

# IT'S A LONG TIME SINCE 1877: THE PERSISTENCE OF CUSTOM

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*This paper considers briefly, in the light of the material presented in Legal Systems of the Pacific, some abiding legal aspects of two movements: The arrival of the peoples of the Pacific and colonisation, and customary law and introduced law.*

*Cet article examine sous la forme de synthèse des contributions parues dans l'ouvrage Legal Systems of the Pacific, les contraintes juridiques liées au phénomène migratoire des peuples du Pacifique et au rapport entre le droit colonial importé et le droit coutumier.*

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## I INTRODUCTION

It is a long time since 1877, but even longer since 3000 BCE. 1877 was the year of the institutionalising of British rule in the Pacific.<sup>1</sup> The reference could equally be to France, Germany, or the USA and to the 19<sup>th</sup> century colonising activities of European powers to serve their strategic and economic advantage. The other date is also a general reference to the populating of the Pacific by its indigenous peoples:<sup>2</sup> For some countries the arrival was probably thousands of years before the current era; for others a 1000 or so years ago. The indigenous peoples are still present. Some colonisers have departed; six countries remain under colonial rule of one form or another.<sup>3</sup>

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1 See the Western Pacific Order in Council of 1877 which was made under the Pacific Islanders' Protection Acts 1872 and 1875, and under the Foreign Jurisdiction Acts 1843 to 1875.

2 G Irwin *The Prehistoric Exploration and Colonisation of the Pacific* (Cambridge University Press, 1993); B Gille, P-Y Toullelan *De la conquête à l'exode* (Au vent des îles, Tahiti, 1999) vol 1; Paul de Deckker (ed) *Coutume Autochtone et Evolution du Droit dans le Pacifique Sud* (L'Harmattan, Paris, 1995); N Thomas *Voyagers* (Head of Zeus, London, 2021).

3 Tokelau (colony of New Zealand), Pitcairn (colony of the United Kingdom), Guam (territory of the United States) American Samoa (territory of the United States), French Polynesia (overseas collectivity of France) and New Caledonia (special collectivity of France).

The first arrivals in the Pacific had to adapt their social ordering to the circumstances of their newfound homes. The first arrivals then had a second major adaptation to address – the arrival of the colonisers. *Legal Systems of the Pacific*<sup>4</sup> provides some insight into how the indigenous norms and colonisers' norms have survived, what of the indigenous social ordering systems has persisted, and whether in the 21st century patterns of strengthening or weakening of indigenous ideas are observable.

In most of the countries covered in *Gems*, the bulk of the population lives on the land and the people live their daily lives according to custom. The land is for them a source of subsistence, and access to the traditional lands and their produce is a birthright. Legislated rules have little or no impact. This is most clearly the case for land rights which are usually a matter for customary determination. Also, a common feature of many systems is the institutionalising of dispute resolution at the local level by the laws for local courts presided over by customary judges.<sup>5</sup>

Land is where custom<sup>6</sup> remains strong despite continual pressure from external sources to commodify land.<sup>7</sup> In Fiji and in Tonga, the protection of land is well provided for by legislation which supports tradition. In the case of Samoa and Tokelau the law shows the strengthening of the traditional rules relating to land. In Vanuatu and New Caledonia, land rights in accordance with tradition have generally been strengthened in more recent times: Vanuatu at the time of independence; New Caledonia in the context of the Noumea Accord.

In Fiji the iTaukei Land Trust Board coordinates all dealings with customary land.<sup>8</sup> Samoa, since the beginning of 2021, has a full-scale court system for traditional lands and titles which is now firmly entrenched in the Constitution.<sup>9</sup>

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4 *Legal Systems of the Pacific. Introducing Sixteen Gems* (Intersentia, Cambridge, 2021). Referred to here as *Gems*.

5 Eg Solomon Islands Customary Land Appeal Court and Vanuatu Island Courts.

6 Without its relationship to land, custom would be significantly weakened. "Custom" is used in this paper to refer to the social ordering principles and traditions of the indigenous people of the country concerned. See generally, Jean Zorn and Jennifer Corrin *Proving customary law in the common law courts of the South Pacific* (British Institute of International and Comparative Law, London, 2002).

