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What's in a Name

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What's in a name? That which we call a rose
by any other name would smell just as sweet.

William Shakespeare, *Romeo and Juliet* (1597)

The above quotation eloquently conveys the notion that the naming of things is ultimately inconsequential to their intrinsic qualities. This timeless sentiment finds a parallel in the legal reasoning displayed in the case of *Nawaikula v The Supervisor of Elections*¹ where similar principles, underscored by keen legal acumen, were articulated.

Fiji's former Supervisor of Elections (Supervisor) announced in a widely circulated press statement on 12 February 2020 that the Fiji Elections Office would only accept names as they appeared on a person's birth certificate for voter registration. The Plaintiff, a Member of Parliament, applied to register as a voter using the name "Niko Nawaikula" despite his registered name with the Births, Deaths, and Marriages Registry being "Nikolau Tuiqamea". The Plaintiff had verified his identity using his driving licence with a Registration Official at the Fijian Elections Office.

The Supervisor sent the Plaintiff a notice stating his intention to have the Plaintiff's name removed from the Register of Voters due to the submission of an incorrect name to the Fiji Elections Office. In a written response, the Plaintiff explained that "Niko Nawaikula" was his preferred name as well as his common name, as it was what people called him. Following this, the name "Niko Nawaikula" was removed from the Register of Voters after the Supervisor sent the Plaintiff a written notification expressing his displeasure with his response. The Supervisor subsequently informed the Speaker of Parliament of his decision to strike the Plaintiff's name from the Register of Voters that same day. The Speaker then wrote to the Plaintiff, advising him that his seat as a Member of Parliament had been made vacant in accordance with section 63(1)(d) of the Constitution of the Republic of Fiji.²

The matter was adjudicated in Fiji's Court of Disputed Returns, which ultimately declared the Supervisor's actions null and void, rendering them of no

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¹ *Nawaikula v Supervisor of Elections* [2021] FJHC, 232.

² Constitution of the Republic of Fiji, s 63(1)(d) reads: "The seat of a member of Parliament becomes vacant if the member [...] ceases to have the right to be nominated as a candidate for election to Parliament under s 56". S 56(2)(b) then further reads: "A person may be a candidate for election to Parliament only if the person [...] is registered on the Register of Voters".

legal effect. Consequently, the Plaintiff was reinstated to his parliamentary seat. While this may not be a love story for the ages, this note outlines the two issues that were the subject of deliberation from a Feminist Legal Theory perspective, along with the Fiji First government's response to the Court of Disputed Returns decision and the notable repercussions that followed.

ISSUE

The issue for determination before the court was twofold. First, whether the Supervisor erred in determining that the Plaintiff had provided an incorrect name when registering as a Voter. Second, whether the Supervisor's act of removing the Plaintiff from the Register of Voters was disproportionate, thus breaching the Plaintiff's right under the Fiji Constitution,³ including his right to be registered as a voter and to uphold office upon being elected under section 23 of the Fiji Constitution and sections 3(1),⁴ 4⁵ and 7⁶ of the Electoral (Registration of Voters) Act 2012 (ERVA). In respect of the first issue, section 4 of the ERVA reads as follows: "(2) An application for registration as a voter shall be made to a registration officer and the application shall have recorded the applicant's – (a) full name;"

According to the Supervisor, the phrase "full name" referred exclusively to the name appearing on the birth certificate. He was of the view that a deed poll was necessary if another name was to be used. However, the plaintiff considered the name "Niko Nawaikula" to be his legal name because he earned and maintained it by usage and repute.

The court noted that neither the ERVA nor the Births, Deaths, and Marriages Registration Act of 1975 defined the term "full name". The court decided to explore common law options. Using a line of common law precedent,⁷ the court ultimately decided that a person has the legal right to use a name they adopt through usage and reputation⁸ if it was decided that this was not done with the intent to cheat or mislead any person or organization, regardless of whether the surname is formally registered with the Birth Death and Marriages Registry.⁹

³ Ibid, s 16(1)(a) reads: "Every person has the right to executive or administrative action that is lawful, rational, proportionate, procedurally fair, and reasonably prompt".

⁴ ERVA s 3 states that any person over the age of 18 and is a citizen of Fiji shall have the right to be registered as a voter excluding those with serving a 12-month prison sentence or longer as well as those who have a mental disorder.

⁵ Ibid. at s 4 reads: "(2) An application for registration as a voter shall be made to a registration officer and the application shall have recorded the applicant's – (a) full name; (b) residential address; (c) occupation; (d) date of birth; (e) gender; (f) form of identification acceptable to the registration officer; (g) thumbprints; (h) facial photographs; and (i) such other particulars as a registration officer may require".

