

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**APPELLATE JURISDICTION**

Criminal Appeal No. HAA 85 & 86 of 2005L

**DHIRENDRA NADAN**

**1<sup>st</sup> APPELLANT**

**AND**

**THOMAS MAXWELL MACCOSKAR**

**2<sup>nd</sup> APPELLANT**

**V**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**AND**

**ATTORNEY GENERAL**

**AMICUS CURIAE**

**AND**

**THE PROCEEDINGS COMMISSIONER, FIJI HUMAN RIGHTS COMMISSION**

**AMICUS CURIAE**

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**FURTHER SUBMISSIONS OF THE FIJI HUMAN RIGHTS COMMISSION**

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**Issues arising in response to State submissions in reply**

1. Whether the offences of section 175 and 177 of the Penal Code ceased to exist in 1997;
2. Whether the Penal Code provisions of sexual immorality are being used to impose so-called moral values, which are conflicting at best, on the majority population and minority communities in Fiji;
3. Whether prosecution of the sexual orientation of gay people and communities has collateral consequences such as discrimination at work and persecution by the State and society;

4. Whether the values the State must mandatorily abide by are human rights values and human rights law.
1. **Whether the offences of sodomy in the Penal Code ceased to exist in 1997.**
  - 1.1 A new Constitution of Fiji came into effect in 1997
  - 1.2 Pursuant to section 2 (1) the Constitution is the supreme law of the State
  - 1.3 Pursuant to section 2 (2) any law inconsistent with the Constitution is invalid to the extent of the inconsistency
  - 1.4 Pursuant to section 21 (3) the Bill of Rights chapter of the Constitution binds the legislative and executive branches of government (as well as the judiciary and all public offices).
  - 1.5 Pursuant to section 21 (3) laws made and administrative and judicial actions taken after the commencement of the Constitution are subject to the provisions of the Bill of Rights chapter
  - 1.6 Pursuant to section 21 (5) the Bill of Rights chapter applies to all laws in force at the commencement of the Constitution.
  - 1.7 It must be noted that section 21 (2) provides direction for any limitations to the rights protected in the Bill of Rights provisions to be interpreted.
  - 1.8 In the **National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice et al** Sachs J stated that in the High Court Hefer J had declared the crime of sodomy to be inconsistent with the 1996 Constitution of South Africa because it had ceased to exist after the coming into effect of the interim Constitution which protected every person's right to equality and right to be free from unfair discrimination.
  - 1.9 The procedure for declaration of inconsistency and invalidity and severance of the offending provisions is discussed by their Lordships on pages 52 -54 of the judgment.

## **Conclusion**

1.10 The Human Rights Commission submits that the offence of sodomy became unconstitutional in Fiji in 1997 when the Constitution which inter alia protects the sexual orientation of every person in Fiji (including heterosexuals), was passed by parliament.

1.11 The procedure that can be followed for declaration of inconsistency and invalidity by the court is set out in the **National Coalition** case.

## **2.0 Whether the Penal Code provisions of sexual immorality are used to impose so-called moral values which are conflicting at best on the majority population and minority groups in Fiji.**

2.1 State counsel in his further submissions states on the last page that ‘the Constitution of Fiji is pillared upon Christian values which the preamble reflects. Such values have an ‘enduring’ influence in the ‘spiritual life of Fiji’ for which ‘morality’ in the offences under Chapter XVII of the Penal Code have their bearing’.

2.2 The falsity of this argument is revealed by a quick reference to the Constitution itself, as follows:

(All emphases are added)

### **2.2.1 Preamble**

RECALLING..... the conversion of the indigenous inhabitants...from heathenism to Christianity through the power of the name of Jesus Christ; the enduring influence of Christianity in these islands and its contribution, *along with that of other faiths*, to the spiritual life of Fiji.

