Tu'itavake v Porter, Government of Australia and Attorney General

Supreme Court
Civil Case No. 24/1989

2 November 1989

Constitution - principles of interpretation
Constitution - clause 4 - not applicable to Diplomatic Relations Act 1971
Constitution - Clause 90 - gives jurisdiction to Supreme Court over foreign diplomats to the extent provided by law
International law - State Immunity Act 1978 UK applicable in Tonga
International law - common law principles of restricted sovereign immunity applicable in Tonga
Statutes - application of English statutes - State Immunity Act 1978 UK

The plaintiffs brought proceedings claiming damages for the unlawful removal to Australia by the first defendant, who was employed by the second defendant, of the illegitimate daughter of the first plaintiff's deceased sister who had been living with them. Both defendants refused to accept service of the writ of summons, and the plaintiffs applied for an order directing the defendants to accept service. The defendants did not take part in the hearing of the application.

HELD:
Dismissing the application.

(i) The Constitution was to be interpreted flexibly and generously having regard to the purpose of the Constitution.

(ii) Clause 4 of the Constitution, as so interpreted, did not apply to legislation protecting diplomats from liability to the extent provided by the Diplomatic Relations Act 1971, and the first defendant was protected from liability by that Act.

(iii) Clause 90 of the Constitution, as so interpreted, gave the Supreme Court jurisdiction over diplomats to the extent provided by law.

(iv) The State Immunity Act 1978 UK and the common law principles of restricted state immunity applied to Tonga, and protected the second defendant from liability.

Cases considered:
Hinds v The Queen [1976] 1 All ER 353

Minister of Home Affairs v Fisher [1979] 3 All ER 21
Attorney General v Olomalu 5894/1981 W/Samoa
Henry v Attorney General 1/83, Cook Islands
Reference by Queen's Representatives (1985) LRC (Cont) 56
James v The Commonwealth (1936) 55 CLR
Attorney General for Ontario v Attorney General for Canada [1947] 1 All ER 137
The Queen v Beauregard (1987) LRC (Const) 180
Ong Ah Chuan v Public Prosecutor [1981] AC 648
60 Clarke v Karika (1985) LRC (Const) 732
Ex parte Koli and Others (1940) I Tonga LR 33
The Cristina [1938] 1 All ER 719

Statutes considered:
Constitution of Tonga Clauses 4 39, 40 and 90
Diplomatic Relations Act 1971 UK
State Immunity Act 1978 UK

70 Webster J

Counsel for plaintiffs : Mr Niu
Counsel for interviewer : Mr Martin

Judgment:

The Plaintiffs in this action are Tongan citizens residing in Kolomotu'a, Nuku'alofa and the First Defendant is the Immigration Attache at the Australian High Commission in Nuku'alofa.

The Plaintiffs claim damages for the alleged unlawful deprivation by the First Defendant of their lawful charge and custody of the illegitimate daughter of the First Plaintiff's deceased sister. This girl, Jeanettee Tu'itavake, is said to have lived in Australia with her mother until after her mother's death and had then been brought to Tonga by the Plaintiffs in May, 1987, travelling on an Australian passport.

It is alleged that the First Defendant issued another Australian passport to Jeanettee, paid for her airfare and on 25th January 1989 took her to the airport and put her on a flight to Australia. It is stated that Jeanettee was born on 26th July 1970 (in Australia) and so at the time she was over 18 1/2.

The Plaintiffs claim $10,000 special damages, $250,000 general damages and $250,000 exemplary damages. They claim that the First Defendant's action caused them direct financial loss in that they had spent money on Jeannettee as their daughter, in airfares bringing her to Tonga, school fees, food, clothing, large traditional birthday feasts etc etc.

The Plaintiffs claim that the First Defendant's action was arbitrary, oppressive and unconstitutional and was done without due regard to the laws and customs of Tonga. They say that it was done by the First Defendant as an officer, of and within the scope of his employment with the Second Defendant, the Government of Australia. They also say that the First Defendant was acting as a public officer serving the people of Tonga, though this proposition must on the face of it at least be open to question.

Both Defendants have declined to accept servie of the Writ of Summons and Statement of Claim apparently on the grounds that they are immune and beyond the jurisdiction of this Court by virtue of the Diplomatic Relations Act 1971.

The Plaintiffs have therefore applied to the Court for an order directing service on the Defendants on the grounds that the 1971 Act is ultra vires clause 4 of the Constitution of Tonga (same law for all classes) in so far as it seeks to absolve diplomatic officers from civil or criminal liability; and is also ultra vires clause 90 of the Constitution (jurisdiction of Supreme Court) in so far as it purports to oust the jurisdiction of this Court.

The Defendants did not take part in this hearing.

On 26th May the Court on its own motion, but with his consent, joined the Attorney-General as an intervener in relation to this application and he was represented at the hearing.

Clause 4 of the Constitution

The Counsel for the Plaintiffs, Mr Niu, based his application almost wholly on clause 4 of the Constitution, which states -

> "Same law for all classes
>
> 4. There shall be but one law in Tonga for chiefs and commoners for Non-Tongans and Tongans. No laws shall be enacted for one class and not for another calss but the law shall be the same for all the people of this land."

Plaintiffs' submissions

The Plaintiffs' submissions were that in their ordinary meaning the words of clause 4 prohibited the enactment of any law which would make any person above or separate

from the law unless the Constitution itself provided for such separate treatment. The 1971 Act, which in Article 31 para 1 of the Schedule provided for the immunity of a diplomatic agent from the civil and administrative jurisdiction of the receiving state, made some people in Tonga not amenable to and beyond the reach of the laws governing people who reside in Tonga. It put some non-Tongans in a different category from others. Mr Niu submitted that there was no ambiguity or nothing unclear in clause 4 and that it was only if there was an ambiguity that a consitution should be given a more liberal or flexible interpretation. If there was an ambiguity then a purposive approach should be taken to interpretation and the circusmstances at the time of its enactment must be considered.

Mr Niu referred to "The Tongan Constitution. A brief history to celebrate its Centenary" by Sione Latukefu as setting out fairly accurately the history and development of the Constitution. This was accepted by Mr Martin, who himself made reference to it. It is interesting in the context of this legal debate that in his Introduction to the book His Majesty King Taufa'ahau Tupou IV himself a law graduate, starts off "It is difficult to understand the Constitution without first knowing something of its history."

Mr Niu said that the main reason for the Constitution was that King George Tupou I wanted Tonga recognised by other nations to show that it was civilized, with a system of government and rights and courts as in other countries. (Latukefu p. 30). Under clause XXX of the 1862 Code of Laws, which preceded the Constitution, "Any foreigner wishing to dwell in this kingdom must obey the laws of the land, and be judged as the people of the land...". This had been done because at that time foreigners had been unwilling to obey the laws (Latukefu p. 39) and so clause XXX was very relevant to any consideration of clause 4.

In his speech to Parliament after the Constitution was passed, the King had emphasised the need for "Tonga for the Tongans" (Latukefu p. 42)

After the Constitution became law, treaties of friendship with Germany, Britain and America were signed (Latukefu p. 56) and Mr Niu submitted that there was no provision in those treaties which would give favourable treatment to foreigners or representatives of the contracting parties. He referred to the case of Bennett v Maeakafa (1915) (1 TLR 22) where Article II of the Treaty of Friendship between Great Britain and Tonga of 1979 is considered.

Mr Niu also referred to several clauses of the 1875 Constitution which did make specific reference to foreigners and provided within the Constitution for some sort of special treatment for foreigners and so were not subject to clause 4. Clause 42 of the 1875 Constitution (Latukefu p. 98) (now clause 39), provided for the King to make treaties with foreign nations provided the treaties were not contrary to the laws of the Kingdom, so any treaty had to be within clause 4.

Considering the position of the Second Defendant, the Government of Australia, Mr Niu submitted that it was only concerned as being vicariously liable for the acts of its employee the First Defendant and there was no provision in the 1971 Act giving the sending state itself immunity. Mr Niu referred to the case of Barker McCormac (Private) Ltd v Government of Kenya in the Supreme Court of Zimbabwe (unreported - Civil Appeal No. 115/83) and the decision there that governments no longer had total immunity but were in the same position as other individuals in commercial matters.

