

Custom, human rights and Commonwealth constitutions

By Justice Susan Glazebrook DNZM¹

I am honoured to have been invited to give this Sir Salamo Injia lecture.² We have had a very enjoyable and productive visit to your beautiful country.³ It was also my privilege to attend the swearing in of the new Chief Justice of Papua New Guinea, Sir Gibbs Salika, on the day of this lecture.⁴

I thought I should first explain why I chose the topic of my address. Partly this is explained by my early background as an historian, with a particular interest in social history. One of my areas of study was the early period of colonisation in New Zealand, including its effect on the indigenous peoples and the relationship between those peoples and the missionaries, settlers, and the Crown, both at the local level and through the Colonial Office.⁵

I then had a long hiatus including undertaking further study and then joining a commercial law firm, specialising in tax and finance. Even then, however, I was not totally cut off from cultural

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² This lecture was the third (and last) in the Sir Salamo Injia Lecture series. It was held on 29 November 2018 at the New Lecture Theatre, Waigani Campus, University of Papua New Guinea, Port Moresby. My thanks to my clerks Nichola Hodge and Rebecca McMenamin for their assistance with this paper and also to the University of Papua New Guinea School of Law and the Papua New Guinea Centre for Judicial Excellence for the invitation. Thanks also to Justice Berna Collier and her associate Mitchell Hughes for their assistance with the arrangements for my visit and their role as enthusiastic tour guides.

³ Among other things, I had a breakfast meeting with the New Zealand High Commissioner, met women legal practitioners and judges at an evening function, had a dinner meeting with John Carey, Executive Director of the Centre for Judicial Excellence, attended a bench/bar dinner, spoke at a breakfast organised by the Papua New Guinea Judicial Women's Association, had a tour of the Court buildings (meeting the wonderful court and library staff) and joined the judges for part of a workshop on gender violence, as well as attending the workshop dinner. I also managed some sightseeing, including visiting markets, a nature park, snorkelling off Lion Island and a very moving visit to the beautifully maintained Bomana War Cemetery. I really appreciate the hospitality and warm welcome given by everyone to my husband and me during our stay.

⁴ It was a pleasure also to be able to catch up with Chief Justice Vincent Lunabek of Vanuatu at the swearing in and at other times during my visit.

⁵ For more information see Claudia Orange *The Treaty of Waitangi* (3rd ed, Bridget Williams Books, Wellington, 2011); Judith Binney, Judith Bassett and Erik Olssen *The People and The land/ Te Tangata me Te Whenua: An Illustrated history of New Zealand, 1820–1920* (Allen & Unwin, Wellington, 1990); and David Williams *A Simple Nullity: The Wi Parata Case in New Zealand law and history* (Auckland University Press, Auckland, 2011).

issues. From 1993 to 2000, I was on the board of South Auckland Health,⁶ which provided hospital services for an area predominantly comprised of Māori and people originally from the Pacific. The cultural aspects of health delivery were therefore of the utmost importance. Issues of differential health outcomes depending on ethnicity were also of major concern to the board.⁷

After my appointment to the Bench in the year 2000, the negative effects of colonisation on our indigenous peoples and also on the peoples from the Pacific living in New Zealand became more apparent to me, manifesting itself, among other things, in incarceration levels that are far too high,⁸ educational achievement levels that are far too low and,⁹ in some cases, the partial and even total loss of connection with their cultural roots and their languages.¹⁰

⁶ Now the Counties Manukau District Health Board is responsible for all health services in the area which are not provided on a national basis by the Ministry of Health.

⁷ Māori face lower life expectancy and higher rates of mental illness, suicide and diabetes: see “Tatau Kahukura: Māori health statistics” *Ministry of Health* (8 October 2015) www.health.govt.nz. An inquiry into the treatment of Māori in the health system is currently underway: Waitangi Tribunal *Health Services and Outcome Kaupapa Inquiry* (Wai 2575). See also Dale Bramley et al “Disparities in Indigenous Health: A Cross-Country Comparison Between New Zealand and the United States” (2005) 95 *American Journal of Public Health* 844 which found health disparities to be more pronounced for Māori than for America’s indigenous populations.

⁸ As at 31 March 2018, 50 per cent of the New Zealand prison population is Māori and 11.6 per cent are Pasifika see Department of Corrections “Prison Facts and Statistics – March 2018” <www.corrections.govt.nz> (as compared to Māori comprising 14.9 per cent and Pasifika peoples comprising 7 per cent of the national population: Statistics New Zealand “Major ethnic groups in New Zealand” (29 January 2015) <www.stats.govt.nz>). For more information see: Statistics New Zealand “Adults convicted in court by sentence type – most serious offence calendar year” NZ.Stat <nzdotstat.stats.govt.nz>.

⁹ In 2017 Māori had the lowest rate of students leaving secondary education with the highest level of school qualification, NCEA level three: 35.6 per cent of Māori obtained level 3, followed by 46.4 per cent of Pasifika leavers, compared to European/Pākehā rates of 57.2 per cent: “School leavers with NCEA level 3 or above” *Education Counts* (September 2018) <www.educationcounts.govt.nz>. See also Statistics New Zealand “18-year-olds with higher qualifications” (February 2017) NZ Social Indicators <archive.stats.govt.nz>.

¹⁰ The loss of te reo Māori has been attributed to government policies designed to encourage assimilation of Māori into European society and to the rapid urbanisation of the Māori population in the 1950s and 1960s: Ministry of Social Development “Cultural Identity” (June 2016) *The Social Report 2016 – Te pūrongo oranga tangata* <<http://socialreport.msd.govt.nz>>. Fluency rates for Māori school children decreased from 90 per cent in 1913 to 26 per cent in 1953: Norman Albert Anaru “A Critical Analysis of the Impact of Colonisation on the Māori Language through an Examination of Political Theory” (Master of Arts in Māori Development, Auckland University of Technology, 2011) at 30. Steps have been made to revive te reo Māori since the passing of the Māori Language Act 1987, including kōhanga reo (full reo and tikanga immersion early childhood education), Māori immersion and bilingual schools, and Te Taura Whiri i Te Reo Māori (the Māori Language Commission). However, the effects of colonisation are still felt with the Waitangi Tribunal calling for more action from the New Zealand Government: Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture*

The essentially British nature of New Zealand’s legal system was also brought home to me, despite the existence of the Treaty of Waitangi¹¹ which guaranteed to Māori people the unqualified exercise of chieftainship over their lands, villages and all their treasures.¹² And, as a judge, one has to be alive to the past injustices suffered by Māori and those in the Pacific at the hands of the colonisers, aided in part by the justice system.¹³

In case all this sounds too negative, I acknowledge having had the opportunity and privilege over the course of my early life growing up in rural New Zealand and in my career to be exposed to the richness of the indigenous cultures in New Zealand and in the Pacific. I was, and remain, impressed by the resilience of these cultures and their languages in the face of the ravages and injustices of colonisation.

Turning now to human rights, I was lucky that early on in my judicial career I was asked to join the Advisory Council of Jurists for the Asia Pacific Forum of Human Rights Institutions.¹⁴ This may not have been an obvious step for one whose legal background was in commercial

and Identity (Wai 262, 2011). See also the earlier Waitangi Tribunal *Report of The Waitangi Tribunal on The Te Reo Māori Claim* (Wai 11, 1986).

¹¹ Treaty of Waitangi (signed 6 February 1840 between about 40 Māori chiefs and Lieutenant Governor William Hobson for the British Crown). By the end of 1840, about 500 chiefs had signed the document.

¹² There were two versions of the Treaty: one in English and one in te reo Māori, the Treaty of Waitangi and Te Tiriti o Waitangi respectively. All but 39 of the Māori signatories signed the Māori text. For the purposes of this discussion I have used Sir Hugh Kawharu’s English translation of the te reo Māori version of the Treaty: Sir Hugh Kawharu “Translation of the te reo Māori text” (19 September 2016) Waitangi Tribunal <www.waitangitribunal.govt.nz>. It is often argued that the two versions of the Treaty are different. Ned Fletcher, however, in his 2014 thesis argues that the early Colonial understanding of the Treaty accorded with the reo text and that the purpose and intent of the Treaty was to establish government over British settlers to protect Māori. Māori tribal government and custom were to be maintained, including recognising Māori as full owners of their lands: Ned Fletcher “A Praiseworthy Device for Amusing and Pacifying Savages? What the Framers Meant by the English Text of the Treaty of Waitangi (PhD, Auckland University, 2014) at ch 2. See also The Independent Working Group on Constitutional Transformation “He Whakaaro Here Whakaumu Mō Aotearoa: the Report of Matike Mai Aotearoa” (2016) for a discussion of the centrality of tikanga (custom) in Te Tiriti (at 50–55) and of tikanga as a core constitutional value (at 70–73).