Affirming the contributions of all communities to the well-being of that society, *and the rich variety of their faiths, traditions, languages and cultures*

### ***Analysis***

The Preamble acknowledges the history of conversion and influence of Christianity but does not impose this on anyone in Fiji

## 2.2.2 Section 5 State and Religion

*Although religion and the State are separate, the people of the Fiji Islands acknowledge that worship and reverence of God are the source of good government and leadership*

### ***Analysis***

Fiji is a secular state. The worship of God is mentioned, not the worship of any particular religion.

The State should pay heed to this constitutional provision.

## 2.2.3 Compact (chapter 2)

....the *conduct of government* is based on the following principles:

- (a) the rights *of all individuals, communities and groups* are fully respected.
- (b) *all persons have the right to practise their religion freely* and to retain their language, culture and traditions

### ***Analysis***

Everyone has the right to practise their religion freely and no one religion can be imposed by law on the rest of the population or any other person

## 2.2.4 Bill of Rights (chapter 4)

Section 35 Religion and belief

- (1) Every person has the right to freedom on *conscience, religion and belief*
- (2) Every person has the right, either individually or in community with others, and both in public and in private, to manifest his or her religion or belief in worship, observance, practice or teaching

### *Analysis*

Nowhere in the Constitution does it state that the Constitution of Fiji is pillared upon Christian values alone. This statement is first of all a falsity, and secondly the reader is expected to accept the State's subsequent statement that Chapter XVII of the Penal Code is justified on the basis of his first premise which is wrong in any event.

### **2.2.5 Case law**

Further to this, the United States Supreme Court in **Lawrence v Texas** (at page 10 of the case) stated as follows:

“It must be acknowledged, of course, that the court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us however. The issue is whether a majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code” *Planned Parenthood of Southeastern Pa v Casey*, 505 US 833, 850 (1992)”

In **Toonen**, the Human Rights Committee rejected the State's view that the laws prohibiting sodomy were justified on public health and moral grounds.

### *Analysis*

We have noticed a disturbing trend in Fiji to impose certain religions and so-called religious values on the rest of the population. There have even been calls to declare Fiji a Christian state.

The crime of burning of religious temples and other houses of worship can be linked to this trend. The Fiji Human Rights Commission has published an article in a newspaper in this regard (**Annexed**).

Further to this, Christian values cannot be used as justification to persecute gay communities. Many churches and religious denominations protect gay communities from harm rather than persecute them. The Anglican church in another country even ordained a gay priest not so long ago.

The broad religious opinion of homosexuality is at best conflicting, and at worst, not uniformly applied. To impose fundamentalist Christian, or for that matter any fundamentalist, religious values on people for the specific purpose of persecuting gay people or unfairly discriminating against them is not only against the law but also against the spirit of the Constitution. The core right in the Constitution of Fiji is the right to equality.

If religious values are to be used as an excuse to discriminate, we need to examine whether the principle of ‘values’ is used equally on everyone in the country or only used by a few to claim a privilege while denying the rights of others.

### **3.0 Whether the prosecution of the sexual orientation of gay people and communities has collateral consequences such as discrimination at work and persecution by the State and society**

3.1 In Toonen, the applicant submitted that there was a link between the existence of anti-gay criminal legislation and ‘wider discrimination’, i.e. harassment and violence against homosexuals and anti-gay prejudice. He argued that the existence of the law in Australia had adverse social and psychological impacts on himself and others in his situation.

3.2 In the National Coalition case, Sachs J stated:

“ ...a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights. The case before us is in point. The group in question is discriminated against because of the one characteristic of sexual orientation. The measures that assail their personhood are clustered around this particular personal trait. Yet the impact of these laws on the group is of such a nature that a number of different protected rights are simultaneously infringed”.

### *Analysis*

The right of gay people to express their sexuality is a fundamental right, which if violated by the State, has collateral consequences in other areas of their lives such as in the areas of work, and other aspects of their civic rights and responsibilities.

