export Promotion Council (Appellant) v A. K. Chopra (Respondent)

AIR 1999 Supreme Court 625

Supreme Court of India

20 January 1999

Dr. A. S. Anand, V. N. Khave JJ

Laws and International Instruments Considered

Beijing Declaration 1995;

CEDAW 1979;

Constitution of India 1949, Articles 14, 21, 311, 226;

International Covenant on Social Economic and Cultural Rights 1966, Article 7;

Industrial Disputes Act, No.14 of 1947.

This case examined the meaning of sexual harassment. It considered whether sexual harassment should be interpreted as actual physical molestation or in the broader context of women's lives, in line with international conventions and norms such as *CEDAW*, which protect the rights of women to fair working conditions. The Court also considered whether in exercising judicial review, the High Court had the authority to alter the findings of fact of disciplinary authorities in departmental proceedings.

Miss X was a junior employee of the Apparel Export Promotion Council [“the Promotion Council”]. The respondent, Mr Chopra, worked as a private secretary to the chairman of the same organisation. On a number of occasions the respondent, a senior employee, made unwelcome sexual advances to Miss X. He pressured her to accompany him to a hotel to take dictations from the chairman despite the fact that she was neither trained nor hired for such work. At the business centre of the hotel, Mr Chopra tried to sit close to her, touch her body, and later attempted to physically molest her while in the lift despite her strong objections to such behaviour.

Miss X lodged a written complaint with the personnel director of the Promotion

Council and the respondent was suspended from work while an inquiry was conducted. A series of internal inquiries concluded that the acts of the respondent failed the “test of decency and modesty” and that the allegations of sexual harassment against him were proved. On the basis of that report, the Disciplinary Authority of the Promotion Council dismissed the respondent with immediate effect.

The respondent filed a departmental appeal before the Staff Committee of the Promotion Council, which concluded that the order terminating the services of the respondent was legal, proper and valid. The respondent subsequently appealed to the High Court where a single judge found that the respondent had “tried to molest but had not in fact molested the complainant” and directed the reinstatement of the respondent without back wages. The Promotion Council appealed to the Division Bench of the High Court who agreed with the findings of the single judge, noting that although the respondent had tried to molest Miss X, he had not had physical contact with her and that such an act was not sufficient grounds for dismissal from service.

The appellant, the Promotion Council, filed an appeal by special leave in the Supreme Court against the decision of the Division Bench.

Decision

The Supreme Court set aside the order of the High Court, which had earlier reinstated the respondent. It also reimposed the punishment of the Disciplinary Authority, which had previously removed the respondent from service. The Court based its decision on the following reasoning.

The Supreme Court held that the Disciplinary Authority is the initial judge of the facts. In an appeal from the Disciplinary Authority, the Appellate Authority also has the power and jurisdiction to reconsider the evidence and to come to its own conclusions. However, once the finding of the facts is recorded by that process, no higher appeal court can interfere with those factual findings unless it finds that the recorded findings are based either on no evidence or that the findings are wholly perverse and/or legally untenable. The Supreme Court, in line with precedent, held that the High Court could not substitute its own conclusion and opinion in regard to the guilt of the delinquent party, or in regard to the harshness of the penalty. In the case at hand, the Court held that the single judge and the Division Bench of the High Court erred by interfering with both the findings of fact recorded by departmental authorities and with the quantum of punishment.

Despite this, the Supreme Court disagreed with the substantive findings of fact by the High Court. The Court stated that although the respondent did not *actually* physically molest the employee but only *tried* to molest her it did not make his behaviour less morally culpable. The High Court’s finding that his removal from service was not

warranted was unrealistic and gave the High Court a lack of credibility. In cases involving sexual harassment, courts are required to examine the broader circumstances of the case and not to focus on narrow technicalities such as the dictionary meaning of the expression “molestation”. They must look at the entire material to evaluate the genuineness of the complaint using sensitivity and sympathy. The Court held that the High Court had ignored the fact that the conduct of the respondent was contrary to moral sanctions, decency and was offensive to the employee’s modesty. Further, a reduction of punishment in cases of sexual harassment, the Court stated, may have a demoralising effect on female employees and would be a retrograde step. Finally, it found there was no justification in this case for the High Court to interfere with the punishment imposed by the Departmental Authority.

In its decision, the Court relied upon *Vishaka v State of Rajasthan* (1997 VII AD S.C. 53) where the Supreme Court held that the *Constitution of India 1949* protected the rights of women to a safe working environment free from sexual harassment and abuse. The Court also referred to a number of international conventions and norms in support of its interpretation of the facts. It noted that the International Labour Organisation seminar held in Manila in 1993 recognised that sexual harassment in the workplace was a form of gender discrimination against women. *CEDAW* and the *Beijing Declaration* direct all state parties to take appropriate measures to prevent all forms of discrimination against women. Article 7 of the *International Covenant on Social Economic and Cultural Rights 1966* recognises the right of women to fair conditions of work. The message of these instruments, the Court held, is applicable to both the Indian State to make their laws sensitive to gender, and to the courts to give them effect wherever possible.

Commentary

The Court broadened the meaning of sexual harassment from physical molestation to include circumstances such as requests for sexual favours and other direct or implicit verbal and physical conduct with sexual overtones. It noted that it is discrimination when the submission to, or rejection of, such conduct by a female employee could affect her employment and unreasonably interfere with her work performance by creating an intimidating or hostile work environment. The Court also referred to international conventions and norms that protect the rights of women such as *CEDAW* and noted that courts should interpret domestic legal instruments in line with their provisions, reinforcing judicial willingness to adopt international principles of equality. It observed that the fundamental rights guaranteed in the Constitution were of sufficient amplitude to encompass all facets of gender equality, including the prevention of sexual harassment and abuse. Further, it noted that each incident of sexual harassment in the workplace resulted in a violation of the fundamental right to gender equality and the right to life and liberty, the two most precious rights guaranteed by the Constitution. Such findings are undoubtedly beneficial to the recognition of the rights of women.