¹³ For example, on land-related issues concerning the treatment of Māori, see: David Williams *Te Kooti Tango Whenua: The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999); Richard Boast *The Native Land Court 1862-1887: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2013); Richard Boast *The Native Land Court Volume 2: A Historical Study, Cases and Commentary 1888-1909* (Thomson Reuters, Wellington, 2015); and Stuart Banner “Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand” (2000) 34 *Law & Soc Rev* 47. The New Zealand Government has apologised for many actions of the settler government as part of the Treaty Settlement process: see for example Ngāi Tahu Claims Settlement Act 1998, ss 3–5; Te Arawa Lakes Settlement Act 2006, ss 6–9; Tūhoe Claims Settlement Act 2014, ss 9–10; and see further Attorney-General Chris Finlayson “Deed of Reconciliation signed with Parihaka” (10 June 2017) Beehive <www.beehive.govt.nz>.

¹⁴ For more information see “Advisory Council of Jurists” *Asia Pacific Forum* <www.asiapacificforum.net>.

law but I found it a fascinating appointment. During my term, we provided advice on the international human rights law position on topics as diverse as trafficking, terrorism, education and the environment, a topic close to the heart of all Pacific peoples.¹⁵

More recently I have served on the board of the International Association of Women Judges (the IAWJ), an organisation dedicated to upholding the rule of law and ensuring equality for women and girls.¹⁶ In the course of this I have had the real pleasure of meeting a number of your wonderful women judges and magistrates from your Judicial Women's Association led so ably by Principal Magistrate, Regina Sagu. I would also like to pay particular tribute to my friend, Justice Catherine Davani, who so sadly passed away in 2016.¹⁷

I have also been exposed to the work of the IAWJ in promoting the participation and leadership of women in the judiciary and more widely. I mention in particular in this regard the work with the Queen Mothers as traditional leaders in Ghana in 2014. The IAWJ worked with the Queen Mothers to assist them in understanding sexual violence and to encourage Queen Mothers to report cases to the police, rather than trying to settle them out of court by arranging marriages between the victims and their attackers to preserve victims' honour.¹⁸

The IAWJ also provides judicial education on women's rights in order to, among other things, combat violence against women, trafficking and the particular form of corruption that involves

¹⁵ See for example Advisory Council of Jurists *Reference on the Right to Education: Final Report* (April 2006); Advisory Council of Jurists *Consideration of the Issue of Trafficking: Final Report* (December 2002); Asia Pacific Forum *Human Rights and the Environment: Final Report and Recommendations* (September 2007). See also the following articles that touched upon these issues: Susan Glazebrook "Ethel Benjamin Address – 'Looking Outwards'" (2005) 11 Otago LR 131 and Susan Glazebrook "Human Rights and the Environment" (2009) 40 VUWLR 2937.

¹⁶ I am currently the President-Elect of the IAWJ and, in 2020, New Zealand will host the Biennial Conference of Women Judges in Auckland. For more information on the conference see <www.iawj2020auckland.com>.

¹⁷ Justice Catherine Davani was the first female judge of Papua New Guinea. Admitted in 1984, she was a strong advocate for women's rights in Papua New Guinea and worked in both private and public practice before being appointed to the judiciary in 2001. In 2013 Justice Davani gave the 17th Annual New Zealand Law Foundation Ethel Benjamin Commemorative Address: Catherine Davani "Ethel Benjamin Address – Violence against women – sorcery related deaths" (May 2013). See also *The Passing of the late Justice Catherine Davani* (Press Release, Prime Minister of Papua New Guinea, 7 November 2016); and Charles Moi "Son pays tribute to Mum" *The National* (15 November 2016).

¹⁸ Arline Pacht and Susan Glazebrook (eds) *The IAWJ: Twenty Five years of Judging for Equality* (IAWJ, 2016) at 98–99 <www.iawj.org>. For a further discussion of "Queen Mothers" see Marijke Steegstra "Krobo Queen Mothers: Gender, Power, and Contemporary Female Traditional Authority in Ghana" (2009) 55 Africa Today 105.

seeking sexual favours instead of money (dubbed sextortion by the IAWJ, a term that has now been picked up more widely).¹⁹ The philosophy of the IAWJ, however, is always to ensure local ownership and control of educational programmes and to work with, and within, the customs and cultures of the jurisdictions involved.²⁰

Drawing this all together, it seemed obvious, to me at least, that I should choose the topic I have and try to compare the approach to issues of custom and human rights in Commonwealth jurisdictions. It also seemed obvious that I should, because of my involvement with the IAWJ, consider the position of women and girls in relation to custom.

I take a wide view of custom to encompass the manner in which the members of a society interact with each other and with the land on which they live.²¹ I should stress too that, by separating human rights from custom, I am not to be taken as suggesting custom and human rights are distinct or, worse, conflicting. Properly understood and applied, they are in my view complementary and consistent.

The right to self-determination is recognised in art 1 of both the International Covenant on Civil and Political Rights (usually called the ICCPR)²² and the International Covenant on Economic, Social and Cultural Rights (the ICESCR).²³ The right to self-determination includes the right to pursue social and cultural development and so, to my mind, includes custom. The inclusion of the right to self-determination means that collective rights, as well

¹⁹ *The IAWJ: Twenty Five years of Judging for Equality*, above n 18, at 108–111. See also “Sextortion” (standing topic since May 2018) *BBC* <www.bbc.com>.

²⁰ *The IAWJ: Twenty Five years of Judging for Equality*, above n 18, at 84-96 and in particular, at 93-94.

²¹ There is no universally accepted definition of custom. As Larcom noted: “Like Law itself it is a nebulous and slippery concept”: Shaun Larcom *Legal Dissonance: The Interaction of Criminal Law and Customary Law in Papua New Guinea* (Berghahn Books, Oxford, 2015) at 26. Custom can be more generally described as the rules and norms that govern behaviour which are distinct to each culture: Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006) at [4.23]–[4.30] [*Converging Currents*]. Moreover, defining customary law should be from a perspective of legal pluralism rather than positivism: *Converging Currents* at [4.8]–[4.15]. Defining local custom by contrasting it with colonial law or constitutionalism can be seen as neo-colonialism or diminishing law which emanates from social life: Melissa Demain “Custom in the Courtroom, Law in the Village: Legal transformations in Papua New Guinea” (2003) 9 *J Roy Anthrop Inst* 97 at 98. For more information on definitional issues see: Grant Follett “Defining the Formless: Customary law in the Pacific” (2014) 39 *AltLJ* 125 (note that Follet’s article does not address issues arising from native title, a topic in its own right).

²² International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 1.

²³ International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 23 March 1976), art 1.

as individual rights, are recognised in major international human rights instruments. Moreover, custom is specifically recognised in art 11 of the United Nations Declaration on the Rights of Indigenous Peoples.²⁴ The relationship between collective and individual rights and how to reconcile any conflicts between them has not, however, been very well developed – a theme to which I will return.

Case studies

My methodology, if it can be graced with such a name, is to discuss a selection of cases from around the Commonwealth. I do not pretend this is a comprehensive study or even a systematic one and the cases I discuss are not necessarily the latest ones. They were chosen because they illustrate different aspects of and approaches to the issues. After discussing the cases I will attempt to draw out some themes. As you will see, I raise more questions than answers, but I hope it is still a useful exercise.

Papua New Guinea

The cases I discuss come from the Solomon Islands, Samoa, Tuvalu, Nigeria and New Zealand. I do not propose to discuss cases from Papua New Guinea as you will be familiar with them. In any event, the topic of the place of custom as one of the sources of the underlying law of Papua New Guinea was the subject of an excellent speech in 2010 by your former Chief Justice, Sir Salamo Injia, for whom this lecture series is named.²⁵

In that speech, he said that the first instance courts, including village courts, would have a wealth of information on customs but that most of those decisions are not published.²⁶ He noted the difficulties faced by the superior courts in ascertaining and applying custom.²⁷ He said that, due to issues of expense and there being no readily available resources in this area, superior courts are often not provided with information on relevant customs by the parties.²⁸

²⁴ *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007). See also the importance placed by Māori constitutional thinkers on the Declaration in relation to self-determination: *The Independent Working Group on Constitutional Transformation*, above n 12, at 60.

²⁵ The Chief Justice's original speech was given the Underlying Law Act conference in Alotau, Papua New Guinea, in 2010. It was subsequently published as Salamo Injia "The Underlying Law Act 2000" [2011] LAWASIA Journal 1. I use the published version in this paper.

²⁶ Salamo Injia, above n 25, at 3.

²⁷ Salamo Injia, above n 25, at 6.

²⁸ Salamo Injia, above n 25, at 4 and 6.

As a result, the superior courts tend to fall back on common law precedents, rather than developing the law in a manner indigenous to Papua New Guinea.²⁹

I understand that there is a project underway by the judiciary to document custom on regional basis.³⁰ This will make customary law much more accessible. The University of Papua New Guinea is also encouraging students to work on customary law projects. These are exciting projects which will no doubt contribute much to Papua New Guinea's jurisprudence in future.³¹

But for now, I turn to three cases from other Pacific jurisdictions: the first two deal with the practice of banishment and the third is mostly concerned with freedom of religion.

Solomon Islands

First, a case from the Solomon Islands, *Pusi v Leni*.³² In this case there had been a dispute between Mr Pusi and other members of the village. What was in dispute was not clear from the facts given in the report of the case, but neither is it material.³³ The issue that concerns us today arose when the Chief's Committee went to talk to Mr Pusi in an attempt to resolve the dispute. Mr Pusi had met this overture with offensive language and, although he later tried to apologise, this had not been done properly in accordance with custom.³⁴ The consequence was that Mr Pusi was banished.

