PACIFIC JUDGES CONFERENCE 2014

WRITTEN CONSTITUTIONS:
PAPER BY CHIEF JUSTICE TOM WESTON (COOK ISLANDS)

Introduction

1 In this paper, I will be focusing on a quite specific example of a written Constitution at work in a Pacific country in 2014. My focus will be upon a decision I issued on 31 January 2014 dealing with the Cook Islands National Superannuation Scheme. I found that the Scheme was unlawful as being in breach of Article 64(1)(c) of the Cook Islands Constitution which is concerned with the deprivation of property: *Minister of Cook Islands National Superannuation Fund v Arorangi Timberland Limited* (OA 1/11; 31 January 2014).

2 The case did not directly involve customary law issues so much as the cultural dimensions of old-age care in a Pacific community and the relationship between that and notions of *"property"*. What did it mean to be deprived of property in the context of a superannuation scheme?

3 I start with some qualifications to what I say. First, my day job is that of a practicing lawyer in New Zealand. As many will know, we do not have a written Constitution in this country. The nearest we have is the Bill of Rights Act but this does not have the over-arching effect of a written Constitution.

4 Like most practitioners in New Zealand, thus, I have not worked within a tradition of constitutional analysis in the same way as is common in other Commonwealth countries such as Canada or Australia whose senior appellate Courts regularly issue complex and lengthy decisions in the area of human rights. I do not claim any particular expertise in this area.

5 Secondly, my observations arise out of the usual haphazard set of facts and circumstances as they emerge before a Court. This is not an academic address but rather a focused and practical one.

6 Thirdly, and as was expected, there are now appeals and cross appeals from my decision.

The case

7 In 2000 the Parliament of the Cook Islands passed an Act establishing a National Superannuation Scheme. It was intended to be compulsory although would be rolled out progressively over time. The intention was that other existing superannuation schemes would be collapsed into the single compulsory scheme.

8 Member's contributions (including those of employers) were to be paid directly to a private trustee – the Public Trustee of New Zealand – and invested under the protection of a Trust Deed. Members had the usual beneficiary protections but very limited scope to access their contributions prior to retirement.

9 The legislation was not entrenched and the Government reserved to itself rights to make amendments to the Scheme along the way. There was a statutory provision providing protection in relation to existing rights but there was argument as to the scope of that protection.

10 The most significant criticism of the Scheme was that there was no form of Government underwriting or guarantee which was compared with the situation in other Pacific countries. This complaint was coupled with two other factors. First, because the Scheme was

intended to be the sole compulsory scheme, it was argued that the absence of any underwriting was particularly significant. Secondly, the 2000 Act was not entrenched as noted above. All of this was argued against an historical and cultural analysis of old age security in the Cook Islands. Previous Government interference and mismanagement of these sorts of schemes was ventilated. The means by which families would care for older relatives was also discussed.

The allegations

11 The various complainants were employers who had refused to make contributions because of their concerns about the Scheme. Criminal enforcement proceedings were taken against them. In their defence, they had complained about the Act being unconstitutional. The responsible Minister then instituted declaratory proceedings to resolve the issue.

12 The various employers were, thus, defendants in fact but, as a matter of practice, bore the burden of proving the unconstitionality of the Act.

13 The complainants alleged a wide range of matters:

- the Act was unconstitutional as being in breach of Article 64(1)(a) which protects *"security of the person"*. It was alleged the Superannuation Scheme did not protect the economic interests of its members and was thus unconstitutional;

- breach of Article 64(1)(c) as mounting to a deprivation of property;

- breach of Article 40(1) as mounting to an acquisition of property without compensation.

14 If the Article 40 challenge were upheld, the Minister then argued that the Scheme amounted to a tax and was thus saved by another provision within Article 40(2).

15 It is useful, I think, to break the case in two. First, to discuss *"security of the person"* arguments in the context of a superannuation scheme. Secondly, to analyse the property arguments (and also the tax defence).

Security of the person

16 *Security of the person* is an expression commonly found in constitutional documents. It appears as a heading in NZBORA although not in a specific section itself.

17 The various complainants argued that security of the person, in the present case, incorporated the economic dimensions of old-age security. It was said that the superannuation scheme amounted to a deprivation of those rights.

18 The main issue for consideration was whether *"security of the person"* had such a broad meaning or was limited to more orthodox notions of integrity of the person.