At the same time however, the Court adopted protectionist language to articulate the scope of sexual harassment as behaviour that is, “wholly against moral sanctions, decency and was offensive to her modesty.” Given that the law on sexual harassment is in its nascent stages in India, based primarily on court pronouncements that apply international legal standards, language consistent with those standards would be more advantageous for women. Instead of emphasising the unwelcome and offensive nature of sexual attention, the power differential at play, and the abuse of authority, the judgment reproduces the language of the archaic Indian *Penal Code* of 1860, which focuses on the morality, decency and chastity of the victim. The use of those value-laden terms may limit the legal protection of women who fall within its prescribed moral scope. It is therefore important to introduce terms that place centrality on the offensive act itself, thereby allowing substantive redress against sexual harassment, rather than focusing on the personality and situation of the victim.

General Recommendation 19

Violence Against Women

Sexual Harrassment

Vishaka (Petitioners) v State of Rajasthan (Respondent)

1997 6 Supreme Court Cases 241

Supreme Court of India

13 August 1997

J. S. Verma CJ, Sujata V. Manohar, B. N. Kirpal JJ

Laws and International Instruments Considered

Bejing Declaration 1995;

CEDAW 1979, Articles 11, 24;

Constitution of India 1949, Articles 14, 19, 21, 32, 51(d), 73, 253;

Protection of Human Rights Act 1993, Section 2 (d).

This case deals with the rights of Indian women to a safe working environment free from sexual harassment and abuse. The petition, a class action, was brought by women's organisations to draw attention to the legislative vacuum in relation to sexual harassment in the workplace. The action also sought judicial intervention to acknowledge the gravity of the problem and to put in place legal norms and regulations for redress. This case considered whether the *Constitution of India 1949* ["the Constitution"] and international conventions provide authority for the Court to create guiding principles for employers in the absence of legislation.

A social worker campaigning against child marriage in Rajasthan was the victim of an alleged gang rape. Consequently, women's organisations brought a class petition against the State of Rajasthan and the Union of India arguing they were obliged by Articles 14, 15, 19 and 21 of the Constitution to ensure the rights of working women to a safe working environment free of sexual harassment and abuse.

The petitioners argued that each incident of harassment of women in the workplace results in a violation of their fundamental right to equality, as well as their right to life and liberty under Articles 14, 15 and 21 of the Constitution. It also amounts to a violation of Article 19(1)(g), (the right to practise any profession or carry out any occupation, trade, or business) by failing to provide a safe working environment.

A safe working environment is fundamental to women's enjoyment of a range of human rights. In the absence of protective legislation, the petitioners argued, the Court should set guidelines to fill the legislative vacuum.

Decision

The Supreme Court held that the Constitution did protect the rights of women to a safe working environment free from abuse and sexual harassment. The Court came to this conclusion by interpreting Articles 14, 15, 19(1)(g), and 21 of the Constitution, which guarantee gender equality and the right for both women and men to work with human dignity, in line with the *Protection of Human Rights Act 1993* and a number of international norms and conventions.

The Court cited Article 11 of *CEDAW*, which directs the State to take appropriate measures to eliminate discrimination against women in their fields of employment. This specifically includes the prevention of gender specific violence and sexual harassment in the workplace. The Court also referred to an official commitment made by the Indian Government during the Fourth World Conference on Women in Beijing to formulate a national policy on women that would continuously guide and inform action at every level and in every sector, to set up a Commission for Women's Rights to act as a public defender of women's human rights and to institutionalise a national mechanism to monitor the implementation of the Beijing Platform for Action.

The Court held that the primary responsibility for ensuring a safe working environment lies with the Legislature and the Executive through the creation of appropriate legislation and a mechanism for its enforcement. However, in the absence of domestic laws providing for the effective enforcement of the rights of women to a working environment free from sexual harassment and abuse, the Court was empowered by Article 32 and the combination of Articles 73, 51(c) and 253 of the Constitution to provide measures to protect those rights. Article 32 gives the Court the power to enforce any rights protected under the Constitution and Articles 51(c), 73 and 253 give it the power to implement international conventions. It said that any international convention that is consistent with fundamental rights and is in harmony with its spirit must be read into the provisions when there is a void in the domestic law. The judgment cited the Australian case of the *Minister for Immigration and Ethnic Affairs v Teoh* 128 ALR 353 ["Teoh"] in support of its position. The Court noted that the Teoh case recognised the concept of legitimate expectation of an international instrument's observance in the absence of a contrary legislative provision. Therefore the combination of constitutional provisions and international conventions referred to by the Court empower it to provide guidelines to protect female workers until such time as legislation is enacted for that purpose. The Court also referred to the Beijing Statement of the "Principles of Independence

of the Judiciary in the LAWASIA Region” which supports the Court’s power to set down guidelines in the absence of domestic legislation. The Court adopted the definition of sexual harassment from General Recommendation 19 of *CEDAW* and provided detailed guidelines to prevent and deter sexual harassment for employers to adhere to. These guidelines include a complaint process, a disciplinary process and an appeal process.

Commentary

This case is important on a number of levels. At the outset, the recognition of the rights of women to a safe working environment free from sexual harassment and abuse is an important acknowledgment of the public lives of women. The active approach of the Court to utilise the Constitution to step in to protect those rights, in the absence of any legislative protection, is an extraordinary example of judicial activism in favour of the rights of women. Further, the acknowledgement of *CEDAW*, the World Conference on Women in Beijing and the use of the Constitution to enforce the provisions and principles of the international norms represented within them, in favour of the rights of women, is a positive indication of the courts willingness to embrace equality for women.

