The reception of Judges' Rules and the right to counsel in the Constitution of Western Samoa

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Introduction

This paper examines the development of Judges' Rules in (Western) Samoa and its role in light of the Constitution, particularly Article 6(3). A critical assessment is made that for over 30 years, the Judges' Rules have been applied exclusively to Police investigatory and prosecutorial work without reference being made to the constitutional safeguard of the right to counsel guaranteed by Article 6(3), or other such constitutional pre-trial rights as, for example, the right against self incrimination, secured under Article 9(5) of the Constitution. In the end, it is arguable that cases might have received different results or the law might have developed differently if Judges' Rules were subjected to the strict scrutiny and review of the Constitution.

Reception of Judges' Rules into Samoa

Judges' Rules, of course, are not a substantive aspect of the common law, but are rules of practice of the criminal law, formulated and developed to assist the Police in their investigation of crimes and offences.[1] That notwithstanding, Judges' Rules have substantially become law in their own right, so that police failure to comply with them may in certain circumstances

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render inadmissible evidence of statements or confessions of an accused person, subject to the Court's discretion on the exercise of the test of voluntariness.[2]

No specific statute, regulation, bylaw etc. authorises the reception of Judges' Rules into the law of Western Samoa. Indeed, when the common law was first received, there were no Judges' Rules.[3]

Historically, the common law was received initially into Western Samoa by authority of the Samoa Act 1921 (the Act), which was an Act of the New Zealand General Assembly in Parliament 'to make Provisions for the Government of Western Samoa'.[4] At the time, Western Samoa was a Trusteeship Territory of the United Kingdom, which under the Covenant of the League of Nations[5] was administered by New Zealand 'for [the] peace, order and good government' of Western Samoa. Moreover, New Zealand was conferred full mandatory power of 'administration and legislation' to administer Western Samoa as 'an integral portion of itself'.[6] Part II of the Act, section 46(1), confers the legislative function of the territory to an Administrator, 'acting with the advice and consent of the Legislative Council of Western Samoa'. The exercise of that lawmaking power, however, must not be 'repugnant to this Act . . . or to any other Act of the Parliament of New Zealand or of the United Kingdom . . . '[7] The Legislative Council consisted of eight Samoan members as specified in section 48 of the Act.

Up until the adoption of the Constitution in 1962, no laws had been passed in the exercise of these legislative functions. Indeed, in the area of criminal law the Act in itself provides for a comprehensive criminal code, its Part V being supported by Parts III and IV covering the Courts system, Part VI dealing with Criminal Procedure and Part VII providing for the Law of Evidence applicable in all litigation proceedings. In a nutshell, the criminal law imposed onto Western Samoa was a legislative adoption of the common law as applied in New Zealand, with clear express provisions that '[t]he criminal jurisdiction of the Supreme Court of New Zealand shall extend to offences committed in Samoa against the laws of the Territory, and may be exercised in New Zealand in respect of such offences in the same manner as if they were indictable offences committed in New Zealand'.[8] By section 349(1) it was made clear that '[t]he law of England as existing on the 14th day of January 1840 (being the year in which the colony of New Zealand was established) shall be in force in Western Samoa . . . Provided that no

Act of the Parliament of England or of Great Britain or of the United Kingdom passed before the said 14th day of January 1840 shall be in force in Western Samoa, unless and except so far as it is in force in New Zealand . . .' and ' . . . all rules of common law or equity relating to the jurisdiction of the superior Courts of common law or of equity in England shall be construed as relating to the jurisdiction of the High Court of Western Samoa'.[9]

The law of England existing as of 1840 did not have Judges' Rules; nor was it precisely certain in 1921—the year the Samoa Act was passed—what that law was, or even what that law was as '. . . in force in New Zealand' at that time. At best, the Samoa Act pertained to an administration closely associated with colonial control, not conducive to the due adoption and development of the laws of Western Samoa. Indeed, the New Zealand administration of Western Samoa [under the Covenant of the League of Nations] relied on the imposition of New Zealand laws as that government sees fit, under the guise of the 'law of England in force in New Zealand' for the 'peace, order and good government of Western Samoa'. As such there were problems.

In *Inspector of Police v Tagaloa & Fuatage* [1921–1929] WSLR 18, the issue concerned the validity of the New Zealand Parliament sitting in New Zealand and making laws extra-territorially for Western Samoa. The case involved banishment under clause 3 of the Samoan Offenders Ordinance 1922 and the defence moved to dismiss the charge on the ground, inter alia, that the Ordinance is ultra vires as being repugnant to the laws of England as adopted into Western Samoa under s349 of the Samoa Act. As well, it was argued that clause 3 created a species of penalty not contemplated by law.[10] These problems were highlighted by eminent counsel for the appellants, Sir John Findlay KC.[11] But the relevance here of *Tagaloa & Fuataga* lies in the uncertain and dogmatic approach with which the common law was made to apply in Western Samoa: in much the same way the Judges' Rules, as shall be seen, were made to apply, without consideration being given to the vastly different social, economic and cultural circumstances of the Samoan political and legal system, as manifested in the particular circumstances of this case.[12] In view of the political nature of the offence of banishment and with what arguably might have been the only justification for it because of the colonial unrest at the time, the New Zealand Supreme Court took a political view of the case and

decided it without regard to the real legal issues in dispute. In its judgment, Sim ACJ, writing for the majority, held that the banishment law, the Samoan Offenders Ordinance 1922, was not repugnant to the Samoa Act or to 'any laws of England' and was validly made by the Legislative Council of Western Samoa. Indeed, banishment was enacted 'not for the purpose of punishing a crime . . . but as a political precaution, and it gives a power which is to be exercised . . . by the political department, the Executive [for the purpose of] prevention' (at 31). In that regard, '[t]he very object of the legislation might be defeated if before exercising the power [to banish] the Administrator was bound to give notice to the person concerned and to hold something in the nature of a formal inquiry' (at 31).

