The Rule of Law: Guiding Principle or Catchphrase?

Justice Susan Glazebrook[1]

The question I pose in my title is whether the rule of law is a guiding principle or a mere catchphrase.[2] For the United Nations at least the answer appears to be not just *a* guiding principle but *the* guiding principle. The United Nations website says that the rule of law is the foundation of friendly and equitable relations between states and the base of fair societies. It is fundamental to international peace and security and political stability; to economic and social progress and development; and to protect people's rights and fundamental freedoms.[3] An all-embracing concept.

In his 2004 book on the rule of law, Professor Brian Tamanaha said that, despite all the divisions in the world, there was worldwide agreement on one point, and one point alone: that the rule of law is a good thing.[4] Support for the rule of law had long been orthodox among the Western states he says,[5] but other supportive statements have come from President Vladimir Putin of Russia, various Chinese leaders, former Presidents Robert Mugabe of Zimbabwe, Abdurrahman Wahid of Indonesia, Mohammed Khatami of Iran, and a notorious Afghan warlord.[6]

It does not take much imagination to realise that this disparate group of supporters must either have a very different view of the rule of law from that espoused by the

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2 This article is based on the University of Waikato & Mackenzie Elvin Law 2021 annual public lecture given in Tauranga on 26 May 2021. I thank my clerk, Don Lye, and my associate, Rachel McConnell, for their assistance in preparing this paper. I also thank McKenzie Elvin Law for sponsoring the lecture and for their hospitality. A live recording of the speech, as originally given, can be accessed at Mackenzie Elvin Law "The University of Waikato & Mackenzie Elvin Law 2021 annual public lecture with Justice Glazebrook" (May 2021) <www.mackenzie-elvin.com>.

3 United Nations "What is the Rule of Law" <www.un.org>. The rule of law has also been described as "a concept at the very heart of the [United Nations] mission": *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General* UN Doc. S/2004/616 (23 August 2004) at [6].

4 Brian Z Tamanaha *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004) at 3.

5 At 1–2. See for example, the Declaration on Democratic Values by the G7 countries at the 1984 London Summit: G7 Research Group "Declaration on Democratic Values" <http://www.g7.utoronto.ca>.

6 Tamanaha, above n 4, at 2. The Chinese leaders referred to were former PRC Presidents, Jiang Zemin and Hu Jintao. The Afghan warlord referred to was Abdul Rashid Dostum.

United Nations or it is indeed a mere catchphrase. But, even if it is just a catchphrase for some of those people, the fact that they see it as necessary to profess allegiance to the concept is significant in itself. If the statements of support for the concept represent a different view of the rule of law, the differences are no doubt reflected in the academic debate as to whether the concept of the rule of law should be formal (thin) or alternatively substantive (thick).[7]

The thin or formal notions[8] of the rule of law include requirements such as the manner in which laws are promulgated, that they are clear, not retrospective and that nobody is above the law.[9] Proponents of the thin view generally do not pass judgement on the content of laws. The thick or substantive views of the rule of law include all the thin formal requirements but, engrafted onto the concept, are other requirements, such as democracy, human rights, an independent judiciary and access to justice.[10]

So into which camp do I fall? To answer that question, first, a bit of history. I start with the United States which prides itself on being the oldest democracy in the world and the land of freedom.[11] Looking first at freedom, Isabel Wilkerson in her recent book, *Caste*, points out that, for the first 246 years of what is now the United States, the vast majority of African-Americans were slaves who, as she puts it, lived under the terror of people who had, by law, absolute power over their bodies and who faced no sanction for any atrocities they could and did conjure up.[12] Of the 4.4 million African Americans in the United States in 1860, approximately four million were slaves.[13] So, if you were

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7 A leading article on this distinction is: Paul P Craig "Formal and substantive conceptions of the rule of law: an analytical framework" (1997) PL 467. Professor Joseph Raz is a proponent of a (thin) approach: Joseph Raz *The Authority of Law* (2nd ed, Oxford, Oxford University Press, 2009) at 221. An advocate of a substantive (thick) approach is Lord Bingham: Tom Bingham *The Rule of Law* (London, Penguin Books, 2010) at 67.

8 'Notions' is deliberately used in the plural because there are many different formulations of the rule of law which could be described as 'thin': Tamanaha, above n 4, at 91–94.

9 Professor Tamanaha identifies three themes as running through the rule of law tradition: government limited by law, formal legality (as in public, prospective, general, certain and equally applied) and rule of law and not by man: at ch 9.

10 See for example, the 'rights' conception coined by Dworkin: Ronald Dworkin "Political Judges and the Rule of Law" (1978) 64 Proceedings of the British Academy 259 at 262. The 'rights' conception takes rights as part of the rule of law and posits that there is no distinction between the rule of law and substantive justice.

11 See below at n 29 and the national anthem, the Star-Spangled Banner.

12 Isabel Wilkerson *Caste: The Lies That Divide Us* (Penguin Books, London, 2020) at 47. Isabel Wilkerson is the first woman of African American heritage to have won the Pulitzer Prize in journalism.

13 Aaron O'Neill "Black and slave population in the United Nates 1790-1880" (19 March 2021) Statistica <www.statistica.com>.

African American in 1860, there was an almost 90 per cent chance you were a slave and, therefore, legally classed not as human but as property. Wilkerson points out that it took a civil war, the deaths of three-quarters of a million soldiers and civilians, the assassination of a president and the passage of the Thirteenth Amendment in 1865 to bring the institution of slavery in the United States to an end.[14]

Or was it in fact at an end? After an all too brief period of twelve years, known as Reconstruction, the federal government withdrew from the South and left the liberated slaves in the hands of those who had enslaved them. And, as Wilkerson says, these people designed a labyrinth of laws to put black citizens into indentured servitude, to take voting rights away, to control where they lived and how they travelled and to seize their children for labour purposes.[15] These laws became known from the 1880s as Jim Crow laws, after a character devised in the 1830s by Thomas Dartmouth Rice, supposedly modelled on a slave.[16] As Jim Crow, Rice performed a very popular song and dance routine in blackface, acting like a buffoon and speaking with an exaggerated and distorted imitation of African American Vernacular English.[17]

The Jim Crow laws spread throughout the South and even to a degree in the North and basically legalised racial segregation. They were backed up by extreme violence against African Americans by individuals and organisations such as the Ku Klux Klan. While that violence was not legal, it may as well have been as the perpetrators operated with impunity and often to large crowds of onlookers and souvenir hunters.[18] A very different fate of course awaited any black person accused of any crime (whether rightly

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14 Wilkerson, above n 12, at 48.

15 At 48.

16 Leslie V Tischauser *Jim Crow Laws* (ABC-CLIO, Santa Barbara, 2012) at 1–2.

17 This was an early example of what were known as minstrel shows, popular from the 1830s to the early 1900s where white entertainers in blackface performed song and dance routines designed to mock black people and to perpetuate damaging racial stereotypes: see generally Stephen Johnson (ed) *Burnt Cork: Traditions and Legacies of Blackface Minstrelsy* (University of Massachusetts Press, Baltimore, 2012).