General Recommendation 19

Violence Against Women

Sexual Violence

Chairman, Railway Board and others (Appellants) v Mrs. Chandrima Das and others (Respondents)

AIR 2000 Supreme Court 988

Supreme Court of India

28 January 2000

S. Saghir Ahmad, R. P. Sethi JJ

Laws and International Instruments Considered

CEDAW 1979;

Constitution of India 1949, Articles 21, 226;

International Covenant on Social Economic and Cultural Rights 1966;

International Covenant on Civil and Political Rights 1966;

Declaration on the Elimination of Violence Against Women 1993;

Universal Declaration of Human Rights 1948, Preamble, Articles 1, 2, 3, 5, 7.

This case considers whether compensatory redress can be awarded to a member of the public under the *Constitution of India 1949* [“the Constitution”] as a public law remedy; whether fundamental rights under the Constitution extend to foreign nationals; who has legal standing to bring actions under the Constitution in the public interest; and whether the government can be vicariously liable for the criminal acts of its employees.

Hanuffa Khatoon, a Bangladeshi national, while waiting for a connecting train, was lured by railway employees to a hostel at Howrah Station, Calcutta, where she was brutally gang raped. Subsequently, Mrs Chandrima Das, a practising advocate of the Calcutta High Court, filed a petition under Article 226 of the Constitution against the Chairman of the Railway Board and others, claiming compensation for the victim. The High Court awarded Hanuffa Khatoon the sum of Rs. 10 lakh (US \$ 20,833) compensation on the basis that the Railway Board was vicariously liable for the rapes perpetrated by its employees in buildings belonging to the railways.

The Railway Board appealed the decision to the Supreme Court, arguing that they should

not be liable to pay compensation to the victim for a variety of reasons. They argued that the victim was not an Indian national and therefore not protected by the Constitution; that the rapes were acts of individual persons who alone should be liable to pay compensation and that neither the Union of India nor the Railway Board should be vicariously liable for their acts in these circumstances; that the High Court did not have the jurisdiction to award damages under Article 226 of the Constitution as any compensatory remedy can only be awarded in private law not public law proceedings; and finally that Mrs Chandrima Das, who brought the action on behalf of the victim, did not have legal standing as there was nothing personal to her involved in the petition.

The respondent argued that rape was a not a violation of an ordinary right but a fundamental right guaranteed by Article 21 of the Constitution as established by precedent law. The respondent relied on precedent to argue that the concept of legal standing had been significantly expanded by the courts, thus allowing public-spirited persons to bring actions in the public interest.

Decision

The Supreme Court held that a private law remedy (i.e. compensation for personal injury) is available for an action brought in public law when the injury is inflicted by government agents and involves the violation of the fundamental right to life with human dignity under Article 21 of the Constitution. The Court held that rape is a violation of a fundamental right and not an ordinary right and accordingly a public law remedy was appropriate in this case. This remedy was available even though a suit for damages could also have been filed under private law.

The Court held that Mrs Chandrima Das did have legal standing to bring the action on behalf of the victim. It held that Indian constitutional jurisprudence has broadened the principle of *locus standi* to allow public-spirited persons to act in matters of public interest. As this case involved criminal actions by railway employees which resulted in the violation of the victim's fundamental rights, it therefore qualified as a petition in the public interest. Further, as Mrs Chandrima Das had filed the petition seeking other reliefs such as the eradication of anti-social criminal activities at Howrah Railway Station, the true nature of the petition was that of one filed in the public interest. The Court also held that as there was nothing personal to her involved in the proceedings, the petition was valid.

The Court held that Hanuffa Khatoon was entitled to compensation despite the fact that she was not an Indian citizen. It referred to a number of international conventions that vest in a "person" certain fundamental rights regardless of nationality. The *Universal Declaration of Human Rights 1948*, ["UDHR"] protects basic human rights for all persons in its Preamble and in Articles 1, 2, 3, 5 and 7. Article 2, in particular, ensures the entitlement of rights and freedoms guaranteed by the UDHR without any distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property,

birth or other status, and states that no distinction can be made on the basis of political, jurisdictional or international status of the country or territory to which a person belongs in claiming these entitlements. The Court also held that the Constitution supported a finding in favour of Hanuffa Khatoon. Although some fundamental rights under the Constitution are only available to citizens, other rights including equality before the law, right to life and personal liberty, and protection against arbitrary arrest and detention, are available to all persons. Rape has been held to be a violation of the right to live with human dignity under Article 21 of the Constitution. The Court looked to precedents and judicial colloquia which confirm the duty of the judiciary to apply international human rights standards generally, as well as those specifically in relation to women e.g. the *Declaration on the Elimination of Violence Against Women 1993* in the interpretation of national constitutions. The judicial colloquia referred to include the Bangalore Principles of 1988, the Zimbabwe Colloquia of 1994, the Hong Kong Colloquia of 1996 and the Guyana Colloquia of 1997, which encourage the judiciary to apply international laws domestically. On the basis of both international conventions and the Constitution, the victim was found to be entitled to redress despite the fact that she was not an Indian citizen.

Finally, the Court held that the Central Government was vicariously liable for the actions of the railway employees. Although the Government can claim sovereign immunity protecting it from liability when exercising the sovereign power of the state, in a welfare state this does not include functions that relate to education, or the commercial, social, economic, political and even marital sphere. The management of railways and the establishment of railway guesthouses is a commercial activity and not related to the sovereign power of the state. Accordingly sovereign immunity could not be claimed and the Railway Board, in line with precedent, was held to be vicariously liable for the actions of its employees.