It is difficult to imagine such a decision could be maintained today, or even to rationalise it with the common law notion of a fair trial. But the point must be made that at that time—1927—the New Zealand Full Supreme Court, exercising jurisdiction over Western Samoa, seemed not to have wondered whether the appellants had had a fair trial, and if so, whether any statements they made breached the Judges' Rules. And it seemed not to matter that '[t]he [appellants] may not have been guilty of a crime of any kind, but [that it was] necessary in the interests of peace, order and good government that [they] should [be banished]' (at 31). Inevitably, the question arises: what peace, what order, what good government is achieved by ignoring the basic human rights of the very people that the government professes to govern? Arguably, the better judgment was the dissenting view of Ostler J, who said:

> In my opinion, it cannot be doubted that these provisions are not only preventive, but also punitive. The Administrator is given power, as an executive act, *without any trial and without the formality of hearing the party proceeded against*, to order his banishment . . . for any period of time extending even to the life of the person against whom the order is made. The Samoan . . . may be banished to a place where he is held in no esteem. I find it difficult to see how it can be argued that *such treatment is merely preventive and not punitive. Even in a civilised country the banishment of a subject from his home . . . to some remote part of the country for an indefinite term could not but be felt to be a heavy punishment*. (at 34, emphasis added)

A year later in *Braisby v Tamasese* [1921–1929] WSLR 48 at 49, the High Court took the same view as the majority in *Tagaloa & Fuataga*, and held that an arresting officer or constable need not show the warrant of arrest to an accused person or to acquaint the accused in any other way as to the warrant's purpose or authority, but that under the common law, it was sufficient that the constable had the warrant with him should he be asked for it.

That uncertainty in the adoption and reception of the law continued and in the first case that applied the Judges' Rules, reliance was placed on Rule 7. In *Police v Samasoni Apa* [1950–1959] WSLR 106, a decision of the High Court of Western Samoa, the defendant was charged with theft. He was held in custody and cross-examined intensively by the Police. Evidence showed the defendant was in great mental distress and he gave conflicting written statements. It was argued in his defence that those statements were obtained in breach of Rule 7 of the Judges' Rules.[13] Alternatively, and even if made not in breach of the Judges' Rules, the Court has a discretion not to admit them if these statements were not made voluntarily. In the Court's judgment, Marsack CJ considered that the surrounding circumstances bearing upon the making of the statement are important, and undertook a survey of English cases that considered Judges' Rules. These cases included *R v Voisin* (1918) 87 LJKB 574, a decision of the English Court of Criminal Appeal, which explained the origin and purpose of the Judges' Rules; and *Ibrahim v R* [1914] AC 599, which looked at the question of admissibility, and also considered the weight to be attached to a confession if admissibility is granted. In *Voisin* it was explained:

> In 1912, the Judges, at the request of the Home Secretary, drew up some rules as guides for police officers. These rules have not the force of law. They are administrative directions the observance of which the Police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the Judge presiding at trial. (at 109, citing *Voisin* at 577)

And in *Ibrahim* the House of Lords held:

> It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. (cited at 109–110)

And on the question of weight, Lord Sumner said:

> It is to be observed that logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight. (cited at 111)

Applying these authorities, the Chief Justice held 'that the trial judge has a discretion to admit the statement of the accused, notwithstanding the violation of Rule No 7, if in his opinion that statement was made voluntarily' (at 110), and after 'careful consideration of the evidence' decided he was in 'doubt as to whether the statement was in fact free and voluntary' (at 111). Accordingly, all charges were dismissed.

One of the major problems in this case—and indeed on the whole general question of the reception of Judges' Rules—is that the Courts have failed to detail the suitability in Western Samoa of Judges' Rules prescribed in England for English police work. No attempt was made to address that issue or to evaluate the very different circumstances for which Judges' Rules were formulated and the fact that citation of them was in support of fundamentally English cases. That problem is clearly recognisable in *Tolovaa v Police* (No 2) [1970–1979] WSLR 105, where the Court of Appeal, in a weak and meek effort, purported to replace the English common law doctrine of the reasonable man with a Samoan standard, simply by inserting the adjective 'Samoan' into the doctrine and holding: 'We accept . . . that the proper test is that laid down in *Kwaku Mensah v The King* [1946] AC 83, which test made it clear that the test may be modified to one of a reasonable man in the social, racial and cultural context

of the accused, or a reasonable Samoan . . . ' (at 110). But what that social, racial and cultural context is was not explained nor was evidence adduced to effect modification to that test. In short, it was a case of planting English oaks on Samoan soil.[14] In substance, there is a gap in the law.

Another factor latent here and widening that gap, thereby rendering questionable the reception of Judges' Rules, is the ultimate failure even to have regard to the democratic foundation of the common law as something distinctly at variance with cultural law, customs and traditions that are inherently Samoan in their own right.[15] Samoans have such tremendous respect for law and order that confessions and incriminating evidence are almost invariably forthcoming without even the simplest of Police inquiries and investigations.[16] If justice is to be achieved, the true nature of Samoan cultural democracy[17] must be fully considered and evaluated; and its own impact on the common law ascertained and assessed. In *Opeloge Olo v Police*, addendum, unreported decision of the Supreme Court (1982), this point arose in respect of the issue of stare decisis. The question before the Court was: 'What sources of the common law are available to draw upon in order to apply the English common law? Is it that as laid down by English Courts only? If no direct authority . . . exists in English reported decisions, can the Court look elsewhere for guidance? What is the position where different courts declaring the common law differ in their views?' St John CJ in answering those questions held:

> In my view, the adjective English is descriptive of a system and body of law which originated in England and is not descriptive of the courts which declare such law. Many former British colonies, on gaining independence or some measure of it, have adopted the English common law, e.g. Australia and New Zealand. The superior courts of those countries have on occasion declared the common law differently to English courts, see for example *Australian Consolidated Press Ltd v Chen* [1969] 1 AC 550; 117 CLR 221. Such differences of views as to what the common law should be declared to be are consistent with the very nature of the common law and its evolution. In some areas of the common law, it has ceased to develop in England. Statute has replaced it. It would seem to be a distortion of constitutional interpretation to hold that atrophied areas of the law be

> preferred to those which have continued to fulfil the essential characteristic of the common law system—adaptation to changing conditions of society.
>
> The English common law as applied to Western Samoa is as declared by its [own] courts. The only decisions absolutely binding on this Supreme Court are those of the Court of Appeal of Western Samoa. Decisions in superior courts of other countries are persuasive only. But obviously where courts of high reputation agree on the common law to be applied in particular circumstances, only a very bold judge would refuse to apply the same law in Western Samoa. In the case where inconsistent declarations have been made by courts of high reputation, it is for this court to determine which declaration is more sound as being consistent with established principles.

