



**ADDRESS BY THE DIRECTOR OF PUBLIC PROSECUTIONS, MR.
CHRISTOPHER PRYDE, AT THE 15th ANNUAL ATTORNEY-GENERAL'S
CONFERENCE HELD AT THE INTERCONTINENTAL RESORT AND SPA,**

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“IMPLEMENTATION OF CIVIL AND POLITICAL RIGHTS”

The Prime Minister, the Attorney-General and members of the Government;

The Chief Justice, The Acting President of the Court of Appeal, Members of the Judiciary including the Chief Magistrate;

The Acting Solicitor-General, Permanent Secretaries; Members of the Diplomatic Community;

Fellow Panellists, Participants, Colleagues, Ladies and Gentlemen

Introduction

First, my thanks to the AG and the AG Conference team for inviting me to speak on the topic of implementing political and civil rights. I think this panel gets the prize for tackling the broadest topic to be found in this year's programme.

What I intend to do is to restrict my speech to just two of those political rights with which the Office of the Director of Public Prosecutions is primarily concerned as set out under sections 13, 14 and 15 of the 2013 Constitution.

I will then talk about the enforcement of those rights through the courts and say something about the constitutional redress provisions under the Constitution, and finally raise for discussion issues that may present themselves when dealing with

balancing the civil rights individuals have with the rights of the State under proceeds of crime applications.

What are Civil and Political Rights?

At the most basic, civil and political rights are a class of rights that protect individuals' freedom from infringement by governments and private organizations, and ensure one's ability to participate in the civil and political life of the state without discrimination or repression.

Civil rights include the ensuring of peoples' physical and mental integrity, life and safety; protection from discrimination on grounds such as race, gender, national origin, sexual orientation, ethnicity, religion, or disability; and individual rights such as privacy, the freedoms of thought and conscience, speech and expression, religion, the press, assembly and movement.

Political rights include natural justice (procedural fairness) in law, such as the rights of the accused, including the right to a fair trial; due process; the right to seek redress or a legal remedy; and rights of participation in civil society and politics such as freedom of association, the right to assemble, the right to petition, the right of self-defence, and the right to vote.

These rights are set out clearly in Chapter 2 of the 2013 Constitution which is the Bill of Rights Chapter. They are deliberately basic (and non-prescriptive) to allow for wide application but in many respects are nothing new to Fiji. We have had most of these rights in different forms for most of the history of Fiji whether through the Judges' Rules, or international conventions such as the 1948 Universal Declaration of Human Rights or the UN Convention of Civil and Political Rights which have found their way into the common law or various statutes that make up the Fijian legal framework.

In fact, apart from certain rights relating to the protection of land under sections 28, 29 and 30 or rights to a clean and healthy environment under section 40, most of the civil and political rights found in the 2013 Constitution have not been created by the Constitution. What the 2013 Constitution does is declare the existence of those fundamental rights. This of course does not in any way diminish the importance of those

rights; even the US Constitution declared rather than created such rights by claiming they were self-evident. Many of the rights are fundamental and have been enforced through the courts of Fiji for many years. The fact that these rights are now expressed in the 2013 Constitution reinforces the importance of these rights in the collective consciousness of the nation.

The Most Fundamental Right of All

In the criminal justice system, the most fundamental right upon which all other rights in the criminal justice system are based is tucked away neatly in section 15 which reads that “every person charged with an offence has the right to a fair trial before a court of law”.

The reason it is fundamental (or an absolute right as the UK’s Lord Steyn has referred to it) is because any breach of any other of the rights declared in sections 13 and 14 such as the right to silence or the right against self-incrimination, or the right to receive disclosures of the State’s case, will ultimately affect the right to a fair trial. The right to a fair trial is absolute in the sense that a conviction obtained in breach of it cannot stand.

The ultimate enforcement of the fundamental right to a fair trial is a stay of proceedings in the High Court as part of the court’s inherent jurisdiction¹. A useful authority setting out the principles for the High Court’s power to grant a stay in criminal proceedings is the case of **Takivikata v State** ².

Generally speaking the circumstances in which a Fijian court might consider the imposition of stay proceedings are:

(a) where circumstances are such that a fair trial of the proceedings cannot be achieved, or

(b) there has been conduct established on the part of the Executive which is so wrong that it would be an affront to the conscience of the Court to allow proceedings brought against that background, to proceed.