Commentary

This case is positive for women in a number of ways. At the outset the outcome of the case ensures compensatory redress for a woman raped by government employees. The use of the Constitution as a mechanism to provide that compensation illustrates the diverse instrumental capacity that the judiciary is prepared to give the Constitution to protect the rights of women. The Court referred favourably to many precedents and to a variety of international conventions such as the *Declaration on the Elimination of Violence Against Women 1993*, indicating its willingness to be guided by international standards in relation to the equality of women. It is also positive that the Court refused to excuse the Railway Board from liability. Although government bodies are ordinarily able to claim a sovereign immunity for the actions of employees the Court held that there are a number of exceptions to this position including commercial activity. The courts are, in effect, directly imposing the rule of law, holding the government equally liable with other members of the community.

General Recommendation 19

Violence Against Women

Sexual Violence

State (Prosecution) v Filipe Bechu (Defendant)

Criminal Case No. 79/94 (unreported)
Magistrates Court, Levuka
2 December 1999
V. D. Nadakuitavuki

Laws and International Instruments Considered

CEDAW 1979;

Constitution of Fiji, Article 43(2);

Criminal Procedure Code, Section 210;

Penal Code, Sections 149, 150;

Sexual Offences Act 1956, Section 2(2);

Sexual Offences (Amendment) Act 1976 (UK), Section 1(2).

This case considers the meaning of consent in rape cases under the Fijian *Penal Code*. In determining what constitutes consent, the Court considered the role of international conventions that protect the rights of women such as *CEDAW*.

On the evening of 13 August 1994 the complainant attended a village dance. She left the dance to return home in a minibus. The defendant, Filipe Bechu who was a former boyfriend of the complainant, was also in the minibus. The complainant asked the driver of the minibus to drop her home but he, at the request of the defendant, dropped both the defendant and the complainant at an isolated spot. The complainant alleged that the defendant physically assaulted and raped her.

The complainant reported the incident to the police later that night. The medical examination showed no physical injury to her genitalia or any evidence of sperm in the vaginal swab. However, there were injuries to her left chest, left forehead and under her eye, which were consistent with the forceful use of a hard blunt object.

The defendant admitted that he had assaulted the complainant and had engaged in sexual intercourse with her, but maintained that his actions did not amount to rape for several reasons. He argued that on previous occasions he had had sexual relations

with the complainant. He also stated that he was jealous because she was currently involved with other men. Finally, the defendant argued he was very drunk at the time and that due to a combination of the above reasons he was not guilty. The complainant argued that she had not consented to sexual intercourse with the defendant.

Decision

The Court found the defendant guilty of rape on the basis that the complainant had not consented to intercourse. The Court looked at section 149 of the *Penal Code* which states that consent forcibly obtained, does not constitute consent. It was not relevant that the complainant was his former girlfriend. The Court found that the defendant was reckless in his drunken state as he had proceeded to have intercourse with the complainant either knowing she was not consenting, or not caring whether she had consented or not. The defendant was sentenced to five years imprisonment.

The Court also stated in support of its finding that women are men's equal and must not be discriminated against on the basis of gender. The Court stated that men should be aware of the provisions of *CEDAW*, and that it is the State's responsibility to ensure that all forms of discrimination against women are eliminated. The role of the court is to oversee this obligation in line with Article 43(2) of the *Constitution of Fiji 1997* which states that courts must have regard to the public international law applicable to the protection of the rights as set out in the fundamental rights provisions. The Court reiterated that the belief that women were inferior to men or part of their personal property to be discarded or treated unfairly at will, is now obsolete and no longer accepted by Fijian society.

Commentary

This was the first decision in Fiji to cite *CEDAW*. A willingness to adopt international conventions that protect the rights of women is a step forward for women in the broader context of Fijian society.

Further, the statements by the Magistrate on the treatment of women in Fiji including "men should be aware of *CEDAW*" set a positive standard for the treatment of women in Fiji. In the Fijian cultural context women have not historically been considered equal in status to men and certain traditional practices purport to categorise women as chattels or the property of men to be used at will.

This decision sets a precedent for the application of international standards for women in criminal rape cases. This is particularly significant since the majority of rape cases are heard in the lower Magistrates courts. The statements about the status of women made by the judge signifies a new commitment to uphold women's rights and to change the perception of the status of women in Fiji. This case illustrates changing norms, which are more positive for women in Fijian society.

General Recommendation 19

Violence Against Women

Sexual Violence

The Republic of Kiribati (Prosecution) v Tieta Timiti & Rabaere Robuti (Defendants)

HCCrC 43/97
High Court of Kiribati
17 August 1998
Lussick CJ

Laws and International Instruments Considered

CEDAW 1979;

Kiribati Constitution 1979, Sections 3, 15;

Kiribati Penal Code Cap 67, Section 128.

This case considers whether the rule of corroboration in Kiribati rape law discriminates against women. The Court was asked to consider whether the corroboration rule is contrary to the provisions of the *Kiribati Constitution 1979* [“the Constitution”] and international conventions such as *CEDAW*.

The complainant, a food seller at the local market, was owed money by the two defendants, Tieta Timiti and Rabaere Robuti. On the day of the alleged offence the complainant went to collect the debt at their place of work. She met the first of the two defendants who told her to come back later. When she returned she was dragged into a room by the defendants and several others. She was held down whilst the defendants had sexual intercourse with her. She reported the matter to the police, identifying the two defendants.

The defendants were charged with rape as per section 128 of the *Kiribati Penal Code Cap 67*. They pleaded not guilty. Although the defendants admitted to having sexual intercourse with the complainant at the alleged time, they denied raping her on the basis that she had consented to intercourse.

The prosecution argued that the complainant did not consent to sexual intercourse and that she was a credible witness despite having forgotten some of the details of

the incident. It further argued that her evidence should be believed because it was corroborated by three witnesses. The prosecution also presented a second argument claiming that the requirement for corroboration violated the rights of women under sections 3 and 15 of the Constitution. Section 3 of the Constitution guarantees all citizens equal protection of the law and section 15 provides all citizens with protection from discrimination. The prosecution stated that although section 15 does not explicitly identify sex as a ground of discrimination, it ought to be read into the legislation. The prosecution argued that the Court should follow this interpretation as it is supported by the principles formulated in *CEDAW* and other international instruments that protect the rights of women.