7 *Land Issues in the Pacific* (Institute of Pacific Studies, University of the South Pacific, 1994); *Making Land Work* (AAID, Canberra, 2008); *Culture and Progress* (Divine Word University, Madang, 2002).

8 More than 90% of land in Fiji is customary land.

9 Constitution Amendment Act 2020, arts 104–104G.

Tokelau has a land system which is governed completely by the elders of the village in which the land is situated.

In the family law area too custom is strong. However, custom in relation to the family has had a particular challenge beyond that of the colonisers, which was the arrival of the missionaries. The result is that in many family law matters, the norms that are now regarded as traditional were adopted by the communities after the coming of the missionaries. Customary law often absorbed the Christian norms. In the case of incest, tradition and the colonisers' law are not coterminous, but there is no necessary clash because any stricter norms of interrelationship known in the indigenous societies are mostly still honoured despite the fact that many of the traditionally outlawed relationships are, in accordance with the law and Christian teaching, not incestuous. Customary family relationships eg marriage, divorce, adoption, are however, recognised by legislation in a number of countries.

The role for custom within each country's national legal system depends on legislation. As the chapters of *Gems* illustrate, custom has been subordinated to norms of a different type.<sup>10</sup> The status given to custom in the 16 countries surveyed in *Gems* varies greatly. Proof of custom is either easy or, on the other hand, conditioned and difficult.

The legislative provision for custom as a source of law is illustrated best by the examples from Papua New Guinea, Solomon Islands, Tokelau and Tuvalu.<sup>11</sup> The Underlying Law Act 2000 (PNG), the Customs Recognition Act 2000 (SI), Custom as a Source of Law Rules 2004 (Tokelau), and the Laws of Tuvalu Act (Cap 1.06) all provide for the recognition of custom and for its proof in the country's courts. They provide examples of custom being regarded either as a matter of law or as a matter of fact. Proof may be provided by customary authorities, by a limited range of sources of evidence, or by evidence that would not normally be admitted in a court of law. Whether proof of custom is a matter for the parties to raise or a matter to be raised proprio motu by the court is also addressed by legislation.

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10 See, for instance, the methods of proof admitted in ordinary courts as distinct from the methods used in "native" courts.

11 This matter is extensively discussed in Corrin and Paterson *Introduction to South Pacific Law* (4<sup>th</sup> ed, Intersentia, Cambridge, 2017) 51-76. The Customs Recognition Act 2000 (SI) is, at 1 September 2021, not in force.

## **II THE PURPOSE OF THIS ARTICLE**

The articles by Jennifer Corrin<sup>12</sup> and Unaisi Narawa<sup>13</sup> in this volume concern developmental aspects of Pacific law. Professor Corrin focuses on the development of a Pacific jurisprudence and presents examples of precedents which have been used across jurisdictions in the Pacific. Some of the cases discussed have involved customary law. Unaisi's piece is a study of a case which exemplifies the protection of customary rights by Common Law methods in order to counter the effects of a statute.

In this paper attention is given to custom and legislation and the part played by custom in legislation. Despite globalisation's homogenising forces, it is possible to perceive in some countries a strengthening, by use of non-indigenous legal methods, of customary law in those areas which are at the heart of the cultural tradition and which were embedded in the countries in the period before 1877. The chapters in *Gems* provide examples both of more extensive support of custom in legislation since the 19<sup>th</sup> century and also of the weakening of references to custom in legislation.

## **III TENDENCIES**

### **A General**

#### *1 The Cook Islands*

The Cook Islands Constitution Amendment Act 1956 (NZ) provided for a House of Ariki (arts 8 and 9);<sup>14</sup> the Rarotongan and English languages were recognised (with English to predominate), there was a Land Court and a Land Appellate Court (arts 52 and 56) supported by provisions in the Cook Islands Act 1915 and Cook Islands Amendment Act 1946, s 19. In the Cook Islands Act 1915, all land was vested in Her Majesty (s 354), customary land extended only to the top of the high-water mark (s 419). Title to customary land was determined "according to the ancient custom and usage of the Natives of the Cook Islands" (s 422). There was to be no alienation of customary land (s 467), there was provision in ss 426 and 445 for Ariki land and wills by 'natives'. Native adoption by custom was declared invalid. There were paternalistic provisions in relation to contracts by Cook Islanders (s 645) and for the non-enforceability of securities against Cook Islanders (s 646). From 1950,

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12 "Legal Scholarship and Pacific Islands' Jurisprudence."

