

# THE INFLUENCE OF CUSTOM ON ADMINISTRATIVE LAW\*

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## Introduction

The customs of Papua New Guinea (PNG) is recognised as one of the sources of the laws under Section 9 of the *Constitution*. This recognition is amplified by Schedule 2 of the *Constitution* and the *Underlying Law Act* 2000. Prior to independence, it is the *Customs Recognition Act* that provides the avenue for the recognition and utilisation of custom in the formal legal system.

Customary law has been applied sparingly by the Supreme and National Courts in various cases since independence in 1975. It deals with various aspects of community life and ranges from matrimonial law to succession law. In 2016, the courts were challenged to ascertain the impact of custom on administrative law in relation to the functions of the legislative arm of government. This is the first time that the courts were invited to review an administrative action of Parliament and declare the action invalid on the basis of custom. The case, *Somare v Zurenuoc*<sup>1</sup>, signals the court's ability to expand its inherent jurisdiction under Section 155(4) of the *Constitution* to administer justice to an aggrieved party. Section 155(4) is in the following terms:

Both the Supreme Court and the National Court have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice in the circumstances of a particular case.

This paper examines the application of custom in administrative law. It shows that the utilisation of custom in resolving administrative law cases is slowly gaining momentum. The aim of the paper is to highlight the ingenuity of the National Court to use custom to stop an administrative decision of the National Parliament.

The paper provides a short analysis of the *Somare v Zurenuoc* case and its effect on other areas of the law. We begin by presenting the facts that give rise to the case and then assess the manner in which the court dealt with the legal issues. We then focus on the approach the court adopted to apply custom in respect of the case. We conclude by presenting some potential challenges that may arise as a result of this case.

## The Question of Customary Belief

The *Somare v Zurenuoc* case involves the use of customary beliefs of the people of PNG as a justification in suppressing the execution of an administrative decision by the court.

The brief facts of the case are that in October 2012, the Permanent Parliamentary Committee called the House Committee headed by the first defendant, the then Speaker, Hon. Theo Zurenuoc, resolved in a meeting to remove unworthy images (carvings depicting nude images) from the precinct of the Parliament. The second plaintiff, - the Director of the National Museum and Art Gallery, Dr. Andrew Moutu, became aware of the committee's resolution and the plans to remove and dismantle the objects of cultural significance, and wrote to the House Committee, in October 2013, advising to

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<sup>1</sup> (2016) N6308.

stop the destruction of the cultural objects. The defendants<sup>2</sup>, however, refused the advice of the second plaintiff and proceeded to desecrate the cultural objects. The primary reason for the decision was that the Parliamentary House Committee deemed the nude carvings and objects of cultural decorations as contradictory to the country's Christian beliefs.

The third defendant (L&A Construction Ltd), a local company, was engaged by the Parliament to implement the resolution of the Parliamentary House Committee. The third defendant commenced work at the Parliament in November 2013. On the 26<sup>th</sup> of November 2013, the company removed the lintel containing 19 masks.

The next morning, the plaintiffs<sup>3</sup> became aware of the destruction of the carvings. The plaintiffs immediately approached the first defendant urging him not to remove the totem pole, which was the next cultural object to be removed. Despite the expostulation at the defendants' conduct by the plaintiffs, the defendants maintained that the sculptures, carvings and portraits were contrary to the Christian belief consequently, the removal is justified.

The matter became a national controversy resulting in the then Prime Minister, Hon. Peter O'Neill, intervening and requesting the defendants to shelf the project. The plaintiffs sought the National Court's intervention on the 23 December 2013. The first plaintiff commenced the proceedings by originating summons in the National Court, seeking orders to permanently restrain the Speaker from completing the removal exercise. An ex parte injunction, is granted on 31 December 2013, restraining the defendants:

...from moving, removing and destroying any cultural property including artefacts, artworks, adornments, totem poles from the National Parliament building until further orders of the court.

The plaintiffs then proceeded with the application for the substantive relief in 2014. On 8 March 2014, the plaintiffs commenced the substantive proceeding with an originating summons in the National Court seeking:

1. An order pursuant to Section 155(4) of the *Constitution* and Order 14, Rule 10 of the National Court Rules that the first, second, third and fourth defendants and their employees, servants and/or agents are restrained from moving, removing and destroying any cultural property including artefacts, artwork, adornments, totem poles from within the National Parliament building until further orders of court.
2. A declaration pursuant to Section 45 of the *Constitution* that the removal and destruction of cultural objects from the National Parliament building violates the right to freedom of thought, conscience and religion.
3. An order that the first and second defendants repair all disfigured artefacts and return them to their original places/locations in the Parliament building and premises.