Mr Pusi alleged that he had been wrongfully banished for failing to pay customary compensation.³⁵ He argued that this breached his constitutional rights of personal liberty, enjoyment of property, freedom of assembly and association and freedom of movement. The

²⁹ Salamo Injia, above n 25, at 4. A similar conclusion was recently reached by Corrin in her analysis of administrative law in Papua New Guinea: see Jennifer Corrin "Administrative law and customary law in Papua New Guinea" (2018) 18 OUCJLJ 123.

³⁰ Salamo Injia, above n 25, at 6. I understand the first report is now completed.

³¹ Indeed, the Papua New Guinean judiciary appears receptive to recent arguments made in relation to custom. For example, in *Kuman v Digicel (PNG) Ltd* [2013] PGSC 10; SC1232 (9 May 2013) on appeal it was alleged by the appellants that the Judge had failed to consider that tribal fights were a "common and traditional way" of resolving disputes. Although the Court described this submission as a "somewhat startling proposition", it did not consider it so "unarguable that it ought to result in dismissal of the proceedings": at [18].

³² *Pusi v Leni* [1997] SBHC 100; HCSI-CC 218 of 1995 (14 February 1997).

³³ At 1.

³⁴ At 2.

³⁵ At 2.

claim was dismissed as Chief Justice Muria was not satisfied that there was a banning order.³⁶ Instead, the Chief Justice considered that Mr Pusi did not feel welcome to return to the village as he had not remedied his breach of custom. It was held that this did not amount to a breach of the Constitution.³⁷

The comments the Chief Justice made after dismissing the application are of interest. He first noted that the Constitution itself recognised customary law as part of the law. He said that customary law has “evolved from time immemorial and its wisdom has stood the test of time”.³⁸ He went on to say that it is “a fallacy to view a constitutional principle or a statutory principle as better than those principles contained in customary law”.³⁹ In his view, one was no better than the other. Rather “it is the circumstances in which the principles are applied that vary and one cannot be readily substituted for the other”.⁴⁰

He said that he had made those observations because he saw the case as “a classic example of an attempt to use the Constitution to circumvent the lawful application of custom, a course of action that may well engender disharmony in society”.⁴¹ In his view such arguments must not be allowed to flourish in the Solomon Islands.⁴²

The Chief Justice’s approach emphasised the vital role of custom in creating stability and harmony in society and the constitutional place of customary law in the legal system. This meant that individuals should not be allowed to call other constitutional provisions to their aid in order to remove or diminish the consequences of their breach of customary law. In this sense, the Chief Justice’s comments can be seen as based on the need to uphold the rule of law.

Samoa

I now move to Samoa and a case which concerned the banishment of a family from a village for alleged insulting conduct and continual failure to comply with village obligations and

³⁶ At 3–4.

³⁷ At 4.

³⁸ At 5.

³⁹ At 5.

⁴⁰ At 5.

⁴¹ At 6.

⁴² The Constitution of the Solomon Islands 1978 expressly recognises customary law and its place in modern society: ss 75 and 76. Protection from discrimination is subject to laws that provide for the application of customary law: s 15(5)(d).

penalties.⁴³ In this case the Court of Appeal of Samoa, comprised of Judges from New Zealand,⁴⁴ had to consider whether banishment conflicted with the constitutional right of freedom of movement.

The Court, relying on the first instance decision of the Chief Justice in the case, identified banishment as being a measure of social control to maintain peace, as well as being a sanction that can be imposed by the Village Council for misconduct or for breaching rules imposed.⁴⁵ The Court noted that, because of the extended family system in Samoa, a person banished always has a place to go if the banishment extends to having to leave the village.⁴⁶ It was also noted that, when banished individuals are remorseful and prepared to make amends for their wrongdoing, they may return to the village and make a presentation of foodstuffs and/or fine mats to the Village Council, after which they will be accepted back into the village.⁴⁷

The Court quoted the preamble to the Constitution that makes it clear that the Samoan nation is based on Christian principles and Samoan custom and tradition.⁴⁸ The Court accepted that customary law and leadership practices are engrained in Samoan society. It also referred to a 1975 report which recognised that banishment from a village was usually only applied as a sanction of last resort when all other methods of settling the issues had failed.⁴⁹ The Court accepted the submission of the Attorney-General that banishment was essentially used to prevent chaos arising in village affairs.⁵⁰

The Court concluded that, in light of the history and social structure of Samoa, banishment was constitutional.⁵¹ It was a reasonable restriction, imposed by existing law, on the right to freedom of movement in the interests of public order. The Court accepted that the Constitution must be applied with due regard to its Samoan setting.⁵²

⁴³ *Taamale v Attorney-General* [1995] WSCA 12; 02 1995B (18 August 1995).

⁴⁴ The panel consisted of Cooke P, Casey and Bisson JJ.

⁴⁵ At 10–11.

⁴⁶ There are also lesser forms of banishment such as shunning and the burning of possessions.

⁴⁷ At 11–12.

⁴⁸ At 14.

⁴⁹ At 8.

⁵⁰ At 8.

⁵¹ At 14–15.

⁵² At 15.

The Court did, however, caveat its approach, agreeing with the Chief Justice that “we by no means exclude the prospect that as Western Samoan society continues to develop the time may come when banishment will no longer be justifiable”.⁵³ The Court emphasised that serious criminal offences should be dealt with by the Samoan Courts, with all the safeguards for the accused this entails. It also said banishment, although a legitimate punishment, should never be lightly imposed. It should only be imposed if it is truly essential to preserve the stability of village life. This is particularly the case as it can affect innocent family members, such as children, as had occurred in the case before it.⁵⁴

This case, like the Solomon Islands case, recognises the role banishment plays in ensuring social harmony but it took a different approach. It tried to reconcile the constitutional right of freedom of movement with the custom by imposing restrictions on the use of banishment to make sure that it is only imposed when justified for social order purposes. In this regard, the Court used a classic human rights analysis of ensuring any restrictions on freedom of movement are prescribed by law and necessary in a free and democratic society.

It is notable, however, that the Court, in holding banishment to be prescribed by law, did not seem to recognise custom as a source of law in its own right. Rather, it relied on statutory recognition of banishment to say that the punishment was based on existing law. Further, while the Court did see the issue as concerning whether group rights should prevail over individual rights, it did not analyse this in terms of the collective right to custom conflicting with the individual right to freedom of movement, with a balancing of the comparative importance of each right in the circumstances. Rather, the Court used a classic human rights analysis of considering whether the authority’s use of banishment was a necessary restriction on the individual’s right to freedom of movement in order to ensure the protection of public order.

Another notable feature of this case is that the Court was alive to the need for its decisions to align with the norms of Samoan society and for courts not to try and rush progress towards

⁵³ At 15.

⁵⁴ At 14. For a discussion on the seriousness of banishment and its consideration in the sentencing of a Samoan offender in New Zealand see Litia Tuiburelevu “Legally brown: The experience of Pasifika women in the criminal justice system” (2018) 11 NZWLJ 78 at 101–103.

reform.⁵⁵ As one commentator has pointed out, if the courts were to “dismiss custom or traditional practices as irrelevant, or pay only lip service to them, it is unlikely that the decisions would gain respect or be widely followed or enforced”.⁵⁶ This might be seen as particularly important for courts comprised of judges from abroad.⁵⁷

The final feature of the case that calls for comment is that the Court recognised that custom has to adapt to changes in society and there may come a time when a particular custom can no longer be justified. I consider this to be a very important observation. Custom, by nature, has to develop in order to align with the needs of society.

Tuvalu

The next case is from Tuvalu, and is again a decision of a Court of Appeal consisting of New Zealand judges.⁵⁸ The appeal concerned Nanumaga, an island in Tuvalu with some 800 inhabitants at the relevant time.⁵⁹ The background to the case is that the assembly of elders for the island decided in 2001 that the four religions already present on the island (Seventh Day Adventist, Jehovah’s Witness, Ekalesia Kelisiaqno Tuvalu and the Bahai faith) sufficed and decided not to allow any new religions to be introduced onto the island.⁶⁰ This decision was said to have been made to strengthen the social structure, traditions, peace and order on the island.⁶¹

⁵⁵ Indeed banishment remains a source of punishment in Samoa. In 2018 for example the family of individuals charged with the murder of a 15 year old were banished by their Village Council in an attempt to maintain peace in the village as tensions mounted over the murder: Joyetter Feagaimaali’i-Luamanu “Tensions mount, family banished” *Samoa Observer* (13 January 2018) <www.samoobserver.ws>. Calls for reform in the last five years (for example, see “Law Change in Samoa Needed for Female Participation” *RNZ* (New Zealand, 21 August 2015) and “Samoa to amend Village Fono Act” *RNZ* (New Zealand, 3 July 2015)) have culminated in the passage of the Village Fono Amendment Act 2017, the object of which is, among other things, to “provide for the recognition and protection of Village Fono; to confer the exercise of power and authority by Village Fono in accordance with custom and usage of their village;” and to provide procedures to be followed when inquiring into village misconduct or imposing punishment, including banishment and ostracism: s 2A.