In *Tumanuvao (Melesala) v Police* [1970–1979] WSLR 192, the defendant was charged in the Magistrate's Court with arson in connection with a dwelling house. Relying on *Samasoni Apa's* case, the Magistrate found the defendant guilty. The defendant appealed, arguing amongst other things that the learned Magistrate was wrong in admitting into evidence a statement he made while detained or held in 'custody' by the Police for about 28 hours. It was raised that there was breach of the Judges' Rules, as well as that the Magistrate confused the issue of admissibility of the statement with that of the weight to be attached to it should it be admitted into evidence. Nicholson CJ rejected this argument, saying it was clear that reference to *Samasoni Apa v Police* by the learned Magistrate showed '[he] was fully conscious of the principles to be applied in considering the admissibility of the Police statement and that by inference he must have considered and rejected the argument based upon a breach of the Judges' Rules' (at 194).

No explanation is provided as to which Rules were breached, or that the caution as required in Rules 2–5 was given before the issue of admissibility was determined. But that failure to caution was the deciding factor in *Police v Pula (Tavita)* [1970–1979] WSLR 181, a case stated for the Supreme Court, heard 4 days after *Tumanuvao's* case was decided. In *Pula's* case, the defendant was charged with three charges under the Road Traffic Ordinance 1960. The facts were that the defendant made a U-turn on Main

Beach Road, and crossed onto the footpath, striking a pedestrian, Mr Belzer, causing him injury. The defendant made a statement to the Police, but was not cautioned as required under the Judges' Rules. In the lower court hearing, the learned Magistrate held that failure to administer caution breached the Judges' Rules, and accordingly ruled the statement inadmissible. However, in the Supreme Court, Nicholson CJ found that 'there is no evidence that the conditions under which the [defendant] was being interrogated were such as to make a caution necessary' (at 184) and that the Court could and should have exercised its discretion to admit that statement, having regard to all the relevant circumstances in the case. Accordingly, the learned Magistrate was wrong.

Thus far, the cases show reluctance to exclude confessional evidence where there is established a breach of Judges' Rules. At best, any breach raises the next question, that of the exercise of judiciary discretion whether or not to admit, if the evidence was voluntarily made. Even after the adoption of the Constitution, more than 35 years ago now, the Supreme Court and the Court of Appeal have continued to apply that test, without regard to the fundamental guarantee of the right to counsel secured under Article 6(3) of the Constitution.

The right to counsel under the Constitution

Although it is over 70 years since the application of the common law into Western Samoa, 85 years since formulation of the Judges' Rules in 1912 and 40 since its reception and first application in *Samasoni Apa* in 1958, very little is shown in the literature establishing a clear and strong process in favour of the rights of an accused person in particular, or human rights generally, in Western Samoa. Even with the adoption in 1962 of the Constitution, in which Article 6(3) provides expressly for a more fundamental constitutional safeguard for the Police to follow and for the protection of a defendant, there is little to show for such protection. Indeed, as noted by St John CJ in *Fatupaito v Barry Johns et al.,* unreported decision, SC October 1980: 'Judicial interpretation of the Constitution has to date been minimal . . . ' (at 5). One reason for this lies in the training of local lawyers, all of whom graduated in law from New Zealand and Australia. Another mentioned by St John CJ is that '[his] predecessors in office have not had

raised before them issues which demand some formulation of general principles of [constitutional] approach . . .' (at 5). And yet another reason lies in the expertise and experience of learned judges who had presided in our Courts. All were and are from the same common law traditions that in the beginning invariably considered the Constitution as no more than just another act of Parliament importing into Western Samoa that English common law. For all intents and purposes, that Constitution is subservient to the supremacy of Parliament.[18] Indeed in *Police v Siaki Tuala* [1960–1969] WSLR 239, the Supreme Court erroneously took the view that Parliament enacted the Constitution.

In following that common law tradition, it was ignored that the Constitution is a document of first and last resort establishing a first foundation to the Samoan legal system. That foundation of the autochthonous Constitution homegrown[19] calls for a 'home' approach that not only appreciates the dynamic application of the law with clear emphasis on its Samoan character and content, but one that equally pays fundamental regard to civil and human rights. That approach began with the term of office as Chief Justice of the Australian Federal Court judge R J B St John in 1980. In *Fatupaito's* case (supra),[20] St John CJ identified that the Constitution is based on the doctrine of separation of powers, with its strong emphasis on fundamental rights. That '[t]he [F]ramers of the Constitution of Western Samoa had regard to the American experience, both as to content of that constitution and its judicial [construction] is an irresistible conclusion to be drawn from the very presence of the provisions, expressed in general terms, regarding fundamental rights . . . ' And in *Saipaia Olomalu et al. v Attorney General* unreported decision SC 1982, St John CJ confirmed that constitutional approach and cited approval of the judgment of the Privy Council in *Minister of Home Affairs v Fisher* [1980] AC 319, where Lord Wilberforce delivering the judgment of the Privy Council spoke of a constitutional instrument such as the Bermuda one as:

> sui generis, calling for principles of interpretation of its own . . . Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a

> recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

Police v Piula (Va'asili) [1980–1993] WSLR 555 is the first case in which the right to counsel was raised and argued; but its consideration by the Court of Appeal was disappointing to say the least. A year later in *Attorney General v U* [1994] 1 HRNZ 286 at 291, a differently constituted Court of Appeal remarked:

> In this context [of prima facie exclusion of confessional evidence] we should mention that an obiter passage in the judgment in *Piula* [supra] is perhaps open to the interpretation that, although the onus is on the prosecution to persuade the Judge to admit a statement obtained in breach of the accused's constitutional rights, the matter is to be approached simply as if the evidence had been obtained by any form of illegal means. Illegality in breach of the Constitution or a Bill of Rights is, however, especially serious; this is the reason for the prima facie exclusion; and in our respectful opinion it would not be right to suggest that the judge has a discretion which could be used so as to whittle away the constitutional protection. It may well be that the Court in *Piula* did not intend to suggest otherwise.