18 Wilkerson, above n 12, at 90–96. See generally Ralph Ginzburg *100 Years of Lynchings* (Black Classic Press, Baltimore, 1988). For an example of the complicity of the courts with regard to impunity: see *United States v Harris* 106 US 629 (1883) where the United States Supreme Court ruled that the federal government could not prosecute a sheriff and others for conspiring to lynch four black prisoners in Tennessee. The lone dissenter was Justice John Marshall Harlan.

or wrongly) even if they avoided lynching. Acquittals were rare and prisons provided another form of forced labour.[19]

Segregation was present in every aspect of society. African Americans were excluded from railway cars, buses, steamboats, sat in secluded and remote corners of theatre and lecture halls, could not enter most hotels, restaurants and restaurants except as servants.[20] They prayed in specific pews designated for them, were educated in segregated schools, punished in segregated prisons, nursed in segregated hospitals and buried in segregated cemeteries.[21]

The Courts were complicit right to the top. The segregation laws were given the seal of approval in 1896 by the notorious United States Supreme Court decision of *Plessy v Ferguson* which concerned a Louisiana law segregating carriages on railways.[22] The Supreme Court upheld the constitutionality of racial segregation under the "separate but equal" doctrine.[23] There was a minority voice but a lone one and ironically from a former slaveholder from Kentucky who had opposed abolition.[24] Justice John Marshall Harlan famously wrote in his dissent "Our constitution is color-blind" and that "The arbitrary separation of citizens on the basis of race while they are on a public highway is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal

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19 See generally Douglas A Blackmon *Slavery By Another Name: The Re-enslavement of Black Americans from the Civil War to World War II* (Anchor Books, New York, 2009). Tens of thousands of Black Americans were arrested on arbitrary charges, then 'leased' by state and county governments to various companies and compelled to work in coal mines and other forced labour: at 4.

20 C Vann Woodward *The Strange Career of Jim Crow* (2nd ed, Oxford University Press, New York, 1974) at 18–19.

21 At 19.

22 *Plessy v Ferguson* 163 US 537 (1896).

23 The 7:1 majority opinion was written by Justice Henry Billings Brown. The majority held that the United States Constitution was only intended to secure the legal equality of African Americans and not their social equality: "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane": at 552.

24 Regarding his reversal from his earlier position on slavery, Justice John Marshall Harlan famously said, "Let it be said that I am right rather than consistent." He would go on to become the single most consistent champion of black civil rights on the United States Supreme Court of his day: see generally Alan F Westin "Mr Justice Harlan" in Allison Dunham and Phillip B Kurland (eds) *Mr Justice: Biographical Studies of Twelve Supreme Court Justices* (2nd ed, University of Chicago Press, Chicago, 1964) 93. I do note, however, that Justice Harlan harboured a seeming animosity towards Chinese litigants: see generally Gabriel J Chin "The *Plessy* Myth: Justice Harlan and the Chinese Cases" 82 Iowa L Rev 151.

grounds."[25] Self-evident I would have thought. The majority decision to the contrary, however, ensured the survival and expansion of Jim Crow laws.

And it appears that the extent of those laws in the 'land of the free' astonished even the Nazi policy makers who were, in the 1930s, helping design the laws to subjugate the Jewish people, using the United States laws as their model.[26] Wilkerson points out (no doubt somewhat for rhetorical effect) that, even for the Nazis, some of the American laws went too far. She notes that the rule where one drop of African American blood meant classification as black was considered too harsh for the Nazis to emulate.[27]

It is important to remember that these Jim Crow laws were not just a temporary aberration.[28] They remained in place for some 100 years, mostly disappearing only as a result of the civil rights movement after World War II.[29] Their dismantling has not, however, meant equality.[30] And some of the restrictive laws have resurfaced more recently but in another form.

I focus on voting rights because of the importance of democracy in some conceptions of the rule of law. According to the World Economic Forum, the United States is classified as the oldest democracy in the world, clocking up some 219 years as at

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25 *Plessy v Ferguson*, above n 22, at 559 and 562.

26 The Nuremberg Laws consisted of two pieces of legislation: Das Reichsbürgergesetz [the Reich Citizenship Law] (Germany) and Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre [the Law for the Protection of German Blood and German Honor] (Germany). For an account of the influence of American race law on Nazi Germany, see James Q Whitman *Hitler's American Model: The United States and the Making of Nazi Race Law* (Princeton, Princeton University Press, 2017). There was also an active back-and-forth traffic between American and Nazi eugenicists until the late 1930s: see Stefan Kühl *The Nazi Connection: Eugenics, American Racism, and German National Socialism* (New York, Oxford University Press, 1994) at ch 4.

27 Wilkerson, above n 12, at 88. See for example, Virginia's Racial Integrity Act 1924 which, besides prohibiting interracial marriage, defined a white person as one "who has no trace whatsoever of any blood other than Caucasian": Wilkerson, above n 12, at 125.

28 In 1961, Virginia was the first colony to outlaw inter-racial marriages. Alabama was the last state to repeal its endogamy laws in 2000: at 111.

29 The Civil Rights Act of 1964 and the Voting Rights Act 1965 are generally taken to have formally put an end to Jim Crow laws. See also *Brown v Board of Education* 347 US 483 (1954) in which the United States Supreme Court declared state-sponsored segregation of public schools unconstitutional and *Loving v Virginia* 388 US 1 (1967) which declared unconstitutional criminalisation of inter-racial marriages. More about the Voting Rights Act below.

30 For example, the median wealth of white families (USD 171,000) is more than 10 times greater than that for black families (USD 17,000), while the unemployment rate for black Americans (six per cent) is approximate twice that of white Americans (3.1 per cent): Don Beyer *The Economic State of Black America 2020* (United States Congress Joint Economic Committee, 14 February 2020) at 2.

2019.[31] Democracies have to be continuous in order to count. This rules out France, which otherwise would have had a good claim. Contenders also have to be nation States.[32] This rules out Iceland which, despite a 1000 year tradition of parliamentary democracy, only became independent from Denmark in 1944.[33]

The definition of democracy, for the purposes of the league table, requires an executive directly or indirectly elected in popular elections and responsible either directly to voters or to a legislature. The legislature (and the executive if elected directly) must be chosen in free and fair elections and a majority of adult men must have the right to vote. Note men only. If universal suffrage were required New Zealand (currently third) would jump to the top of the list.[34] The United States only granted the vote to women in 1920.[35]

But let us have a closer look at the United States claim to continuous democracy, even disregarding the lack of women's suffrage. For a start slaves could not vote, although, given the relative population numbers, the United States could still claim that a majority of men could vote.[36] The passage of the Fifteenth Amendment in 1870 did guarantee the right to vote to men of all races, including former slaves. During the Reconstruction era, black voter turnout in many elections exceeded 90 per cent.[37] Indeed, black voter

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31 Jeff Desjardins "Mapped: The world's oldest democracies" (8 August 2019) World Economic Forum <www.weforum.org>. The article referred to data from Carles Boix, Michael Miller and Sebastian Rosato "A Complete Data Set of Political Regimes, 1800–2007" (2013) 46 Comp Pol Stud 1523.

32 While Ancient Athens arguably had the first instance of democracy, allowing landowners to speak at the legislative assembly, it was not a national State in the modern sense of the word.

33 This also rules out the Isle of Man, which has a parliamentary body over 1,000 years old, but which is a self-governing British Crown Dependency and therefore not a nation State.

34 In 1893, New Zealand gave the right to vote to all women and ethnicities: Electoral Act 1893. For a full account of the women's suffrage movement in New Zealand, see Patricia Grimshaw *Women's Suffrage in New Zealand* (Oxford University Press, Auckland, 1987).