⁶ Ibid. at s 7 concerns the confirmation of registration as a voter on the condition of it not been rejected in the first instance.

⁷ *In re T (Orse. H.) (an infant)* [1963] 1 Ch 238, *D v B (otherwise D) (child: surname)* [1979] 1 All ER 92 and *Smith v US Casualty Co* 90 NE 947 (NY 1910).

⁸ In this case, the commonly used name was out of repute and custom and that surname has been used by Plaintiff for most of his life.

⁹ Note 1 above, p. 73 emphasized that changing one's name via a Deed Poll at the Birth, Death and Marriages Registry did not provide the only method by which an individual may alter their name and it does not restrict a person's ability to change their name via usage and reputation. A person has the right to be recognized by the name that they have chosen for themselves based on reputation and usage.

The court also noted that it was evident from section 4(1)(f) of the ERVA that the form of identification needed must be one that the registration officer accepts. The birth certificate was not required to be submitted by law for acceptance and subsequent registration as a voter. It would have to be stated by the legislature if that was the strict necessity.¹⁰ Hence his registration on the basis of his driver's licence was sufficient as it was deemed a good and valid identification at the time of his registration.¹¹

In respect of the second issue, the court while acknowledging that the Supervisor had the power to deregister voters, was the exercise of such power disproportionate in respect of his constitutional right¹² for proportionate treatment? The court found that instead of deregistering him as a voter, the Plaintiff's right to voter registration could have been preserved simply by correcting any mistake or omission in the particulars of the registration of a person as per section 12(1)(a) of the ERVA (in this case possibly amending his name) instead of removing him entirely as a voter pursuant to section 12(1)(j) of the ERVA and on that basis losing his seat in parliament.¹³ The Supervisor exercised the most severe of his powers instead of the lesser option. Given that the Constitution protects fundamental rights, the right should have been maintained.¹⁴

The court ordered the Supervisor to reinstate the Plaintiff's name to the National Register of Voters which would subsequently reinstate him as a Member of Parliament. The outcome of the decision triggered a government response and resulting social discontent.

REACTION OF GOVERNMENT

Shortly after the court decision, the former Attorney General of Fiji, Mr. Sayed Khaiyum, expressed his dissatisfaction with the quality of the legal submissions and arguments presented by both parties during a press conference. He indicated that, in his view, this had resulted in a challenging situation that necessitated intervention.¹⁵ He stated that he had reviewed the submissions and found that none of the legal counsel had specifically addressed the implications of registering with either their birth name or an alternative name.¹⁶ He was of the opinion that to do so, could allow for multiple name registrations which could

¹⁰ Note 1 above, p. 59.

¹¹ Ibid., pp. 60 and 62.

¹² Note 2 above, s 16 reads: "Every person has a right to an executive or administrative action that is lawful, rational, proportionate, procedurally fair, and reasonably prompt".

¹³ Note 2 above, s 56(2)(b) reads: "A person may be a candidate for election to Parliament only if the person ... is registered on the Register of Voters".

¹⁴ The Court relied on common law precedents such as *Prasad v Nacewa* [2002] FLR 35, *Greidinger v Davis* [1993] USCA4 466; (1993) 988 F 2d 1344 (4th Cir), *Reynolds v Sims* [1964] USSC 202; (1964) 377 US 533, 1378 and *Wesberry v Sanders* (1964) 376 US 1; [1964] USSC 3184, S Ct 526; all of which emphasized the prominence of the ability to ultimately vote for a candidate of one's choosing.

¹⁵ A. Waqairadovu, "AG Disappointed with Lawyers in Nawaikula Case", Fiji Broadcasting Corporation News, 27 March 2021 (available online).

¹⁶ Ibid.

effectively bring into disrepute the results of the forthcoming election results if individuals had the ability to register under more than one name.¹⁷

The former Solicitor General of Fiji, who was lead counsel representing the Elections Office, was terminated following the outcome of this case.¹⁸ The EVRA was then amended and referred to as the Electoral (Registration of Voters) (Amendment) Act 2021. The Electoral (Registration of Voters) (Amendment) (No.2) Act 2021 (Amendment Act) was passed on 22 September 2021 and came into effect on 06 October 2021. Section 3 of the Amendment Act stated unequivocally that all eligible voters registering for the first time must disclose their full names as they appear on their birth certificate. A Birth Certificate was to also be included among the supporting documentation for their voter registration and imposed a strict requirement for first-time voters to register with names as per their birth certificate.