Piula's case concerned four defendants jointly charged with murder. Three pleaded guilty to the reduced charge of manslaughter and the fourth defendant, Piula, elected to go to trial as originally charged. In the Supreme Court, the three defendants who had pleaded guilty to manslaughter each testified that he did not know or see what Piula did. The prosecution then sought to rely on Piula's alleged confession obtained while he was held in custody. The defence objected, arguing that Piula's confession was obtained in violation of Article 6(3) of the Constitution; that at all material times, in particular during and while under custodial holding, Piula was not advised of his right to counsel of his own choice without delay; and that no reasonable opportunity was given to him to consult with a lawyer. Moreover, since Piula did not waive that constitutional right, it follows that his confession was unlawfully obtained.

Article 6 of the Constitution provides:

> **(6) Right to Personal Liberty**
>
> (1) . . .
>
> (2) . . .
>
> (3) Every person who is arrested shall be informed promptly of the grounds of his arrest and of any charge against him and shall be allowed to consult a legal practitioner of his own choice without delay.

In addition, there is also section 9(1) of the Criminal Procedure Act 1972, which provides:

> **9 Duty of persons arresting — (1)**
>
> It is the duty of every one arresting any other person to comply with the provisions of Clauses (3) and (4) of Article 6 of the Constitution (as that Clause (4) was substituted by section 2 of the Constitution Amendment Act 1965), relating to promptly informing the person arrested of the grounds of his arrest, and of any charge against him, and allowing him to consult a legal practitioner of his own choice without delay, and producing him before a remanding officer within 24 hours (excluding the time of any necessary journey).

For the prosecution, it was argued there was no breach of the Judges' Rules and the confession was obtained voluntarily. Counsel for the Attorney General who acted for the Police did not refer to Article 6(3). In his judgment, Sapolu CJ accepted the defence submissions and held accordingly. Piula was acquitted. The Attorney General then appealed by way of case stated, seeking inter alia a ruling on the following questions:

> Q.2. If the Police obtains a cautioned statement from a person who is arrested without allowing that person to consult a legal practitioner of his own choice without delay as required by Article 6(3) of the Constitution and that person has not waived his right to consult a legal practitioner, is the cautioned statement automatically inadmissible or does the Court have a discretion to exclude it or not, if it is otherwise found to have been voluntarily obtained? (at 560)

And:

> Q. 3. Was the cautioned statement of Vaasili Piula correctly held to be inadmissible as having been obtained in violation of his right to be allowed to consult a legal practitioner of his own choice without delay? (at 560)

In answering these questions, the Court of Appeal,[21] while recognising that the Constitution 'is . . . an organic document . . . the provisions of which transcend the enactments of the Samoan legislature' (at 557), declared Article 6(3) to be just another legislative provision whose 'scope and intendment is a matter of statutory construction' (at 558). This erroneous characterisation of Article 6(3) is further relied on as: 'We have, however, been referred to no reported case in which such a provision as s6(3) has by a process of statutory construction been expanded to require arresting officers to actively assist and facilitate an arrested person to communicate with a legal practitioner . . . ' (at 559). Accordingly, it was held, question 2, that despite a breach of Article 6(3), there is still a judicial discretion to exclude or not a confessional statement if voluntarily obtained, and question 3, that Piula's confession was wrongly held not to be admitted into evidence.

One of the basic errors in the judgment here is the Court's declaration that '[Piula] was informed in this case [that he had the right to counsel] and we understand it to be a standard practice in Samoa which in our view should continue' (at 558). It is not known how or by whose authority the Court of Appeal made this finding. But as mentioned herein, this is the first time that this constitutional safeguard was raised and argued. The Police had not, at any time prior to *Piula's* case, ever used or relied on Article 6(3) in the course of their investigations or prosecutorial work. The Attorney General counsel in his submissions did not even anticipate or mention Article 6(3). His submissions dealt fully with caution and voluntariness as part of the Judges' Rules. Speaking and writing as a practitioner in Western Samoa since 1980 and having regularly appeared in Supreme Court litigations, this writer can attest that Article 6(3) and section 9 of the Criminal Procedure Act 1972 were not raised after the adoption of the Constitution until *Piula's* case in 1993. Indeed, the review of Judges' Rules in this paper shows the right to counsel was not the 'standard practice' in Western Samoa.

Therefore, this portion of the Court of Appeal's decision is not true. It follows the judgment lacks legitimacy and credibility that puts in doubt its binding authority as the highest appellate Court in the country.

Another mistake evident in the Court's decision is its characterisation, though not expressly stated, of Article 6(3) as another statutory section to be interpreted. With respect, constitutional construction is fundamentally different from statutory interpretation.[22] That difference is made more emphatic with the Constitution being the supreme law.[23] In *Ailafo Ainuu v Police* [1960–1969] WSLR 203, this mistake was also evident where the Supreme Court equated Article 9(5), relating to self incriminating evidence, with the common law rule that an accused person is not compellable to be a witness against himself, subject to his own discretion whether or not to give evidence (at 208).

Overall, the better view, or at least one that appreciates the fundamental guarantee of the constitutional safeguard, is that of Sapolu CJ in *Piula's* case in the Supreme Court. He held that all other relevant factors remaining constant, a breach of Article 6(3) activates prima facie exclusion of that confessional evidence. No judicial discretion fettered that safeguard unless there are clear exceptional reasons proven to the Court.