35 Mary Margaret McKeown and Kelsey L Matevish (eds) *The Nineteenth Amendment Centennial Cookbook: 100 Recipes for 100 Years* (online ed, American Bar Association, 2020) at 4. The cookbook is free to access online at <19thamendmentcookbook.com> and includes recipes contributed by Lady Brenda Hale, Justice Rosalie Abella, the late Justice Ruth Bader Ginsburg as well as my New Zealand contribution.

36 Just after the signing of the United States Constitution in 1790, there were almost 700,000 slaves in the United States which was approximately 18 per cent of the total population: Aaron O'Neill "Black and slave population in the United States 1790-1880" (19 March 2021) Statistica <www.statista.com>. Despite slaves not being able to vote, they were nevertheless counted for electoral purposes due to the infamous Three-Fifths Compromise whereby three-fifths of each state's enslaved population would count towards the state's total population for the purpose of apportioning seats in the House of Representatives.

37 United States Commission on Civil Rights *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Enforcement Report* (12 September 2018) at 16.

registration rates surpassed white registration rates in Louisiana, Mississippi and South Carolina.[38] In States such as Alabama and Georgia, black citizens made up nearly 40 per cent of all registered voters.[39]

At the end of the Reconstruction era, however, Southern states began implementing policies to suppress black voters. This led to a dramatic reduction in black voting.[40] One of the main ways of disenfranchising voters was poll taxes, requiring eligible voters to pay a fee before casting a ballot. Another was literacy tests.[41] Needless to say, these measures were designed largely to affect black voters and succeeded in almost total disenfranchisement for black women. And the laws were only finally outlawed with the Voting Rights Act in 1965.

But is there truly voter equality in the United States even now? A 2018 statutory report of the United States Commission on Civil Rights, an independent, bipartisan agency established by Congress in 1957, would suggest not.[42] The report concluded that in states across the country, there are voting procedures that wrongly prevent some citizens from voting – including but not limited to: voter identification laws, voter roll purges, proof of citizenship measures, challenges to voter eligibility, and polling places moves or closings.[43] These measures have had a disparate impact on voters of colour and poor citizens. Some of the Commissioners in their statement annexed to the report put it as follows:[44]

> Voting discrimination has merely assumed seemingly benign, modern forms enacted often with discriminatory intent in the guise of election integrity, just as was happening before the passage of the Voting Rights Act over 50 years ago.

Threats to voting rights continue. Various laws have been introduced by Republican-dominated state legislatures since the last election purportedly to deal with

38 At 16.
39 At 16.
40 For example, in Mississippi, fewer than 9,000 of the original 147,000 voting age African Americans remained registered after 1890: at 17, n 38.
41 At 291.
42 United States Commission on Civil Rights, above n 37.
43 At 83–198.
44 Commissioner Karen K Narasaki's Statement with which Chair Catherine E Llhamon, Vice Chair Patricia Timmons-Goodson and Commissioner David Kladney concurred: at 301.

voter fraud, despite it being clear that voter fraud is in fact very rare.[45] As of June 2021, in this year alone, 17 states have enacted 28 such laws.[46] Take for example, the provision in Georgia prohibiting any individual other than a worker at a polling place from handing out water within 150 feet of a polling place or within 25 feet of the line.[47] This is purportedly designed to ban soliciting for votes but the consensus seems to be that the provision is not so limited.[48] Further, long queues to vote are the norm largely only in black and poor neighbourhoods.[49] There are other disenfranchising measures.[50] For example, felony disenfranchisement in the United States is estimated to deprive 6.1 million voting-age United States citizens of the right to vote, disproportionately impacting African Americans and other persons of colour.[51]

Commentators point out that then-president, Donald Trump made the discriminatory intent of many voter restriction laws clear in dismissing a Democrat-led push for vote-by-mail, same-day registration and early voting, proposed in order to keep voters safe during the COVID-19 pandemic. He said:[52]

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45 At 102–121. Also to be noted is that, in an interview with the Associated Press, Trump-appointed United States Attorney General, William Barr, stated that there was no evidence of widespread voter fraud that could have changed the outcome of the 2020 election: Michael Balsamo "Disputing Trump, Barr says no widespread election fraud" *Associated Press* (online ed, Washington DC, 2 December 2020).

46 Brennan Center for Justice "Voting Laws Roundup: May 2021" (28 May 2021) <www.brennancenter.org>. The article was updated for June 2021.

47 The Justice Department has commenced legal action against Georgia over its new voting laws: Barbara Sprunt "In Suing Georgia, Justice Department Says State's New Voting Law Targets Black Voters" *National Public Radio* (online ed, Washington DC, 25 June 2021). In response to Republican state legislatures that have initiated private audits of voting records, the Justice Department has also warned that such auditors could face criminal and civil penalties for tampering with election records: Katie Benner "Justice Dept Warns States on Voting Laws and Election Audits" *New York Times* (online ed, New York, 28 July 2021).

48 Tim Carman "New limits on food and water at Georgia's polls could hinder Black and low-income voters, advocates say" *The Washington Post* (online ed, Washington DC, 10 April 2021).

49 Charles M Blow "Mr President, You're Just Plain Wrong on Voter Suppression" *The New York Times* (online ed, New York, 25 July 2021).

50 See generally Erin Kelley *Racism & Felony Disenfranchisement: An Intertwined History* (Brennan Center for Justice, 9 May 2017).

51 At 1. It has been said that there has been an insidious resurfacing of the Three-Fifths rule (see above n 36) by the combined operation of federal head count rules and prisoner disenfranchisement legislation. The former counts prisoners as residents of the particular location they are incarcerated for the purposes of House of Representatives seat apportionment, but the latter deprives those same prisoners of the right to vote: see Hansi Lo Wang and Kumari Devarajan "'Your Body Being Used': Where Prisoners Who Can't Vote Fill Voting Districts" *National Public Radio* (online ed, Washington DC, 31 December 2019).

52 Aaron Blake "Trump just comes out and says it: The GOP is hurt when it's easier to vote" *Washington Post* (online ed, Washington DC, 31 March 2020). See also a similar comment made by a Georgia legislator in the response to early voting: United States Commission on Civil Rights, see above n 37, at 288.

> The things they had in there were crazy. They had things, levels of voting that, if you'd ever agreed to it, you'd never have a Republican elected in this country again.

And then there is gerrymandering. The name was coined in reaction to an 1812 bill which redrew the Massachusetts state senate election districts to benefit a particular party. This had been signed by Governor Elbridge Gerry, later Vice President of the United States, who in fact personally disapproved of the practice. One of the contorted districts in the Boston area was said to resemble a salamander. On March 1812, a political cartoon ran by the *Boston Gazette* depicting a dragon-like animal that supposedly resembled the oddly shaped district was instrumental in making the term gerrymander stick.[53]

To date, gerrymandering remains a thorny issue in the United States, especially with the upcoming redistricting cycle this year in which seats in the House of Representatives are allocated based off population numbers in States.[54] The Supreme Court, however, has refused to deal with the issues, holding partisan gerrymandering a political question beyond the reach of the federal courts.[55]

For a country that lauds itself as the oldest democracy in the world, the current state of affairs in the United States is worrying.[56] Little headway has been made with voting rights reform at the federal level.[57] And once again Courts have been accused of being

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53 Becky Little "How Gerrymandering Began in the US" (20 April 2021) History <www.history.com>.