Mr Niu argued that the law in Tonga does not provide immunity for sovereign nations and that there is no such gap in the laws as will allow the application of English law by virtue of the Civil Law Act (Cap. 14) because clause 90 of the Constitution gives

this Court jurisdiction to try foreign states.

In this respect Mr Niu said that in not providing sovereign immunity the law of Tonga was different from that of other countries. The protection of the law was a fundamental provision of the Tongan Constitution and the law could not be intepreted to cut off the right to bring an action in court unless there was a very clear provision. He submitted that the doctorine of sovereign immunity was not envisaged at the time the Constitution was enacted.

Attorney-General's submissions

Mr Martin for the Attorney-General also referred the Court to Sione Latukefu's history, pointing out that the Constitution had come into being only 13 years after the tongan people had been freed by the 1862 Code "from the bondage of an institutional system akin to feudalism" (Latukefu p. 34). As King George Tupou I said to Parliament in 1875 "now a new era has come to Tonga - an era of light" (Latukefu p. 41) and there was more than ever the urgent need for international recognition. (Latukefu p. 39).

Mr Martin said that the Declaration of Rights in the Constitution was clearly concerned with peoples' rights and this was especially true of clause 4, which was about the equality of all men - chiefs or commoners, Tongans or foreigners - before the laws of the country (Latukefu p. 45). Mr Martin submitted that 2 clear principles could be drawn from the 1875 Constitution and the events leading up to it; firstly the principles of making the people free and equal; and secondly bringing Tonga into the comity of nations (that is the body of rules which states observe towards one another from/international law). However while these deductions may not be wrong, they do not entirely coincide with what Latukefu says were the 2 main aims (as Mr Martin pointed out) (p. 43, 48, 54 and 88): "to maintain efficient administration as a means of attaining internal stability, and to encourage the recognition of the country's sovereignty by the main powers."

Mr Martin further drew the Courts' attention to some very important passages for this case on page 89 of Latukefu, albeit that these are only the views of one commentator -

> "There is a growing disparity between the Constitution and the codified laws of the country which has worried legal authorities. The Constitution was written in layman's language while the laws have been drafted by trained lawyers .... There seems to be a need for further rewriting of the Constitution in legal language more compatible with the present Laws of Tonga."
>
> "The Constitution was designed to safeguard the welfare of the country in perpetuity, but many of its provisions were concerned with the specific needs of their day. Some of these needs have changed over the years, as Tonga has become modernized".

Mr Martin said that in the case of statutes affecting international law there is a presumption that Parliament intends to fulfil, rather than break, an international agreement (Halsbury's Laws (4th Ed) Vol. 44 para 908).

He submitted that the Intervener fully accepted that the words of clause 4 should take their normal and natural meaning, but looking at their meaning and intention when enacted in 1875. That intention was to stop people being discriminated against, as shown by the English text of clause 4 in 1875 -

> "4. There shall be but one law in Tonga, one for the Chiefs, and commoners, and Europeans and Tongese. No laws shall be encted for any special class to the detriment of another class; but one law equally the same for all persons residing in this land."

(Latukefu p. 90-91), apparently Baker's original translation into English (p 116): the difference from the present English text may be accounted for by Sir Basil Thomson's 1890 English translation "at least free from grammatical error" (p. 66)

Mr Martin submitted that the 1971 Act did not discriminate against anybody in granting certain privileges to foreign diplomats in Tonga on a wholly reciprocal basis, as Tongan diplomats received identical privileges all over the world. If Tongan diplomats received lesser privileges in a particular country overseas, then under section 7 privileges and immunitites in Tonga for that country's diplomats could be modified, restricted or withdrawn.

He said that from the history of the Constitution, the purpose of clause 4 was to avoid people being prejudiced on grounds of their class or colour or social position, in the sense envisaged in 1875 with the extreme privileges of nobles and foreigners. Diplomats were not a separate class of people in that sense. He drew the attention of the court particularly to the preamble to the Vienna Convention on Diplomatic Relations signed in 1961, and set out in the Schedule to the 1971 Act.

Mr Martin emphasised that the last thing which King George Tupou I would have had in his mind was that clause 4 of the Constitution would take Tonga out of the comity of nations and make Tonga different from other countries as regards diplomatic relations. The Diplomatic Relations Act 1971 could not therefore reasonably be construed as contrary as contrary to the Constitution.

Mr Martin referred to Court to certain passages in Halsbury's Laws (4th Ed) Vol. 18 on Foreign Relations Law. Under English law even if legislation implementing a treaty is not enacted, the treaty is nevertheless binding on the UK and failure to pass the necessary legislation may place the UK in breach of international law (paras 1405 and 1788). The same will apply to Tonga. Diplomatic agents are a means by which the political relations of one state with other states are carried on (para 1411). He also referred the Court to a number of relevant cases which will be mentioned later in this decision.

Turning to the question of sovereign immunity with respect to the Second Defendant, Mr Martin made it clear that his arguments were not to be taken as binding the Government of Australia, which is of course accepted by this Court.

He submitted that if the Court found the 1971 Act valid, then in practical terms that would be an end of the matter as the second Defendant was only the employer and that if the First Defendant was immune from jurisdiction the case could not go further. However Mr Martin later accepted that this was not so as diplomatic privilege gave immunity from suit only and did not give immunity from legal liability: (Dickinson v Del Solar [1929] All ER Rep 139.

Mr Martin submitted that under the Civil Law Act the UK State Immunity Act 1978 was an English statute of general application and applied in Tonga. The 1978 Act was merely codification of the common law which already applied, and it was generally relevant to the conditions of other countries.

There was no existing enacted law in Tonga but the common law of sovereign immunity applied as described in the case of Baker McCormac v Government of Kenya referred to by Mr Niu. This did not abrogate clause 90 of the Constitution, which gave this Court jurisdiction which was to be exercised under the Constitution and the laws of the Kingdom.

On the face of the Statement of Claim Mr Martin said the subject of the claim was not a commercial matter or another matter to which sections 3 to 11 of the 1978 Act

applied.

Interpretation of the Constitution

The principles of interpretation of the Constitution were considered recently in the Land Court in Finau v Alafoki and Minister of Lands (Land Case No. 10 of 1989) and the same principles are applicable here. The interpretation involves special principles which have been fully considered by the highest courts in the Commonwealth in recent years.

In Hinds v The Queen, [1976] 1 All ER 353, in the Privy Council in London, Lord Diplock said at page 359 a -

"A written constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject-matter and of the surrounding circumstances with reference to which it was made."

Then, in the leading case of Minister of Home Affairs v Fisher, [1979] 3 All ER 21, again in the Privy Council in London, Lord Wilberforce refers to "a generous interpretation avoiding what has been called 'the austerity of tablulated legalism'". (page 25h) and said that the approach must be -

"..... to treat a constitutional imstrument such as this as sui generis [that is in a class of its own], 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."

"This is in no way to say the 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." (page 26 c-d)

In the South Pacific, what was said in Fisher's case was adopted by the Court of Appeal of Western Samoa in Attorney-General v Olomalu, 5894/1981, which further said -

"..... a Constitution cannot be interpreted in vacuo ..... and its interpretation can be affected by the conditions, but ..... the prime matter is the words used by the framers."

"This involves, we think, still giving primary attention to the words used, but being on guard against any tendency to interpret them in a mechanical or pedantic way."

In Henry v Attorney-General, No. 1/83, the Court of Appeal of the Cook Islands also adopted Fisher and said -

"[a constitution] must be interpreted according to principles suitable to its particular character."

"The construction of the Constitution involves paying proper attention to the language used in the particular provisions but at the same time giving full weight to the over riding objects and scheme of the Constitution so as to avoid a bland literal and legalistic interpretation."