The defendants argued that the complainant's evidence that she did not consent was unreliable because she suffered an illness that caused her to imagine things and disturbed her reasoning. Further, they argued that as some of the corroborative evidence presented by the prosecution was contradictory, her evidence had not been corroborated. Therefore, the defendants argued the judge was obliged to warn himself of the danger of convicting on uncorroborated evidence. This rule, it was further argued, was not discriminatory because it applied to both sexes, notwithstanding that the majority of rape victims are women.

Decision

The Court found the defendants guilty of rape. The judge believed the evidence given by the complainant that she had not consented to intercourse. He also held that the explanations given by the defendants that the complainant had consented could not be reconciled with the evidence that the complainant, as soon as she had recovered, had reported the matter to the police. The judge also noted that she had maintained her credibility and her version of events despite a long cross-examination. He accepted the evidence of the witnesses who corroborated the complainant's version of events. It was illogical according to the judge, that she would have willingly agreed to intercourse with both men in such public circumstances especially when it was clear she was very distressed.

The Court also held that the rule of corroboration was not relevant to this case because it is a requirement in rape only if the credibility of the complainant's evidence is in question. Since the Court believed the evidence of the complainant there was no requirement for corroboration or warning to either judge or jury. Therefore, the issue of whether the requirement for corroboration is discriminatory and in breach of international conventions was held not to be relevant. The judge commented that in his opinion regardless of whether corroboration is present, the fundamental issue is whether the complainant is believed. If the victim is not believed then the accused will be acquitted, regardless of the presence of corroborating evidence. Both defendants were convicted and sentenced to imprisonment for seven years.

Commentary

Any rape decision in favour of a complainant is a positive outcome for women in general. In this case the judge believed the evidence of the complainant and disbelieved the evidence of the two convicted men. The judge was prepared to consider the issue of consent from the point of view of the complainant.

This decision however falls short in that it did not change the rule of corroboration, or advance women's rights per se. The Court was presented with the opportunity to consider the claim that the requirement of corroboration is discriminatory against women under international law, particularly *CEDAW*. The Court failed to recognise that as rape is primarily perpetrated against women, the requirement for corroboration in rape may amount to indirect discrimination. Indirect discrimination in some jurisdictions means that the application of a rule appears to be neutral but in practice impacts to the detriment of a particular group. Despite this, there are a number of positive aspects to the case.

First, the introduction of *CEDAW* by the prosecution and the attempt to persuade the Court to apply it illustrates the willingness of lawyers to use international human rights law in the Kiribati courts. Although the judge was unwilling to rule that the corroboration rule itself is discriminatory under *CEDAW* and other international conventions that protect the rights of women, the judge did acknowledge the relevance of international law to Kiribati courts. This is a significant development considering Kiribati is yet to ratify *CEDAW*.

Second, the finding of the judge that corroboration was not necessary or of any significance if the complainant is credible lessens the impact of the corroboration rule. The corroboration rule requirement undermines the credibility of rape victims and imposes a higher threshold in proving that the rape occurred. The judge held that when evidence capable of providing corroboration of the complainant's testimony exists, as it did in this case, the primary issue is whether in light of that evidence the complainant is believed or disbelieved. Consequently the requirement for corroboration was given a reduced importance in this case.

Finally, the judgment is also significant in that it is a direct result of human rights training that is provided to lawyers in Kiribati by the Pacific Regional Human Rights Education Resource Team and Asia Pacific Forum on Women Law and Development ["APWLD"]. The Public Prosecutor who incorporated *CEDAW* into his arguments had attended Feminist Legal Theory and Practice training in Fiji which was co-hosted by APWLD, the Fiji Women's Rights Movement and the Pacific Regional Human Rights Education Resource Team.

Part II

Constitutional Law Cases

Customary Law

Sex Roles and Stereotypes/Freedom of Movement

Public Prosecutor (Plaintiff) v Walter Kota, Chief Jimmy Kawai, Chief Cyril Wis Menesu, Chief Andrew Koau, Chief Ringimanu, Joseph Nayo, Charles Narun Kawiata, Thomas Nasup Taura, Barbara Teku Mathias, Marie Salome Morrison, Mathias Teku (Defendants)

Vanuatu Law Reports, Volume 2, 1989-94, pp. 661-665
 Supreme Court of Vanuatu
 31 August 1993
 Downing J

Laws Considered

Constitution of the Republic of Vanuatu, Article 5;
Penal Code Cap. 135, Sections 12, 35, 105(b).

This case deals with the conflict between customary law, criminal law and the constitutional rights of Vanuatu women to liberty and freedom of movement. The case was brought in the criminal law jurisdiction for charges of inciting to commit kidnapping and kidnapping under sections 35 and 105(b) of the *Penal Code*. The Court considered whether a defence of custom could be sustained in relation to these charges.

The complainant, Marie Kota, ceased living with her husband Walter Kota after problems in their marriage. On 31 July 1993, she had a dispute with her estranged husband at a nightclub in Port Vila. Marie and Walter Kota were originally from the outer island of Tanna, traditionally the most patriarchal island in Vanuatu. The dispute attracted the attention of the community from Tanna who were living in the capital, Port Vila. A meeting was called by two chiefs of the community to try to resolve the dispute between Marie Kota and her husband and to promote a reconciliation between them.

The police were consulted by the defendants and involved in forcibly taking Marie Kota to the meeting. Marie Kota stated at the meeting that she did not wish to reconcile with her husband and that she wanted a divorce, as he had beaten her. Nevertheless,

the decision of the chiefs was that she was to return to Tanna immediately and rejoin her husband who was granted two weeks to organise his return to the island.