54 Michael C Lee *The Redistricting Landscape, 2021–22* (Brennan Center for Justice, 11 February 2021). See also Joseph Ax "How the battle over redistricting in 2021 could decide control of the US Congress" *Reuters* (online ed, United States, 19 February 2021).

55 *Rucho v Common Cause* 18–422, 18–726, 27 June 2019 (United States Supreme Court). The Court split along ideological lines with the five Republican-appointed judges in the majority and the four Democratic-appointed judges in dissent.

56 A statement of concern detailing the breaking down and deterioration of democracy in the United States has been issued by 100 political scholars in the United States: "Statement of Concern: The Threats to American Democracy and the Need for National Voting and Election Administration Standards" (1 June 2021) New America <www.newamerica.org>. See also Aziz Huq and Tom Ginsburg "How to Lose a Constitutional Democracy" (2018) 65 UCLA Law Review 78.

57 See the For the People Act 2021: "Brennan Center for Justice "Annotated Guide to the For the People Act of 2021" (January 2021) <www.brennancenter.org>.

complicit, with a number of Supreme Court decisions neutralising aspects of the Voting Rights Act.[58]

But before we get too complacent, let us look at New Zealand's historical record. New Zealand too has prisoner disenfranchisement laws.[59] These laws disproportionately affect Māori too as they are overrepresented in prisons.[60]

New Zealand also had a poll tax.[61] This was not designed to suppress voting but to restrict Chinese immigration. It was passed in 1881 pandering to anti-Chinese sentiment and followed the lead of Australia and Canada. We used literacy tests too. From 1907 up until 1952, all arrivals were required to sit an English reading test as part of a suite of other measures targeted at restricting Chinese immigration.[62] The poll tax was not repealed until 1944,[63] although its use had diminished in the 1920s because the other restrictive measures sufficed. It is only some consolation that the New Zealand government formally apologised to the Chinese community in 2002 for the injustice of this tax.[64]

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58 See *Brnovich v Democratic National Committee* 19–1257, 1 July 2021 (Supreme Court of the United States) slip op; and *Shelby County v Holder* 570 US 529 (2013). See also *Rucho v Common Cause*, above n 55. For a commentary on *Brnovich*, see Michael C Dorf "What Was/Is at Stake in Brnovich?" (1 July 2021) Dorf on Law < http://www.dorfonlaw.org>.

59 The Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 amended the Electoral Act 1993 so that the prohibition on voting was extended to any person detained in prison pursuant to a sentence of imprisonment. Prior to 2010, only some prisoners who were convicted on the most serious offences were disqualified from voting. On 29 June 2020, Parliament passed the Electoral (Registration of Sentenced Prisoners) Amendment Bill which allowed prisoners serving a sentence of less than three years to enrol to vote.

60 As of June 2021, Māori constitute 53.1 per cent of the total prison population while making up about 16.5 per cent of the population: see Ara Poutama Aotearoa/Department of Corrections "Prison facts and statistics - June 2021" <www.corrections.govt.nz>. The legislative amendment was challenged as disproportionately affecting Māori who are overrepresented in prisons, and hence, indirectly discriminating against Māori on the basis of race: see *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643. However, the case was unsuccessful in the Court of Appeal and the Supreme Court declined to grant leave to appeal because it would be approaching the issues of disproportionate imprisonment rates from a very particular angle: *Ngaronoa v Attorney-General* [2017] NZSC 183 at [2].

61 Chinese Immigrants Act 1881, s 5. Section 3 of the Act also provided for a tonnage restriction of one Chinese passenger per ten tons of cargo.

62 Chinese Immigrants Amendment Act 1907, s 3. Section 3 provided that it was not lawful for any Chinese to land in New Zealand until they could prove to an official that they could read a printed passage of not less than 100 English words which were selected at the discretion of the Collector or Principal Officer.

63 Finance Act 1944. The poll tax and tonnage restriction were waived in 1934 by the Minister of Customs.

64 Helen Clark, Prime Minister of New Zealand "Address to Chinese New Year celebrations" (12 February 2002, Parliament, Wellington). See also George Hawkins "Poll tax apology marks new beginnings" (13 February 2002) Beehive <www.beehive.govt.nz>.

Turning now to the treatment of Māori, the law again has a lot to answer for, despite the guarantee to Māori of unqualified exercise of their chieftainship over their lands, villages and all their treasures as well as that of protection and the conferral of rights and duties of citizenship in articles 2 and 3 of the Treaty of Waitangi/Te Tiriti o Waitangi (the Treaty).[65] These guarantees all gave way in the face of the rapacious hunger for land from the colonising English settlers. Substantial areas of Māori land were confiscated after the Land Wars under the New Zealand Settlements Act 1863, including in the Waikato and Tauranga.[66] In confiscating land, the government did not discriminate between tribes who had fought against the government and those who had fought as government allies.[67]

Nor did the inroads into Māori land stop with the confiscations. The process was continued with the establishment of the Native Land Court under the Native Lands Acts of 1862 and 1865 to investigate titles to Māori land and convert that interest into a fee simple interest.[68] It was not compulsory for Māori to bring their land before the Native Land Court. They were theoretically free to leave their lands in customary title if they wanted to. In practice, however, virtually all land still in Māori ownership in 1865 was brought before the Court and converted to freehold title. And the result was individualised titles that took little or no account of the collective nature of Māori

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65 The language used here is from Sir Hugh Kawharu's English translation of the te reo Māori text of the Treaty which aims to show how Māori would have understood the meaning of the text at the time it was signed: Te Rōpū Whakamana i te Tiriti o Waitangi/Waitangi Tribunal "Translation of the te reo Māori text" <waitangitribunal.govt.nz>. The Treaty was initially signed at Waitangi on 6 February 1840 by Captain William Hobson and about 46 Māori rangatira (chiefs) before brought around the country to obtain further Māori signatures. The apparent divergence between the Māori and English texts as well as the fact that most rangatira signed the Māori text has led to controversy on what was actually agreed. It has, however, been suggested that the colonial understanding of the English text and the Māori text reconcile: Ned Fletcher "Foundation" in Simon Mount and Max Harris (eds) *The Promise of Law: Essays marking the retirement of Dame Sian Elias as Chief Justice of New Zealand* (LexisNexis, Wellington, 2020) 67.

66 The Land Wars were a series of wars in the 19th century between Māori and British colonial forces: see further Vincent O'Malley *The New Zealand Wars Ngā Pakanga O Aotearoa* (Bridget Williams Books, Wellington, 2019).

67 See for example, the occupation of Tikorangi which was on Ngāti Rahiri land, despite the fact that Ngāti Rahiri had been a government ally: Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996) at 117.

68 See Tom Bennion "Māori Land" in Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) 441 at [5.3.05].

society and that could be, and were, readily sold.[69] This was contrary to the view of land in traditional Māori society: land was not something that could be owned or traded. Instead, Māori belonged to the land.[70] It formed an essential part of their collective identity, with a spiritual link between the land and the people. This remains true today.[71]

By 1860, about two-thirds of Aotearoa had already passed out of Māori hands (including virtually the entire South Island) primarily through the pre-emptive purchases by the Crown.[72] Although in 1860, the majority of the North Island was still held by Māori, confiscations and later land policies were to have a dramatic effect. By 1939, only scattered fragments remained.[73] Today, Māori freehold land comprises slightly over 1.4 million hectares which is approximately five per cent of New Zealand's land mass.[74] Treaty settlements have only restored a tiny fraction of Māori land.[75] In fact, total Māori land appears to have decreased over the last few years.[76]

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69 In contravention of Native land legislation, early Native Land Court judges applied a 10-person rule in which large blocks of land would be vested in 10 owners; this made sales to private purchasers relatively easy to complete: at [5.3.06(1)]. Although this was subsequently changed in 1867, the result was title documents with lists of hundreds of persons with interest in the land. Through subsequent generations, land interests became increasingly fragmented as the intestacy law provided that the interests should be distributed equally among the children of the deceased (which was generally contrary to Māori custom). Consequently, retained land became of little value for development as hundreds of owners would have to be consulted and private finance became impossible to obtain. This phenomenon has been described as the twin forces of individualisation and fragmentation which effectively stymied Māori efforts to retain and develop Māori freehold land: at [5.3.06(2)].