This was amplified by the Court of Appeal of the Cook Islands in Reference by the Queen's Representative, (1985) LRC (Const) 56 in interpreting their Constitution, where it indicated "that a broad contextual approach is even more appropriate in the case of constitutions" (page 68b) after considering Viscount Simonds words in the UK Houe of Lords in Attorney-General v Prince Ernest Augustus of Hanover, (1957) 1 All ER 49) -

"For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right

and duty to examine every word of a statute in its context, and I use 'context' in its widest sense ..... as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy." (p. 53).

"The elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it. Until he has done so he is not entitled to say that any part of it is clear and unambiguous." (p. 55).

In the circumstances of this case, it is clear that the context must include the international background and that the interpretation must be consistent, in so far as the language allows, with the comity of nations and the established principles of international law (Halbury's Laws (4th Ed) Vol. 44 para. 908)

There are 3 further cases which are of assistance in shedding light on how this Court must interpret the Constitution of Tonga granted in 1875 and now 114 years old.

In James v Commonwealth (1936) 55 CLR 1, [1936] 2 All ER 1449, the Privy Council in London said -

"The words used [in a constitution] are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning."

This case also gives a vivid example of the difficulties of interpreting general words in a constitution, in this case the word "free" in the expression "trade .... between the states .... shall be absolutely free" in section 92 of the Commonwealth of Australia Constitution

'In any case the use of the language involves the fallacy that a word completely general and undefined is most effective. A good draftsman would realise that the mere generality of the word must compel limitation in its interpretation. "Free" in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law ..... Free love, on the contrary, means licence or libertinage, though even so there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to anyone who comes, subject however to his condition or behaviour not being objectionable. Free trade means in ordinary parlance freedom from tariffs. Free in sect. 92 cannot be limited to freedom in the last-mentioned sense." (p. 1473-4)

"As a matter of actual language, freedom in sect. 92 must be somehow limited, and the only limitation which emerges from the context and which can logically and realistically be applied is freedom at what is the crucial point in inter-state trade, that is at the state barrier." (p. 1476)

In AG for Ontario v AG for Canada [1947] 1 All ER 137, at 145 the Privy Council also said -

"To such an organic statute (the British North America Act, 1867, the Canadian

Constitution the flexible interpretation must be given that changing circumstances require."

Then in the case of The Queen v Beauregard, (1987) LRC (Const) 180 in the Supreme Court of Canada, Dickson CJ used some more very vivid words (page 195 e) relevant also in Tonga -

"The Canadian Constitution is not locked forever in a 119 - year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people.

"Accordingly, if the Constitution can accommodate, as it has, many subjects unkown in 1867 - airplanes, nuclear energy, hydro-electric power - it is surely not straining [a section] too much to say that [a word in the section] can today support federal legislation based on a different understanding of [that word]."

"... interpreting a constituent or organic statute such as the [British North America Act 1867, the Canadian Constitution] that construction most beneficial to the widest possible amplitude of its powers must be adopted."

As Mr Martin put it, the Tongan Constitution is not to be regarded as a dead hand holding Tonga back from the realities and needs of the modern world as it has developed.

To summarise the principles which emerge from these cases with relevance to the interpretation of the Constitution in the present application, this Court must -

(1) first pay proper attention to the words actually used in context;
(2) avoid doing so literally or rigidly;
(3) look also at the whole Constitution;
(4) consider further the background circumstances when the Constitution was granted in 1875;
(5) bear in mind established principles of international laws;
(6) finally, be flexible to allow for changing circumstances.

Constitutionality of legislation

It is a serious matter for a court to declare that any Act passed by Parliament is unconstitutional and so invalid, and it is therefore not a step which a court should take hastily or lightly.

It is clear too that legislation may indirectly offend some constitutional limitation, although as drafted it does not do so directly, but the result will be the same, that the legislation will be ultra vires: Pillai v Mudanayake [1955] 2 All ER 833 (PC) at 837.

"... the question for decision in all these cases is in reality the same, namely, what is the pith and substance, as it has been called, or what is the true character of the legislation which is challenged:"

AG for Ontario v Reciprocal Insurers (1924) AL 328 (PC), 337 cited in Pillai.

Conflicting provisions in the Constitution

An Act may even be apparently authorised by one section of a constitution but invalid on a reading of the constitution as a whole and other sections of it, as in James v Commonwealth of Australia, where it was also said that the question could not be decided without a careful consideration of the true effect of the section concerned. (p. 1461)

In construing the Constitution and finding apparently conflicting provisions, the Court must look at the Constitution as whole and attempt to give reasonable meaning and proper effect to all parts of it without -

(a) contradiction;
(b) straining the natural and ordinary meanings of the words concerned;

(c) breaking the sound principles of interpretation (James v The Commonwealth p. 1456, 1458 and 1476).

On this subject, with particular reference to clause 4 but of general application there is the important Tongan Privy Council case of Tu'ipulotu v Kavaonuku (1938) 2 TLR 143 which considers clause 4 in relation to clause 67 (privilege of nobles) and makes it clear that a reservation such as clause 67 must be conservatively interpreted as it is an invasion by a privilege on a general right (p. 144). It is stated by Stuart CJ at p. 146, exemplifying the applications of the guidelines in James -

"Through a confused and much amended Constitution we must reach out to fundamental principles and modify them only so far as we are absolutely compelled so to do. We must read it as a whole to find its intent. We must not pick at solitary sections to annihiliate legislation and to embarrass the Judiciary."

"Here says Counsel 4 and 67 are repugnant or inconsistent - obviously so. If my opinion is correct 4 though earlier dominates 67 limiting it to very special cases. If not, then the Golden Rule on page 4 of Maxwell on Statutes applies, and then the wording of 67 must be modified to remove inconsistencies."

The Golden Rule, based on the words of Parker CB in Mitchell v Torrup (1766) Park 227, allows for a departure from the literal rule of interpretation when the application of the words in the ordinary sense would be repugnant to or inconsistent with some other provisions in the statute or even when it would lead to what the court considers to be an absurdity. The usual consequence of applying the Golden Rule is that words which are in the statute are ignored, or words which are not there are read in. Often the Golden Rule simply serves as a guide to the court where there is doubt as to the true import of the words in their ordinary sense. When there is a choice of meanings there is a presumption that one which produces an absurd, unjust or inconvenient result was not intended, but it is emphasised that the Rule is only used in the most unusual cases as a justification for ignoring or reading in words. Cross, "Statutory Interpretation" p. 14-15; Halsbury's Laws (4th Ed) Vol. 44 para 896.

Clauses 39 and 40 of the Constitution

In relation to diplomatic immunity, these clauses are the most important in the Constitution. They provide -

"Treaties

39. It shall be lawful for the King to make treaties with Foreign States provided that such treaties shall be in accordance with the laws of the Kingdom. ..... The King may appoint his representatives to other nations according to the custom of nations."

Foreign ministers

40. The King shall receive Foreign Ministers ....."

The final sentence of clause 39, read together with the start of clause 40, clearly shows from the words of the Constitution that when the Constitution was enacted in 1875 it was definitely envisaged that diplomatic representatives would be exchanged with other countries, foreign ministers in this context being synonymous with diplomats. More than that, Tonga's representatives were to be appointed "according to the custom of nations" which even at that time (as will be mentioned later) had established immunity for diplomats and the importance of reciprocal treatment. So if clause 4 was to be read as preventing immunity being granted to diplomats, as Mr Niu submits, clauses 39 and 40 of the present Constitution are apparently in conflict with clause 4 unless they are read as

an exception to it..

Returning to the first sentence of clause 39 the words "..... such treaties shall be in accordance with the laws of the Kingdom" in the modern translation are rather difficult for a lawyer to understand. Almost every treaty must by its nature require some alteration in the law of the country and so in a strict sense is never likely to be completely in accordance with the law. Perhaps the 1875 translation is of more help "..... but it shall not be lawful for him to make treaties countrary to the laws of the kingdom." But however this is to be interpreted it is clear for the reasons given above that, if it is constitutional to grant immunities to diplomats, Tonga's accession to, or ratification of, the Vienna Convention on Diplomatic Relations was within the provisions of the Constitution and so in accordance with the law.

