ADVISORY OPINION ON THE CONSTITUTION (LEGAL AID)

Supreme Court Apia
Maxwell CJ
23 August, 18 October 1988

CONSTITUTION - advisory opinion - free legal assistance - right to counsel of choice.

HELD: If the interests of justice require, Art. 9(4)(c) of the Constitution requests the State to furnish alleged offenders with free legal assistance if he has insufficient means to pay, but not with counsel of his own choice.

CASES CITED:

- Flost v Cohen 88 G.Ct. at 1950-1951, 392 US at 96-97
- Attorney General v Saipa'ia Olomalu and Others (26.8.1982)
- Reference by the Queens Representative (1985) LRC (Const) 56

LEGISLATION:

- Constitution of Western Samoa: Arts 1, 3, 9, 73(3)
- Judicature Ordinance 1961, S 33(1)

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Cur adv vult

By constitutional reference dated 22nd March 1988, the Head of State acting pursuant to article 73(3) of the Constitution and section 33(1) of the Judicature Ordinance 1961 sought to invoke the advisory jurisdiction of the Supreme Court of Western Samoa. For completeness I set out section 73 of the Constitution of the Independent State of Western Samoa.

"73. Jurisdiction of the Supreme Court -

(1) The Supreme Court shall have such original, appellate and revisional jurisdiction as may be provided by Act.

(2) Without prejudice to any appellate or revisional jurisdiction of the Supreme Court, where in any proceedings before another court (except the Court of Appeal) a question arises as to the interpretation or effect of any provision of this Constitution, the Supreme Court may, on the application of any party to the proceedings, determine that question and either dispose of the case or remit it to that other court to be disposed of in accordance with the determination.

(3) The Head of State, acting on the advice of the Prime Minister, may refer to the Supreme Court for its opinion any question as to the interpretation or effect of any provision of this Constitution which has arisen or appears likely to arise, and the Court shall pronounce its opinion on any question so referred to it."

For the same reason I set out section 33 of the Judicature Ordinance although it is sub-section (1) which is relied upon.

"33. Interpretation of provisions of the Constitution -

(1) The Head of State, acting on the advice of the Prime Minister, may refer to the Supreme Court for its opinion any question as to the interpretation or effect of any provision of the Constitution which has arisen or appears likely to arise, and the Court shall pronounce its opinion on any question so referred to it.

(2) Without prejudice to any appellate or revisional jurisdiction of the Supreme Court, where in any proceedings before another court except the Court of Appeal a question arises as to the interpretation or effect of any provision of the Constitution, the Supreme Court may, on the application of any party to the proceedings, determine that question and either dispose of the case or remit it to that other court to be disposed of in accordance with the determination."

The full reference to the Supreme Court is as follows:

"REFERENCE BY THE HEAD OF STATE

WHEREAS the Cabinet of Ministers of Western Samoa has approved the establishment of the Office of Public Defender.

AND WHEREAS conflicting opinions have been expressed as to extent of the State's obligations to provide legal assistance to impecunious persons.

NOW THEREFORE, I, MALIETOA TANUMAFILI II, Head of State, acting on the advice of the Prime Minister and pursuant to Article 73(3) of the Constitution of Western Samoa and section 33 of the Judicature Ordinance, do hereby refer to 122 123 124 123the Supreme Court for its opinion the following questions as to the interpretation and effect of Article 9(4)(c) of the Constitution of Western Samoa: -

1. Does Article 9(4)(c) of the Constitution require the State to furnish every person charged with an offence with free legal assistance if he has insufficient means to pay for legal assistance and the interests of justice so require?

2. If the answer to Question 1 is "Yes", does Article 9(4)(c) of the Constitution require the State to furnish every such person with legal assistance or with legal assistance of his own choosing?

Malietoa Tanumafili II
HEAD OF STATE

DATED at Apia this 22nd day of March 1988

TO The Registrar, Supreme Court, Apia
AND The Secretary, Western Samoa Law Society, Apia"

I must say that I agree with counsel for the Attorney General that the Supreme Court acting in an advisory role must proceed with caution because such procedure departs fundamentally from the traditional concept of the independence of the judiciary.

The United States Supreme Court has clearly rejected the giving of advisory opinions and in The Federal Practice and Procedure by Wright Miller and Cooper the following comment is made as to such opinions.

> "The oldest and most consistent threat in the federal law of justiciability is that Federal Courts will [not] give advisory opinions," page 293 Vol 13

The authors indeed suggest that the reason for this caution is that a general advisory role for the courts would infringe upon the lines of separation drawn by the United States Constitution between the three Departments of Government.

In an American decision, Flost v Cohen 88 G.Ct. at 1950-1951, 392 US at 96-97 Chief Justice Warren said:

> "the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts. When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III. .... However, the rule against advisory opinions also recognizes that such suits often "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests." United States v Fruehauf, 365 US 146, 157 (1961). Consequently the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable resolution through the judicial process."

