

Duties of individuals: some implications for the Pacific of including "duties" in "human rights" documents

Guy Powles*

I A DIFFERENT EMPHASIS

A *Obligations*

The European conception of human rights regards a person as an isolated abstract individual whose rights are to be invoked against the group - and "individuals as locked in a constant struggle against society for the redemption of their rights".¹ The language is of "freedoms" and "guarantees of protection".

Such a view is thought to be inconsistent with, and destructive of, the traditional value systems of the Pacific and Africa, where emphasis lies on the primary obligations of the individual to the group. In reporting on the drafting of the Banjul (African) Charter, it was observed that, in Africa, "individual rights could be explained and justified only by the rights of the community".² To take a Pacific example, land is customarily held by groups, and individuals may obtain rights to it only through membership of a group.

As will be discussed, the draft Pacific Charter follows the lead taken in the African Charter, in proposing a separate chapter on "Duties of Individuals" towards "their families and society, the [State] Parties and other legally recognized communities and the regional and international community".³ The "Obligation of the [State] Parties" is declared to be to "recognize the rights, *duties* and freedoms" in the Charter.⁴

* Associate Professor of Law, Monash University. This paper was distributed at the 1991 PILOM on 4 October 1991.

¹ See RN Kiwanuka "The Meaning of 'People' in the African Charter on Human and Peoples' Rights" (1988) 82 AJIL 80, 82. Also see generally PN Bhagwati "Fundamental Rights in Their Economic, Social and Cultural Context" in Commonwealth Secretariat *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms* (Judicial Colloquium in Bangalore) (Human Rights Unit, London, 1988); RM D'Sa "The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action" (1986) Australian Yearbook of International Law, (1985) 29 Journal of African Law 72; L Marasinghe "Traditional Conceptions of Human Rights in Africa" in CE Welch and RI Meltzer (eds) *Human Rights and Development in Africa* (State University of New York Press, Albany, 1984); and K Vasak (ed) *The International Dimensions of Human Rights* (UNESCO, Paris, 1982).

² NS Rembe *Africa and Regional Protection Rights* (1985) 121.

³ See art 27.

⁴ Article 1 (emphasis added).

B The New Nation

A further concern is that freedoms of the individual stand in the way of post-colonial nation-building. The obligations of citizens to the state should be stressed as well as their rights, in any document which purports to spell out common aspirations and fundamental laws. In this regard, the notion of "social and national solidarity" is a feature of the African Charter⁵ not adopted in the Pacific draft. It is referred to as "interdependence and solidarity" in the Papua New Guinea (PNG) and the Vanuatu Constitutions.⁶ It is expressed as "the sense of identity" of, and "unity within", island Communities, in the Tuvalu Constitution.⁷

Similarly, the obligation to "participate" in the development of the national community and government is recognized in the African Charter, implied in the Pacific draft, and made specific in the PNG and the Vanuatu Constitutions.⁸

C Traditional Authority and Civic Obligation

The duty of individuals to continue to obey traditional authorities such as chiefs, elders and village councils has been given limited constitutional recognition in some Pacific societies. This has been achieved in the derogation clauses attached to the "freedom" from forced labour or involuntary servitude. Labour required by traditional law is explicitly saved, as an exception to the "freedom", in two countries. The Constitution of Western Samoa exempts "any work or service which is required by Samoan custom or which forms part of normal civic obligations",⁹ while a test of reasonableness is introduced in Tuvalu - "labour reasonably required as part of reasonable and normal traditional, communal or civic obligations".¹⁰

Many other Pacific constitutions permit labour to be required "as part of reasonable and normal communal and other civic obligations" - such as PNG, Kiribati, Solomon Islands, Nauru and Fiji.¹¹

The significance of these provisions lies in the source of of the power exercised. The duty to provide labour or work may be owed to authorities, whether traditional or civic, which are beyond the supervision of the state. It should be noted that none of the Pacific jurisdictions referred to above stipulates that these obligations must be imposed by law.

⁵ See arts 10, 29.

⁶ National Goals 3(3) and Basic Social Obligations (f); and art 7(c) respectively - see the Annexure.

⁷ Principles 3.

⁸ See art 29(2); art 29(2); Basic Social Obligations (b), (c); and art 7(b), (c) respectively.

⁹ Article 8(2)(d).

¹⁰ Article 18(2)(b)(vii).

¹¹ See arts 43(2)(e); 6(3); 6(3); 6(2); and 7(3)(e) respectively.