The Amendment Act particularly impacted married women, many of whom used their married names on their Voter Identification, which often differed from the names on their birth certificates. Fijians wishing to use their married or adopted names were required to amend their birth certificates accordingly. Consequently, any registered voter who opted to use their married name or alias on their Voter Identification but did not legally change their name would be de-registered as an eligible voter.¹⁹ To support the above, the new Interpretation (Amendment) Act 2021 amended the principal Act²⁰ which defined 'Birth Certificate' as the original or certified copy of a certificate which reflects the entry of the person's current information in the register of births.

There are various instances where governments have been dissatisfied with court decisions and subsequently changed laws. In 2016, the Australian government made changes to the Commonwealth Electoral Act after the High Court invalidated the 2013 Western Australian Senate election due to lost ballot papers. The government aimed to introduce stricter regulations to avoid a recurrence of such incidents.²¹ The Canadian government has occasionally modified legislation in response to rulings made by the Supreme Court. For example, in response to the Supreme Court of Canada's 2013 ruling to invalidate prostitution laws, the government enacted new legislation in 2014 to address the court's concerns.²² Following the Supreme Court's 2014 decision that it was illegal to hold foreign national criminals in detention while they awaited deportation, the United Kingdom's government changed the Immigration Act.

¹⁷ Ibid.

¹⁸ The Supervisor had complained to the Judicial Services Commission that the Solicitor General had not properly consulted him prior to the case being heard. The basis of the former Solicitor General dismissal was a matter for Judicial Review, and it was decided that the former Solicitor General was unlawfully terminated from his position and is currently being appealed in respect of the quantum for his award.

¹⁹ Part of the process to enforce this included a national wide change in voter registration cards. Everyone had to change to a "blue voter card" which replaced the older "green card". In order to change to the "blue voter card" one had to provide the elections officials their birth certificate as a form of verification. This was supplemented with a Birth Certificate Name Check Tool utilized by the Elections Office.

²⁰ Interpretation Act 1967 (Fiji).

²¹ *Day v Australian Electoral Officer for the State of South Australia* (2016) 258 CLR 548.

²² *Canada (Attorney General) v Bedford*, 2013 SCC 72.

The modifications attempted to address the concerns raised by the court while preserving the government's ability to hold foreign national criminals in order to deport them.²³ In India, the government has occasionally changed legislation in response to court rulings. For example, in 2014, following the Supreme Court's cancellation of one hundred and twenty-two 2G spectrum licenses and criticism of the government's spectrum allocation policies, the government modified the Telecom Regulatory Authority of India Act.²⁴ The Supreme Court's 2013 decision that a complete ban on prisoner voting violated the Bill of Rights Act caused the New Zealand government to amend its country's voting laws. To limit inmates' ability to vote, the government passed the Electoral (Disqualification of Sentenced inmates) Amendment Act 2010.²⁵

FEMINIST LEGAL THEORY

In the context of the freedom to choose one's name, feminist legal theory critically examines the intricate relationship between gender, identity, and legal rights. This theoretical framework focuses on how legal structures and societal norms influence the fundamental autonomy associated with name selection, particularly in relation to gender identity and expression. Feminist legal scholars argue that patriarchal norms have historically influenced traditional legal frameworks, often constraining individuals' ability to assert control over their identities, including their names. This approach advocates the enhancement of equal rights and opportunities for all individuals, irrespective of gender, by scrutinizing and challenging legal systems that perpetuate gender-based inequalities.²⁶

Feminist legal scholars advocate for the recognition and protection of an individual's self-identified name in relation to the right to select a chosen name, independent of prevailing gender norms or stereotypes. They may propose legislation aimed at eliminating unnecessary barriers to the name change process and challenge any gendered assumptions embedded within the legal framework governing name changes.²⁷ From a feminist perspective, the courts recognition of the common law principle concerning "usage and reputation" is viewed as a significant victory for feminist legal theorists advocating for the freedom to choose one's name.

However, the legislative amendments provoked a backlash, undermining this theoretical approach. It was argued that the amendments were discriminatory towards women, particularly given that a significant majority of women in Fiji adopt their spouses' surnames upon marriage.²⁸ The new requirements imposed additional financial and time burdens on women. They were compelled to cover costs related to transportation, childcare, and waiting in line, as well as expenses

²³ *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57.

²⁴ *2G Spectrum case* (2012) 9 SCC 274.

²⁵ *Taylor v Attorney-General* [2017] NZSC 104.

²⁶ F. Martha, *The Autonomy Myth: A Theory of Dependency* (2004), p. 143.

²⁷ C. A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", *Signs: Journal of Women Culture in Society*, VIII (1983), p. 639 (available online).