Traditionally the development of case law in Western Samoa has been according to the English Common Law where a fundamental distinction exists between parliament making the law and the judiciary interpreting it. There are of course many instances of conflict where the courts have gone beyond mere "interpretation" and have descended into the arena of "legislation". I do not propose developing this theme further.

Perhaps the remarks of a great jurist Charles Evans Hughes should not be overlooked when he said in an address in 1907 in reference to the United States constitution:

> "We are under a constitution, but the constitution is what the judges say it is and the judiciary is the safeguard of our liberty and of our property under the constitution."

I am asked here by counsel for the Attorney General to answer the questions in the reference briefly and not to formulate constitutional rules which are broader than necessary to answer the questions before me. This is a view to which I subscribe. Mr Grace provided me with a helpful constitutional

interpretation. He suggests that the questions are misleadingly characterised as "simply matters of legal construction and interpretation." He cites a number of authorities; in particular the Attorney General v Saipa'ia Olomalu and Others, a decision of the Court of Appeal delivered on the 26 August 1982 and Reference by the Queens Representative (1985) LRC (Const) 56.

I accept that Western Samoa is an emerging nation and I accept that what has been the traditional pattern of following "Westminster" principles may have had the edge removed from it and philosophical concepts particularly from the Pacific region may be more appropriate. However, it seems to me that both of the cases cited above should be essentially characterised as political, for example, relating to parliamentary election qualifications.

As I say, I accept basically all of what Mr Grace has submitted, a careful analysis of constitutional interpretation. In spite of what he submits it seems to me, that this issue before me is a much narrower one. Section 9 of the constitution is a wide ranging charter of the rights of an individual to a fair trial. The section provides:

> "9. Right to a fair trial -
>
> (1) In the determination of his civil rights and obligations or of any charge against him for any offence, every person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established under the law. Judgment shall be pronounced in public, but the public and representatives of news service may be excluded from all or part of the trial in the interests of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
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> (2) Nothing in clause (1) shall invalidate any law by reason only that it confers upon a tribunal, Minister or other authority power to determine questions arising in the administration of any law that affect or may affect the civil rights of any person.
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> (3) Every person charged with an offence shall be presumed innocent until proved guilty according to law.
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> (4) Every person charged with an offence has the following minimum rights:

(a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him:

(b) To have adequate time and facilities for the preparation of his defence:

(c) To defend himself in person or through legal assistance of his own choosing and, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require:

(d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him:

(e) To have the free assistance of an interpreter, if any doubt exists as to whether he can understand or speak the language used in court.

(5) No person accused of any offence shall be compelled to be a witness against himself."

It is section 9(4)(c) with which this advisory opinion deals.

In New Zealand the right to representation was largely limited and because there is no constitution, has not been elevated to a constitutional right such as appears to be the case in Western Samoa. "Legal Aid" in its broadest sense both in Australia and New Zealand has been a creature of statute. While there were informal means traditionally adopted to assist indigent person there is now [the] currently in New Zealand [of] the Offenders Legal Aid Act 1954 and there are several systems which operate throughout Australia. It is clear from an examination of the history of provision of free legal assistance to persons in Australia and New Zealand that the problem has been a difficult one suggesting of no easy answer. Mr Grace urges upon me the words said by Lee Dain J, in the judgement of the Supreme Court of Canada in R v Therenes, (p.12) made in the context of construing the language of s.10(b) of the Canadian Charter of Rights and Freedoms which was set out in the judgment in R v Rees:

"In my opinion the premise that the framers of the Charter must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the Charter was enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and

freedoms must use general language which is capable of development and adaptation by the courts. As Dickson J. (as he then was) said in Hunter v Southam Inc. (1984) 2 S.C.R. 145 at 155, 9 C.R.R. 355 at 363, 14 C.C.C. (3d) 97: "The task of expounding a constitution is crucially different from that of construing a statute." ....Although it is clear that in several instances as in the case of s.10, the framers of the Charter adopted the wording of the Bill of Rights it is also clear that the Charter must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection. This results from s.52 of the Constitution Act, 1982, which removes any possible doubt of uncertainty as to the general effect which the Charter is to have by providing that it is part of the supreme law of Canada and that any law that is inconsistent with its provisions is to the extent of such inconsistency of no force and effect, and from s.24 of the Charter, which provides that anyone whose guaranteed rights or freedoms have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. In considering the relationship of a decision under the Canadian Bill of Rights to an issue arising under the Charter, a court cannot, in my respectful opinion, avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the Canadian Bill of Rights because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament.....