13 "*Australasian Conference Association Ltd v Mere Sela and Ors* [2007] FLR 12: A Case Analysis."

14 See also the House of Ariki Act 1966.

an amendment to the Cook Islands Act introduced protection for "Native antiquities".

Since 1995, much has changed. The Land Court and the Land Appellate Court have gone. A special provision has been made in the Constitution<sup>15</sup> for the role of custom as a source of law. The hierarchy of sources established by that provision is the Constitution, other legislation, then custom. Article 66A(4) states that the determination of custom is to be by customary authority. The first Constitution had no provision for human rights; provision was made for human rights by constitutional amendment in 1981. Article 64 now provides both for fundamental rights and fundamental duties. This provision for duties resonates with the provision in the Constitution of Vanuatu<sup>16</sup> and is similar in intention to rule 16 of the Constitution of Tokelau. These provisions are interesting in the context of custom because the juxtaposition of rights with duties or the de-emphasising of rights<sup>17</sup> is indicative of a desire to temper the individuality of international human rights norms with the community obligations of the local culture.

## 2 *French Territories*

The Code de l'indigenat 1887 of New Caledonia subjected indigenous people to restrictions on movement, an authoritarian system of local governance, and loss of identity. That Code was abolished on 7 April 1946: "The law of persons is now characterised by a new form of legal pluralism."<sup>18</sup>

The Noumea Accord recognised the pre-colonial presence of the Kanak people and granted some "rehabilitation of their social and cultural identity, to use as bulwark against Westernisation".<sup>19</sup> Since the New Caledonia Act 1999 "litigation relating to the civil status of persons under customary law, where the conflict cannot be settled by the customary authorities, will be decided by the civil courts, before a panel comprising customary assessors"<sup>20</sup> who inform the judge about the relevant customary rules involved.

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15 Article 66A(3).

16 Chapter 2.

17 Constitution of Tuvalu, art 29(3).

18 *Gems*, 148.

19 *Gems*, 147.

20 *Gems*, 149.

Section 18 of the New Caledonia Act 1999 states that:<sup>21</sup>

customary lands and all goods situated on them and belonging to persons of customary civil status ... are regulated by customary law. Customary lands are inalienable, non-transferable, non-exchangeable and unseizable.

French Polynesia has special provision for customary land and since 2017 has had a new system for the settlement of disputes concerning land.<sup>22</sup>

Wallis and Futuna accommodates custom in clear form in the provisions for customary assessors in the customary civil courts.<sup>23</sup>

### 3 *Niue*

The Niue Act 1966, continued many of the custom related provisions of the Cook Islands Act 1915. In particular, the protective provision of s 645 of the Cook Islands Act was repeated in s 711 of the Niue Act.<sup>24</sup> The Land Court and the Land Appellate Court were continued in the Niue Constitution of 1974. In 1992 the Constitution was amended to bring land matters within the jurisdiction of the ordinary court system. Niue followed the Cook Islands example, abolished the Land Court and the Land Appellate Court, and brought land court matters within the jurisdiction of the High Court as one of the three divisions of the High Court.<sup>25</sup> Although most of the legislation relating to land was not changed, land disputes became subject to standard methods of proof when the land jurisdiction was integrated into the work of the High Court. This had the effect of diminishing the role of custom in the field of court procedure. The Constitution of 1974 makes no provision for custom.<sup>26</sup> There have however been some developments in ordinary legislation which relate to custom and tradition, in particular, the Vagahau Niue Act 2012 and the Taoga Niue Act 2012.

### 4 *Tuvalu*

The Preamble to the Constitution and its Principles put specific emphasis on the culture and traditions of the Tuvaluan communities. This emphasis is continued into the body of the Constitution in s 1. Section 13 states that the Principles in the

21 *Gems*, 152.

22 Angelo and Sage "The Principles Governing Mediation in Land Matters in French Polynesia" (2018) 24 CLJP/JDCP 15.

23 *Gems*, 452.

