

# A SURVEY OF HUMAN RIGHTS DECISIONS IN FIJI, SAMOA, TONGA AND VANUATU

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*The aim of this article is to provide an account of the state of human rights jurisprudence in the courts of Fiji, Vanuatu, Tonga, and Samoa and to explore the influence of human rights jurisprudence in those jurisdictions to date.*

*The article will first give a brief context to human rights in the PICs<sup>1</sup> to set the scene for an overview of the Fijian, Samoan, Tongan, and Vanuatu human rights jurisprudence in the last five years. The last part the article explores the influence of custom on the courts' jurisprudence and whether the ECtHR's margin of appreciation doctrine has taken some hold in the Pacific islands.*

*Cet article offre aux lecteurs, l'occasion de brosser sur une période de dix années, un état de la jurisprudence en matière de droits de l'homme à Fidji, au Vanuatu, à Tonga et aux Samoa et de l'influence que la coutume a pu y jouer.*

*Dans une première partie, l'auteur dresse un bref aperçu des règles applicables en matière de Droit de l'homme dans les pays insulaires du Pacifique, laquelle sera suivie d'une synthèse quinquennale de la jurisprudence des tribunaux fidjien, des Samoans, des Tonga et de Vanuatu.*

*Dans sa dernière partie, l'article examinera l'influence de la coutume sur la jurisprudence de ces juridictions et s'attachera à déterminer si la doctrine prétorienne dite de 'la Marge Nationale d'Appréciation', qui a pour effet de laisser*

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1 See also regarding the PICs' human rights framework and discussion ten years ago: Petra Butler "Margin of Appreciation- A Note towards a Solution for the Pacific" (2008) 39 VUWLR 687, 691 et seq.

*de la liberté aux Etats d'encadrer les libertés consacrées par la Convention, est mise en oeuvre dans les petits États insulaires du Pacifique*

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We [the Pacific Island peoples] are not lesser people entitled to lesser rights.<sup>2</sup>

## **I INTRODUCTION**

The distance between the Pacific Island countries (PICs) and Europe is about 16,000km.<sup>3</sup> Far enough that, despite the PICs' colonial past, it would be fair to assume the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights" or "ECHR")<sup>4</sup> would not play a role in PICs' courts' jurisprudence. Ten years ago, it was argued that the doctrine of margin of appreciation which is a core part of the ECtHR's jurisprudence would be "a good basis to put all doubts about an impossibility of balancing customs<sup>[5]</sup> and "Western style" human rights to rest. The doctrine [would] provide a good foundation for a balance between to two perceived diametrically opposed concepts."<sup>6</sup> At that point in time the PICs' courts' jurisprudence did not refer to the ECHR, however, did rely on international human rights instruments, such as the Convention on the Rights of the Child<sup>7</sup> or the Convention on the Elimination of all Forms of Discrimination Against Women.<sup>8</sup> The aim of this article is to provide an account of the state of human rights jurisprudence in the courts of Fiji, Vanuatu, Tonga, and Samoa ten years later and to explore the courts approach to custom in the human

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2 Imrana Jalal "Why do we need a Pacific Regional Human Rights Commission?" (2009) 40 VUWLR 177, 184.

3 <[https://distancecalculator.globefeed.com/Distance\\_Between\\_Countries.asp](https://distancecalculator.globefeed.com/Distance_Between_Countries.asp)> (last accessed 6 Dec 2018).

4 Rome, 4 Nov 1950, as amended by Protocols Nos 11 and 14.

5 As far as this paper uses "custom" or culture and traditions it has to be pointed out that those concepts are difficult to define. The New Zealand Law Commission stated in its study paper that there was no settled definition of custom law. It warned against one and went on to adopt the term "custom law" to encompass references to "custom" and "customary law" and to describe the "values, principles and norms that members of a cultural community accept as establishing standards for appropriate conduct", New Zealand Law Commission *Converging Currents: Customs and Human Rights in the Pacific* (Wellington, 2006) study paper 17, para 4.23

6 Petra Butler "Margin of Appreciation - A Note towards a Solution for the Pacific" (2008) 39 VUWLR 687, 694.

7 See eg *Leituala v Mauga* [2004] WSSC 9 per Vaai J; Convention on the Rights of the Child, GA res.44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989), entered into force 2 September 1990.

8 See eg *Public Prosecutor v Kota* [1993] VUSC 8; Convention on the Elimination of All Forms of Discrimination against Women, GA res.34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, entered into force 3 September 1981.

rights jurisprudence in those jurisdictions to date. It also gives an overview of the human rights jurisprudence of those courts and their susceptibility to the margin of appreciation doctrine. The choice of jurisdictions was random and it is not the aim or claim of this article to make a pronouncement on all PICs. However, the findings derived from the four jurisdictions discussed provide an interesting insight into the evolving human rights jurisprudence which is distinct from its larger neighbours, Australia and New Zealand.

The article will first give a brief context to human rights in the PICs<sup>9</sup> today to set the scene for an overview of the Fijian, Samoan, Tongan, and Vanuatu's human rights jurisprudence in the last five years. In the last part the article will explore the influence of custom on the courts' jurisprudence and whether the ECtHR's margin of appreciation doctrine has taken a certain hold in the Pacific islands.

## **II HUMAN RIGHTS IN THE 21<sup>ST</sup> CENTURY IN THE PICs**

Ten years ago the human rights discussion in the PICs centred on the need of a regional human rights charter and a regional Pacific human rights commission,<sup>10</sup> ie whether a regional human rights instrument would mean a renunciation of custom.<sup>11</sup> To date the discussion has shifted to a functional analysis of specific rights ie the way in which human rights can be utilised to improve serious injustices and wrongs.<sup>12</sup> The utility of human rights is generally accepted. Even though the level of ratification of international human rights treaties is still low in the PICs (most PICs

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9 See also regarding the PICs' human rights framework and discussion ten years ago: Petra Butler "Margin of Appreciation- A Note towards a Solution for the Pacific" (2008) 39 VUWLR 687, 691 et seq.

10 See Imrana Jalal "Why do we need a Pacific Regional Human Rights Commission?" (2009) 40 VUWLR 177; Kelly Haines-Sutherland, *Balancing Human Rights and Customs in the Pacific Region*, ANU thesis (2009) available at <[www.cla.asn.au/Article/2009/Paper%20Kelly%20HS%200912.pdf](http://www.cla.asn.au/Article/2009/Paper%20Kelly%20HS%200912.pdf)> (last accessed 5 Dec 2018); see *Protecting Human Rights in the Pacific*, (2009) 40 VUWLR (special issue) and Petra Butler "Foreword" to that volume.

11 Kelly Haines-Sutherland *Balancing Human Rights and Customs in the Pacific Region* ANU thesis (2009) available at <[www.cla.asn.au/Article/2009/Paper%20Kelly%20HS%200912.pdf](http://www.cla.asn.au/Article/2009/Paper%20Kelly%20HS%200912.pdf)> (last accessed 5 Dec 2018); Petra Butler "Margin of Appreciation - A Note towards a Solution for the Pacific" (2008) 39 VUWLR 687, 691 et seq.

12 See, eg Bridget Lewis "A Human Rights-based Approach to Disaster Displacement in the Asia-Pacific" 6 (2016) *Asian Journal of International Law* 326; Elizabeth Thomas "Protecting Cultural Rights in the South Pacific Islands: Using UNESCO and Marine Protected Areas to Plan for Climate Change" 29 (2018) *Fordham Envtl L Rev* 413; Zeid Ra'ad Hussein "Human Rights in the Pacific: Navigating New Challenges with the Universal Declaration of Human Rights" lecture (2018) available at <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=226498LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=226498LangID=E)> (last accessed 11 February 2019).

have not ratified the ICCPR)<sup>13</sup> the PICs have recognised the importance of international human rights standards.<sup>14</sup> Compliance with international human rights standards at the national level has been evident through a range of steps taken by the PICs, inter alia, the reporting to treaty bodies, through standing invitations to and in hosting the visits of special rapporteurs, and the PICs' engagement with the Universal Periodic Review (UPR) process.<sup>15</sup> In 2016 all PICs had been through two rounds of UPR reporting, generating more assessments, dialogue, and commitments to human rights in the region than ever before.<sup>16</sup> The heightened relevance of human rights in the PICs is also evidenced by the increase of human rights jurisprudence in their courts.<sup>17</sup> The pure rise in quantity of available human rights case law, simply ascertained by searching with human rights search terms, does not reveal the actual engagement with human rights or the development of a distinct PIC human rights jurisprudence. The following part will examine Fiji's, Samoa's, Vanuatu's, and

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13 See for an overview of international human rights instruments ratified by PICs: Pacific Community (SPC) *Human Rights in the Pacific- A situational analysis* (2016) p 4 available at <[www.spc.int/sites/default/files/resources/2018-05/Human-right-Pacific.pdf](http://www.spc.int/sites/default/files/resources/2018-05/Human-right-Pacific.pdf)> (last accessed 6 Dec 2018).