The right to express one's sexuality cannot be seen as an isolated right which is divorced from other rights protected in the Constitution. Persecution of one part of a person's existence has inevitable consequences for safety and security guaranteed by the state in other aspects of the person's life.

#### **4.0 Whether the values the State must mandatorily abide by are human rights values and human rights law.**

- 4.1 It has often been stated that the Fiji Constitution is the only supreme law which is underpinned by principles of human rights. This is illustrated by section 3 Interpretation of the Constitution which states that the entire Constitution must be interpreted in human rights terms (section 3 (b) (i) and (ii).
- 4.2 This section has been cited by all parties in this case.
- 4.3 Sexual orientation which refers to consensual sexual activity is a protected right under the Constitution. It can also be noted that in the 1970 as well as 1990 Constitutions, the state could not discriminate on the grounds of 'sex'. **Toonen's** case has now established that the term 'sex' includes 'sexual orientation'. This interpretation is something we should also pay attention to.
- 4.4 While religious values are important, there is no uniform agreement about what these values are or should be. Different groups and communities adhere to different set of values, perhaps the only principle most people may agree with is that of the existence of God. (But the US Supreme Court has apparently ruled that atheism is also considered to be a belief and a protected right). In religion, everything has historically and contemporaneously been up for debate. Religious wars are daily being fought over conflicting views and values. Who is to say whose values should prevail? In **Lawrence v Texas**, the court stated that moral disapproval cannot translate into a legitimate state interest or desire to harm an unpopular group.

- 4.5 Human rights values are more likely to be universally accepted. These values are based on mutual respect, fairness, justice and integrity. Human rights values reject exploitation and oppression of people and the Universal Declaration was drafted specifically to protect the rights of everyone so that there would not be a repeat of the persecutions of WWII Germany and Europe, where not only Jews, but also Gypsies, homosexuals and disabled people were put into labour and concentration camps.
- 4.6 But individual and group rights cannot be expressed in a way which violates others' rights. This is the subject of the second part of our initial submissions, namely that exploitation of others in the expression of one's own right is not contemplated by assertion of human rights values in the Constitution.
- 4.7 It is the duty of the State to abide by human rights values and human rights law.

## **Conclusion**

1. The Fiji Human Rights Commission submits that the Penal Code provisions against sodomy and other offences against the 'order of nature' lead to:
  - (i) Persecution of a class of people (gay community)
  - (ii) Persecution of a category within that class (male homosexuals)
  - (iii) Imposition of an obsolete moral law drafted in 1533 in the United Kingdom to deal with the need for population growth-linked to procreation- possibly for more people to work in the industrial factories of the UK. It has now fallen into desuetude in any event.
  - (iv) The Penal Code provisions prohibiting sodomy was used to impose moral values which are conflicting and not even the majority view, on everyone
  - (v) There should be a clear observation and declaration from the bench that Fiji is a secular state and the rights of every person are protected, whatever their personal circumstances or characteristics.

- (vi) That the issue is also whether there should be a distinction made in any review of the Penal Code between a consensual act and that which is non-consensual. Only non-consensual acts should be punished by law.

These are our submissions My Lord.

**Dated this 15<sup>th</sup> day of August 2005**

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*Dr. S. Shameem and Ms. Deveena Sudhakar-Herman*  
*Counsel on behalf of*  
**THE PROCEEDINGS COMMISSIONER**  
**FIJI HUMAN RIGHTS COMMISSION**

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**APPELLATE JURISDICTION**

Criminal Appeal No. 85 & 86 of 2005L

**BETWEEN: DHIRENDRA NADAN**  
**1<sup>st</sup> APPELLANT**

**AND: THOMAS MAXWELL MACCOSKAR**  
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**THE PROCEEDINGS COMMISSIONER**  
**FIJI HUMAN RIGHTS COMMISSION**  
**LEVEL 2 CIVIC TOWERS**  
**SUVA**