24 Repealed in 2004.

25 Civil, criminal and land; art 37 of the Constitution.

26 There is, however, provision in art 33 of the Constitution for Bills that could amend the law relating to Niue and land – it is necessary for the Assembly to have before it a report on the legal constitution and policy issues raised by the Bill.

Preamble are of substantive effect and condition the interpretation of the human rights provisions. The decision of the Tuvalu Court of Appeal in *Teonea*<sup>27</sup> gave priority of the rights' provisions over traditional values.<sup>28</sup>

Following that decision, Parliament amended the Constitution to avoid future such decisions:<sup>29</sup>

The purpose of this Act is:

- (a) to protect the island communities of Tuvalu from the spread of religious beliefs which threaten the cohesiveness of island communities.
- (b) to provide the powers necessary to make laws to restrict the exercise of certain constitutional freedoms, where the exercise of those freedoms is inconsistent with a law, or an act done under law, which accords with the traditional standards, values and practices of the island communities of Tuvalu.
- (c) to provide legal recognition for the traditional practices of island communities to limit the establishment of religions on their islands.

It is clear that a high level of emphasis must be placed on traditional standards, values and practices.<sup>30</sup>

## 5 *Tonga*

As indicated in the Tonga chapter in *Gems*<sup>31</sup> and in the paper by Mele Tupoa in this volume,<sup>32</sup> the 2010 democratic reforms shifted the balance of power from an absolute monarchy to a constitutional monarchy. There was a shift towards greater ownership and agency by people over Tonga's political system.

There is no explicit reference to Tongan customs or cultural values as a source of law but "there are many instances where customary laws and practices have shaped the written law and its application to Tonga".<sup>33</sup> If there is a gap, the common law and

27 *Teonea v Pule o Kaupule o Nanumaga* [2009] TVCA 2.

28 A H Angelo "Steady as She Goes" – The Constitution and the Court of Appeal of Samoa" (2012) 18 NZACL Yearbook 145.

29 Constitution (Recognition of Traditional Standards, Values and Practices) Amendment Act 2010, s 4.

30 Article 29 of the Constitution. *Tepulolo v Pou* [2005] TVHC 1; Petra Butler "Margin of Appreciation - A note Towards a Solution for the Pacific" (2008) 39 VUWLR 687, 693.

31 Page 351.

32 "Constitutional Weaving: A Conceptual Approach to Examination of the 2010 Constitutional Reform in the Kingdom of Tonga".

33 Jennifer Corrin "Crossing the border from custom to contract: legal pluralism and Pacific Islands' contract laws" (2021) 21 Oxford University Commonwealth Law Journal 73, 76.

equity will apply.<sup>34</sup> There is "no authority for the courts to incorporate Tongan custom into the law".<sup>35</sup> That said, the Constitution itself is imbued with matters of cultural significance.<sup>36</sup> These provisions are reminiscent of tradition as is the veto of the Monarch in cl 68. Clause 111 also mentions custom in passing.

An amendment to the Constitution passed by the Legislative Assembly in 2020 related to Tonga's customs:<sup>37</sup>

Customs in Tonga comprises all reasonable and sufficiently certain customs, traditions, practices, values and usages of Tongans: and every Court or Tribunal in the Kingdom, where relevant, shall have regard thereto when deciding any matter before them for decision. Custom requires to be established in evidence but in so doing a Court or Tribunal shall not apply technical rules of evidence but shall admit and consider such information as is available. Tongan Customs shall not be lost by reason of lack of recent usage.

## 6 Vanuatu

By art 95(3) of the Constitution, custom is "part of the law of the Republic".<sup>38</sup> Chapter 12 of the Constitution (arts 73–81), land has a special place in the law of Vanuatu.<sup>39</sup>

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34 Guy Powles "Testing Tradition in Tonga: Approaches to Constitutional Change" (2007) *Revue Juridique Polynésienne* 111, 118.

35 *Taione v Kingdom of Tonga* [2004] TOSC 47. The Supreme Court rejected any relevance of Tongan culture because the Constitution did not mention culture and was supposed to be western-style constitution; Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006) at 9.42-9.43.