14 See *Ligavai v State* [2016] FJHC 673 [20]: "Although Fiji has not ratified the International Covenant on Civil and Political Rights, Government of Fiji has shown its willingness to respect the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights by the promulgation in 2014 of a Constitution with a comprehensive Bill of Rights which incorporates the International Covenant on Civil and Political Rights." It has to be noted that, as in all states, there are areas of improvements in the PICs when it comes to human rights treaty compliance and implementation of human rights: see a summary of the issues that emerged from the 1<sup>st</sup> periodic review: Rhona Smith "The Pacific Island States: Themes Emerging from the United Nations Human Rights Council's Inaugural Universal Periodic Review?" (2002) 13 *Melbourne Journal of International Law* 1.

15 Pacific Community (SPC), *Human Rights in the Pacific - A situational analysis* (2016) p 4 available at <[www.spc.int/sites/default/files/resources/2018-05/Human-right-Pacific.pdf](http://www.spc.int/sites/default/files/resources/2018-05/Human-right-Pacific.pdf)> (last accessed 6 Dec 2018) p 5.

16 Pacific Community (SPC) *Human Rights in the Pacific - A situational analysis* (2016) p 4 available at <[www.spc.int/sites/default/files/resources/2018-05/Human-right-Pacific.pdf](http://www.spc.int/sites/default/files/resources/2018-05/Human-right-Pacific.pdf)> (last accessed 6 Dec 2018) p 5.

17 Ten years ago research revealed six accessible and available cases from all the PICs' courts [this does not necessarily reflect the actual case number by any means since the availability from outside the respective PIC was severely restricted]. To date research, only using the available data bases, has revealed 39 human rights cases in the last five years in Fiji alone; nine in Samoa; 11 in Vanuatu; three in Tonga. Even giving a margin of error to the better reporting and availability it can be assumed from these numbers that there a body of sustained human rights jurisprudence evolving in the PICs. See also, even earlier, Laitia Tamata "Application of the Human Rights Conventions in the Pacific Island Court" (2000) 4 *JSPL* available at <[www.usp.ac.fj/index.php?id=13205](http://www.usp.ac.fj/index.php?id=13205)> (last accessed 11 February 2019).

Tonga's human rights case law of the last five years to ascertain how the respective courts have engaged with human rights.<sup>18</sup>

### **III HUMAN RIGHTS IN THE FIJIAN, SAMOAN, TONGAN AND VANUATU COURTS 2014-2018<sup>19</sup>**

#### **A Tonga**

Many Pacific constitutions include provisions that protect custom and recognise it as a source of law. However, the constitutional protection of custom differs.<sup>20</sup> For example, the constitutions of Papua New Guinea<sup>21</sup> and Solomon Islands<sup>22</sup> imbue custom with a superior status to the imported common law. In contrast, Tonga's constitution lacks any formal protection of custom.<sup>23</sup> Nevertheless, the relevance of human rights to the decision-making in the three Tongan cases, in which a reference to human rights was made in the last five years, is illustrative of the heightened relevance of human rights in the PICs. In *Police v Yu*<sup>24</sup> the issue was whether the right of a witness not to incriminate him or herself by giving evidence (s 137 Evidence Act 1988) would extend to the provision of a body sample.<sup>25</sup> In its judgment the Court relied on the ECtHR jurisprudence in *Saunders v United*

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18 See for a discussion of the meaning of custom NZLC paper *Converging Currents: Custom and Human Rights in the Pacific* Study Paper 12 (Wellington, 2006); Morsen Moses "Custom as a Source of Law in Vanuatu: A Critical Analysis" (2017) JSPL 37, 38; Campbell McLachlan *State Recognition of Customary Law in the South Pacific* (PhD Thesis, University of London, 1988) 336; *Halsbury's Laws of England* (4<sup>th</sup> ed, reissue, 1998) vol 12(1) Custom and Usage at [606]; David J Bederman in *Custom as a Source of Law* (Cambridge University Press, Cambridge, 2010) at xi; Bernard Narokbi in his book *Lo Bilong Yumi Yet, Law and Custom in Melanesia* (University of the South Pacific, Suva, 1989); and Eddie Durie in "*Custom Law*" (unpublished paper for the Law Commission, January 1994).

19 The cases were ascertained by using PacLII and using the search term "human right\*".

20 NZLC paper *Converging Currents: Custom and Human Rights in the Pacific* Study Paper 12 (Wellington, 2006) at para 3.5.

21 Constitution of the State of Papua New Guinea 1975 (PNG), sch 2, pts 1 and 2; Underlying Law Act 2000 (PNG).

22 Constitution of Solomon Islands 1978 (UK), sch 3.3.

23 NZLC paper *Converging Currents: Custom and Human Rights in the Pacific* Study Paper 12 (Wellington, 2006) at para 3.5; see also the Constitution of Tonga (Tonga).

24 *Police v Yu* [2014] TOSC 26 per Tu'uholoaki CJ.

25 Evidence Act 1988, s 137.

*Kingdom*,<sup>26</sup> as well as on the jurisprudence of the High Court of Australia<sup>27</sup> and of the English Court of Appeal.<sup>28</sup> The Court noted how helpful it had been that those decisions had been brought to its attention and relied on them to hold that a protection against being forced to give oral evidence existed.<sup>29</sup> On the other hand no such protection extended to the "protection against the provision of materials including body samples or documents which have an existence independent of the will of the suspect".<sup>30</sup>

Article 8 ECHR provided the cornerstone for the analysis of the Court when having to decide whether to grant or to continue interlocutory injunctive relief.<sup>31</sup> The Court had to balance the harm to the plaintiff's reputation resulting from the publication of confidential documents against the freedom of speech of the respondent and the right of the public to be informed about matters of the real and substantial public interest.<sup>32</sup> The Court discussed Eady J's analysis of art 8 ECHR regarding breach of confidentiality in *Lord Browne of Madingley v Associated Newspapers Ltd*,<sup>33</sup> on which the plaintiff as well as the respondent had relied.<sup>34</sup> The Court noted that the threshold to restrain from publication set out in *Pale v Pohiva*<sup>35</sup> was higher than that set out by Eady J.<sup>36</sup> However, ultimately the Court did not have to decide whether the higher test was preferable since on the facts the threshold was met.<sup>37</sup>

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26 *Saunders v United Kingdom* (1997) 23 EHRR 313.

27 *Environment Protection Authority v Caltex Refining Co Pty Ltd* [1993] HCA 74; (1993) 178 CLR 477.

28 *R v Apicella* (1986) 82 CrAppR 295.

29 *Police v Yu*, above n 24, at [4] per Tu'uholoaki CJ.

30 At [4] per Tu'uholoaki CJ.

31 *Friendly Islands Satellite Communications Ltd v Pohiva* [2015] TOCA 14 per Moore, Blanchard, Hansen and Tupou JJ.

32 At [28] per Moore, Blanchard, Hansen and Tupou JJ.

33 *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] EWHC 202 cited in *Friendly Islands Satellite Communications Ltd v Pohiva* above n 31, at [29] per Moore, Blanchard, Hansen and Tupou JJ.

34 *Friendly Islands Satellite Communications Ltd v Pohiva*, above n 31, at [29] per Moore, Blanchard, Hansen and Tupou JJ.

35 *Pale v Pohiva* [2006] Tonga LR 148 per Webster CJ.

36 *Friendly Islands Satellite Communications Ltd v Pohiva*, above n 31, at [30] per Moore, Blanchard, Hansen and Tupou JJ.

37 At [30] per Moore, Blanchard, Hansen and Tupou JJ.

How much human rights have permeated the discourse in Tonga is evidenced by the reference in *Finau v Finau* to the role of the Secretariat of the Pacific Communities and the Regional Rights Resource Team to further the observance of human rights standards in the PICs and in particular the assistance they have provided to address Tonga's serious domestic violence problem.<sup>38</sup> The Court's comment is part of the narrative when discussing the role of the judiciary and its independence from the Ministry of Justice.<sup>39</sup>

## ***B Samoa***

The preamble of the Samoan constitution references Samoan custom and tradition as well as fundamental freedoms.<sup>40</sup> This is illustrative of the equal importance that the constitution and society place on the values of custom and human rights.<sup>41</sup> The relationship between custom and human rights was discussed in two decisions by Samoan courts between 2014 and 2018. Having to decide on whether the Supreme Court correctly refused to review a decision of the Land and Titles Court, the Court of Appeal confirmed its decision in *Penaia II v Land and Titles Court*.<sup>42</sup> The Land and Titles Act 1981 deals with customary land and Matai title, each held in accordance with Samoan custom and usage and with the law relating to custom and arts 100<sup>43</sup> and 101(2)<sup>44</sup> of the Constitution. "Law" is defined as custom and usage

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38 *Finau v Finau* [2018] TOSC 34 at [11] per Paulsen CJ.

39 At [15] per Paulsen CJ, the Court was clear that "[t]he Judges of Tonga are not employed by the Ministry of Justice."

40 Constitution of the Independent State of Samoa 1960 (Samoa), preamble.

41 NZLC paper *Converging Currents: Custom and Human Rights in the Pacific* Study Paper 12 (Wellington, 2006) at para 6.1.

42 *Penaia II v Land and Titles Court* [2012] WSCA 6 per Baragwanath, Fisher and Galbraith JJ.