²⁸ Fiji Women's Rights Movement, "Women Challenge Gender Discriminatory Name Change Laws", Fiji Women's Rights Movement, 30 December 2023 (available online).

for obtaining revised certificates and verifying their voter identification details. The primary concern was that women who did not fulfil these requirements would jeopardize their right to vote. Ultimately seven women supported by the Fiji Women's Rights Movement and the Fiji Women's Crisis Centre had filed a constitutional redress case challenging such legislative amendments.²⁹

REVERSAL OF THE LAW

Prime Minister Sitiveni Rabuka promised to amend the Amendment Act to allow women to use their preferred name when the new coalition government took office in December 2022. Speaking during a nationwide gathering commemorating the government's first 100 days in office, Prime Minister Rabuka stated that many women were upset and perplexed to learn that in order to register to vote, they had to use the names from their birth certificates.³⁰ After a national wide consultation exercise, the new government realized that the name change requirement caused a sense of loss of identity and a feeling of disconnection from their family history.³¹

Cabinet then prepared two bills to repeal the changes made by the previous government that was ultimately presented to parliament and approved on the 14 July 2023. The Former Minister for Women, Honourable Lynda Tabuya, during the Parliamentary debate of the bills stated that the previous legislation was intended to deny women the right to vote: "It was a law that had disrespected the High Court's decision-making process and affected Niko Nawaikula to the extent that he was temporarily removed from Parliament". She went on to state that while the law intended to deny women the right to vote, it also made nearly 100,000 women choose between their names. She referred to the previous government's legislative amendments as "disrespectful",³² "stupid",³³ and "arrogant".³⁴

CONCLUSION

An individual acquires their original name when it is registered at birth. A name on a birth certificate does not effectively serve its purpose if a married name is used instead. The birth certificate specifies the registration of birth and serves as evidence of a person's details at the time of birth. The option to use a married name comes into effect upon marriage.

The case of *Nawaikula v The Supervisor of Elections*, which centered on a dispute over a name, transcended its apparent simplicity to become a nuanced exploration of legal principles, government response, and societal repercussions.

²⁹ Ibid.

³⁰ V. Narayan, "Govt is Engaged on Changing the Law so Women Can Use their Name of Preference", Fiji Village, 4 April 2023 (available online).

³¹ T. V. Mai, "Cabinet Endorses Repeal of Name-Change Policy Bills for Tabling in Parliament", MaiTV Fiji, 11 June 2023 (available online).

³² R. Kumar, "Parliament Passes Interpretation Act", *The Fiji Times*, 15 July 2023 (available online).

³³ Ibid.

³⁴ Ibid.

The Court of Disputed Returns, guided by a qualitative analysis rooted in feminist legal theory, affirmed the right of individuals to use names adopted through usage and reputation, thereby safeguarding the autonomy inherent in the choice of one's name.

However, the aftermath of the court decision saw the exercise of legislative power by the Fiji First government, driven by dissatisfaction with the ruling. The subsequent amendments, mandating the use of names as per birth certificates, triggered discontent, particularly among married women compelled to adopt their husbands' names. This legislative change, echoing a global pattern of governments modifying laws in response to court decisions, provoked a significant social reaction.

Feminist legal theory, with its focus on dismantling gender-based disparities, found itself both validated and challenged. The acknowledgment of the common law position on "usage and reputation" aligned with feminist principles, yet the legislative amendments, perceived as discriminatory, ignited resistance. The burden placed on women to conform to strict registration requirements prompted constitutional challenges, underscoring the intersectionality of legal and gender issues.

The tide turned with the ascendance of a new coalition government in 2023. Recognizing the concerns raised by women and the broader implications of the legislation, the government undertook a reversal. Prime Minister Sitiveni Rabuka, in a decisive move, committed to repealing the restrictive changes. The subsequent parliamentary approval in July 2023 marked the restoration of the right of Fijian women to use their preferred names, bringing an end to a chapter marked by legal battles, governmental shifts, and a resilient pursuit of gender equality.

The case of *Nawaikula v The Supervisor of Election* serves as a testament to the dynamic interplay between legal decisions, legislative actions, and societal responses. It reflects the enduring importance of legal principles rooted in autonomy and equality, especially regarding names and identity. As the legislative pendulum swung back, the resilience of feminist legal theory and the collective voice of those affected underscored the ongoing journey toward a legal landscape that embraces diversity, equity, and individual agency. While recognizing that multiple identities can pose challenges, relevant public and private authorities must now carefully balance the threat of misrepresentation with the issue of disenfranchisement.

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