Custom and constitutionally protected fundamental rights in the South Pacific Region

the approach of the courts to potential conflicts

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Introduction

As a form of social regulation, custom is characteristic of traditional societies. As societies develop, custom gives way to law, either being replaced by it or by taking on the form of law itself, becoming customary law. The State, rather than the family, village or clan, emerges as the dominant regulatory force. Consequently traditional society and developing society may be juxtaposed, as may moral order and civil order, custom and law. In the South Pacific region, however, a number of countries seek to overcome this apparent juxtaposition by giving custom the force of law, incorporating it into the sources of law recognised by the State. Often this recognition is in the same document in which the State undertakes to protect fundamental rights. The potential conflict between customary rights and constitutional rights, and attempts by the courts to resolve that conflict, are the subject of this article, which looks at the decision-making of the courts in specific cases. These cases are considered in some detail partly because the reader may be unacquainted with them and also because the context of the dispute is important for understanding the issues raised.

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Why conflict?

Custom and constitutionally protected rights present two fundamentally distinct aspects of the legal systems of the South Pacific region.

Custom is essentially non-legal, emerging from traditional—often local—use and acceptance over a period of time. Custom reflects moral, religious and social aspects of behaviour determined by the demands of the group, family or clan. Although the emergence of a practice or usage as custom may be difficult to pinpoint in time, custom is essentially spontaneous rather than imposed, relatively unchanging, and commonly recognised for what it is by those to whom it applies.

A written Constitution is characteristic of all the countries in the region, reflecting the emergence of the independent State and its power as a legislative force, seeking to impose a uniform rule of law on all its subjects. The Constitution is the instrument of political ordering of society sanctioned by organised force.

While both law and custom seek to regulate behaviour, the inclusion of a Bill of Rights or a statement of fundamental rights in these Constitutions confounds morality with legality. In some systems where this is done, this will not create any conflict because custom is either not recognised as a source of law, or is of such little importance as to not be controversial. Such systems are those found in most of Western Europe and America, and this is perhaps the source of the problem. The fundamental rights protected in the Constitutions of the South Pacific region are drawn from the Codes and Conventions of the West—primarily the European Convention of Human Rights, and in the case of the Marshall Islands, the American Constitution and its Bill of Rights. The rights and liberties that are stated represent a particular ideology. They have also attracted international approval—if not international observance. Incorporation into the Constitutions of emergent States places those states within a recognised international brotherhood. The dangers inherent in this confusion of morality with legality manifested in international conventions, transported and transplanted in diverse legal systems, is the assumption that these rights are of universal applicability regardless of differences in culture, social organisation, religion and so on. It may, however, be the case that these rights are unprecedented in the regional system. Where custom is an important aspect of the regulatory framework of a society, the legislation of conscience through external, imposed, political instruments directed at goals determined by the State,

may be the very antithesis of custom. There is, therefore, a contradictory relationship between law and custom that is clearly evident in the case of constitutionally protected fundamental rights and the simultaneous recognition of custom as a source of law.

Inclusion of both also presents an evolutionary dilemma for the law. Custom comes from the past, reflecting usages and mores that some may consider to be no longer suitable or desirable in a developing country. Nevertheless custom survives and is obeyed because it is intertwined with a network of social, economic and cultural interrelationships. Custom may therefore remain important as long as the juridical, economic and social units it reflects are indispensable to the functioning of society and productivity—for example the extended family, the village and the clan. As the region develops, however, these units may become less important, being replaced by others—such as the nuclear family or the individual, corporate entities and juristic persons, and the State. This development is erratic, it varies from country to country of the region and from island to island, village to village. This process of change and development means that inevitably there is a certain antagonism between the old and new, between kin groups and the individual, between local custom and national or even international law.

By including custom as a source of law three possible consequences can arise as the legal systems develop. First, custom can become doubly institutionalised, being recognised extra-legally—having preceded the law—and legally. Secondly, codification by an external agency, here the Constitution, strengthens the role of custom, elevating and changing it. Thirdly, that recognition of custom in principle is gradually undermined by denial of it in practice because it is not sanctioned by an external force within the State machinery, and therefore remains essentially non-legal.

The role of the courts and case-law

At the cutting edge of this process and facing the dilemmas raised by the potential conflict between constitutional rights and custom are the courts.