36 Eg cls 30, 32-50 relating to the monarchy in the act of Constitution of Tonga (cl 115).

37 Clause 89A. As at July 2021, this has not been approved by the King. Custom will continue to play a role in Tongan jurisprudence whether or not constitutional amendment passes.

38 "Les règles coutumières continuent à produire tous leurs effets au sein du système juridique de la République de Vanuatu." "Customary law shall continue to have effect as part of the law of the Republic of Vanuatu."

39 73) Toutes les terres situées dans le territoire de la République appartiennent aux propriétaires coutumiers indigènes et à leur descendance.

74) Dans la République, les règles coutumières constituent le fondement des droits de propriété et d'usage des terres.

75) Seuls les citoyens indigènes de la République ayant acquis leur terre selon un système reconnu de tenure foncière jouissent des droits de propriété perpétuelle sur celle-ci.

73) All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants.

74) The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.



By constitutional amendment in 2013, the Malvatumauri Council of Chiefs is required to be consulted by the government on any matter relating to land and custom.

The Custom Land Management Act No. 33 of 2013 (Bill of 2021) was proposed for the purpose of streamlining the processes involved in the determination of the management and other rights of custom owners in relation to customary land. If passed, the Bill would have removed the requirement under the Custom Land Management Act 2013 for consensus by all members of a *nakamal* or an Area Land Tribunal in determining custom land ownership and use rights disputes.

The Constitution of Vanuatu provides for human rights with a complementary provision for duties.<sup>40</sup>

## ***B Three Countries in More Detail: Fiji, Samoa, Tokelau***

### *1 Fiji*

Fiji is an example of a country where the place of custom in legislation has decreased markedly since the independence of Fiji in 1970. In the 1970 Constitution (arts 33-39) the state was divided for electoral purposes into Indian and Fijian constituencies; there was also a role for the Great Council of Chiefs (s 3 Fijian Affairs Act);<sup>41</sup> the Senate had specific provision for a representative of the Council of Rotuma; section 68 made special provision for statutes relating to cultural matters.

In the Constitution of Fiji of 2013 there is reference to customary matters in the Preamble,<sup>42</sup> but there are no ethnic constituencies (s 53 provides instead for multi-member open list system of proportional representation), there is no Great Council of Chiefs,<sup>43</sup> and the Banaban/Rotuman reference is weaker.<sup>44</sup> Special provision is

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75) Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land.

40 Articles 5-7.

41 Abolished by the iTaukei Affairs (Amendment) Decree 2012, s 4.

42 "WE, THE PEOPLE OF FIJI, RECOGNISING the indigenous people or the iTaukei, their ownership of iTaukei lands, their unique culture, customs, traditions and language; RECOGNISING the indigenous people or the Rotuman from the island of Rotuma, their ownership of Rotuman lands, their unique culture, customs, traditions and language; RECOGNISING the descendants of the indentured labourers from British India and the Pacific Islands, their culture, customs, traditions, and language; and RECOGNISING the descendants of the settlers and immigrants to Fiji, their culture, customs, traditions and language".

43 iTaukei Affairs (Amendment) Decree 2012, s 4.

44 But see s 26(8)(g) and s 28 in relation to iTaukei, Rotuman and Banaban lands.

made in s 31(3) for "contemporary iTaukei and Fiji-Hindi languages" to be taught as compulsory subjects in all primary schools; the primary language of Parliament is English.

The iTaukei lands situation has not changed.<sup>45</sup> It has, however, been subject to a number of amendments some of which have signaled a patriation of the Act eg deletion of references to the Crown and the change of the name from "Native" to "iTaukei". Others have strengthened the role of government in relation to iTaukei land and eased the restrictions on alienations of iTaukei land.<sup>46</sup>

The latest change is the 2021 amendment to the iTaukei Land Trust Act. It removed the requirement of obtaining the consent of the iTaukei Land Trust Board for "any mortgage, charge, pledge or caveat on a lease under the Act or for any such lease to be dealt with by any court of law or under the process of any court of law".<sup>47</sup>

## 2 Samoa

### (a) Land and Titles

The references in Samoan legislation to matters relating to custom are many and varied.<sup>48</sup> In the Independence Constitution, reference is made in the Preamble to "Samoan custom and tradition"; in art 8(2)(d) to "work or service which is required by Samoan custom". Article 54 provides that the languages of the Legislative Assembly are Samoan and English. Article 100 provides that matai titles "shall be held in accordance with Samoan custom and usage and with the law relating to Samoan customs and usage". This form of reference to customary law is consistent with usage in the definition of "Law" in art 111(1) which includes as law "any custom or usage which has acquired the force of law in Western Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction". Article 101(2) states "Customary land means land held from Western Samoa in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage".