⁵⁶ A H Angelo “‘Steady as she goes’ – The Constitution and the Court of Appeal of Samoa” (2012) 18 NZACL Yearbook 145 at 159.

⁵⁷ For a discussion of the issues that arise with using expatriate judges in the Pacific see Natalie Baird “Judges as Cultural Outsiders: Exploring The Expatriate Model of Judging In The Pacific” (2014) 19 *Canta LR* 80. See also Law Commission *Converging Currents: Custom and Human Rights in the Pacific*, above n 21, at [13.75].

⁵⁸ *Teonea v Pule o Nanumaga* [2009] TVCA 2 (Tompkins, Fisher and Paterson JJA).

⁵⁹ At [2].

⁶⁰ At [5] and [11].

⁶¹ At [5].

In 2003 Mr Teonea, a pastor in the Brethren Church, had come to the island to preach and conduct bible lessons.⁶² Within a short time there were 40 converts to the church.⁶³ Mr Teonea had not applied for permission before coming to the island,⁶⁴ although it would likely have been refused if he had. Another church had been refused permission earlier that year.⁶⁵

After Mr Teonea's actions, the Assembly of Elders of the island confirmed the earlier resolution and passed a resolution that had the effect of banning the Brethren Church from seeking converts on the island.⁶⁶ Mr Teonea and his converts decided to continue with their church meetings. A group of young men took exception to this and threw stones at the building where one of these meetings was being held, causing some damage to property and minor injuries.⁶⁷ After discussions with the High Chief of the island and the local policeman among others, Mr Teonea and the other leaders of the Brethren Church left the island about a month later.⁶⁸

Mr Teonea then brought proceedings alleging breach of the Constitution and in particular breach of the rights to freedom of religion and freedom of association.⁶⁹ The Constitution at the time was subject to guiding principles which stressed the need to maintain the stability of Tuvalu society by maintaining the traditional values, culture and traditions and the attitudes of cooperation, self help and unity within island communities. The guiding principles also stressed the traditional search for consensus in the society, rather than confrontation and divisiveness.⁷⁰ It was recognised, however, that in a changing world those principles and values and the manner of their expression may gradually change.⁷¹

It is significant that the constitutional provision relating to freedom of religion expressly recognised the right to “show and spread, both in public and in private, a religion or belief, in worship, teaching, practice and observance”.⁷² It also expressly encompassed the freedom to

⁶² At [8].

⁶³ At [2].

⁶⁴ At [12].

⁶⁵ At [7].

⁶⁶ At [9]–[14].

⁶⁷ At [15].

⁶⁸ At [16].

⁶⁹ At [17].

⁷⁰ At [18]. These guiding principles were outlined in the preamble of the Constitution.

⁷¹ At [19].

⁷² Section 23(2)(c). See also at [23] of the decision.

change a religion or belief.⁷³ The provision did, however, allow derogation of the right in the interests of public safety or public order and allowed measures designed to protect the rights of others to practice their religion “without the unsolicited intervention of members of any other religion or belief”.⁷⁴ The Constitution itself specifically recognised that, to protect Tuvalu values, individual freedoms can only be exercised having regard to the rights or feelings of other people and the effect on society.⁷⁵

At first instance, the Chief Justice dismissed Mr Teonea’s application on the basis that there was clear evidence that his actions constituted a direct threat to the values and culture of the majority of those on the island and that a failure to act would be divisive and threaten traditional values.⁷⁶

On appeal, the Court split. The minority judge, Tompkins JA, would have dismissed the appeal.⁷⁷ He considered that the possibility of the breakdown of social unity and order on the island far outweighed the benefit to the Brethren Church members of being allowed to preach their faith to others.⁷⁸

The other two judges, Fisher and Paterson JJA, allowed the appeal.⁷⁹ Fisher JA said that he could understand the view that the threat to the stability, culture and unity of the island is a high price to pay for permitting the introduction of another religion on the island but, in the end, he considered that “the time has come to allow the people of Nanumaga their constitutional freedoms”.⁸⁰ He said this was for a number of reasons.

First, he noted that this was not a choice between Pre-European Tuvalu traditions and the modern world. Rather, “it was a choice between the island having four foreign sourced

⁷³ Section 23(2)(b). See also at [23] of the decision.

⁷⁴ Section 23(6)(a) and (b). See also at [23] of the decision.

⁷⁵ Section 29(3). This section, entitled “Protection of Tuvaluan values etc” reaffirmed the values outlined in the preamble and also noted at (3) that “[w]ithin Tuvalu, the freedoms of the individual can only be exercised having regard to the rights or feelings of other people, and to the effect on society”.

⁷⁶ At [27].

⁷⁷ At [70] and [72].

⁷⁸ At [36]–[38].

⁷⁹ At [15] and [163] per Fisher JA; at [199] and [2242]–[225] per Paterson JA.

⁸⁰ At [158].

religions or five”.⁸¹ He also said that the preservation of culture was only one of many values the people of Tuvalu said they wanted when they adopted the constitution. He said that, if they had wanted “stability and culture above all else they could have easily said so”.⁸² What they opted for instead, he concluded, “was a more sophisticated formula which requires competing values to be carefully balanced on a case by case basis”.⁸³ He noted that to deny the appeal would put the island in the minority of places in the world where freedom of religion is denied.⁸⁴ Fisher JA also referred to the fact that the island had already seen sweeping changes and that contact with the rest of the world, through television and the internet, meant that the growth of new ideas and beliefs was unstoppable.⁸⁵ He also considered that there would have been other, more moderate, ways in which intrusive conduct by new religions could be validly controlled.⁸⁶

Although it was for slightly different reasons, Paterson JA agreed with the result reached by Fisher JA, and noted in particular that a free and democratic society tolerates minority views.⁸⁷ He accepted the possibility of divisiveness but did not accept that unlawful acts, such as the stoning of the building, should be a major factor in the balancing act.⁸⁸ Indeed, he considered that the authorities should take action against those committing unlawful acts. Paterson JA’s conclusion may in part have been due to his belief that the elders’ customary authority could not be a basis for limiting a constitutional right.⁸⁹

The Court of Appeal decision did not go down well in Tuvalu. After the decision, the Tuvalu Parliament amended the Constitution to make it clear that the Constitution was designed to protect Tuvalu culture and unity, which could include restricting religious freedom.⁹⁰ I interpolate that this was arguably already clear from the Constitution and that the majority’s opinion meant the constitutional provisions related to culture were, in fact, read down.

⁸¹ At [158](a). Fisher JA had earlier noted that the four religions originally on the island were progressively introduced from abroad over the last 150 years, which meant they did not meet the definition of cultural heritage or traditional knowledge in art 31 of the UN Declaration on the Rights of Indigenous Peoples: at [113].

⁸² At [158](b).

⁸³ At [158](b).

⁸⁴ At [158](c).

⁸⁵ At [158](d). See also at [147].

⁸⁶ At [158](e). See also at [148]–[152].

⁸⁷ At [211]–[212].

⁸⁸ At [221].

⁸⁹ At [198].

⁹⁰ Constitution (Recognition of Traditional Standards, Values and Practices) Amendment Act 2010, ss 4–5.

A few other comments on this case. First, it is hard not to have some sympathy with the view expressed by Fisher JA that the religions at issue were all foreign. In this sense, one can understand his view that the dispute was not one between old and new values and therefore that the protections for custom were not activated. I think this approach was, however, too narrow. What was at the heart of this case was the customary authority of the Assembly of Elders to make declarations that they saw as necessary for the stability of the island community. It must also be remembered that religion (and in particular Christianity) has become engrained in Pacific societies and an essential part of their identities, as evidenced by its inclusion in many of the constitutions of Pacific nations.⁹¹

It seems to me too that the importance the Constitution placed on collective rights and on unity in a small island society was underestimated by the majority of the Court of Appeal. The majority, in deciding to impose change on the Tuvalu community, showed itself to be perhaps less effective in promoting the development of culture and the freedom of religion than it might have been had it sowed the seeds for gradual change as the Samoan Court of Appeal did in the banishment decision I have just discussed.

Nigeria

I now turn to a 2014 case from the Supreme Court of Nigeria.⁹² Essentially the case concerned whether a widow could inherit the family home after her husband's death. If she was not

⁹¹ The Constitution of Tuvalu makes several references to God. The preamble states “the people of Tuvalu, acknowledging God as the Almighty and Everlasting Lord and giver of all good things, humbly place themselves under His good providence and seek His blessing upon themselves and their lives;” and that “the people of Tuvalu desire to constitute themselves as an independent State based on Christian principles, the Rule of Law, and Tuvaluan custom and tradition”. God is also referenced in principles 2 and 3 of the Constitution. Other Pacific nations’ constitutions also include references to Christianity especially in their preambles. The Constitution of the Republic of Vanuatu proclaims the “establishment of the united and free Republic of Vanuatu founded on traditional Melanesian values, faith in God, and Christian principles”. Similar references are found in the Constitution of Solomon Islands which notes that their state is established under the “guiding hand of God”; and in the Constitution of Samoa, the preamble of which states “In the holy name of God, the almighty, the every loving whereas sovereignty over the Universe belongs to the Omnipresent God alone, and the authority to be exercised by the people of Samoa within the limits prescribed by His commandments is a sacred heritage”. For more information on Christianity in the Pacific see Jamie Tahana “Christianity spread through top down approach in the Pacific – study” *RNZ* (25 July 2018) <www.radionz.co.nz>.