If customary societies precede legal societies, the domination of law over custom is symptomatic of a changing and developing society, while recognition of custom as law may be a denial or temporary set-back to that process of change and development—particularly if judged by external

standards. This premise supposes that law follows and reflects social change, so that if the law upholds custom and recognises it as an integral part of the legal system—making it customary law—this is an accurate reflection of present society. It might be, however, that the legal order does not follow society but seeks to order it, giving supremacy to the rule of law even if this is out of touch with the society which that law governs. Cases concerning fundamental rights are not, therefore, simply a reflection of the current legal situation in the South Pacific region, but may be a dynamic force seeking to channel legal and social development in particular ways.

Consequently the case law reveals that there are, from time to time, apparent conflicts between constitutionally protected rights and custom. In resolving these issues, the courts have to tread a careful path. Custom itself represents accepted and established mores and rights. Whereas customary rights have evolved within the context of the region, most of the rights and liberties safeguarded in the Constitutions have been imported. Rights recognised as fundamental and deserving of protection in the Constitution are primarily perceived as individual rights, rather than group rights, while the permitted exceptions to the enjoyment of such rights tend to be directed at the general good, for example public order, national security and so on. Customary rights, on the other hand, are primarily group orientated. The source and the objectives of the two aspects of law are therefore immediately different. The potential conflict arises where a customary right is deemed to be inconsistent with the provisions of the Constitution. If the rights protected in constitutional provisions are seen as being of universal application, then in every case custom—the regional dimension—would have to give way to the universal. Such an approach appears to be inconsistent with legal systems that recognise custom as a source of law. At the same time, however, the desire of developing countries to move towards international standards means that some regional characteristics may have to be forfeited. Where custom is found to be inconsistent with constitutional protection there is a conflict of legal sources. Invariably the Constitution provides that in the case of inconsistency custom will not apply. This raises the question of whether, and how far, custom law is really regarded as a source of law and the weighting attached to customary law within the hierarchy of legal sources, and whether in fact, custom is in danger of being ultimately excluded from Pacific region legal systems through a process of gradual denial brought about by upholding introduced ideas on fundamental rights and placing law ahead of social change.

Land, custom and constitutional rights

One of the difficulties arising in the context of custom and constitutional rights is that custom reflects practices and usages established over considerable periods of time. Once recognised by the legal system these customs may become customary law. In some circumstances there is provision in the various legal systems for new customs to become accepted once firmly established, and presumably for old ones to be abandoned. This process is, however, essentially slow. If a custom is found to be in conflict with constitutional provisions or other legislation, but nevertheless is held to be the applicable source of law, then the question arises as to how the law can be changed sufficiently quickly, so as to comply with the requirements of the Constitution and international conventions.

This problem is particularly pertinent in the case of land. Not only do customary forms of land holding closely reflect traditional forms of social and economic organisation, but most of the legal systems in the region recognise that this is an area of law where custom remains important for determining the applicable regulations, not least because of the continuing importance of traditional forms of land tenure to the economic and social fabric of many countries in the region. At the same time, however, there are new issues to be considered resulting from developing economies, urban migration, increases in population and new forms of agricultural exploitation. In cases involving land, therefore, the courts are confronted by the claims of tradition and the demands of new rights, development and change.

For instance, in the case of *John Noel v Obed Toto*,[1] it was accepted that the rules of custom formed the basis of ownership and use of land in Vanuatu. According to these rules, however, custom ownership appeared to discriminate between male and female children. In particular a woman, when she married, was deprived of property rights that she would otherwise retain. Men who married were not similarly deprived. While it was clear from Article 74 of the Vanuatu Constitution that customary law should prevail in land ownership cases, it was also clear from Article 5—providing for non-discriminatory protection of fundamental rights and freedoms—that: 'A law which gives a lesser right to a woman, because of her sex is inconsistent with the guarantee of protection of the law, may be inconsistent protection from unjust deprivation of property and is inconsistent with the right to equal treatment under the law'. Therefore that aspect of

custom with respect to land rights, which appeared not to give the same right to women as to men, was inconsistent with Article 5. The apparent conflict between this line of reasoning and the application of Article 74 was resolved by holding that the Constitution permitted—in Article 5—legislation that made provision for the *special benefit, welfare, protection or advancement of females*. As there was no such legislation specifically permitting discrimination with respect to land rights, such discrimination could not be permitted.[2] The fact that any such legislation, had it existed, could only be constitutionally valid if it conferred a positive benefit on women—amounting to welfare, protection or advancement—was not addressed. Any specific provision for discriminatory land rights that operated unfavourably for women would still have been inconsistent with the Constitution and therefore void.