43 Constitution of the Independent State of Samoa 1960 (Samoa), art 100: "A Matai title shall be held in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage."

44 Constitution of the Independent State of Samoa 1960 (Samoa), art 101(2): "Customary land means land held from Samoa in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage."

which has acquired the force of law in Samoa (art 111).<sup>45</sup> The 1981 Act gives jurisdiction over those subject-matters only to the Land and Titles Court.<sup>46</sup> The judgments of that Court are "ring-fenced", in two important respects. Under s 70 of the 1981 Act "every final decision of the Court on a petition is deemed to be judgment in rem and shall bind all Samoans who are affected by it, whether parties to the proceeding or not."<sup>47</sup> Secondly, under s 71, "... no decision or order of the [Land and Titles] Court shall be reviewed or questioned in any other Court by way of appeal, prerogative writ or otherwise howsoever."<sup>48</sup> The appellant relied on art 9(1) of the Samoan Constitution which guarantees a right to a fair trial<sup>49</sup> and argued that the Supreme Court could review the decision of the Land and Titles Court since the said Court had not observed his right to be heard.<sup>50</sup> Even though at first instance it might have been thought that s 71 of the 1981 Act precluded any review by any court in any circumstances such an outcome would be inimical in a constitutional regime which protects fundamental rights. Section 71 has to be read alongside art 4(2) of the Constitution, which specifically enables the Supreme Court to make orders to secure fundamental rights.<sup>51</sup>

Section 71 of the Land and Titles Act 1981 cannot oust the jurisdiction of the Supreme Court in this respect. The constitutional framework allocates the power of decision-making between the courts on the basis a policy which respects both Samoan values (fa'a Samoa which remains a strong force in Samoan life and politics)

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45 *Penaia II v Land and Titles Court*, above n 42, at [16] per Baragwanath, Fisher and Galbraith JJ. Constitution of the Independent State of Samoa 1960 (Samoa), art 111 "'Law' means any law for the time being in force in Samoa; and includes this Constitution, any Act of Parliament and any proclamation, regulation, order, by-law or other act of authority made thereunder, the English common law and equity for the time being in so far as they are not excluded by any other law in force in Samoa, and any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction...".

46 At [17] per Baragwanath, Fisher and Galbraith JJ: "The *raison d'être* of the Land and Titles Court is to provide that competence, bringing to disputes concerning Samoan custom and usage the expertise of Judges versed in such matters so they can evaluate what answer is most in keeping with the justice of the case according to Samoan values. Such expertise can be gained only from a life-time's exposure to Samoan culture, which in the courts of general jurisdiction may be, and in this Court, as constituted for this appeal, is wholly absent."

47 Land and Titles Act 1981 (Samoa), s 70.

48 Land and Titles Act 1981 (Samoa), s 71.

49 Constitution of the Independent State of Samoa 1960 (Samoa), art 9(1).

50 *Malifa v President of Land and Titles Court* [2014] WSCA 11 [10] et seq per Fisher, Hammond and Blanchard JJ.

51 Constitution of the Independent State of Samoa 1960 (Samoa), art 4(2).



and the importance of fundamental human rights.<sup>52</sup> In *Punitia v Tutuila* the Court was asked to (re)-examine the impact of banishment on the Samoa's legal order.<sup>53</sup> In earlier cases, courts have been more willing to uphold banishment, however more recent decisions reflect a growing awareness that banishment has become increasing unacceptable in Samoan society.<sup>54</sup> In *Punitia v Tutuila* the respondent sought damages for the loss of the right to move freely throughout Samoa and to reside in any part thereof set out by art 13(1)(d) of the Constitution due to banishment.<sup>55</sup> The appellants relied on art 111 of the Constitution which states that customs and usage form part of the law in Samoa,<sup>56</sup> and argued that the banishment was based on custom rather than the Village Fono Act 1990.<sup>57</sup> In its judgment the Court summarised the existing case law regarding the treatment of the custom of banishment by the Samoan courts pointing out that the "history of Samoan banishment is primarily about banishment by Village Fonos in the exercise of their customary powers."<sup>58</sup> The Court in the particular case, however, was presented with the argument that banishment was a customary village power that had survived the 1990 Act and which represented a reasonable restriction in the interests of public order.<sup>59</sup> The Court noted that due to the severity of an order for banishment the constitutional right to a fair trial must be upheld.<sup>60</sup> The Court relied on Lord Cooke's observation in *Piteamoa Mauga & Ors v Fuga Leituala*<sup>61</sup> where his Honour acknowledged the need to marry modern democratic ideals and human rights with indigenous customs and traditions but pointed out that this marriage had been already effected, "through recognition that a carefully circumscribed power of banishment was possessed by the Land and Titles

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52 *Penaia II v Land and Titles Court*, above n 42, at [25] per Baragwanath, Fisher and Galbraith JJ.

53 *Punitia v Tutuila* [2014] WSCA 1 per Fisher, Hammond and Blanchard JJ.

54 See for example *Italia Taamale & Others v The Attorney-General* [1995] WSCA 1 per Cooke P, Casey and Bisson JJ.

55 Constitution of the Independent State of Samoa 1960 (Samoa), art 13(1)(d).

56 Constitution of the Independent State of Samoa 1960 (Samoa), art 111.

57 *Punitia v Tutuila*, above n 53, at [25] per Fisher, Hammond and Blanchard JJ; and Village Fono Act 1990 (WS).

58 At [36] Fisher, Hammond and Blanchard JJ.

59 At [40] Fisher, Hammond and Blanchard JJ.

60 At [8] Fisher, Hammond and Blanchard JJ.

61 *Piteamoa Mauga & Ors v Fuga Leituala* WSCA, 4 March 2005, per Lord Cooke.

Court."<sup>62</sup> The balancing of custom, in particular banishment, with modern human rights was also discussed by Splicer J in the earlier decision of *Tutuila v Punitia*:<sup>63</sup>

[Banishment] is not a weapon to be used by the majority to act on a whim. Misconduct is not what the powerful choose to call misconduct when their dignity is offended. It is not a vehicle to oppress or punish for personal gain. It must be grounded in custom not abuse of power. It must be appropriate to the conduct.

The judgment of the Court in its more recent decision further relies on New Zealand's Court of Appeal decision in *Simpson v Attorney-General [Baigent's Case]*<sup>64</sup> granting damages to the respondents.<sup>65</sup> Thus, drawing on prior jurisprudence the Samoan courts are able to rely on human rights standards and norms to provide individuals with the grounds to challenge the unjust application of a customary practice.<sup>66</sup>

Relief for human rights breaches was also the issue in *Woodroffe v Fisher*, a decision that amplifies the increasing importance placed on comparative case law by the courts.<sup>67</sup> The Court acknowledged unequivocally that compensation for a breach of a constitutional right was available in Samoa.<sup>68</sup> By assessing whether the applicant was entitled to relief for a breach of the applicant's human rights the Court had to assess whether the applicant had been subject to degrading treatment by a court under art 7 of the Constitution.<sup>69</sup> A crucial part of the assessment whether the conduct of the court had amounted to degrading treatment towards the applicant was whether there had been comparable case law. Since neither party found comparable case law to present to the Court the Court drew the inference that "the treatment in this instance was at a level not worthy of consideration in human rights jurisprudence".<sup>70</sup>

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62 At 10 per Lord Cooke. For a broader discussion see Jennifer Corrin "A Green Stick or a Fresh Stick?: Locating Customary Penalties in the Post-Colonial Era" (2006) 6 Oxford University Commonwealth Law Journal 1.

63 *Tutuila v Punitia* [2012] WSSC 107, per Splicer J.

64 *Simpson v Attorney-General* [1994] 3 NZLR 667.

65 *Punitia v Tutuila*, above n 53, at [61] et seq per Fisher, Hammond and Blanchard JJ.

66 Tracy Whare "Customary Law and Human Rights in the Pacific – Potential for Convergence or Inevitable Conflict" (2015) 13 NZYIL 187 at 202-203.

67 *Woodroffe v Fisher* [2017] WSCA 9 per Panckhurst, Tuala-Warren and Vaepule Vaai JJ.

68 At [32] per Panckhurst, Tuala-Warren and Vaepule Vaai JJ.

69 The Constitution of the Independent State of Samoa 1960 (Samoa), art 7, "No person shall be subjected to torture or to inhuman or degrading treatment or punishment."

70 *Woodroffe v Fisher*, above n 67, at [40] per Panckhurst, Tuala-Warren and Vaepule Vaai JJ.