⁹² *Anekwe v Nweke* SC 129/2013, (2014) LPELR-22724(SC).

entitled to inherit, then the property would go to the eldest living male in the family – in this case a nephew.

The interesting issue for us in the case is the rejection by the Nigerian Supreme Court (and indeed by the courts below) of a customary law that discriminated against women and, in particular, the very strong terms in which this rejection was expressed. This is in marked contrast to earlier decisions that had upheld customary law in inheritance matters. For example, one earlier Supreme Court case had held that women could not inherit as they themselves were part of the inheritance – essentially the custom treated women as chattels to be passed on to the remainder of their husband’s family after their husband’s death.⁹³

The applicable customary law in the case was that of Awka people who live in the south-east of Nigeria, in the centre of Igboland.⁹⁴ Under Awka customary law (at least as contended for by the nephew), a widow could only inherit if there was a surviving male child. In this case the marriage had produced only daughters.⁹⁵

The Nigerian Supreme Court held unanimously that the Awka customary law that disinherited a widow because the marriage had not produced a male child was repugnant to natural justice, equity and good conscience, and could not be upheld.⁹⁶ The Court was thus applying a classic test for whether indigenous customary law can be recognised as part of the common law.⁹⁷

The lead judgment was given by Justice Clara Bata Ogunbiyi. Among other things, she said that a custom of this nature could not be upheld in the 21st century. She said that such a custom is “punitive, uncivilized and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the rights of [...] womenfolk”. She would have expected the days of such obvious differential discrimination to be over.⁹⁸

⁹³ *Suberu v Sunmonu* (1957) 2 FSC 31. See also *Julie Neziyanya v Anthony Okagbue* (1963) 1 All NLR 82 and *Osilaja v Osilaja* (1972) 10 SC 126 where women were prohibited from inheriting the property on the basis of their sex under customary law.

⁹⁴ Awka is the capital of the Anambra State in Nigeria. The term Awka people seems to be the collective name given by the Supreme Court to the seven Igbo groups which occupy the 33 villages that comprise Awka: Awka Capital Territory Development Authority “History of Awka Capital Territory” <actda.com.ng>.

⁹⁵ *Anekwe v Nweke*, above n 92, at 19.

⁹⁶ *Anekwe v Nweke*, above n 92, at 16 and 18–20.

⁹⁷ The tests for custom as part of common law are discussed further below in relation to a New Zealand case.

⁹⁸ *Anekwe v Nweke*, above n 92, at 15.

The other judges agreed with the condemnation of the custom in modern conditions and a number of them referred to it as also being a challenge to God's will. For example, Nwali Sylvester Ngwuta JSC said:⁹⁹

The custom ... wherein a widow is reduced to chattel and part of the husband's estate, constitutes, in my humble view, the height of man's inhumanity to woman, his own mother, the mother of nations, the hand that rocks the cradle.

He further noted that the widow was not responsible for having only female children and that "[c]hildren, whether male or female, are gifts from the Creator for which the parents should be grateful". He went on to say that the custom of the Awka people is "barbaric", "repugnant to natural justice, equity and good conscience" and takes the Awka community back to "the era of cave man".¹⁰⁰

It is significant that the Nigerian Constitution was not in fact invoked in the judgment, although other cases concerning similar issues have relied on the equality provisions in the Nigerian Constitution.¹⁰¹ As I noted earlier, the decision was instead made under the common law test for the recognition of customary law used in colonial times.

It is also interesting that the Court in *Anekwe* did not deal with the widow's argument that the inheritance custom argued for by the nephew was not in fact the true custom of the Awka people. The nephew argued that only a male could inherit the property where the widow had not purchased it herself. The respondent widow challenged that formulation of the custom and argued that customary law allowed for the widow of a deceased to stay in the matrimonial home whether or not she had a male heir. In a series of arbitrations held at an earlier stage, the widow's arguments had in fact found favour, with the nephew being asked to leave the widow alone.¹⁰²

⁹⁹ *Anekwe v Nweke*, above n 92, at 18.

¹⁰⁰ *Anekwe v Nweke*, above n 92, at 18.

¹⁰¹ See for example *Ukeje v Ukeje* SC 224/2004, (2014) LPELR-22697(SC), which was released at the same time as *Anekwe v Nweke* in 2014. *Ukeje* also concerned an issue of inheritance of the property of the deceased who had died intestate. The Supreme Court was unanimous in finding that it was unconstitutional to exclude female children from the inheritance. Rhodes-Vivour JSC, delivering the lead judgment of the Court, noted that to do would violate ss 39 and 42 of the 1999 Constitution. For a discussion on these cases see Israel NE Wirugi and Rose O Ugbe "The Supreme Court has cleared the customary law inhibitions on the inheritance rights of women in Nigeria" (2016) 2 International Journal of Law 27.

¹⁰² *Anekwe v Nweke*, above n 92, at 10.

The judgments of the various judges raised a number of justifications for the result. The first was the idea that the Awka inheritance custom is outmoded in the 21st century. But at the same time, with the reference to God in a number of the judgments, there was a view expressed that this custom is repugnant to a more fundamental natural law based on God's will. Further, running through all of the judgments is a strong sense of the need for gender equality and equity in a civilised society.

One commentator, Diala, argues that the Supreme Court did not go far enough. He says that customs relating to inheritance have become outmoded, because the duties attached to inheritance in pre-colonial society are no longer recognised. In the past, in traditional collectivist societies, male heirs assumed the responsibility of providing for any widows and for all their children, regardless of their sex.¹⁰³ The eldest male relative also had the responsibility of providing for the younger male members of the family.¹⁰⁴ Diala argues that, because that traditional structures have broken down, discriminatory inheritance customs should no longer be recognised as good law and the Supreme Court should have made that absolutely clear.¹⁰⁵

New Zealand

Finally, I turn to a case from New Zealand.¹⁰⁶ This case does not concern a constitution, as New Zealand is one of the few countries without a supreme written constitution.¹⁰⁷ Nor does

¹⁰³ AC Diala "A Critique of the Judicial Attitude Towards Matrimonial Property Rights Under Customary Law in Nigeria's Southern States" (2018) 18 AHRLJ 100 at 102. See also in *Ngwo v Onyejena* (1964) 1 All NLR 1352 (SC) where the Supreme Court upheld the custom of the land passing to the eldest son but said that he then holds the land in trust for his siblings who have a beneficial interest in the land and a right to farm on it. (This case was sourced from: Oyeniyi Ajigboye and Temiloluwa Alabi "The Protection of Women's Rights in Nigeria: An Appraisal of Judicial Intervention on Women and Inheritance" (2015) available from <www.researchgate.net>).

¹⁰⁴ In modern times it has been held that this duty upon eldest sons is not legally binding: see discussion of *Ogiamien v Ogiamien* (1967) NMLR 245 (SC) in Ajigboye and Alabi, above n 103, at [2.1]. There is also a tribal difference in custom: the case *Ogiamien* related to Igbo custom in Benin; the case of *Ngwo* related to Asaba custom.

¹⁰⁵ Diala, above n 103, at 102. Diala also contrasts the cases of the Nigerian Supreme Court with a case from the South African Constitutional Court that abolished the primogeniture rule (*Bhe v The Magistrate* (2005) 1 SA 580 (CC)): see AC Diala "Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa" (2014) 14 AHRLJ 633. It does seem to me, however, that the Nigerian Supreme Court did make it clear that outmoded customs would not be recognised, and did so in strong language.

¹⁰⁶ *Takamore v Clarke* [2010] 2 NZLR 525 (Fogarty J) [*Takamore* (HC)]; *Takamore v Clarke* [2012] 1 NZLR 573; [2011] NZCA 587 [*Takamore* (CA)]; and *Takamore v Clarke* [2013] 2 NZLR 733; [2012] NZSC 116 [*Takamore* (SC)].

¹⁰⁷ The constitutional framework of New Zealand is composed of a series of statutes, such as the Constitution

the case directly concern human rights. It does, however, engage collective rights and custom and also arguably a clash of customs. This is an important issue where there are multiple customs in a jurisdiction, such as in Papua New Guinea.¹⁰⁸

The case concerned Mr Takamore. He was Māori, of Whakatohea and Ngāi Tūhoe descent.¹⁰⁹ His de facto partner, Ms Clarke, was of European descent. At the start of their relationship they lived in the Bay of Plenty, where Mr Takamore was born and where his family lived. After the birth of their first child, Ms Clarke moved back to Christchurch with their baby as she was missing her family. A month later Mr Takamore followed her and their second child was born in Christchurch a few years later. The family continued living there for some 20 years and Mr Takamore's contact with his Bay of Plenty family became infrequent.¹¹⁰

The next part of the story is a sad one. Mr Takamore died suddenly in 2007. His will appointed Ms Clarke as executrix but, apart from stating that he wanted his body to be buried, gave no other formal instructions on his preferred burial location.¹¹¹ Ms Clarke decided to bury him in Christchurch so he could be close to her and the children in accordance with what she thought he would have wanted.¹¹²

Mr Takamore's mother and some of the rest of his family wished Mr Takamore to be buried in his home marae's urupā (burial ground), in Kutarere in the Bay of Plenty in accordance with Māori custom.¹¹³ They travelled to Christchurch with the express purpose of taking his body back with them for burial. There was an attempt at negotiation between Ms Clarke and her children and Mr Takamore's wider family but the process and the Tūhoe customs involved

Act 1986 and the New Zealand Bill of Rights Act 1990, and constitutional conventions: see Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in *Cabinet Manual* (Department of the Prime Minister, 2017). For a more general discussion on the constitutional framework in New Zealand see Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, 2014) ch 4; and Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne 2004).