The court went on to express the view that although custom would remain the source by which land rights were determined, in the future there might be a change in the basis. At the same time, the court held that the 'general principles of land ownership' would not be changed. While it is difficult to see how these two viewpoints can be reconciled, the dilemma raised by the provisions of Article 74 is clear: if the source of law is to be customary law and this leads to a result that is inconsistent with the Constitution, the custom must change—and change immediately—or new legislation must replace it, thereby ousting custom as the source of law for that particular subject.

If custom is incorporated in statutory law—a situation of double institutionalisation—the position of custom should be stronger, but bringing custom within the law may in fact make it more vulnerable because it places custom within the same legal arena as constitutional rights. This was illustrated in the case of *Chu Ling (John) v Bank of Western Samoa (No. 1)*.[3] In this case it appeared that s.367 of the Samoa Act 1921 conferred procedural advantages on Samoans that were not available to non-Samoans. Although the provision here was statutory, regional examples of distinctive treatment afforded to those who claim their nationality by descent or place of birth can be traced to customary distinctions between indigenous peoples and others.[4] The relevant section provided that 'no security given by a Samoan over any property shall be enforceable . . . without the leave of the Supreme Court'. In reliance on this provision the plaintiff had sought to defeat an action by the defendant bank to enforce its rights as mortgagee.

While the court rejected the argument that there had been an implied repeal of this provision by subsequent legislation, it did accept that the provision was inconsistent with the provisions of Article 15 of the Constitution—providing for equal treatment—and was therefore void. Although the voidness only applied to this particular section, clearly any subsequent legislation would have to avoid the same error.

The interface of custom with rights potentially enforceable under constitutional provisions was also well illustrated by the case of *Fugui & Another v Solmac Construction Company Ltd and Others*.[5] The fundamental right claimed concerned section 8 of the Constitution of Solomon Islands regarding compensation for the wrongful deprivation of property.[6] The facts in brief were that the respondents, Solmac Construction, were seeking to enforce a logging licence over land claimed by the appellants, Fugui and Others. Under the Forest and Timber Act (Cap. 90) as amended,[7] provision is made for the granting of logging licences subject to strict compliance with procedural measures. These measures are intended to safeguard the interests of the group having an interest in the land. The consent of those having an interest in the timber must be obtained and evidenced in an agreement, which must also be approved of by the Minister of Lands, Energy and Natural Resources. The rights claimed by the appellants were customary land rights. In considering whether the claim came within the ambit of s.8 of the Constitution, one of the issues that the court had to address was the nature of property in the context of Solomon Islands. The applicants had to show that they had *property* in the disputed area, and that it had been compulsorily taken possession of, or their interest or right compulsorily acquired, in circumstances that were a breach of their fundamental constitutional rights.

Section 8 refers to 'property of any description' and 'any interest in or right over property of any description'. The procedural requirements of the Forest and Timber Act were directed at tracing any protecting customary *owners*. Although the procedure involves the Area Committee, which must include in its membership 'persons having particular knowledge of customary land rights in the area affected' (s.50(1)), the Act uses concepts and language drawn from western legal systems. As the Commissioner hearing the case, Mr D R Crome, pointed out, the Act does not guarantee that those who contract as customary owners are the true owners. Solmac's defence was that the landowners themselves had accepted the agreement, but the

Commissioner, referring with approval to the words of Daly CJ in an earlier case,[8] suggested that: 'it is well established that in custom land is owned not by a person, but by a line or family or tribe. Other persons, families, lines or tribes may have secondary rights in the land . . The permission of other lines having interests in neighbouring lands may be required, in custom, before a line can develop its own land in case that development affects adjoining land in any way'.

In this case there had been intermarriage between saltwater people—from the coast—and bush people, over a number of generations. The land in the area had been settled on, gardens established and food cultivated and harvested for custom religious purposes. The lines also had fishing rights in the cove where the company was proposing to land logging equipment. Whatever the nature of their rights, the court was satisfied that the applicants had property in the disputed area 'in the sense of user and access'. The only property, however, that the applicants could prove that they actually owned were the cropping rights to a coconut plantation. Despite this the court was satisfied that the applicants had 'property of any description' falling within section 8(1) of the Constitution, on the grounds that: 'the right to crop the coconuts . . . is a right which is granted in custom capable of inheritance . . . and enforceable against the rest of the world'.

The second question that the court had to address was whether this property had been acquired or possessed in circumstances amounting to a breach of the fundamental rights of the applicants.

