

THE ROLE OF THE COURTS IN UPHOLDING RELIGIOUS FREEDOM IN PAPUA NEW GUINEA

Introduction

1. The right of freedom of thought, conscience and religious is enshrined in the PNG Constitution under s.45. It reads:-

FREEDOM OF CONSCIENCE, THOUGHT AND RELIGION.

- (1) *Every person has the right to freedom of conscience, thought and religion and the practice of his religion and beliefs, including freedom to manifest and propagate his religion and beliefs in such a way as not to interfere with the freedom of others, except to the extent that the exercise of that right is regulated or restricted by a law that complies with Section 38 (general qualifications on qualified rights).*
- (2) *No person shall be compelled to receive religious instruction or to take part in a religious ceremony or observance, but this does not apply to the giving of religious instruction to a child with the consent of his parent or guardian or to the inclusion in a course of study of secular instruction concerning any religion or belief.*
- (3) *No person is entitled to intervene unsolicited into the religious affairs of a person of a different belief, or to attempt to force his or any religion (or irreligion) on another, by harassment or otherwise.*
- (4) *No person may be compelled to take an oath that is contrary to his religion or belief, or to take an oath in a manner or form that is contrary to his religion or belief.*
- (5) *A reference in this section to religion includes a reference to the traditional religious beliefs and customs of the peoples of Papua New Guinea.*

Human Rights – Historical background.

2. The idea of human rights has evolved over centuries in various countries of the world due to the oppressions of citizens by dictatorial governments and private groups. The “rights of man” became a catch

cry in struggles against injustices and indignities perpetrated by such governments and groups. At these struggles attempts were made to set or list some minimum rights that could be demanded by all citizens, by the very fact of being human. These demands were made to the governments that ruled them.

3. In the late 17th century ideas began to be incorporated into constitutional documents. In England after the Glorious Revolution of 1688, the Bill of Rights of 1689 was adopted to preserve and protect the people of the country from recurrence of arbitrary royal rule. The Bill of Rights set out “the ancient rights and liberties” of the people such as freedom of election of members of parliament, freedom of speech and debate in parliament, freedom from cruel or unusual punishments, from excessive fines or demand for excessive bail and the right of trial by jury.
4. The American Revolutions included in their declarations of Independence in 1776 a claim to “certain inalienable rights” including “life, liberty and pursuit to happiness”. The Americans included in their constitution defined rights to freedom of speech and the press, to a speedy and public trial by an impartial jury, the right to free exercise of religion and the right of people to be “secure in their persons, houses, papers and effect against unreasonable searches and seizures”. Other additional rights were added by amendment to the Constitution in the 1860s after the civil war. They included the prohibition of slavery and the protection from deprivation, without due process of law of every person’s life, liberty and property and prohibited the denial to any person the equal protection of the law.
5. In 1789, the French Revolution after having disposed of their King, laid down in their Declaration of the Rights of Man, that all men are born and remain free and equal in rights, those rights being “liberty,

prosperity, security and resistant to oppression". They listed in particular, freedom of speech, of the press, of religion, and freedom from arbitrary arrest". They said these rights had been denied the ordinary people under the rule of the kings.

6. After the French Revolution Sweden in 1809 and Holland in 1815 included clear statements of human rights in their respective constitutions. Since then many other countries in all parts of the world have given recognition to basic human rights in their respective constitutions and other laws.

UNITED NATIONS

7. Since the establishment of the United Nations Organisation, there has been a general agreement to recognise a number of basic rights and freedoms. These include:
 - The right to live;
 - The right to personal liberty;
 - Freedom from slavery;
 - Freedom from inhuman treatment;
 - The right to protection of property;
 - The right to protection from arbitrary search and entry on premises;
 - Protection of law to ensure no imprisonment except on a proper charge and after a fair trial;
 - Freedom of thought, conscience and religion;
 - Freedom of speech and the right to publish;
 - Freedom of peaceful assembly and association; and
 - Freedom of choice of employment.
8. These and a number of other rights and freedom are now set out in the Universal Declaration of Human Rights (UDHR) which were adopted without dissent by the United Nations in 1948. The rights and freedoms stated under the UDHR are not unlimited meaning that the

rights and freedoms are subject to the rights and freedoms of others. The declaration also recognizes that while people have rights, they also have duties to others as well in their communities and must exercise their rights responsibly.