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45 iTaukei Land Trust Act 1940.

46 These changes followed the land reforms that were proposed by the Qarase government; Scoop "Blueprint for the Protection of Fijian Rights" (17 July 2000) <<https://www.scoop.co.nz/stories/WO0007/S00055/blueprint-for-the-protection-of-fijian-rights.htm>>.

47 iTaukei Land Trust (Budget Amendment) Act 2021 (Act 22 of 2021).

48 En passant. The resolution of the electoral impasse of 2021 may owe much to the strength of *fa'a samoa*, its strong hierarchy and rule based system.

In art 112: "The Samoan and English texts of this Constitution are equally authoritative but, in case of difference, the English text shall prevail". This provision is to be contrasted with s 11 of the Acts Interpretation Act 2015 by which:

- (1) The English and Samoan versions of Acts are equally authoritative.
- (2) If there is a difference between the English version and the Samoan version of an Act, the English version prevails unless the original draft was in the Samoan language.

No indication is given as to how the identity of the "original draft" is established.

In the Constitution as amended by the Constitution Amendment Act 2020, the references to customary law are somewhat different. The new art 71 says that "customs may be taken into account in all courts" under Part VI. That is to say in all courts other than the Land and Titles Courts. The major change made in the 2020 Amendment Act related to Part IX and land and titles. The new art 104A makes reference to custom at several points. In art 104A(5)(b) the phrase is "in accordance with the customs and usages of the Samoan race and all laws in force in Samoa with reference to customs and usages"; art 104A(6) states that the court will apply "(a) custom and usage of the Samoan people; (b) the law relating to custom and usage".<sup>49</sup>

The Acts Interpretation Act 2015 in s 3(1) provides a default definition of "customs":

"customs" means the customs, usages and traditional practices of the Samoan people existing in relation to the matter in question at the time when the matter arises, regardless of whether or not the custom, usage or practice has existed from time immemorial.

The Land and Titles Act 2020 for its part uses a different range of expressions. Section 2 has a definition:

"custom and usage" or "Samoan custom and usage" means the customs and usages of Samoa accepted as being in force at the relevant time and includes: (a) the principles of custom usage accepted by people of Samoa in general; and (b) the customs and usages accepted as being in force in respect of a particular place or matter.

In s 9(3)(d) the relevant phrase is "custom and usage"; in s 12(1)(c) the reference is to "Samoan custom and usage"; in s 12(1)(d) "family ... custom and usages"; in s 15(1)(a) "customs and usages of the Samoan people"; in s 16(6) "customs and usage

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<sup>49</sup> These variations seem to exist also in the Samoan language text.

of the Samoan people"; in s 39(f) "custom and usage"; in s 62(5) "Samoan custom and usage".

Several points of interest arise from these differences of expression: The role of the English text may be different for the Land and Titles Act and the Constitution given the differing provisions of the Constitution and the Acts Interpretation Act; there is a clear distinction between references to custom on the one hand, and references to law relating to custom on the other; s 5 of the Acts Interpretation Act 2015, which deals with the interpretation of cognate expressions in legislation, clearly applies to the Land and Titles Act 2020, but probably not to the Constitution.

The significant substantive shift in the Constitution Amendment Act 2020 was in relation to land and titles under "Part IX Land and Titles Court". Under the Independence Constitution, the Supreme Court took precedence over the Land and Titles Court in that it had a power of review of Land and Titles Court decisions affecting fundamental rights. Under the Constitution as amended, the Land and Titles courts have precedence. Article 104C(8) gives that priority ie if the Land and Titles Court states that a matter is a Part IX matter, the Part VI courts have no jurisdiction – their jurisdiction is that which is not allocated to Part IX.