Daly in the *Lilo* judgment had stated that: 'there are chiefs or big men, but they may only behave in a customary way and if they give away or sell interests in customary land against custom it is possible that not only will the dealing be void but the chief may lose his right to be chief'. In the *Solmac* case the chief of one of the lines had made an agreement with the Company. The Commissioner found, however, that at least three lines had an interest in the disputed area. More seriously, the Minister for Lands, Energy and Natural Resources—whose approval was required under the Forests and Timber Act—had intervened in the proceedings and ordered that a licence be granted to Solmac. Clearly such a licence, if issued, would be unlawful as it did not comply with the necessary procedures. Both the Minister and the Company were made aware of this. Nevertheless the Company went ahead, landed its equipment, made a road and cleared a coconut plantation to establish a logging camp. The Court found that whatever licence purported to be granted was, therefore, void.

This did not mean, however, that the circumstances amounted to compulsory acquisition. The Court refused to interpret the provisions of section 8 as meaning that any property that was compulsorily acquired breached this fundamental right unless it was acquired under the authority of a law that met the conditions of the section. It preferred instead to interpret the section as meaning that any laws providing for compulsory acquisition of property must meet the conditions of the section in order to be constitutional. The court therefore understood compulsory acquisition to mean the taking of title to property under statutory powers. This interpretation meant that the applicants' claim failed because the Company did not claim to be acting under any statutory authority but under a licence. Therefore any claim to compensation for compulsory acquisition had to fail. The applicants' only remedy lay in an action for damages, which would in turn require them to establish a property right recognised at common law—rather than under the potentially broad scope of s.8 of the Constitution.

The case highlights some of the problems in applying and interpreting fundamental rights in an area that is strongly influenced by custom.[9] While the case avoided trying to clarify the definition of the nature of property or property interests, it was clear that the term 'landowners', which *Solmac* had relied on, could not be taken to have what might be its usual meaning in other contexts. Also, the Forest and Timber Act—despite the procedural safeguards that were intended to take into account the nature of customary land ownership—made inadequate provision for obtaining the consent of customary owners who were not living on the land or in the area covered by the Area Committee. Typical of such a claimant was Adawane, one of the applicants, who, although she lived away from the area, had retained her customary right to come twice a year to harvest coconuts. The fact that she was absent from the area for most of the time did not diminish her customary land rights. Indeed this was the only right that was proved to the court's satisfaction. This fact in itself suggests that the court was slipping into the temptation of applying western concepts and standards in its interpretation and recognition of property rights: a point supported by the fact that the Commissioner referred to two old English law cases for definitions of property.[10] The success of the applicants' claim for damages depended on them being able to establish that they were 'landowners in the fullest sense'. What that might mean in the Pacific context was not examined.

The case also highlights the dilemmas likely to be experienced as customary owners move from subsistence farming to the sale of timber and other crops; transactions that require consent and agreement and that are essentially governed by introduced contractual concepts, which may fail to provide for the type of interests evidenced in this case. There is also the problem of 'who are the big men'. Although the court reprimanded the Minister involved in this case, no comment was made as to whether he or the other chief had been acting in a non-customary way, or that either should lose his position—as suggested in the *Lilo* case.

Finally, the decision in this case suggests that the constitutional protection of fundamental rights may be narrowly construed, ultimately so as to exclude customary rights. Through the interpretation applied in the case, constitutional redress was denied to applicants who the court considered have sufficient protection at common law through the actions for detinue and conversion. This interpretative approach may in the long term undermine the constitutional protection of property rights, because it may deny a remedy to weaker parties in a changing property environment. It is not unusual for logging contracts to involve the interests of powerful players and ignore the well-being of weaker elements. Agreements may be made *ultra vires*, the bargaining position may well be unequal, the possibility of civil litigation remote, or even unwise. Weakening customary property rights and adopting a narrow view of those property rights that are constitutionally protected may leave the most vulnerable unprotected by law or custom.

Custom, public order and private ordering in society

Not only do changes in the use and exploitation of land in a developing economic climate present problems, social organisation and control also bring fundamental rights and customs into potential conflict. One of the consequences of imposing certain fundamental rights on people is that behaviour that has previously not attracted any sanction or that has been sanctioned by custom may now present a threat and possible infringement of those rights. In such a situation custom and law may both be seeking to achieve the same end in regulating conduct, or they may be in opposition. This type of problem is illustrated in the cases of *R v Loumia & Others*[11] and *Italia Taamale and Taamale Toelau v the Attorney General of Western Samoa*.[12]

The case of *Loumia* raised the question of whether a charge of murder could be reduced to one of manslaughter where the accused justified the killing of his victim(s) on the grounds of a customary duty to kill. The right to life, protected under section 4 of the Constitution of Solomon Islands, is not absolute. There are circumstances in which killing may be justified, for example judicial execution, defence of person or property, arrest or prevention of escape, suppression of riot etc. Revenge-killing is not specifically included. The accused and others were involved in an inter-group fight during which the accused saw one of his group killed and another wounded by members of the opposing faction. In the court of first instance, the judge had advised the assessors not to consider the defence raised by the accused, of a belief in a legal duty to kill—provided for in s.197(c) of the Penal Code—based on custom. Had a valid legal duty been found the charge of murder might have been reduced to manslaughter. As it was the accused was convicted of murder.