¹⁰⁸ Papua New Guinea is considered one of the most culturally diverse countries in the world. There are over 1,000 tribes and 800 languages in Papua New Guinea: *Papua New Guinea: United Nations Development Assistance Framework 2018-2022* (United Nations Development Program) at 16.

¹⁰⁹ *Takamore* (HC) at [10].

¹¹⁰ *Takamore* (HC) at [14].

¹¹¹ *Takamore* (HC) at [17].

¹¹² *Takamore* (HC) at [1]–[2].

¹¹³ *Takamore* (HC) at [3].

were not properly explained to Ms Clarke.¹¹⁴ In the end Mr Takamore’s body was taken by the wider family, against the wishes and Ms Clarke and the children, and buried in Kutarere.¹¹⁵

High Court

Ms Clarke issued proceedings for the return of the body for burial in Christchurch. She argued that, as the executrix of Mr Takamore’s estate, it was for her to decide where the body should be buried.¹¹⁶ The wider family argued that the issue was governed by Tūhoe tikanga or custom. Two independent experts gave evidence on the relevant parts of that custom.¹¹⁷ They said that the decision on burial under Tūhoe custom is a collective one made by a deceased’s whanau (family).¹¹⁸ If there is disagreement, there will usually be negotiation between family members but, where agreement is not reached, it accords with Tūhoe custom for the body to be taken for burial by one of the parties.¹¹⁹ Taking a body for burial shows respect for and enhances the mana of the deceased, regardless of whether it is against the wishes of part of the family.

The High Court held that, as Mr Takamore had abandoned his culture, Tūhoe custom could not be imposed on him.¹²⁰ On this analysis, there was no need to consider whether Tūhoe custom formed part of New Zealand’s common law.¹²¹ This was also the minority view in the Court of Appeal.¹²²

Court of Appeal

The majority in the Court of Appeal, of which I was a part, started by analysing the position of custom at common law.¹²³ Custom formed part of the common law of England if it was shown

¹¹⁴ *Takamore* (HC) at [18]. For example it had not been explained to Ms Clarke that, as claimants to the body, she and her family had to stay with it to ensure that it would not be moved: *Takamore* (CA) at [19], [36] and [40]. Her absence was seen as acquiescing to the wider family’s claims: *Takamore* (SC) at [165].

¹¹⁵ *Takamore* (HC) at [4]–[5].

¹¹⁶ *Takamore* (HC) at [17].

¹¹⁷ *Takamore* (HC) at [54].

¹¹⁸ The evidence on the relevant tikanga provided that “Where there is a dispute between the wishes of the deceased and the interests of the collective, under tikanga, the collective takes priority”: at [57].

¹¹⁹ *Takamore* (HC) at [55]–[59].

¹²⁰ *Takamore* (HC) at [70]–[89].

¹²¹ *Takamore* (HC) at [89].

¹²² *Takamore* (CA) at [267], [271]–[292].

¹²³ *Takamore* (CA) at [105]–[106] and [109]–[196].

to: (a) have existed from time immemorial (meaning since the reign of Richard I in 1189);¹²⁴ (b) have continued as of right and without interruption since its origin; (c) be reasonable; (d) be certain in its terms, and in respect of the locality to which it obtains and the persons it binds; and (e) not have been extinguished by statute.

This approach was also applied to indigenous customary law in the colonies, with the added requirement that the custom was not “repugnant to justice and morality”.¹²⁵ Custom would be repugnant if it clashed with the core principles or foundations of the legal system in question.

The majority of the Court of Appeal held that the Tūhoe custom of one party taking the body in the event of a disagreement did not satisfy the common law test.¹²⁶ This was on the basis that, although the custom had not been extinguished by statute and was of the necessary longevity and continuity, it failed the reasonableness test as it allowed a body to be taken by force.¹²⁷

The majority, however, suggested that this should not be the end of the matter and a “modern” approach to the incorporation of custom in New Zealand law was required. Under this approach, the common law should, as much as reasonably possible, be developed to be consistent with the Treaty of Waitangi and custom.¹²⁸ Applying the modern approach, the majority held that an executor, while having the final decision-making power, should be required to take into account tikanga or custom and engage in the discussion and negotiation processes under custom when deciding on where to bury the deceased.¹²⁹

¹²⁴ *Takamore (CA)* at [110]. The requirement that the custom be in existence since the reign of Richard I was recognised not to apply outside of Britain. Rather, the custom needed to be a “long standing consistent custom” for it to be recognised: PG McHugh “The Aboriginal Rights of the New Zealand Māori at Common Law: (PhD thesis, University of Cambridge, 1987) at 182.

¹²⁵ *Takamore (CA)* at [121] and [126]–[127]. This is similar to the test used in *Anekwe v Nweke*, above n 92, at 16 per Clara Bata Ogunbiyi JSC and at 18 per Muhammad Saifullahi Muntaka-Coomassie JSC.

¹²⁶ *Takamore (CA)* at [175].

¹²⁷ *Takamore (CA)* at [163]–[166].

¹²⁸ *Takamore (CA)* at [254]–[258] per Glazebrook and Wild JJ.

¹²⁹ *Takamore (CA)* at [259]. Given the duration of the case and already failed attempts at resolution between the parties, the Court of Appeal, however, held that Ms Clarke’s determination was final and her decision should prevail: at [261]–[262].

The reasoning of the majority in the Court of Appeal has been criticised.¹³⁰ For example, Lincoln considers that the Court of Appeal’s “modern” approach purports to recognise Māori custom where the common law test fails but, as in practice the custom was not recognised, the approach paid “lip service” only to custom.¹³¹

Supreme Court

The majority of the Supreme Court saw tikanga as a relevant, but not a determinative consideration in this case.¹³² They said that, as executrix, Ms Clarke had the right and duty to decide on the place of burial, particularly in the case of disagreement among family members.¹³³ Contrary to the approach of the majority of the Court of Appeal, the majority of the Supreme Court did not consider there should be a mandatory duty to consult.¹³⁴ The views and heritage of the deceased should, nevertheless, be taken into account, as should the views of family, which will include views that arise from religious or cultural issues.¹³⁵

The minority (Elias CJ and William Young J, each giving separate reasons) would have accorded a more central, but still not determinative, role for tikanga, placing a greater emphasis on the interests of the collective. The minority agreed that, in this case, Ms Clarke’s claim should nevertheless prevail.¹³⁶ In her separate reasons, Elias CJ noted that “[v]alues and cultural precepts [which are] important in New Zealand society must be weighed in the

¹³⁰ See for example Emma Marguerite Gattey “Do New Zealand Courts Regard Tikanga Māori as a Source of Law Independent of Statutory Incorporation? Or is Anglo-Inspired Common Law Still the ‘sole arbiter’ of Justice in New Zealand?” (Honours dissertation, University of Otago, 2013) at 39–41; Laura Lincoln “*Takamore v Clarke: An Appropriate Approach to the Recognition of Māori Custom in New Zealand Law?*” (2013) 44 VUWLR 141.

¹³¹ Lincoln, above n 130, at 163.

¹³² *Takamore* (SC) at [152] and [156].

¹³³ *Takamore* (SC) at [162]–[164].

¹³⁴ *Takamore* (SC) at [156]. Compare the approach taken by the majority of the Court of Appeal see *Takamore* (CA) at [150] and [219]–[225]. Associate Professor Claire Charters considers that the approach of the Supreme Court majority in finding that the common law was not displaced did not give weight to indigenous peoples’ rights to authority. However, Charters did find that the majority gave some weight to indigenous peoples’ collective rights by holding that the executor was required to take into account cultural practices of the immediate and wider family (referencing [169] of *Takamore* (SC)): Claire Charters “Finding the Rights Balance: A Methodology to Balance Indigenous Peoples’ Rights and Human Rights in Decision-making” [2017] NZ L Rev 553 at 583.

¹³⁵ *Takamore* (SC) at [155]–[156].

¹³⁶ See the discussion of Elias CJ at [101]–[108].

common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case”.¹³⁷

What is significant for our purposes, however, is that all of the members of the Supreme Court considered that Tūhoe custom should be taken into account on the basis that tikanga or custom forms part of the values of the common law in New Zealand.¹³⁸ Further, none of the judgments in the Supreme Court utilised the common law test for the recognition of tikanga that was discussed by the Court of Appeal.