New Zealand Bill of Rights Act 1990 (BORA) jurisprudence came to bear in the case of *Police v Faleupolu*.<sup>71</sup> The issue was in how far human rights had to be taken into account when considering a bail application. The Court held that the accused's right under art 9(3) of the Constitution, the right to be presumed innocent until proven guilty,<sup>72</sup> had to be adhered to from the start of the criminal process.<sup>73</sup> The Court then pointed out that New Zealand courts had to take the rights enshrined in BORA into account when considering a bail application. Since New Zealand, unlike Samoa, had not even an enshrined and supreme constitution it was therefore only opportune for Samoan courts to adopt the "NZ balancing approach to our own local context."<sup>74</sup> The Court then not only gave weight to the presumption of innocence but also to the accused's right to prepare his defence when deciding whether to grant bail.<sup>75</sup>

The Samoan courts have regularly referred to international human rights instruments in their judgments. In particular the Convention on the Rights of the Child (CRC)<sup>76</sup> has been cited by the courts to emphasise the special care and assistance children deserve<sup>77</sup> but also the right of a child who had committed a crime to reintegration.<sup>78</sup> Both cases had at their heart the rape of a child or young person by a family member. In the former case the eighteen year old victim had been raped by her uncle, in the latter a fourteen year old had raped his ten year old cousin. In the former case the Court relied on the preamble of CRC to stress the need to address the sexual offending occurring in Samoa against children.<sup>79</sup> In *Police v I.I* the Court relied on CRC to impose community work instead of imprisonment on the fourteen year old rapist.<sup>80</sup> However, reliance on CRC has not always been successful. In

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71 *Police v Faleupolu* [2017] WSDC 22 per Papalii J.

72 Constitution of the Independent State of Samoa 1960 (Samoa), art 9(3).

73 *Police v Faleupolu*, above n 71, at [53] per Papalii J.

74 At [57] per Papalii J.

75 At [60] per Papalii J.

76 Resolution 44/25 (20 Nov 1989).

77 *Police v Sione* [2018] WSSC 89 at [26] per Tuala-Warren J citing the Preamble of CRC.

78 *Police v I.I* [2014] WSYC 5 at [31] per Tuala-Warren J relying on CRC art 40.

79 *Police v Sione*, above n 77, at [26] per Tuala-Warren J.

80 *Police v I.I*, above n 78, at [31] per Tuala-Warren J.

*Police v Chen* the accused had relied, inter alia, on CRC in his sentencing hearing. The Court held:<sup>81</sup>

7. ... And then the extraordinary submission that in sentencing in this matter the court should take into account Samoa's obligations under two United Nations Conventions. Convention on the Rights of the Child ("CRC") and the Convention on Economic, Social and Cultural rights.
8. I have some passing familiarity with the Convention on the Rights of the Child. But I know of no convention on economic, social and cultural rights, only an International Covenant not a convention. It is a Covenant to which Samoa is not a party. Perhaps this mistaken reference is a reference to the International Covenant on Civil and Political Rights ("ICCPR") to which Samoa is a party.
9. But whatever the case may be I can assure counsel that his client being a mature 51 year old male is not subject to the principles of either Convention. The fact that the defendant is a caregiver for his children does not trigger the application of the Conventions. If one wishes to fully understand the Conventions there is ample literature available on the internet which can be read. ... The office of the United Nations High Commissioner for Human Rights (OHCHR) in Fiji and Geneva also has numerous publications and articles on the CRC and ICCPR.

It should be noted, despite the judgment that articles 2, 3, 12, and 20 of CRC set out the rights of the children that a court should have regard to when sentencing a parent.<sup>82</sup>

Cases in which the ECHR was relied on concerned the right to a fair hearing and the right to trial by an independent and impartial tribunal and the question of immunity of an international organisation. The former case dealt with an issue unsurprising in small jurisdictions, namely the impartiality and independence of a judge who was related to the wife of the respondent in the underlying matter. The interesting problem was that the judge had recused himself when the case first came to the courts without either party requesting recusal. When the same matter came in front of him a few years later he did not recuse himself. The Supreme Court in its judgment referred to art 6(1) ECHR and extensively to the jurisprudence of the

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81 *Police v Chen* [2015] WSSC 226 [7] et seq per Nelson J.

82 See "Safeguarding Children when Sentencing Parents" <[www.law.ox.ac.uk/sites/files/oxlaw/maternal\\_sentencing\\_briefing\\_paper.pdf](http://www.law.ox.ac.uk/sites/files/oxlaw/maternal_sentencing_briefing_paper.pdf)> (last accessed 7 Dec 2018).

ECtHR regarding art 6(1).<sup>83</sup> In addition, the Court relied on its own jurisprudence in *Leleua v Land and Titles Court* which discusses when family relationships are too close in the Samoa and warrant a recusal.<sup>84</sup> The Supreme Court held that the family ties in the particular case were such that the independence and impartiality of the court had not be assured and therefore the parties did not get a fair hearing in accordance with art 9(1) of the Samoan Constitution.<sup>85</sup> The Supreme Court, in deference to counsel, took the opportunity to discuss the case law of the ECtHR, in particular *Waite and Kennedy v Germany*, on the question of alternative dispute settlement mechanisms or forum concerning the immunity of international organisations even though the Court had found earlier that the Secretariat had waived its immunity rights.<sup>86</sup> The Court thereby opined that the availability of mediation and conciliation as mechanisms of dispute resolution were reasonable alternatives since the immunity which had been conferred on the defendant was questionable.<sup>87</sup>

### C Vanuatu

Vanuatu courts have not relied heavily on international human rights instruments in their human rights jurisprudence. Courts focus their analysis on the rights enshrined in the Constitution of the Republic of Vanuatu<sup>88</sup> and general observations regarding human rights. They do, however, refer to overseas case law, such as the jurisprudence of the Solomon Islands High Court<sup>89</sup> and the Privy Council decision in *Maharaj v Attorney General of Trinidad and Tobago*.<sup>90</sup> The courts place

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83 *Esekia v Land and Titles Court* [2017] WSSC 145 at [19] et seq per Nelson J; citing eg *Findlay v The United Kingdom* ECtHR (25 Feb 1997), *Brudnicka & others v Poland* 38 ECHR 2005-II, *Kleyn and others v The Netherlands* ECtHR (6 May 2003).

84 *Leleua v Land and Titles Court* [2009] WSSC 123 per Nelson J.

85 *Esekia v Land and Titles Court*, above n 83, at [26] and [31] per Nelson J.

86 *Johnston v Secretariat Pacific Regional Environment Programme* [2017] WSSC 27 at [43] per Sapolu CJ.

87 At [54] per Sapolu CJ, also citing August Reinisch/Ulf Weber "In The Shadow of Waite and Kennedy" [2004] 1 IQLR 69.

88 *Nari v Republic of Vanuatu* [2015] VUSC 132 per Fatiaki J; *Public Prosecutor v Guray* [2016] VUSC 154 per Chetwynd J.

89 *Benard v Republic of Vanuatu* [2015] VUSC 143 at [17] per Chetwynd J citing *Hatilia v AG* [2014] SBHC 125.

90 *Maharaj v Attorney-General of Trinidad and Tobago* [1979] AC 385, cited in *Mass v Government of the Republic of Vanuatu* [2018] VUCA 11 [61] per Lunabek CJ, Doussa, Asher, Saksak, Aru and Wiltens JJ.

importance on custom in particular in questions of family structures and relationships.<sup>91</sup>

The international instrument relied on most extensively was CRC. This Convention references culture in relation to learning resources, education, enjoyment of culture and participation in cultural life and the arts.<sup>92</sup> As identified by Elise Huffer, the Cultural Adviser to the Secretariat of the Pacific Community, this creates the potential for cultural rights to be aligned with customary law in relation to children.<sup>93</sup> This is of particular interest in Vanuatu, where the Constitution provides that "[c]ustomary law shall continue to have effect as part of the law of the Republic of Vanuatu".<sup>94</sup> Huffer identifies examples of child protection programmes, in Vanuatu such as Save the Children, which promote children's rights while also conforming with customary practices. Examples such as this illustrate how customary practices are being valued and recognised, and in doing so promote the cultural rights of individuals.<sup>95</sup>

CRC was at the core of the decision in *Nakamura v Dalley*,<sup>96</sup> a custody dispute. Both parents relied on the Convention and the respondent provided the Court with relevant New Zealand case law under CRC.<sup>97</sup> The Court observed:<sup>98</sup>

Children are no longer treated as second class citizens and are now accorded pride of place in the family, and this recognition has led to a number of States ratifying the Convention on the Rights of the Child, including the Republic of Vanuatu.

The Court's analysis centred on the "best interests of the child" and CRC being its starting point the Court set out its approach as follows:<sup>99</sup>

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91 Section 95(3) of the Constitution of the Republic of Vanuatu 1980 (Vanuatu); art 95(3) provides: "Customary law shall continue to have effect as part of the law of the Republic of Vanuatu."

92 Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September, 1990) arts 17, 29, 30 and 31.

93 Elise Huffer "Cultural rights in the Pacific – What they mean for children" (paper presented to a seminar on Children's Rights and Culture in the Pacific, October 2006), see also Tracy Whare, above n 66, at 212-213.

94 Constitution of the Republic of Vanuatu 1980 (Vanuatu), art 95(3).

95 Elise Huffer, above n 93, at 7 and 18.

96 *Nakamura v Dalley* [2018] VUSC 134, at 15 and 17 per Cenac Master.

97 At 17 fns 9 et seq per Cenac Master.

98 At 18 per Cenac Master.

99 At 18 per Cenac Master.

In attending to the "best interests of the child" the court will look to relevant legislation applicable to Vanuatu, other relevant legislation within the South Pacific, case law in this jurisdiction and case law outside Vanuatu as persuasive authority. Legislation and case law looked at will be limited to jurisdictions that are signatories to the Convention on the Rights of the Child...