In the High Court, Sir John White ACJ considered the claim put forward on behalf of the accused that he acted in the belief and in good faith and on reasonable grounds that he was under a legal duty to cause the death or to do the act that he did—a claim based on custom. The Constitution of Solomon Islands provides that 'customary law shall have effect as part of the law of Solomon Islands' except that 'any customary law which is inconsistent with the Constitution or any Act of Parliament shall not apply'. The question of whether the duty to kill was part of customary law was not openly disputed. However, the judge held that any customary law purporting to entitle a person to kill another person on grounds of custom was inconsistent with the Penal Code and the Constitution and could not be regarded as having effect as part of the law of Solomon Islands. The point underlined in the judgment was that any person who was party to any action based on customary law but found to be inconsistent with the Constitution and contrary to the law may be guilty of an offence, and the law, to the extent that it was so inconsistent, would be void.

The accused appealed on the grounds that the assessors sitting with the judge in the High Court had been misdirected, and that they should have considered his claim that he believed in good faith and on reasonable grounds that he had a legal duty to kill those people who were responsible for the death of a relative. He also appealed on the ground that the constitutional right protected under s.4 applied only to the relationship

between the State and individuals, and not between private persons, and that therefore the customary duty to kill was not inconsistent with s.4 of the Constitution and should have been recognised as part of the law of Solomon Islands.

Considering whether a belief in a legal duty to kill amounted to an extenuating circumstance that would justify reducing a charge of murder to manslaughter under s.197(c) of the Penal Code, Connolloy JA acknowledged that the Constitution of Solomon Islands did give limited recognition to customary law, and from the evidence given in court it appeared that there was a custom that if a close relative was killed, custom requires the killing in turn of the person responsible for the death of the close relative, even if the person under that duty is himself exposed to the danger of death. If the custom was not inconsistent with the Constitution or statute, it received the force of law on the coming into effect of the Constitution. However, the operation of such customary law might be modified by statute or by the provisions of the Constitution—in this case s.4. In order to test whether a belief in a customary duty to kill was or was not inconsistent with the Constitution, it could be asked whether Parliament could itself validly pass a statute imposing a duty to kill on relatives of a victim. Clearly, Parliament could not, because to do so would be in conflict with s.4.

Although it was not strictly necessary to consider the Penal Code provisions separately, as this legislation could not itself be inconsistent with the Constitution, the Court nevertheless considered whether the custom claimed was consistent with the Penal Code and applicable common law. In answering this, Connolly JA held that: 'It is beyond question that a killing for revenge or retaliation could not have been regarded as a lawful act in the application of the Code or at Common Law'. The only defences available were those found under Part IV of the Code, ss196, 197 and 199. Therefore custom that in itself called for action amounting to a criminal offence could not be raised as a defence. This result was inevitable if reference was had to the common law, which primarily was that of England and Wales, in which the notion of revenge-killing was hardly likely to be referred to.

Whether the events amounted to sufficient provocation to constitute an extenuation depended on the 'reasonable man' test; i.e. would the reasonable man do as he (the accused) did?' It was argued that the Acting Chief Justice had failed to advise the assessors that in this case the 'reasonable man' should be understood as 'a reasonable East Kwaio pagan villager'. Adoption

of the guidelines suggested by Lord Diplock in interpreting the phrase as used in s.3 of the Homicide Act 1957[13] might have led to a more sympathetic consideration of the accused's situation. But first, Lord Diplock's judgment was only a direction not a formulation; the characteristics of the accused had been referred to in a general way, the assessors being reminded of the Kwaio custom; and the assessors were themselves Solomon Islanders and their assessment might be expected to reflect their local knowledge. Secondly the question of provocation was one for the judge alone to decide on and not the assessors.