70 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia, Wellington, 2016) at 289–290. See also Eddie Durie "The Law and the Land" in Jock Phillips (ed) *Te Whenua Te Iwi: The Land and the People* (Allen & Unwin, Wellington, 1987) 78 at 78.

71 For Māori, land is the foundation of the social system and their tūrangawaewae (a place for one to stand): Mead, above n 70, at 288. Māori have been consistent in placing a high value in ancestral land and have engaged in protests and occupations to defend it, for example, the 506-day long occupation of Bastion Point in the 1970s: see generally Sharon Hawke (ed) *Takaparawhau: The people's story—1998 Bastion Point 20 year commemoration book* (Moko Productions, Auckland, 1998).

72 Richard Boast "Maori and the Law, 1840-2000" in Peter Spiller, Jeremy Finn and Richard Boast (eds) *A New Zealand History* (2nd ed, Brookers, Wellington, 2001) 123 at 144. The right of pre-emption meant that any land had to be sold to the Crown and not directly to private purchasers.

73 For maps illustrating the difference in the land held by Māori from 1860–2000, see Manatū Taonga/Ministry for Cultural & Heritage "Māori land loss, 1860-2000" (21 April 2021) NZ History <nzhistory.govt.nz>.

74 This is according to the most recent Māori Land Update (June 2020) which is updated annually: Te Kooti Whenua Māori/Māori Land Court "Māori Land Data Service" <maorilandcourt.govt.nz>.

75 Matthew Wynyard "'Not One More Bloody Acre': Land Restitution and the Treaty of Waitangi Settlement Process in Aotearoa New Zealand" (2019) 8(11) MDPI Land at 1 (open access journal available at <www.mpdi.com>). Treaty settlements are agreements between Māori and the Crown seeking to provide redress to Māori for historical grievances arising from breaches of the Treaty.

76 At 10.

Māori women, if anything, fared worse than Māori men in the native titles debacle. As explained by the Law Commission, the role of Māori women in society was gradually undermined in the period of colonisation by the colonial view of men as heads of the family, while the role of women of rank as leaders was challenged by the colonial view of the subordinate role of women to men.[77] The relationship of women with the land was also challenged by the colonial concept of the role of men as property owners.[78] The Native Land Act 1873 provided that husbands had to be party to all deeds executed by married Māori women. Husbands, on the other hand, were free to dispose of their Māori wives' land interests without their wife being a party to the deed.[79]

Land alienation had profound effects on Māori society, and in particular Māori women, as it destroyed the collective relationship of the whānau/hapū[80] unit to the land.[81] It thus had serious impacts on Māori social organisation, the effects of which are still being felt today, with serious inequalities in health, education, socio-economic status and massive overrepresentation in the criminal justice system.[82]

All of which goes to highlight that the law can really be a terrible thing. To me, this clearly means that a definition of the rule of law that limits itself to merely formal requirements cannot be supported. In my view, the concept of the rule of law must at the least require laws that recognise basic human rights. As Lord Bingham said:[83]

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77 Te Aka Matua o te Ture/Law Commission *Dividing relationship property – time for change?/Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [2.10]. The significant role of Māori women is illustrated by the fact that a number signed the Treaty: Ani Mikaere "Cultural Invasion Continued: The Ongoing Colonisation of Tikanga" (2005) 8 Yearbook of New Zealand Jurisprudence 134 at 154.

78 Te Aka Matua o te Ture/Law Commission *Justice: The Experiences of Māori Women—Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine Māori e pa ana ki tēnei* (NZLC R53, 1999) at 11.

79 See the Mana Wāhine claim: Te Rōpu Whakamana i te Tiriti o Waitangi/Waitangi Tribunal "Mana Wāhine Kaupapa Inquiry" <waitangitribunal.govt.nz>.

80 The hapū is the primary political unit in traditional Māori social organisation. There is generally understood to be a hierarchy of descent groups, with hapū intermediate between whānau (extended families) and iwi (groupings of hapū sharing a common ancestor): Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 71.

81 One of the aims of the Native Land Act has been described as destroying the principle of collectivism in Māori society, the other aim being to access Māori land for settlement: Mikaere, above n 77, at 152.

82 Māori are statistically overrepresented in virtually every index of socio-economic marginality: see Te Manatū Whakahiato Ora/Ministry of Social Development *The Social Report 2016: Te pūrongo oranga tangata* (June 2016) at 259–271.

83 Bingham, above n 7, at 67.

> A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if … [the 'laws' it uses to achieve its ends are] duly enacted and scrupulously observed.

It is true that proponents of the formalised or thin concepts of the rule of law, recognise that the rule of law is only one of the virtues by which a legal system may be judged. So the thin concepts do not rule out human rights or other considerations but say that these should be separate from the concept of the rule of law.[84] They argue that it would be difficult to achieve a consensus on a more substantive definition and that compliance would be difficult to measure.[85]

This, in my view, fails to acknowledge the weight of the rhetoric that the rule of law possesses in the public consciousness. Regimes that do not respect and protect fundamental freedoms should not be granted the legitimacy associated with 'complying with the rule of law' by merely formal compliance. Given the way the phrase 'rule of law' has been used in public discourse, describing a genocidal regime as 'complying with the rule of law' would be both misleading and baffling to the public who generally understand the phrase in its substantive sense. It is also questionable whether an 'evil' regime would really have good prudential reasons to comply with the rule of law in the formal sense.[86] It has been suggested, at least as an empirical matter, that it is highly unlikely that an 'evil' regime would be incentivised to comply with the formal rule of law.[87] I agree.

In New Zealand, it seems clear that the rule of law is understood to have at least some substantive content.[88] Section 3(2) of the Senior Courts Act 2016 provides that

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84 Craig, above n 7, at 468.

85 Robert S Summers "A Formal Theory of the Rule of Law" (1993) 6 Ratio Juris 127 at 136–137. However, for an example of some international consensus around a substantive definition: Organisation for Security and Cooperation in Europe "Rule of law" <www.osce.org>. The OCSE's definition encompasses not only formal legal frameworks but also aims at developing justice systems that guarantee respect for fundamental rights and freedoms in a fair and independent manner. The OCSE has 57 participating States from Europe, Central Asia and North America. See also the definition adopted by the United Nations, above n 3.

86 This question has been heavily debated by Matthew Kramer and Nigel Simmonds. For a selection of their work, see Matthew Kramer "On the Moral Status of the Rule of Law" (2004) 63 CLJ 65 and NE Simmonds "Straightforwardly False: The Collapse of Kramer's Positivism" (2004) 63 CLJ 98.

87 Hamish Stewart "Incentives and the Rule of Law: An Intervention in the Kramer/Simmonds Debate" (2006) 51 Am J Juris 149 at 150.