In line with that approach the Court referred in its discussion to the relevant New Zealand case law<sup>100</sup> and the relevant United Kingdom<sup>101</sup> and Papua New Guinea<sup>102</sup> legislation.

The ECHR was found to provide helpful guidance regarding the ambit of the right to silence in a case that saw 16 Members of Parliament and Leaders of the Republic of Vanuatu charged with bribery and corruption.<sup>103</sup> Except for one of the accused the accused never made any statement to the police or in court regarding the charges. The Court relied on *Murray v United Kingdom*<sup>104</sup> where the ECtHR found that drawing an adverse inference from silence was in the particular circumstances a justified limit on the right to silence.<sup>105</sup> The Court also discussed New Zealand, Australian and United Kingdom case law on the point.<sup>106</sup>

The divergence of custom and human rights was discussed in three judgments in the last five years. In two of the judgments the Court had to answer whether the custom discriminated with respect to land rights of women.<sup>107</sup> The courts found the fundamental rights which are recognised in art 5 of the Constitution of Vanuatu were not superseded by custom. Article 5 states:<sup>108</sup>

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100 At 19 per Cenac Master.

101 At 19 per Cenac Master; and Children Act 1989 (UK).

102 At 20 per Cenac Master, and Lukautim Pikini Act 2015 (PNG).

103 *Public Prosecutor v Kalosil* [2015] VUSC 135 at [64] per Sey J.

104 *Murray v United Kingdom* [1996] 22 EHRR 29.

105 At [56] and [57].

106 *Public Prosecutor v Kalosil*, above n 103, at [67] per Sey J, *Graham v R* [2012] NZCA 372; [69] *R v Harbour* [1995] 1 NZLR 440, *Weissersteiner v R* [1993] HCA 65; [72] *Haw Tua Tau v Public Prosecutor* [1982] AC 136.

107 Constitution of the Republic of Vanuatu 1980 (Vanuatu), art 74: "The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu."

108 Constitution of the Republic of Vanuatu 1980 (Vanuatu), art 5.

## 5. Fundamental rights and freedoms of the individual

(1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –

- (a) life;
- (b) liberty;
- (c) security of the person;
- (d) protection of the law;
- (e) freedom from inhuman treatment and forced labour;
- (f) freedom of conscience and worship;
- (g) freedom of expression;
- (h) freedom of assembly and association;
- (i) freedom of movement;
- (j) protection for the privacy of the home and other property and from unjust deprivation of property;
- (k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.

The Courts were unequivocal that a law or custom rule which discriminates against women is in conflict with the Constitution's intention "to guarantee equal rights for women with men".<sup>109</sup> Importantly, the Court in *Lapenmal v Awop* observed:<sup>110</sup>

.. in determining land rights in future, there will be a change in the basis of determining land ownership. This does not mean that ownership will be decided otherwise than in accordance with custom. *Custom law must provide the basis for determining*

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109 *Lapenmal v Awop*, below n 111, at [37] per Fatiaki J; *Gongi v Willie*, below n 111, at 3 Macrevehg Magistrate, Niptik, Tasvalie and Malres JJ.

110 *Lapenmal v Awop*, below n 111, at [37] per Fatiaki J - emphasis in judgment.



*ownership, but subject to the limitation that any rule of custom which discriminates against women cannot be applied.*

In addition, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was called upon to reinforce the courts finding that women's equal treatment superceded custom.<sup>111</sup>

The need for respect for women and their equal treatment has been a theme in a number of judgments relating to violence against women. As the Court in *Public Prosecutor v Patunavanu* emphatically emphasised "[v]iolence [could] never be part of a civilized society such as Vanuatu... in which the human rights of Women must be respected at all times."<sup>112</sup>

The acceptance of equal treatment of women and men has not extended to the equal treatment of homosexuals. In *In re MM, Adoption Application by SAT*<sup>113</sup> the Court declined the application for adoption based on the evidence of the President of the Malavatumauri Council of Chiefs that based on "custom, Christian principles and the concern for the sustainability of clans/tribes to continue" "the adoption of a ni-Vanuatu child by a gay person [was] not tolerable."<sup>114</sup> The Court gave considerable weight to the Chief's evidence since the Constitution recognises Chiefs as the repository of customary wisdom and advice.<sup>115</sup> The Court did acknowledge that in accordance with art 95(2) of the Constitution custom is not determinative and only has to be taken into account. However, in family-related subject-matters custom, in particular expressed unequivocally and strongly, had to determine the outcome.<sup>116</sup> The Court also pointed out that art 5(1) of the Vanuatu Constitution unlike s 21 of the New Zealand Human Rights Act 1993 did not include sexual orientation as a

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111 *Lapenmal v Awop* [2016] VUSC 90 at [33]; *Gongi v Willie* [2015] VUIC 3, at 3.

112 *Public Prosecutor v Patunavanu* [2016] VUSC 110 per Lunabek CJ; *Public Prosecutor v Welgtabit* [2016] VUSC 48 per Lunabek CJ; see also *Public Prosecutor v Jimmy* [2018] VUSC 35 at [8] per Chetwynd J: "There is also the need to deter other men from using violence against women and to reinforce the need to respect the equal and human rights of women particularly in the context of a domestic relationship."

113 *In re MM, Adoption Application by SAT* [2014] VUSC 78 per Harrop J.

114 At [52] per Harrop J.

115 At [55] per Harrop J.

116 At [55] per Harrop J.

ground for discrimination and therefore was not guaranteeing freedom from discrimination on that ground.<sup>117</sup>

Article 5(1) of the Constitution recognises, in line with generally accepted human rights methodology that fundamental rights are "subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order and work fair and health."<sup>118</sup> In two decisions the courts had to examine whether those enumerated concerns were legitimately limiting the right in question. In both cases the respective Court did so without a detailed analysis. In *Nari v Republic of Vanuatu* the Court acknowledged that "the rights and freedoms recognized in art 5(1) are not absolute and indeed granted "subject to" several limitations."<sup>119</sup> In *Mass v Government of the Republic of Vanuatu* the Court, relying on Article 5(1), limited the right of the administration of justice without delay since "the difficulties created by the pressure of work on the court system and the limited resources available must be taken into account".<sup>120</sup> In *Benard v Republic of Vanuatu* the Court stated that "it would be difficult to say all rights were equal in that the consequences of a breach of the fundamental right to life would likely be viewed as more serious tha[n] the breach of the fundamental right to freedom of expression."<sup>121</sup>

## **D Fiji**

Fiji's 2013 Constitution directs Parliament to make provisions for the application of customary laws.<sup>122</sup> The Constitution also strikes a balance with human rights, noting that interpretations of the constitution must promote human dignity, equality and freedom.<sup>123</sup> Interestingly, the Fiji Constitution also provides for the inclusion of economic social and cultural rights, specifically the right to education, health and economic participation.<sup>124</sup> Human rights issues regarding bail, delay, and the

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117 At [63] per Harrop J; see also Constitution of the Republic of Vanuatu (VU), art 5(1) and the New Zealand Human Rights Act 1993, s 21.

118 Constitution of the Republic of Vanuatu 1960 (Vanuatu), art 5(1).

119 *Nari v Republic of Vanuatu* [2015] VUSC 132 [21] per Fatiaki J.

120 *Mass v Government of the Republic of Vanuatu*, above n 90, at [63] per Lunabek CJ, Doussa, Asher, Saksak, Aru and Wiltens JJ.

121 *Benard v Republic of Vanuatu*, above n 89, at [25] per Chetwynd J the statement came in light of the question of compensation for breach of a right, however, it does give an insight into the Court's methodological thinking.

122 Constitution of the Republic of the Fiji Islands 2013 (Fiji), preamble.

123 Constitution of the Republic of the Fiji Islands 2013 (Fiji), art 3.

124 Constitution of the Republic of the Fiji Islands 2013 (Fiji), arts 31, 32 and 38

question of constitutional redress have occupied the Fijian courts in the last five years in particular. Regarding the latter, art 44(1) of the Constitution of the Republic of Fiji Islands sets out the right to seek redress in the High Court for violations of one's human right.<sup>125</sup> Courts have stressed the importance of the right to redress as an important safeguard of the rights and freedoms set out in the Fijian Constitution.<sup>126</sup> This right is fettered by art 44(4) of the Constitution which bestows a discretion on the High Court not to grant relief "if it considers that an adequate alternative remedy is available to the person concerned."<sup>127</sup> When and how to exercise that discretion was the focus of the decision's legal analysis since the value of the right to redress in art 44 would "be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action."<sup>128</sup> Relying on the findings of the Privy Council, such as in *Maharaj v A-G of Trinidad and Tobago (No 2)*<sup>129</sup> (which was also the benchmark for the Court of Appeal in Vanuatu)<sup>130</sup> the court unequivocally held that:<sup>131</sup>

where an adequate alternative remedy is available then constitutional redress will be refused. [The Privy Council] has regarded the application for constitutional relief in these circumstances as abuse of process and as being subversive of the Rule of Law which the Constitution is designed to uphold and protect.