Kapi JA, adopting a slightly different approach, expressed the view that the defence raised under s.197(c) of the Penal Code recognised that an element of mistake was provided for in the wording of the provision, in as much as 'belief in good faith and on reasonable grounds' was distinguishable from the situation where a person acted properly in accordance with a legal duty. However, the Acting Chief Justice had only considered the third element of the defence, i.e. that the belief must be based on a 'legal duty'. However, it appeared that the Acting Chief Justice had accepted impliedly that the term 'legal duty' included, or could include, a duty arising under custom. The appeal was therefore limited to this ground alone. If the legal duty—being based on a customary duty to kill—raised the issue of considering customary law as a separate body of law, distinct from other sources recognised and applied under the Constitution, then it would have to be decided whether customary law was inconsistent with the Penal Code. Kapi JA disagreed with the Acting Chief Justice's opinion that 'legal duty' under s.197(c) could include a legal duty based on custom. The basis of Kapi JA's reasoning lay in s.3 of the Penal Code whereby it was stated that the Code should be interpreted according to 'the principles of legal interpretation obtaining in England'. Any interpretation based on such principles would clearly offer little scope for the inclusion of customary law, let alone the customs and usages of pagan Kwaio villagers.

If the legal duty raised did not fall within the provisions of the Penal Code it had to be considered separately. The exceptions included under s.4 regarding the intentional taking of life do not include taking another person's life in payback in accordance with custom. By implication, therefore, such killing was prohibited, and therefore incapable of being recognised or enforced by any law. As a consequence, any question of customary law would not be relevant. There were only three sources of criminal law in

Solomon Islands: statutory laws, common law as applied under Schedule 3(2) of the Constitution (i.e. English common law) and customary law as applied under Schedule 3(3). Under this last schedule, no customary law that was inconsistent with the Constitution could be applied.

As regards the submission that the provisions of the Constitution did not apply to relationships between private persons, this line of reasoning was rejected by Connolly JA and Kapi J. The effect of holding otherwise would be to place a very limited range of circumstances within the ambit of the constitutional protection. The argument was based on the Privy Council decision of *Maharaj v Attorney General of Trinidad and Tobago (No. 2)* [1978] 2 All ER 690. Fortunately the Court was able to distinguish the situation in Solomon Islands from that in Trinidad and Tobago. In Solomon Islands, all the laws existing at the time of the Constitution are to be subject to the Constitution, whereas in Trinidad and Tobago, the protection given to human rights under the Constitution only extends to subsequent law: law existing at the time of the Constitution was not to be read as being subject to it. Moreover the protections given in the Constitution of Trinidad and Tobago are directed at contravention by the State or public authorities, whereas those of Solomon Islands are broader and need not be cut down so as to exclude the relationships of private individuals.

This case illustrates the different approaches open to the court: to refer directly to the constitutional protection of the fundamental right and rule on the basis of inconsistency, which removes the need to consider other legislation—here the Penal Code; or to start with the custom claimed and examine it in the context of the applicable law before finally examining its inconsistency with the constitutional provision. The first approach may be impliedly premised on the universality of fundamental rights. The second approach allows for the inclusion of custom and its greater recognition in the judicial process.

The reasoning in the decision also throws some interesting light on judicial use of implied terms. While the Court was ready to ensure the broad scope of the protection of the Constitution, it was not prepared to find exceptions that were not expressly stated. This approach may work both ways in the case of custom, depending on whether the custom is being urged as part of a general principle, which is the broader and more liberal approach, or as one of the provisions that cut down the general principles, in which case it is desirable that a narrow and limited approach is followed.

The case of *Taamale*, however, illustrates how custom can be accommodated within the protection of fundamental rights by making fine distinctions between preventative and punitive measures, and how policy considerations that take into account the welfare not of the individual but of the group may lead to different results.

The case, which was heard by the Court of Appeal of Western Samoa, involved an order of banishment passed by the Land and Titles Court on the appellants and their children. The effect of the order was that they were to leave their village for an indeterminate time on account of a number of allegations including insulting conduct and failure to comply with village obligations and penalties. The appellants were charged with contempt of the banishment order—although there was some dispute over the timing of the supposed contempt. The question before the Court was: whether the contempt charge could be maintained in the light of Articles 13 (1)(d) and 13 (4) of the Constitution, and in particular whether the order of banishment violated the fundamental guarantees of these articles, which related to the right to freedom of movement.

There was no dispute that the order of banishment could be made under s.75 of the Land and Titles Court Act of 1981. It was also possible for the right of freedom of movement under Article 13 to be curtailed by law through the imposition of reasonable restrictions within recognised grounds, i.e. national security, the economic well-being of the country, public order, health or morals, etc.