19 Ultimately, I was not required to reach a final view on this as a result of findings under the property head. It seemed to me a radical suggestion that *"security of the person"* had the meaning contended for. The strongest argument raised by the complainants was based upon Canadian authority and in particular the Supreme Court of Canada in *Gosselin v Attorney General* [2002] 4 SCR 429.

20 However, it was clear that the majority in that decision was not prepared to go so far. There was a strong dissenting Judgment from Arbour J which, if that view had prevailed, might have provided such a foundation for argument in the Cook Islands.

21 Argument on this topic was fascinating and ranged back, ultimately, to the Magna Carta. A lot of emphasis came on the 17th century writings of William Blackstone as well as other Enlightenment philosophers. Intellectually, there was no doubt that these various threads supported the complainants' argument as to the meaning of *"security of the person"*. However, I was far from persuaded that constitutional reference to *"security of the person"* should be read in such an expansive way. Amongst other things, it seemed to me that, in essence, the complainants were running property arguments and their arguments were, indeed, able to be addressed under that heading. In those circumstances, there seemed to be no need to take a broad and, indeed, radical, approach to *"security of the person"*.

Property

22 The Cook Islands, like many former Commonwealth countries, has a double property guarantee in the form of Articles 40(1) and 64(1)(c). The relationship of these, one to the other, is complex.

23 Ultimately, I decided that the two Articles did not entirely overlap. Article 40 – dealing with takings or acquisitions without compensation, is to be read as part of the State's power of eminent domain. The Article 64(1)(c) prohibition on deprivation of property is to be read in the context of a State's police-powers (e.g. speed limits on cars etc).

24 I concluded that the Article 40 challenge must fail because it was simply inapt to think of a superannuation scheme in the context of a prohibition upon takings coupled with compensation. So there was no need to deal with the tax defence although I set out provisional views contrary to the argument that the contributions amounted to a tax.

25 In order to reach my conclusion in relation to property, it was necessary to analyse the Superannuation Scheme, ascertain the rights and interests of the individual members, and, moreover, think about the economic underpinnings of a superannuation scheme generally.

26 A superannuation scheme, by definition, is about deferring present enjoyment in favour of future security. Superficially, then, it could be said that such a scheme amounts to a deprivation or a taking. My conclusion – right or wrong – was that this would be too simplistic analysis. Rather, it was a matter of analysing whether the balance between the present and the future had been met.

27 Ultimately, I concluded that the absence of Government underwriting, and the absence of entrenchment, were powerful factors supporting a deprivation. This conclusion was followed by a proportionality assessment. Were the interests of the individual in balance against the interests of the majority? I concluded that they were not. The absence of the underwriting and entrenchment weighed the scales in favour of the majority against the interests of the individual citizen.

Remedy

28 At the time of my decision, the Superannuation Scheme had been in existence for some fourteen years with at least $64m by way of assets. I had found the Scheme unconstitutional. However, it was eminently capable of being fixed up. What to do?

29 The various complainants were not advocating wholesale demolition of the Superannuation Scheme. Rather, they wanted Parliament to amend the Act.

30 In Canada there is well defined scope for the Courts to defer declaratory relief for a defined period so as to allow Parliament to rectify legislation if it is so minded. This seems to me a sensible solution.

31 There can be difficult issues as to whether declarations of breach of a constitution – and thus invalidity of the Statue – should be prospective (as to the future) or retroactive (back to the date of the enactment). Setting aside legislation retroactively may have dramatic and unnecessary consequences. Persons may have quite properly conducted their affairs in reliance upon the legislation being valid. Certainly, that was a concern I had in relation to the Superannuation Scheme. At the same time, though, I was conscious that there were outstanding criminal proceedings against the various complainants for having breached the Act. In light of my finding of unconstitutionality it would seem grossly unfair if they did not obtain some effective relief from that threat.

32 In the event, I reserved leave for further argument on this topic. Counsel had not fully grappled with remedies. It seemed to me sensible to discuss remedies against the particular findings that I had made. There is now an issue as to whether I will complete that exercise pending the foreshadowed appeal.

A general observation about customary law

33 The Cook Islands Constitution is similar to that of many former Commonwealth countries and reflects the common law of England. Individual human rights are protected. During the course of arguing the above case it became apparent that some of the assumptions underpinning provisions in the Constitution were not entirely appropriate in the cultural setting of a Pacific community which gives greater value to collective values as opposed to individual values. That, of course, is a gross generalisation but there is an interesting issue lurking in the middle of this.

Chief Justice Tom Weston (Cook Islands)