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125 Constitution of the Republic of the Fiji Islands 2013 (Fiji), art 44(1): "If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress."

126 *Vatunitu v iTaukei Land Trust Board* [2016] FJHC 785 at [37] per Amaratunga J.

127 Constitution of the Republic of Fiji (Fiji), art 44(4).

128 *Vatunitu v iTaukei Land Trust Board*, above n 126, at [37] per Amaratunga J.

129 *Maharaj v A-G of Trinidad and Tobago (No 2)* [1979] AC 385, in particular cited in *Vetau v Attorney-General's Office* [2018] FJHC 881 at [13] per Goundar J.

130 *Mass v Government of the Republic of Vanuatu*, above n 90, per per Lunabek CJ, Doussa, Asher, Saksak, Aru and Wiltens JJ.

131 *Waqabaca v State* [2018] FJHC 203 [34] per Rajasinghe J, where the Court also relied on a settled principle in constitutional, human rights and criminal law that constitutional redress was not available if an adequate alternative remedy was available [34]; see also *Vetau v Attorney-General's Office*, above n 129, at [13]-[15] per Goundar J; *Sharma v Legal Aid Commission* [2018] FJHC 301at [3]; *Waq v Commissioner of Fiji Corrections Service* [2018] FJHC 99; *Proceedings Commissioner v Attorney-General of Fiji* [2017] FJHC 50 regarding the possibility of pursuing a rights infringement before the Fiji Human Rights Commission; *Natakuru v Attorney-General of Fiji* [2017] FJHC 461 [19].

Related to the issue whether a person has a right of redress under art 44(1) of the Fijian Constitution is the question of who has standing under art 44(1).<sup>132</sup> This was the subject-matter in *Dutt v Commissioner of Prisons*.<sup>133</sup> The Court referred to the jurisprudence of the ECtHR under art 34 ECHR<sup>134</sup> and drew on a decision of the Solomon Islands' High Court<sup>135</sup> and of the Privy Council.<sup>136</sup> The Court adopted the position formulated in those authorities that in order to represent a detained person, "the Applicant must first satisfy the court that the detained person is not in a position to invoke the jurisdiction of the court ... by himself due to [a] restriction or [a] condition that has arisen from his detention."<sup>137</sup>

Especially in cases concerning the granting of bail the courts have struggled with how to weigh up "the right to personal liberty" with the state's duty to keep the accused secure and safe for trial. In particular in the bail decisions the courts emphasised that each case had to be decided on "its available merits" and that "every case is a fresh case to the court which should determine subjectively to find justice"<sup>138</sup> relying on the Human Rights Committee jurisprudence<sup>139</sup> and art 5(3) of the ECHR.<sup>140</sup> The Court in *Ravudi* also took into account that the Constitution imposes limits on the right set out in the Constitution but drawing the conclusion from the limitations imposed that the Constitution established the "universal value and untouchable nature of personal liberty of a person."<sup>141</sup> In *James v State* the Court

132 Constitution of the Republic of Fiji 2013 (FJ), art 44(1).

133 *Dutt v Commissioner of Prisons* [2016] FJHC 1028 per Rajasinghe J.

134 At [14] et seq per Rajasinghe J citing *Campbell and Cosans v The United Kingdom* [1982] ECHR 1 (25 Feb 1982), *British Gurkha Welfare Society and Others v The United Kingdom*, Application No 44818/11 (15 Sept 2016).

135 *Ulufa'alu v Attorney-General* [2001] SBHC 178; HCSI-CC 195 of 2000 (9 Nov 2001) per Palmer ACJ.

136 *Kamrajh Harrikissoon v Attorney-General of Trinidad and Tobago* [1979] 3 WLR 62.

137 *Dutt v Commissioner of Prisons*, above n 133, at [38] per Rajasinghe J.

138 *State v Ravudi* [2014] FJMC 177 at [8] per Rupasinnge Magistrate; *James v State* [2017] FJHC 344 at [16] per Aluthge J, where the Court refers to the "delicate balancing act".

139 *Arts v State* [2017] FJHC [11] per Rajasinghe J citing *Marinich v Belarus* [10.4.] No 1502/2006, UN Doc CCPR/C/99/D/1502/2006 (2010); *Cedeno v Bolivarian Republic of Venezuela* [7.10] No 1940/2010, UN Doc CCPR/C/106/D/1940/2010 (2012).

140 *Arts v State* [2017] FJHC [12]; ECHR, art 5(3): "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

141 *State v Ravudi*, above n 138, at [10] per Rupasinnge Magistrate.

stated that one of the main issues taken into account when granting bail in Fiji was the time the accused may have to spend in custody before trial if bail is not granted.<sup>142</sup> The delay of proceedings has emerged as one of the most widespread human rights issues.<sup>143</sup> The Fijian Courts, in extensive discussion of international precedent,<sup>144</sup> have formulated the following test.<sup>145</sup>

[T]he applicable approach in [determination] of stay of proceedings on the ground of delay constitutes two main components. The first component is to determine whether the delay is unreasonable. If the court is satisfied that the delay is unreasonable, the court is then required to consider what is the appropriate and available remedy for such unreasonable delay. If the court is satisfied that the accused person is still able to be

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142 *James v State*, above n 138, at [16] and [18] per Aluthge J.

143 Constitution of the Republic of the Fiji Islands 2013 (Fiji), art 14(2)(g) "Every person charged with an offence has the right to have a trial begun and conclude without unreasonable delay" and art 15(3) "Every person charged with an offence ... has the right to have the case determined within a reasonable time".

144 *Shah v State* [2016] FJHC 446 per Rajasinghe J referring generally to a comparative approach [15]: "Having comparatively reviewed the approaches of the jurisdictions of New Zealand, Canada, England and European Court of Human Rights, the Fiji Court of Appeal found that the governing principle in an application of this nature must always is to consider whether an accused person can be tried fairly without any impairment in the conduct of his defence." Discussing eg *Martin v District Court of Tauranga* (1995) 12 CRNZ 509; *Attorney-General's reference No 1 of 1990* (1992) QB 630, 643, 644; *Attorney-General's Reference No 2 of 2001* (2003) UKHL 68; *Qurai v Director of Public Prosecution* [2016] FJHC 228 [19] relying on Human Rights Committee General Comment No 13, Communications No 210/1986 and 225/1987, *E Pratt and I Morgan v Jamiaca* (Views adopted on 6 April 1989) UN doc GAOR, A/44/40, p 229 [13.3.]; UN Human Rights Committee, CCPR General Comment 32 (2007), para 35; *Taright, Touadi, Remli and Yousfi v Algeria*, HRC Communication 1085/2002, UN Doc CCPR/C/86/D/1085/2002 (2006) [8.5]; *Rouse v the Philippines*, HRC Communication 1089/2002, UN Doc CCPR/C/84/D/1089/2002 (2005) [7.4]; and *Sobraj v Nepal*, HRC Communication 1870/2009, UN Doc CCPR/C/99/D/1870/2009 (2010) [7.4.], and *Deweere v Belgium* [1980] ECHR 1 [42] regarding the question what undue delay means; *Obermeier v Austria* [1990] ECHR 15 [72]; and *Angelucci v Italy* [1991] ECHR 6 [15] for the proposition that "constitutes reasonable time within which a matter must be heard is a matter for assessment in each particular case" [31]; *Chand v State* [2016] FJHC 637 relying to *Martin v Tauranga District Court* and *Attorney-General's reference No 1 of 1990*. *Malatolu v State* [2016] FJHC 136 referring to *Attorney-General's reference No 1 of 1990*, *Attorney-General's Reference No 2 of 2001*.

145 *Shah v State* [2016] FJHC [19]; see *Qurai v Director of Public Prosecution* [2016] FJHC 228 [32], *Chand v State* [2016] FJHC 637 [13], *Malatolu v State* [2016] FJHC 136 [16] setting out the requirements as set out by the Common Law:

Even where delay is unjustifiable a permanent stay is the exception and not the rule, Where there is no fault on the part of the prosecution, very rarely will a stay be granted, No stay should be granted in the absence of any serious prejudice to the defence so that no fair trial can be held, and On the issue of prejudice, the trial court has processes which can deal with the admissibility of evidence if it can be shown there is prejudice to an accused as a result of delay.

tried fairly without any impairment in the conduct of his defence, the court should not stay the proceedings.

The Court in *Chand v State* cautioned that delay "is often a strategy to avoid justice". Therefore, "the law on stay must not make an abuse of the process of the courts a successful strategy under the guise of a human rights shield."<sup>146</sup>

Fair trial rights and access to justice are also at the heart of the question whether a party has to provide security for costs.<sup>147</sup> The ECtHR's jurisprudence relating to art 6 ECHR was used as a benchmark by the courts.<sup>148</sup> The courts also were asked to decide on criminal justice and fair trial rights such as direction to the jury or assessors,<sup>149</sup> the right to be heard,<sup>150</sup> a reasoned decision,<sup>151</sup> and equality of arms.<sup>152</sup>

In line with the courts in Samoa and Vanuatu, the Court in *Singh v Singh* stressed that children are gifts of creation and a hope for the future.<sup>153</sup> Unlike the Vanuatu Court in *Nakamura v Dalley*,<sup>154</sup> which held that the best interest of the child test compelled the Court to a comparative analysis of legislation, and of the jurisprudence, the Court in *Singh* held that the best interest test invited the individual judge to decide in accordance with his/her own values.<sup>155</sup> Article 40 of the Convention on the Rights of the Child United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules') provided important

146 *Chand v State* [2016] FJHC 637 at [22] per Aluthge J.