In the wake of *Piula's* case, there is reliance now on the pre-trial defence of right to counsel, though many cases are not reported. Indeed, that reliance seemed to put on hold the protection once endured and delivered on application of the Judges' Rules. In *R v Butcher* [1992] 2 NZLR 257 at 266, in one of the early judgments on its Bill of Rights, the New Zealand Court of Appeal held that '. . . the Judges' Rules of 1912 and 1930 [are] now in their literal form largely obsolescent in New Zealand. It is important not to confuse . . . the New Zealand Bill of Rights and the Judges' Rules.'

That Judges' Rules are now rarely relied on and Article 6(3) is the rule now applied is confirmed in *Attorney General v U* [1994] 1 HRNZ 286, a decision of the Court of Appeal of Western Samoa.[24] In that case the defendant was charged with murder following a fight with the victim. The latter received two serious stab wounds. He died a day later in hospital. In de facto arrest, at about 3 p.m. on Sunday 1 August, the defendant orally admitted that he stabbed the victim. The prosecution did not seek to admit this oral testimony, because of the de facto arrest and since no warning of

right to counsel had been given to the defendant. At trial and during the voire dire, the defendant testified that he had made similar oral admissions to two police officers in Savaii on 6 August. After these oral admissions, a written statement was obtained. Early in the statement, there is reference to a solicitor, which at the hearing was evident as follows: 'I have been informed that I have a right to contact a solicitor to represent me and I have been shown a list of solicitors and their telephone numbers, but I think there will be another time for it'. The defence argued that to advise the defendant as recorded was ambiguous, and that it could be interpreted 'to mean he had a right to contact a lawyer but at some other time'. Moreover, on a Sunday, and in Savaii, the solicitors' numbers given to the defendant were numbers for Apia offices, which were of course all closed. In the Supreme Court, these submissions were accepted and the case was dismissed. The Attorney General appealed. In rejecting these same arguments, the Court of Appeal held that while the advice could be ambiguous, the defendant had not said in his evidence at the voire dire that he was confused, or that he did not understand, or was misled by that advice. Indeed, '[t]he more obvious inference is that [the defendant] was willing to make a statement without legal advice at that stage' (at 287). As to the guarantee procured by Article 6(3), Cooke P delivering the judgment of the Court of Appeal said:

> Plainly the information, to be of value and to give effect to the constitutional provision should be conveyed before any statement is taken. And it should be made clear that, if the person arrested wishes to consult a lawyer, any questioning will be deferred for a reasonable time to enable the person to obtain legal advice. For, if the right to counsel is to be effective, the police must refrain from eliciting evidence until the accused has had a reasonable opportunity to consult counsel. *R v Manniner* (1987) 34 CCC (3rd) 385; [1988] 41 DLR (4th) 301; *R v Taylor* (1993) 1 NZLR 647. (at 287)

On the question of time to consult a lawyer, it was held: 'What is a reasonable time will be a question of fact depending on all the circumstances. In this case, it might have been difficult to contact a lawyer on the Sunday afternoon, but there was no particular urgency and no reason why the interview could not have been delayed until Monday' (at 288).

And as to the nature and content of the advice itself:

> No particular words are required to be used by the Police Officer, as long as what is said brings home to the particular accused the substance of his right to legal advice without delay. It is necessary that the accused should understand his right. If the officer reasonably considered that what he said did result in an understanding of the right by the particular accused, the Court will ordinarily infer in the absence of evidence to the contrary that the accused did understand his right. [Ultimately] the question is subjective . . . Whether . . . the . . . accused understood that he had a right to a reasonable opportunity to obtain legal advice before any continuation of the interview'. (at 288)

Following *Piula's* case and *Attorney General v U*, Police practice now advises an arrested person of his right to counsel under Article 6(3) of the Constitution. At least, it is obvious in the many cases where statements are obtained, that there is always a paragraph mentioning that that advice had been given. But whether that advice is sufficient is not so plain. The phrase '[n]o particular words are required to be used' seems not fully to appreciate the scope and content of that constitutional protection.

Consultation and waiver vis-à-vis the right to counsel

In *U's* case, the Court of Appeal held: it '. . . may be taken to be settled' that there is an implied obligation in Article 6(3) to inform the arrested person promptly of his right to a lawyer. In one sentence immediately before that statement was made, the court referred to 'the duty of the person arresting [being] expressed in similar terms in s9(1) of the Criminal Procedure Act 1972' (at 289). No more was said of that duty or of section 9, either for it to be read together and or conjunctively with Article 6(3), or in some other way or in a way to assist in procuring the protection of that constitutional right. That section explicitly imposes a 'duty' to comply with Article 6(3). It follows that duty carries the responsibility to inform and to comply in accordance thereto.[25] That being so, it seemed a fetter on that constitutional right to imply a duty for its operation, when the same is patently provided

for. Absent a more justifiable rationale, it is respectfully submitted that the implied obligation imported into Article 6(3) clouds it and arguably fetters its fundamental safeguard.

Accepting that there is a duty to inform an arrested person of his right to a lawyer without delay, it is difficult even so to say whether that duty is fulfilled if the scope and content of that advice is not expressed, in particular as to where or how consultation is to be concluded, or where an arrested person voluntarily and in full knowledge chooses not to have a lawyer and thereby waives that right to counsel. These aspects were not dealt with in *U's* case, and no reported decision has ruled on these. But in *U*, the Court's ruling that '[t]he more obvious inference is that [the defendant] was willing to make a statement without legal advice at that stage' (at 291) is clear indication that the defendant had waived his right to a lawyer; or maybe the situation is one of consequentiality, that all things considered, that confession was forthcoming nonetheless (at 291).[26] Whether consultation shall be in public or in private also remains unclear. At best and following *U's* case, it is almost certain that those issues shall be decided similarly to the way they are in New Zealand. In rejecting that despite a breach of Article 6(3), there is still judicial discretion to admit confessional evidence, the Court rationalised:

> The principles evolved by the New Zealand Courts are that where there is an evidential foundation for the view that a confession has been obtained by breach of the Bill of Rights, the onus is on the prosecution to negative that confession on the balance of probabilities; and if the breach is not so negatived, the statement should prima facie be ruled out, in the absence of some special reason making it fair and right to admit it. The mere fact that the Police acted in good faith or that there is other evidence (in the form of alleged admissions or otherwise) pointing to the accused's guilt are not such special reasons. Nor, even more obviously are the seriousness of the offence charged or the likelihood that the prosecution will fail unless the statement is admitted: See generally *Police v Kohler* [1993] 3 NZLR 129; *R v Te Kira* [1993] 3 NZLR 257 'We see no reason why those principles should not apply in Western Samoa . . .' (at 291)

Further, in *Police v Kohler* [1995] 1 HRNZ 303, the New Zealand Court of Appeal held:

> A right to consult and instruct a lawyer without delay carries with it the right to consult and instruct in privacy. The traditional and necessary confidentiality of the lawyer-client relationship is an implicit requirement . . . Since 1986, there appears to be an unbroken line of Canadian authority under s10(c) of the Canadian Charter of Rights and Freedoms . . . that a right to privacy is inherent in the right to counsel and that a request of privacy is not required'. (at 307)

As to waiver of the right to counsel, the Court in *Kohler* followed the famous US case of *Miranda v Arizona* 384 US 436, 444 (1966), with what it called 'its insistence that any waiver be made voluntarily, knowingly and intelligently remains a sound guide in this matter' (at 308). Cooke P delivering the judgment of the Court of Appeal said:

> . . . a valid waiver requires a conscious choice that is both informed and voluntary, and that valid waiver cannot be implied from silence . . . It is also entirely clear that a mere failure to request rights cannot of itself be a waiver. As was said in *Miranda* of pp 471–472, 'The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel'. (at 308)

The facts in *Kohler's* case are that the defendant tested positive on the roadside with a breath screening test. He was required to accompany the constable to the Paraparaumu Police Station for an evidential breath test or a blood test or both. The constable advised that he had the right to consult and instruct a solicitor without delay, and also the right to refrain from making a statement. The constable added he could also telephone his solicitor from the Police station. The defendant obtained the name of the solicitor from his friends in the car. He went with the constable to the station. They were in a room measuring about 3 m by 4 m. The constable brought a telephone into the room and plugged it into a jackpoint. The defendant telephoned and spoke to the solicitor. During some of the conversation, the constable was getting the breath testing device out of the cupboard and assembling the necessary forms. At some other times, the constable was seated directly opposite and within a few feet of the defendant.

The constable could not hear what the solicitor said. But at one stage, he took the telephone from the defendant and spoke to the solicitor himself, outlining what had happened. Evidently, the solicitor raised no question about whether the constable was within earshot. In accordance with the solicitor's advice, an evidential breath test was taken, which was positive. Before that test was taken, the constable 'read him his rights'. The constable described him as very cooperative and polite.

In evidence, the defendant said that he felt intimidated and nervous, because of the presence of the constable. He said that having had a great deal to drink, he would have liked to know whether he should take a blood test and that he felt he could not ask the solicitor about that with the constable in the room.

These facts—particularly in being taken to the Police Station—are not so dissimilar to what obtains in Western Samoa. Indeed, it is inherent in the very nature of this right to counsel that few people are aware of it and that even Police officers for a long time did not know about their duty to inform an arrested person of the full content and scope of the right to counsel. Most persons arrested simply answer whatever questions the Police officers put to them, whether or not the detainees have been informed of their right to counsel. In the main, the major problem is ignorance of the fact that such a constitutional protection exists. In such a traditional society as Western Samoa—where there is so much respect for law and order and an overwhelming emphasis on doing as you are told—this safeguard is virtually unknown. Indeed, despite being the country that was first in the South Pacific, excepting Tonga, to have a written Constitution guaranteeing basic fundamental human rights, Western Samoa still does not implement these protections.

A South Pacific view or implications

Since the passage of the New Zealand Bill of Rights Act 1990, that country's Courts in interpreting it have seemed to adopt a global appreciation of human rights, not only in accord with New Zealand's own particular circumstances, but more universally in 'affirm[ation of] New Zealand's standards [of human rights and freedoms]'.[27] That global view has relied primarily on constitutional principles from Canada and the United States, and also from

the European Court on Human Rights.[28] Yet in the process of application within the South Pacific itself, little or no recognition is given to the same constitutional safeguard. In a departure, however, Cooke P, in *R v Goodwin* [1993] 2 NZLR 153 at 179, echoed with approval a case from the Federated States of Micronesia, the judgment of King CJ in *Federated States of Micronesia v Edward* [1987] SPLR 44. Though Cooke P was referring to that judgment's celebration of the US approach to the right to counsel as pioneered in *Miranda's* case, and particularly on a statutory definition of 'arrest', that case has direct relevance for this paper's avowed purpose of beginning and developing a model and perspective of that pre-trial right for our own South Pacific cultures and people. Indeed, such a model must begin 'with an awareness that many arrested persons in the Federated States of Micronesia [or the South Pacific for that matter] even when fully apprised of their right to counsel, may fail to perceive the significance of the right'.[29]

The facts in *Edward's* case concerned the defendant, who was taken to the Police station at about 11.00 a.m. on suspicion of murder. He was made to wait in a small room with one desk and a chair. The room had louvred windows and an unlocked door, so was not entirely secure. At the time, no officer advised Edward that he was free to leave, and Edward did not believe he would be permitted to leave. He sat at the chair and desk.

Throughout the afternoon, a series of officers came into the room, usually one at a time, and asked various questions. During intervals between questioning sessions, Edward dozed off from time to time. This continued until 4.00 p.m. when he was taken to the detectives' office for further questioning. Throughout the period 11.30 a.m. to 7.00 p.m. Edward was not advised that he had a right to remain silent and could decline to answer questions. Nor was he told during this time that he was entitled to have legal counsel and that counsel could be present during any further questioning.

At about 7.00 p.m. Edward was put in jail on grounds of reasonable suspicion of charge and also because he was still intoxicated. Only at this time was Edward advised of his rights, while he was booked for custodial holding.