Clauses 39 and 40 will be referred to again frequently in this decision, especially when dealing in detail with diplomatic immunity. Their position in relation to clause 4 will also be considered.

Other relevant clauses of the Constitution

Other clauses relevant to clause 4 and to the question of diplomatic immunity, including clauses in the 1875 Constitution, are the following:

Clause 3 (1875)

> "..... But any Chinaman wishing to reside in Tonga must first produce a doctor's certificate that he is free from such disease [Leprosy]: then it shall be lawful for him to reside in Tonga."

Therefore this envisaged a special law for Chinamen.

Clause 27 (1875)

> "..... And all foreigners or strangers who shall come and reside in this land ..... after they have resided six full months in the land shall pay taxes the same as all other people ....."

So foreigners got different treatment, being exempt from tax for the first 6 months here.

Clause 31 (1875)

> "Any foreigner or stranger from any one of the great nations who shall be guilty of any great crime ..... or who shall owe a large amount ... shall be judged by jury, six being foreigners resident in the land who pay taxes, and six Tonga jurymen ....."

The aim behind this clause is obviously fair treatment for foreigners, but it is still different treatment from Tongans, showing that this was not an idea alien to the 1875 Constitution.

Clause 32 (1875)

> "That any nation which has recognised Tonga as a kingdom it shall be lawful (sic) for the people from that nation after they have resided in Tonga for the space of two years to take the Oath of Allegiance. Such persons shall have the same privileges as the native born subjects of Tonga. And for the benefit of strangers residing in Tonga after 1st January 1876, any law which may be enacted by the Government shall be printed both in Tongese and in English. And if in the arraignment of any foreigner it shall appear that there is a difference of meaning between the law published in English from that published in Tongese, the case shall be judged according to the English version of the law, which shall be held to be the meaning of the law. And should any foreigner be judged and there shall be no Tonga law to meet the case, he

shall be judged according to the British law which shall be held to be the law of Tonga in such cases, until a law has been passed by the King and Legislative Assembly to meet the same."

This is a very relevant clause for 3 reasons. First a foreigner from a country which has not recognised Tonga cannot take the Oath of Allegiance and so is discriminated against in the Constitution. Secondly foreigners were to be judged according to the English version of the law - again perfectly fair, but still giving different treatment. Thirdly, and a much greater discrimination, British law was to apply to foreigners if there was no relevant Tongan Law. All 3 points emphasise that the 1875 Constitution recognised that Tongans and foreigners could not be treated totally identically.

Clause 90

I shall deal with this clause separately later. It is relevant to this case but not directly to clause 4.

The overall result of a consideration of these clauses in relation to clasue 4 is that, even if the express words of clause 4 specify equal or identical laws for all, this was certainly not a rigid rule in the minds of the framers of the Constitution, which itself departs from that principle, even if it does so with the aim of being fair to everyone.

Equality under the law

If clause 4 of the Constitution does not mean that all the law is to apply to everyone in Tonga without exception, then what does it mean and what, if any, exceptions are allowed under the general principles of law?

Case law does not give much guidance, but there are a few cases of assistance. In what is probably the leading case of Ong Ah Chuan v Public Prosecutor [1981] AC 648; [1981] 3 WLR 855 in the Privy Council in London, Lord Diplock said -

"Equality before the law and equal protection of the law require that like should be compared with like. What Article 12 (1) of the Constitution [of Singapore, whichs tates "All persons are equal before the law and entitled to the equal protection of the law"] assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits law which requrie that some individuals within a single class should be treated by way of punishment more harshly than others ..... Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with Article 12 (1) of the Constitution." (p. 673).

Coming nearer to home, in Clarke v Karika (1985) LRC (Const) 732 in the Supreme Court of the Cook Islands, Speight CJ quoted Ong Ah Chuan and said (p. 745) -

"No court has attempted or would attempt an exhaustive definition of what is meant by "equality before the law" in a constitutional context ..... In applying the idea that like should be treated alike it is of course necessary to remember also that groups cannot be singled out for constitutionally unjustifiable discrimination"

"The question is whether the challenged provisions are discriminatory in a way which singles out persons for reasons not consonant with a legitimate and apparent legislative purpose. In McGowan v Maryland 366 US 420 (1961) it is said at page 425 that equal protection clauses permit state legislatures

"a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of

the State's purpose."

In the same volume in AG v Morgan (1985) LRC (Const) 770, while very properly cautioning that in the interpretation of a constitution great care has to be taken before adopting judgments on other constitutions (p. 796 i) the point is repeated in a quotation from an Indian case -

> "Article 14 [of the Indian Constitution which states (p. 776 h) "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India] does not purport to guarantee equal treatment to all persons, but equal treatment to all persons similarly situated. It permits discrimination if it is based on reasonable classification."

Finally, in Abeywickrema v Pathirana and Others (1987) LRC (Const) 999, in the Supreme Court of Sri Lanka, Sharvananda CJ said that there was no violation of the fundamental right to equality when the Constitution bestowed special treatment on certain public officers. The Constitution was the basic supreme law and generated its own validity. Any discrimination in the treatment of different public officers results from the Constitution itself and was therefore binding.

To condense all these cases into a single sentence in the context of clause 4, laws can apply to some people and not others provided they do not do so arbitrarily or for some reason based solely on social class or nationality.

Tongan cases on clause 4

The reference in Bennett v Maeakafa (1915) (1 TLR 22) to the 1879 Treaty was on a different point of no interest in the present case. However the case is of interest because it contains an early consideration of clause 4 in respect to Ordinance No. 10 of 1910 and Law No XI, 1912, which was effectively the re-enactment by Parliament of the 1910 Ordinance. The purpose of the Ordinance was to "restrain the indiscriminate giving of credit to Tongans and other South Sea Islanders by Storekeepers and Traders". By the Ordinance traders were debarred from the recovery of debts from Tongans or other South Pacific Islanders but they still retained the right to sue under certain conditions (p. 24). Skeen CJ said (p. 28) -

> "I cannot hold that this is class legislation within the meaning of section 4. It is restrictive legislation and is applied to all classes of the community, to Chiefs and commoners, to Europeans and all other foreigners and to Tongans alike."

Whatever these words may mean exactly, they hardly support the Plaintiffs' submissions and it clear that clause 4 was not being applied strictly or rigidly in 1915.

The 1938 Privy Council case of Tu'ipulotu referred to earlier is also of relevance in the present case as it shows that clauses 39 and 40 are to be read in the light of the more general clause 4 which limits these clauses to very special cases, but in the circumstances of this case it is not clear that this assists the Plaintiffs. Clauses 39 and 40 clearly provide for diplomatic relations and what can be more directly linked with that than the Diplomatic Relations Act 1971, providing statutorily for the time honoured privileges and immunities of diplomats?

On the other hand there is an interesting example of the application of clause 4 in Ex parte Koli and Others (1940) 1 TLR 33. Here Stuart CJ held that a Notice which demanded imperatively a birth certificate and nothing but a certificate from candidates for the Public Service Examination, who for no fault of their own were unregistered, was ultra vires and bad as in conflict with clause 4. No law was to be enacted for one class and not for another. The Notice differentiated against a class of persons in no way to blame and

in no way to be submitted to any unnecessary penality for the acts or defaults of others. If the Notice purported to make the unregistered outcasts from educational facilities it made them a class and then differentiated against them. However it was made clear that the judgment did not enfranchise the unregistered to defy the Notice, nor did it apply to persons who could obtain a certificate and negligently failed to do so. Although expressed simply in terms of class, careful reading shows that decision was really based on grounds that the distinction between the registered and unregistered was rather made because of the Notice. This therefore fits in with the wider judicial authorities on equality before the law already cited.

Treaty of Friendship with Great Britain of 1879

Mr Niu referred in his submissions to this Treaty (included in the Revised Edition of the Law of Tonga 1927 at page 704) and submitted that Article II (mentioned in Bennett v Maeakafa 1915 1 TLR 22) did not mention anything about immunity for diplomats, which is correct. But that may hardly have been necessary, given the terms of Article III, the main points of which can be summarised as follows -

(a) Britons charged with a criminal offence cognizable by British Law may be tried by the Court of the British High Commissioner for the Western Pacific Islands;

(b) If the offence is not cognizable under British Law, the Briton is amenable to the jurisdiction of Tongan courts with proceedings in public;

(c) If either (a) or (b) is possible, the Briton may elect which court will try him;

(d) Every civil suit against a Briton in Tonga to be tried by the High Commissioner's Court.