The defendants forcibly took Marie Kota back to the outer island of Tanna. She stayed for a week and then fled to Port Vila where she reported the matter to the police, with the assistance of the Women Against Violence Against Women Association. Walter Kota, four police officers and six others were charged with inciting to commit kidnapping under sections 35 and 105(b) of the Penal Code. One of the defendants, Mathias Teku, was also charged with kidnapping for his role in physically removing Marie Kota and placing her on a boat to Tanna, as ordered by the chiefs at the meeting.

In attempting to establish that the defendants had incited to commit kidnapping, the prosecution submitted that Marie Kota's constitutional right to freedom of movement had been violated when she was forced to immediately return to Tanna.

The defendants argued that the defence of "a mistake of facts" under section 12 of the *Penal Code* applied to their situation. Section 12 states that "a mistake of facts shall be a defence to a criminal charge if it consists of a genuine and reasonable belief in any fact or circumstances which, had it existed, would have rendered the conduct of the accused innocent." They argued that they had held a genuine and reasonable belief that their actions did not amount to a criminal act. The defendants argued that custom had warranted their actions and that their conduct was a result of their genuine desire to help Walter and Marie Kota reconcile.

Decision

The defendants were convicted of the charge of inciting to commit kidnapping and sentenced to 12 months imprisonment, which was suspended for 12 months. Mathias Teku was found guilty of kidnapping and sentenced to two and a half years imprisonment, suspended for two and a half years provided that he exhibited good behaviour during that period. Each defendant was fined 40,000 vatu. The Court also awarded compensation of 29,600 vatu in special damages and 150,000 vatu in general damages to Marie Kota.

The Court found that the charges against the defendants were proved as Marie Kota was "forced" to comply with the decisions of the chiefs. They held that compelling her to attend the meeting against her will, deciding that she should return to Tanna and then taking her there against her will, constituted force. "Force" refers not only to physical force, but to coercion and threats of force. Further, the Court found that the defence of a mistake of fact was not made out by the defendants. The Court stated that if anything, there had been a mistake of law and the effective custom, but not of fact.

The Court also held that customary law is subject to the *Constitution of the Republic of Vanuatu* and other statutory legislation. Further, the fundamental rights enshrined in the Constitution apply to every person, irrespective of gender. Although custom may have dictated in the past that women could be treated as property, any such action was clearly now in breach of the Constitution. Accordingly the actions of the defendants were found by the Court to be in breach of Article 5(1)(b) of the Constitution which provides for the liberty of people and Article 5(1)(i) which provides for freedom of movement.

Commentary

This case reinforced other similar decisions that constitutional and statutory provisions in the Constitution take precedence over customary law. This decision is important for women in Vanuatu since it challenges Vanuatu customs and redefines the status of women. Judge Downing stated that, “Article 5 of the Constitution makes it quite clear that men are to be treated the same as women, and women are to be treated the same as men. All people in Vanuatu are equal and whilst the custom may have been that women were to be treated or could be treated as property, and could be directed to do things by men, whether those men are their husbands or chiefs, they cannot be discriminated against under the Constitution.” The statement of the judge indicates that the rights of Vanuatu women are changing, giving women the freedom to make personal decisions about their lives.

The Court’s analysis of the word “force” in the *Penal Code* as referring not only to physical force, but to coercion and threats of force, illustrates a much broader understanding of the imbalances that may be present in relationships between men and women. Whilst the Court appreciated the role of the chiefs in trying to resolve a dispute, it noted that their actions were biased as they were based on a male point of view. The Court’s approach throughout the case was sensitive to gender inequalities.

Nationality and Citizenship

Meera Gurung (Petitioner) v Her Majesty's Government, Department of Central Immigration, Ministry of Home Affairs (Respondents)

Decision No. 4858 of 1994
Supreme Court (Full Bench)
Hargovind Singh Pradha, Laxman Prasad Angel JJ

Laws Considered

Constitution of Nepal 1990, Article 11;
Regulation Relating to Foreigners, Rules 14(3) and 14(4).

This case examines discriminatory standards in Nepalese immigration law. The Court considered whether regulations which treat Nepalese men marrying non-nationals differently to Nepalese women marrying non-nationals were in breach of the *Constitution of Nepal 1990* [“the Constitution”].

The petitioner, Meera Gurung, a Nepalese woman, married a foreigner and intended to settle in Nepal with their child. Meera Gurung’s husband applied for a work visa and a residential visa. The Department of Immigration denied both applications on the basis of the *Regulation Relating to Foreigners* [“the Regulation”]. The Regulation states that when a Nepalese man marries a foreign woman, she is automatically entitled to a non-tourist visa for the duration of the marriage with an additional three months if the marriage should end. However, when a Nepalese woman marries a foreign man, he is only entitled to a non-tourist visa for a maximum of four months in every year and this visa must be renewed each year. The Ministry of Home Affairs refused to hear any complaint on this matter. The petitioner began court proceedings to declare the Regulation invalid.

The petitioner argued that the Regulation was contrary to the equality provisions contained in Article 11 of the Constitution as it was discriminatory on the ground of sex.

The respondents argued that the Department of Immigration was the proper place for the petitioner to lodge her complaint and consequently the Court had no jurisdiction to hear the matter. Further, the respondents argued that as Article 11 of the Constitution applied only to Nepalese citizens, and not to foreign husbands, the challenge had no substance.