The defendants on the other hand argued that the reliefs should be denied on the following grounds:

1. The plaintiffs lack standing;
2. There is no evidence that anyone's religious rights or freedoms are infringed.
3. The objects of cultural decoration, the subject of this proceeding, are not objects of "*national cultural property*" as they are neither declared nor proclaimed as such under the *National Cultural Property (Preservation) Act*; and
4. There is no breach of copyright.

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<sup>2</sup> The Speaker of Parliament, Hon. Theo Zurenuoc; the Chairman of the Parliamentary House Committee; L&A Construction Ltd; and the State.

<sup>3</sup> Sir Michael Somare, the country's founding father and Dr. Andrew Moutu, the Director of the National Museum and Art Gallery.

## Challenging Customary Beliefs

The National Court, presided by his honour, Justice Canning, identified five main issues for the court to address. These were:

1. Do the plaintiffs have standing to commence and maintain the proceeding?
2. Is there any breach of the right to freedom of conscience, thought and religion under Section 45 of the *Constitution*?
3. Is there any breach of the *National Cultural Property (Preservation) Act* Chapter No 156?
4. Is there been any breach of the *Copyright and Neighbouring Rights Act 2000*?
5. What declarations or orders should the Court make?

On the first issue of the plaintiffs' locus standi, the counsels for the defendants argued that the entire proceedings should be dismissed because the plaintiffs did not have standing to seek such relief. The defendants argued that the plaintiffs lacked standing because they were not able to prove that they represented a group of people or an organisation that was affected by the actions of the defendants, as such they did not have any direct or personal interest in the outcome of the matter.

His honour rejected these arguments for two reasons: (1) the application is not a representative application; and (2) the issue of personal or direct interest in the outcome of the matter varies for different applications and is determined according to the nature of the proceedings that have been commenced. The rules on locus standi have been judicially developed over time. Hence, different applications for different reliefs sought have different requirements for one to have locus standi. His honour therefore, found that the plaintiffs had standing to seek such relief.

In relation to the issue of violation of Section 45 of the *Constitution*, the court held that the actions of the defendants were in breach of the right to freedom of conscience, thought and religion. The court's finding and reasoning on this issue is discussed in detail as this is where custom is involved in determining the outcome of the issue.

As to whether there was a breach of the *National Cultural Property (Preservation) Act*, the plaintiffs had to establish that the artefacts, artworks, adornments, totem poles were '*national cultural property*'. To resolve this issue, the court had to determine whether the objects, the subject of the proceeding fell within the definition of '*national cultural property*'.

The definition of '*national cultural property*' is stipulated under Section 1 of the Act. The definition is provided in full below:

- "national cultural property" means any property, movable or immovable, of particular importance to the cultural heritage of the country, and in particular (but without limiting the generality of the foregoing) includes-
- (a) any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of any of the peoples of the country, past or present; and
  - (b) any mineral specimen or fossil or mammal remains of scientific or historic interest to the country; and
  - (c) any other collection, object or thing, or any collection, object or thing of a class, declared to be national cultural property under Section 4; and
  - (d) any collection of national cultural property.

The court ruled that the artefacts, artworks, adornments, totem poles, the subject of the proceedings, fell within the definition of '*national cultural property*'. Subsequently, the court held that the defendants were in breach of Section 9 of the Act.<sup>4</sup> Section 9 provides that:

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<sup>4</sup> It is interesting to observe that the court did not establish whether the objects of cultural decoration were actually '*declared national cultural property*' under section 4 of the *National Cultural Property*

- (1) A person who, without lawful and reasonable excuse (proof of which is on him) wilfully destroys, damages or defaces any national cultural property, is guilty of an offence.

Penalty: A fine not exceeding K200.00.

- (2) A person who, by force, threat, fraud, misrepresentation, undue influence or in any other manner, obtains the destruction, damaging, defacing, confiscation or yielding up of any national cultural property is guilty of an offence.

Penalty: A fine not exceeding K500.00 or imprisonment for a term not exceeding six months.

In its deliberation the court said that the plaintiffs failed to resort to criminal proceedings and the defendants lacked the opportunity to make an application to court to strike out the matter on the grounds of abuse of process. However, the court went ahead and made a civil order in a case where criminal penalty is applied.