¹ NB. A stay cannot be granted in the Magistrates’ Court

² [2008] FJHC 315; HAM039.2008 (12 November 2008) per Bruce]

However, a stay in proceedings is a discretionary remedy of the High Court and will only be used occasionally, with the utmost care, and in exceptional circumstances since most breaches of rights such as the right to legal representation, the right to know the charge against you, or the right to receive the evidence of the case against you can all be remedied by the trial court either by adjourning the matter or excluding illegally obtained evidence or making orders to direct the furnishing of particulars or the amending of the charge without the need for a stay.

Takivikata was applied more recently in the Fiji High Court in **Filipe Baba v the State**³. In short, the Court in that case said that to justify a stay of proceedings there must be a fundamental defect, exceptional circumstances, or an abuse of the process of the Court.

The stay therefore is the ultimate sanction to protect the processes of the court by enforcing an individual's legal rights to ensure a fair trial.

The 2013 Constitution declares and builds on a number of rights. I want now to look briefly at two specific rights of detained or accused persons that have been altered or enhanced by the new Constitution in ways that may not be immediately obvious. They are the right to silence (s. 13 (1) (a) (ii) and (iii), and s.13 (1) (b), and s. 14 (2) (j)) and the right to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to that evidence (s. 14 (2) (e)).

Right to Silence

The right to silence has always been a very basic right in criminal proceedings. But at section 13 (1) (a) (ii) we see the introduction of the right not just to be informed of the right to silence but at section 13 (1) (a) (iii) the right to be informed of the consequences of not remaining silent. This right is again reinforced at section 14 (2) (j) of the Constitution as a right of an accused person as opposed to a person merely arrested or detained.

This is in sharp contrast to the situation in the UK where intrusions into the right to silence have occurred and it is no longer an absolute right. In the UK you are informed of your right to silence however you are also warned that it may harm your defence if

³ [2011] FJHC 53; HAM238.2010 (17 February 2011)

you fail to mention when questioned something that you later rely on in court. In other words, an adverse inference may be drawn by the court from your silence.

Not so in Fiji. Under the 2013 Constitution, the fundamental right to silence has been declared as such and enhanced. It remains to be seen exactly how the courts will deal with any failure on the part of the State to address the additional right to be informed of the consequences of an accused person waiving his or her right to silence.

Right to Disclosures

The next right I want to look at is at section 14 (2) (e). This is expressed as a right of an accused person “to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to that evidence.” Interestingly, under the 1997 Constitution, the right to receive disclosures was restricted to a right “to be given adequate time and facilities to prepare a defence, including, if he or she requests, a right of access to witness statements.”⁴ Section 14 (2) (e) under the 2013 Constitution widens this right considerably.

Is section 14 (2) (e) a change in the common law position on disclosures or just a restatement of the prosecution’s duty to inform an accused person of the evidence that the State intends to put before the court in order to prove the charge? The framing of the right under section 14 (2) (e) appears to change the emphasis from a duty by the State to one of a right of the accused. Is the right to receive different from the duty to impart? Will section 14 (2) (e) expand the amount of evidence available to the accused or restrict it?

The common law position has traditionally placed a positive duty on the State to provide disclosures to an accused person in order to ensure a fair trial. It is an aspect of the prosecutor’s overall obligation to act fairly, incidental to the accused person’s right to a fair trial.

That duty imposed on the State is a duty owed to the court not to the accused person.⁵ And that duty has been developed over time as is reflected in the Director of Public

⁴ see section 28 (1) (c) Constitution Amendment Act 1997

⁵ Chernov J. in *Cannon & Roschford v Tahche & Ors* [2002] VSCA 84- quoted in *Dip Chand v State* [2012] CAV 0014/2010).

Prosecutions Uniform Guidelines on Disclosure of Prosecution Evidence 1998⁶ and the common law.

In general terms, the prosecution's duty is to make available all relevant material that the State intends to rely on, whether it strengthens or weakens the prosecution case.⁷ It must make available to the defence witnesses that it does not intend to call as well as earlier inconsistent statements made by witnesses the prosecution intends to call.⁸ The duty to disclose is a continuous duty which begins at the time of charge and continues to the end of the trial. Although a fairly wide duty, there are exceptions such as legally privileged documents, internal memorandums or inter-office correspondence⁹, or documents in the possession of third parties¹⁰.

The prosecution's duty to disclose is discretionary and the test is one of relevance based on a sensible appraisal by the prosecution.¹¹ It is dependent on the content and circumstances as perceived by the prosecutor; the facts known to the prosecutor; and in fairness of trial processes. The discretion also extends to the withholding of information and timing of disclosure.¹² Although a fundamental right, the right to have reasonable access to the evidence is also determined at the discretion of the prosecutor.