The significance of Article III of the 1879 Treaty in relation to the interpretation of clause 4 is obvious. Here was a Treaty, made only 4 years after the enactment of the constitution, which clearly provides for different treatment - if not preferential treatment - for Britons in Tonga in compairson to Tongans themselves. While it is perhaps possible that in doing so the Treaty was unconstitutional, that is not of concern in this case, but what the Treaty does show is that it was far from the mind or intention of King George Tupou I at the time that clause 4 should estblish some kind of rigid and inflexible equal treatment above all else.

It is important to read the whole of a legal document when construing it.

The differentiation or discrimination was made even more marked by the 1901 Treaty (1927 Law p. 708) provision in Article IV that the British Queen Victoria "should have and exercise civil and criminal jurisdiction over all subjects of foreign Powers in Tonga", even though this may have been forced onto Tonga.

But the 1879 Treaty was not forced onto Tonga in the face of the Constitution, indeed quite the reverse, Tonga entered the 1879 Treaty voluntarily using the new Constitution.

Mr Niu submitted that Article II also had shed light on the position in that Britain and Tonga were reciprocally agreeing to grant to subjects of the other the rights, privileges and immunities they then possessed, or which were then accorded to subjects of the most favoured nation. Mr Niu said that because, as he submitted, everyone was under the same law in Tonga, there was no need to give favourable treatment to any nationality and the King was well within the Constitution in agreeing to Article II.

But I do not accept that this was a necessary inference to be drawn from Article II. There would have been no need to give most favoured nation treatment if the laws of

Tonga had in practice applied fairly to all people and Britons had been treated in the same way as Tongans: so the inference must be that the laws did not apply equally in 1879. Further if clause 4 were interpreted strictly as submitted by Mr Niu, the King would not have been within the Constitution in agreeing to Article II, albeit that there was to be reciprocity for Tongans in British territories.

So I do not find that Article II helps the Plaintiffs' case.

What does clause 4 mean?

The first sentence of clause 4 and the start of the second sentence indicate by their plain words that what is being struck at is laws which differentiate either between chiefs
680 and commoners or between foreigners and Tongans. This is very understandable in the light of the background at the time, as explained in Latukefu, especially pages 34 and 39. The abolition of discrimination of both types was very important at that time, following the emancipation from serfdom in 1862 and also the troubles with foreigners defying the laws.

Then this is followed by the final provision that "the law shall be the same for all the people of this land" or as the 1875 translation puts it "one law equally the same for all persons residing in this land". The final provision appears to be just a restatement of the first part of clause 4.

690 Although the wording of this final provision is slightly different from the provisions in other countries in the cases referred to earlier, the idea and the purose is clearly the same - equality before the law (and see Latukefu p. 45) But this is an idea which can be very difficult if not impossible to put into practice perfectly in an imperfect world. George Otwell was being realistic and not just cynical when he wrote in his famouse satire "Animal Farm" that "All animals are equal, but some animals are more equal than others". As Speight CJ said in Clarke v Karika

> "No court has attempted or would attempt an exhaustive definition of what is meant by "equality before law" in a constitutional context."

For the reasons already given under the heading of equality under the law, and on
700 relevant cases from other jurisdictions, I believe that clause 4 does not mean all that it may appear to mean. But it does mean that like must be treated alike; and that differentiation between different groups of people may be permissible if it is legally justifiable and not arbitrary. These points are I believe borne out by the whole background to the Constitution and its development.

While I do not therefore wish to be taken as saying that clause 4 absolutely prohibits any differentiation in the laws of Tonga between different classes or nationalities of people, I do not have any difficulty in accepting Mr Niu's central proposition provided it is modified to say that the odinary meaning of clause 4 includes prohibiting the enactment
710 of any law which would make any person completely above or separate from the law unless the Constitution itself provides for the exception. This is supported by the Tongan cases, especially Tu'ipulotu and Koli.

I have added the word "completely" because otherwise clause 4 would have such a rigid meaning that it would prevent the smallest degree of differentiation e.g. acceptance of a foreigner's driving licence as equivalent to passing a Tongan driving test - and would be impractical and ineffective. But I do not consider that even so modified the proposition states the position fully or that as a whole it helps the Plaintiff when we come to look at the 1971 Act.

720 Firstly, clause 4 prohibits discrimination between races or social classes; and

secondly, to emphasise the point it is repeated in different words - the same laws are to apply to everyone.

But because in interpreting the Constitution the whole document has to be looked at, both provisions are impliedly subject to any exceptions made in other parts of the Constiutiton, even though such exceptions may themselves be limited by clause 4 to very special cases.

And in relating clause 4 to present day circumstances, the other two principles of constitutional interpretation have to be applied - the words have not to be taken literally or rigidly, but have to be viewed with flexibility for the changing circumstances.

730 It is these principles - and the whole background of the general principles of law - which drive the Court to the interpretation of the principles of equality before the law as being circumscribed and limited (1) to like having to be treated alike; and (2) to discrimination being prohibited only if it is arbitrary or not justified constitutionally.

The history of diplomatic immunity

The existence of immunities granted to diplomatic representatives is very ancient and certainly predates the Tongan Constitution. Satow's "Guide to Diplomatic Practice' (5th Ed) indicates that it can be seen in the earliest history of ancient peoples in Greece, India and China: (para 15.2. The Preamble to the Vienna Convention recalls that peoples

740 of all nations from ancient times have recognized the status of diplomatic agents. In England the common law position was declared in the Diplomatic Privileges Act, 1708. Satow states -

> "..... from the sixteenth centruy until the present one can find virtually no instances where a breach of a diplomats inviolability was authorised or condoned by the Government which received him." (para 15.2)

Further history is given in the case referred to by Mr Martin, Ghosh v D'Rozario [1962] 2 All ER (CA) which quotes the preamble to the Diplomatic Privileges Act, 1708 (p. 642 I) -

> "Reasons for passing this Act: - whereas [the Russian ambassador] was detained
750 in custody for several hours in contempt of the protection granted by Her Majesty contrary to the law of nations and in prejudice of the rights and privileges which ambassadors and other public ministers authorised and received as such have at all times been thereby possessed of and ought to be kept sacred and inviolable."

and that case goes deeper into the background (p. 643 G) -

> "The immunity is derived from the rules of international law and from the legal maxim par in parem non habet imperium [or no state can claim jurisdiction over another sovereign state;] see Dicey's Conflict of Laws (7th Edn.), p 132. This rule of international law has been "engrafted onto our domestic law"; per Lord Atkin in
760 The Cristina. In Magdalena Steam Navigation Co v Martin (1859) 2 E & E 94 it was held that the accredited public minister of a foreign state cannot be sued in a civil action ... Lord Campbell CJ, in delivering the judgment of the court said: "The great principle is to be found in Grotius De Jure Belli et Pacis, lib 2, c. 18, s. 9 'Omnis coactio abesse a legato debet' [or literally all coercion must be absent from the envoy]. He is to be left at liberty to devote himself body and soul to the business of his embassy. He does not owe even a temporary allegiance to the sovereign to whom he is accredited and he has at least as great privileges from suit as the sovereign whom he represents. ..... For these reasons, the rule laid down by all jurists of authority who have written upon the subject is, that an ambassador is

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exempt from the jurisdiction of the courts of the country in which he resides as an ambassador."

An early judicial decision is the well-known American case of The Schooner Exchange v McFaddon, US Supreme Court (1812) 7 Granch 116 and the judgment of Marshall CJ, which sets out the constitutional and legal principles lucidly, and was described by Lord Atkin in the Privy Council in Chung Chi Cheung v R (cited later) as "a judgment which has illumined the jurisprudence of the world" (p. 790 C) -

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied .....

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers .....

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world .....