Decision

This case was initially heard by two judges of the Supreme Court. The two judges each came to a different conclusion. Justice Pradha held that the Regulation did violate Article 11 of the Constitution by discriminating against the petitioner on the basis of sex. He held that a residential visa should be issued to the petitioner's husband. Justice Angel held that the Regulation was not discriminatory because inequality can only exist between people in similar situations, or between members of the same group. He held that because women and men do not belong to the same group, there could not have been unequal treatment. He concluded that since the husband's visa had already expired and the petitioner had not specifically indicated what type of visa was sought, no visa should be issued. Because the two judges came to different conclusions, the case was subsequently heard by the Full Bench of the Supreme Court.

The Full Bench of the Supreme Court held that the Regulation was discriminatory on the basis of sex and thus breached Article 11 of the Constitution. The Court stated that although the law may appear to discriminate against the husband, it in fact discriminates against Nepalese women who choose to marry foreigners. It stated that the Regulation valued men's marriages more which constituted unequal treatment. The Court directed the Department of Immigration to reconsider the husband's visa application and to create new rules for this situation.

The Court distinguished this case from *Mr Benjamin Peter and Mrs Mina Kumari Tiliya Peter v Ministry of Home Affairs, Department of Immigration* (1992 Nepal Law Magazine 2049). It stated that the case had failed because the correct procedure had not been followed in the petitioner's application for a visa. In the present case there were no similar circumstances.

Commentary

This decision was a victory for women's rights. Not only was an appropriate remedy given to the petitioner and her family, but international standards and norms (as adopted by the Constitution) were successfully used to bring about a change in the domestic law.

The case also stands for the proposition that if advocates are determined and use well constructed arguments, ultimately they can prevail. In reality, there was no factual difference between this case and the Benjamin Peter case and this decision is therefore progressive in terms of understanding and applying the constitutional protection of equal rights.

Employment

Houshasen Eikyou Kenkyujo Case

Roudou Keizai Hanrei Sokuhou No. 1394, p. 3
Supreme Court, 1st Small Bench
28 May 1990

Laws Considered

Civil Code, Article 90;
Constitution of Japan 1949, Article 14;
Equal Employment Opportunity Law, Article 11.2;
Labour Standards Law, Articles 3, 4.

This case considered whether different mandatory retirement ages for men and women constitute sex discrimination and whether it breaches Article 14 of the *Constitution of Japan 1949*.

The company with which the petitioner was employed had a policy that set different mandatory retirement ages based on sex. The retirement age was 62 years for men and 57 for women. The petitioner argued that by setting different retirement ages, the company was discriminating against women and the policy should therefore be declared invalid.

Decision

The Court held that by setting different retirement ages for men and women the company did discriminate against women. Its policy was therefore unlawful. The Court ordered that immediate steps be taken by the company to correct its policy. Further, it held that implementing a gradual rather than immediate change towards an equal retirement age would also be unlawful.

Commentary

This case is significant because the Court recognised a woman's right to a livelihood on equal terms to men. By stating that the company must take immediate action, the Court set a high standard for implementing the changes that enable women to achieve equality in employment. This standard could be used by advocates as an example of the role of courts in recognising and enforcing women's equality in the workplace and in general.

Employment

Iwate Bank Case

The Hanreijihou, No. 1410 pp. 37-43
Sendai High Court
10 January 1992

Laws Considered

Civil Code, Articles 1, 90;
Constitution of Japan 1949, Article 14;
Labour Standards Law, Articles 4, 11.

This case deals with the discriminatory aspects of a worker's wage agreement between a bank and its employees. The Court considered whether the payment of different household and family allowances to male and female workers constitutes sex discrimination and whether it was in breach of the *Labour Standards Law* and the *Constitution of Japan 1949* ["the Constitution"].

X, the mother of one child, worked as a bank clerk for the Iwate Bank ["the Bank"]. Since 1976 she had received both a family allowance and a household allowance on the basis that she was the head of her household. The worker's wage agreement of the Bank made provision for the allowances to be paid to "a clerk who is a head of household". This was defined as a clerk who was "supporting the household with his or her income". However, the agreement also stated that if the clerk was a female and her husband earned more than the maximum income permitted to qualify for a family support tax deduction the allowances would not be paid. By contrast, for a male employee, the allowances would be paid regardless of the income of his wife. In 1981, when X's husband received income above the limit for the tax deduction, the Bank stopped paying X the allowances. X began court proceedings claiming that the worker's wage agreement discriminated against women, and claimed a back payment of the allowances. Her claim in the Morioka District Court was successful. The Iwate Bank appealed to the Sendai High Court.

X argued that the family and household allowances were a "wage" within the meaning of the *Labor Standards Law* as they were an integral part of the payment for an employee's work. The allowances should therefore be governed by Article 4 of the *Labor Standards Law* which provides for the equal treatment of men and women. X argued that the

provisions of the worker's wage agreement were discriminatory on the basis of sex because when a male was head of the household he was entitled to a family allowance regardless of his wife's earnings. Women however, were only entitled if their husbands earned more than the maximum income permitted to qualify for a family support tax deduction. X also argued that the provision was unlawful because it was contrary to Article 14 of the Constitution, which protects the equal rights of men and women.

The Bank argued that the family and household allowances were not a "wage" because the allowances were not given in exchange for labour, but instead to provide livelihood assistance for families. The allowance was intended for a household's main income provider and supervisor. The Bank argued that if both the husband and the wife were employed, it was socially accepted to recognise the man as the head of the household and the different conditions for men and women were acceptable because they accorded with social norms. Further, the Bank argued that the provisions of the worker's wage agreement was not subject to the Constitution because it was a private agreement between the Bank and its employees.

Decision

The Court held that the worker's wage agreement discriminated against female employees and declared the relevant provisions unlawful. The Court ordered the Iwate Bank to pay X the family allowances that it had withheld from her.

The Court held that the household and family allowances were a "wage" within the meaning of the *Labor Standards Law*. The Bank did not therefore have a discretion in relation to the allowances. The Court stated that when determining whether the allowances were payable, the main factor should be whether or not that person is the household's main income provider, rather than whether the person is the "head" of the household. In this case, X was the main income provider for the family and therefore entitled to the allowances.