Analysis

My first comment is that this case illustrates what can happen when there are different cultures involved and different cultural traditions. For Mr Takamore’s family, coming to claim his body and transporting it back to Mr Takamore’s cultural home and where his placenta was buried was a recognition of his mana and showed their respect. To Ms Clarke, as a New Zealander of European origins, taking the body wrenched Mr Takamore from his wife and children and was disrespectful and an affront to his dignity in death. It is important to note that neither party intended to offend or harm the other and that neither parties’ arguments were inherently right or wrong. Rather their different cultures meant they were viewing the situation from different perspectives. This suggests that the first step should be to facilitate understanding as this in itself may suffice to resolve the dispute and indeed this would accord with tikanga.

The second comment is that this case is an illustration arguably of a clash between individual rights and collective rights in the sense of a clash between the wishes of Mr Takamore’s immediate family (Ms Clarke and her children), and the wider family and cultural group. I do recognise, however, that to Mr Takamore’s Tūhoe relatives, this was not a clash of rights: Mr Takamore was Tūhoe and therefore had no choice but to be subject to Tūhoe tikanga.

Finally, this is an important case in that it recognises that the common law can develop in accordance with tikanga or custom, without being trammelled by the old common law rules for

¹³⁷ *Takamore* (SC) at [94], per Elias CJ.

¹³⁸ *Takamore* (SC) at [83] per Elias CJ, [164] per Tipping, McGrath and Blanchard JJ and [213] per William Young J. Note that the judgment has faced academic criticism on this point because neither the majority or minority made it clear when and how tikanga has the status of law as part of the common law: see Natalie Coates “What does Takamore mean for tikanga? – *Takamore v Clarke* [2012] NZSC 116” (2013) Feb Māori Law Review 14.

the recognition of custom. The full implications of this and where matters will go in the future in this regard in New Zealand remains to be seen.¹³⁹ But *Takamore* shows that custom can be incorporated in the common law and used to develop the common law, without the recognition of custom in a constitution or in a statute.

Overview of themes

I now turn to discuss the themes I take from this brief survey of cases from the Commonwealth under the following headings:

- (a) Collective rights as against individual rights;
- (b) Distortion of custom through the effects of colonisation;
- (c) Adaptation of custom to modern conditions;
- (d) Custom and the common law; and
- (e) Preservation of diversity of cultures.

Collective rights as against individual rights

As will have been obvious from my earlier comments, the cases I discuss from Samoa and Tuvalu (in contrast to the one from the Solomon Islands) were analysed in line with a standard human rights analysis. The standard human rights analysis effectively asks whether the collective rights are a justified limit on the individual right at issue for reasons of public order. I consider that this approach fails to treat collective rights as distinct rights and risks relegating them to a secondary position or at least to a position where they are only important where the traditional justifications for derogation from rights, such as public order, exist.

The approach stems from the very beginning of modern human rights: the Universal Declaration on Human Rights.¹⁴⁰ The Universal Declaration does not contain any collective rights and does not even refer to self-determination. During the drafting process, there was some push for some collective minority rights to be included but, as this mainly came from the

¹³⁹ See Justice Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Waikato L Rev* 1; Charters “Finding the Rights Balance: A Methodology to Balance Indigenous Peoples’ Rights and Human Rights in Decision-making”, above n 134; and Natalie Coates “The Recognition of Tikanga in the Common Law of New Zealand” [2015] *NZ L Rev* 1.

¹⁴⁰ *Universal Declaration of Human Rights* GA Res 217A (1948). See for example Johanna Gibson “The UDHR and the Group: Individual and Community Rights to Culture” (2008) *Hamline J Pub L & Pol’y* 285 at 294.

Communist bloc, the collective rights involved were effectively fused with nationalism and territorial authority.¹⁴¹

As I note above, the right to self-determination did make its way into the two main human rights instruments that followed the Universal Declaration, the ICCPR and the ICESCR. The fullest expression of collective rights is, however, contained in the UN Declaration on the Rights of Indigenous Peoples.¹⁴² Nevertheless, there still seems to be a struggle in the UN human rights system to work out the proper approach to reconciling collective and individual rights.¹⁴³ This is echoed in the cases involving constitutions which recognise both custom, by its nature collective, and human rights, most of which are individualistic. A clear mechanism for balancing the individual and collective interests, especially in indigenous settings, is still a work in progress.

Domestic law cases analysing conflicting rights, albeit conflicting individual rights, can be useful in working out how potentially conflicting individual and collective rights can be balanced, to give proper weight to collective rights as rights in their own regard.¹⁴⁴ At the beginning of the analysis both the individual and collective right would be accorded equal weight. The court would then examine exactly what each right protects and what risks are associated with giving one right precedence over the other in the particular circumstances.¹⁴⁵

¹⁴¹ Johannes Morsink “Cultural Genocide, the Universal Declaration, and Minority Rights” (1999) 21 Hum Rts Q 1009 at 1019–1021.

¹⁴² *United Nations Declaration on the Rights of Indigenous Peoples* GA Res A/RES/61/295 (2007), art 11.

¹⁴³ See for example the Report of the Commission on Legal Empowerment of the Poor *Making the Law Work for Everyone Vol 1* (UNDP, 2008) which focussed on four pillars of legal empowerment of the poor: rule of law and access to justice, property rights, labour rights, and business rights. In particular, the property rights pillar suggests the need for a system to encompass both individual and collective property rights, including customary rights, but does not detail how that system might work or indeed how it could deal with any conflicting rights: at 6–7.

¹⁴⁴ Of course, how well a particular template will work in different jurisdictions depends on how human rights law is structured in different jurisdictions. I acknowledge that my suggested approach may not be universally applicable.

¹⁴⁵ See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 175–176, citing *In re S (FC) (a child)* [2004] UKHL 47, [2005] 1 AC 593 (HL) at [17] per Lord Steyn. The conflicting rights at issue in that case were art 8 (right to private and family life) and art 10 (freedom of expression) of the European Convention on Human Rights. Although *In re S* has been criticised for the application of the law to the facts, the approach to balancing conflicting rights has been endorsed by New Zealand human rights scholars; it is also similar to (although not discussed in) the leading case on the interpretation of s 5 of the New Zealand Bill of Rights Act 1990, the section under which balancing of rights falls to be determined: *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

This may include the risk that a customary practice may be lost if individual freedoms are given primacy.

Associate Professor Charters supports balancing of individual and collective rights in a way that fairly accommodates them all, including providing express reasons and justification for the balance reached.¹⁴⁶ She considers, however, that current human rights recognised in the ICCPR and ICESCR do not adequately respect indigenous philosophical or legal traditions and that the current framework is instead a manifestation of ongoing colonial domination.¹⁴⁷ To better balance conflicts of custom and human rights, Charters proposes using a three part typology of indigenous rights to ensure that human rights evolve to accommodate all types of indigenous collective rights:¹⁴⁸

- (1) indigenous individuals' rights (rights that belong to all individuals, including indigenous individuals, for example non-discrimination);
- (2) indigenous peoples' human rights (rights the collective has so that individuals can flourish in the same way individuals from the dominant culture flourish, for example minority rights, rights to property, rights to culture); and
- (3) indigenous peoples' collective rights to authority (rights arising from indigenous peoples' historical authority over their territories, such as the right to self-determination).¹⁴⁹

Distortion of custom through the effects of colonisation

The second theme, which emerged from the case from Nigeria, is the distortion of custom through the effects of colonisation. It has been argued that inheritance custom in Nigeria, if indeed it allowed a widow to be disinherited as the nephew argued, may well have been

¹⁴⁶ Charters "Finding the Rights Balance: A Methodology to Balance Indigenous Peoples' Rights and Human Rights in Decision-making", above n 134, at 587.

¹⁴⁷ Charters, above n 134, at 589–590.

¹⁴⁸ Charters, above n 134, at 562–563 (typology) and 592 (purpose of using typology). Charters cites *Takamore (CA)* at [250]–[253] per Glazebrook and Wild JJ as authority for her typology: at 594.

¹⁴⁹ And, in the New Zealand context, art 2 of the Treaty of Waitangi gives the right to unqualified chieftainship over lands and treasures.

distorted through European notions of inheritance being transplanted into Africa.¹⁵⁰ Colonial administrators may have seen the custom through their own experience of the primogeniture rules in Britain.¹⁵¹ In particular, as Diala argues, the notion of duties to family members may have been overlooked.¹⁵²

Many commentators have suggested that the distortion of custom through colonial influence has been particularly acute in relation to the position of women. One argument is that colonisation changed the power balance between women and men that existed in pre-colonial societies.¹⁵³ Women, it is said, had prestige and protection in traditional societies because of their gender specific roles as “child bearers, food producers and managers of domestic affairs”.¹⁵⁴ It is claimed that western influences changed the perception of women in the colonies in line with women’s position in Europe and that this meant women became excluded from their customary roles and leadership positions.¹⁵⁵ One example of this is the Mana Wāhine claim currently before the Waitangi Tribunal in New Zealand, which alleges that the Crown’s actions and policies since the Treaty of Waitangi have discriminated against Māori women and deprived them of their spiritual, cultural, social and economic well-being.¹⁵⁶

More specifically, it has been pointed out that men were not always the sole decision-makers in indigenous societies and that their prominence in that role is a colonial distortion. For example, it has been argued that the women’s committees in Samoa had real power, which was misunderstood by colonial authorities and therefore discounted.¹⁵⁷ The same is said in relation

¹⁵⁰ See for example MJ Maluleke “Culture, Tradition, Custom, Law and Gender Equality” (2012) 15 Potchefstroom Elec L J 1 at 16–18 who argues that the primogeniture rule is an introduced concept.