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory .....

2 d. A second case, standing on the same principles with the first is the immunity which all civilized nations allow the foreign ministers ....."

This case was referred to with approval in the English Court of Appeal case The Parlement Belge (1880) LR 5 PD 197 and 3 BILC 322, 331 by Brett LJ whose words have been often quoted -

"The principles to be deduced from all these cases is that, as as consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and everyone declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.

In Engelke v Musman [1928] All ER Rep 18 (HL) it was said about the origins of diplomatic privileges -

"The privileges affording ambassadors and other accredited representatives of foreign countries immunity from all writs and processes is an ancient doctrine of the common law declared in terms by the Diplomatic Privileges Act, 1708." (p. 19 H)

"It is well settled that the questions we have been discussing do not depend on the

statute, but are principles of common law having their origin in the idea of the comity of nations." (p. 27 F)

"The privilege itself depends upon maintaining the obligations of international law and the comity of nations." (p. 22 C)

"The Attorney-General states explicity in his case that it is a necessary part of His Majesty's prerogative in his conduct of foreign affairs and his relations with foreign States and their representatives to accord or refuse recognition to any person as a member of a foreign ambassador's staff exercising diplomatic functions." (p. 27 C)

With reference to the last quotation, no suggestion has been made that the same should not apply in Tonga. A certificate by the Minister for Foreign Affairs has been filed with the Court that the First Defendant is First Secretary at the Australian High Commission and as such is a diplomatic agent and entitled to the privileges and immunities pertaining thereto by virtue of the 1971 Act. So far as the First Defendant's status in concerned, this certificate is accepted by Mr Niu for the Plaintiffs.

It is recognised that diplomatic immunity is likely to create individual hardship; but that this hardship must bow to a general overriding principle of comity between conflicting jurisdictions (Ghosh p. 644 C)

It was pointed out in Engelke that the object to be attained is immunity from the vexation of litigation with its impediments to the discharge of functions (p. 25 H). Immunity includes immunity from service of a writ (Ghosh p. 644 H). It was impossible to say that this might not both interface with the proper functioning of the organisation of the High Commissioner concerned and affect his dignity as the representative of a sovereign state (p. 645 F)

In this context it is also important to note from the Preamble to the Vienna Convention on Diplomatic Relations signed in 1961 the express stipulation that the purpose of diplomatic immunity is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.

The Preamble, which is set out in the Schedule to the 1971 Act, summarises the position and status of diplomatic immunity very succinctly:-

"The States Parties to the present Convention,

Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,

Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their diferring constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

Affirming that the rules of customary international law should continue to govern

questions not expressly regulated by the provisions of the present Convention,

Have agreed as follow: ....."

Mr Niu also submitted that immunities and privileges were not essential for diplomats to carry out their tasks and that there was nothing in the cases to show that they were essential. However, as the references in Ghosh (p. 643 I and 644 F and H) and in Engelke (p. 25 H) and the Preamble to the Vienna Convention show, there are very real reasons to allow a diplomat to carry out his functions properly. The concept of "functional necessity" is in fact the basis of immunities today. Satow (5th Ed 1979) states -

"modern practiceand theory have adopted this explanation of "functional need" as the correct explanation of and justification for diplomatic privileges and immunities" (para 14.3)

"Diplomatic privileges and immunities therefore are founded on the customary practice of many centuries. They enable ambassadors and their staffs to act independently of any local pressures in negotiation, to represent a foreign state under protection from attack or harrassment, to speak freely to their own governments, and they are thus essential to the conduct of relations between independent sovereign states." (para 14.4)

This immunity does not necessarily put diplomats above or separate from the law. In Dickinson v Del Solar (1929) All ER Rep 139 it was said by Lord Hewart CJ at p. 140 H -

"In my opinion, diplomatic agents are not, in virtue of their privileges as such, immune from legal liability for any wrongful acts. The accurate statement is, I think, that they are not liable to be sued in the English courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction."

The position of diplomats in this respect is emphasised by Article 41.1 of the Convention, which makes it clear that diplomats are not above the law -

"Without prejudice to their privileges and immunitites, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State ....."

Satow enlarges on the position at para 15.30 -

"Certain duties laid on a diplomatic agent under cusotmary international law may be said to be the corollary of the immunities which he enjoys in the receiving state. These duties are now set out in Article 41 of the Vienna Convention. The most important is his duty to respect the laws and regulations of the receiving state. His immunity from jurisdiction does not i mply and exemption from liability, although special provisions are oftern made in the local law to provide that diplomats should be exempt from certain obligations - for example rules under local labour law - which are inappropriate to their special circumstances or might be argued to be incompatible with their status. But in the absence of such special exemptions he is bound by local laws even though they cannot be enforced against him because of his immunity. For example it is of the greatest importance that he should observe local motor traffic regulations ....."

"The obligation to respect the laws and regulations of the receiving state applies to the official as well as the private activities of diplomats." (para 15.31)

A quotation from Bishop "International Law: Cases and Materials" (2nd ED) at p. 594 takes the matter further -

"As Moore points out, "In considering the immunities of diplomatic officers, it is important to draw a distinction, which, it is believed, has not usually been noticed, between measures of punishment and of prevention. The theory of diplomatic immunity is not that the diplomatic officer is freed from the restraints of the law and exempt from the duty of observing them, but only that he cannot be punished for his failure to respect them. ... It will hardly be denied ... that it is his duty to respect the laws of the country in which he resides, and that he may in many conceivable cases be prevented from doing unlawful acts, for which, if he were allowed to commit them, he could not be punished. This distinction is peculiarly applicable to police regulations, made for the purpose of assuring the public health and safety ..... The immunity from judicial process cannot be perverted into a license to disregard the health and safety of the public, nor can it be construed as precluding the actual prvention of injuries to person or property, where, but for the exercise of immediate restraint, irreparatble damage is threatened." 4 Moore, International Law 678 (1906)."

But even if the need for diplomatic immunity were questionable, it stands as a fact that immunity is recognised under international law, and Mr Niu accepted this. It is also clear from reported Tongan cases that the general principles of law and the common law of England were applied by this Court for many years before the Civil Law Act was passed in 1966, and again Mr Niu accepted this. So I believe that diplomatic immunity has been recognised in Tonga from the time of the 1875 Constitution, if not previously, and there is no evidence to the contrary.

All the history shows firstly that diplomatic immunity was certainly in existence at the time the Constitution was enacted in 1875 and must have been in mind when the present clauses 39 and 40 were framed. Given that one of the two main purposes of the enactment of the Constitution in 1875 was the recognition of Tonga's sovereignty by the main powers (Latukefu p. 88) it is inconceivable that the authority given to the King in clause 42 of the 1875 Constitution for appointing Tongan representatives "according to the law of nations" did not include or countenance reciprocal immunity for the "public ministers" to be received in Tonga under clause 43. As Mr Martin emphasised in his submissions, at a time when Tonga was keenly seeking recognition, the last thing King George Tupou I would have been likely to seek was to avoid reciprocal treatment for the diplomats which the main powers might send to Tonga.

Secondly, this history shows that this particular treaty - the Vienna Convention - was essentially expressing and codifying the constitutional and common law position in all civilized nations throughout the world, including Tonga, and was therefore in accordance with the laws of the Kingdom in terms of clause 39 of the present Constitution.

The Diplomatic Relations Act 1971

Considering the 1971 Act with reference to all these matters and principles, there is little doubt about what is the pith and substance or the true character of the Act. It is encapsulated in the long title -

"An Act to provide for the granting of privileges and immunities to diplomatic missions and to give effect to the Vienna Convention on Diplomatic Relations: and for connected purposes."

More than that, this case is dealing with one of the kernels of the Act, the immunity

of diplomatic agents from the civil jurisdiction of the receiving state given by Article 31.1 of the Convention as set out in the Schedule to the Act.

As has been said already, this immunity does not necessarily put diplomats above or separate from the law. What Article 31.1 does is to exempt diplomats from the jurisdiction of the courts in Tonga, but not for the matters specified in sub-paragraphs (a), (b) and (c) of Article 31.1. Diplomats still have a duty to respect the law, as Article 41.1 stipulates. So rather than putting diplomats above the law, the Act is providing a different law for them.