9. It is to be noted that the UDHR was made after World War II which was a significant event in World history. The UDHR while internationally recognized cannot be effective in a country unless they are enforceable in that country by the country's courts.
10. Many nations in the world today have incorporated in their constitutions many of the basic human rights recognized internationally in the UDHR. However many of these basic rights and freedoms are unenforceable.

HUMAN RIGHTS IN PNG

11. We in PNG are all too familiar with authoritarian governments having been ruled by others for almost 90 years. In those years of rule by others the basic rights and dignity of our people were predominantly suppressed and ignored.
12. It was only in 1971, just 4 years before Independence, that PNG enacted a law, through the House of Assembly called the Human Rights Ordinance of 1971. It was introduced into the House of Assembly by a private member of the House, a clergyman Rev. Percy Chatterton. This law came about after the 1970 enactment of the Public Order Ordinance. The 1970 Public Order Ordinance limited and restricted processions and public meetings. That law unjustifiably limited basic democratic freedom and was intended to suppress the efforts of PNG people seeking to recover land rights in the Gazelle Peninsular. The Human Rights Ordinance of 1971 was therefore seen as an assertion of basic democratic freedoms in the light of moves by

the colonial Administration to curtail the fundamental rights and freedoms of Papua New Guineans.

THE HUMAN RIGHTS ORDINANCE 1971

13. The Human Rights Ordinance of 1971 protected 11 rights and freedoms. They are:-

- (i) The right to live;
- (ii) The right to personal liberty;
- (iii) Freedom from slavery;
- (iv) Freedom from inhuman treatment;
- (v) The right to protection of property;
- (vi) The right to protection from arbitrary search and entry on premises;
- (vii) Protection of law to ensure no imprisonment except on a proper charge and after a fair trial;
- (viii) Freedom of thought, conscience and religion;
- (ix) Freedom of speech and the right to publish;
- (x) Freedom of peaceful assembly and association; and
- (xi) Freedom of choice of employment.

14. Under the Human Rights Ordinance of 1971 all of the 11 rights could be enforced by the Full Court of the Supreme Court, which could act upon a complaint from any person who claimed his rights and freedoms had been denied. The Public Solicitor or the Secretary for Law could apply to the courts for the courts to make the appropriate orders for enforcement of those rights and freedoms.

CONSTITUTION OF PNG

15. At Independence in 1975, all the rights and freedoms under the Human Rights Ordinance of 1971 were incorporated into the National Constitution of PNG. A number of new ones were added. Under the Constitution the following rights and freedoms are protected.

- (i) right to freedom (s 32);
- (ii) right to life (s 35);
- (iii) freedom from inhuman treatment (s 36);
- (iv) protection of the law (s 37);
- (v) proscribed acts (s 41);
- (vi) liberty of the person (s 42);
- (vii) freedom from forced labour (s 43);
- (viii) freedom from arbitrary search and entry (s 44);
- (ix) freedom of conscience, thought and religion (s 45);
- (x) freedom of expression (s 46);
- (xi) freedom of assembly and association (s 47);
- (xii) freedom of employment (s 48);
- (xiii) right to privacy (s 49);
- (xiv) right to vote and stand for public office (s 50);
- (xv) right to freedom of information (s 51);
- (xvi) right to freedom of movement (s 52);
- (xvii) protection from unjust deprivation of property (s 53);
- (xviii) equality of citizens (s 55); and

THE FREEDOM OF CONSCIENCE, THOUGHT AND RELIGION

16. This right is a basic civil right. It is a right given to every person in this country, freedom either alone or with others, both in public and private, to practice his or her religion or belief in worship, teaching or observance.

17. This right has specific qualifications one of which is the protection of rights and freedoms of others from interference by people from other religions.

CONSTITUTIONAL OBLIGATIONS

18. In order for the rights and freedoms to be observed and to be protected it is equally necessary to impose duties, obligations and responsibilities on ourselves. We often say that it is a person's right to do something and that no man or authority should interfere with that right unreasonably. For example we say it is a person's right to drive

his motor vehicle on a public road. However that right must be exercised with the necessary restraints so that the person does not make difficult the exercise of the same rights to use the road by other motorists or people on foot. In other words the person has the obligation to drive safely; by obeying the laws of the road.

19. The same must be said in relation to the exercise of one's right and freedom to practice one's religion. A person's right to practice his religion should not be interfered with unreasonably.