It will be interesting to see if the courts interpret the positive right to receive under section 14 (2) (e) differently from the traditional common law duty on the prosecution to disclose.

Constitutional Redress Applications

I want to look now at the constitutional redress provisions under section 44 of the Constitution since this is the enforcement section.

⁶ see Practice Directions in *Criminal Procedure Decree* No. 43 of 2009 created after *State v Jamuna Prasad* Crim. App. No. 28 of 1995 consequently upheld by Goundar J. in *Dakuidreketi v FICAC* [2011] Misc. Case. No. 038 of 2011).

⁷ However, the prosecution cannot disclose what it does not have (*Manjula Ali v The State* [2005] FJHC Crim. App. No 23 of 2005).

⁸ The duty even goes so far as to require the prosecution to disclose materials not in themselves admissible, but that may lead by a train of inquiry to admissible evidence: material that is irrelevant and inadmissible may be used to discredit prosecution witnesses in cross examination (derived from the *Melvin* categories in *Takivekata v State* [2008] HAM 39 of 2008).

⁹ For an example of this see *Mahendra Chaudhry v State* [2013] HAM 178 of 2013

¹⁰ *Dakuidreketi v FICAC* [2011] Misc. Case. No. 038 of 2011.

¹¹ While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant. (Sopinka J. in *R v Stinchcombe* [1991] 3 S.C.R. 326 quoted in *Dip Chand* [supra]).

¹² Sopinka J. in *R v Stinchcombe* [1991] 3 S.C.R. 326

As mentioned, most breaches of rights under Chapter 2, the Bill of Rights Chapter of the 2013 Constitution will be dealt with by the trial court and I have already mentioned some of the ways the courts already deal with these breaches in order to ensure a fair trial; with the ultimate power being the stay. That being the case, there will be few times in a criminal matter that recourse will be made to the constitutional redress provisions under section 44 of the 2013 Constitution.

It must be noted however that the Constitutional Redress provisions in the 2013 Constitution do not create any new procedure for addressing contraventions of an individual's rights under the Constitution.

Section 44 (1) simply states that:

If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her ... then that person ... may apply to the High Court for constitutional redress.

And section 44 (2) states that:

The right to make an application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.

It is important to note two points before a constitutional redress application is filed in court.

First, a Constitutional Redress application is a civil action and not a criminal action. This is because the High Court (Constitutional Redress) Rules 1998 continue to apply and those Rules set out the procedure to be followed.

Section 7 of those Rules state:

Except as otherwise provided in these Rules, the jurisdiction and powers conferred on the High Court in respect of applications made by any person ... are to be exercised in accordance with the practice and procedure (including any rules of court) for the time being in force in relation to civil

proceedings in the High Court, with any variations the circumstances require. (emphasis added)

Reference to the 1997 Constitution is a reference to the 2013 Constitution by virtue of the Interpretation Act 1985 and the Rules are made by virtue of the High Court Act 1997. Until those Rules are varied or revoked by the Chief Justice, the High Court (Constitutional Redress) Rules 1998 continue to apply in Fiji in relation to Constitutional Redress applications.

In **Abhay Singh v DPP**¹³ the Court of Appeal made it clear that “an application for constitutional redress even if it pertains to a criminal matter should be filed in the civil jurisdiction of the High Court. It necessarily follows therefore that the High Court Rules 1988 also apply to such an application.”

Part of the reason for Constitutional Redress applications being brought in the civil jurisdiction of the High Court will be to ensure that the Attorney-General is aware of the matter and can intervene if he or she wishes.

Second, section 44 (4) states that:

The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned.
(emphasis added)

In criminal procedure, it will be highly unusual that an alternative remedy will not be available and the Court of Appeal in **Abhay Singh v DPP**¹⁴ made it clear that where an alternative remedy is available then an application for constitutional redress will be refused. In the facts of the Abhay Singh case the Court of Appeal went even further and stated that an attempt to use the Constitutional Redress provisions of the Constitution in circumstances where an alternative remedy was available in the trial court and before the matter had even been tried in the lower court was an abuse of process and

¹³ [2004] FJCA 37; AAU0037.2003S (16 July 2004)

¹⁴ supra

was “subversive of the Rule of Law which the Constitution is designed to uphold and protect”.

Finally, it must be noted that the section 44 Constitutional Redress provisions are only available for the enforcement of contraventions of rights under Chapter two of the Constitution, the Bill of Rights Chapter. The enforcement provisions are not available for issues outside this chapter.