Only Papua New Guinea makes the requiring of labour subject to the approval of a local government body for the area.¹²

The Federated States of Micronesia (FSM) has devised a constitutional test applicable to situations where the legislature desires to protect traditional law by statute. If the legislature were to pass a statute recognizing the traditional authority of chiefs to require young men and women to carry out local work of a civic nature, a provision of the Constitution creates the possibility (however unlikely) that the statute might survive challenge under article 4 of the FSM Declaration of Rights on the ground that "protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action".¹³

D Duties: An Untested Concept

The inclusion of duties of individuals in international human rights documents and domestic constitutions is a comparatively recent, and still uncommon, phenomenon. Brief statements occur in the UN Declaration and the American Convention,¹⁴ but there was no mention of duties in the European Convention and the UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.

By the time the African Charter was adopted in 1981, all of the now independent and self-governing states in the Pacific had acquired their constitutions. Only Tuvalu and Fiji have subsequently made significant changes.

Apart from Australia, New Zealand, Niue and the French territories, all Pacific constitutions - some 127 of them - contain Bills of Rights.

The first and only Pacific states to adopt clear statements of fundamental individual duties were Papua New Guinea and Vanuatu - in 1975 and 1980 respectively.¹⁵

The first and only international agreement to provide for such duties is the Banjul (African) Charter, adopted in 1981 and effective in 1986.¹⁶

E This Paper

This paper examines some of the ways in which duties of individuals are articulated and the implications of duty provisions in human rights documents - with particular reference to the Pacific and the draft Pacific Charter.¹⁷

¹² Article 43(2)(e).

¹³ Article 5(2).

¹⁴ Articles 29 and 32 respectively - see the Annexure.

¹⁵ Basic Social Obligations and art 63; and arts 7 and 8 respectively - see the Annexure.

¹⁶ Chapter II, arts 27-29 - see the Annexure.

¹⁷ Articles 27-29 - see the Annexure.

To begin with, it may be helpful briefly to consider the nature of rights and duties, and the types of relationships involved.

II RIGHTS AND DUTIES

A *Correlation between Rights and Duties*

Conferring a right on a person necessarily involves imposing a duty on another person or entity to give effect to the right or otherwise to permit it to operate. Indeed, human rights are of legal importance only if corresponding legal obligations of other individuals and especially of the state are established, either by domestic constitution and legislation or by international agreements.

By and large, constitutions and international agreements are concerned to declare and delimit the rights and to leave it to the state to make such provisions as are necessary to give effect to them. Thus, these documents do not identify a corresponding duty for each right. Similarly, corresponding rights have not been articulated in respect of most of the recent duty provisions.

B *Limitations Created by Duties*

Where human rights are defined in terms which limit their operation and require consideration of competing factors, such derogation from the scope of the right is often in recognition of the rights and freedoms of others.¹⁸ In this sense, one can say that every person owes *duties* to others and, accordingly, is subject to *limitations* in the exercise of rights and freedoms.¹⁹

C *Legal Effect*

When rights are described as "legal" or "justiciable" it is intended that they should have effect as law. On the other hand, rights are sometimes expressed in terms which appear incapable of enforcement, such as a number of the economic, social and cultural rights.

Constitutions generally prevail as supreme law, and international human rights agreements may or may not be incorporated into domestic law. Enforcement will depend upon machinery provisions. In the case of the proposed Pacific Charter, it is not intended that the substantive provisions would be enforced, as such, as domestic law. It would be the obligation of contracting state parties to implement Charter provisions through domestic law. The Charter may have some further legal effect, however, in the sense that the courts of a state party would be intended to derive some guidance from them.

¹⁸ See, eg, Kiribati Constitution, arts 3, 9, 13.

¹⁹ See, eg, Cook Islands Constitution, art 64(2); and the African and Pacific Charters, art 27(2).

Preambles to constitutions and other declaratory provisions similarly offer guidance where there are ambiguities or gaps in the specific substantive law. The constitution may indicate what weight should be attached to such provisions. For example, the Constitutions of Papua New Guinea and Tuvalu indicate how the principles in the preambles should be applied.

What of the legal status of duty provisions? Where there is a direct correlation between right and duty, prospects for the enforcement of both may be enhanced. So, under the African Charter, the right of the aged to "special measures of protection in keeping with their physical or moral needs" appears to be strengthened by the individual's duty to maintain his or her parents "in case of need".²⁰

Generally speaking, duty provisions which *both* identify the person owing the duty and the person to whom it is owed *and* specify the nature of the duty, may be capable of enforcement (eg the duty of the parent to support and educate the children).²¹ However, the two Pacific jurisdictions which have articulated duties in detail have expressly provided that the duties and obligations are non-justiciable.²² Responsibility has been passed to public authorities whose duty it is "to encourage compliance with them so far as lies within their respective powers".²³ In the case of Papua New Guinea's Basic Social Obligations, a degree of justiciability is preserved by the requirement that, in the interpretation and application of the law, compliance with the Obligations is to be considered alongside the intention of the legislature.²⁴ A third constitution, that of Tuvalu, attempts to make the distinction between legal and non-legal obligations in a different way.²⁵

D *Language of Personal Obligation*

"A person shall do or refrain from doing ..."