#### (b) Village Fono Act

The Village Fono Act 1990 was enacted to "validate and empower the exercise of power and authority by Village Fono in accordance with the custom and usage of their villages and to confirm or grant certain powers...". It amounted to an affirmation of the role of Village Fono in the life of Samoa.<sup>50</sup> It was a direct response to concern that the customary rules and the role of leadership in the villages was being eroded. Following a Samoan Law Reform Commission Report,<sup>51</sup> the Village Fono Act was amended in 2017 to add an Objects clause and a series of provisions relating to *faiga fa'avae* and *i'ugafono*. "Village Fono" is defined in s 2 of the Act as "the assembly of the *Alii* and *Faipule* of that village meeting in accordance with the custom and usage of such village".<sup>52</sup> The Village Fono Act provides for a right of appeal from the decision of a Village Fono to the Land and Titles Court. That right is restricted to those adversely affected by the decision. The Land and Titles Act 2020 makes specific provision for such appeals in its s 65. This brings the Village Fono jurisdiction squarely within the provisions of Part IX of the Constitution.

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50 Jennifer Corrin "Exploring the Deep: Looking for Deep Legal Pluralism in the South Pacific" (2017) 48 VUWLR 305 at 321.

51 Samoa Law Reform Commission *Village Fono Act 1990* (Report 09/12, June 2012).

52 To the same effect is the definition of Village Fono in s 6 of the Acts Interpretation Act 2015.

### 3 Tokelau

Tokelau became part of New Zealand on 1 January 1949. A number of pieces of legislation were in existence then but almost none of them were known within the community. Few of them reflected custom or tradition. The reality was that the three communities of Tokelau self-governed in accordance with the custom of each of the communities.

There was a significant patriation of legislation from the 1980s to the early 2000s.<sup>53</sup> In particular, the succession law was localised (from New Zealand statute law and the Wills Act 2007) to provide for the role of custom. The marriage and divorce laws were likewise patriated. All land in Tokelau is customary land. Its status was recognised in the Tokelau Amendment Act 1967.<sup>54</sup> Tokelau control was extended till 2007 when the 1967 Act was repealed and replaced consequent to Rules made by the General Fono.<sup>55</sup> The consequence of that amendment was to re-place customary ownership rules. From 1949 till 2007, the Tokelau land was:<sup>56</sup>

- (1) ...vested in the Crown as the trustee of the beneficial owners thereof, and shall be held by the Crown subject to the customary title, and all such land is hereby declared to be Tokelauan land accordingly, but shall remain subject to any rights which may have been lawfully acquired in respect thereof before the passing of this Act otherwise than in accordance with the customs and usages of the Tokelauan inhabitants of Tokelau.
- (2) ... the beneficial ownership of Tokelauan land shall be determined in accordance with the customs and usages of the Tokelauan inhabitants of Tokelau.

Tokelau is subject to the ICCPR and to the First Optional Protocol to the ICCPR. Tokelau legislation reflects this in Rule 16 of the Constitution, which seeks to balance the individualism of the ICCPR with the communal nature of life in a Tokelau village by reference to the UDHR.

## IV CONCLUSION

This paper has considered some aspects of the persistence of custom and its fate in legislation. The specific examples have shown a divergence of approach such as

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53 See *Tokelau Subdelegated Legislation 1877-1948* (Tokelau Administration, Wellington, 1986); *Law of Tokelau – Interim Report* (Ministry of Foreign Affairs, Wellington, 1981) 12-21.

54 Part II (ss 18-26). Approximately 40 acres is held in fee simple as the consequence of a 19<sup>th</sup> century transaction with a non-Tokelauan. See Tokelau Islands Amendment Act 1967, s 18(2).

55 Tokelau Amendment Act 2007, s 9, which made rule 15 of the Constitution effective. But see also the Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977, s 10.

56 Tokelau Amendment Act 1967, s 20.

that between Fiji and Samoa or Fiji and Tokelau. Are these differences of approach referable to the strength of a country's economy, the relative homogeneity of the community, the strength of the indigenous language in the community, the influence of the WTO, or to the strength of custom? That is a matter for future research and consideration.