Constitutional Redress applications therefore will be rarely used in relation to criminal procedure matters but nonetheless remain an important protection for an individual where an alternative remedy in the court is unavailable.

I want to now say something about the nexus between individual rights guaranteed in the Constitution and the application of civil procedures for the forfeiture of property under Fiji’s proceeds of crime laws.

Civil Proceeds of Crime Applications versus Individual Rights – the criminal/civil divide

Fiji has one of the most sophisticated proceeds of crime legal frameworks in the Pacific. Recently, Fiji’s laws have been strengthened to keep up with emerging trends in money laundering with the use of tools such as civil and conviction based forfeiture applications in the courts.

The latest tool in the armoury has been a further amendment to the Proceeds of Crime Act to allow for the forfeiture of unexplained wealth. This, as yet untested device allows the Director of Public Prosecutions to make an application in court for the forfeiture of assets that are “unexplained” to the satisfaction of the court. In other words, the burden of proving that wealth is lawfully obtained is on the respondent or the person against whom the order is sought.

For example, an application might be made against the million dollar house and the Rolls Royce car of a middle ranking civil servant on a yearly salary of \$30,000. In court, it would be for him or her to explain that the house and car were obtained from legitimate sources, for example, through an inheritance or from funds remitted from family overseas. If his or her explanation is not satisfactory, the court can then make an

order declaring that the house and car are unexplained wealth and therefore forfeited to the State.

This is particularly helpful since most current laundering trends demonstrate that money launderers commit their crimes overseas and then remit the funds to another country and then integrate them into the financial system by purchasing assets. Removing the benefit or the profit of the crime has a powerful deterrent effect on any potential criminals. It also acts to remedy unjust enrichment of criminals who profit at society's expense.

However, how does the highly desirable goal of taking the profit from criminals and deterring their criminal activities sit with the need to protect and enforce rights enshrined in the 2013 Constitution? At first glance, there are a number of rights that may be potentially breached by the reverse onus provisions of an unexplained wealth declaration application procedure; the right to property, the right to silence, the right to be presumed innocent, the right against self-incrimination, to name a few.

Where you sit on the debate probably depends upon whether you regard civil forfeiture proceedings as essentially criminal in nature as opposed to a purely civil tool that is directed at property rather than the person. So where does the balance lie? On the one hand we have an extremely convenient tool to deter criminals by removing the profit from crime and on the other hand we have the State's ability to confiscate property from a person even though they have not been charged with any criminal offence or even if they have been convicted, or had their charge overturned on appeal. No specific offence needs to be identified in these applications.

Are the reverse onus provisions contrary to the constitutional right to a fair trial under section 15 of the Constitution? Is there a need to make an amendment to these civil applications in order to better protect an individual's rights under the Constitution? Is there a need to "ring-fence" evidence obtained in an unexplained wealth application proceeding from a later criminal proceeding as occurs in some jurisdictions? There is no definite answer and different jurisdictions around the region are divided on the issue.

In Fiji's case, an application for an unexplained wealth declaration can only be made by the DPP. In fact, the section says the DPP may, not must, make an application to the

court. I interpret this to mean that the section intended to give the DPP the right to exercise discretion. In specifying that it is only the DPP that may make an unexplained wealth declaration application a degree of protection for the individual is already inserted into the law. This is because the DPP as a minister of justice or in the role of gatekeeper to the criminal justice system is bound by its own Code of Ethics and the common law in making a decision to bring a matter to court. In other words, it is the discretion granted to the DPP under the law that affords protection to an individual.

For example, it is unlikely that an unexplained wealth declaration application would be made without first considering whether an investigation into criminal wrongdoing has been conducted. If there is evidence of criminal activity that needs further investigation, the matter would be referred to the appropriate authority whether that is FICAC, FRCA or the Police. If a matter has proceeded to court, the usual procedure would be for an application to restrain the property and either a civil based or conviction based order forfeiting the property would be sought.

It is therefore only in highly unusual situations when an application for unexplained wealth is likely to be sought and only when the procedures for a civil or conviction based order are not available.

Conclusion

In conclusion, the 2013 Constitution introduces some new rights for the individual, restates some already existing rights, and modifies still others. The rights and protections outlined in the 2013 Constitution so far as the criminal justice system is concerned are fundamental and will continue to be enforced through the court process to ensure a trial is fair; this being the most fundamental of all criminal justice rights. The 2013 Constitution can give Fijians confidence that basic rights are being protected and will continue to be developed as the criminal jurisprudence in Fiji continues to expand.

I thank you for listening to me and I wish you all the very best for the remainder of the Conference.

Thank you.

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