Following this, he was taken to hospital for a report on his injuries and scratches. Throughout all this time, Edward was not given anything to eat. By the time he signed his statement, he had not eaten for more than 40 hours,

during the preceding 60 hours. At 9.00 p.m. he was brought back to the detectives' office for questioning. At about 10.00 p.m. Edward said he was willing to make a statement. Another police officer was then called in to advise him of his rights. It was during this time that Edward said he wished to have counsel, but as the police officer was leaving the room, Edward said he did not need an attorney immediately. He was then readvised of his rights and signed two forms in his language, one indicating he had been advised of his rights and the other stating he did not desire to have an attorney brought to him immediately.

Further questioning resumed, in the course of which the statement now at issue was obtained.

In holding that that statement was not admissible, King CJ held 'that by the time Mr Edward was being advised of his rights . . . after 10.00 p.m., his will was overborne. Any waivers by him of his rights or statements made thereafter, were not voluntary, but were products of physical exhaustion and a sense of oppression born of violation of his rights under 12 FSM Constitution 218' (at 56 l 545–550).

More particularly and on the issue of the advice of the right to counsel, King CJ cited with approval *Miranda v Arizona* 384 US 436, 444–5 (1966), where the US Supreme Court stated:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney there can be no questioning.

And:

> These principles should be applied with an awareness that many arrested persons in the Federated States of Micronesia even when fully apprised of their right to counsel, may fail to perceive the significance of the right. (at 52)

Moreover, King CJ emphasised that the duty to inform detainees of that right and what it implies must be made plain and clear, especially recognising that few people in the Federated States of Micronesia, or in any of the countries of the South Pacific including Western Samoa for that matter, are aware of such a right or the content of it:

> Another important difference [from the conditions in the United States] is the much lower degree of general understanding as to the functions of counsel, the responsibilities of the police and limitations on their powers and the much greater apprehension of danger of [sic] police requests are not complied with or unnecessary requests are made of them [The predecessors of 12 FSMC section 218 and 220] have proved largely ineffective because . . . most Micronesians under arrest for examination either never think of asking to see anyone or do not dare to ask . . . In the present, the accused's principal complaint . . . is not that [the police] failed to notify him of his right to counsel, but that they failed to explain to him why he needed counsel, and in a surprising number of cases, we have found instances of an accused stating that he desired counsel, but apparently quite freely going on to talk about the merits of the case without any effort to obtain counsel or have counsel obtained for him on the theory that counsel would only be important at the time of trial, even though the 'notice to accused' used has expressly advised him that he has the right to advice of counsel before making any statement which may involve him as an accused in any criminal action: *Trust Territory v Poll* 3 TTR 387, 399–400 (Pon 1968). [In that regard and] . . . within the social context of the Federated States of Micronesia, courts should indeed 'indulge every reasonable presumption' against waiver of the right to counsel. (at 52 1360–390)

This emphasis on application of the right to counsel as something rooted within our own South Pacific countries' cultural, economic and political circumstances as guaranteed by our own Constitutions is also recognised in *The State v Songke Mai & Gai Avi* [1988] SPLR 251, a decision of Los J in the Supreme Court of Papua New Guinea. His Honour made that point strongly:

> Also it is fair to advise a detained person of his rights . . . because he can only decide to exercise those rights if he knows about them. In this country where the levels of sophistication and education, whether general or legal, are low among the majority of the people, including a lack of and sufficient spread of lawyers, fair play should be the rule rather than the exception . . . (at 278 l 1230–1240)

The case itself concerns a reference from the National Court to the Supreme Court under section 18(2) of the Constitution, which provides for the Liberty of the person. The reference asked for consideration of the following questions: (1) Does a police officer have any obligation to inform a person detained, but not actually arrested, of his rights pursuant to s4 and s2 of the Constitution? (2) When is a person 'arrested' and when is a person 'detained'? (3) When an accused person is asked in a record of interview whether or not he wishes to see a lawyer and the accused says 'yes', should the interviewing officer then suspend the record of interview, or is he permitted to ask another question as follows: 'Do you wish to see the lawyer now or after the record of the interview'?

In the lower court, the prosecution sought to tender into evidence the records of interviews of the defendants, which were objected to on the basis that the Police failed to inform the defendants [separately] of their rights under section 42(2) of the Constitution.

Section 42(2) provides:

> (2) A person who is *arrested* or *detained* —
>
> (a) *shall be informed promptly* in a language that he understands of the reasons for his *arrest* or *detention* and of any charge against him; and
>
> (b) *shall be permitted* whenever practicable to communicate without delay and in private with a member of his family or a personal friend, and with a lawyer of his choice (including the Public Solicitor if he is entitled to legal aid); and

(c) *shall be given adequate opportunity* to give instructions to a lawyer of his choice in the place in which he is detained, *and shall be informed immediately on his arrest of his right under this subsection.*

In its judgment, the Supreme Court held, reading from the headnote:

(1) There is no police power to detain suspected persons: and

(2) when a person who is being interrogated advises the police that he wishes to see a lawyer, the police must cease the interview taking genuine and practicable steps to comply with section 42.

Finally, it is invariably the situation within our South Pacific countries that defendants simply do not understand they have such a right,[30] or that an accused is illiterate and of limited intellectual capacity,[31] or is an unsophisticated person with a low level of education and limited knowledge of English[32] and therefore is unable to understand fully the advice of the right to counsel. That being so, the police must take extra steps to ensure that that advice has been communicated effectively to the defendant.[33] In *R v Tuniu*, unreported decision, HC Auckland, T223/91, March 10, 1992, it was stated:

> In some cases, it may be necessary to inform an arrested person more than once of the existence of the particular right in order to ensure that the right of consultation and instruction of a lawyer without delay is in reality being accorded to . . . Nor will it be sufficient compliance with the spirit of the Act . . . merely to recite the exact words of s23(1) . . . [34]
>
> Some people may understand, others may not. There may be persons whose first language is not English and may require [it] to be explained in comprehensive form . . .