Moreover, despite the similarity in the wording of s.2(c) of the Canadian Bill of Rights and s.10 of the Charter, there is difference under the Charter in the scope or content of the right to counsel and in the approach to the qualification or limitation of the right that must, I think, have an influence on the interpretation and application given to it. Section 10(b) of the Charter guarantees not only the right to retain and instruct counsel without delay, as under s.2(c)(ii) of the Canadian Bill of Rights, but also the right to be informed of that right. This, in my opinion, shows the additional importance which the Charter attaches to the right to counsel."

I totally agree with the sentiments but would add a view of my own. A document such as a Constitution[al] or a Charter of Rights

is not calcified into an era, but must be fluent and capable of change to meet current trends and social values. It must be capable of re-evaluation should the need arise and as Wood J, says it must be capable of adaptation.

I must say that the right to defend one-self in person or through counsel, of one's own choosing is axiomatic. This of course relates to the case of an individual who is capable of meeting his own legal expenses. The real question here for answer, however, is the right to free legal assistance. However, I do have some difficulty in assigning a proper meaning to the words of the section "when the interests of justice so require" a proper definition. Broadly speaking subsection (1) speaks of 'any offence' so that the matter does not necessarily rest merely with the strict criminal law. It is clear on the other hand, that whoever has the authority vested to grant free legal assistance has inherently a residual discretion to decline such a grant and this is where of course there is in my view a problem.

I do not think it is for me in this advisory opinion to determine what might be the discretionary guidelines appropriate in granting or refusing legal aid. It may be thought that simple traffic offences do not justify representation or indeed that where the liberty of the subject is not at stake, there may be questions of such legal or national importance that they should be argued. These however, are not questions to be addressed here; the attempts defining the limits of a discretion traverse a difficult path indeed and the more one tries to attempt this, the more I suspect problems arise.

In summary therefore, I must say that I disagree with Mr Grace in his ultimate submission as to state responsibility. Article 1 of the Constitution speaks of an Independent State of Western Samoa. Article 3 defines State:

> "3. In this part, unless the context otherwise requires, "the State" includes the Head of State, Cabinet, Parliament and all local and other authorities established under any law."

The state therefore is as therein set out. The Oxford Reference Dictionary describes state as "an organised community under one government or forming part of the Federal Republic, e.g. United States". Parliament by the same reference is 'the Legislative Assembly of the country' while 'Government' is:

(a) 'the form of organisation of state';

(b) 'group of persons governing the state';

(c) 'the state as an agent."

I propose giving an unqualified 'yes' to the first question. It is the State's responsibility to pay for legal assistance where the offender has insufficient means. There is no compromise to this as suggested by Mr Grace.

It is not for me to speculate as to the best method of providing this service. The issues are far too complex and require much more information than I have at my disposal. There are many alternatives to a legal aid scheme such as a public defenders scheme, a relaxed scheme of representation where members of ones aiga might act as a "MacKenzie" friend, or someone may be given leave by the court.

In this context it appears that there is support for my view in the remarks of Dr. Aikman, the then constitutional adviser. In the constitutional convention debates in 1960 he addressed the convention by referring to the basic principles of criminal law in Commonwealth countries and in the United States. He went on to say that details of how fundamental rights were to be given practical effect was for Parliament to consider at a later date under what he generally referred to as 'legal aid schemes'.

He was in my opinion quite correct. It is for Parliament to determine how the scheme is to be funded and not for this court and it is an area into which I refuse to be lured by the blandishments of Mr Grace's submissions. That does not mean to say that the issue is not complex. Throughout civilised countries where there is a legal aid scheme, the enormous cost of free legal aid, is only now being realised. The operation of any scheme requires enormous good faith on the part of applicants for assistance, administrators of the scheme and on the part of the legal profession.

While declining in this opinion to make any comments about how the scheme should be funded I do say that naturally there is a role which one might play as an individual before a select committee but it is certainly not in this decision.

As I say I therefore hold that the answer to (1) is "yes". This requires me to answer (2) if an individual is provident enough to pay for his own legal representation, he is entitled to a lawyer of his choice. That is a fundamental right. If another is paying, does the same principle apply? For instance, if the state establishes an Offenders Legal Aid system, is an offender entitled to the lawyer of his choice?

I am satisfied that the states obligation is limited to provide defendants with free legal assistance and there is no right of choice reserved to an offender once he enters upon that scheme. Once a defendant embarks under a state funded scheme counsel will be assigned to him and he has no choice in the selection of that counsel. His minimum rights are guaranteed under article 9(4)(c)

and it would be unreasonable to extend that right to counsel of choice. The answer therefore to question (2) is "No". I have expressed some misgivings as to the implementation of the legal aid scheme and I invite Cabinet and Parliament to pursue such a scheme with the utmost caution seeking advice from all sectors of the community. While the right exists, the costs to a developing state could be very great indeed.