ENFORCEMENT OF RIGHTS AND FREEDOMS

20. It is all very good to have all those rights stated in the Constitutions but if there are no enforcement provisions they are worthless and of no value. In PNG the courts have been given the powers to enforce the rights and freedoms of the people. The Supreme Court, the National Court and the District Courts all have the powers to enforce human rights. For instance a person has a right to have his trial within a reasonable time after being charged. The District Court has the powers to enforce that right. Similarly the National Court also has the powers to enforce the same right. Sections 57 and 58 of the Constitution provide for the enforcement of Constitutional rights. For ease of reference I set them out here.

57. ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS.

- (1) A right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his rights under this*

section by a person acting on his behalf, whether or not by his authority.

(2) For the purposes of this section–

- (a) the Law Officers of Papua New Guinea; and*
- (b) any other persons prescribed for the purpose by an Act of the Parliament; and*
- (c) any other persons with an interest (whether personal or not) in the maintenance of the principles commonly known as the Rule of Law such that, in the opinion of the court concerned, they ought to be allowed to appear and be heard on the matter in question,*

have an interest in the protection and enforcement of the rights and freedoms referred to in this Division, but this subsection does not limit the persons or classes of persons who have such an interest.

(3) A court that has jurisdiction under Subsection (1) may make all such orders and declarations as are necessary or appropriate for the purposes of this section, and may make an order or declaration in relation to a statute at any time after it is made (whether or not it is in force).

(4) Any court, tribunal or authority may, on its own initiative or at the request of a person referred to in Subsection (1), adjourn, or otherwise delay a decision in, any proceedings before it in order to allow a question concerning the effect or application of this Division to be determined in accordance with Subsection (1).

(5) Relief under this section is not limited to cases of actual or imminent infringement of the guaranteed rights and freedoms, but may, if the court thinks it proper to do so, be given in cases in which there is a reasonable probability of infringement, or in which an action that a person reasonably desires to take is inhibited by the likelihood of, or a reasonable fear of, an infringement.

- (6) The jurisdiction and powers of the courts under this section are in addition to, and not in derogation of, their jurisdiction and powers under any other provision of this Constitution.*

58. COMPENSATION.

- (1) This section is in addition to, and not in derogation of, Section 57 (enforcement of guaranteed rights and freedoms).*
- (2) A person whose rights or freedoms declared or protected by this Division are infringed (including any infringement caused by a derogation of the restrictions specified in Part X.5 (internment)) on the use of emergency powers in relation to internment is entitled to reasonable damages and, if the court thinks it proper, exemplary damages in respect of the infringement.*
- (3) Subject to Subsections (4) and (5), damages may be awarded against any person who committed, or was responsible for, the infringement.*
- (4) Where the infringement was committed by a governmental body, damages may be awarded either—*
 - (a) subject to Subsection (5), against a person referred to in Subsection (3); or*
 - (b) against the governmental body to which any such person was responsible,**or against both, in which last case the court may apportion the damages between them.*
- (5) Damages shall not be awarded against a person who was responsible to a governmental body in respect of the action giving rise to the infringement if—*
 - (a) the action was an action made unlawful only by Section 41(1) (proscribed acts); and*
 - (b) the action taken was genuinely believed by that person to be required by law,*

but the burden of proof of the belief referred to in paragraph (b) is on the party alleging it.

21. The courts therefore are empowered under the Constitution of PNG to enforce all the human rights one of which is the right to freedom of conscience, thought and religion. This means that where anyone whose rights and freedoms to practice his or her religion are denied that person is able to enforce those rights by going to court and applying to the courts to enforce those denied rights. For instance if a person's right to worship on a Saturday is denied that person is entitled to apply to the court to have that right enforced. Similarly if a person's right to worship on Sunday is denied that person has the right to apply to the court to have that right enforced.
22. The Judges in the National Court have promulgated Human Rights Rules to make it easier for litigants and lawyers to assist them to quickly progress their claims for alleged breaches of human rights.
23. The rules also provide for persons who may bring or commence or appear in human rights proceedings. They include:-

5 *Human rights proceedings*

The following proceedings shall be placed on the Human Rights List and shall be dealt with in accordance with these Rules:

- (a) proceedings that are, in substance, irrespective of whether expressly so described, for enforcement under Sections 57 (enforcement of guaranteed rights and freedoms) or 58 (compensation) of the Constitution of any of the Basic Rights, viz:*
 - (i) right to freedom (s 32);*
 - (ii) right to life (s 35);*
 - (iii) freedom from inhuman treatment (s 36);*
 - (iv) protection of the law (s 37);*