The Court of Appeal accepted that banishment from the village was a long established custom in Western Samoa,[14] indeed a Cabinet Committee had drawn up recommendations for the codification of the law of banishment in 1975. The *alii* and the *faipule* of the villages could order banishment, as also could the Land and Titles Court. It was seen as an important and ultimate sanction vested by custom in the village council and essential to the authority of the council. It was used when all else failed, to deal with uncooperative and violence-provoking elements in the village, and fulfilled a role that would otherwise fall to the police services. Such orders were made, therefore, in the public interest, in the interests of public order, to prevent disturbances, violence or the commission of offences. The Land and Titles Court could either make orders on petition of the council or reject such petitions, or lift banishment orders. The application of banishment orders was not discriminatory and it was clear from an Ordinance of 1922

that not only did the custom exist but that it could be used against any Samoan person.[15] There was no evidence that subsequent legislation had abolished the custom,[16] nor any case law suggesting that it might have fallen into abeyance.[17]

There was some debate about whether the 1922 Ordinance, which had transferred the power of banishment to the Administrator, should be classified as preventative or also punitive. In interpreting the Ordinance the majority of the court in the case of *Tagaloa* had held that it was merely preventative.[18] The Court of Appeal was prepared to follow this decision and accept that the practice of banishment from a village is essentially preventative—to prevent chaos arising in village affairs.

The Court of Appeal was also satisfied that the Land and Titles Court, which succeeded the Land and Titles Commission of 1903, had power—under the Land and Titles Act 1981, amended by the Land and Titles Amendment Act 1992/93, s.34 (2)—to hear all claims and disputes between Samoans relating to customary land. The law to be applied by the Land and Titles Court includes: custom and usage; the law relating to custom and usage; this Act and any other enactment expressed to apply to the Court. The Court of Appeal interpreted this to include the authority to order banishment—even though this was not expressly referred to. Indeed evidence was produced that orders of banishment had been so made in recent years.[19] In 1987 the power to make such an order had been considered in the context of the Constitutional right of freedom of movement in the case of *Marina Ututu Alega v Luafatasago Iulio*. Prior to this judgment, in 1980, a direction had been issued by the Chief Justice and President of the Land and Titles Court, reiterating an earlier direction of 1974, that further banishment orders should not be made because they were in violation of the Constitution. The Court of Appeal, however, did not feel bound by this direction, partly because it held that a practice direction could not settle the law, but also because there was no evidence that the practice direction had taken into account the exceptions already provided for in Article 13(4). In any case the court in the *Iulio* case had not followed the practice direction. The Court of Appeal similarly dismissed the influence or effect of a press statement issued by the Acting Chief Justice.

In considering the constitutional implications of banishment the Court of Appeal referred to the comments of Sapolu CJ in the Supreme Court concerning the role of banishment that: 'the concept of banishment

. . . is a measure of social control which is applied in the villages to maintain peace, harmony and order within a family, or between families, and within the village itself. It is also a measure of law enforcement within the village in the sense that banishment is a sanction which may be imposed for certain misconduct or disobedience to rules and regulations made in the village . . .' He went on to indicate that there were two forms of banishment, ostracism of an individual from village affairs, and expulsion from the village itself —which was in issue in this case. The Court of Appeal were satisfied that the Land and Titles Court had jurisdiction to make this latter kind of banishment order if there were truly strong reasons for doing so. Where an order was so made it should be understood that the Court could also cancel it, or the banished person could petition for its rescission or variation. The Court of Appeal emphasised that a banishment order should never be lightly made and that in no case could it be used instead of punishment by the criminal courts in the case of murder, rape or other criminal offences—where the accused had other constitutional rights relating to procedural fairness.

In arriving at its conclusion, the Court stressed that the Constitution *must be applied with regard to its Samoan setting*. In accordance with this the Court found no difficulty in holding that within the meaning of Article 13(4), banishment from a village is, at the present time, a reasonable restriction imposed by the existing law in the interests of public order.

Obiter the Court did not exclude the possibility that a time might come when Samoan society had developed to the state where banishment was no longer justifiable. What the case does highlight is the importance of placing the protection of fundamental rights within the local context if the practical content of such rights is to evolve in a relevant way. This, of course, rather undermines the notion of the universality of human rights, but at the interface of rights with customary law it is questionable how far the content of rights can be held to be universal.