The fourth and final issue related to the breach of the *Copyright and Neighbouring Rights Act*. The second plaintiff argued that, the objects of cultural decoration, the subject of these proceedings were protected works under the *Copyright and Neighbouring Rights Act*. Copyright in those works vests in their “authors” (the persons who created them), which gave economic and moral rights, including the exclusive right to authorise “transformation” of the works and the right to object to any “mutilation” of their works. None of those rights were afforded to the authors. Therefore, the transformation and mutilation that occurred was a breach of the Act. The court agreed with the second plaintiff’s arguments and found that the defendants violated the Act.

The court, in the end, decided in favour of the plaintiffs. The court, in exercising its powers pursuant to Sections 57(3) and 155(4) of the *Constitution* made the following orders:

1. That the damage, dismantling and removal of the objects of cultural decoration at Parliament House, the subject of these proceedings – the 19 masks on the lintel at the main entrance and the totem pole in the Grand Hall – infringed Section 45 of the Constitution, and were unlawful acts.
2. That the objects of cultural decoration at Parliament House, the subject of these proceedings, were “national cultural property” for the purposes of the National Cultural Property (Preservation) Act and that the damage, dismantling and removal of those objects breached Section 9 of the *National Cultural Property (Preservation) Act* and were unlawful acts.
3. That the objects of cultural decoration at Parliament House, the subject of these proceedings, were protected works under the Copyright and Neighbouring Rights Act and that copyright in those works vested in their “authors”, which gave them or their descendants economic and moral rights, including the exclusive right to authorise “transformation” of the works and the right to object to “mutilation” of their works; which rights had not been afforded to them or their descendants; and that accordingly the transformation and mutilation of those works was unlawful.
4. That the first, second and third defendants and all other persons are restrained forthwith from further damaging, dismantling and removing the objects of cultural decoration at Parliament House, the subject of these proceedings, or similar objects of cultural decoration at Parliament House.
5. That the first and second defendants shall, within six months after the date of judgment, at the cost of the National Parliament, and in consultation with the persons who created, curated and installed the objects of cultural decoration at Parliament House, the subject of these proceedings (or their descendants) and in consultation with the plaintiffs, repair, return or replace the objects of cultural decoration at Parliament House, the subject of these proceedings.
6. That the first, second and third defendants and all other persons are permanently restrained from further damaging, dismantling and removing the objects of cultural decoration at

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(*Preservation*) Act. Section 4 of the Act provides that a ‘national cultural property’ must be declared by the Head of State in the National Gazette.

Parliament House, the subject of these proceedings, or such objects as are created, curated and installed to replace those objects or similar objects of cultural decoration at Parliament House, unless the question of destruction, damage or removal of such cultural objects is decided by the Parliament, at a meeting of the Parliament, in accordance with Section 114 of the *Constitution*, having regard to and respect for the rights and freedoms conferred by Section 45 of the *Constitution* and the restrictions imposed under the *National Cultural Property (Preservation) Act* and the *Copyright and Neighbouring Rights Act*.

The defendants appealed these orders to the Supreme Court. In October 2017, the Supreme Court refused the appeal for want of prosecution.

Before we turn to the issue of custom, it is important to observe that the court made a glaring error when it interpreted sections 1, 4 and 9 of the *National Cultural Property (Preservation) Act*. According to the scheme of the legislation, for a cultural decoration to fall within the meaning of ‘national cultural property’, it must meet the requirements under section 1 of the Act. To be a protected ‘national cultural property’ the item must be declared as such by the Head of State, through a gazettal notice as stipulated by section 4 of the Act. Once a cultural decoration is **declared as a national cultural property**, its destruction, damage or defacement is a violation of section 9 of the Act.

Thus, where a cultural decoration is not declared as a national cultural property by the Head of State, its destruction, damage or defacement is not an offence under the Act. In this case, the court readily accepted that the sculptures, carvings and portraits were never declared as a national cultural property. How then could the defendants be guilty of violating section 9 of the Act? It is our view that the court failed in finding that the objects were national cultural property based on their history. This is clearly wrong in law as they were never declared as national cultural property by the Head of State as required by section 4 of the Act.

### **The Position of Customary Beliefs in Law**

The court resorted to custom in dealing with the second issue in the case. That is, whether the removal of the masks on the lintel and the totem pole violated the plaintiffs’ right to the freedom of conscience, thought and religion set out in Section 45 of the *Constitution*. The plaintiffs’ argument raised a number of pertinent questions including:

1. Whose freedom of conscience, thought and religion were violated?
2. How were these rights violated? and
3. Which religion?