147 Constitution of the Republic of Fiji 2013 (Fiji), art 15(2): "Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal."

148 *Bailiff v Tuivuna* [2018] FJHC 909 [15] per Azhar Master; *Saddique v Nisha* [2017] FJHC 272 [23] per Aimeer J.

149 *Nakato v State* [2018] FJCA 129 [23] et seq; *Maya v State* [2015] FJSC 30 per Gates CJ, Keith P and Dep J relying on Art 6 ECHR.

150 *Silatolu v State* [2018] FJCA 118 per Calanchini P, Wati J and Senevirante J.

151 *State v Western Division Supervisor of Corrections* [2015] FJHC 782 [66] per Ajmeer J – referring to art 6 ECHR.

152 *State v Niudamu* [2017] FJHC 688 per Althuge J relying on ECtHR jurisprudence [30]; *State v Nagata* [2015] FJHC 1043 [30] et seq citing *Rowe and Davis v United Kingdom* App no 28901/95, ECHR 2000-II, 30 EHRR 1, IHRL 3224 (ECHR 2000) (16 Feb 2000) and *Van Mechelen and others v the Netherlands* (1997) 25 EHRR 647.

153 *Singh v Singh* [2014] FJMC 176 at [26] per Rupisinghe Magistrate; see also *Proceedings Commissioner v Kant* [2017] FJHC 407 [48] per Amaratunge J.

154 *Nakamura v Dalley*, above n 96, at 18 per Cenac Master.

155 *Singh v Singh*, above n 153 at [26] per Rupisinghe Magistrate.

considerations for when a juvenile could be tried by the ordinary courts.<sup>156</sup> Interestingly, the Court in *Vualiku*<sup>157</sup> relied on a passage in the US Supreme Court decision of *Roper v Simmons* that made use of the "body of sociological and scientific research that juveniles have a lack of maturity and sense of responsibility compared to adults".<sup>158</sup> Surveying Australian legislation and jurisprudence<sup>159</sup> the Court held that juveniles could be tried as adults for indictable offences which fall under the jurisdiction of the High Court.<sup>160</sup>

Furthermore, Fijian courts had to deal with cases concerning torture,<sup>161</sup> slavery and trafficking,<sup>162</sup> and inhuman treatment.<sup>163</sup> However, in none of these cases did the courts rely on foreign or international jurisprudence.

A judgment that canvassed international and European human rights jurisprudence is *State v Waqabaca*, a sedition case.<sup>164</sup> The Court highlighted that:<sup>165</sup>

[t]he nature and purpose of the offence of sedition is capable of limiting the freedom of expression and speech of the people. In the meantime, absolute freedom of expression and speech could possibly endanger the very existence of the state and its authority which the people have chosen through the exercise of their democratic will. Hence, International Human Rights Instruments and also many modern jurisdictions have recognized the importance of permissible limitation of the freedom of expression and speech.

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156 *State v Vualiku* [2018] FJHC 615 at [5] per Goundar J.

157 *State v Vualiku*, above n 156, per Goundar J.

158 At [3] per Goundar J citing *Roper v Simmons* [2005] USSC 2017; 543 US 551 (2005) 15, 16. The Court also relied on the House of Lords decision of *Smith, R (on the application of) v Secretary of State for the Home Department* [2005] UKHL 51 to support the finding.

159 *State v Vualiku*, above n 156, at [12] et seq per Goundar J citing in particular *PM v The Queen* [2007] HCA 49.

160 At [16] per Goundar J.

161 *Christopher v Attorney-General of Fiji* [2018] FJHC 522 per Seneviratne J. Constitution of the Republic of Fiji (Fiji), art 11(1): "Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment."

162 *State v Raikadroka* [2014] FJHC 409 per Madigan J.

163 *Proceedings Commissioner v Kant*, above n 153, at [47] et seq per Amaratunga J.

164 *State v Waqabaca* [2017] FJHC 932 per Rajasinghe J.

165 At [24] per Rajasinghe J.

That rights can be lawfully limited is also acknowledged in *Christopher v Attorney-General* regarding the right of the persons detained to be held separately.<sup>166</sup>

Two other rights have been subjected to judicial scrutiny. In *A Solicitor v Chief Registrar*<sup>167</sup> the Court had to decide whether the right to privacy of a solicitor could warrant restraining publication of a judgment. In that case the Court weighed up the right of the public to open justice with the right to privacy of the applicant.<sup>168</sup> In *State v Hurtado*, the Court acknowledged freedom of movement as a human right, however, defined it as a right only granted to every citizen of Fiji.<sup>169</sup>

#### **IV THE USE OF FOREIGN HUMAN RIGHTS JURISPRUDENCE IN THE COURTS OF FIJI, TONGA, VANUATU, AND SAMOA**

The human rights jurisprudence in the respective PICs reveals that their courts champion the universality of human rights. The reliance on foreign human rights jurisprudence for their decision-making is a matter of course and is carried out without any hesitation or limitations. The decision of *Woodroffe v Fisher*<sup>170</sup> of the Samoan Court of Appeal indicates that courts might more and more frequently expect parties to present comparative jurisprudence on human rights issues.

The reliance on ECtHR jurisprudence is commendable and to the author in a certain way slightly surprising. The PICs discussed are all Common Law jurisdictions (Vanuatu being mixed) whose statutes and case law are historically, and still to date, heavily influenced by the law of England. It is noteworthy that their biggest neighbour, Australia, does not have a fully-fledged human rights catalogue in its constitution, but that the smaller but relatively still big neighbour, New Zealand, has neither a supreme nor entrenched human rights catalogue. It is also noteworthy that the former colonial power which gave them a large part of their law has a rather difficult relationship with the ECtHR. Given this background it is laudable that the courts rely so readily on the case law of a court 16,000 km away.<sup>171</sup>

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166 *Christopher v Attorney-General of Fiji*, above n 161, at [18] per Hickie Commissioner.

167 *A Solicitor v Chief Registrar* [2017] FJILSC 5 per Calanchini P, Goundar and Alfred JJ.

168 At [110] and [111] per Calanchini P, Goundar and Alfred JJ.

169 *State v Hurtado* [2015] FJCA 169 at [26] per Calanchini P, Goundar and Alfred JJ.

170 *A Solicitor v Chief Registrar* [2017] WSCA 9.

171 During de-colonisation the UK insisted on former colonies adopting written supreme constitutions compliant with the ECHR and conform with other human rights instruments; see Malcolm Shaw *International Law* (8<sup>th</sup> ed, Cambridge University Press, Cambridge, 2017) at 741; and DP O'Connell *State Succession in Municipal Law and International Law* (Cambridge University Press, Cambridge, 1967) vol II at 352. Also not all Fiji's several constitutions are based on international human rights instruments – however the 1997 Constitution based on the NZ Bill of Rights Act, ie



Since the choice of the surveyed PICs was random, two of the surveyed PICs, Tonga and Vanuatu, do not have ECHR human rights roots. Despite the lack of a historic link the courts in both countries have relied on ECtHR jurisprudence. That might not seem noteworthy since the ECHR is the oldest modern international human rights instrument. However, as already pointed out, their bigger neighbours are more partial to Canadian and US human rights jurisprudence and the United Kingdom, the colonial power, does have a rather strained relationship with the ECtHR jurisprudence. It would have been, therefore, not surprising if the Tongan and Vanuatu courts would have relied solely on New Zealand and United Kingdom jurisprudence. That the Tongan and Vanuatu courts have looked to the ECHR and its jurisprudence for guidance in developing their own human rights jurisprudence indicates that the ECHR framework allows for a nuanced balancing of rights.

Reliance on the ECtHR jurisprudence has not meant that the particular local conditions, ie the role of custom within society and the law, cannot be considered. As Imrana Jalal has pointed out:<sup>172</sup>

Cultural sensitivity is different from cultural relativism, the former being an acknowledgement that Pacific island cultures are like all cultures, idiosyncratic. Sensitivity in approach and form is critical. However, Pacific peoples and Pacific culture are not so different that international human rights standards and norms ought not to apply.

Only the courts of Samoa and Vanuatu in the surveyed PIC jurisdictions had to decide on the role of custom in the last five years (which is not surprising since neither Fiji or Tonga recognise custom as a source of law). The courts interestingly echoed, albeit not explicitly, the South African Constitutional Court's findings regarding custom in *Alexkor Ltd et al v Richtersveld Community and Others*:<sup>173</sup>

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the ICCPR and the operative provisions of unique with reference to custom. See the Constitution of the Republic of Fiji (Fiji) Chapter 2 – Bill of Rights, and the New Zealand Bill of Rights Act 1990, preamble: "(b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".