Conclusion

Although the above cases are concerned with very different specific instances in a number of legal systems, it may be asked whether any discernible pattern emerges in the resolution of the potential conflict between custom and fundamental rights. Here a number of possibilities regarding differences of approach can be suggested. For instance, does the end result depend on whether the claim to a customary right results in discrimination against or in favour of the claimant, and whether the benefit or detriment is likely to affect the group or simply an individual? The Samoan custom of banishment is upheld because it operates in favour of the group, although it discriminates against the banished individuals and innocent parties such as the children. The right to claim a revenge killing is rejected because it would harm the peace and stability of society, and its claim would discriminate in favour of an individual claimant. Alternatively, are customary rights more likely to be upheld if they approximate to western-style equivalents? Customary measures that can be included in one or more of the exceptions permitting infringements of fundamental rights seem more likely to be tolerated than those that stand outside permitted exceptions in the introduced sense. At the same time it is evident from the *Solmac* case that in order to be accommodated, customary rights have a greater chance if they can be brought within western conceptual frameworks. Ultimately this must mean that customary rights that survive as enforceable rights will be modified in the process. The very nature of custom gives it a certain plasticity. Similar flexibility ought to be found in the interpretation of fundamental rights. It ought to be possible to place the evolution of rights within the local context. If this is not done there is a danger that not only will certain rights and values be lost, but that those that are introduced will lack relevance for the people who are meant to be able to claim them. It is evident that the courts will continue to have a leading role in determining the relationship between custom and constitutional rights and the consequences that this relationship has for the developing societies of the South Pacific region.

Notes

1 Case No. 18/1994 Supreme Court of Vanuatu.

2 Indeed the court expressed the view that 'it must be presumed that when the Constitution was adopted, it was known that custom law discriminated against women with respect to land ownership'—a presumption that might in fact have been erroneous.

3 1980–93 Western Samoa Law Reports Vol. 1.

4 In particular laws relating to citizenship and land holding rights tend to emphasise the importance of distinguishing birth and descent as relevant criteria for determining rights. See for example the case of *John Aremwa & Others v The Nauru Lands Committee*, Nauru Law Reports Part B, 1969–82, 18, concerning whether customary law allowed a non-Nauruan to take land under an oral will, in which it was held that such law did not permit a non-Nauruan to inherit the land.

5 [1982] SILR 100.

6 S8(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where . . . [there then follow certain exceptions].

7 Forests and Timber (Amendment) Act 1972 (No. 11 of 1972) and the Forests and Timber (Amendment) Act 1977 (No. 11 of 1977)

8 Customary Land Appeal Case 14 of 1981, *George Lilo & David Bule v Gideon Ghomo.*

9 Other cases where non-western property concepts have raised questions about the nature of the property right and who is entitled to protection from wrongful deprivation have been: *Serupepeli Dakai and Others v NLDC* [1983] FLR 92, and *Naimisio Dikau & Others v NLTB* [1986] FLR 179—concerning group ownership rights; *Capelle and Others v Mwareow Dowaiti* Land Appeal No. 19 of 1971 Nauru Law Reports, Part B, 1969–82 51—concerning a child's customary obligations to transfer land in accordance with a deceased parent's wishes; and *James Ategan Bop* Land Appeal No. 20 of 1969 Nauru Law Reports, Part B 1969–82 13—imposition of a customary trust imposed on an heir's honour.

10 In *Re Earnshaw-Wall* [1894] 3 Ch 156 and *James v Skinner* 5 LJ Ch 80.

11 [1984] SILR 51 and [1985/86] SILR 158.

12 Court of Appeal Western Samoa, 18 August 1995.

13 *Director of Public Prosecutions v Camplin* [1978] AC 705. These were that the 'reasonable man . . . is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they (the jury) think would affect the gravity of the provocation to him'.

14 Evidence was produced in court that banishment went back to before the German administration and that in 1901 Samoans were forbidden to exercise the power of banishment and it was vested in the Imperial German Governor.

15 The Samoan Offenders Ordinance 1922.

16 See for example the Samoan Offenders Ordinance Repeal Ordinance 1936, the Samoan Amendment Act 1927 and the Samoan Seditious Organisations Regulations 1930.

17 Whereas there was case-law in which appeals against convictions for breach of banishment orders were heard: *Tagaloa v Inspector of Police* and *Fuataga v Inspector of Police* [1927] NZLR 883.

18 See note 17.

19 An order made on 7 February 1972, in the case of *Maia and Others v Solomon and Others*, an order made on 13 March 1973, in the case of *Taimalie Time and Others v Papalii Lave and Others*, and an order confirmed on appeal on 19 March 1987 in the case of *Marina Ututu Alega v Luafatasago Iulio and Others.*