Justice Cannings answered these questions by relying on the evidence provided by the plaintiffs. His honour concluded that the first defendant’s action interfered with the religious freedoms of the creators and curators of the objects of cultural decoration, the subject of the proceeding, contrary to section 45(1) of the *Constitution*. The creators and curators are Papua New Guineans. They manifest their culture, beliefs, custom and religion in the objects of cultural decorations. The *Constitution* recognises the manifestation of customs and the practice of customary beliefs. Thus, the removal of the masks and totems influenced by Christian principles is in breach of the constitutional right to the freedom of religion.

Obviously, there are two religious rights at play in this case: right to Christian belief versus right to traditional beliefs. If the right of the creators and curators of the cultural masks and totem poles are violated, what about the Christian belief of the Speaker and the members of the Parliamentary House Committee?<sup>5</sup> Unfortunately, this and other relevant issues were not properly argued in this case. Maybe if the appeal in the Supreme Court had proceeded, these would have been resolved.

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<sup>5</sup> For a brief discussion on the right to Christian religion, see *State v Gotama* (2006) N3156. See also Evens, R, Haley, May, R, Cox, J, Gibbs, P, Merlan, F and Rumsley, A; “Purging Parliament: A New

Mr Zurenuoc in his capacity as the Speaker of Parliament and through the House Committee, made an administrative decision to remove the masks on the lintel and the totem pole. His intention was to reform the Parliament, the building that houses the legislative arm of government.

The reform exercise at Parliament was driven by the Christian religion to reflect the Christian principles. However, the court ruled that the action violated the right to freedom of religion in the *Constitution*. The religion in this case refers to the customary beliefs and practices of the creators and curators of the objects of cultural decoration. The creators and curators manifested their customary beliefs of spirits etcetera in the carvings. It follows that a citizen has the right to manifest his or her customary beliefs. Therefore, the court declared that the administrative decision of the legislative arm was in breach of the right to freedom of religion, thought and conscience.

As discussed briefly, what about the right to freedom of the Christian religion? Which religious right is greater? Western Christian religion or traditional customary beliefs? Without the results of the Supreme Court appeal, the resolution of this issue will remain unresolved.

### Potential Challenges

The *Somare v Zurenuoc* case is a triumph for custom in administrative law matters. For the first time in an administrative law case, the court allowed the constitutional right to embrace custom to influence an administrative decision. The case however raises a number of challenges for future administrative decisions. We raise only four:

1. What happens in sorcery cases where the accused raises the ground that they committed a crime because of their right to a traditional belief?
2. What other customary rights can be accommodated under our Bill of Rights, example, the right to the freedom of movement, the right to employment, etcetera?
3. Does this case extend standing to third party individuals who are unknown or out of reach of litigants?
4. How will this outcome affect decisions of incorporated land groups (ILG) under the *Land Registration (Customary Land) (Amendment) Act 2009* and the *Land Groups Incorporation (Amendment) Act 2009* relating to land allocation?

We will briefly consider these. In relation to the first issue, the increasing incidences of sorcery related violence is a major concern for the country. The level of violence associated with this belief is frightening. As a matter of belief, will perpetrators of sorcery relate to a violence claim under Section 45 of the *Constitution* as a defence? This line of argument may be far-fetched, but it is worth the debate.

Can Papua New Guineans claim customary belief in something to pursue an illegal act? For instance, can customary belief in some ritual purification be used as an excuse to engage in an illegal sexual conduct, or the abuse of children?

In the present case, the creators and curators of the artefacts, artworks, adornments, totem poles, were not identified and brought before the National Court to substantiate the arguments by the plaintiffs. Can it be argued that because the creators and curators were engaged by the Parliament on certain terms and conditions which may have included monetary benefits, the copyright now belonged to Parliament and not the creators and curators? Therefore, did the Parliament have the right to destroy these items?

We make a slight reference to the ILGs because these are customary clans which are now given formal recognition by law. Although ILGs are now regulated by statute, their operation and management are largely governed by custom. If the ILG Committee makes an administrative

decision to allocate property, disburse monetary benefits or disciplines a member of the ILG, can a dissatisfied member resort to judicial review for help?<sup>6</sup>

These and other legal issues may however have to be resolved by the courts in the future, as litigants explore the impacts of this precedent on their cases. Apart from other legal issues such as the right to copyright and the right to the freedom of religion, it is encouraging to note that the courts are confident in looking beyond the formal rules of administrative law and adopt relevant custom to do justice in appropriate cases.

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<sup>6</sup> See *Kawira v Bone* (2017) N6802; *Natto v Sakai* (2019) N7866 and *Moio v Kaeka* (2020) N8204.