172 Imrana Jalal "Why do we need a Pacific Regional Human Rights Commission?" (2009) 40 VUWLR 177, 184; Alice Venn, "Universal Human Rights? Breaking the Institutional Barriers Facing Climate-Vulnerable Small-Island Developing States"(2017) 7 Climate Law 322; Dominic O'Brien/Sue Farran "A New Dawn for Human Rights in Fiji? Learning from Comparative Lessons" (2015) J Int'l & Comp L 227 [about health & healthcare].

173 CCT 19/03 (14 Oct 2003) at [53], available at <[www.saflii.org/za/cases/ZACC/2003/18.pdf](http://www.saflii.org/za/cases/ZACC/2003/18.pdf)> (last accessed 10 Jan 2019). For a Samoan example, see *Attorney-General v Olomalua* [1980-93] WJLR 41.

Throughout its history [custom] has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.

In *Lapenmal v Awop* the Vanuatu Supreme Court unequivocally stated after pointing to the right to equality in the Constitution that "[c]ustom law must provide the basis for determining ownership, but subject to the limitation that any rule of custom which discriminates against women cannot be applied."<sup>174</sup> In *Punitia v Tutuila* the Samoan Court of Appeal relied on Lord Cooke's observation in the earlier judgment of *Piteamo Mauga & Ors v Fuga Leituala*<sup>175</sup> where his Honour pointed out that this marriage between custom and the modern democratic ideas, ie rights enshrined in the Constitution, had been already achieved, "through recognition that a carefully circumscribed power of banishment was possessed by the Land and Titles Court."<sup>176</sup>

Ten years ago, it was argued that the ECtHR's doctrine of margin of appreciation would provide PIC courts with a useful paradigm to balance custom with the human rights enshrined in their constitutions.<sup>177</sup> Given the courts' treatment of custom as an important source of law, capable of evolving over time and adjusting to social change, and their reliance on ECtHR jurisprudence, the appropriateness of the application of the margin of appreciation doctrine as a paradigm to help balancing custom and human rights is truer than ten years ago. The dichotomy between custom and human rights raised to date in the courts pertained mostly to fundamental issues

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174 *Lapenmal v Awop*, above n 111, at [37] per Fatiaki J - emphasis in judgment.

175 *Punitia v Tutuila* [2014] WSCA 1 per Fisher, Hammond and Blanchard JJ; *Piteamo Mauga & Ors v Fuga Leituala* WSCA, 4 March 2005, per Lord Cooke.

176 At 10 per Lord Cooke.

177 It should be noted that the four surveyed courts are all mandated to balance the rights enshrined in their respective constitutions with the rights of others and/or social values, security concerns: Constitution of the Independent State of Samoa limits rights internally, eg Art 13(2) limits freedom of expression due to "national security, friendly relations with other States, or public order or morals, for protecting the privileges of the Legislative Assembly, for preventing the disclosure of information received in confidence, or for preventing contempt of Court, defamation or incitement to any offence."; equally the Constitution of Tonga also limits rights specifically, eg Art 5 s2 limits the freedom to worship: "But it shall not be lawful to use this freedom to commit evil and licentious acts or under the name of worship to do what is contrary to the law and peace of the land; the Constitution of the Republic of Fiji has a in art 6(5) a general limitation clause which states: "The rights and freedoms set out in this Chapter apply according to their tenor and may be limited by— ... (b) limitations prescribed or set out in, or authorised or permitted by, other provisions of this Constitution". The Constitution of the Republic of Vanuatu also has a general limitation clause. Article 5(1) limits the rights in the Constitution by "subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health".

where there was a lacuna in the domestic legislation to protect the vulnerable.<sup>178</sup> Under the jurisprudence of the ECtHR, states would not have had any margin of appreciation in those cases where the core of the rights was infringed.<sup>179</sup>

The ECtHR has been unequivocal that a State's cultural or social make up cannot ever justifiably limit the essence or core of a right.<sup>180</sup> Hence, the jurisprudence of the surveyed courts regarding custom and human rights is consistent with the ECtHR's margin of appreciation jurisprudence. Of interest is the Vanuatu Supreme Court decision of *In re MM, Adoption Application by SAT*<sup>181</sup> where the Court clearly deferred to custom. The difference between *In re MM* and the other cases discussed is that the Court had to weigh up the rights of one vulnerable group (children) against another vulnerable group (same sex partners, homosexuals). The Court based its decision, inter alia, on custom which did not allow the adoption of children by a male, arguing that custom had to be given due weight "because the Republic has not yet enacted its own statute covering the topic of adoption."<sup>182</sup> In cases where no legislative lacuna existed, ie the Samoan banishment cases, the courts examined in depth the legislative intention and reach and deferred to the state. In summary, it might be fair to say that the courts so far have not had to deal with issues where the margin of appreciation doctrine could provide its most useful application. The courts' reliance on ECtHR jurisprudence and their already demonstrated willingness to carefully balance custom and human rights should allow for the courts to consider the doctrine when more finely balanced cases appear before them.

## V CONCLUSION

The reliance on ECtHR jurisprudence seems to coincide with an emergent domestic judiciary and the growing independence from having to rely on foreign judges. This "home-grown" judiciary is not only imbedded in custom and the local legal framework but has also developed its own human rights jurisprudence. The human rights jurisprudence is coined by a universal comparative approach with a reliance and emphasis on international instruments where judges perceive a

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178 See, for example, *Lapenmal v Awop*, above n 111.

179 See Steven Greer, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights-Human Rights Files No 15* (Council of Europe Publishing, Strasbourg, 1997) at 15 et seq; compare *Opuz v Turkey Application no 33401/02* (Chamber) (9 June 2009) at [184] et seq.

180 Steven Greer "The Margin of Appreciation: Interpretation and Discretion under the European Convention of Human Rights" (Council of Europe Publishing, Strasbourg, 2000) with examples for the different rights.

181 *In re MM, Adoption Application by SAT* [2014] VUSC 78 per Harrop J.

182 *In re MM, Adoption Application by SAT* [2014] VUSC 78 at [60].

particular lacuna in the appreciation of rights eg the rights of children or women,<sup>183</sup> and the previously mentioned reliance on ECtHR jurisprudence. The latter could be interpreted as a deliberate departure and detachment from the colonial legal heritage.

While the local judiciary has grown considerably in the Pacific, many of the PICs judiciaries are still supplemented by judges from foreign jurisdictions, namely New Zealand, Australia and Sri Lanka (in Fiji). As noted by Susan Boyd, an Australian diplomat with Pacific experience, "expatriate judges continue to be needed by the common law jurisdictions in our region, especially for the courts of appeal, where a high level of knowledge, a greater experience, and a high level of respect is required."<sup>184</sup> Boyd provides further elucidation, highlighting the challenge for judges operating in such an environment is to be rigorous in administering and interpreting the law, while taking appropriate account of the local operating environment.<sup>185</sup> In this context foreign judges are faced with the challenge of developing indigenous common law rooted in the values underlying human rights, indigenous peoples' rights, customary law, and the Common Law derived from other sources.<sup>186</sup> Judges, while participating in this process will be undoubtedly influenced by the jurisprudence of their own jurisdictions.<sup>187</sup> The sensitivity towards and the value placed on custom, rooted already in their home jurisdiction, is evidenced by the decision of *Punitia v Tutuila* concerning the Samoan custom of banishment.<sup>188</sup> The Court, comprised of three New Zealand judges, acknowledged and valued the custom of banishment and its place in Samoan society, undoubtedly drawing on their experience of the role of Māori custom in New Zealand society and jurisprudence.

The courts have shown considerable partiality to the jurisprudence of the ECtHR, embracing the margin of appreciation doctrine follows should a case come to the courts that demands a fine balance between custom and human rights. The margin of appreciation is not an uncontested doctrine and has been subject to severe

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183 See above, eg *Police v I.I* [2014] WSYC 5 at [31] per Tuala-Warren J; *Nakamura v Dalley* [2018] VUSC 134, at 15 and 17 per Cenac Master; *Singh v Singh* [2014] FJMC 176 at [26] per Rupisinghe Magistrate.

184 Susan Boyd "Australian judges at work internationally: Treason, assassinations, coups, legitimacy of government, human rights, poverty and development" (2003) 77 ALJ 303 at 306.

185 Above n 184, at 307.

186 NZLC paper *Converging Currents: Custom and Human Rights in the Pacific* Study Paper 12 (Wellington, 2006) at para 12.1.

187 For discussion see Claire Charters "Finding the Rights Balance: A Methodology to Balance Indigenous Peoples' Rights and Human Rights in Decision-making" [2017] NZ L Rev 553.

188 [2014] WSCA 1 per Fisher, Hammond and Blanchard JJ.

criticism.<sup>189</sup> In the author's view the doctrine, albeit not perfect, provides, however, a useful framework in which to analyse the balance between human rights as enshrined in the PICs' constitutions and the ratified international human rights instruments and existing customs.

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<sup>189</sup> See for example, Janneke Gerards, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights" 18 (2018) *Human Rights Law Review* 495.