Constitutional provisions conferring *rights* speak of entitlements such as the freedoms of speech, assembly and association, without specifying how they might be secured. (The detailed provisions constituting the right to a fair trial are an exception.) It is only in subordinate legislation that the language of personal obligation is used in order to require state agencies and individuals to do or refrain from doing acts relevant to the securing of the rights. The legislature usually considers what would be appropriate penalties for breach of the duties thus expressed.

On the other hand, when *duties* are articulated in the context of human rights documents, we may see the language of personal obligation employed at the level of constitutionally supreme law. Here, the constitutional lawyer knows that it is

²⁰ Articles 18(4), 29(1).

²¹ Vanuatu Constitution, art 7(h).

²² PNG, Basic Social Obligations; and Vanuatu, art 7 - see the Annexure.

²³ PNG, art 63; and Vanuatu, art 8 - see the Annexure.

²⁴ Article 63(3).

²⁵ Article 10 - see the Annexure.

inappropriate for sanctions for breach of the constitution to be imposed in that document. Such matters are for the legislature to determine, usually having regard to various policy considerations.

But the ordinary citizen may regard another individual's breach of constitutional duty, as such, as deserving a penalty or at least some meaningful expression of disapproval. After all, the citizen who has been made aware of the insistence of human rights lawyers and Western-trained civil libertarians that the protection of freedoms must be accorded highest priority may not appreciate distinctions necessary to the enforcement, respectively, of rights and duties. Might over-zealous traditional leaders and politicians be tempted to point to the language of personal obligation, where it is used in the constitution, in order to justify extra-legal "penalties" against individuals who are alleged to have failed to carry out their duties?

At first glance, rights and duties are accorded equal status in the two Charters and in the Constitutions of Papua New Guinea and Vanuatu. Given the language employed in the imposition of personal obligations in their Constitutions, these two countries were wise to limit the circumstances in which such expressions of duty can be used. Unfortunately, so complex are the words of limitation, when compared with the popular (if imprecise) style of the words which impose the duties, that the reader is likely to remember only the latter.

III SOME CLASSIFICATIONS

A *Entities on whom Duties are Imposed*

- 1 *The state:* State parties and their agencies undertake obligations, under international and regional agreements, to implement and enforce human rights provisions. This paper is not concerned with the state's duties of implementation. Such duties rarely appear in domestic law. One example is the requirement in article 15(4) of the Western Samoa Constitution that the state "shall direct its policy towards the progressive removal" of discriminatory disabilities and restrictions. Another example is article 21 of the Fiji Constitution of 1990 which requires Parliament and the Government to enact laws and adopt programmes in order to promote and safeguard the interests of the Fijian and Rotuman people (as defined).
- 2 *The individual:* As a citizen-isolate, the individual under a legal duty stands alone in relation to the state.
- 3 *Individuals collectively:* Although the family is recognized as "the custodian of morals and traditional values",²⁶ no duties are imposed on the family unit, as such. There seems no reason, in principle, why they should not be.

²⁶ African Charter, art 18.

B Entities to whom Duties are Owed

- 1 *The regional and international community:* Apart from the contractual obligations of states to each other, it is not clear what is intended to be the content of duties owed under the Charters. Article 27 of the Pacific draft requires clarification. The notion of regional "unity" featured in article 29(8) of the African Charter is not recommended for the Pacific, although the individual's duty "to preserve and strengthen positive Pacific cultural values" has been adopted in the Pacific Charter.²⁷
- 2 *The state:* The African Charter gives some prominence to the existence of duties owed by individuals to the state as such, including those relating to service, security, defence and taxes.²⁸ For the reasons discussed in this paper, and subject to clarification of article 27, the Pacific draft sensibly shifts the emphasis away from duties to the state itself.
- 3 *Society; wider national community:* Articles 27 and 29 of both Charters speak in uncertain terms of entities broadly co-existent with the nation. There is also the further expression, "their communities", in article 29(2) of the Pacific Charter, which appears to have the same meaning.
- 4 *Peoples or groups identified broadly by common race or culture:* The Charters give expression to a range of concerns. The Pacific draft goes further, with references to "peoples", "minority groups", and "communities".²⁹ The obligations of individuals to preserve positive cultural values are naturally linked with cultural groups.³⁰ Expression of such concern is also to be found in the preambles of most Pacific constitutions (and spelled out further in article 29 of the Tuvalu Constitution).
- 5 *Family:* Duties are owed by the state, under both Charters, to protect the family as "the natural unit and basis of society".³¹ Closely associated is recognition of the interests of posterity in the descendants of families and groups, which is so important, for example, in relation to land and natural resources.³²
- 6 *Associations:* The right to free association requires a balance between the interests of state and individual which is better reflected in the Pacific draft than the African Charter (see discussion below).