Conclusion

In conclusion, this paper contends that what is needed is a realistic regional approach to the construction and application of Article 6(3). This is true not only '. . . that the Courts in Western Samoa should not be bogged down by academic niceties [elsewhere] which have little relevance to real life',[35] but because the problem to which attention is drawn in this discussion is a general and widespread one within our own South Pacific islands.

Notes

1 *11 Halsbury's Laws of England*, 4th edn para 419. See also Adams, *Criminal Law* 3rd edn para 3921.

2 See also s18 Evidence Act 1961.

3 The Judges' Rules, known as Home Office Rules in England, were first formulated in 1912. There were 4 of them then. In 1918, another 5 were added, and explained in 1934 by a Home Office Circular 536053/23. These are the only rules applied in New Zealand: Adams 4th edn paras 3922–3925. In England these have been replaced by new rules that came into force in 1964: see Practice Note [1960] All ER 237; *11 Halsbury* 4th edn para 419. In New Zealand, the Court of Appeal in *Convey* [1968] NZLR 426 held these 1964 Rules do not apply in New Zealand.

4 Samoa Act 1921, Preamble.

5 Article 22 of the Covenant of the League of Nations; First Schedule, Samoa Act 1921/1957/1959.

6 Samoa Act 1921, Preamble.

7 ibid. s46(1). See also *Tagaloa & Fuataga v Inspector of Police* [1921–1929] WSLR 23.

8 Samoa Act 1921.

9 ibid. s81 (a). Note s349(1) is now restated in Article 111 of the Constitution.

10 The case was an appeal to the full Supreme Court of New Zealand sitting in New Zealand.

11 Sir John Findlay KC made strong submissions that highlighted these problems. More particularly, he argued that banishment is alien and repugnant to the 'laws of England' under s349 of the Act, as well as that New Zealand has no mandate—under the Covenant of the League of Nations—to legislate for Western Samoa in violation of basic human rights.

12 The facts were: the appellants were convicted for breach of a banishment order made by the Administrator under the Samoan Offenders Ordinance 1922. Clause 3 of that Ordinance provided: 'If the Administrator is satisfied that the presence of any Samoan in any village . . . is likely to be a source of danger to the peace, order, or good government . . . the Administrator may by order . . . order such Samoan to leave any village, district, or place . . . and to remain outside such limits for such time as the Administrator shall think fit . . . ' The Appellants appealed against that conviction.

13 Rule 7 provides: 'A prisoner making a voluntary statement must not be cross examined, and no questions should be put to him about it except for the purpose of removing an ambiguity in what he has actually said'.

14 See L Denning, *The Due Process of Law*, London 1980; Jowell & McAuslan (eds), *Lord Denning: The Judge and the Law*, Sweet & Maxwell 1984.

15 See Marsack, *Notes on the Land and Titles Court as to Samoan Titles and Land Held in Accordance with Customs and Usage* (1961); Napoleone, 'The Compatibility of the Samoan Legal System', unpublished paper (1980); Powles, The Status of Customary Law in Western Samoa, unpublished LLM dissertation, Victoria University of Wellington (1973).

16 See Report of Commission of Inquiry Into Police and Prisons 1–5 (1976).

17 Davidson, *Samoa mo Samoa*: *The Emergence of the Independent State of Western Samoa* (1976); Slade, *A Constitution in Practice*, 2, 4 NZL Conference 1984.

18 *Ainuu v Police* [1960–1969] WSLR 203.

19 Roberts-Wray, *Commonwealth and Colonial Law* 295, 301 (1966); Wheare, *Consitutional Structure of the Commonwealth* Chapt IV (1968).

20 *Fatupaito v Barry Johns et al.* unreported decision SC October 1980. See also *Attorney General v Taulealo et al.* unreported decision SC June 1981; *Tariu Tuivaiti v Faamalaga et al.* unreported decision SC 1980; *Eikeni v Observer et al.* unreported decision SC 1981; *Opelogo Olo v Police* unreported decision SC 1980.

21 The justices were Morling J from Australia and Reynolds and Roper JJ from New Zealand.

22 See Malifa, The Franchise in the Constitution of Western Samoa: Towards a Theory of the Constitution Incomplete . . ., unpublished LLM thesis, Harvard Law School 140 (1988).

23 Article 2, Constitution.

24 The Court included Sir Robin Cooke P (now Lord Cooke of Thorndon) and Sir Gordon Bisson, both from New Zealand. This is not the correct name of the case.

25 See Dworkin R, *Taking Rights Seriously* London 1977; Rawls, *A Theory of Justice* Oxford 1971.

26 See also *Police v Kohler* [1993] 3 NZLR 129.

27 R v *Butcher*[1992] 2 NZLR 257 at 264.

28 *Kohler* supra n.26; *R v Goodwin* (1993) 2 NZLR 153 at 163.

29 *Edward's* case at 56 l 545–550.

30 cf. *R v Evans* (1991) 63 CCC (3rd) 289 SCC.

31 cf. *R v Nelson* (1982) 3 CCC (3rd) 147.

32 cf. *R v Tanguay* (1984) MVR l (Ont G Ct). See also *R v Vanstaceghen* (1987) 36 CCC (3rd) 142 (Ont CA).

33 *Evans* supra n.30. Such extra steps may involve use of simpler language for the advice or obtaining an interpreter. In *R v Cotten* (1991) 62 CCC (3rd) 423 (BCCA), it was held Police may suspend efforts to use the defendant as a source of evidence until effects of an intoxicant have worn off.

34 Section 23(1) of the New Zealand Bills of Rights Act 1990 is similarly worded to Article 6(3), though section 23(1) is statutory whereas Article 6(3) is a fundamental constitutional right.

35 per Ryan CJ, in *Australia & New Zealand Bank Group Ltd v Ale (Ulugia)* [1980–1993] WSLR 468 at 469. The case is not about Article 6(3): but the point mentioned by His Honour adequately points to the need for a first regional approach such as this paper advocates for our own situation here in Samoa.