Section 3 (replacement of existing law) makes it clear that the provisions of the Act are to have effect "in substitution for any previous enactment or rule of law". While this is a draftsman's standard phrase to wipe the state clean for a new law, it certainly carries implications that, in addition to the then Diplomatic Privileges Act (Cap. 125) which I shall deal with shortly, there were relevant rules of law applicable in Tonga prior to the 1971 Act. Accordingly this reinforces the conclusion already reached on the common law position.

The former Diplomatic Privileges Act was enacted in 1948 and in relation to diplomatic immunity it provided in section 3 (1) -

"... the like immunities and privileges as are accorded to an envoy of a foreign sovereign Power accredited to Her Britannic Majesty in the United Kingdom"

showing again that immunity ws not introduced in Tonga for the first time by the 1971 Act.

On account of these 2 aspects and of the whole history of diplomatic immunity as engrafted into the common law as expressed under the previous heading, I find that the 1971 Act essentially codified the common law position of diplomatic immunity in tonga and so the 1971 Act was authorised by clauses 39 and 40 of the Constitution, which were not limited by clause 4 so as to exclude diplomatic immunity.

Clause 4 and clause 39 and 40

My reason for deciding that clauses 39 and 40 are not limited by clause 4 In this way re as follows.

Returning to Article 31.1, it is clear that the immunity from civil jurisdiction, while not confined to official acts of the diplomat, is not absolute and does not cover certain actions done in his private capacity. In this context Article 38.1 provides that a diplomat who is a national or permanent resident of the receiving State is to enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions, except in so far as additional privileges and immunities may be granted by the receiving state. Section 4 (6) (a) of the Act shows that if these are to be granted it will be done by His Majesty by Order in Council.

So in this respect there is only minimal discrimination between races and social classes, remembering particularly that all diplomats have a duty under Article 41.1 to respect the law. If a diplomat of a foreign country happens to be a Tongan he receives the same immunities as a foreigner diplomat for official acts - but none for private acts, whereas a foreigner diplomat gets immunity for private acts subject to exceptions (a), (b) and (c). If by chance a foreigner diplomat is permanently resident in Tonga, he also gets reduced immunity, putting him in a slightly different position from a foreigner diplomat who is only temporarily resident here, who gets full immunity. But the permanently resident foreigner diplomat gets exactly the same immunity as his colleague the Tongan diplomat, so it is very clear that there is no discrimination on grounds of race betwen them.

The only discrimination for diplomats under the Convention is therefore between those who are diplomats and everyone else in Tonga who is not a diplomat; and between diplomats with some sort of tie (by race or permanent residence) to Tonga and diplomats without that tie. Both forms of discrimination are based on distinctions which are functional, legally justifiable and not arbitrary and so cannot offend a proper application of a clause 4.

A similar position is shown by section 5 of the 1971 Act, although it applies to administrative, technical and service staff of a diplomatic mission and is not strictly in point in this case. It provides for immunities of Tongan subjects or permanent residents who are members of a foreign mission in Tonga, but only in respect of official acts performed in the exercise of their functions. By Article 37.2 of the Convention such people who are not Tongans or permanently resident here get immunity for acts performed in the course of their duties, so there is no discrimination on race for them. Section 5 is required to make this provision because Article 38.2 states that other members of the staff of the mission who are nationals or permanent residents of the receiving State are to enjoy immunities only to the extent admitted by the receiving State.

Finally, to underline that the Act is doing as much as possible to avoid gratuitous discrimination, section 7 empowers His Majesty by Order in Council to modify, restrict or withdraw privileges or immunities if equal reciprocity is not given to Tongan diplomats in a foreign country.

The result of this detailed look at the 1971 Act is to find that it does not breach the principle of equality before the law under clause 4, in that like is indeed being treated alike; and what minimal discrimination there may be as a result of the Act is non-arbitrary and also constitutionally justified by clauses 39 and 40.

Applying the principles discussed under the heading of constitutionality of legislation, this Court believes that if it were to find the 1971 Act invalid because it conflicted with clause 4, that would be a clear contradiction and restriction of the powers given to the King in clauses 39 and 40: not only a restriction, it would virtually nullify diplomacy and dilomatic relations for Tonga. Which country would want to send diplomats to Tonga if they were not guaranteed the customary freedom to go about their diplomatic business without the threat of court proceedings hanging over them? Which Tongan diplomat would wish to serve in another country without, for example, the ability to communicate in absolute secrecy with the Tongan Government by diplomatic bag? The whole scenario is so far from the result desired by King George Tupou I in 1875 that it is unthinkable.

On the other hand if the 1971 Act is valid, there is no clear conflict with the wider meaning that must be given to clause 4 to make it work sensibly. The words of clause 4 are not strained, as is shown by the cases on equality before the law, and no sound principles of interpretation are broken. Mr Niu himself at the start of his submissions made it clear that his preferred interpretation of clause 4 allowed for exceptions provided for in the Constitution.

There is therefore no difficulty in upholding the validity of the Diplomatic Relations Act 1971.

Clause 90 of the Constitution

Mr Niu also submitted that clause 90 of the Constitution gives this Court jurisdiction over diplomats. Clause 90 provides -

"Jurisdiction of Supreme Court

90. The Supreme Court shall have jurisdiction in all cases in Law and Equity

arising under the Constitution and Laws of the Kingdom (except indictable offences where the accused elected to be tried by jury and except also cases concerning titles to land which shall be determined by a Land Court subject to an appeal to the Privy Council) and in all matters concerning Treaties with Foreign States and Ministers and Consuls and in all cases affecting Public Ministers and Consuls and all Maritime Cases."

Mr Niu's submissions were based on the 2 provisions "in all matters concerning Treaties with Foreign States and Ministers and Consuls and in all cases affecting Public Ministers and Consuls."

1080 One of the dictionary meanings of "Minister" is any diplomatic agent accredited to a foreign government and it is used in Article 14.1 (b) of the Vienna Convention. It is clear from the previous quotations from the preamble to the Diplomatic Privileges Act, 1708 (Ghosh p. 642 I) and from Ghosh (p. 643 G) that Public Minister was one of the old terms for a diplomat. The original translation of clause 43 of the 1875 Constitution refers to "public ministers" (Latukefu p. 98) where its modern counterpart clause 40 calls them "Foreign Ministers". On the doctrine of noscitur a sociis (literally know it by its fellows), the meaning of a word can be gathered from the context and the occurrence of the words "Ministers" and "Public Ministers" alongside "Consuls" resolves any doubt that the
1090 meaning is diplomats. It is well known that the Constitution of Hawaii was used in the drafting of the Tongan Constitution - see Latukefu p. 30 and 41 - and the derivation of clause 90 can be traced through Article 67 of the Constitution of Hawaii of 1864 -

"The Judicial Power shall extend to ..... all cases affecting Public Ministers and Consuls ....."

Looking back further, an almost identical provision exists in Article III Section 2 (1) of the U.S. Constitution of 1787 -

"(1) The Judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; - to all Cases affecting
1100 Ambassadors, other Public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; ....."

This shows even more conclusively that Public Ministers - sandwiched between ambassadors and consuls - mean diplomats.

As the wording of the US Constitution is so similar to the Tongan Constitution, the interpretation and application of this provision in the United States can be of great assistance to this Court. It is clear from Bishop "International Law: Cases and Materials" (2nd Ed) p. 592 - 596 and the cases referred to there that diplomatic immunity is allowed in the USA notwithstanding Article III Section 2 (1) of their Constitution. It is also clear
1110 that this immunity was allowed long before the Vienna Convention, as in The Schooner Exchange v McFaddon (1812) referred to earlier -

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied."

While the reasons for allowing diplomatic immunity in the USA notwithstanding Article III Section 2 (1) do not appear from the cases available here in Tonga, I believe that the proper interpretation of clause 90 is that the Courts do indeed have jurisdiction, but subject to any immunitites derived from other clauses of the Constitution or the law
1120 of Tonga.