¹⁵¹ In England for example, it was not until the Administration of Estates Act 1925 that women became the preferred recipient of their husband’s property if he died intestate.

¹⁵² See Diala, above n 103 and above n 105.

¹⁵³ See Annie Mikaere “Māori Women: Caught in the Contradictions of a Colonised Reality” (1994) 2 Waikato L Rev 125.

¹⁵⁴ Jennifer Corrin Care “Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Post-Colonial South Pacific Societies” (2006) 5 Indigenous Law Journal 51 at 62. See also Mema Motusaga “Women in Decision Making in Samoa” (PhD, Victoria University, Victoria, Australia, 2016).

¹⁵⁵ See Corrin Care, above n 154, at 63–64. See generally also Silia Pa’Usisi Finau “Women’s Leadership in Traditional Villages in Samoa: The Cultural, Social, and Religious Challenges” (PhD, Victoria University of Wellington, 2017).

¹⁵⁶ “Memorandum-Directors of the Chairperson calling judicial conferences on starting kaupapa inquiries into claims concerning mana wāhine and housing policy and services” (Waitangi Tribunal, 16 November 2017).

¹⁵⁷ Pa’Usisi Finau, above n 155, argues that the introduction of Christianity with male leaders and other male colonial powers led to women losing their status in Samoan Society: at 3–9, 177–179 and 184. See also Corrin Care, above n 154, at 63–64.

to the Queen Mothers in Ghana. As I indicated earlier, Queen Mothers are traditional women leaders who resolve disputes in their communities. The source of their authority is local and the institution pre-dated colonialism in Ghana. The colonial encounter is said to have diminished the Queen Mother's authority because the nineteenth century colonial authorities perceived the Queen Mothers' position through Victorian concepts of gender roles. In recent years, the Queen Mothers have organised to reclaim their status alongside traditional male leaders.¹⁵⁸

It could be argued therefore, that what is required is a return to true pre-colonial customary practices which valued women. However, there must also be a recognition, as discussed in the next section, that customs must adapt and in this case that they must adapt to recognise the place of women in modern society.

Adaptation of custom to modern conditions

Custom by its nature must evolve and adapt to modern conditions. There is scope for debate as to whether the courts (or indeed legislatures) should be in the forefront of social and cultural change or gently nudging it. The difference in the approaches of the Samoan and Tuvalu Courts of Appeal in the cases I have discussed may suggest that normally nudging is the better approach. The judiciary (and legislation) should not get too far ahead of society, unless the custom involved is one that cannot be tolerated in modern society.¹⁵⁹ Further, even if customs are to be modified, these should, in my view, only be modified to the extent necessary to take into account other values and rights, and the justifications for doing so should be carefully explained.

One issue that arises, both with regard to searching for true custom and modifying it to meet modern conditions, relates to the nature of the decision-makers.¹⁶⁰ For many people (particularly those in rural areas and especially rural women), recourse to the national courts

¹⁵⁸ *The IAWJ: Twenty Five years of Judging for Equality*, above n 18, at 98.

¹⁵⁹ There are some matters I think where there can be no compromise and in my view this includes, for example, female genital mutilation (FGM): see "Female genital mutilation: Key facts" (31 January 2018) World Health Organisation <www.who.int>; see also the recent case in the UK where a mother was convicted of FGM for the first time: "FGM: Mother guilty of genital mutilation of daughter" *BBC* (1 February 2019).

¹⁶⁰ See generally Janine Ubink and Thomas McInerney (eds) *Customary Justice: Perspectives on Legal Empowerment* (IDLO, Leiden, 2011); and the IDLO's series of Consultations published in January 2019 as part of the global dialogue on "Navigating Complex Pathways to Justice: Engagement with Customary and Informal Justice Systems" to help to realise Sustainable Development Goal 16 (see <www.idlo.int>).

will be out of reach and thus they will be dependent on local decision-makers, who will usually be men.¹⁶¹ Some of these male decision-makers may have become comfortable with their post-colonial roles and distorted customs and may be reluctant to change.

As I understand it, the 2014 Village Courts (Amendment) Act in Papua New Guinea tries to address some of the above issues.¹⁶² I mention in particular the provision that custom is not to be followed if it is not in the best interests of any woman or child involved in the case.¹⁶³ I also note the requirement that, where practicable, at least one woman must be appointed as a Village Magistrate for each Village Court.¹⁶⁴ This measure was I assume introduced to help bring increased diversity into the Village Courts.

A similar argument was advanced by Samoa's first female judge, Justice Mata Keli Tuatagaloa, on her recent visit to New Zealand. She said that "having more women within the sitting of the village councils would definitely add that voice [to better reflect issues and challenges facing Samoan women] to the decisions that are made in there".¹⁶⁵

Diversity among decision-makers is, in my view, important. Decision-makers should be reflective of the people for whom they shape the law.¹⁶⁶ This of course applies not just to

¹⁶¹ Susan H Williams "Women and Judging: A Feminist Approach to Judging and the Issue of Customary Law" (2013) 36 T Jefferson L Rev 25 at 30.

¹⁶² Village Courts (Amendment) Act 2014 (No 7). See also the Village Courts (Amendment Act 2018).

¹⁶³ Village Courts (Amendment) Act 2014 (No 7), s 9.

¹⁶⁴ Section 28.

¹⁶⁵ "Visiting Samoan judge shares observations on Samoan law and culture" (8 March 2019) Victoria University of Wellington Faculty of Law <www.victoria.ac.nz>. Tuatagaloa J's comments are in the context of a national inquiry into family violence in Samoa that found that 9/10 of women had experienced physical or emotional violence at the hands of family members, with 6/10 women experiencing intimate partner violence: see "Inquiry report breaks 'veil of silence' on family violence" (20 September 2018) Asia Pacific Forum of National Human Rights Institutions <www.asiapacificforum.net>; Office of the Ombudsman/ National Human Rights Institution Samoa *State of Human Rights Report: National Public Inquiry into Family Violence in Samoa* (June 2018).

¹⁶⁶ *Fostering Diversity in the Public Service* (OECD, 2009) at 9–16. See more generally on women's access to justice: UN Women, IDLO, The World Bank *Justice for Women: High-level Group Report* (2019) and IDLO *Women Delivering Justice: Contributions, Barriers, Pathways* (2018).

Village Courts but throughout the entire legal system. Diversity of decision-makers will bring diversity of viewpoint and experience and in some cases a challenge to old thinking.¹⁶⁷

Custom and the common law

The fourth theme is that it is not necessary to have recourse to constitutional provisions to recognise custom. Indeed, custom is the foundation of the common law. The common law provides a remarkably flexible tool not only to incorporate custom but also to create novel solutions or adaptations to law that has become outdated or no longer suits the conditions or cultural context of a particular jurisdiction.

A strength of the common law system is that, as we share a common tradition, we have access to case law from around the world. However, although the precedent system can make courts reluctant to develop their own unique jurisprudence incorporating local custom, we must be prepared to ensure that the common law is adapted to our own cultures and the needs of our particular jurisdictions. The common law methodology provides flexibility to do this. It can thus, in some cases, be a much more suitable tool for the incorporation of custom than statute or constitutional provisions.

Preserving diversity of cultures

My final theme is that, although each of the cases I have discussed came from different jurisdictions and each concerned different cultures and customs, they all shared the common theme of preserving culture and custom in modern society, at least to the extent it remains appropriate in the modern world. Custom and culture are the essence of identity.

This is recognised in art 1 of the UNESCO Universal Declaration on Cultural Diversity (2001), which states:

Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.

¹⁶⁷ See for example Rosemary Hunter “More than Just a Different Face? Judicial Diversity and Decision-making” (2015) 68 *Current Legal Problems* 119; Lady Hale “Equality in the Judiciary” (Kuttan Menon Memorial Lecture, 13 February 2013); and Lord Burnett of Maldon “A Changing Judiciary in a Modern Age” (Treasurer’s Lecture, 18 February 2019).

Conclusion

I have, as I warned at the beginning, left you with more questions than answers. How to work out the proper place of custom and its relationship with individual rights is not easy. Nor is the issue of what should happen if there are conflicting customs. But I believe that we should strive to overcome these difficulties and ensure that custom is properly recognised in the common law and, where appropriate, in statute. This should be done in a manner that is appropriate to the particular jurisdiction and that accords with human rights, both collective and individual.

I end with a whakataukī (a Māori proverb), which can be translated as “those who do not seek [a solution] will not find one”: “Ko ia kāhore nei i rapu, tē kitea”.¹⁶⁸

¹⁶⁸ “Māori Proverbs” *Massey University* <www.massey.ac.nz>.