The Court held that the equality of men and women must be implemented, even in private arrangements such as the Bank's worker's wage agreement. The Court stated that it is necessary to consider social norms only in terms of their potential for achieving positive changes in society, such as moving towards the equality of men and women.

Commentary

By the time of this judgment, many companies had already begun reviewing their regulations relating to allowances and wages in light of equality laws. This case, however, makes a strong statement in relation to the use of social norms in equality cases, which may be useful in other discrimination cases. There was no reference to *CEDAW* in this case because the Bank had stopped paying the allowances to X before Japan ratified the treaty. This case is an example of the way in which terms such as "head of household" may discriminate against women, and also a good example of the type of argument that may be used to challenge such terminology in future.

Employment

Kenwood Case

Roudouhanrei No. 635, p. 11
Tokyo High Court
28 September 1995

Laws Considered

Labour Standards Law, Chapter 2;

Law Concerning the Promotion of Equal Opportunity and Treatment Between Men and Women in Employment and Other Welfare Measures for Women Workers, Article 28.1.

This case considered whether employers have a duty to consider the childcare responsibilities of employees in their decision making processes.

The company for which the petitioner worked ordered her to transfer locations which made it difficult for her to take her child to and from daycare. The petitioner argued that by asking her to transfer to a new location, the company violated its duty to the petitioner to consider her childcare responsibilities.

Decision

The Court dismissed the petitioner's claim. The Court recognised that an employer does have a duty to consider its employees' responsibilities in raising children. However, the Court found that the employer is not obliged to take into consideration the inconvenience to the employee of transporting children long distances to and from daycare, when making decisions about transfers.

Commentary

This case is noteworthy for holding that it is an employer's duty to consider the childcare obligations of employees. It impacts on women because they are often responsible for childcare, even when employed. The Court held, however, that when making transfer decisions, a company's duty did not extend to taking into consideration an employee's inconvenience in transporting children to daycare. Presumably in this case, the Court felt that the interests of the company in transferring the petitioner outweighed her need for convenient access to daycare for her child.

Employment

Korea Electric Power Corporation (Appellant) v Commissioner of the Central Labour Commission (Respondent)

94 Nu13589
Supreme Court
23 August 1996

Laws Considered

Gender Equal Employment Law, Articles 2.2, 8;
Labour Standard Law, Article 5.

This case examines mandatory retirement ages and whether a regulation requiring telephone operators to retire earlier than other workers amounts to gender discrimination, since most telephone operators are women. The Court considered whether the requirement was in breach of the *Gender Equal Employment Law*, which prohibits differential treatment on the basis of gender without reasonable cause.

The Postal Service employed a female telephone operator who was subsequently transferred to the appellant, the Korea Electric Power Corporation. The transfer occurred when the electrical communications work of the Postal Service was taken over by the appellant. The appellant had a mandatory retirement regulation [“the regulation”] for telephone operators requiring them to retire at the age of 53, although in most other positions there was a mandatory retirement age of 58 years. The appellant asked the female employee to retire in accordance with its regulation when she reached the age of 53. She claimed that she had been unfairly dismissed. The Trial Court held that a review for relief from the unfair dismissal should be conducted. The appellant appealed from that decision.

The respondent, the Commissioner of the Central Labour Commission, argued the regulation indirectly discriminated against women because it set a lower retirement age for telephone operators employed by the appellant, an overwhelming majority of whom were women. The respondent claimed that having a different mandatory retirement age for telephone operators amounted to discrimination against women because it limited their right to work.

The appellant argued that as most telephone operators retired earlier than the mandatory retirement age it did not affect the right of telephone operators to work. Further, to increase the mandatory retirement age would result in an older workforce and create difficulties for management, particularly considering the surplus of workers available for this type of work and the current hiring freeze. These factors, they argued, created a “reasonable basis” to have different retirement ages and thus the regulation did not fall within Article 8 of the *Gender Equal Employment Law*, which prohibits discrimination against women and men without just cause.

Decision

The Court decided in favour of the appellant. It held that there was a reasonable basis for instituting earlier retirement ages for telephone operators and higher retirement ages for other workers. Article 5 of the *Labour Standard Law* and Clause 1 of Article 2.2 of the *Gender Equal Employment Law* provide that gender discrimination means differential treatment on the basis of gender without reasonable cause. The Court held that despite the majority of telephone operators being women there was just cause for gender discrimination for several reasons. Increasing the retirement age of telephone operators would increase the costs of the appellant. These higher costs would result from the establishment of a seniority system, a reduction in the inflow of new human resources and a decrease in productivity. The Court also took into account the human resource policy of telephone operators, which included variables such as the surplus of human resources, the personnel structure of each age, the degree of difference of retirement age, and the opinions of telephone operators on the current retirement age of 53. These factors, the Court held, supported its decision. It also noted that within a seven year period, 90% of telephone operators had retired by the age of 41, well before the mandatory age of 53.

Commentary

This decision was detrimental to women’s equality in the workplace as it failed to recognise the effect of the mandatory retirement age regulation on women’s right to work. Although the Court recognised that the earlier retirement age for telephone operators was discriminatory on the basis of gender since most operators were women, it held that it was reasonable to discriminate in the circumstances. The Court’s perception of what is reasonable discrimination stemmed from a male-oriented perspective. In this decision, the business needs of management in relation to profit outweighed the claim of the female telephone operators to equal treatment with other workers. Subsequently however, on 8 February 1999, the *Gender Equal Employment Law* was amended to include the phrase “it is deemed discrimination to have the business owner apply standards or conditions to personnel positions that are staffed by any one gender”. This amendment provides specific protection for female workers who are working in female- dominated occupations as occurred in this case.