88 The view that the substantive approach has been generally taken in New Zealand is also shared by Sir Kenneth Keith, a former judge of the New Zealand Supreme Court and International Court of Justice: Kenneth Keith "The International Rule of Law" (2015) 28 LJIL 403 at 413.

"Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament." The use of the phrase, 'rule of law' in this statutory provision would have very little meaning if it only meant the rule of law in a formal sense. Another statutory reference to the rule of law is contained in s 4(a) of the Lawyers and Conveyancers Act 2006 which provides that lawyers have a fundamental obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand. The New Zealand Law Society certainly does not see its duty to uphold the rule of law as being confined to a formalised conception. One of the terms of reference of its Rule of Law Committee is to assist the Law Commission in its goal to achieve laws that are just, principled and accessible.[89]

As to the contention that it would be difficult to get worldwide consensus on a thick definition of the rule of law, it is true that the rule of law cannot be viewed purely in the abstract and that the content of the law will depend on the socio-political, constitutional and historical context of a particular jurisdiction. However, the point about human rights, as enshrined in the main human rights covenants, is that they are indivisible and universal.[90] Bills of Rights are included in many national constitutions, especially modern ones. There are also regional bills of rights with regional enforcement mechanisms in Europe, Africa and the Americas. In 2012, the ASEAN Human Rights Declaration for South East Asia was promulgated.[91] So inclusion of human rights should not in fact cause major definitional problems. Compliance with human rights obligations is of course another matter, but all countries, including New Zealand, have issues on that front.

There remain many academic arguments as to exactly what should be included in the ideal substantive definition of the rule of law. There is not time to go into these. I just

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89 Te Kāhui Ture o Aotearoa/New Zealand Law Society "Rule of Law Committee" (4 March 2020) <www.lawsociety.org.nz>.

90 See the statements of the then United Nations High Commissioner for Human Rights: Navanethem Pillay "Are Human Rights Universal?" United Nations Chronicle <www.un.org>.

91 Association of Southeast Asian Nations "ASEAN Human Rights Declaration" (19 November 2012) <asean.org>. See also the Arab Charter of Human Rights adopted in 2004 by the Council of the League of Arab States. However, the Arab Charter has been criticised by the then United Nations High Commissioner of Human Rights, Louise Arbour, for its approach towards the death penalty for children, the rights of women and non-citizens, as well as equating Zionism with racism: "Arab rights charter deviates from international standards, says UN official" *United Nations News* (online ed, 30 January 2008). See also International Commission of Jurists *The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court* (April 2015).

note that I have a soft spot for the very thick conception of the rule of law used by the World Justice Project, probably because I was involved with that project in its early stages.[92] The definition is based on four principles: accountability under the law, just laws, open government and access to justice.[93] Under the umbrella of its definition the project uses eight particular factors in an index designed to measure adherence to the rule of law throughout the world.[94] While one could quibble at the margins as to inclusions in the index and the methodology, the fact the index exists gives the lie to the formalists who say a substantive conception of the rule of law would be difficult to measure.[95] I note incidentally that the World Justice Project principles do not include democracy,[96] although many of the features it outlines are more likely to exist in democracies than in other forms of government.

Returning now to the concrete as against the theoretical, I am not going to attempt a comprehensive assessment of New Zealand's adherence to the rule of law. Rather I concentrate on what might be considered the current underpinnings of the law as that is an important first step in the analysis.

The first point is that New Zealand does not stand alone. It is part of the world and is subject to international law obligations, including international human rights obligations. Some of these have been incorporated into our domestic law including, for example, through the New Zealand Bill of Rights Act. They are, thus, directly enforceable in the courts.

Even where that is not the case, there is a presumption that Parliament intends to legislate consistently with New Zealand's international obligations, and this means that legislation will be interpreted consistently with treaties to the extent that the words and

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92 World Justice Project *Rule of Law Index 2020* (11 March 2020) at 9.

93 At 10. Rights would only exist on paper without access to justice – for example, through the courts with the necessary institutional actors to enforce them.

94 The eight factors are constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice and criminal justice: at 11.

95 See also European Commission "2021 Rule of law report" (20 July 2021) <ec.europa.eu> which monitors rule of law developments in European member States.

96 Leaving out democracy was a deliberate choice by the World Justice Project to enable the Index to apply to different types of social and political systems: World Justice Project, above n 92, at 9.

purpose of the statute allow.[97] Further, where there is a broad discretion given to the executive, the courts will require this to be exercised consistently with New Zealand's international obligations, again including international human rights obligations.[98] And the courts require, through the principle of legality, that any incursions into fundamental rights be clearly expressed by Parliament.[99]

International obligations are also necessarily part of the values, norms and principles to be taken into account when developing the common law. An example of this can be found in the decision in *Hosking v Runting*, where the majority recognised a tort of privacy in New Zealand.[100] The fact that the right to privacy recognised in the International Covenant on Civil and Political Rights was not included in our Bill of Rights did not prevent the common law from being developed to protect particular aspects of privacy.[101] All this shows that human rights form an important part of our current legal framework.

New Zealand's law is also necessarily a function of local conditions.[102] In this regard, I want to return to the theme of the law and its effect on our indigenous people, concentrating in particular the position of the Treaty and tikanga in our law.[103] There has been a clear shift in the view of the relevance of the Treaty to our law in Aotearoa. When I was at law school, the Treaty must have been mentioned as I was taught legal system by Professor David Williams but, even in the history department which was my other home, it was seen as something of historical interest only. Outside of the university context, the Treaty was used as a focus of protest and rhetoric, but not with

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97 I discuss this further in Susan Glazebrook "Do they say what they mean and mean what they say? Some issues in statutory interpretation in the 21st century" (2015) 14 Otago LR 61 at 82–84.

98 *Tavita v Minister of Immigration* [1994] 2 NZLR 257, (1994) 11 FRNZ 508 (CA).

99 See for example, *D v New Zealand Police* [2021] NZSC 2.

100 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

101 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR]. New Zealand ratified the ICCPR on 28 December 1978.

102 I discuss this further in Susan Glazebrook "Custom, human rights and Commonwealth constitutions" (Sir Salamo Injia Lecture, University of Papua New Guinea, Port Moresby, 29 November 2018) <www.courtsofnz.govt.nz>.

103 The origin of the word 'tikanga' comes from 'tika' which means "straight, direct, keeping a direct course" and has moral connotations of justice and fairness, including notions such as "right, correct": Benton, Frame and Meredith, above n 80, at 429. For a discussion of the then position of tikanga in New Zealand law, see generally Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

any view of it actually having current legal force. Little wonder as it had been described by Chief Justice Prendergast in *Wi Parata* in 1877 as a 'simple nullity'.[104]

Fast forward to 1987 and the *Maori Council* case where Cooke P said that s 9 of the State Owned Enterprises Act, which provides that nothing in the Act permits the Crown to act in a manner that is inconsistent with the principles of the Treaty, has "the impact of a constitutional guarantee".[105] That the Treaty is a constitutional document, at least when given statutory force in that manner, was confirmed by the Supreme Court in 2013.[106] Even where the Treaty is not specifically incorporated in legislation, there is a requirement, as with international law, to interpret statutes consistently with the Treaty where possible.[107] And the Treaty, given its constitutional force, must also be very relevant to the development of the common law.[108]

The other major change has been with regard to the position of tikanga. Theoretically tikanga, as custom, was part of the common law from 1840. However, the incorporation of tikanga in the common law was subject to strict tests, such as a requirement that the custom be certain, reasonable, observed as of right from time immemorial and not contrary to an Act of Parliament.[109] There was an added requirement for the colonies. Custom could not be part of the common law if it was "repugnant to justice and morality".[110] Custom would be deemed repugnant if it clashed with the core principles

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104 *Wi Parata v Bishop of Wellington* (1877) 1 NZLRLC 14 (SC). It has been suggested that Justice Richmond was actually the author of the judgment and that Chief Justice Prendergast's involvement was actually quite minimal: David V Williams *A Simple Nullity? The Wi Parata case in New Zealand law and history* (Auckland University Press, Auckland, 2011 at 142–150.