²⁷ Article 29(3).

²⁸ See arts 27, 29.

²⁹ Articles 19-22A; 14A; and 17 respectively.

³⁰ Article 29(3).

³¹ Article 18(1).

³² See PNG Basic Social Obligations: "to themselves and their descendants".

- 7 *Women, children, youths, aged, disabled:* The Pacific Charter highlights groups to which duties are owed in articles 18A and 18B.
- 8 *Individuals:* It is a premise on which all documents rest that individuals, as well as states, owe duties to other individuals.

C Types of Duties: Expression and Implementation

There are important distinctions between: (a) those unexpressed duties which are co-relative to the protection of particular rights; and (b) the duties selected for articulation as independent obligations in human rights documents.

Discussion in this paper also draws attention to the broad spectrum which has developed *from:* (a) obligations expressed in non-specific terms to observe morally and culturally desirable standards; *to:* (b) detailed duties requiring obedience to precisely worded instructions. Further attention may be needed to the degree of specificity and manner of implementation of the law relating to duties.

IV SOME IMPLICATIONS

The inclusion of duties in the draft Pacific Charter shifts the emphasis somewhat and broadens the thrust of the document so as to require the consideration and balancing of competing factors and interests. This, in itself, seems to justify the "duties" initiative, but some implications require further attention.

- 1 It is undesirable that the exercise of rights by an individual should be made expressly subject to the performance by that individual of a prescribed duty.
- 2 An example of the undesirable linking of rights to duties in the African Charter lies in the express connection between articles 10 and 29, which has been removed in the Pacific draft. In Africa, the limitation on freedom of association could permit a government to impose compulsory membership in a formal organization such as a single ruling party - or at least to embark upon discrimination against non-members.
- 3 There remains the possibility that articles 1 and 29 of both Charters may be seen as encouragement to powerful groups such as traditional leaders to try to set standards of behaviour to be observed by citizens - and to require the carrying out

of duties generally as a pre-condition to the exercise of rights. As a critic of the African Charter puts it:³³

Article 1 may be read as empowering insecure elites to issue executive decrees by which to criminalize what they perceive as negative consequences ... arising from the individual's exercise of his freedoms (assembly, speech, association).

The Pacific draft departs from the African Charter in dramatically reducing the scope of article 29. Reference to "solidarity" and "unity" have been removed. Nevertheless, if, as articulated in the Pacific draft, the individual has a duty "to strengthen positive Pacific cultural values", then there is the danger that the adequacy of the individual's performance may be judged by a ruling traditional elite.

- 4 The States Parties have a mandate to give effect to duties as well as rights and freedoms - by adopting "legislative, executive or other measures".³⁴ The likelihood of abuse might be significantly reduced by adding the proviso that the state's obligations to give effect to duties of the individual should be implemented pursuant to statute. The legislature should always have the opportunity to weigh the competing interests involved.

³³ HM Scobie "Human Rights Non-Governmental Organizations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter" in CE Welch and RI Meltzer (eds) *Human Rights and Development in Africa* (State University of New York Press, Albany, 1984) 200.

³⁴ Article 1.

ANNEXURE

I UN DECLARATION 1948

Article 29

- 1 Everyone has duties to the community in which alone the free and full development of his personality is possible.
- 2 In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in democratic society.
- 3 These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

II AMERICAN CONVENTION ON HUMAN RIGHTS

Chapter V Personal Responsibilities
Article 32 Relations between Duties and Rights

- 1 Every person has responsibilities to his family, his community and mankind.
- 2 The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

III PAPUA NEW GUINEA CONSTITUTION 1975

Basic Social Obligations

WE HEREBY DECLARE that all persons in our country have the following basic obligations to themselves and their descendants, to each other, and to the Nation:

- (a) to respect, and to act in the spirit of, this Constitution; and
- (b) to recognize that they can fully develop their capabilities and advance their true interests only by active participation in the development of the national community as a whole; and
- (c) to exercise the rights guaranteed or conferred by this Constitution, and to use the opportunities made available to them under it to participate fully in the government of the Nation; and
- (d) to protect Papua New Guinea and to safeguard the national wealth, resources and environment in the interests not only of the present generation but also of future generations; and
- (e) to work according to their talents in socially useful employment, and if necessary to create for themselves legitimate opportunities for such employment; and
- (f) to respect the rights and freedoms of others, and to co-operate fully with others in the interests of interdependence and solidarity; and
- (g) to contribute, as required by law, according to their means to the revenues required for the advancement of the Nation and the purposes of Papua New Guinea; and

- (h) in the case of parents, to support, assist and educate their children (whether born in or out of wedlock), and in particular to give them a true understanding of their basic rights and obligations and of the National goals and Directive Principles; and
- (i) in the case of the children, to respect their parents.

IN ADDITION, WE HEREBY DECLARE that all citizens have an obligation to themselves and their descendants, to each other and to the Nation to use profits from economic activities in the advancement of our country and our people, and that the law may impose a similar obligation on non-citizens on economic activities in or from our country.

Division 5 Basic Social Obligations
Article 63 Enforcement of the Basic Social Obligations

- (1) Except to the extent provided in Subsection (3) and (4), the Basic Social Obligations are non-justiciable.
- (2) Nevertheless, it is the duty of all governmental bodies to encourage compliance with them as far as lies within their respective powers.
- (3) Where any law, or any power conferred or duty imposed by any law (whether the power or duty be of a legislative, judicial, executive, administrative or other kind), can reasonably be understood, applied, exercised, complied with or enforced, without failing to give effect to the intention of the Parliament or to this Constitution, in such a way as to enforce or encourage compliance with the Basic Social Obligations, or at least not to derogate them, it is to be understood, applied, exercised, complied with or enforced in that way.
- (4) Subsection (1) does not apply in the exercise of the jurisdiction of the Ombudsman Commission or other body prescribed for the purposed of Division III.2 (*leadership code*), which shall take the Basic Social Obligations fully into account in all cases as appropriate.

IV VANUATU CONSTITUTION 1980

Part 2 Fundamental Duties

Fundamental duties

- 7 Every person has the following duties to himself and his descendants and to others:
 - (a) to respect and to act in the spirit of the Constitution;
 - (b) to recognise that he can fully develop his abilities and advance his true interests only by active participation in the development of the national community;
 - (c) to exercise the rights guaranteed or conferred by the Constitution and to use the opportunities made available to him under it to participate fully in the government of the Republic;

- (d) to protect the New Hebrides and to safeguard the national wealth, resources and environment in the interests of the present generation and of future generations;
- (e) to work according to his talents in socially useful employment and, if necessary, to create for himself legitimate opportunities for such employment;
- (f) to respect the rights and freedoms of others and to co-operate fully with others in the interests of interdependence and solidarity;
- (g) to contribute, as required by law, according to his means, to the revenues required for the advancement of the Republic and the attainment of national objectives;
- (h) in the case of a parent, to support, assist and educate all his children, legitimate and illegitimate, and in particular to give them a true understanding of their fundamental rights and duties and of the national objectives and of the culture and customs of the people of the New Hebrides;
- (i) in the case of a child, to respect his parents.

Fundamental duties non-justiciable but public authorities to encourage compliance

8 Except as provided by law, the fundamental duties are non-justiciable. Nevertheless it is the duty of all public authorities to encourage compliance with them so far as lies within their respective powers.

V TUVALU CONSTITUTION 1986

10 Freedom under law

- (1) Freedom based on law consists of the least restriction on the activities of individuals consistent with the public welfare and the maintenance and development of Tuvalu and Tuvaluan society in accordance with this Constitution and, in particular, in accordance with the Principles set out in the Preamble.
- (2) Everyone has the right to freedom based on law, and accordingly, subject to this Constitution:
 - (a) everyone has the legal right to do anything that:
 - (i) does not injure others, or interfere with the rights and freedoms of others; and
 - (ii) is not prohibited by law; and
 - (b) no-one may be:
 - (i) legally obliged to do anything that is not required by law; or
 - (ii) prevented by law from doing anything that complies with the provisions of paragraph (a).

- (3) This section is not intended to deny the existence, nature or effect of cultural, social, civic, family or religious obligations, or other obligations of a non-legal nature, or to prevent such obligations being given effect by law if, and so far as, it may be thought appropriate to do so.