- (v) *proscribed acts (s 41);*
- (vi) *liberty of the person (s 42);*
- (vii) *freedom from forced labour (s 43);*
- (viii) *freedom from arbitrary search and entry (s 44);*
- (ix) *freedom of conscience, thought and religion (s 45);*
- (x) *freedom of expression (s 46);*
- (xi) *freedom of assembly and association (s 47);*
- (xii) *freedom of employment (s 48);*
- (xiii) *right to privacy (s 49);*
- (xiv) *right to vote and stand for public office (s 50);*
- (xv) *right to freedom of information (s 51);*
- (xvi) *right to freedom of movement (s 52);*
- (xvii) *protection from unjust deprivation of property (s 53);*
- (xviii) *equality of citizens (s 55); and*

- (b) *proceedings under Section 183 of the Bougainville Constitution for enforcement of Basic Rights under that Constitution; and*
- (c) *proceedings under Section 23 (sanctions) of the Constitution for imposition of sanctions for breach of prohibitions, restrictions or duties imposed by the Constitutional Laws in regard to human rights issues; and*
- (d) *complaints under Section 42(5) (liberty of the person) of the Constitution that a person is unlawfully or unreasonably detained; and*
- (e) *proceedings where a claim is made by the plaintiff for any relief or remedy for any tort allegedly committed by a member of a disciplined force, where the cause of action might reasonably be regarded as a breach of one or more of the Basic Rights; and*
- (f) *proceedings where the issues of fact or law that are likely to arise overlap with the type of issues of fact or law that commonly arise in enforcement proceedings under Sections 57, 58 or 23 of the Constitution; and*

- (g) *any proceedings within the jurisdiction of the National Court concerning the discharge of powers, functions, duties or responsibilities under Part X (emergency powers) of the Constitution; and*
- (h) *applications for a writ of habeas corpus under Order 17 of the National Court Rules; and*
- (i) *proceedings for enforcement of the provisions of the Correctional Service Act and the Correctional Service Regulation concerning treatment of detainees, calculation of periods of detention and related proceedings; and*
- (j) *applications under Section 5(2)(c)(iii) (notice of claims against the State) of the Claims By and Against the State Act to allow a further period in which to give notice to the State of an intention to make a claim against the State, where the claim relates to enforcement of a right or freedom referred to in Division III.3 of the Constitution.*

24. Moreover our Human Rights Rules state who has standing to bring or appear in such applications. Rule 6 says:-

6. *Standing to bring or appear in proceedings*

Without derogating from Sections 57(1) and (2) of the Constitution, persons who may bring or commence or appear in a human rights proceeding include:

- (a) *a person whose human rights or freedoms are adversely affected by any act or omission of:*
 - (i) *the government or a governmental body or a person exercising public power or performing public functions;*
or
 - (ii) *a private person or a body corporate, including a company, and any of its officers or employees exercising private powers or performing private functions;*

- (b) *a person acting on behalf of a person who is under a disability or is unable to fully and freely exercise their right to bring an application for enforcement of their human rights or freedoms;*
- (c) *a person or body, whether public or private, who has an interest in the protection and enforcement of human rights and freedoms;*
- (d) *a person representing an international body with responsibility for, or a principal function of which is, protecting human rights and freedoms under international laws and conventions such as the Universal Declaration of Human Rights and any other declarations, recommendations or decisions of the General Assembly of the United Nations concerning human rights and freedoms;*
- (e) *any other person or body who has a sufficient interest in the protection and enforcement of human rights and freedoms, approved by the Court.*

25. In circumstances where the defense of the country arises or where issues of public health and safety arise and public welfare is affected, those rights may be denied.

26. Any reference to the practice of religion and beliefs in the Constitution include reference to traditional religious beliefs to Papua New Guinea.

CONCLUSION

27. In conclusion I would say that the Courts in PNG have a Constitutional duty to uphold and protect religious freedom and liberty and to guard against those liberties being suppressed and eroded. In that regard, I think the Courts are at the forefront and taking proactive steps to protect those human rights. This includes situations where Parliament makes laws to curtail or prohibit religious freedom. Individually, people and organizations whose liberties could or might be adversely affected are at liberty to challenge the validity or otherwise of such laws in our Courts of law.

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- Views expressed in this paper are personal.