105 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 658. I note that Ani Mikaere has heavily criticised the notion of the principles of the Treaty outlined in this case as judicial rewriting of the Treaty at the expense of what was actually agreed: Ani Mikaere "Seeing Human Rights Through Māori Eyes" 10 Yearbook of New Zealand Jurisprudence 53 at 57.

106 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [55]–[59]. See also Lord Woolf, writing for the Judicial Committee of the Privy Council, who characterised the Treaty generally as being of the "greatest constitutional significance to New Zealand": *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 516.

107 See also Legislation Design and Advisory Committee *Legislation Guidelines: 2018 Edition* (March 2018) at 27.

108 For a discussion of how the Treaty has influenced the development of the common law, see Paul Rishworth "Writing things unwritten: Common law in New Zealand's constitution" (2016) 14 ICON 137 at 147–153.

109 The foundation case for these requirements is *The Case of Tanistry* (1608) Dav Ir 28 at 32.

110 This was a general requirement applied by colonial tribunals: PG McHugh "The Aboriginal Rights of the New Zealand Māori at Common Law" (PhD thesis, University of Cambridge, 1987) at 182. See also New Zealand Constitution Act 1852 (UK) 15 & 16 Vict c 72, s 71 which limited the preservation of Māori law and custom "so far as they are not repugnant to the general principles of humanity".

or foundations of the legal system.[111] In other words, in cases of conflict, the superior laws of the imperial power were to prevail. As Professor Peter Fitzpatrick has put it:[112]

> to the imperial eye law was pre-eminent among the 'gifts' of an expansive civilization, one which could extend in its abounding generosity to the entire globe … Looked at another way, the violence of imperialism was legitimated in its being exercised through law.

Fast forward to the current day where references to tikanga have started appearing in a range of statutes.[113] In addition, tikanga has been recognised by the Supreme Court as a relevant factor to be considered by an executor in deciding on the burial place of a person with Māori whakapapa and without even commenting on the old common law tests for incorporation of custom, let alone applying them.[114] The Supreme Court also recently heard submissions on tikanga with regard to whether the appeal of Peter Ellis against his convictions should proceed despite his death.[115] While the Court has not yet issued its reasons for its decision that the appeal should continue,[116] there is force in the view that, whatever the place of tikanga in the reasons for that decision, the important

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111 See for example, *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 [*Takamore CA*] at [166] per Glazebrook and Wild JJ. The judgment, however, suggested a more modern approach to the incorporation of customary law: at [254]–[258].

112 Peter Fitzpatrick "Terminal legality: imperialism and the (de)composition of law" in Diane Kirkby and Catharine Coleborne (eds) *Law, history, colonialism: The reach of empire* (Manchester, Manchester University Press, 2001) 9 at 19.

113 See for example, Resource Management Act 1991; Te Ture Whenua Maori Act 1993; Marine and Coastal Area (Takutai Moana) Act 2011; and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

114 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 [*Takamore SC*] per Tipping, McGrath and Blanchard JJ at [152] and [156]. The minority (Elias CJ and William Young J each giving separate reasons), would have afforded a more central role, but still not determinative, role for tikanga: at [101]–[108] per Elias CJ and [175] per William Young J. The majority of the Court of Appeal in that case had suggested that a process of consultation should be undertaken by an executor with issues of tikanga being properly explained and explored in the course of that process: *Takamore CA*, above n 111, at [259]–[260] per Glazebrook and Wild JJ. No order was ultimately made by the Court for such a process of consultation given the entrenched position of the parties: at [261].

115 Peter Ellis was convicted on 16 charges of sexual offending in 1993. Subsequently, three convictions were quashed in an appeal but the remaining 13 conviction were upheld: *R v Ellis* (1994) 12 CRNZ 172 (CA). Those remaining 13 convictions were again upheld by the Court of Appeal when the case was referred to the Court by the Governor-General pursuant to s 406(a) of the Crimes Act 1961 (now repealed): *R v Ellis* [2000] 1 NZLR 513 (CA). The Supreme Court granted leave to appeal against the second decision of the Court of Appeal in *Ellis v R* [2019] NZSC 83. Mr Ellis passed away on 4 September 2019 before the appeal could be heard in the Supreme Court.

116 A results judgment was issued allowing the appeal to continue, with reasons to be provided in the decision on the substantive appeal: *Ellis v R* [2020] NZSC 89. The substantive appeal is being heard by the Supreme Court in October 2021.

point is the fact that submissions were called for and argument heard on tikanga, even though neither Mr Ellis nor the victims are Māori.[117]

So far so good, but there remain a number of issues still to be worked out. I list a few of these without making any attempt at being comprehensive. I am not to be taken as making any comment on any of them, apart from recognising that there may be issues to resolve in the future. I also recognise that resolution of some of the issues may not lie with the courts.

First, there is the issue of what Associate Professor Claire Charters calls the indigenous peoples' collective rights to authority and, therefore, whether it is even appropriate for institutions like the mainstream courts to be delving into tikanga.[118] This is related to the tino rangatiratanga guarantee in article 2 of the Treaty. It also relates to the right to self-determination in article 3 of the UN Declaration on the Rights of Indigenous Peoples.[119] This right is included in article 1 of both of the two main international human rights treaties.[120] The issue is tied up with the concept of legal pluralism, where two or more legal systems exist in the same State, raising conflict of law issues that might thereby arise and how they should be handled.[121]

Second, there is the concern that incorporation in the common law may end up distorting tikanga and in fact mean not decolonisation of the law but a re-colonisation.[122] Tied up with this is the concern that incorporation could end up

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117 See Professor Jacinta Ruru's comments in Martin Van Beynen "The Peter Ellis case and Māori customary law" *Stuff* (online ed, Auckland, 9 July 2020).

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

119 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007) [UNDRIP]. The *He Puapua* report recommends a staggered approach for Aotearoa/New Zealand to realise the UNDRIP by 2040: *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand* (Te Puni Kōkiri/Ministry of Māori Development, NRC-104358-1-128-V1, 1 November 2019). For a personal perspective from a Pākehā on the significance of the *He Puapua* report, see Richard Shaw "The Conversation: From Parihaka to He Puapua - it's time Pākehā New Zealanders faced their personal connections to the past" *New Zealand Herald* (online ed, Auckland, 16 July 2021). There has been no official government response to the report as yet.

120 ICCPR, art 1; International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICESR], art 1. New Zealand ratified the ICESR on 28 December 1978.