This is illustrated very clearly by exceptions (a), (b) and (c) in Article 31.1 of the Convention. If this case had involved a real action against the First Defendant relating to land in Tonga, or an action against him as an executor in his private capacity, or an action against him relating to some private commercial business, then in any of these cases this Court would have had jurisdiction against the First Defendant. But it appears from the Statement of Claim that this case does not concern any of these and concerns official activities.

By simply sitting and hearing this application, this Court is demonstrating that it is exercising jurisdiction in a case affecting a Public Minister - but subject to the diplomatic immunities constitutionally given, originally under common law, and now under the 1971 Act - so clause 90 does not assist the Plaintiffs in this application.

Refusal of service on First Defendant

So the Court refuses the Plaintiffs' application for an order directing service on the First Defendant by virtue of the certificate of the Minister for Foreign Affairs dated 29th August, 1989 that he is a diplomatic agent and as such entitled to the privileges and immunities pertaining thereto by virtue of the 1971 Act, the certificate being conclusive evidence in terms of section 8 of the 1971 Act.

The history of sovereign immunity

Sovereign immunity is the immunity of one state from being sued in the courts of another state. If flows from the personal immunity of a sovereign or head of state in another state which he is visiting and its basis is well described in the quotation already given from The Schooner Exchange.

The doctrine of sovereign immunity is based on the same principle of par in parem non habet imperium (or no state can claim jurisdiction over another sovereign state) and was developed during the 18th and 19th centuries as part of international law on nations state theory: see The Christina [1938] 1 All ER 719 (HL) for a classic discussion of its foundations by Lord Wright. In addition to the well-known US case of The Schooner Exchange in 1812 cited earlier, cases in the courts in various other countries were being reported in at least 1844 and examples which predate the Tongan Constitution are Duke of Brunswick v King of Hanover (1848) 2 HLC 1, 3 BILC 138 and The Charkieh (1873) 3 BILC 275, so sovereign immunity certainly existed in 1875.

There are 3 important cases with regard to the adoption of international law in domestic law -

(i) Commercial and Estates Co of Egypt v Board of Trade [1925] 1 KB 271 where Lord Atkin said (p. 295) -
"International law as such can confer no rights cognizable in the municipal courts. It is only in so far as the rules of international law are recognized as included in the rule of municipal courts to give rise to rights or obligations."

(ii) The Cristina (already cited) "..... it is a recognized prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions."

(iii) Chung Chi Cheung v R [1938] 4 All ER 786 (PC) where Lord Atkin again said (p. 790 A)
"It must always be remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its

principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."

Applying these principles the English courts have adopted sovereign immunity as a proposition of international law engrafted onto English domestic law so as to be well established and beyond dispute (The Christina per Lord Atkin at p. 720 H).

As was said in The Charkieh by Sir Robert Phillimore (3 BILC at 298) -

"The object of international law, in this as in other matters is not to work injustice, not to prevent the enforcement of a just demand but to substitute negotiations between governments, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state."

While the immunity given to state was originally absolute, by the end of the last century, and more so after the First World War, it began to be appreciated that a distinction should be drawn for this purpose between different classes of state activity. According to this view immunity was to be allowed to acts falling within the normal functions of government, but immunity was to be denied to acts of a private law nature.

This restrictive theory of sovereign immunity, as it is known, was developed by courts throughout the world and is now almost universally accepted and the English courts apply it, as in Trendtex Trading Corp. v Central Bank of Nigeria [1977] 1 All ER 881 (CA) and I Congresso del Partido [1981] 2 All ER 1064 (HL). The courts in other countries have also adopted this position, for example the Supreme Court of Zimbabwe in the case of Barker McCormac referred to earlier which sets out the modern position very succinctly and makes it clear that restrictive immunity applies only to governmental or public acts (jure imperii) and not to private or commercial acts (jure gestionis) of the state. The distinction depends on the nature of the dispute.

Application of sovereign immunity in Tonga

Given the whole background to the adoption of the Tongan Constitution in 1875 as already explained, and particularly that one of the two main purposes of the enactment of the Constitution was the recognition of Tonga's sovereignty by the main powers (Latukefu p.88) it is again inconceivable that King GeorgeTupou I would have refused to grant sovereign immunity to a foreign power in accordance with the then recognised practice and international law. There is every reason to think that sovereign immunity is part of the general principles of law and common law applicable in Tonga. As clause 82 states -

"the present law shall be in force until repealed by the Legislative Assembly excepting such laws as are at variance with this Constitution ..."

I do not take the words "the present law" to refer only to written laws and they must also embrace the general principles of law and common law..

I am not aware of any provision in this field in the Acts or Ordinances of Tonga and indeed Mr Niu argued that this was so, except for the reference in clause 90 of the Constitution to this Court having jurisdiction "in all matters concerning Treaties with Foreign States and Ministers and Consuls" . But jurisdiction in a matter concerning a

treaty with a foreign state is a very different matter from jurisdiction over a foreign state (especially when as here the subject matter of the action does not fall under any treaty) and I cannot read these words as affecting positively or negatively any immunity of a sovereign state. So there is no provision on this subject in the laws of Tonga, and Mr Niu admitted this.

The matter of a court exercising jurisdiction in applying immunities under the law has already been discussed in relation to diplomatic immunity and clause 90.

For similar reasons, I believe that it is the restrictive theory of sovereign immunity which now applies in Tonga.

U.K. State Immunity Act 1978

The position in England was clarified by the State Immunity Act 1978, which codifies the modern restrictive theory of sovereign immunity under international law.

Under section 3 and 4 of the Civil Law Act, this UK Act will apply in Tonga if -

(a) it is a statute of general application in force in England (s. 3);

(b) no other provision has been made by or under a Tongan Act or Ordinance (s. 4(a)); and

(c) the circumstances of Tonga and its inhabitants permit.

Mr Martin referred the Court to the tests of whether a statute is of general application as set out in "Commonwealth and Colonial Law" (Roberts-Wray) at pages 556-7, being principally that the Act is of general relevance to the conditions of other countries and, in particular, not based on politics or circumstances peculiar to England. The process of selection cannot rest on anything less than some solid ground that establishes an inconsistency: Leong v Lim Beng Chye [1955] 2 All ER 903 (PC).

For all the reasons already discussed, the 1978 Act is clearly of relevance to Tonga and is not based on circumstances peculiar to England. It is also clear that there is nothing in the circumstances of Tonga or its inhabitants to prevent the application of the 1978 Act, so I find that the UK State Immunity Act 1978 applies in Tonga.

Looking at the nature of the Plaintiffs' claim, the Statement of Claim avers in paragraph 12 that the actions of the First Defendant complained of were done in the purported exercise of his functions as an officer of and within the scope of his employment by the Second Defendant, the Government of Australia. So it seems clear that these were governmental acts, at least in the purported exercise of his duties as Immigration Attache. Mr Niu did not make any submissions to the contrary.

The actions complained of do not therefore fall within any of the exceptions to immunity in sections 2 to 11 of the 1978 Act. Thus the Government of Australia is immune from the jurisdiction of the courts of Tonga in terms of section 1(1) of the 1978 Act, which gives another state general immunity from such jurisdiction; the Court is required to give effect to this immunity even though the Government of Australia does not appear in the proceedings (section 1(2)).

While section 12 of the 1978 Act provides for service on a state, this must apply only to cases where there is an exception from immunity. Given section 1(2), there is no point in permitting service on the Government of Australia under section 12.

Sovereign immunity under common law

If I am wrong in finding that the 1978 Act applies, I believe that under common law the restrictive theory of sovereign immunity under international law applies as Tongan law on the same principles as for the 1978 Act and already discussed.

Also for the reasons already given, the actions complained of are governmental acts

within the restrictive theory and so immunity from jurisdiction applies also at common law to the Second Defendant.

Refusal of service on Second Defendant

The Court therefore also refuses the Plaintiffs' application for an order directing service on the Second Defendant, the Government of Australia.

No costs

As the Attorney-Genral appears in the public interest, no order for the costs of this application will be made.