121 See generally Val Napoleon "Legal pluralism and reconciliation" (November 2019) Māori LR 1.

122 This has been said to be particularly problematic where our justice system seeks to incorporate tikanga Māori while at the same time denying Māori the power to control how that occurs: Annette Sykes "The myth of tikanga in the Pākehā law" (7 February 2021) E-Tangata <e-tangata.co.nz>.

stultifying the organic development of tikanga and its links with the community.[123] There is also the unease which derives from the fact that tikanga in this context would draw its authority from the Crown and not Māori rangatiratanga.[124]

Third, there is the issue, which arises with the international human rights system generally, of working out the proper approach to reconciling collective and individual rights.[125] This is echoed in cases around the world involving constitutions which recognise both custom, by its nature collective, and human rights, most of which are (or have, to date, been interpreted as) individualistic. A clear mechanism for balancing individual and collective interests, especially in indigenous settings, is still a work in progress for the international human rights framework and for Aotearoa.[126]

Fourth, there is the issue of distortion of tikanga having already been distorted through the effects of colonisation and in particular related to the place of women.[127] It has been argued very strongly, however, that any such distortions should be for Māori women to address in a tikanga-appropriate manner rather than being a matter for the courts.[128]

Finally, there is the issue of how issues of tikanga can be decided in a mainstream court. For a start, it would need a wholly different education and mindset, taking into account sources well removed from the traditional written sources.[129] It would (at the least)

For a discussion of how customary justice systems have been distorted by colonial administrations internationally, see generally Ross Clarke "Customary Legal Empowerment: Towards a More Critical Approach" in Janine Ubin and Thomas McInerney (eds) *Customary Justice: Perspectives on Legal Empowerment* (International Development Law Organisation, Legal and Governance Reform: Lessons Learned No 3/2011, 2011) 43.

123 Contrast Napoleon's view that indigenous law will not be so easily damaged – after all, it has withstood colonisation: Val Napoleon "Did I Break It? Recording Indigenous (Customary) Law" (2019) 22 PER/PELJ 2 at 28–29.

124 Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Oxford, 2005) 330 at 342.

125 For a view that human rights treaties are a Western construct, see Mikaere, above 105, at 57–58. She suggests that the question should be not "how well does tikanga fit with human rights concepts?" but "what do human rights principles have to offer by way of useful adaptation to or development of tikanga Māori in a contemporary context?"

126 Glazebrook, above n 102, at 25.

127 Mikaere, above n 77, at 143–155.

128 Claire Charters "Te Tiriti o Waitangi, the UN Declaration on the Rights of Indigenous Peoples and constitutional issues" (Speech to the IAWJ 15th Biennial Conference, Wellington, 7 May 2021).

129 One method suggested by Napoleon and Friedland is the careful and conscious application of adapted common law tools such as case method and legal analysis to existing indigenous resources such as stories, narratives and oral histories: Val Napoleon and Hadley Friedland "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2010) 61 McGill LJ 725.

require facility in te reo, and even then tikanga would not be a lived experience for non-Māori judges.[130] There is also the danger of such judges seeing superficial parallels between the values and customs of tikanga and the values and rules of the common law and ending up distorting both. There is also the question of whether the orthodox adversarial method is well-suited to evaluate tikanga.[131]

It is true that there are mechanisms available to assist. Where any question of tikanga arises in the High Court, that Court may state a case and refer it to the Māori Appellate Court and the decision is binding on the High Court.[132] Another mechanism is for the court to appoint independent expert witnesses or pūkenga.[133] However, I do note that hearing evidence on tikanga is treating it as a question of fact rather than law in the same manner as foreign law is proved in New Zealand courts.[134] If tikanga is directly applicable as law, this may not be appropriate (although it is difficult to see a viable alternative especially where the tikanga is contested).

So what does all this say about Aotearoa and the rule of law? I would suggest that, until we complete the process of decolonisation,[135] the rule of law can only be considered a

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130 The indigenising of legal education and our universities will have a major part to play in decolonisation: see generally Joe Williams "Decolonising the law in Aotearoa: Can we start with the law schools?" (FW Guest Memorial Lecture 2021, University of Otago, Otago, 22 April 2021). A first-of-its-kind degree program which aims to provide law students a lived experience in indigenous law is University of Victoria (Canada)'s Joint Indigenous Law Degree which combines a study of Canadian common law with the laws of Indigenous peoples: University of Victoria (Canada) "Joint Degree Program in Canadian Common law and Indigenous Legal Orders (JD/JID)" <www.uvic.ca>. The program combines classroom learning with field studies conducted in collaboration with indigenous communities.

131 Christian Whata "Evolution of legal issues facing Maori" in *Maori Legal Issues* (Legal Research Foundation conference, 29 November 2013) 1 at [47]. Justice Whata suggests that an inquisitorial methodology may be better suited to dealing with tikanga issues.

132 Te Ture Whenua Maori Act 1993, s 61; Marine and Coast Area (Takutai Moana) Act 2011, s 99.

133 Marine and Coast Area (Takutai Moana) Act 2011, s 99(1)(b); High Court Rules 2016, r 9.36. In *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025 (Churchman J), the Judge appointed two independent pūkenga who adopted a poutarāwhare (which they described as a construct) in response to the questions posed to them: at [313]. The pūkenga report was also attached as an appendix to the judgment. By contrast, the High Court in *Ngāti Whātua Ōrākei Trust v Attorney-General (No 1)* [2020] NZHC 3120 (Palmer J) declined to appoint an independent pūkenga, considering that it was unclear how much additional utility there would be in doing so given the significant amount of expert tikanga evidence already adduced: at [39]–[40]. Annette Sykes has praised the former case and criticised the latter arguing that it is necessary that judges (non-experts in tikanga Māori) have the assistance of a tohunga (specialist knowledge-keeper) to guide the assessment of tikanga: Sykes, above n 122. See also Ben Leonard "'Judgment for the decade' in landmark foreshore and seabed case" *Newsroom* (online ed, Auckland, 17 May 2021).

134 *Takamore SC*, above n 114, at [95] per Elias CJ.

135 See Williams, above n 130, for a discussion of decolonisation. It has been suggested that at a fundamental level, decolonisation involves the taking back by indigenous people of power and control: Eesvan Krishan "Decolonising the Common Law: Reflections on Meaning and Method"

work in progress. The new place of the Treaty and tikanga in the law is a start. There are of course other initiatives underway, including within and outside the courts, but these are beyond the scope of this paper.[136]

And as an overall conclusion on the rule of law generally, I finish where I began with my title. The rule of law is a guiding principle as long as it includes human rights, access to justice, and I would add, redress for historical disadvantage. If that is the case, it is also an appropriate catch cry for a better and more just world.[137]

(2020) 26 Auckland U L Rev 37 at 39 citing Moana Jackson "Where to next? Decolonisation and the stories in the land" in Rebecca Kiddle and others *Imagining Decolonisation* (Bridget Williams Books, Wellington, 2020) 133 at 135.

136 For example, the Waitangi Tribunal investigates claims that government legislation, policies or practices prejudicially affect Māori and breach the principles of the Treaty: Treaty of Waitangi Act 1975, s 6. Also relevant is the treaty settlements claim process and the various specialist courts - Te Whare Whakapiki Wairua/Alcohol and Other Drug Treatment Court; Te Kooti o Timatanga Hou/New Beginning Court; Te Kōti Rangatahi/Rangatahi Court. I refer also to the transformative Te Ao Mārama model for the District Court and the new Māori Health Authority.

137 Catch cry is deliberately used here to capture the concept of the rule of law as a call to action. I do, however, recognise that while law can effect and does affect social change, it is not the whole answer to societal ills.